CRIME BUSINESS AND CRIME MONEY IN EUROPE

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The Cross-Border Crime Colloquium is an annual event since 1999. It brings together experts on international organised (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 East and West Europe, between scholars and practitioners, and between old and young. The Cross-border Crime Colloquium, so far, has been organised nine times:

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2005 Sarajevo, Bosnia and Herzegovina
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Virtue and Reality: An introductory tale of two cities

Petrus C. van Duyne

The cities of Virtue and Entrepreneurship

Morality and money are usually considered as opposites like the idea of the Augustian two cities: the godly city of Virtue and the worldly city of Sin. The first one is pure and does not know any compromise; the second one is doomed unless pure virtue reigns again. Nevertheless history knows episodes in which (corrupted) holiness and dirty monies appeared to enjoy a happy alliance, as happened during the reign of the Medici popes in the beginning of the 16th Century (Hibbert, 1979). The enlargement of St Peter's proved to be very expensive and the papal licensed brothels in the Holy City were therefore charged extra. This was not enough, and the Pope started to issue letters of indulgence which assumedly shortened the time in purgatory. This proved to be a successful scam, particularly in Germany where the letters were enthusiastically sold by the monk Johann Tetzler, in close cooperation with the Fugger bank. Another German monk, Martin Luther, felt deeply offended by this after-life insurance scam and in October 1517, legend has it, nailed 95 statements on the door of the castle church in Wittenberg. This unleashed the reformation which –among others– aimed to sever this corrupt relationship (Diwald, 1982: 102-103). Whether they succeeded is for historians to judge.[1]

At present morality and (dirty) money are the focus of attention again – although this time less cosily connected. Since the Financial Action Task Force on money-laundering (FATF) sounded the alarm about the extent and threat of crime-money and the laundering thereof in 1990, a serious worldwide programme to clean the global 'financial city' of this evil has set in (Stessens, 2002; Reuter and Truman, 2004). Starting with drug money –an easy target no one could disagree with– the financial moral crusaders, united in the above mentioned FATF, developed recommendation after recommendation, gradually tightening the screws. No potential actor or financial temptation was omitted: a system of reporting was designed encompassing bankers and antique dealers, real estate agents and car dealers alike. This is no surprise: as with the anti-drug policy fanned by the US since the beginning of the last Century, a moral campaign against an evil is not a half-way enterprise (Van Duyne and Levi, 2005;

[1] At any rate this relationship had some longevity, as demonstrated by the story of the Banco Ambrosiano which ended with the demise of 'God's banker', Roberto Calvi, hanging under one of the bridges in London (Cornwell, 1983).

Courtwright, 1982).[2] The ideal 'financial city' has to be pure, like the Augustinian Godly City.

So what is the outcome after 17 years of purification, three FATF recommendations and an equal number of EU guidelines? What was the effect on the earthly city, the place of trade and industry, of real money (of whatever colour), the city of potential sinners as well as those who have to report potential sinful transactions? How does this place –with the laundered linen hanging around– relate to the constructed ideal city of legislators and policy makers? In this contraposition we are confronted with the usual strain between a 'should-be' world and the confusing state of reality. This is not only a matter of reality usually lagging behind in complying with the demands of rule makers. That has always been the case. The confusion concerns rather the ambiguous state of the threatening (and threatened) financial reality. On the one hand, the flow of threat assessment reports concerning 'organised crime' presents us an array of pictures full of 'transnational' crime-for-profit (Van Duyne, 2007). It conveys the image of a 'global city' (instead of a cosy 'village') of crime, crime-money and the laundering thereof. On the other hand, some critical researchers are still looking for the 'True Threat'. The fact that the real threatening examples must be scraped together sheds doubt on the validity of the claimed ubiquity of the dirty money threat. (Maybe it represents no more threat than the dirty money with which St. Peter –still admired today– has been built.) If it is so big, why does a simple hedge fund or a policy of bad mortgages have more capacity to create havoc on the financial and investment market than all the alleged trillions of crime-money? Consequently, if the moral 'financial city' and the related threat image of the FATF does not match with the 'earthly commercial city' of daily life, what about all the measures to stem the depicted threats? Are they really commensurate to reality or do they just follow from the orthodox purist legal principle of 100 % law coverage? This volume may provide some insights into this issue.

The conditioned loophole reflex and enlightenment

From the elaboration above as well as from the extensive literature (for example Reuter and Blum, 2004), the reader may already surmise that the international legal experts represented in the FATF have taken the money-laundering threat anything but light-heartedly. Whether one reads the first list of recommendations or the last one, they reflect a constant search to plug any hole through which even the smallest financial fish may try to swim. This drive has certainly been intensified by the terrorist attack of 11 September 2001, in the

[2] That was also the lesson of the reformation: Luther's righteousness was soon surpassed by the severe Calvin, who was himself surpassed by Scottish reformer John Knox.

aftermath of which the reach of the anti-laundering regime has been extended to the financing of terrorist activities (Levi, 2003). After the FATF issued new recommendations, the EU-commission was bound to follow suit with corresponding directives.

Designing directives for the EU is a meticulous legal labour, as can be admired in the contribution of *Joeb Rietrae*, economist and previous financial markets and AML/CTF expert at the Dutch Ministry of Finance. The author carefully discusses the third EU anti-money laundering Directive of December 2005. The Directive represents a tightly woven and broadly designed net covering a broad sample sheet of financial activities as well as commercial institutions and persons in the EU. As far as the scope of criminal activities are concerned, it covers all 'serious' offences which are defined as being those: '*punishable by deprivation of liberty or a detention order for a maximum of more than one year*'. This represents a very low threshold, though still a bit higher than those in jurisdictions like the Netherlands, which applies the anti-laundering clause to *all* criminal offences. As there are hardly crimes for profit which have a maximal prison term of less than one year, the practical coverage is virtually 100 %, though one may wonder what the qualification 'serious' still means. In this context it is just a formal threshold without any criminological meaning, stretching from petty shoplifting to ENRON-like fraud schemes.

Also in other aspects the coverage is broad as well as dense. This follows from the strict application of the transparency requirement and know-your-customer requirement: no entity or commercial market player which is engaged in activities likely to be used for money laundering or terrorist financing is allowed to remain out of reach. And no institution or obliged person is allowed *not* to know his customer. It is irrelevant whether such activities take place on internet or in real, 'bricks and mortar' enterprises. In all cases the know-your-customer principle applies and there is no slackening of the requirement of the customer due diligence (CDD). This entails that one is obliged to find out who the –thus far ephemeral– potential *beneficial owners* of any legal person really are. These are defined as those persons or entities which control 25 % plus one of the shares, votes or property of whatever entity. Given that it may sometimes be difficult to establish the identity of a customer, the obliged entity must proceed on a risk based approach or take every reasonable measure. If the identity cannot be determined, no business relation must be established or an occasional transaction be carried out. Predictably, anonymous bank accounts and bearer passbooks are prohibited, as well as (indirect) relationships with shell banks.

Leaving aside the multitude of other requirements imposed on the financial system or recommendations to the Member States, I would like to point at one particular pious wish: money-laundering statistics. Member states "shall . . . maintain comprehensive statistics". If the financial system must be a perfect transparent city, the same standard should apply to the organs of the Member

States. However, here we arrive again at the 'earthly city', this time of real people staffing the agencies who have to do something themselves, other than interfering in someone else's financial job. I must defer the tale of that part of city. First comes an interesting description of a special group: lawyers, civil-law notaries and tax advisors.

For good reasons the author *André Tilleman* working at the Dutch Bureau of Financial Supervision devotes ample space to the legal professional groups. Indeed, its members are at great risk of being exposed to various aspects of criminal or at least hidden funds while having a statutory duty to professional secrecy. What their clients convey to them must remain as confidential as the confessions to a father confessor. Nevertheless, since 2003 also these professionals are obliged to report suspicious transactions related to money-laundering or terrorism. How to deal with this obvious tension?

The involvement of legal professionals did not come as a surprise. Since the mid 1990s there were already guidelines for civil-law notaries and lawyers to prevent their involvement in criminal activities by receiving illegally obtained money. Cash payments of more than € 10.000 were prohibited for civil-law notaries (€ 11.345 for lawyers). Now these professionals are within the orbit of the anti-laundering legislation, with the exception of 'typical' activities pertaining to their core business. These relate to "determining the legal position of a client, his representation at law, giving advice prior to, during or after legal proceedings, or giving advice about instituting or avoiding legal proceedings". They have to determine the identity of their clients too before rendering services which are subject to the Identification Act and they must not accept cash payments above the specified threshold (which would have to be reported). Unusual transactions which may relate to money-laundering and/or terrorist activities have to be reported as well.

Though these professional's secrecy is no longer sacrosanct, when lawyers and notaries perform their 'core function' of determining the legal position of their clients, client confidentiality and the right of non-disclosure are not waved. However, invoking these rights is no longer taken for granted and has been challenged in court, though not always successfully. The legal profession is aware now that their work is under supervision too.

The author provides an elaborate description of the supervisory bodies: the Dutch Central Bank, the Authority Financial Markets, the Fiscal Police and the Bureau Financial Supervision. The latter deals particularly with the legal and financial professions (e.g. accountants and tax advisors) and has extensive powers, such as inspecting also confidential client documents.

Of course, the brief sections above are only intended to give an initial impression of the thorough efforts of the authorities to fight money-laundering and to impose an impressive supervisory network. This is all about the regulation of various actors to safeguard the ideal of financial transparency to keep dirty money out. It is a legislators' reflex to mend the loopholes, not to balance

legal interests against the real threat posed by financial actors (Van Duyne *et al.*, 2005). But these actors (and their potentially murky clients) are not the only citizens. There is also the district of law enforcing agencies and agents, either supervising others or chasing the crime-monies and suppressing the laundering. What does it look like?

In his contribution *Petrus C. van Duyne*, professor of Penal Law at Tilburg University, makes an attempt to obtain material for this side of the story. His approach is simple: if the gruesome story about crime-money and laundering the authorities want us to believe is true, then they should have properly documented all statistical evidence about perpetrators and their deeds. All in all, this should represent the authorities' part of the transparency play.

Van Duyne's search through the available public data bases of four European Member States (Netherlands, Germany, Belgium and the UK) makes it clear that irrespective of the seriousness of the problem, the authorities do little more than shedding some flickering lights on a few stretches of their law enforcement tasks. The data are fragmentary, badly kept and from proper methodological standards shallowly justified (if at all) making it impossible to determine their reliability and validity. Above all, despite the repeatedly stated and generally recognized 'transnational' nature of the dirty money flows, the national statistics are actually incomparable. This is the more poignant as there are German and Dutch statistics concerning suspicious money flows going out of and into these countries, differentiated by country of origin and destination. However, in no way do they match: neither in format nor in content. It yields to all extent comparisons of apples and oranges. The lofty recommendation about 'comprehensive statistics' in the Member States, mentioned above, is telling for the lack of statistical expertise of the authors of the third EU directive. It is a pious wish from an alien legalistic city.

Despite the flickering lights of the law enforcement documentation (FIUs, police and Public Prosecution Office), some glimmering evidence can be gleaned. In the first place, there is the traditional fear about the drug money. The Belgian statistics, allowing a breakdown of the reported suspicious money volume and the predicate crime, shows that compared to (tax) fraud and (organised) economic crime drug money is just a fraction of the whole at 5 %. This is somewhat in line with the findings of Levi and Reuter (2006) and the German annual money laundering reports in which drug offences rank well below commercial crimes like deceit and swindling. Despite the weakness of the data it can be taken as a serious refutation of the drug money scare, even if no one would deny that there is a lot of drug money around.

A more detailed analysis of the Dutch money-laundering database reveals in the first place how careful one must be in interpreting the laundering data. This was the case with a few mega-transactions with (Russian) oil money, which distorted the picture of 2003 or the 'revolving door launderers' who carry out a large number of suspicious transactions (particularly money transfers). The

analysis also demonstrates patterns of money flows into and out of the country which should have caused the authorities to raise questions. For example: the traditional 'criminal payment deficit' of the UK (particularly Scotland) with the Netherlands, paying either for dope or cigarettes; and the large incoming flow of suspicious money from Italy. No such questions were raised, however.

The same can be said about the outcome of the fight against crime-money: the confiscated assets or the 'fruits of crime', which are also the 'fruits' of enforcement. No questions were asked about what the composition of the confiscated assets actually meant in terms of criminal economy. Or whether the conviction success rate of a mere 6 % is not a bit meagre. The information management of the law enforcement agencies proved to defy almost any question, if raised in the first place. The author concludes that the present anti-laundering approach is rather based on a firmly established belief system than on a sober statistical analysis of what happens in the 'real city'. It is a tale of a city whose policy makers still live in the intellectual stage of the 'pre-Enlightenment' era, formulating its policies in an empirical *camera obscura* without feeling uneasy about it.

The criminal inhabitants

The contribution of Van Duyne demonstrates that attempts to get a view on the (finances of the) criminal inhabitants of the city –for whom all the regulations have been drafted– foundered on the information mismanagement of the law enforcement agencies. Fortunately the contributions following this sad conclusion do show light on who we meet in the 'criminal down town'.

Human traders

In their contribution *Kauko Aromaa*, director of HEUNI and *Martii Lehti*, director of National Research Institute of Legal Policy, give an account of the market of human beings. Granted, they too have to start with a warning about the 'data full of gaps', particularly concerning non-sex related human trafficking. For example, victims of trafficking may be counted every time she/he has been observed in various countries: each country counting one but the same victim. Briefly and critically they scanned a few sources (with a probable common but unknown source), reaching a total of 500.000 trafficked persons to the 'old' EU, with spooky turnovers of 100 million to 'several billions of Euros'. Equally indeterminate are the number of purportedly identified victims of prostitution related trafficking, sometimes with estimated ranges of more than 500 %.

Despite decades of policy making, implementing, defining and redefining human trafficking, the authors make clear that there is still little clarity in this

field. Human trafficking is not necessarily a cross-border trade, though most identified cases concern international movements (or those cases get prime law enforcement attention). Many trafficked women come from far and wide, which attracts most attention because such displaced victims seem to be more harmed. However, more accurate estimates for the Northern European countries shows that a substantial part of the forced (or voluntary) commercial prostitutes' mobility is still very much a regional affair between adjacent countries. Though a large number of women from poorer Russian districts, like Kaliningrad, are working in the Baltic and Scandinavian countries, the number of reported victims is not large, according to the authors. Or are there more cases of *voluntary* trafficking (with perhaps subsequent abuse) than conventional wisdom admits?

We do not know: it is the same old song of raising the alarm about a threatening harmful phenomenon and neglecting the basics: getting it known in a disciplined way.[3] This neglect is not unrelated to the association of 'the illicit movement of people across borders' and the 'organised crime' imagery, as set out in the following contribution by *Jon Spencer*, Director of the Criminal Justice Research Unit of the University of Manchester. Does an association with the dreaded phenomenon of 'organised crime' lower the need for precise quantitative analysis? Actually the author broadens the focus, not only by including sex related trafficking as a subset of the illegal cross-border movement of people, but also by projecting it against those actors who determine the way it is defined. Defining things is certainly not an academic semantic exercise. Depending who does the defining it determines the very concrete way persons involved may be treated by the authorities. A foreign prostitute 'with a good victim story' may be promoted to a protection programme, while a less smart colleague may find herself confined for deportation. Nor is it this matter of defining an activity which determines 'only' the (bad) luck of an illegally migrating individual. More important, it permeates the media coverage and subsequently the whole political debate (and politicians rarely dare to deviate from the created media imagery). Defining is language which makes a whole world.

Hence, overgrowing the 'victim imagery' is the picture of 'organised crime', in whatever meaning, which is of less importance as long as the words are not questioned. This 'organised crime' is responsible for smuggling hundreds of thousand people into the UK – unseen! That is quite a feat, so it must be 'organised crime'. Discussion closed and subsequently law enforcement can move to a justified degree of penal law toughness. To guarantee a tough law enforcement appearance one needs commensurate organisations, like the densely staffed SOCA (Serious and Organised Crime Agency).

Meanwhile the personal narratives of 'victims' and perpetrators alike look more often than not very different. There is much organisational fragmenta-

[3] An exception to this repeated state of affairs are the annual reports of the Dutch Rapporteur of Human Trafficking during the last five years.

tion; local support for the cross-border illegal passage with only short term loose organisations; many females trying their luck as sex worker to return home with extra money. Indeed, an unruly collection of mobile (illegal) entrepreneurial inhabitants conveniently ordered and grouped together under the organised crime emblem. But what is really overarching is not a criminal organisation, but its law enforcement imagery.

No smoke without fire and booze to quench it

If the criminal city would be just as populated with social and political constructions as seems to be the case with the 'ideal city', we could just wait until the public and political opinion get saturated or a few more terrorist attacks overwhelms all attention. However, the criminal city is no fantasy, but as *Klaus von Lampe*, senior researcher at the Freie Universität Berlin, describes, a real place in which criminals live and interact with a lot of fellow criminals as well as ordinary people. This does not only apply to small time thieves who sell their stolen laptops to 'law abiding' bargain hunters, but certainly also to more skilled, commercially operating offenders like wholesale cigarette traders. Like any (illegal) commercial operator they are functionally embedded in a microcosm encompassing legal bystanders or (silent) supporters as well as fellow crime-entrepreneurs. Fellow criminals are not only the close accomplices but also those who provide temporary or merely moral support. A broader social perimeter may imply the required social embeddedness, which may provide a criminal surrounding of trust but also less criminally intended (unwitting) information or just 'normal' infrastructural support to the crime-business. A third important, also broader aspect concerns the interaction with the licit surroundings: the societal and business infrastructure with all kinds of players who might be of relevance for the crime-enterprise. In this respect one may think of corruption and infiltration. However, of equal importance are the unwitting and neutral interactions with the upperworld.

The author underlines the importance of this broad criminal microcosm with his findings of the illegal cigarette market, though he recognizes that this may not be representative of other crime-markets. After duly warning the reader of other methodological caveats, the author designs a typology based on the size of the discovered smuggling schemes. This is not merely a quantitative division, but a functional one entailing specific forms of '*criminal mimicry*' (Van Duyne, 2006). *Small-scale* operations are usually carried out by non-hierarchically operating partners whose main criminal mimicry is stealth and blending in the normal cross-border flow of persons. Such schemes do not demand much of their surroundings. This is different with the *medium-scale* smuggling operations. The increasing volume requires not only more cooperating fellow criminals, but also more upperworld facilities, which have to be paid for in a normal way. For example storage facilities have to be rented under the disguise of other merchandise, like 'foodstuff'. The criminal mimicry becomes

more complicated while the social interaction with the upperworld increases. With the outgrowth of the crime-business we see a real *wholesale* enterprise emerging. This type of contraband trade requires a fuller use of facilities and techniques of the normal business life, like licit front firms. Front firms and transport documents are required in addition to other tools to pretend a licit business life. Non-structured co-offending has been replaced with a division of labour and hierarchic command lines. The author discerns critical volume thresholds above which other executive principles come into play, like one million cigarette shipments in wholesale business.

Criminals do not stand alone, certainly when their businesses grow which generates more critical and dangerous contact points. Apart from the inevitable custom officers, trucks and storage room have to be rented from licit entrepreneurs who should not be alerted by unusual transactions. This does not mean that crime-entrepreneurs will penetrate their environment by means of corruption or intimidation. Preferably not: though criminals do not stand alone, their embeddedness may last longer and more successfully if they succeed in remaining 'existentially (and criminally) alone' by restricting the sharing of knowledge.

From a commercial perspective criminals are never alone, as long as they offer something of interest for a reasonable price to many eager buyers. As a rule, the (fiscal) authorities see to it that this requirement is fulfilled by taxing harmful consumer products. In the opinion of the consumers this is most unreasonable and consequently they are motivated to buy their coveted products 'extra-legally' (Hornsby and Hobbs, 2007). The social and commercial platform of an illegal market stands on fiscal poles, as is accurately described by *Maarten van Dijck*, previously senior researcher at the University of Tilburg, in his quantitative analysis of the Dutch illegal cigarette market. However, also this Dutch market 'does not stand alone', as it is mainly a transit place for the flow of contraband to the UK, where the authorities have established the most perfect market condition by imposing draconian taxes. Consequently 44 % of the contraband intercepted in the Netherlands was heading for the UK, of which an increasing part consists of counterfeited cigarettes. The master counterfeiters are (also in this market) the Chinese.

Apart from such and other interesting market parameters, it is again of interest to take a closer look at the market players, the 'criminal citizens'. Who are they? Granted, every individual is different, but there are some common characteristics. The modal market player in the cigarette market is around 40 years old, (self) employed, without criminal record, non-violent and 'married with children'. In brief, 'petit bourgeois', attracted by reasonable profits on a 'not-so-criminal' market and mainly operating within small networks and in more than half of the cases able to operate by means of a front firm. The threshold of entry is low and one is not frightened off by gruesome stories of violent sinister figures inhabiting a world of crime. Nevertheless, bigger organi-

sations with more than 20 co-offenders and a strict hierarchic line of command also occur.

To what extent are these findings specific for the Netherlands and Germany? Should the criminal inhabitants from another jurisdiction not be differentiated because of other populations or market characteristics? The contribution of *Anna Markina*, senior researcher at the University of Tartu, in which the Estonian market is described, makes clear that this is hardly the case. Only the geographical proximity to Russia as a cheap source country and Sweden and Finland as expensive buyer countries add some local colour, like corruption within the customs at the Russian border. Whether corruption was a really important determiner of the Estonian underground cigarette market remains uncertain: the Estonian market is rather characterised by a high degree of stability. Since 2002, the share of smuggled cigarettes in the Estonian market has remained at the level of around 25 %. The same stability is to be observed concerning the price of illegal cigarettes, despite the increased excises. Hence, in relative terms the smuggled cigarettes became cheaper!

In another respect Estonia has remained true to her reputation: it is still one of the links in the Northern Trade Belt stretching from the Baltic countries to the British Isles. However, its importance has declined somewhat, particularly as far as Sweden is concerned.

The organisational aspects are comparable to the findings in Germany and the Netherlands: apart from a few bigger cases the organisation of this contraband is a matter of small groups. The contraband is taxed (low) in the source country and retailed in the streets and sometimes shops.

If the cigarette smugglers population shares so many features within a relatively stable market, how does the population of another popular crime-market look like? For example, the market of smuggled booze in Norway as lively set out by *Per Ole Johansen*, professor of criminology at the University of Oslo and a pioneer researcher of the illegal alcohol history of this country. The author addresses an aspect which has not so very often been a point of attention: why do some crime-entrepreneurs succeed. This is an interesting perspective, abstracting from the usual moral approach to the wickedness of 'organised crime', mainly uncovered because of its failures.

The author distinguishes between the 'A' teams and 'B' teams. Part of the differentiation between the two consists of a list of "don't do" principles, which are obvious over time and place. Nevertheless, they are regularly not heeded, sometimes even by veterans who should know better. The most important principle is: "Do not create your own evidence". This can range from not leaving notes behind; not living a conspicuous life; to not cheating your fellow offenders. The 'A' team members operate in a more prepared manner, which reflects in the first place in the way they manage information. This concerns the police and potential competitors as well as their own co-offenders, who operate, like the police, on a 'need to know' basis. What 'A' team mem-

bers also know is that 'violence is bad for business'. And that is the general picture, as is the case with the illegal cigarette market. Nevertheless, even veterans sometimes surprisingly resort to violence. But on the other hand they also realise that supporting relatives of those who happened to be caught is another way of managing information and maintaining morale.

As is the case with cigarette smugglers, booze smugglers 'do not stand alone', but are fairly socially embedded. They know they sell to a willing, non-criminal public, mildly chased by the police who do not see them as the 'evil incarnated'. Much white money changes hands against the coveted illegal alcohol. That white money having become black is turned again into white money by some form of laundering despite the financial Puritanism of FATF adherents and the Norwegian FIU. As Norwegians are a modestly living people the author observes also modest forms of laundering or rather, investment into licit firms and some pleasure outlets abroad. He depicts the smugglers as very mainstream Norwegians, caring for a house, a car and a nice boat on the fiord. Preferably nothing flashy. Of course, they are criminal citizens of our metaphoric city. But if you want a bottle of good and not too expensive wine, you would not mind if they were your neighbours. Neither would you be worried by the illegal cigarette seller round the corner.

The 'genetics of corruption'

If one's neat booze (or cigarettes) providing neighbours may even be too bourgeois or careful to facilitate their business by resorting to (risky) corruption, other districts of our metaphoric city are rife with corruption. Reading Cambridge lecturer *Anna Markovska*'s contribution about Ukraine, one may wonder whether in this regard citizens in some districts may have the wrong ancestors. For the Ukrainian district this seems to be a plausible explanation for a historically deeply engrained public illness. Granted, the Ukrainians can argue that basically corruption is a Russian disease and heritage: did not Tsar Peter the Great impose the obligation to report corruption, thereby introducing a kind of FATF-like reporting system?[4] Next came Potemkin of the proverbial 'Potemkin villages', the edifice-houses in the newly conquered and 'rebuilt' Ukraine with which he cheated Catherina the Great and got her into bed (Alexander, 1989). Yes, these were defective forefathers, upped by the bad dream of the socialist era. But is this the whole explanation?

What had gone wrong with the body politic of the Ukraine? At any rate not the legislative medication: the Ukraine has the highest density of anti-corruption laws in the Eurasian continent. This reminds us of the anti-money laundering legislation: a tightly woven net through which no vile financial fish

[4] Successful reporting was rewarded from the confiscated possessions of the reported person (comparable to asset sharing today); failure to report was punished (Holm, 2003; 95-98). Peter the Great might have been a source of inspiration to the FATF.

is supposed to swim. Nevertheless, most of the money schools splash cheerfully at the other side of the legal net, which is the case with the Ukrainian laws as well. Besides, corruption has become materially embedded. In the Soviet times a rich man 'stood alone': one had to hide one's wealth against the jealous eyes of his neighbours. At present, one can be *seen* to be rich, irrespective of the origin of the monies. This different view on each other's richness does make a difference.

Of course, if the heritage was already miserable, there is the aggravating problem of transition, though the frequent invoking of this explanation has made me a bit wary. The 'transition' seems to have become a steady epoch itself, while the collapse of the Soviet system mainly brought the socialist edifice down bringing the already existing corruption into the open. The lack of proper judicial institutions allowed it subsequently to expand to which were added the effects of the globalisation. The latter, a dynamic mixture of mobility, commercial opportunities and pressures, exerted its influence in the Ukraine too.

As an amoral phenomenon being 'beyond good and evil' ('*Jenseits von Gut und Böse*') globalisation can also reinforce existing negative trends like corruption. In Ukraine this could be observed in the pharmaceutical industry, as elaborated by the author. With a population of 50 million inhabitants and a rapidly developing pharmaceutical industry western firms exploited the opportunity to gain a solid foothold. They brought with them the same corrupt practices as can be found in the western medical world. Ukrainian civil servants of the health departments as well as doctors were lured by 'extras' to do the 'right prescriptions'. Given the low salaries of the medical staff, the surrounding corrupt landscape and inherited tradition, one hardly notices it as coming from abroad, except for the hard 'white' currency flowing into dark Ukrainian coffers. Corrupt citizens use to speak the same language.

The sirens of virtue and drafting a moderate city rule

This volume set out with the aim of presenting the tight regulations of the 'city of (financial) virtue', designed to fend off the threats of the fruits of sin: crime-money. On the other hand, (part of) the sinners prove to be rather Mr. and Mrs. Average, spending their ill-gotten profits with little financial and economic fantasy. This is of course not the image legislators and policy makers feel they should to react to: a tough legislation, the 100 % penal dose, requires tough villains, not Mr. Averages. So the latter is upgraded to the required threat level of 'organised crime', as described by Jon Spencer.

Of course, unfortunately there are tough villains who are also good organisers; there are also pretty dangerous terrorists. How to respond to these? If the natural policy maker's tendency is already to open all the legislative and law enforcement portholes, a shocking event like the terrorist attack on 11 September 2001 will evoke an even stronger response. In their contribution the authors *Katja Šugman*, researcher at the Slovenian Institute of Criminology and *Matjaž Jager*, Director of the same institute, point at this tendency to respond toughly and compare it with another, alternative mode of conduct: self-knowledge of this 'weakness of will' and taking measures not to be lured to such a response. The authors cite the story from Homer's Ulysses, who faced the temptations of Sirens by having himself bound to the mast of his ship because he knew he could not resist. According to the authors such a self-knowledge cannot be discerned with the European legislators. Though they do not mention the European directive on money-laundering, much of their remarks may apply also to the topic of the first chapters of our volume.

In general they deplore the way penal legislation is drafted, whereby the principles of proportionality and *ultimo ratio* are neglected. What human rights, what privacy, what double criminality, what other safeguards against overzealous authorities? No, the authorities are for our common good: trust them! And the measures which are proposed are only intended for 'serious' cases, real exceptions. But as soon as one turns around they have been extended and have become the rule. This was the case with data retention, but also with the dense control system of money-laundering. "No", said the Dutch Minister of Justice once, "this is only for serious and organised crime and big money". Soon the majority of the cases involved illegal profits of less than € 6.000 (Vruggink, 2001).

What about the watchdog of the executive, the national and European parliaments? Unfortunately, the wave of concern following the terrorist attacks eroded their will to resist the non-proportionate measures. After some tokens of resistance they gave away. Against this weakness of will the authors evoke the *ultima ratio* principle: criminal law is a measure of the last resort, and must be applied with restraint to rule the 'city' with moderation. However, the authors are also realistic enough to be aware of another tendency: the conditioned reflex of the legislative Pavlov-dog to react to any criminal mischief with a full 100 % penal dose, lest one might be considered weak. Though I agree with the authors' appeal to moderation, it is more realistic to expect that the tale of the 'city of virtue' will rather be based on that conditioned reflex, which with hindsight will be dressed as 'evidence based' policy making. Then the tale of the city of law-breakers must logically correspond in content and tenor. Both tales cannot stand alone.

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The 3rd EU anti-money laundering directive

Main issues and intriguing details

Joeb Rietrae[1]

Introduction

Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system[2] for the purpose of money laundering[3] and terrorist financing (hereinafter: the 3rd Directive)[4] entered into force on 15 December 2005. The Member States have to implement the 3rd Directive into national legislation at the latest by 15 December 2007.

The 3rd Directive prohibits money laundering as well as terrorist financing. It is applicable to the financial sector and to lawyers, notaries, accountants, real estate agents, casinos, trust and company service providers as well as to all providers of goods (when payment is made in cash in excess of € 15.000).[5] These entities need (a) to identify and verify the identity of the customer and of any beneficial owner(s) and to monitor transactions with the customer, while allowing a risk-based approach; (b) to report suspicions of money laundering and terrorist financing to the national financial intelligence unit (FIU); and (c) to take supporting measures, such as record keeping, training of personnel and the establishment of internal policies and procedures. These requirements are completed with the supervision of the entities subject to the 3rd Directive and offer the possibility to take implementing measures.

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1 The author is economist, financial markets and AML/CTF expert, the Dutch Ministry of Finance and formerly had a position with DG Market of the European Commission where he was responsible for the 3rd EU directive at the time of writing this text in August 2006. This text is based on a presentation made by the author on 22 May 2006 in Tallinn. The views expressed are purely those of the writer and may not in any circumstances be regarded as stating an official position of the European Commission.

2 The financial system performs four vital functions in particular: a) it organises the payment system; b) it is a vehicle for monetary policy; c) it provides for the allocation of savings/investments; and d) it functions as a channel for international payments.

3 The money laundering process is characterised by input, production and output. The input into the money laundering process concerns the proceeds of crime. The output is supposed to encompass legally looking property or at least property from which the origin can no longer be determined. The production, bridging the gap between the input and the output, concerns in essence the faking of income/production or mutations in wealth. By doing so, the launderer uses such techniques as corruption, fraud, manipulation, infiltration, blackmail, anonymity and complex legal structures.

4 Published on 25.11.2005 in OJ L 309, p. 15.

5 The figures are in European continental decimal notation.

Scope

The jurisdictions to which the 3rd directive is addressed (Article 47)

The Directive is addressed to the Member States of the EU. Nevertheless, the question might arise whether particular jurisdictions related to Member States are included. The scope of the 3rd Directive includes the (dependent) territories of Member States such as the French overseas departments (Martinique, Guadeloupe, Reunion, St. Martin and French Guyana), as well as to Gibraltar on the basis of the Accession Treaty of the United Kingdom.[6] However, the 3rd Directive does not apply to independent (associated) jurisdictions such as the Netherlands Antilles, Aruba, New Caledonia, Wallis and Fortuna, French Polynesia, Mayotte, the British Virgin Islands, the Channel Islands, the Isle of Man or Dominica. The 3rd Directive is also relevant to Iceland, Liechtenstein and Norway[7].

The definition of money laundering (Article 1(1) to (3)) and terrorist financing (Article 1(4))

It is underlined that the basis for prosecuting money launderers and terrorist financiers depends upon the way jurisdictions have criminalised money laundering and terrorist financing.[8] The more limited the basis, the more space for manoeuvre will remain for money launderers and terrorist financiers.[9]

The definition of money laundering[10] has remained the same as in the 1st Directive. However, the Directive now specifies that all serious crimes need to serve as predicate offences for money laundering.[11] Serious offences are defined

6 Gibraltar has been part of the European Union since 1973 under the U.K. Treaty of Accession. Article 28 of the Act of Accession granted three exemptions from complying with the European Community rules: common customs tariff, common agricultural policy, and harmonization of turnover taxes, notably the value added tax (VAT).

7 Decision No 87/2006 of 7.7.2006 of the EEA Joint Committee amending Annex IX (Financial services) to the EEA Agreement.

8 Moreover, for effective prosecution it is also important that the possibilities for freezing, seizure and confiscation match the possibilities for money laundering and terrorist financing.

9 Main issues in relation to the definition of money laundering concern: the scope of the predicate offences (all versus selected predicate offences); the inclusion of self laundering; the inclusion of foreign predicate offences; the inclusion of negligent money laundering; and the application of objective factual circumstances instead of convictions with regard to predicate offences.

10 Based on Article 6 of the Council of Europe Convention of 1990 on laundering, search, seizure and confiscation of proceeds of crime which in turn is based on Article 3 of the United Nations Convention against Illicit Traffic in Narcotics Drugs and Psychotropic Substances (1988).

11 To avoid any misunderstandings, it is observed that money laundering is not limited to the proceeds of crime, but also includes the property derived from the proceeds of crime.

as "*all offences which are punishable by deprivation of liberty or a detention order for a maximum of more than one year or, as regards those States which have a minimum threshold for offences in their legal system, all offences punishable by deprivation of liberty or a detention order for a minimum of more than six months*" (Article 3(5) (f)). This has a harmonising effect. However, it is observed that Member States determine in their Criminal Codes the scope of offences and the seriousness of these offences with the exception of the serious offences explicitly specified in the 3rd Directive, i.e. terrorist activities[12]; drug offences[13]; activities of criminal organisations[14]; fraud[15]; and corruption (Article 3(5) (a) to (e)).

The definition of terrorist financing is new and has been derived from Council Framework Decision 2002/475/JHA of 13 June 2002 on terrorism, which definition itself has been derived from the United Nations Convention for the Suppression of the Financing of Terrorism (1999).

Entities subject to the 3rd Directive (Articles 2, 3(1) and (2) and 4)

As with the 1st Directive, the entities subject to the 3rd Directive include: credit institutions; investment firms; investment funds; life insurance companies, the activities mentioned in the points 2 to 12 and 14 of Annex 1 to Directive 2000/12/EC (such as leasing, exchange offences, money remittance offences and consumer credit)[16]; independent lawyers and notaries as regards specified activities; auditors; external accountants, tax advisors; real estate agents and casinos. In addition to the 1st Directive, the 3rd Directive also includes trust and company service providers, insurance intermediaries provided they are related to life and other investment related insurances and all providers of goods when payment is made in cash of € 15.000 or more. Previously, only traders in precious metals, precious stones and works of art were covered.

Furthermore, it is observed that Article 4(1) obliges Member States to "*ensure that the provisions of this directive are extended in whole or in part to professions and to categories of undertakings, other than the institutions and persons referred to in Article 2(1) [being aforesaid entities], which engage in activities which are particularly likely to be used for money laundering or for terrorist financing purposes*". Accordingly, it is expected that Member States make an assessment of the vulnerability of their country for money laundering and terrorist financing.

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12 As defined in Articles 1 to 4 of Council Framework Decision 2002/475/JHA of 13 June 2002 on terrorism.

13 As defined in Article 3(1)(a) of the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.

14 As defined in Article 1 of Joint Action 98/733/JHA.

15 As defined in Article 1(1) and 2 of the Convention on the protection of the European Communities' financial interests.

16 Including branches, when located in the Community, of credit and other financial institutions, whose head offices are inside or outside the Community.

Moreover, it is pointed out that the definition of credit institutions, investment firms, investment funds, life assurance companies, insurance intermediaries, needs to match the definition in the relevant directives.[17]

Besides, the 3rd Directive does not exclude entities from its scope on the basis of their form, manifestation or whether they have been registered in a Member State or not. In this context, it is also noted that recital 14 explicitly mentions, that the Directive should also be applied "*to those activities of the institutions and persons covered hereunder which are performed on the internet*".

Recital (34) makes it clear that "*Persons who merely convert paper documents into electronic data and are acting under a contract with a credit institution or a financial institution do not fall within the scope of this Directive, nor does any natural or legal person that provides credit or financial institutions solely with a message or other support systems for transmitting funds or with clearing and settlement systems*".

Lastly, Article 2(2) of the 3rd Directive in conjunction with Article 4 of the implementing measures allows Member States to exclude certain specified activities from the scope of the 3rd Directive; see section 9 in respect of implementing measures.

The definition of beneficial owner (Article 3(6))

A key element of the 3rd Directive is the concept of beneficial ownership. Paraphrasing, the beneficial owner is defined as: the natural person(s) (and/or the natural person on whose behalf a transaction or activity is being conducted) who, ultimately (through whatever construction or quantity of layers): 1) through direct or indirect ownership controls or owns 25 % plus one or more of the shares or votes of a private company (i.e. a company not listed on a regulated market); or 2) is a beneficiary or controls 25 % or more of the property of a foundation, trust or other such entity.

Following the definition of beneficial owner, it is not only important to assess whether a jurisdiction itself allows for the issuance of bearer shares, but also whether other jurisdictions allow for the issuance of bearer shares. If, for example, company A established in jurisdiction A (not allowing the issuance of bearer shares) is owned by company B established in jurisdiction B (allowing the issuance of bearer shares), then the issuance of bearer shares by company B is also relevant for the entity subject to the 3rd Directive in jurisdiction A to determine the beneficial owner(s) of company A.

In the same way, Member States will also need to define in their legislation "trusts and similar arrangements", even if they do not distinguish such entities themselves.

[17] See footnotes 47 to 51; moreover, the definitions of credit institutions, investment firms, investment funds, life insurance companies and insurance intermediaries follow a functional approach.

Recital 13 of the 3rd Directive explains that "*trust relationships are widely used in commercial products as an internationally recognised feature of the comprehensively supervised wholesale markets [and that] an obligation to identify the beneficial owner does not arise from the fact alone that there is a trust relationship in this particular case*".

The Directive allows the identification of the "class of persons" who are intended to be the beneficiaries of the foundation or trust when individual beneficiaries are yet to be determined and, therefore, it is impossible to identify an individual as the beneficial owner. This requirement does not include the identification of the individuals within that class of persons.

The way Member States will implement the concept of beneficial ownership is of the utmost importance, given that the idea is to create transparency in respect of the customer and any beneficial owner(s) and taking into account that money launderers and terrorist financiers are trying to do the opposite. The more limited the interpretation by Member States, the less transparency will arise, and as a consequence the more margins for manoeuvre will remain for money launderers and terrorist financiers. In this context, it will be interesting to see how Member States will comply with the derivative's constructions; cooperation agreements between shareholders (and those having otherwise control over a company) and straw men?

Minimum harmonisation directive (Article 5)

Similar to the 1st Directive[18], the 3rd Directive is a minimum harmonisation directive: in accordance with Article 5, Member States "*may adopt or retain in force stricter provisions in the field covered by the directive to prevent money laundering and terrorist financing*". A ban on cash transactions beyond a certain threshold should be considered in this respect as being stricter than allowing providers of goods to receive payments in cash of € 15.000 or more, provided supervision is in conformity with the 3rd Directive.

Customer due diligence requirements

The customer due diligence (CDD) requirements have been substantially widened and strengthened in view of the crucial importance of this aspect of money laundering and terrorist financing prevention compared to the 1st Directive. Accordingly, transparency in respect of the customer[19] and any beneficial owner(s) will increase. The standard elements of CDD encompass according to Article 8(1): identifying and verifying the identity of the customer and any beneficial owner(s); obtaining information on the purpose of the relation-

18 See Article 15 of the 1st Directive.
19 Whether natural or legal persons or a trust or similar arrangements.

ship with the customer; and monitoring of the business relationship with the customer.

General principles

The CDD requirements encompass the following principles (Articles 6 to 10, 13 to 19 and 31)[20].

- The entities subject to the 3rd Directive must always apply CDD (Article 8(2)).
- The extent of CDD may be determined on a risk-sensitive basis; however, the appropriateness of the risk-based measures needs to be demonstrated to the supervisory authorities (Article 8(2)).
- As to the timing of CDD, identification and verification of the identity of the customer and its beneficial owner(s) need in principle to happen: (i) *before* entering into a business relationship; (ii) *before* an occasional transactions above € 15.000 (whether in a single operation or several linked operations); (iii) when there is a suspicion of money laundering or terrorist financing, independently of any threshold, derogation or exemption; and (iv) when there are doubts about previously obtained identification data (Article 7 and 9(1)).
- Third parties may apply CDD, with the exception of monitoring a business relationship on behalf of an entity subject to the 3rd Directive, *provided certain conditions are fulfilled* (Articles 14, 16 to 19).
- Anonymous accounts and bearer passbooks, and correspondent relationships with shell banks or banks having a correspondent relationship with a shell bank *are forbidden* (Article 6 and Article 13(5)).
- The foregoing principles have also to be applied in respect of existing relationships; however, they may be applied on a risk-sensitive basis (Article 9(6)).
- When CDD fails, the entity subject to the 3rd Directive must not establish *a business relationship or carry out an occasional transaction*, and an existing relationship must be terminated, and making a report to the FIU must be considered (Article 9(5), first paragraph).
- Branches and majority owned subsidiaries of credit and other financial institutions in third countries shall apply the same principles (Article 31(1)).

Specific comments

In addition to these general principles, the following specific comments can be made.

Firstly, the application of CDD requirements as such is only linked to individual customer relationships. The CDD requirements do not require a con-

[20] Following Article 10 of the 3rd directive, the position of casinos differs in some respects from other entities subject to the 3rd Directive.

solidated CDD approach whereby CDD needs to be applied in respect of all relationships with a customer (in its different appearances, such as natural person, private company, beneficial owner) at the level of an entity (or group of related entities) subject to the 3rd Directive.

The entities subject to the 3rd directive must always apply CDD

Identification and verification of the *customer*'s identity must take place *on the basis of documents, data or information obtained from a reliable and independent source* (Article 8(1) (a)). It is up to national legislation to determine which documents are to be considered as being from a reliable and independent source: normally passports, identity cards, driver's licenses or documents certified by diplomatic services, notaries or official company registrars. Fraud, stolen identity documents and identity theft influence of course the reliability.

Given that the identification and in particular the verification of the identity of the *beneficial owner*(s) of a customer is generally more difficult than that of a customer[21], Article 8(1) (b) allows for *identifying the beneficial owner and taking risk-based and adequate measures to verify his identity so that the institution or person covered by this directive is satisfied that it knows the beneficial owner.* However, taking into account that FATF recommendation 5 is stricter in this respect, it is expected that Member States will follow the FATF standard and, accordingly, will replace the words "*risk-based and adequate measures*" in practice with "*reasonable measures*" when implementing the 3rd Directive. That approach also fits better with the general principle that entities subject to the 3rd Directive have *always* to apply CDD.

What in the end will be *reasonable measures* "*to verify [the identity of the beneficial owner] so that the institution or person covered by this directive is satisfied that it knows who the beneficial owner is*", will particularly depend upon the supervisory policies and practices within the national legal context.

The extent of CDD may be determined on a risk-sensitive basis and will be touched upon in the following section.

The timing of CDD

It is up to the Member States to determine in relation to Article 7(c) whether there is a state of suspicion. Several indicators may exist: indications of the reporting entity itself, a warning from, for example, a supervisor or an analysis of a country.

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[21] Through verification, one determines whether the identification data a person presented are correct; this makes verification essential. Customers being natural persons are normally identified and verified in one and the same step on the basis of reliable official identity papers; customers being companies, foundations or other such entities are normally identified and verified in one and the same step on the basis of official company registers or of foundation documents drawn up by notaries, but in respect of beneficial owners the question might arise whether somebody is who he or she says he or she is.

The 3rd Directive allows for three derogations on the timing of the identification and verification of the identity of the customer and its beneficial owner (Article 9(1)): *1.* "*[. . .] Member States may allow the verification of the identity of the customer and the beneficial owner to be completed during the establishment of a business relationship if this is necessary not to interrupt the normal conduct of business and where there is little risk of money laundering or terrorist financing occurring [. . .].* (Article 9(2)) *2. [. . .] Member States may, in relation to life insurance business, allow the verification of the identity of the beneficiary under the policy to take place after the business relationship has been established. In that case, verification shall take place at or before the time of payout or at or before the time the beneficiary intends to exercise rights vested under the policy.* (Article 9(3)) *3. [. . .] Member States may allow the opening of a bank account provided that there are adequate safeguards in place to ensure that transactions are not carried out by the customer or on its behalf until full compliance with the aforementioned provisions is obtained.*" (Article 9(4)).

Third parties may apply CDD, provided certain conditions are fulfilled

Member States may permit the entities subject to the 3rd Directive to rely on third parties in relation to identifying and verifying the identity of the customer and its beneficial owner(s) and obtaining information on the purpose of the relationship with the customer under the following conditions: i) the ultimate responsibility for meeting the requirements shall remain with the entity subject to the 3rd Directive which relies on the third party (Article 14); ii) only entities subject to the 3rd Directive (or equivalent entities in third countries) supervised in conformity with the requirements of the 3rd Directive *and* subject to mandatory professional registration recognised by law can act as third parties (Article 16(1)); and iii) third parties shall make information requested immediately available to the entity relying on them (Article 17).

When a third party, on the basis of a contract, is virtually to be considered as part of an entity that is subject to the 3rd Directive, then the conditions mentioned are not applicable (Article 19).

Anonymous accounts and bearer passbooks and correspondent relationships with certain banks are forbidden

Anonymity undermines transparency and is for that reason rejected. Therefore, the 3rd Directive prohibits "*credit institutions from entering into or continuing a correspondent banking relationship with a shell bank and shall require that credit institutions take appropriate measures to ensure that they do not engage in or continue correspondent banking relationships with a bank that is known to permit its accounts to be used by a shell bank*". Although the 3rd Directive does not mention securities firms and investment funds having correspondent relationships, consistency

demands that the same rule should also be applied to these entities, also taking into account Article 4(1) of the 3rd Directive.[22]

Furthermore, it follows from the provisions of the Banking Directive, the Life Assurance Directive, the Market in Financial Instruments Directive and the UCITS Directive that shell banks and other financial institutions do not occur in the EU.

When CDD fails, a business relationship must not be established or an occasional transaction carried out.

Failure of CDD of the customer and/or its beneficial owner implicates that a customer relationship cannot be established or has to be terminated. So, the result of the CDD process will not be without consequences.

This is especially relevant with regard to the identification and verification of the beneficial owner's identity, taking into account that this may not always be easy. On the other hand when, after reasonable measures have been taken to verify the beneficial owner's identity, transparency is still lacking, the question arises why a private company is not able to exchange information on its beneficial owner(s) from whom it, for example, ultimately accepts instructions or on behalf of whom it collects dividends and interest. Taking into account that the aim of money laundering and terrorist financing is staying out of sight, such a situation should generally be considered as quite peculiar and should (have) set off alarms.

In this context, the issuance of bearer shares by a private company in relation to the identification and verification of the identity of the beneficial owner is also relevant. If entities subject to the 3rd Directive are not willing to run the risk of being unable to establish a business relation with a private company or to carry out a transaction, or even need to terminate an existing relationship, immobilisation, dematerialisation, or abolition of bearer shares for private companies should be considered.

In the case of the (intended) termination of an existing business relationship as a consequence of the failure of CDD, it seems preferable in suspicious situations to always inform the FIU or law enforcement authorities before terminating the relationship, taking into account Articles 22 and 24.[23] Terminating the relationship without informing the authorities would take away the possibility of freezing, seizure or confiscation and might put entities subject to the 3rd Directive in a vulnerable position.

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[22] "Member States shall ensure that the provisions of this Directive are extended in whole or in part to professions and to categories of undertakings, other than the institutions and persons referred to in Article 2(1), which engage in activities which are particularly likely to be used for money laundering or terrorist financing purposes."

[23] Termination of a relationship in practical terms may not always be easy, for example in respect of life insurance products. In such cases, it goes without saying that at a minimum the relationship needs to be frozen.

Lastly, it is observed that for good reasons "*Member States shall not be obliged to apply the provision requiring not to enter into a business relation/perform a transaction in situations when notaries, independent legal professionals, auditors, external accountants and tax advisors are in the course of ascertaining the legal position for their client or performing their task of defending or representing that client in, or concerning judicial proceedings, including advice on instituting or avoiding proceedings*"(Article 9(5), second paragraph).

Branches and majority owned subsidiaries of credit and other financial institutions in third countries shall also apply CDD

Where the legislation of the third country does not permit the application of CCD measures as laid down in the 3rd Directive in respect of branches and majority-owned subsidiaries located in third countries of entities subject to the 3rd Directive, the Member States shall require the credit and other financial institutions concerned to notify the competent authorities of the relevant home Member State accordingly. Ultimately, this will give the possibility to take coordinated action to pursue a solution (Article 31(1 to (3)).

The risk-based approach in respect of CDD

The 3rd Directive allows the entities subject to this directive to apply a risk-based approach; the 1st Directive did not prohibit in any way a risk-based approach; it was simply silent on the issue. The essence of the risk-based approach is the application of resources in proportion to the risk of money laundering and terrorist financing taking into account a certain minimum threshold. In this respect, the 3rd Directive distinguishes essentially three levels of risk: normal CDD, enhanced CDD and simplified CDD. As far as the normal CDD is concerned, the entities subject to the 3rd Directive *must* apply Article 8(1) as *the standard* for CDD. The other forms require somewhat more explanation.

Enhanced CDD (Article 13)

However, in respect of *all (potential) customer relationships representing an enhanced risk*, entities subject to the 3rd Directive *must take additional measures* compared to the situation of normal CDD to compensate for the higher risk of money laundering or terrorist financing. The risk factors from which the risk profile of a customer relationship is derived, as earmarked in the 3rd Directive (including the implementing measures taken; see section 9), do not represent an exhaustive list of risk factors that *might* represent a higher risk of money laundering or

terrorist financing[24]. Enhanced CDD needs to be applied in respect of *all risky (potential) customer relationships* whether mentioned in the 3rd Directive or not.

Simplified CDD (Article 11)

On the other hand, Member States *may* only apply *in the situations specified* in the 3rd Directive (or meeting the criteria of the implementing measures; see section 9) simplified CDD with the exception of EU credit and other financial institutions acting as customers, where the application of simplified CDD is compulsory.[25] Situations of simplified CDD are *characterised by low risk* of money laundering or terrorist financing *and the existence of other checks and balances* such as the supervision of financial institutions. Moreover, in situations of simplified CDD, entities subject to the 3rd Directive shall in any case gather sufficient information to establish if the customer relationship qualifies for simplified due diligence (for example if a financial institutions has a licence) and if so, it still needs to apply CDD when there is a suspicion of money laundering or terrorist financing: an apparent situation of simplified CDD might then turn into a situation of enhanced CDD.

The question might arise whether situations of enhanced CDD and simplified CDD could conflict with each other.[26] Taking into account that enhanced CDD *must* be applied in every risky (potential) customer relationship, while simplified CDD may be applied in the situations in which specified conflicts should not arise. When a situation allowing for simplified CDD nevertheless, as an exception to the general rule[27], should be regarded as risky, for example in suspicious situations, one must apply enhanced CDD. On the other hand, there is no reason whatsoever to apply enhanced CDD in a situation allowing for

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24 Instead of the word "only", the 3rd Directive uses the word "at least" in Article 13(1).

25 Apart from the checks and balances the EU treaty already offers, it is noted that in order to operate legally, the supervisors of banks, life insurance companies, securities/derivatives firms and investment funds on the basis of the respective EU Directives and bureaux de changes and money transfer agencies on the basis of Article 36 of the 3rd Directive check the integrity of management and qualifying holders. In this respect, it is observed that the definition of qualifying holder resembles very much the definition of beneficial owner in the 3rd Directive: "a direct or indirect holding in [a bank, life insurance company, securities/derivatives firm or investment fund] which represents 10% or more of the capital or of the voting rights, or which makes it possible to exercise a significant influence over the management of the bank, life insurance company, securities/derivatives firm or investment fund in which that holding subsists". Also taking into account that supervision takes place on a regular basis, the conclusion must be that CDD has already been applied by the supervisor and as a consequence making in principle the application of CDD by the entities subject to the 3rd Directive superfluous.

26 For example in the case of non-face to face identification and a life insurance policy where the annual premium is no more than € 1.000 or the single premium is no more than € 2.500.

27 The exemption makes the rule, for example, in the case of listed entities: Parmalat, Enron and WorldCom.

simplified CDD, normally indeed characterised amongst others by low risk of money laundering and terrorist financing.[28]

Risk perception

Generally, the *risk perception of a (potential) customer relationship* is determined on the basis of *risk categories* as the following:

- product risk (i.e. *risk factors* determining the sensitivity of a product for money laundering and terrorist financing);
- customer risk (i.e. such *risk factors* as, politically exposed persons, correspondent relationships, non-face to face situations, cash intensive business, business with complex ownership/control structures, overseas transactions without a legitimate commercial rationale)[29];
- country risk (i.e. such *risk factors* as, countries having poor/weak money laundering or terrorist financing defences, countries having high levels of organised crime/corruption, countries subject to financial sanctions of international bodies);
- experience with a customer, including such *risk factors* as suspicions of money laundering or terrorist financing and doubts about already obtained CDD.

From the perception of risk is derived, taken into account the weight the risk factors and the risk categories have, which level of risk is applicable to the (potential) customer relationship: i.e. normal CDD, enhanced CDD or simplified CDD.

Summing up: *enhanced CDD must* be applied in respect of all (potential) customer relationships representing an enhanced risk; *simplified CDD may* only be applied in the situations specified in the 3rd Directive (including the implementing measures) provided they represent *a low risk* of money laundering and terrorist financing and *in all other situations normal CDD must* be applied.

Risk is dynamic. So, the perception of risk can change over time and by place in respect of a customer relationship. Moreover, various risk models are possible. What matters is the result: where institutions and persons subject to the directive are in the same situation, the result should be similar.

Although the 3rd Directive applies the same regime both for anti-money laundering and anti-terrorist financing purposes, it makes sense that the risk-based approach should lead to the adoption of differentiated measures, given

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28 In contrast to a risk-based approach, it is observed that in a rule-based approach conflicts may arise between situations of enhanced and simplified CDD, taking into account that a rule-based approach is less refined than a risk-based approach.

29 It is observed that it may not be easy to identify risk factors in practice. It will often be a process of trial and error and learning while the relationship develops, the more so taking into account that money launderers and terrorist financiers are inclined to be as opaque as possible: so, the profile of a customer develops during the relationship. On the other hand, occasional transactions do not often offer a second chance.

that normally the risks of money laundering and terrorist financing are different in nature and intensity in the same circumstances.

Supervision

Entities subject to the 3rd Directive need to demonstrate to the competent supervisory authorities that the extent of the measures is appropriate in view of the risks of money laundering and terrorist financing (Article 8(2)). To make their risk-based approach transparent, entities subject to the 3rd Directive are required, according to Article 34, to establish policies and procedures of training, risk assessment, risk management, internal organisation and compliance.

Close cooperation between the supervisory authorities and the entities subject to the 3rd Directive is in this context important for two reasons: firstly, to avoid competitive differences between entities subject to the 3rd Directive within and between countries and secondly, taking into account that supervisory policies and practices will have an effect on the outcome of the risk-based approach: the risk-based approach (a principles based approach) is more subjective than a rule-based approach (a prescriptive based approach), and as a consequence might cause concerns when the supervisor does not fully appreciate a risk model used by an entity subject to the 3rd Directive[30].

Different entities, different approaches

The various (categories of) entities subject to the 3rd Directive differ from each other. Recital 37 notes in this context that "*Member States are expected to tailor the detailed implementation of [the provisions of the 3rd Directive] to the particularities of the various professions and to the differences in scale and size of the institutions and persons covered by [the 3rd Directive]*". Therefore, where the risk-based approach at entity level may suit credit and other financial institutions quite well, it is expected that this is a different matter for traders in goods for example. With regard to this latter category, one may expect that a rule-based approach (one rule by a Member State for the whole sector or a category of traders in goods) will remain more appropriate, provided that the rule is in line with the substance of the 3rd Directive. One could also imagine a rule-based approach as a basis, but complemented with a risk-based approach. Practice will show what is appropriate to do in respect of the various entities subject to the 3rd Directive.

Cooperation/coordination

With a view to avoiding distortions between entities subject to the 3rd Directive and money launderers and terrorist financiers taking advantage of differ-

[30] It is observed that the prosecutor can always open a case of money laundering if it is his/her feeling that money laundering has been made possible by a legal person, taking into account that a legal entity may be held liable for money laundering.

ences in money laundering or terrorist financing defences, it is important that supervisors within a jurisdiction and between jurisdictions develop common policies and practices in respect of the risk-based approach and the measures that need to be taken to compensate for the higher risk of money laundering or terrorist financing.

Good cooperation also avoids treating similar situations in a different manner[31].

Reporting obligations

Suspicious transactions

If one has reasonable certainty about the identity of the customer and its beneficial owner(s), it becomes interesting to link these persons with suspicions transactions. For that reason, entities subject to the 3rd Directive need to "*pay special attention to any activity which they regard as particularly likely, by its nature, to be related to money laundering or terrorist financing and in particular complex or unusually large transactions and all unusual patterns of transactions which have no apparent economic or visible lawful purpose*" (Article 20). Entities subject to the 3rd Directive will be able to fulfil this provision when they, on a risk-based approach, conduct ongoing monitoring of the business relationship with their client, including scrutiny of transactions undertaken throughout the course of that relationship to ensure that the transactions being conducted are consistent with the institution's or person's knowledge of the customer, the business and risk profile, including, where necessary, the source of funds and ensuring that the documents, data or information held are kept up-to-date.

Suspicious transactions must be reported to the FIU by the entities subject to the 3rd Directive and by supervisors of these entities when supervising these entities or the markets on which they operate (Article 21, 22 and 25). It is observed that suspicions of money laundering and terrorist financing can of course only arise in situations that present themselves as being 'suspicious'. Where situations do not present themselves as such, one cannot expect (a lot of) suspicious transactions reporting.[32] Moreover, suspicions of money laundering or terrorist financing are not by definition equal to evidence of crime.

Lawyers, notaries, accountants and tax advisors, are allowed to report suspicions of money laundering and terrorist financing through their self-regulatory bodies, provided the self-regulatory bodies forward the information promptly and unfiltered to the FIU (Article 23(1)). However, lawyers, notaries, account-

31 For example, terminating a customer relationship in Member State A and leaving a similar relationship open in another Member State.

32 For example, trade finance by a bank; generally, the bank does not know what is really in the containers it finances.

ants and tax advisors need not report suspicious transactions "*with regard to information they receive from or obtain on one of their clients, in the course of ascertaining the legal position for their client or performing their task of defending or representing that client in, or concerning judicial proceedings, including advice on instituting or avoiding proceedings, whether such information is received or obtained before, during or after such proceedings*" *(Article 23(2)*[33, 34]).

It is up to the Member States to define what suspicious transactions are. However, it is observed that in contrast to the 1st Directive and FATF recommendation 13, Member States have lost their margins for manoeuvre to allow reporting on a narrower basis than the predicate offences for money laundering. In the past, this margin was sometimes used for not reporting money laundering in relation to tax offences. Moreover, it is noted that the 3rd Directive is not limited to the reporting of suspicious financial transactions. It covers financial as well as non-financial activities. Suspicion of money laundering and terrorist financing can also arise from checking the books of a customer or advising customers on (complex) legal constructions.

The disclosure of suspicious transactions in good faith "*shall not constitute a breach of any restriction on disclosure of information imposed by contract or by any legislative, regulatory or administrative provision, and shall not involve liability of any kind*" (Article 26).

Against the background of a number of cases where employees reporting their suspicions of money laundering were subjected to threats or harassment, Article 27 requires Member States to take all appropriate measures in order to protect employees of entities subject to the directive who report suspicious transactions, taking into account Member States' judicial procedures.

Financial Intelligence Units

It is up to the Member States how to organise their FIUs, apart from the task FIUs have to fulfil and the access they must have to relevant information (Article 21). In practice, this means that FIUs may be part of different organisational structures such as Ministries of Justice, law enforcement agencies, Ministries of Finance or Central Banks and as a consequence function under different regimes. This may affect operational possibilities[35] and may cause challenges in coordinating the activities of FIUs.

The relevant FIU to which reporting has to be made, is the FIU of the Member State, in whose territory an entity subject to the directive is estab-

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33 So, all requirements in respect of CDD, reporting and supporting measures following from the third directive need to be fulfilled with the exception of those mentioned in Articles 9(5) and 23(2).

34 It is observed that legal proceedings have been initiated in the context of the 1st Directive challenging the applicability of anti-money laundering rules to lawyers.

35 For example, reporting suspicions transactions to the FIU as part of the Prosecutors Office may cause confusion by the reporting entities if there is no clear-cut division of tasks and responsibilities, ending up in low reporting.

lished (Article 22(2)). So, if an entity subject to the directive established in Member State A offers services in Member State B, then it needs to report to the FIU in Member State A. If in this context, the FIU of Member State B wants to be informed about the suspicious transactions reported by the entity offering its services in Member State B, then it needs to address itself to the FIU of Member State A. This system finds its origin in the differences between Member States in particularly in the Criminal (Procedure) Code area (such as the definition of offences, penalties, reporting systems, police investigation and prosecution). As a consequence of these differences, it is impossible to report suspicious transactions to a FIU in the EU of one's choice.

The FIU analyses all pieces of information and disseminates relevant information concerning potential money laundering or terrorist financing to the competent authorities (Article 21(2)). In respect of the financing of terrorism, the obligations of the 3rd Directive are especially interesting when intelligence services and law enforcement agencies give the entities subject to the 3rd Directive a clue about possible suspicious customers, beneficial owners or transactions. After all, these agencies are able to run undercover operations, tap phones and are able to do other things that financial institutions are unable to carry out. On the other hand, these services and agencies are very prudent about sharing information.

Prohibition on tipping off

Article 28(1) prohibits the disclosure to the customer or to any other third persons of information transmitted to the FIU that a money laundering or terrorist financing investigation is being or may be carried out. However, Article 28 (2) grants an exception to the supervisory authorities or for law enforcement purposes. Moreover, disclosure is allowed to entities subject to the directive belonging to the same group (Article 28 (3) and (4)) and beyond a group in respect of the same customer and the same transaction provided that those exchanging information are from the same category (bank to bank; lawyer to lawyer, etc) (Article 28 (5)). These latter two derogations are not applicable to trust and company service providers, real estate agents, traders in goods and casinos irrespective of whether they are part of a group or not. Moreover, whether the latter two derogations will work or not, will depend on data protection and professional secrecy legislation[36]. Lastly, Article 28(6) determines that lawyers, notaries, accountants and tax advisors may always seek to dissuade a client from engaging in illegal activity.

[36] See recital 33 of the 3rd directive.

Refraining from transactions

Article 24 requires that entities subject to the directive refrain from carrying out transactions which they know or suspect to be related to money laundering or terrorist financing until they have reported their suspicions to the FIU, unless this is impossible or is likely to frustrate efforts to pursue the beneficiaries of a suspected money laundering or terrorist financing operation. In the latter case, the FIU needs to be informed as soon as possible. This, however, is without prejudice to the international obligations accepted by the Member States to freeze without delay funds or other assets of terrorists, terrorist organisations and those who finance terrorism, in accordance with the relevant United Nations Security Council Resolutions.

Cooperation/coordination

Article 38 calls upon the Commission to lend such assistance as may be needed to facilitate coordination. Good cooperation, for example, between FIUs is important in fighting money laundering and combating terrorist financing[37]. At least, the situation should be avoided that similar situations are treated differently by Member States or the entities subject to the 3rd Directive.

Supporting measures

Compared to the 1st Directive, the supporting measures in the 3rd Directive have been extended and/or more precisely specified. Although such measures are just supporting the CDD obligation and the reporting requirements, it is observed that well functioning CDD and reporting obligations depend heavily on such measures. For example, without adequate training of the employees, CDD and reporting obligations would probably remain rather ineffective.

Next to training of employees (Article 35(1)) and record keeping of relevant documents (Article 30), entities subject to the 3rd Directive are also required "*to establish adequate and appropriate policies and procedures in respect of customer due diligence, reporting, record keeping, internal control, risk assessment, risk management, compliance management and communication in order to forestall and prevent operations related to money laundering or terrorist financing*" (Article (34(1)).

Article 32 requires that credit and financial institutions have systems in place that enable them to respond fully and rapidly to enquiries from the FIU, or from other authorities, in accordance with their national law, as to whether they maintain or have maintained during the previous five years a business

[37] An EU FIU platform and a FIU-NET (being a decentralised (horizontal) secured network facilitating the exchange of financial intelligence between FIUs) have been established.

relationship with specified natural or legal persons and on the nature of that relationship. Recital 36 specifies in this context that "*in particular, it would be appropriate for credit institutions and larger financial institutions to have electronic systems at their disposal. This provision is of particular importance in the context of procedures leading to measures such as the freezing or seizing of assets (including terrorist assets), pursuant to applicable national or Community legislation with a view to combating terrorism*".

All of these requirements will have to be met by each of the entities subject to the 3rd Directive. However, "*Member States are expected to tailor the detailed implementation of these provisions to the particularities of the various professions and to the differences in scale and size of the persons covered by this directive*" (Recital 37).

Furthermore, "*Member States shall ensure that they are able to review the effectiveness of their systems to combat money laundering or terrorist financing by maintaining comprehensive statistics on matters relevant to the effectiveness of such systems. Such statistics shall as a minimum cover the number of suspicious transaction reports made to the FIU, the follow-up given to these reports and indicate on an annual basis the number of cases investigated, the number of persons prosecuted, the number of persons convicted for money laundering or terrorist financing offences and how much property has been frozen, seized or confiscated*" (Article 33 (1) and (2)). (Statistical) information is an important basis for every kind of action. A lack of statistics makes it difficult to measure the effectiveness of the money laundering and terrorist financing defences and to correctly focus the direction of the fight against money laundering and terrorist financing.

Lastly, Article 35 (2) and (3) require that "Member States shall ensure that the institutions and persons covered by this Directive have access to up-to-date information on the practices of money launderers and terrorist financiers and on indications leading to the recognition of suspicious transactions. Member States shall ensure that, wherever practicable, timely feedback on the effectiveness of and follow-up to reports of suspected money laundering or terrorist financing is provided".

Supervision

Compared to the 1st Directive, the 3rd Directive includes an explicit section on the supervision of compliance with the requirements on CDD, reporting and the supporting measures.

Supervisors need to check compliance of the entities subject to the directive with all requirements of the 3rd Directive, i.e. the CDD obligations, the reporting obligations and the measures, such as record keeping, training of personnel and the establishment of internal policies and procedures in support of the CDD and reporting obligations.

Different levels of supervision

The level of (harmonisation of) supervision depends upon the supervisory category the entities subject to the 3rd Directive belong to. In essence, the directive distinguishes between the following supervisory categories: 1) banks, securities firms, investment funds, life insurance companies, insurance intermediaries and casinos; 2) currency exchange offices and money transmitters; 3) trust and company service providers; 4) other financial institutions subject to the 3rd Directive; 5) lawyers, notaries, accountants and tax advisors; and 6) other entities subject to the 3rd Directive.

Irrespective of the supervisory category, all supervisors need to be able to effectively monitor compliance; to take necessary measures with a view to ensuring compliance with the anti-money laundering and anti–terrorist financing requirements; to have adequate powers, including the power to compel the production of any information and perform checks; and to have adequate resources to perform their functions (Article 37(1) and (2)). *In addition, depending on the supervisory category* entities subject to the 3rd Directive belong to, the following supervisory requirements need to be taken into account.

Banks, securities firms, investment funds, life insurance companies, insurance intermediaries and casinos

Banks, securities firms, investment funds, life insurance companies, insurance intermediaries and casinos need to have a licence in order to operate legally. The licence will be refused if supervisors are not satisfied about the integrity of management and the beneficial owners of these entities. Furthermore, supervisors need to have the possibility to conduct on-site inspections. As to banks, securities firms, investment funds, life insurance companies and insurance intermediaries it is noted that these requirements result from the Banking Directive, the Life Assurance Directive, the Insurance Mediation Directive, the Market in Financial Instruments Directive and the UCITS Directive (Article 36 and 37(3)).

Currency exchange offices and money transmitters

Currency exchange offices and money transmitters need to have a licence or registration in order to operate legally. The registration or licence will be refused if supervisors are not satisfied about the integrity of management and the beneficial owners of these entities. Furthermore, the supervisor must have in respect of these entities the possibility to conduct on-site inspections (Article 36 and 37(3)).

Trust and company service providers

Trust and company service providers need to have a licence or registration in order to operate legally. The registration or licence will be refused if supervi-

sors are not satisfied about the integrity of the management and the beneficial owners of these entities. Supervisors of trust and company service providers are allowed to focus their supervision on only the more risky entities. The directive does not demand that the supervisor is able to conduct on-site inspections (Article 36 and 37(4)).

Other financial institutions

In respect of other financial institutions, such as leasing companies and consumer credit institutions, the directive demands that the supervisor is able to conduct on-site inspections, but does not require licensing or registration or checks on the integrity of the management and beneficial owners of these entities (Article 37(3)).

Lawyers, notaries, accountants and tax advisors

In respect of lawyers, notaries, accountants and tax advisors, the directive does not require licensing or registration or checks on the integrity of management and beneficial owners of these entities or the possibility for supervisors of these entities to conduct on-site inspections. The directive allows the self regulatory bodies of these entities to act as supervisors for the purposes of the directive, provided they are to able to effectively monitor compliance; to take necessary measures with a view to ensuring compliance with the anti-money laundering and anti–terrorist financing requirements; to have adequate powers, including the power to compel the production of any information and perform checks; and to have adequate resources to perform their functions. Furthermore, supervisors of lawyers, notaries, accountants and tax advisors are allowed to focus their supervision on only the more risky entities (Article 37(4) and (5)).

Other entities subject to the 3rd Directive

The other entities subject to the 3rd Directive, such as: traders in goods and real estate agents also do not require licensing or registration or checks on the integrity of management and beneficial owners of these entities or the possibility for supervisors of these entities to conduct on-site inspections. Supervisors of these entities are allowed to focus their supervision on only the more risky entities (Article 37(4)).

The focus of supervision will generally be on the more risky entities subject to certain minimum requirements in respect of all entities. However, in respect of the supervisory categories mentioned in the paragraphs above, supervision is allowed to focus on *only* the more risky entities. Irrespective of the kind of supervision, one might expect that Member States (supervisors) make an assessment of the vulnerability for money laundering and terrorist financing of the entities within supervisory categories.

A powerful instrument is testing the integrity of management and beneficial owners. Fit and proper managers and beneficial owners will in principle run

proper policies and procedures. "No doubt whatsoever on integrity" would be in this respect a preferred line above "having no criminal record" when testing integrity of managers and beneficial owners.[38, 39]

The supervisors

The organisational structures of supervision are left to the Member States. As a consequence, Member States may choose different organisational solutions. Whatever solution is chosen, coordination of supervisory policies and procedures is a very important element in making the 3rd Directive work.[40]

Furthermore, it is observed that in contrast to the 3rd Directive, which is based on the territoriality principle, supervision on the basis of the Banking Directive, the Life Assurance Directive, the Insurance Mediation Directive, the Market in Financial Instruments Directive and the UCITS Directive is (largely) based on home country control.

Infringements of the requirements

Infringements of national provisions following from the 3rd Directive need to be effectively punished. Penalties should be effective, proportionate and dissuasive (Article 39(1)). Only in the case of credit and financial institutions, the 3rd Directive requires that without prejudice to criminal sanctions, Member States should ensure that the appropriate administrative measures can be taken or administrative sanctions can be imposed in respect of credit and other financial institutions (Article 39(2)).

Given that the process of money laundering and terrorist financing is internationally oriented, it is important that this also is reflected in the penalties. In other words, penalties in respect of money laundering and terrorist financing may be relatively high in the national context, but relatively low from an international perspective and therefore may not be appropriate.

Liability of legal persons is foreseen in the 3rd Directive. Member States shall ensure that legal persons can be held liable when money laundering or terrorist financing has been committed for the benefit or on behalf of the legal person by any person who has a leading position within the legal person, based on: (a) a power of representation of the legal person; (b) an authority to take decisions on behalf of the legal person, or (c) an authority to exercise control

38 See also recital 39 of the 3rd Directive.

39 Member States are also able to take action in respect of illegally operating internet casinos operating in Member State A (so operating via: www.casino.memberstate A), taking into account that internet providers in that Member State facilitating those illegal internet casinos commit an offence as a consequence of collaboration in an illegal activity. The same applies to a bank in that Member State making payments to and from an illegal internet site possible, given that this should be regarded as non-integer conduct.

40 The Commission has asked the EU supervisory committees of the banking, securities and the insurance sector (www.c-ebs.org, www.cesr.org and www.ceiops.org) to coordinate supervisory activities in the area of money laundering and terrorist financing.

within the legal person (Article 39(3)). The legal person shall also be held liable when as a consequence of lack of supervision or control by a person referred to under (a) to (c) the commission of a crime has been made possible (Article 39(4)).

Persons intentionally infringing the requirements of the 3rd Directive run the risk of committing the offence of money laundering or terrorist financing.

Implementing measures

The 3rd Directive *opens the possibility* for the Commission to adopt implementing measures with the assistance of a new regulatory Committee on the Prevention of the Money Laundering and Terrorist Financing.[41] However, the Commission's powers are subject to several conditions. Firstly, the principles in Recital 47 need to be respected; moreover, the powers have been limited in time (four years); and the powers have been limited to specific issues: establishment of technical aspects in respect of a limited set of definitions (e.g. politically exposed persons, beneficial owner and shell bank); establishment of technical criteria for earmarking situations of enhanced CDD and simplified CDD; establishment of technical criteria for determining when financial activity on an occasional or very limited basis falls outside the scope of the directive; the adaptation of the amounts referred to in various provisions of the directive; and deciding whether third countries need not to considered as countries having established equivalent measures.

First set of implementing measures

The Commission has adopted a first set of implementing measures[42] in respect of 1) the definition of politically exposed persons (PEPs), 2) situations of simplified CDD and 3) financial activity on an occasional or very limited basis falling outside the scope of the directive.

The definition of politically exposed persons

The implementing measures (IM) in relation to PEPs involve 4 elements: a) a definition of PEPs (IM, Article 2(1)); b) a definition of immediate family members of PEPs (IM, Article 2(2)); c) a definition of persons known to be close

41 See Articles 40 and 41 of the 3rd Directive.

42 Commission Directive 2006/70/EC of 1 August 2006 laying down implementing measures for Directive 2005/60/EC of the European Parliament and of the Council as regards the definition of "politically exposed person" and the technical criteria for simplified customer due diligence and for exemption on grounds of a financial activity conducted on an occasional or very limited basis, OJ L 214/29, 4.8.2006.

associates of PEPs (IM, Article 2(3)); and d) the period PEPs are still considered to be a PEP, although having left office (IM, Article 2(4)).

The following is observed. Enhanced CDD must be applied in respect of *all risky (potential) customer relationships*, whatever their origin, whether politically involved or not, whether falling in the definition of PEPs in the IM or not, whether foreign or domestic, etc. Recital 1 of the IM reconfirms this. Therefore, one may wonder what the advantage is of defining one particular group of customers, knowing that it is just one of the possible risk factors determining the risk profile of a (potential) customer relationship and which factor by itself does not determine whether the relationship is risky or not from the perspective of money laundering.

Elements b) and c) define possible persons close to PEPs who might be risky in the context of money laundering and terrorist financing and element d) defines the period PEPs are still considered to be PEP, although having left office. Consistency demands, that the substance of elements b) to d) should also be applied to other (potential) customer relationships representing an enhanced risk.

Situations of simplified due diligence

Article 11 of the 3rd Directive specifies eight concrete situations of simplified CDD. Article 11(2) and (5) of the 3rd Directive *open the possibility* of applying simplified CDD in additional situations. Article 3 of the IM specifies that Member States may additionally apply simplified CDD a) when a situation of low risk exists *and* b) when the criteria mentioned in Article 3(2) of the IM in relation to customers and Article 3(3) in relation to products have been fulfilled. So, in contrast to the concrete situations of simplified CDD as specified in the 3rd Directive, in the context of the IM all activities fulfilling the conditions mentioned in the IM qualify for simplified CDD.[43] There are no other situations of simplified CDD allowed.

Financial activity on an occasional or very limited basis

Article 4 of the IM allows Member States to exclude specific currency exchange activities, subject to strict criteria, from the scope of the 3rd Directive. In practice, this derogation aims to facilitate currency exchange on an occasional or very limited basis by such entities as hotels, camp sites, ferries and shops. Other derogations to the scope are not permitted.

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43 It is observed that Council Regulation No 2580/2001 of 27 December 2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism, OJ L 344, p. 70 and Council Regulation No 881/2002 of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban, and repealing Council Regulation (EC) No 467/2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan, OJ L 139, p. 9.

Second set of implementing measures

Whether a second set of implementing measures will be adopted, particularly in relation to the establishment of technical criteria for earmarking situations of enhanced CDD and whether third countries need not to be considered as countries having established equivalent measures, is still open.

On the one hand, one could argue that the absence of harmonised rules with regard to enhanced CDD might create loopholes in the anti-money laundering and combating terrorist financing systems and therefore facilitate forum shopping by money launderers and terrorist financiers. On the other hand, one could also argue that Article 8(2) already creates a sufficient level of harmonisation, given that the entities subject to the 3rd Directive are required to demonstrate to their supervisors that the extent of the measures is appropriate in view of the risks of money laundering or terrorist financing and assuming that supervisors will succeed in reaching adequate harmonisation of supervisory rules and practices. Moreover, whether cases of enhanced CDD are earmarked in the directive (or the IM) or not, entities subject by the 3rd Directive need only apply enhanced CDD on a risk-sensitive basis.

Several articles in the 3rd Directive (Article 11(1), (2)(a) and (b), 16(1)(b), 28 (3) to (5) and 31(1)) allow entities from third countries to be treated in the same way as those from EU Member States provided that these entities are subject to equivalent obligations. These provisions avoid making unnecessary costs between comparable entities in different countries which are under equivalent obligations. In the first instance, it is up to Member States to determine which countries should be treated as equivalent countries; however, where the Commission finds that a third country does not meet equivalence, it shall adopt an IM to correct that situation. It is obvious that the preferred situation is that the Commission will never need to use this power; in other words, the Member States and the Commission should agree before the implementation of the 3rd Directive upon guidelines including which countries need to be considered initially as equivalent third countries and by which criteria an initial list should be changed. However, it is observed that if the level of equivalence chosen is ultimately too low, the money launderers and terrorist financiers will benefit from that choice.

Lastly, it is noted that implementing measures can at any time be changed, including withdrawal or extension.

Relationship with the FATF standard

The 3rd Directive implements to a large extent the revised 40 plus nine recommendations of the FATF.[44] This standard, dating back to 1996, was revised

[44] FATF Recommendations 1, 2, 3, 36 to 40 and Special Recommendations I, II, III, V, VII, VIII and IX have been implemented fully or partly by other instruments.

in 2003 (and amended in October 2004) and has been extended to terrorist financing. It is observed that the revised 40 Recommendations in turn were influenced by the 1st Directive, as amended by the 2nd Directive. Furthermore, it is noted, that the FATF standard refers back to the relevant international conventions.[45]

Differences between the FATF standard and the 3rd Directive

There are differences between the FATF standard and the 3rd Directive, in particular in the following areas. The 3rd Directive is binding upon Member States, while the FATF standard as such only comprises a set of recommendations, although in practice this standard is considered as a commitment by countries to be incorporated into their legislation. The FATF recommendations specify different criteria to identify predicate offences and specify a minimum list of serious crimes as predicate offences for money laundering, while the 3rd Directive includes all 'serious' crime.[46] In contrast to the FATF recommendations, credit and other financial institutions are defined (by the respective directives such as the Banking Directive[47], the Life Assurance Directive[48], the Insurance Mediation Directive[49], the Market in Financial Instruments Directive[50] and the UCITS Directive[51]). The FATF recommendations are applicable to dealers in precious metals and dealers in precious stones, while the 3rd Directive is applicable to *all* traders in goods when payment in cash is

45 The United Nations Convention against Illicit Traffic in Narcotics Drugs and Psychotropic Substances (1988), the United Nations Convention for the suppression of the financing of terrorism (1999), the United Nations Convention on transnational organised crime (2000), the United Nations Convention on corruption (2003) and the Council of Europe Convention of 1990 on laundering, search, seizure and confiscation of proceeds of crime, and the (renewed) Council of Europe Convention of 2005 on laundering, search, seizure and confiscation of proceeds of crime and on financing of terrorism.

46 Compare FATF recommendation 1 with Article 1 in conjunction with Article 3((5) of the 3rd Directive.

47 Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions (recast), OJ L 177, 30.6.2006, p. 1-200.

48 Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance, OJ L 345, 19.12.2002, p. 1-51, as last amended by Directive 2005/1/EC.

49 Directive 2002/92/EC of the European Parliament and of the Council of 9 December 2002 on insurance mediation, OJ L 9, 15.1.2003, p. 3-10.

50 Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC, OJ L 145, 30.4.2004, p. 1-44, as last amended by Directive 2006/31/EC.

51 Council Directive 85/611/EEC of 20 December 1985 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investments in transferable securities (UCITS), OJ L 375, 31.12.1985, p. 3, as last amended by Directive 2004/39/EC.

made in excess of € 15.000.[52] The FATF recommendations are applicable to the activities of gatekeepers (lawyers, notaries, accountants and real estate agents) only as far as they are related to financial transactions, while the 3rd Directive goes further[53]; moreover, the FATF recommendations do not include tax advisors.[54] Furthermore, the 3rd Directive defines the beneficial owner in a more concrete and operational way, while the definition in the FATF recommendations is rather vague, as a consequence giving room to more interpretation.[55] Whereas the FATF recommendations leave the possible derogations as to the timing of the verification open, the 3rd Directive clearly specifies the possible derogations.[56] Whereas the FATF recommendations leave the possible situations of simplified due diligence open, the 3rd Directive specifies such situations.[57] While the FATF recommendations allow reporting on a narrower basis than the predicate offences to money laundering, the 3rd Directive applies a stricter regime by not allowing this.[58] As opposed to the FATF recommendations, the 3rd Directive demands that Member States shall require the entities subject to it to refrain in principle from carrying out transactions which they know or suspect to be related to money laundering and terrorist financing unless the FIU has been informed.[59] In contrast to the FATF recommendations, the 3rd Directive accepts derogations to the no tipping off requirement: namely to competent authorities, within a group, and beyond a group in restricted situations.[60] Like the FATF recommendations, the 3rd Directive accepts numbered accounts provided that the requirements of this directive are fulfilled. In contrast to the FATF recommendations, the 3rd Directive also accepts lettered accounts (including accounts in fictitious names), provided that the requirements of the Directive are fulfilled, on the basis that there is no difference in principle between numbers and letters.[61]

52 Compare FATF recommendation 12(c) with Article 2(1)(e) of the 3rd Directive.
53 Compare FATF recommendation 12(d) in conjunction with recommendation 13, with Article 2((1)(3)(a) and (b) in conjunction with Article 22 of the 3 rd Directive.
54 Compare FATF recommendation 12(d) with Article 2(1)(a) of the 3rd Directive.
55 Compare the FATF glossary to the 40 recommendation with Article 3(6) of the 3rd Directive.
56 Compare FATF recommendation 5, including interpretative notes, with Article 9(1) to (4) of the 3rd Directive.
57 Compare FATF recommendation 5, including interpretative notes, with Article 11 of the 3rd Directive.
58 Compare FATF recommendation 13, including interpretative notes, with Article 21 in conjunction with Article 1 and 3(5) of the 3rd Directive.
59 See Article 24 of the 3rd directive.
60 Compare FATF recommendation 14(b) with Article 28(2) to (5) of the 3rd Directive.
61 Compare FATF recommendation 5 with Article 6 of the 3rd Directive.

Conclusion

As a consequence of the many changes the 3rd Directive has brought about, the 1st EU anti-money laundering Directive, as amended by the 2nd EU anti-money laundering Directive , has been repealed. The 3rd Directive builds upon the policy already reflected in the 1st Directive and includes new elements and develops others. A preventive *legislative* framework for fighting money laundering and terrorist financing has been created.

However, whether a solid *framework* for fighting money laundering and terrorist financing has been created also depends on the way Member States implement and effectively enforce the legislative framework.

Enforcement is an area that is difficult to manage. It should get much more attention than it often is given. Money launderers and terrorist financiers will ultimately only be caught via solid cooperation between legislation *and* enforcement, nationally and internationally. You need both legs to walk.

Money laundering and the Professional sector supervision of lawyers and civil-law notaries in the Netherlands

– what about professional secrecy?[1] –

A.T.A. Tilleman[2]

Introduction

Following the introduction in the late 1980s of legislation that compelled financial and other institutions to take measures against money laundering, the Second Directive[3] of the European Community necessitated Member States to amend their legislation to also oblige professionals to play a role in the fight against money laundering.

The Netherlands' legislator amended the Identification (Provision of Services) Act[4], the Disclosure of Unusual Transactions (Financial Services) Act[5, 6] and adopted the Decree which designated institutions and services under these two acts.[7] The Identification Act, Disclosure of Unusual Transactions Act and

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1 In this paper I deliberately use the term 'professional secrecy' in order to distinguish from the English legal concept of 'legal professional privilege' the latter pertaining to the right whereby communications between client and legal adviser may not generally be given in evidence without the client's consent if made in relation to contemplated or pending litigation, or made to enable the adviser to give, or the client to receive, legal advice. Such communications are defined under P & C.E.A. 1984, s. 19 (6) as "communications between a professional legal adviser and his client or any person representing his client made in connection with the giving of legal advice to the client . . . or in contemplation of legal proceedings" [Dictionary of Law, L.B. Curzon, 4th ed, 1993].

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3 Directive 2001/97 EC of 4 December 2001 amending Council Directive 91/308 on prevention of the use of the financial system for the purpose of money laundering, OJ L 344, 28/12/2001 p. 76.

4 *Wet identificatie bij dienstverlening*, also known as 'Wid'.

5 *Wet Melding ongebruikelijke transacties*, also known as 'Wet Mot'.

6 An (unofficial) English language text version of an earlier version of the Identification Act and Disclosure of Unusual Transactions Act is available at http://www.dnb.nl and http://www.bureauft.nl Both the Identification Act and Disclosure of Unusual Transactions Act were amended by Law of 2 February 2006, Stb. 2006, 187 and Decree of 13 April 2006, Stb 2006, 211 entering into force on 1 May 2006.

7 *Aanwijzingsbesluit instellingen en diensten in het kader van de Wet identificatie bij dienstverlening en de Wet Melding ongebruikelijke transacties*, also referred to as 'Decree', 24 February 2003, Stb. 2003, 94 amended by Decree of 13 April 2006, Stb. 2006, 212.

Decree are further referred to as Anti-money laundering legislation in the Netherlands ('AML').

The act determined that as of 1 June 2003, civil law notaries and other independent professionals (such as, for example, lawyers, accountants, tax advisers), working in or from the Netherlands, are subject to obligations pursuant to AML. In order to ensure that these professionals comply with this, staff working at the Bureau Financial Supervision (*Bureau Financieel Toezicht*, 'BFT') has been tasked to supervise them.[8]

Creating an obligation to comply with AML is one thing; supervision of lawyers is another. Like in many other countries, attorneys at law[9] and civil-law notaries[10] in the Netherlands have a statutory duty to professional secrecy. These lawyers are under a legal obligation to keep client information confidential. Consequently, these professionals claim that they may not provide supervisors, like employees from the BFT, access to their client confidential files. A conflict of duties is apparent. In various Dutch legal journals authors paid attention to the impact on professional secrecy, however, it has not caused the Netherlands' legislator to reconsider its position. Nevertheless it is a serious subject that has also emerged in other member states in the European Union (e.g. Case C 305/05) and other jurisdictions. I will project this issue in the Netherlands against the Dutch AML-system and aspects of its impact on professionals.

Anti-money laundering legislation and lawyers practising in the Netherlands

Introduction

Prior to June 2003 attorneys at law and civil law notaries had not been addressed by legislation intended to combat money laundering. However, professional rules of conduct were, and still are, in place, as was a rather general legal prohibition to participate in the receiving of unlawfully obtained monetary goods (which at the time encompassed money laundering). Since the mid 1990s, a civil-law notary has been under an obligation to take account of the

8 Ministerial Regulation of 3 September 2003, *Wijziging Uitvoeringsregeling Wet identificatie bij dienstverlening*, Stcrt. 10 September 2003, nr. 174 p. 18, amended.

9 In the Netherlands there are approximately 14.000 advocates (or 'attorneys at law') registered as member of the Netherlands Bar Association, 'NOVA'; For more information http://www.advocatenorde.nl, also with information in the English language.

10 Where I mention '*civil law notary*', I also refer to the junior civil law notary, unless indicated otherwise. In the Netherlands there are approximately 1.500 civil law notaries (excluding junior civil law notaries) registered as member of the Royal Dutch Notarial Society 'KNB'; For further information see http://www.notaris.nl, with also English information.

Guideline on cash transactions[11] and an attorney at law on the Guidelines to prevent advocates from becoming involved in criminal proceedings (*Bruyninckx* guidelines). Hence, there were guidelines which generally prohibit a civil-law notary to accept a cash payment of over € 10.000[12] and an attorney at law of over € 11.345.

With the adoption of the Decree in February 2003, more institutions and services came under the scope of existing AML. The Decree meant that AML also extended to professionals and to services they (may) provide.

The Decree entered into force on 1 June 2003 and generally contains two obligations: the first obligation determines that the professional must identify the client in case the professional provides a certain service. The second obligation confers a duty on the professional to report to the Financial Intelligence Unit of the Netherlands (previously known as 'Office for the Disclosure of Unusual Transactions'[13]) in case there appears to be an unusual (planned or performed) transaction in connection with the service. It is clear that these duties refer to the Forty Recommendations of the FATF.[14]

In the following paragraphs, I will discuss the Identification Act, Disclosure of Unusual Transactions Act and the Decree in more detail. However, I need to point out that at the moment further developments are taking place. With the adoption of the Third Directive[15], the First Directive is repealed and Member States are under an obligation to comply with the Third Directive by 15 December 2007. This means that further legislative actions have taken place in order to meet those obligations and that we are currently in the process of further implementation of the Third Directive.

a. Identification Act - Disclosure of Unusual Transactions Act - Decree

The Identification Act is the instrument that assists the Disclosure of Unusual Transactions (Financial Services) Act. The Identification Act contains rules on which entity must identify which person(s) under described circumstances. It also determines in what manner identification must take place and what other documentation must be collected. This is all set up, to assist, in case a planned or performed unusual transaction must be reported pursuant to the Disclosure of Unusual Transactions Act. Generally speaking, one may claim that the Identification Act aids the Disclosure of Unusual Transactions Act. After all, only the reporting of unusual transactions is of real interest.

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11 *Reglement Contanten*.

12 Since December 2006 this has been changed to € 15.000.

13 The Office for the Disclosure of Unusual Transactions is the Netherlands' FIU and member of the Egmont group.

14 FATF Recommendation nr. 12 refers to 'customer due diligence' (CDD), and FATF Recommendation nr. 16 refers to the reporting of a suspicious transaction by professionals.

15 Directive 2005/60 EC of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing, OJ L 309, 25/11/2005 p. 15.

Article 1 subsection 1 under a) of the Identification Act enlists under numbers 1° - 6° a series of entities that fall under the definition of 'institution'. Professionals are not covered by this. However, subsection 1 under a) 7° allows the addition of other entities by further legislation (i.e. 'order in council'). Article 1 subsection 1 under b) of the same article enlists under numbers 1° - 8° a series of activities that fall under the definition of 'service', and again under subsection b under 9° other services may be added by order in council.

The Decree (being an order in council) adds further 'institutions' and 'services' to the list. Like the Identification Act, the Disclosure of Unusual Transactions Act contains a similar method for adding other activities that fall under the definition of 'service'.[16]

Only if, pursuant to the Decree, a professional falls under the definition of 'institution' under the Identification Act, and the service falls under that definition under the Identification Act and Disclosure of Unusual Transactions Act, obligations coming from the latter to report an unusual transaction, apply. A key feature of this legislation is the obligation to report an 'unusual transaction'. This is a lower reporting threshold than a suspicious transaction as mentioned in the Forty Recommendations.

In order to further grasp the merits of the legislation, let me discuss some aspects.

b. Professional = institution

Article 1 of the Decree mentions under a – g (on the basis of Article 1 subsection one, under a, 7° of the Identification Act) additional entities that fall under the definition of 'institution'[17]:

"As institution within the meaning of article 1, subsection 1, under a, 7° of the Identification Act are designated:

d. the natural person, legal entity or company that independently and autonomously carries out activities as described in section 2, subsection one, under c or d, as advocate, civil law notary or junior civil-law notary, or in the practice of a similar legal profession or undertaking, as a profession or a trade;

e. the natural person, legal entity or company that independently and autonomously carries out financial economic or fiscal activities as described in section 2, subsection one, under e, as public chartered accountant, public accountant-business administration consultant, tax adviser, or in any other capacity as a profession or a trade;

16 Disclosure of Unusual Transactions Act, article 1 subsection 1 under 10°. Note that article 1, subsection 2 Disclosure of Unusual Transactions Act limits the scope.

17 I will only discuss those parts that apply directly to professionals.

c. Professional provides 'service'

Article 2 of the Decree mentions in subsection 1 under a- h (on the basis of Article 1, subsection one under b, 9º of the Identification Act) more activities that fall under the definition of 'service':

1. The following acts shall be designated as services within the meaning of section 1, subsection one under b, 9º of the Identification Act: . . . .

c. giving advice or assistance by the persons or institutions as referred to in section 1, under d, with respect to:

1º purchasing and selling real estate;

2º managing cash, securities, coins, currency notes, precious metals, precious stones, or other assets;

3º incorporating or managing companies, legal entities, or similar bodies as referred to in article 2, subsection one, under b, of the State Taxes Act;

4º purchasing, selling or taking over of enterprises;

5º activities in the field of taxes as described under e, 1º;

d. acting by the persons or institutions as referred to in article 1, under d, on behalf of and for the account of a client in any financial or real estate transaction;

e. providing tax advice or completing tax returns, as well as any related activities thereto, by the persons and institutions as referred to in article 1, under e, with the exception of tax returns and tax advice in relation thereto with regard to the Act on Income Tax 2001 on behalf of natural persons who, according to that tax return have:

1º no profit from entrepreneurial activity as referred to in title 3.2 of that act;

2º have not more than € 10.000 taxable income resulting from alternative resources as referred to in title 3.4 of that act;

3º have no considerable interest as referred to in title 4.3. of that act;

4º have not more than € 4.000 profit from savings or investments as referred to in article 5.2 of that act.

f. carrying out activities related to the compiling, assessing or auditing of annual accounts or keeping accounts by the persons or institutions as referred to in article 1, under e.

Article 4 of the Decree mentions in subsection 1 under a-j (on the basis of Article 1, subsection one under a, 10º of the Disclosure of Unusual Transactions Act) activities that fall under the definition of 'service'. It seems that it aims to do so in a similar manner to the definition mentioned above in relation to the Identification Act, however, since an amendment that entered into force on 1 May 2006, there is an inconsistency if one compares Article 2, subsection 1 under e with Article 4 subsection 1 under h:

The following shall be designated as services within the meaning of section 1, subsection one, under a, 10º, of the Disclosure of Unusual Transactions Act:

f. giving advice or assistance by the persons or institutions as referred to in section 1, under d, with respect to:

1º purchasing and selling real estate;

2º managing cash, securities, coins, currency notes, precious metals, precious stones, or other assets;

3º incorporating or managing companies, legal entities, or similar bodies as referred to in article 2, subsection one, under b, of the State Taxes Act [Algemene wet inzake rijksbelastingen];

4º purchasing, selling or taking over of enterprises;

5º activities in the field of taxes as described under h, 1º;

g. acting by the persons or institutions as referred to in article 1, under d, on behalf of and for the account of a client in any financial or real estate transaction;

h. the following acts of persons and institutions as referred to in article 1, under e:

1º providing tax advice, and completing tax returns, as well as any related activities thereto, or;

2º carrying out activities related to the compiling, assessing or auditing of annual accounts or keeping accounts[18]*;*

Notwithstanding the inconsistency, it will be apparent, when reading the above sections, that for example, attorneys at law and civil law notaries now fall under the definition of 'institution' and thus are compelled to report an unusual transaction once their activity falls under the definition of 'service'. When compared to the FATF Forty Recommendations[19] it must be noted that the text of the Dutch AML contains a wider range than the Forty Recommendations. For example, tax advice and services of accountants are not mentioned in the Forty Recommendations and in the Netherlands professionals are already providing a service under AML when they 'give advice or provide assistance' and not merely 'prepare for or carry out transactions'.

d. Exclusion of 'service'

It must be noted however that the activities mentioned in article 2 section 1 under c, 1º-5º (and also article 4, section 1, f 1º-5º) of the Decree and provided by (e.g.) attorneys at law, or civil-law notaries will not be regarded a service as referred to above, in case the activity relates to 'determining the legal position of a client, his representation at law, giving advice prior to, during or after legal

18 It is remarkable that since the amendments entering into force on 1 May 2006 the definition of 'service' in articles 2 and 4 of the Decree is not equivalent anymore.

19 See FATF Recommendation nr. 12 d.

proceedings, or giving advice about instituting or avoiding legal proceedings[20] The same applies to *inter alia* an accountant or tax adviser if he deals, in such (contentious) situation, with providing tax advice, or completing tax returns.[21]

With the exclusion of activities of an attorney at law, a civil-law notary and an accountant/tax adviser pertaining to (in short) 'determination of the legal position' the legislator aims to cautiously consider the special position these professionals fulfil with regard to client confidentiality and the meaning of these professionals in society. In addition thereto, the legislator states in the Explanatory Notes to the Decree (summarized and in short) that 'determining the legal position of the client' must be interpreted –restrictively– in the light of the current duties of confidentiality and must be explained such that opportunity must be given to ascertain what services the client requires from the advocate, (junior) civil law notary or tax adviser. To the advocate and tax adviser such initial (first) consultation is necessary in order to decide whether the requested services relate (or do not relate) to 'determining the legal position' and the civil law notary must have a first meeting to find out whether the requested service is appropriate to the client's needs.[22]

Now that we have learned that the attorney at law and civil-law notary may be considered an institution providing under certain conditions services that are subject to the Identification Act (also called 'Wid-services'), it is clear that other activities of these lawyers remain unaffected by the Identification Act and Disclosure of Unusual Transactions Act. Notwithstanding this, in other circumstances the advocate has yet to pay attention to the 'Guidelines to prevent advocates from becoming involved in criminal proceedings'[23] and the civil law notary to the Guideline on cash transactions. As said, this paper will not further discuss these guidelines in detail.

Customer due diligence: how to establish the identity of the client?

The professional, acting as an institution providing a Wid-service, must establish his client's identity prior to providing a service.[24] Within the context of this paper I will only discuss three (probably the most important) features:

1. If the client is a natural person, the identity shall be established on the basis of a document as meant in the Compulsory Identification Act.[25] This gen-

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20 Article 2 section 2 and article 4 section 2 Decree, respectively.

21 Article 2 section 3 and section 1 e under 1° and also article 4 section 3 and section 1, under h, 1°) of the Decree. See also FATF Recommendation nr 16 and Article 6 of the Second Directive.

22 Paragraph 4.3 of the Explanatory Notes to the Decree.

23 *Richtlijnen ter voorkoming van betrokkenheid van de advocaat bij criminele handelingen* (also known as the *Bruyninckx* guidelines), adopted 30 June 1995, latest amendment 30 November 2001, see http://www.advocatenorde.nl with an English version of these guidelines including 'Commentary on the Guidelines to prevent advocates from becoming involved in criminal dealings'.

24 Article 2 section 1 Identification Act.

erally boils down to identification with a passport, or – depending on the situation – a driving licence;
2. If the client is a Dutch legal person, or a foreign legal person established in the Netherlands, the identity shall be established on the basis of an authenticated extract from the Trade Registry of the Chamber of Commerce and Industry where the legal person has been registered.[26] This may also be an electronic authenticated extract transmitted by computer transfer by the Trade Registry to the professional[27];
3. If the client is a foreign legal person not established in the Netherlands, the identity shall be established on the strength of an authenticated extract from the official trade registry of the state where the legal person has its registered office, or on the strength of a deed drawn up by a notary or other official.[28] In the latter situation international harmonisation on registration of legal persons would serve this purpose. At the moment the variety of legal entities in the European Union and the peculiarities of each member state lead to compliance complications.

In case another situation occurs than described here, another manner provided for in the remainder of article 3 (or otherwise articles 4 and 5) may be possible. Discussion of these methods falls outside the scope of this paper, although I would still like to mention the possibility of identification of a client (natural person) on the basis of an advance payment to the professional from an account of that client (natural person) with an institution as mentioned in article 1 subsection one, a 1º or 2º Identification Act.[29]

Recording of other information

Article 6 Identification Act determines what other information relating to the client and the requested transaction must be collected. Worth mentioning here is that on the basis of article 6 under d, 9º Identification Act, article 3 subsection 2 of the Decree determines that depending on the type of service to be provided, data such as: size, nature, origin, destination, identity of legal entities/similar bodies, or other unique characteristics of the assets or transaction,

25 Article 3 section 1 Identification Act in relation to Article 1 of the Compulsory Identification Act (*Wet op de Identificatieplicht*).
26 Article 3 section 2 Identification Act.
27 This is based on a communication dated 18 July 2003 by the Minister of Finance (reference FM 2003-00959M) to the association of Chambers of Commerce, see http://www.bureauft.nl 'Veel gestelde vragen' nr. 17.
28 Article 3 section 3 Identification Act.
29 This follows from the letter dated 26 August 2003 (FM 2003-01150-U) by the Minister of Finance to the Chairman of the KNB in connection with article 4 subsection 1 Identification Act.

must be recorded.[30] The institution must retain the information referred to in article 6 in an accessible manner for a period of five years[31] and providing a service whilst failing to identify the client in the manner prescribed in the Identification Act is prohibited.[32]

Disclosure of Unusual Transactions Act – reporting unusual transaction

Whilst the Identification Act requires that the institution establishes the identity of the client, the Disclosure of Unusual Transactions Act determines that anyone providing a service is compelled to disclose any unusual (performed or planned) transaction in connection with that service.[33] Such disclosure must take place together with certain specifics pertaining to the service.

Any disclosure on the basis of the Disclosure of Unusual Transactions Act must be done to the FIU[34]. The FIU has been established according to article 2 Disclosure of Unusual Transactions Act. Its duties vary from gathering and analysing information in order to establish whether the information may be relevant to the prevention and detection of criminal offences to providing information on and conducting research into money laundering. These tasks include the determination whether a reported unusual transaction actually must be considered to be a suspect transaction. If that proves to be the case, the FIU will forward that information to the investigation authorities.

In order to assess whether a transaction should be designated as unusual, indicators have been established[35]. Since 1 November 2005 the indicators relating to the professionals that are subject of this paper are as follows:

I. Subjective indicator

Dislosure obliged in case the person obliged to disclose determines that the following situation applies:

Possible money laundering transaction or financing of terrorism

Transactions that presumably could be related to money laundering or the financing of terrorism.

30 Article 4 and 5 of the Decree contain a similar provision in relation to article 1 subsection one, under a, 10° and article 9 subsection two, under g of the Disclosure of Unusual Transactions Act respectively.
31 Article 7 Identification Act.
32 Article 8 Identification Act.
33 Article 9 subsection 1 Disclosure of Unusual Transactions Act.
34 The FIU's telephone number: +31(0)79 345 9681 and postal address: P.O. Box 3016, 2700 KX, Zoetermeer, The Netherlands.
35 Article 8 subsection 1 Disclosure of Unusual Transactions Act and article 5c and appendix to the Decree.

II. Objective indicator

Disclosure obliged in case of transactions that are being reported to the Police or Prosecution Service and, . . .

IIF Independent legal advisers, advocates, notaries, tax advisers, public chartered accountants, financial economic advisers, real estate agents, trust offices

Transactions of € 15.000 or more paid to or through intermediary service of the professional, with bearer cheques or similar methods of payment.

Experience with the subjective indicator since June 2003, shows that it proves to be somewhat difficult to judge whether such a situation applies. Both the law society[36] and the Royal Dutch Notarial Society (KNB)[37] have drafted an instructive memorandum that assists these professionals. It must be noted, however, that the threshold to disclose must be considered to be lower than assumed due to the use of terms like 'presumption that [the transaction] could be related to'. Creating further awareness of AML will be necessary in order to reach a level of more active consideration of the matter.

The objective indicator provides an easy guideline to determine whether there exists an unusual transaction. However, it has not automatically been followed by all professionals: there have already been a few disciplinary proceedings (leading to sanctions) against civil-law notaries who accepted a cash payment of more than € 15.000 without making a disclosure. If one considers that civil-law notaries have been under an obligation not to accept cash of more than € 10.000 since April 2002[38], it is particularly strange that such disciplinary actions were nevertheless necessary. Even to date notaries seem to be unaware of the need to report in case a cash payment of more than € 15.000 is made into the notaries' third party bank account.

Unlike civil-law notaries, attorneys at law have to comply with the Bruyninckx guidelines (see above) and are prohibited to make or accept cash payments of sums in excess of € 11.345 or the equivalent thereof in any other currency.[39] These Bruyninckx guidelines have been issued in 1995 by the law society itself and, in this situation also, it is hard to comprehend that advocates have been ignorant (for such a long time) of these rules or have been deliberately ignoring them. There is still a long way to go to achieve more compliance.

36 http://www.advocatenorde.nl
37 http://www.notaris.nl
38 Reglement contanten (Guideline on cash transactions), dated 6 March 2002, see http://www.notaris.nl This guideline was reviewed in December 2006 leading to the threshold of € 15.000 to bring it in line with the Disclosure of Unusual Transactions Act.
39 Article 6 of the Bruyninckx guidelines.

Supervision under AML

Introduction

On 3 September 2003, notably three months after the Decree entered into force, the Minister of Finance appointed, by Ministerial Regulation on the basis of the Identification Act and the Unusual Transactions Act, additional supervisors to ensure compliance with these acts.[40] Consequently from that date there are four different supervisory institutions:

1. Autoriteit Financiële Markten (Authority Financial Markets)
2. De Nederlandsche Bank (Dutch Central Bank)
3. FIOD-ECD (Fiscal and economic police)
4. Bureau Financieel Toezicht (Bureau Financial Supervision)

Each supervisory institution operates in its own field of expertise. Let me briefly introduce these supervisory institutions.

a. Authority Financial Markets ('AFM')

The AFM is the Netherlands' Authority for the Financial Markets.[41] The AFM is a foundation and established on 1 March 2002 as successor of the STE.[42] The AFM website states that it: ' . . . supervises the conduct of the entire financial market sector: savings, investment, insurance and loans. By supervising the conduct of the financial markets, AFM aims to make a contribution to the efficient operation of these markets'.

Since the Ministerial Regulation of 3 September 2003 (appointed personnel of) the AFM has (further) supervisory powers in connection with AML regarding:

- securities firms[43]
- institutions providing collective investment schemes[44]
- intermediaries in the insurance trade[45]

b. De Nederlandsche Bank ('DNB')

DNB is the central bank of the Netherlands.[46] It is a public limited liability company (N.V.) that dates back to the early 19th Century. Any statutory terms regarding DNB can be found in the Banking Act 1998. DNB is, as central

40 Wijziging Uitvoeringsregeling Wet identificatie bij dienstverlening, Stcrt. 10 September 2003, nr. 174 p. 18, amended.
41 http://www.afm.nl/english.htm
42 *Stichting Toezicht Effectenverkeer,* foundation Supervision Securities Trade.
43 '*effecteninstellingen*', Art. 8a subsection 1 under c and subsection 2 under c.
44 '*beleggingsinstellingen*', *ibid*.
45 '*assurantietussenpersonen*', Article 8a, subsection 1 l and article 8a subsection 2 m. This task is in addition to earlier entrusted tasks regarding AML.
46 http://www.dnb.nl/dnb/homepage.jsp?lang=en DNB's (excellent) website has a great number of legal texts both in the Dutch and English language.

bank, part of the European System of Central Banks. In addition, DNB supervises various activities in the financial sector. In 2004 DNB merged with the Pension and Insurance Supervisory Authority.[47]

Already prior to the Ministerial Regulation of 3 September 2003 (appointed personnel of) DNB had supervisory powers in connection with AML regarding (inter alia):

- credit institutions[48]
- insurance companies[49]
- credit card issuers[50]
- money transaction offices[51]
- casinos[52]
- trust offices[53]
- money transfer offices[54]

c. FIOD-ECD

The FIOD-ECD[55] is the 'Fiscal investigations and policing unit' of the Dutch Tax and Customs Administration. The FIOD-ECD investigates tax and other fraudulent activities and together with the Public Prosecutions Service it may decide to perform a criminal procedural investigation.[56] The FIOD-ECD also acts as supervisor in the field of economic regulation and financial integrity.

Since the Ministerial Regulation (appointed personnel of) the FIOD-ECD has been appointed as (additional) supervisor regarding AML. At the moment developments are taking place whereby this task is being transferred to the tax authorities.

The supervisory tasks in connection with AML relating to the FIOD-ECD are with respect to the following entrepreneurs:

- professional sellers or brokers of vehicles, vessels, objects of art, antiquities, gems, precious metals, jewellery or other as such designated valuable objects (in short professional traders in valuable assets)[57];
- real estate agents and intermediaries in real estate.[58]

47 *Pensioen- en Verzekeringskamer.*
48 '*kredietinstellingen*', Article 8a subsection 1 a.
49 '*verzekeringsmaatschappijen*', Article 8a subsection 1 b.
50 'creditcard uitgevende instellingen', Article 8a subsection 1 e.
51 '*geldtransactiekantoren*', Article 8a subsection 1 f.
52 Article 8a subsection 1 g.
53 '*trustkantoren*', Article 8a subsection 1 i en subsection 2 j.
54 Article 8a subsection 2 h.
55 http://www.belastingdienst.nl/english There is no information available on this website in the English language regarding the FIOD-ECD.
56 Act of 22 June 1950, Wet op de Economische Delicten (sometimes also referred to as 'the Economic Offences Act').
57 '*handelaren in goederen van grote waarde*', Article 8a subsection 1 d.
58 '*makelaars*', Article 8a subsection 1 k and article 8a subsection 2 l. This task is in addition to earlier entrusted tasks regarding AML.

d. Bureau Financieel Toezicht ('Bureau Financial Supervision')

In the context of this paper it is justified to pay somewhat more attention to the BFT and to elaborate on its position.

The BFT is an autonomous administrative authority[59] incorporated by article 110 of the Notaries Act.[60] The origins of the BFT date back to the 1930s. Originally the BFT was known as the Central Office for Assistance[61] and in that position the BFT provided and still provides assistance to the Chambers of Supervision[62] in case a disciplinary procedure is considered or has been initiated against a civil-law notary. The BFT can also initiate a disciplinary procedure itself and has already done so in cases where it found that a notary accepted cash in excess of € 15.000.

The BFT, pursuant to its original tasks, is the sole prudential supervisor in connection with monies entrusted to the notaries' 'client's account'. In 1999 this supervision was extended to also control 'client's accounts' of Court bailiffs.[63] All personnel of the BFT must, prior to taking up their position at the BFT, pledge confidence towards all information that come to their knowledge, subject to otherwise being determined by or pursuant to the law.[64]

Since the Ministerial Regulation of 3 September 2003 (appointed personnel) of the BFT has, for the first time, supervisory powers in connection with AML regarding:

- attorneys at law[65]
- (junior) civil-law notaries[66]
- independent legal advisers[67]
- public chartered accountants[68]
- public accountant-business administration consultant[69]
- tax advisers[70]
- other independent finance economic advisers.[71]

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59 '*zelfstandig bestuursorgaan*', for further information: http://www.bureauft.nl

60 *Wet op het Notarisambt*, '*Wna*'. The Notaries Act, article 110 subsection 1: There is a Bureau Financieel Toezicht that is established at Utrecht. The Bureau has corporate identity. The Bureau supervises compliance by the notary of articles 23, 24 and 25 subsection one and two, third sentence, including by-laws, mentioned in article 18, subsection two, and 24, subsection three, and the Ministerial Regulation, mentioned in Article 25, subsection seven. Title 5.2 of the Administrative Act does not apply.

61 '*Centraal Bureau van Bijstand inzake het Toezicht op de boekhouding van notarissen*', *May 1933*.

62 '*Kamers van Toezicht*'.

63 Article 30 Gerechtsdeurwaarderwet (Act on Court bailiffs).

64 Article 110 subsection 10 WNA.

65 '*advocaten*', advocates, i.e. lawyers member of the law society 'NOVA'.

66 '*(kandidaat-) notarissen*', lawyers member of the KNB.

67 '*onafhankelijk juridische adviseurs*'. Regarding advocates, (junior) civil law notaries and independent legal advisers, see article 8a subsection 1 under h and article 8a subsection 2 under i.

68 '*accountants*'

69 '*accountants-administratieconsulenten*'

70 '*belastingadviseurs*'

The appointment of supervisors means that they are entrusted with the rights and duties based on the General Administrative Law Act.[72]

Sanctions

Failure to comply with AML, may lead to various types of action:

1. *A punitive sanction, based on the Act establishing rules for the investigation, prosecution and adjudication of economic offences*.[73] In that case under the authority of the Public Prosecutions Office an investigation will be started by the FIOD-ECD acting in its capacity of criminal investigator (and not as supervisor pursuant to the Identification Act and Disclosure of Unusual Transactions Act) and depending on the outcome further punitive measures may be taken. On the basis of the Economic Offences Act a failure to comply with (certain) provisions of the Identification Act and Disclosure of Unusual Transactions Act may lead to a punitive sanction of a maximum two years imprisonment or a fine;
2. *Disciplinary sanction*. The nature of the sanction depends on whether the professional is an advocate, notary, public chartered accountant, public accountant-business administration consultant or tax adviser;
3. *A sanction based on administrative law*. Since 1 May 2006 a supervisor may impose a 'cease and desist order under penalty' (*administratieve dwangsom*). It is also possible to impose an administrative fine (*adminstratieve boete*) on the offending institution.
4. *A sanction in relation to an issued licence to operate as (some sort of) 'financial enterprise'*. This sanction is only available to the Dutch Central Bank and the Authority Financial Markets in relation to their supervisees on the argument that having a licence to act, e.g. as a trust office, requires a sufficient standard of the administrative organisation. Failure to meet AML may be seen as lacking such standard.

Professional secrecy – what secrecy ?

Introduction

With the Decree, professionals like *inter alia attorneys at law, civil law notaries* and tax advisers have been placed under the definition of 'institution' pursuant to

71 '*onafhankelijke bedrijfseconomische adviseurs*'. Regarding public chartered accountants, public accountant-business administration consultants, tax advisers and independent finance economic advisers, see article 8a subsection 1 under j and article 8a subsection 2 under k.

72 '*Algemene wet bestuursrecht*', see further hereinafter the paragraph 'Authority of BFT-supervisor'.

73 Act of 22 June 1950, Wet op de Economische Delicten (in some cases also referred to as 'the Economic Offences Act').

the Identification Act. The consequence is that these professionals, depending on the type of activity they perform, sometimes provide a service that is covered by the Identification Act and Disclosure of Unusual Transactions Act (also referred to as a 'Wid-service'). Employees of the Bureau Financial Supervision (BFT) have been tasked to supervise these professionals to see whether they act in compliance with obligations following from AML.

When the BFT-supervisor calls at the office of an attorney at law or civil-law notary to perform his supervisory duties, these professionals regularly refuse to cooperate with the supervisor. In this chapter I discuss the basis of the refusal to cooperate. I distinguish between 'client confidentiality' and 'the right to refuse to cooperate'.

a. Advocate and civil law notary - professional secrecy

An advocate and a civil-law notary have a statutory duty of confidentiality.[74] To the notary this is based on article 22 WNA[75] and to the attorney at law on article 6 Code of Conduct of Advocates 1992.[76] Failure to comply with this duty of confidentiality is an offence under article 272 Criminal Code. Also a disciplinary sanction can be imposed. It is worth noting in this respect that even if a client discharges the attorney at law or civil-law notary from his duty of confidentiality, this nonetheless does not allow such professional to reveal any information.[77]

b. Right to refuse to cooperate – statutory basis

A complementary element to the statutory duty of confidentiality is the right (in court) to the attorney at law and civil-law notary to refuse to give evidence or refuse to respond to requests for information that has come to the attention of the attorney at law or civil-law notary by exercising that profession. This is the 'professional right to refuse to cooperate' or alternatively 'right of non-disclosure'.[78] The right of non-disclosure is recognized in article 218 of the

74 '*geheimhoudingsplicht*'

75 Article 22 WNA subsection 1: "The notary is, unless determined otherwise by or pursuant to the law, obliged to remain silent regarding all information he has obtained in the capacity of his position."

76 *Rule 6* 1. "Advocates must observe secrecy; they shall not divulge the details of cases they are handling, the identity of their clients or the nature and extent of their interests. 2. If an advocate is of the opinion that the proper performance of the task entrusted to him requires his knowledge to be made public in any way, he shall be free to do so if the client does not object thereto and if it is compatible with sound professional practice. 3. Advocates shall impose the same obligation to observe secrecy upon their staff as that to which they are bound. 4. The obligation to observe secrecy shall continue after the relationship with the client has come to an end. 5. If advocates have undertaken to observe secrecy, or if this secrecy arises from the nature of their relationship with any third party, they shall also observe this secrecy vis-à-vis their clients." See website of the Netherlands Bar Association: http://www.advocatenorde.nl

77 Nr. 3.3. HR 1 March 1985, NJ 1986/173, re 'Notary Maas'.

78 In the Dutch language this is called '*verschoningsrecht*'.

Criminal Code of Procedure and article 165 Civil Code of Procedure but only towards information that has been provided to the professional in that capacity.

In 1985 the High Court of the Netherlands[79] ruled, in a case relating to a civil-law notary, that the professional right of non-disclosure is grounded in a general principal of law (applying in the Netherlands) and that it implies that the public interest that the truth be known must give way to the public interest that anyone is able to seek freely, and without fear of disclosure, advice from legal professionals.[80] In the previous year, the High Court had (again) confirmed that an advocate belonged to those professionals that have a professional right of non-disclosure.[81] One may conclude that the High Court acknowledges the advocate an equal professional right of non-disclosure as the civil-law notary (Barmentlo & Van der Vegt, 2005: 29; see also Kamerling & Klein Sprokkelhorst, 1996: 90).

The advocate or civil-law notary may determine himself whether he thinks a professional right to refuse to cooperate exists and to what extent he wishes to invoke this.[82] In case an advocate or civil-law notary wishes to invoke the right of non-disclosure, the court ultimately determines whether such must be honoured. It must be noted, however, that only a marginal check of the court is allowed.

In relation to invoking the right to non-disclosure, it is of importance whether the information that is sought has come to the advocate or civil-law notary acting in that capacity, whereby it is to the court to determine what is covered by 'acting in that capacity' (Bannier & Fanoy, 2006: 110). It has been claimed by some authors that for example opening a bank account on behalf of a client, and taking care thereof does not belong to the activities of the advocate acting in that capacity and hence are not covered by the right to refuse to cooperate (Doorenbos, 1996: 111). An equal result follows for the advocate providing purely tax or investment advice, or the advocate who also is director of a trust. The question then araises as to whether any of the activities that qualify as a 'Wid-service'[83] follow the latter interpretation, although some authors claim that any general legal advice should qualify and allow the right of non-disclosure (Bannier & Fanoy, 2006). The consequence thereof is that on a case by case basis the courts have to determine where the thin line lies between 'activities of the advocate acting in that capacity' (according to some also including general legal advice) or other (non-advocate/ notary) services (such as investment advice) (see also Fernhout, 2004: 155 and AG Maduro in his Opinion in case C305/05). This is particularly the case if one considers the Wid-

79 With this I refer to the *Hoge Raad*, being the highest judiciary in the Netherlands.
80 HR 1 March 1985, NJ 1986/173, re 'Notary Maas'.
81 HR 22 June 1984, NJ 1985/188 as mentioned by Barmentlo & Van der Vegt, p. 28.
82 HR 9 August 2002 NJ 2004/47; HR 11 March 1994 NJ 1995/3; HR 25 September 1992 NJ 1993/467.
83 With 'Wid-service' I mean any service falling under the Identification Act and Disclosure of Unusual Transactions Act.

service relating to for example 'giving advice or assistance . . . with respect to purchasing and selling real estate' or the managing of cash, securities etc.[84] Both these activities come very close to the 'investment advice' that falls short of being an advocate's service.

Whilst the professional right of non-disclosure concerns a right based on general principles of law, it is not in quiet possession (Suyver, 2006: 78 and Mevis, 2006: 241). It may be set aside in exceptional circumstances. Recently the High Court of the Netherlands determined that this applies, in case an advocate (himself) is being suspected of for example money laundering.[85] It was honoured in a recent case whereby the Public Prosecutor took possession of a diary of the mother of the suspect, which was with the advocate of the suspect.[86] The High Court of the Netherlands, following the reasoning of the District Court, determined that 'confidential information from the mother had been provided to the advocate 'in his capacity' and the professional right of the advocate to refuse to cooperate did not only extend to correspondence and other written documentation that had been sent to, or produced by the professional and such also extended to the mentioned diary'.

After these introductory notes, which I realise are not comprehensive, I now turn to the situation regarding the lawyer, or other professional, who works as an autonomous tax adviser. In this respect I will not discuss any rules relating to the accountant, who, is either bound by regulations issued by NIVRA[87] or NOVAA.[88]

Tax adviser – professional secrecy

The tax adviser who does not act in the capacity of attorney at law or civil-law notary does not have a statutory duty of confidentiality. Any practitioner may call himself 'tax adviser' and depending on qualifications, a person calling himself a tax adviser may register with one of the professional organisations of tax advisers. In the Netherlands there are mainly three organisations of tax advisers: the Dutch Association of Tax advisers with 4.000 members[89], the Dutch Federation of Tax advisers with approximately 3.000 members[90] and the College of Tax Advisers with 2.600 members.[91] All three organisations are an association under Netherlands' civil law where a tax adviser may seek membership depending on his/her qualifications.

Any obligation of a tax adviser relating to confidentiality results from by-laws pertaining to membership of one of these three professional organisations

84 Two examples of 'Wid-services': article 2 subsection 1 under c 1º and 2º of the Decree.
85 HR 14 June 2005, NJ 2005/353.
86 HR 24 January 2006 LJN: AU4666.
87 http://www.nivra.nl (with also some information in the English language).
88 http://www.novaa.nl
89 *Nederlandse Orde van Belastingadviseurs,* '*NOB*' http://www.nob.net (with also some information in the English language).
90 *Nederlandse Federatie van Belastingadviseurs,* '*NFB*' http://www.fb.nl
91 *Nederlands College van Belastingadviseurs,* '*CB*' http://www.cb.nl

of tax advisers. A client of such a tax adviser may only assume confidentiality based on that membership and/or the contractual relationship with that tax adviser, or the organisation to which the tax adviser belongs. In case a tax adviser, member of one of these three professional organisations, violates such professional duty of confidentiality, (s)he may be liable to a procedure based on the code of conduct pertaining to the membership of such organisation.

b. Right to refuse to cooperate – no statutory basis

A complementary statutory right to a tax adviser like the advocate and civil-law notary have, to refrain from answering questions or giving evidence in court, does not exist. However, in case of a third party investigation of the tax authorities, the tax adviser may apply a so-called informal professional right to refuse to cooperate. Two recent judgments of the High Court of the Netherlands on 23 September 2005[92] seem to provide a stronger basis to the tax adviser for not cooperating with the tax authorities, at least under certain circumstances. I will first explain the formal and informal professional right to refuse to cooperate in tax matters; thereafter I will briefly address these two High Court rulings.

c. 'Formal' right to refuse to cooperate in tax matters

Article 47 of the State Taxes Act[93] obliges anyone to provide information to the Tax inspector in relation to *his personal* tax position. Article 53a of the AWR then contains a statutory professional right of non-disclosure in relation to *a third party* investigation of the tax authorities. This statutory professional right of non-disclosure applies to professionals that hold a position that historically has been acknowledged as receiving confidential information: e.g. members of the clergy, members of medical professions, advocates and notaries. It clearly does not mention tax advisers and accountants.

On the basis of the statutory professional right of non-disclosure the tax authorities cannot endeavour to obtain information on a tax payer by addressing (instead) for example her/his advocate or notary. However, on the basis of that article 53a AWR, it appears possible to obtain such information by addressing the tax payer's accountant or tax adviser. This was felt to be unreasonable – hence the concept of 'informal right to refuse to cooperate'.

d. The 'informal' right to refuse to cooperate

The informal professional right to refuse to cooperate has been documented in a Communication from the State Secretary of Finance of 1994[94] but dates back

92 HR 23 September 2005, nrs. 38 809 and 38 810, V-N 2005/46.5, LJN AR 6468 and AU 3140.

93 '*Algemene wet inzake rijksbelastingen*', '*AWR*'.

94 Communication of the State Secretary (staatssecretaris van Financiën) of 5 January 1994, nr. 10DG/M4, V-N 1994, p. 456.

to the 1950s (Kamerling & Klein Sprokkelhorst, 1996: 85). The Communication contains guidance to the tax authorities such that from accountants and tax advisers no information may be demanded regarding their advice to and correspondence with their clients (third parties), as long as these professionals acted in their particular capacity. The reasoning behind the acceptance of this informal professional right to refuse to cooperate lies in acknowledging the option for the taxpayer to seek tax advice from a professional adviser. It constituted a matter of 'fairness'. However, statutory provision was not possible due to the fact that the profession of tax adviser was not organised by law (Barmentlo & Van der Vegt, 2005, 38 ff.).

The informal professional right to refuse to cooperate encompasses tax advice, correspondence and consultations with the clients. Until September 2005, it has been a question whether due diligence reports or reports with a dual character (advice and facts) were also covered by this informal professional right to refuse to cooperate. Since the ruling of the High Court in the cases that led to the judgments of 23 September 2005 (Barmentlo & Van der Vegt, 2005: 40), it is assumed that the latter mentioned type of documents may, from now on, not be requested by the tax authorities, as long as these documents are aimed to inform on the tax position of the client or advise on that. This is not based on the Communication, but on the principle fair play and good governance. The High Court determined: '. . . it is based on fair play, being one of the general principles of reasonable governance, that declines the authority to the tax inspector to use his powers pursuant to article 47 AWR, to obtain information from reports and other documentation of third parties as long as these documents aim to inform the tax payer about his tax position or advise him thereon . . .' Some authors now claim that it is not necessary anymore to separate facts from advice in such a report (Pechler, 2005: 1) and that a tax adviser now, similarly to the advocate or notary, has the right to judge for himself what is covered by the professional right to refuse to cooperate (Barmentlo & Van der Vegt, 2005: 44). Another consequence of this judgment is that the basis of fair play causes that amending the Communication has no influence (Klein Sprokkelhorst, 2005: 20).

e. Tax adviser equal level ?

I assume that it may be fair to conclude that the tax adviser in his/her position towards the tax authorities, *in case of a third party investigation*, has arrived at a comparable level of the professional right to refuse to cooperate as the advocate or notary as long as it deals with documents in which the tax adviser aims to inform the client on his/her tax position or advise him/her thereon.

Supervision or professional secrecy

Introduction

The BFT-supervisor has been tasked to ensure compliance with AML by the professionals that are subject to its supervision. Let us now turn to some arguments that are put forward by either side of the spectrum to claim or deny access to client confidential files. Whilst dealing with the situation in the Netherlands, I will not discuss any arguments that are being used in Case C305/05, as this case covers the matter from a somewhat different angle, i.e. the compatibility of the First and Second Directive with (for example) article 6 of the Convention for the Protection of Human Rights. It is however worth mentioning that the European Court of Justice in its judgment of 26 June 2007 upheld that the obligations to for example, attorneys at law and civil-law notaries to inform and cooperate with the authorities responsible for combating money laundering do not infringe the right to a fair trial as guaranteed by article 6 of the Convention for the Protection of Human Rights taken into account the exclusion of the second subparagraph of article 6 paragraph 3 of the First Directive.[95]

Authority of BFT supervisor

The Explanatory Notes to the Ministerial Regulation of 3 September 2003[96], explain that with that regulation supervision of observance of AML has been created. It also states: 'The employees that are specifically entrusted to observe compliance with the Identification Act and the Disclosure of Unusual Transactions Act have the powers on the basis of Division 5.2 of the General Administrative Law Act[97] to demand information, or insight into files and documents'.

Division 5.2 of the Awb is placed in Chapter 5 'Enforcement'.[98] The powers entail the right to:

- enter every place, with the exception of a private home (article 5: 15);
- require the provision of information (article 5:16);

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[95] Subparagraph 2 of Article 6 paragraph 3 of the First Directive as amended by the Second Directive provides: "Member States shall not be obliged to apply the [reporting] obligations laid down in paragraph 1 to notaries, independent legal professionals, auditors, external accountants and tax advisors with regard to information they receive from or obtain on one of their clients, in the course of ascertaining the legal position for their client or performing their task of defending or representing that client in, or concerning, judicial proceedings, including advice on instituting or avoiding proceedings, whether such information is received or obtained before, during or after such proceedings."

[96] Ministerial Regulation of 3 September 2003, Stcrt. 10 September 2003, nr. 174 p. 18: '*bestuurlijk Toezicht op naleving*'.

[97] *Algemene wet bestuursrecht*, '*Awb*'.

[98] An unofficial translation of a 1999 version of the Awb can be found at: http://www.justitie.nl/themas/wetgeving/dossiers/Awb/diversen/Diversen.asp, view under 'Engelse tekst Awb'.

- require inspection of business information and documents and to make copies thereof, or take the information and documents away (article 5:17);
- inspect and measure goods and take samples thereof, to open packages, to take things away (article 5:18);
- stop and inspect means of transport that are subject to supervision, cargo thereon, documents related thereto (article 5:19).

On the basis of article 5:20 subsection one Awb, everyone is obligated to co-operate fully with a supervisor, and according to article 5:20 subsection two, any person that is bound by a duty of secrecy by virtue of his profession, or statutory regulation, may refuse to cooperate with the supervisor, in so far as his duty of secrecy makes this necessary.

Countering the authority? – Article 5:20 paragraph 2

This last subsection of article 5:20 is the basis that advocates and civil-law notaries refer to at the time the BFT-supervisor demands access to client files and they deny access. Until now, it has caused quite some discussion between parties involved whether this argument is valid.

Since it is generally recognized that a refusal of a tax adviser to the BFT supervisor to disclose client files lacks any legal grounds (notwithstanding the earlier discussed concept of the 'informal' right to refuse to cooperate), and since that has not posed a problem, I will not elaborate on that any further.

Obligation to disclose unusual transaction

If we turn to the obligations of the professional pursuant to AML, we know that the professional may come in a situation whereby (s)he is compelled, by virtue of article 9 Disclosure of Unusual Transactions Act, to report an unusual transaction of the client. This impacts clearly on the professional's duty of confidentiality (Huydecoper, 2003: 513) and the Dutch legislator chose to do so.[99] The initiative to report an unusual transaction has been placed on the professional, and only activities that qualify as (i) belonging to an 'initial conference', (ii) a Wid-service, but are exempted pursuant to article 1 subsection 2 Disclosure of Unusual Transactions Act[100], or (iii) not a Wid-service, remain free from this impingement. Consequence thereof is, that a major part of the notary services and a rather significant part of an advocate's non-contentious work falls within the ambit of the obligation to report an unusual transaction. With this, a 'hole has been hit' in the duty of confidentiality of professionals (Huydecoper, 2003: 517). Does this entail that where an intrusion to the duty of confidentiality has been made and accepted at the level of the duty to report an unusual transaction, this also means that the duty of confidentiality does not apply in

[99] Article 6, Second Directive.
[100] Including article 2 subsection 2 and 3, and article 4 subsection 2 and 3 of the Decree.

case the BFT-supervisor wishes to investigate compliance? In a sense the latter is of a lesser impingement on the duty of confidentiality than the obligation to disclose. As such, it leaves untouched the 'quiet enjoyment' of the duty of confidentiality. It is, after all, the professional that is being supervised.

In line with this lies the reasoning of the legislator that the duty of confidentiality (together with the right to refuse to cooperate) remains in place to its full extent, if (i) there is a situation to which article 1 subsection 2 Disclosure of Unusual Transactions Act applies (i.e. contentious work)[101] – which relates to the original 'typical' advocates' work-, and (ii) in case one may determine that it is a first or initial meeting. These two areas remain unaffected by AML-obligations, whether or not assistance is sought relating to Wid-services. The creation of two areas of exception to the duty to disclose in connection with 'Wid-services', and thus the acknowledgement of the duty of confidentiality, seem to imply that outside these areas AML related duties prevail over the duty of confidentiality. One could even claim that the legislator (carefully and purposely) considered to subdivide the activities of a legal professional into two categories and only impacted on as much as it thought was required.

BFT supervisor – experience with professional secrecy

The Explanatory Notes to the Ministerial Regulation of 3 September 2003 pay attention to the duty of confidentiality on the one hand, and supervision by the BFT on the other. It states that supervision should be exercised respecting the duty of confidentiality and the professional's right to refuse to cooperate. 'When exercising supervision, the BFT shall have regard to this special position. The BFT has already much experience with exercising supervision on legal professionals and the special position they have within our legal system. The BFT shall apply that expertise when exercising supervision pursuant to AML'.[102]

One could claim that this means that the BFT is able to investigate client files and thus interfere with the duty of confidentiality of the professional. It is, however, important to realise that the BFT-supervisor may only take further steps once the professional has not exercised his duties based on the Identification Act and on the Disclosure of Unusual Transactions Act - nothing more, nothing less. The action against the professional relates to his own (apparent) behaviour (Doorenbos & Van der Landen, 2002: 10). One could question, whether the BFT supervisor may actually report the unusual transaction himself on the basis of article 17 Disclosure of Unusual Transactions Act[103], as this

101 Including article 2 subsection 2 and 3, and article 4 subsection 2 and 3 of the Decree.
102 Ministerial Regulation, see note 8, Explanatory Notes p. 2.
103 Article 17 MOT reads: "The entities responsible for the *supervision of financial institutions* shall inform the Office, in derogation of any confidentitality obligations imposed by other Acts applicable to such entities, if, in the exercise of their duties, they discover facts indicative of money laundering or of the receipt of stolen money" [italics added - AT].

article refers to supervisors of financial institutions (only). With regard hereto it is also essential to realise that the BFT-supervisor himself is under three different regimes of secrecy: (i) an obligation based on the position with the BFT[104], (ii) an obligation based on the General Administrative Law Act[105], and (iii) the Disclosure of Unusual Transactions Act itself.[106]

It would be hard to comprehend if the contrary would be accepted. In case the BFT-supervisor were not able to investigate client files whatsoever, there would be no adequate supervision of these professionals in the first place.[107] In the second place, it would have been meaningless to create the exemption relating to 'the initial conference'. Thirdly a distinction between Wid-services and non Wid-services would have no goal, and fourthly the exemption to Wid-services that are in relation to contentious work of the advocate or civil-law notary would be without reason as well. It seems unlikely that such a structure with exceptions would have been set up without having any consequences. It may be fair to conclude that the BFT-supervisor must be allowed access to confidential client files.

Dutch legislative choice

In addition, it must be noted that the Dutch legislator, when implementing the Second Directive, chose a certain approach, notwithstanding the options that were open to it. First, the Netherlands legislator did not exercise the option that was left open by the Second Directive to designate an 'appropriate self-regulatory body of the profession' to act as the authority to which an indication of money laundering must be reported[108] (in the Netherlands, the professionals must report a disclosure to the FIU, like any other party that is under an obligation to report an unusual transaction), and second, the Dutch legislator did not exercise the option not to prohibit notaries and other independent legal

104 Article 110 subsection 10 WNA: "The governors and personnel of the Bureau shall, prior to accepting their position, take, before the district court at Utrecht, the following oath: 'I swear/promise allegiance to the Crown and the law. I swear/promise to perform my task loyal and careful, and I shall, unless determined otherwise, by or pursuant to the law, preserve confidence with regard to all information I become aware of as a consequence of my function.' . . ."

105 Article 2:5 General Administrative Law Act:
1). "Anyone involved in the performance of the duties of an administrative authority who in the process gains access to information which he knows, or should reasonably infer, to be of a confidential nature, and who is not already subject to a duty of secrecy by virtue of his office or profession or any statutory regulation, shall not disclose such information unless he is by statutory regulation obliged to do so or disclosure is necessary in consequence of his duties. 2) . . ."

106 Article 18 Disclosure of Unusual Transactions Act: "He who is engaged in performing, or has performed in the past, any duty pursuant to the provisions of this Act or to provisions pursuant to this Act shall not use any information furnished or otherwise received by virtue of this Act, nor shall he make such information known, otherwise or further than shall be required for the exercise of his duties or by the provisions of this Act".

107 In other words: supervision would be an illusion. It would be hard to believe that such contradiction of the aims of the EU-Directive and FATF-regulations would exist.

108 Article 6 paragraph 3, Second Directive.

professionals, auditors, external accountants and tax advisers to tip off their clients.[109]

By not using these two options, and thus not creating a special position to notaries and other independent legal professionals, but by appointing a special supervisor (like the BFT) and specifically distinguishing the activities of these professionals (in Wid-services, initial conference, and excluding court work in relation to Wid-services), one may assume that such is sufficient indication that effective supervision, including access to client confidential files, was aimed, whether we like it or not.

As long as a professional refuses access to client confidential files to the BFT-supervisor, there remains no other option then requesting a court to give an authoritative ruling on this subject. An interesting period of time is ahead of us.

Concluding remarks: Supervision and professional secrecy

AML entrusted the BFT-supervisor with the task to investigate compliance of *inter alia* the attorney at law, tax adviser and civil-law notary with this type of legislation. Compliance can only be measured by examining client files. The *attorney at law* and civil law notary have refused at many occasions to cooperate when the BFT-supervisor wished to perform his supervisory duties, by referring to their statutory duty of confidentiality and right of non-disclosure.[110] The tax adviser recognizes that (s)he has no legal basis to refuse to cooperate with the BFT-supervisor. The tax adviser realises that the 'informal' right to refuse to cooperate merely relates to the situation of the tax adviser towards the tax authorities in relation to (certain) third party investigations only.

European legislation left some options to the national legislator to create special provisions to these professionals that are under a duty of professional secrecy. The Dutch legislator clearly chose not to use the options that were left open. On one hand, it did not create a special own professional reporting body to which advocates and civil-law notaries could report an unusual transaction, and it did not use the option not to prohibit the tipping off. On the other hand, the Dutch legislator clearly distinguished, in line with international guidance, the services that may be provided by advocates and civil-law notaries. It has done so in such manner that some of these services fall within the ambit of AML, but may be excluded again in case of e.g. an 'initial conference' or 'typical' advocates work.

[109] Article 8 paragraph 2, Second Directive.
[110] Interesting is that not all advocates or civil law notaries refuse to cooperate.

In addition, the Dutch legislator appointed BFT-employees as supervisor of legal and other professionals with the argument that the BFT had already gained much experience with supervision of professionals that are under a duty of professional secrecy.

By not using the options opened by European legislation and by distinguishing the services of the advocates and civil-law notaries, together with the appointment of employees of a supervisor that has longstanding experience with supervision of professionals under a duty of professional secrecy, one wonders whether it can be validly denied that the conclusion must be that professional secrecy may not be used to stop the BFT-supervisor to examine professional's client confidential files in order to ensure compliance. The conclusion must then be: supervision and professional secrecy, whereby the latter will only be lifted as far as necessary to allow the BFT-supervisor to perform his/her duties, under conditions that are also governed by the BFT-supervisor's duties to confidentiality. It appears that the European Court of Justice endorses this view in case C 305/05.

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Criminal finances and state of the art. Case for concern?

Petrus C. van Duyne[1]

Two decades in a state of concern

Though the gospel warns us not to serve the idol Mammon, there is no societal system which has more religious features than the financial one, apart from the phenomenon of 'hard core' religion itself. There is hardly any system which is more based on beliefs than the financial system. Savers *believe* that banks 'keep' their money they have deposited and therefore do not rush to the bank to withdraw their savings. But the banks do not have these savings anymore; these have already been lent at a higher interest. But people believe that they can get these savings back, which is only correct as long as the majority of savers share this belief and do not withdraw their savings. To keep the financial community in a state of proper belief or trust, there are the presidents of central banks whose scanty words are received as the holy sayings of an Upper High Priest. Like most belief systems the financial system is also believed to be threatened by dark forces abusing the goodness of the faith. There are the 'traditional' predators of various sorts who lie on the wait to steal the silver from the financial alter. In the last two decades the financial and law enforcement authorities believe to have found new enemies to the financial system. These are misleading fiends who do not take monies *out* of the financial system, but bring these *into* it. The monies they bring are 'dirty' and are therefore *believed* to affect the essential virtue of the financial system in which we all believe: integrity.

About two decades ago the authorities have raised the alarm against these interlopers and their assumed pernicious effects on the system. Subsequently, since 1991 under the leadership of an activist informal body, the FATF, an ever growing worldwide system has been put into place, which is believed to have upheld the virtuousness of the financial system by designing and imposing a global anti-laundering regime (Levi and Reuter, 2007; Reuter and Truman, 2004).

It is easy to extend the number of financial statements, particularly about crime-monies and money-laundering, which reflect a broadly shared belief rather than facts. But what do we actually know about the threat of crime-money? On what empirical evidence is the global anti-laundering regime based, apart from speculative statements, derived from methodologically debat-

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able extrapolations (Keh, 1996; FATF report, 1990)? The latest sober summaries of the potential volume of crime-money by Levi and Reuter (2006) and Reuter and Truman (2004) are in this respect telling. A motley assembly of uncertain estimates of the proceeds from crime in the US (1990) has been brought together. Part of it concerns proceeds from various forms of illicit traffic in prohibited substances and services. However, the lion's share concerned proceeds from tax fraud: 56 % of the total sum of $ 471,1 billion.[2] But does all this represent the feared laundering? Yes, if we would stretch the reach of the definition of laundering to: *all unrecorded illegal income*. Then: *black income = laundering* (hence, tax fraud included).[3] This has the effect of blurring the concept of money-laundering, which may be convenient for political purposes, but does not lead to a real understanding.

The field of criminal finances and related activities (money laundering and the total set of countermeasures) is far from clear. Basically we have a dreaded but hazily delineated phenomenon, a global enforcement system to combat it and –most important– various crime-markets which in broad outlines apparently do not budge an inch (or a Euro). There are no official reports which signal even the beginning of a reduction of the volume of crime-money. If that is the case, what is the point of continuing along this apparently unpromising path? To answer this question it is of course required to have broader sight on that law enforcement path. However, not just that path in terms of laws and institutions because these are all virtually in place by now. What we need is a proper view on the social and economic surrounding 'laundering landscape' through which this law enforcement path has led us in the past decades. Is there any light on what happens left and right of this path, apart from the flickering law enforcement lights?

Apples and oranges in flickering law enforcement lights

Given the scarcity of systematic research, the answer to the question at the end of the previous section is: 'hardly'.[4] If we want to know more we are thrown back on these 'flickering lights' of the agencies of law enforcement. Should we

2 All figures in this article are in European *continental* annotation, replacing dots by the comma for decimals and commas by dots for separating thousands.

3 To be more precise: the illegal income from tax fraud is either the money saved because of a wrongly reduced tax assessment (income and corporate tax) or money wrongly reclaimed (e.g. VAT). The basic income from labour or trade can be legal.

4 There are journalistic investigative accounts of money laundering, which are of course highly selective because they must have an attractive news value. Some concern sting operations, which demonstrate the difficulty owners of large volume of black money have to get their money undetected into the financial system. See: Woolner (1994); Robinson (1996); Lilley, 2002.

ignore these? If it is all we have, we should not dismiss them *a priori* (against the better knowledge of methodologists). We should inspect them and find out whether we can glean from them some meaningful traces of the surrounding reality. These again may be related to some of the common belief statements about the threat of laundering, which then could be scrutinized, even if imperfectly.

Some public data

Managing crime-money is in essence managing information risks posed by the law. This is reflected in most of the recommendations of the FATF aimed at making the flow of financial information transparent. As crossing borders is a common criminal money-management safety measure, cross-border information tracing is supposed to be a proper counter-measure of the authorities. This should have contributed to the development of harmonized FIU databases which should have roughly the same structure in terms of format and content. For example, a set of common variables which indicate distinguishing features of transactions and perpetrators. Consequently, despite methodological caveats, cross-country comparison should then be feasible and certainly a meaningful first step to improve the methodology and develop a cross-country strategic survey. As a consequence, that could at least reveal something about the foundations of the official concern about crime-money. That would be 'evidence based policy making'.

In order to find out whether such cross-country comparisons are feasible I inspected the annual reports of the FIUs of Germany (BKA), Belgium, the UK and the Netherlands. The first question one has to clarify is the level of reporting. The Netherlands and Belgium have the system of *unusual* transaction reports, being 'filtered' by the FIU[5] after which those which meet certain criteria are converted into *suspicious* transactions. The German reporting system is based on *suspicious* transactions. One can harmonise this somewhat by considering only the suspicious transactions in Belgium and the Netherlands. Granted, the criteria for qualifying a transaction as suspicious are themselves not the same for every country. For example, in the Netherlands an unusual transaction is considered suspicious if the person connected to that transaction is known to the police. It does not matter whether the transaction was a perfectly legal deposit for his granny. Apart from that, disharmony soon emerges concerning the way the basic counting units are presented. The Belgian FIU annual report mentions the number of *files* in which the suspicious transactions are brought together, while the German BKA mentions the number of *suspects* involved and

[5] Up until the beginning of 2007 there were two responsible agencies in the Netherlands: the MOT a supervisory agency which received unusual transactions and processed these into suspicious transactions if they met the required features and the BLOM, a law enforcement agency operating under the responsibility of the Public Prosecutor. At present they form one organisation: FIU Netherlands.

the Netherlands the number of transactions. In short, these FIUs (together with the other European FIUs) still have a long way to go towards a harmonised reporting mode. This makes any comparison extremely hazardous.

Despite this serious caution, I will give an impression of the public figures by selecting them according to a few variables. I will address these figures by comparing them from various angles, like the rate of prosecution, the predicate crimes, amount of money involved or the global flows of the crime monies. Of course, this will illustrate some differences (based on national criteria), but may also provide some indications for more detailed in-depth analysis, which are lacking thus far. Perhaps it would stimulate the FIUs (or Europol) to replace the flickering lights by clear lamps.

a. Reported suspicious transaction

The first thing we want to know is the number of the *suspicious* transactions reported by the institutions obliged to report to the financial intelligence units in Belgium, Germany, the Netherlands and the UK. For the years 2001-2005 these were available, though for the UK the figure of 2005 is missing.

Table 1.
Development of the suspicious transaction reports in four countries, 2001-2005

	2001	2002	2003	2004	2005	total
Belgium	2.335	2.473	2.036	3.163	3.051	4.153
Germany	7.284	8.261	6.602	8.062	8.241	38.450
Netherlands	20.233	24.741	37.748	41.003	38.481	161.806
UK	29.976	56.023	94.718	154.536	n.a.	335.253

There appears to be a striking difference between Belgium and Germany on the one hand, and the Netherlands and the UK on the other hand. This is determined by the way of adding the input: the figures in the UK and the Netherlands are about single transactions, irrespective whether they belong together. As mentioned above, the Belgian and German figures concern the number of *files*, or reports which can contain numerous transactions.

It is difficult to attribute a particular meaning to these figures, for example in terms of how good or bad the system works, let alone to derive something about the underlying reality. Even if the reports concern *suspicious* transactions, there may be no evidence about any real wrongdoing after all. Hence, even though the suspicious transaction reports are used to report something about 'crime-money' –and subsequently used as official figures– they cannot be used for that purpose. Would a better indicator be the number of *prosecutions* and *convictions*? Actually these reflect the outcomes of official efforts to determine the 'truth' (rather legal evidence) about the underlying activities.

b. Comparing within the chain of penal processing

Relating the suspicious transactions to the following stages in the chain of penal processing proves to be no easy task. This is partly due to the circumstance that the annual reports usually do not make clear what the 100 % basis of a dataset is or what proportion of a certain year contains the spill-over of the previous year. Worse, the reports do not clarify unambiguously what the purported *counting units* are. The term 'file' in the Belgium report covers transactions of which there may be more than one in a file. But does it also contain more than one suspect if there are co-offenders? The German 'Verdachtsanzeige' (suspicious reports) may also contain more than one suspect and transaction. The data made available by the Home Office were about transactions, prosecutions and verdicts without indicating the mutual connections. Prosecutions and verdicts are on a person-bases, but transactions are not.

When we look at prosecutions and convictions related to money-laundering, we have only the data of England and Wales and Belgium. Those of England and Wales cover the years 1987-2004; those of Belgium the years 1993-2005, but are not differentiated per year. Hence we must disregard the difference of time span, put the years together and look at the proportion of convictions related to the cases prosecuted. The Belgium figures still have to be reduced by omitting the files which were never have reached the courts because of being transferred to a foreign agency or dismissed by the prosecution (= 64 % of the files). The uncertainty has not been cleared yet: there are 1523 files under the labels: preliminary investigation and judicial investigation, without indication of their outcome. I leave them in the set of cases processed by the penal system. After this small correction we obtain the following prosecution to conviction rates for England and Wales and Belgium:

Table 2.
Files, prosecutions and convictions in Belgium and England and Wales

Belgium 1993-2005		England and Wales: 1987-2004	
Files to be processed	2.593	Prosecutions:	1.823
Guilty	837	Convictions	696
Conviction rate:	32 %	Conviction rate:	38 %

Sources: FIU Belgium, 2006; UK Home Office, 2005

It is tempting to suggest an average long term success rate for these jurisdictions of between 30-40 percent, but nothing would be more misleading if we would not project it against more detailed case flow information. One might rather wonder why the number of prosecutions in England and Wales is so much lower than in the much smaller Belgium.[6]

[6] Addressing this question will require a systematic survey of the legal and organisational differences between jurisdictions and the function of the public prosecution.

A comparison of these oranges and pears with the German 'tomatoes' concerning (a) the results of the analysis of the incoming reports by the 15 federal FIUs and (b) the feedback of the Prosecution Office to the FIUs is hard to make. Hence, I do not compare but just present the outcomes. The FIUs closed 14 % of the incoming suspicious reports because there was no evidence and 'no remaining suspicion'. In 25 % the cases were also closed, but 'with remaining suspicion'. The remainder was still 'in process' or were forwarded to the competent police forces or the Inland Revenue Service.

The feedbacks concern another phase of the handling of the suspicious reports: the evaluation by the Public Prosecution Office (PPO) of their usefulness in relation to further investigation. In 2005 the PPO returned 1860 feedback reports (which covered also previous reporting years): in 77 % the case was dismissed; in 9 % the feedback contained useable leads for further investigation and in 14 % of the cases there was too little information to use it. Does all this represent a meagre success rate? To answer that question we should connect these figures with the initial input (reported transactions), which should subsequently be clustered into cases or files (as the Belgian FIU does) in order to develop a yardstick for measurement.

A similar comparison of the Dutch databases proved to be impossible. A connection of the Dutch FIU database with that of the police or prosecution was not available at the time of writing. In general there are continuing complaints that the police do too little with the FIU reports, a complaint about inefficiency which stretches back for almost a decade (Gold and Levi, 1994).

Granted, these systems of collecting figures and maintaining the resulting databases are evidently not meant to constitute the foundation of 'evidence based policy making'. The IT-specialists were not tasked: 'design a system which allows us to make comparisons between the procedural links of the penal chain' (not even within the same jurisdiction). This question was never raised in the first place, though questions about the success rate continued to haunt the ministers of justice.[7]

c. Predicate crimes

The initial 'great concern' was focused on drug-money undermining the financial integrity of the financial system. This was an easy target and skilfully used for the subsequent spreading of the anti money laundering regime. Therefore it is of interest to inspect the databases from the predicate crime perspective: if drug-money is 'bad', what do we know about other monies?

[7] To understand this outcome one has to look at the social-psychological composition of the stakeholders involved. The IT specialists are really 'electronic craftsmen' or wizards, the clients who have to work with them are clumsy jurists, and the policy makers and civil servants who are supposed to read the results of such systems in the reports . . . hardly ever read them.

Again only the Belgium and German annual reports provide more detailed information and again one needs some fantasy for explorative extrapolations. As the offence categories of Germany and Belgium differ, I will present them separately.

Table 3.
Categories of predicate offences in forwarded criminal files: Belgium

Offences	2001	2002	2003	2004	2005	Total	%
Illegal traffic	313	353	137	127	114	1.044	*25*
Drugs offences	285	227	149	112	111	884	*21*
Swindle/fraud	26	66	61	87	82	322	*8*
Bankruptcy fraud	20	21	37	36	58	172	*4*
Serious/org. tax fraud	77	109	154	87	66	493	*12*
Abuse corp. assets★				23	49	72	*2*
Human traffic	44	70	86	56	39	295	7
Organised crime	64	80	78	47	34	303	7
Sex exploitation	102	63	42	32	34	273	7
Terror. & financing	32	19	13	12	24	100	*2*
Other offences	22	24	27	45	75	193	*5*
Total = 100 %	908	923	630	577	620	4.151	100

★ The law of 11 January was extended in 2004 with new underlying forms of corporate crime. Source: Annual report FIU Belgium, 2006, ch. 3.

Inspection of table 3 shows that drug traffic represents 21 % of the criminal files. Whether the category 'organised crime' also contains cases of drug traffic is unknown. But even if one would add that category to drug traffic, it combined set still represents only less than 30 % of the total set. This is far less than the reported offences with other commodities: illegal trading with various licit goods (clothes, cars, excise goods, but also: weapons, counterfeits, stolen objects) representing the largest crime category. It is followed by serious and/or organised tax fraud (12 %), of which the main subset consists of VAT fraud. If one would put together all manifestations of fraud and economic crime, their share in the whole database is just more than 50 %.

The proportions of the various predicate offences can also expressed in terms of the money volumes involved.

Table 4.
Reported predicate offences and money involved: Belgium 2001-2005⋆

Offences	2001 € ml	2002 € ml	2003 € ml	2004 € ml	2005 € ml	Total € ml	%
Illegal traffic	247,0	808,0	234,7	199,6	187,9	1677,2	*28*
Drugs offences	88,0	81,4	77,8	36,4	37,5	321,1	*5*
Swindle/fraud	22,4	35,1	75,7	51,9	37,3	222,4	*4*
Serious/org. tax fraud	347,6	1.105,3	475,5	148,0	172,3	2.248,7	*38*
Abuse corp. assets⋆⋆	0,0	0,0	0,0	12,0	18,9	30,9	*0,5*
Organised crime	50,3	593,4	50,7	37,4	100,6	832,4	*14*
Sex exploitation	6,0	4,5	4,1	2,3	9,5	26,4	*0,4*
Terror. & financing	2,9	26,8	42,3	9,7	16,5	98,2	*2*
Corruption	0,0	0,5	30,2	0,3	8,6	39,6	*0,7*
Investment service	0,0	0,0	0,0	0,1	6,6	6,7	*0,1*
Other	42,7	104,0	163,3	102,5	40,5	453,0	*8*
Total = 100 %	806,9	2.759	1154,3	600,2	636,2	5.956,6	100

⋆ The tables in the Belgium report differ as far as the inclusion of certain crime types is concerned.

⋆⋆ The law of 11 January was extended in 2004 with new underlying forms of corporate crime.

Source: Annual Report FIU Belgium, 2006, ch. 3.

In this table the category 'serious and organised fiscal fraud' has the largest share in the reported money volume. If all the economic crime categories would be taken together, their total financial share in the Belgian reporting system is almost 70 %. Drug offences stand at a low 5 %. Even if one would enlarge it with organised crime (which would inflate it), it will not reach one fifth of the reported money volume.

Comparison with the German findings is difficult: the 2005 report deviates from those of the previous years 2003-2004 by mentioning only the 'top-ten' categories. The relative frequencies of drug offences were:

2005: 5 %
2004: 5 %
2003: 6 %

The lions' share was again determined by various forms of economic crime, like fraud (*Betrug*: deceit, swindle). No figures were available to relate these outcomes to the potential money volume.

As mentioned before, these are far from conclusive comparisons. Nevertheless, these outcomes do give some food for reflection concerning the relative ordering of the crime types in prevalence as well as their share in the money volume. Is the low rating of drugs offences an artefact of police priority, an indication that they are the best launderers or are economic crimes more prof-

itable after all? These questions must be addressed as answering is important as far as the historic fear of drug money is concerned.

d. More apples and oranges: the 'global dimension'

One of the fears concerning crime-money and laundering is its assumed global dimension. In many official presentations shaded money flows are projected with big arrows as flashing all over the world, from tax haven to tax haven, in the end landing in the green meadows of the threatened industrialised countries. As there is a dense global anti-laundering monitoring system in place, some signs of these large flows should emerge in some recognizable form in the FIU databases. The parameters for such money flows should obviously be the volume of the flows differentiated by country of origin *and* destination. Unfortunately, these data are not available in the annual reports, though (theoretically) they should be somewhere as raw data in the respective databases: namely the variable 'to-and-from'. These variables are certainly available in the banks: otherwise they cannot execute payment orders.

I do not know whether this question has ever been raised, but the available information is less than perfect anyhow. Of Belgium and Germany we have the country of residence and the nationality of the (main) persons involved. The German report also provides the country of residence of the corporation and the destination and origin countries of the financial transactions, but not related to the volume of the money flow.

The frequencies of the payments 'to-and-from' in the German annual report provide some interesting points. In the first place, there is an enormous scattering with very low frequencies (together around 50 %) spread over many jurisdictions, which does not show up in the tables as they are brought together in the category 'other'. In the second place, there are more suspicious transaction reports concerning *outgoing* payments than *incoming* ones: 57 % outgoing and 43 % incoming. Will this imbalance also concern the *amount* of money flowing in and out? We do not know as no money is mentioned. We can only observe the frequency imbalance of payments. Those *to* Germany involve the USA, Kazakhstan and Switzerland. From Kazakhstan and Switzerland there were only incoming payments. On the other hand, China and Nigeria show a clear imbalance concerning suspicious *outgoing* transactions. Proportionally (but not in absolute numbers) the other countries did not show large imbalances.

Table 5.
The frequency of the in- and outgoing transactions: Germany, 2005

From	%	Fr.	%	Fr.	To
USA	*9*	186	4	100	USA
UK	7	128	5	135	UK
Kazakhstan	7	127			
Russian Federation	*6*	123	5	138	Russian Federation
Switzerland	*5*	106	-		
Italy	*4*	88	3	73	Italy
France	*4*	77	3	80	France
Spain	*3*	64	4	114	Spain
Netherlands	*3*	60	4	114	Netherlands
Turkey	*3*	57	4	100	Turkey
	-		5	123	China
	-		6	162	Nigeria
Other	*48*	949	56	1.444	Other
Total = 100 %		1.965		2.583	

Source: BKA Jahresbericht, 2005, FIU Deutschland

It is of course tantalising to derive some hypotheses about the 'global money flows'. However, such far flung hypotheses, let alone concluding statements tend to evaporate when the frequencies are related to the size of the related economy and proximity. The US, England and Russia are large economies with a high statistical likelihood of having odd transactions, though that does not explain the large flow from the US.[8] The other high frequencies concern *European* countries (if Turkey (!) is a part of Europe) and Kazakhstan (high inflow frequency), China and Nigeria with high outflow frequencies.[9]

The Belgian frequencies of the last five years concerning the requests for information received from foreign FIUs may provide indications of international connections but should be projected against corresponding findings (though not available). These requests (with very low frequencies) were scattered over about 105 jurisdictions. The countries with high request frequencies of more than hundred were the Netherlands, France and Luxembourg. Given their proximity, this is not really surprising.

There are more incomparable fruits in the FIU baskets to compare, of course leading to the same inconclusiveness as long as the various variables cannot be connected in one analysis. Returning to the 'flickering light' metaphor: we catch some glimpses of aspects of the criminal money management but the

8 It would be of interest to match the suspicious transaction reports to and from the US with similar reports in the US itself. Do the US meet the standards they so rigorously impose on all other countries and can they tell us how much money leave the US and to what destination?

9 The high frequency of Nigeria may be related to the widespread Nigerian fraudsters luring greedy Europeans to disclose their bank account number for a percentage of the money they suggested to channel via that number.

FIUs appear to have dimmed the lights such that a proper interpretation is well-nigh impossible.

Analysis of the Dutch FIU files

Though the conclusion in the previous section looks a bit gloomy, the situation would be less gloomy if a suitable raw database were available. To which I should add: and if such database were properly cleaned. This condition is obvious, however not in the real world of the police and prosecution as we will see.

Going back to the basic raw material allows a deeper analysis by cross-breaking and recoding/regrouping the values of the variables. In the previous sections I have indicated already that the statistical output of the FIUs would have been more meaningful if they would have cross-tabled it with other variables. In the on-going research project about the social and economic meaning of crime-money the Tilburg research team is in the process of analysing the databases of the Public Prosecution and the Dutch FIU to find out what may emerge from a more refined analysis. To that end I have access to two databases of:

- the FIU: recorded suspicious transactions;
- the Public Prosecution Office (PPO): the seizures of assets and the execution of recovery orders.

The FIU database is very elaborate, but as part of the 'system chain' it is not directly connected to the databases of the prosecution and courts. It contains unusual as well as suspicious transactions. As the unusual transactions may also concern licit business and money and because the database of suspicious transaction is richer and better analysed I took that part of the database. However, the database of suspicious transaction is not a finalised one: unusual transactions which could not be connected to any suspicious feature at the time of reporting, may –even after years– become upgraded to 'suspicious transactions'. This applies particularly to the last two or three years, which can be considered as unfinished. This means that if after a year or two the database is surveyed again, the frequencies of suspicious transaction of 2005 and 2006 will have increased: a kind of 'statistical afterbirth'. Only the 'old years' will remain fairly stable.[10]

The database of the PPO appears to be –in principle– very valuable, but unfortunately the management never spent much effort in database maintenance and regular cleaning. Therefore I will use this database sparingly and cautiously.

[10] This implies that the FIU figures published in the annual report should be considered provisional. They are just the representation of the state of affairs at 31 December of that year.

The general picture

Though the total database covers about ten years, the FIU Netherlands provided a subset from 1999 onwards[11], which are represented in the following table.

Table 6.[12]
Suspicious transactions, persons and money volume: central indexes

Year	N transact.	N persons	€ Total	mean	median
1999	18.020	18.543	307.951.001	17.089	3.630
2000	16.120	16.476	318.983.024	19.788	5.009
2001	21.954	22.347	752.058.564	34.257	5.164
2002	31.895	32.356	552.832.721	17.332	4.209
2003	35.491	36.263	1.963.017.452	55.310	4.000
2004	29.007	29.788	446.830.354	15.405	3.775
2005	16.653	17.076	234.830.659	14.101	3.500
Total	169.140	172.849	4.576.503.778	27.057	4.084

Source: FIU Netherlands, database, 2006

At first sight the figures show an increase till 2003 after which the curve declines. The money volume of that year shows a huge increase, after which it decreases by some 1,5 billion euros. However, this picture is deceptive. In the first place, also the years 2004 and 2005 are likely to receive their 'statistical afterbirth' of unusual transactions to be upgraded to suspicious ones.[13] In the second place, the picture is biased by one single transaction in 2003 of a big oil company channelling € 1.088.000.000 through the Netherlands. If we would correct for this extremity we still have a very large suspicious money volume of 875.000.000 euros, which in view of the low median indicate that there are other biasing extremes.

In general the frequency distribution of the suspicious transactions is in every year very skewed, with a large difference between the arithmetic mean and the median (50 % point). For the whole database the mean of the suspicious monies was € 27.057 while the median was € 4.084. While the difference between the mean and the median was for most years between € 10.000 and € 15.000 (still substantial), for the years 2001 and 2003 the difference was enormous: € 29.000 respectively € 51.000 (rounded figures).

Contrary to expectations, 2002, the Euro conversion year, is not the busiest year, but 2003. However, from 2001 to 2002 the number of transactions and

11 Until 1999 the information collection and processing was carried out by FINPOL, the predecessor of the FIU. The database of FINPOL covering the years 1994-1996 has been analysed by Van Duyne and De Miranda (1999).

12 The totals derived from combining the variables in the database differ from those of the annual reports because of the rate of missing values which increases sharply when two or more variables are combined. One of the selection variables was '*natural person*'.

13 The latest message (April 2007) from the FIU added some 6.000 as 'statistical afterbirth' till 2001.

natural persons involved increased sharply (45 %), while the central indexes decreased. More people with smaller transactions: were the socks and mattresses emptied? Did many owners of suspicious money wait for a year in the hope that the heat would be less? Or did they anticipate the Euro conversion, as may be interpreted from the increase with about 37 % from 2000 to 2001? Though this hypothesis should not be excluded, these data are too rough for such an interpretation of financial conduct.

The table shows that there are more persons reported than transactions. This implies that in a number of transactions more persons were observed. This was the case in 4,3 % of the suspicious transactions. Was there (relatively) also more money involved in these multiple-persons transactions? No significant financial overrepresentation could be observed: the 4,3 % multiple-persons transactions involved 4,9 % of the money volume. Only the category of *three* persons showed a large overrepresentation: with less than 0,01 % of the population they accounted for 2,6 % of the money volume.

At first sight it looks like a neat distribution: in 95,7 % of the transactions only one person was reported, accounting for 95,1 % of the money volume. However, this does no justice to the much more complicated reality: persons can execute a number of single transactions, which may be counted as one-person transactions. To obtain insight in 'multiple player' patterns a separate 'multiple player' subpopulation has to be identified and analysed. In addition, a differentiation must be made between legal persons and natural persons: corporations are likely to likely make more and higher bank transfers, like trust offices. For example, in 2004 two trust offices reported four suspicious transactions with a total value of € 43.627.000. We will return to the multiple players in the section about money transfers, though only to lift a tip of the veil.

This more refined analysis has not yet been completed as the police and Public Prosecution Office prioritized cases in which they could intervene relatively quickly: hit the criminal and run to another similar case. This is the 'hit and run money-laundering' approach, from which it derived its name: HARM.

Hit and Run Money Laundering: HARM

The 'hit and run' approach started in 1999 and targeted reported transactions in which there was little doubt about their suspiciousness and in which the person(s) involved could be identified easily. In such cases the police could intervene either immediately (in cases of money couriers) or in a short time span without first investigating what the predicate offence might be. 'Hit now, ask questions later' and run to the next case. Whether or not the underlying crime-markets were affected, the approach was considered successful, particularly in the first years, as the following table shows.

Table 7.
HARM investigations, transactions and suspicious monies

Year	N. HARM investigations	N. transactions	€ Total	Mean	Mean case
1999	4	1.392	63.349.920	45.510	15.837.480
2000	11	1.107	32.234.733	29.119	2.930.430
2001	41	780	41.977.968	53.817	1.023.853
2002	56	728	8.761.970	12.036	156.464
2003	40	1.369	13.682.454	9.994	342.061
2004	41	441	4.394.435	9.965	101.181
2005	6	85	725.612	8.536	120.935
Total	199	5.902	165.127.092	27.978	829.784

Again two remarks: the last two years are not completed, maybe due to their expected 'statistical afterbirth'[14], and a subsection of the HARM cases consist of money transfers (to be elaborated later), of which the amount of money per transaction is usually lower. The average sum of money transfers is around € 3.600, (median around € 3.300), while the transaction average of the HARM cases without such money transfers is € 34.600 (median € 9.000).

Unfortunately the FIU Netherlands did not (yet) carry out a proper time series analysis. If we abstract from the last two years and the start-up year 1999, apparently with some conspicuous hits, there are only a few years left. It is tantalising to interpret this small time series against the background of the Euro conversion: 'anticipation' in 2001 (increased money volume) and waiting a year (increase in transactions and again money volume). However, given the small numbers, that would be pure speculation.

Of the 'real' financial conduct related to these cases we can get a fragmented picture if we look at what kind of handling of the money has been observed. This is wider than 'financial transaction' in the strict sense of the word and can range from carrying the money on or in the body, cloths, baggage, depositing, changing etc.

[14] It is not certain that the low figure of 2005 is really due to a backlog in the procession of 'afterbirths'. Interviews with officers carried out by M. Bruns of Tilburg University indicated rather that the HARM policy has 'evaporated': the ministry of Finance stopped its financial support. As happens often in (Dutch) policing, after an enthusiastic phase of a 'new approach' it silently fades away.

Table 8.
Observed ways of handling/transactions in HARM cases

Handling/transaction	*N*	*%*
Change	76	38
"with suspect"	78	39
Placement	10	5
Withdrawal	9	4,5
Money transfer	4	2
Bank transfer	8	4
Other	14	7,5
Total	199	100

Source: FIU Netherlands, database 2006

In many cases the money handled was cash and carried around personally, in clothes, suitcases, on or in the body, boot of the car: 'with the suspected persons'. The second large category consisted of changing money at the banks or exchange offices. Banking transactions were much less frequent. The so-called placement of money into the bank accounted for only 5 %. The reverse, money withdrawal was equally (in)frequent, despite its purported key role in the FATF literature. 'Real' banking, from bank account to bank account, does not appear to play a prominent role, being observed in only 8 HARM cases. The category 'other' was thinly spread over categories like 'ransom' (2 times), 'terror' (2 times), 'cheque' (2), 'bonds' (1), 'a-b-c' selling (three parties buying and selling in a fictitious construction) and other minor categories.

Overlapping with these ways of dealing with the monies are the ways or the agencies which detected or recorded the suspicious monies. 39 % of the HARM cases were detected by the border guard or the Customs: cross-border money transport. In 29 % exchange offices or banks reported the transactions. 18 % of the HARM cases were initiated due to the own analysis of the FIU.

Related to this finding are the suspected predicate offences, presented in the following table. In 76 % of the cases the offence is 'having or receiving' suspicious money, being suspicious because of being hidden somehow or being offered at the bank and/or exchange office in a suspicious way or exceeding the stipulated reporting threshold. The reasoning is simple: because it *looks* suspicious and no explanation of the origin of the money can be provided, it *is* suspicious and therefore laundering, which in that case is its own predicate offence. Of course, there may be a 'real' money generating offence like drug offences, but the database does not contain additional records.

Table 9.
Known predicate offences in HARM cases

Predicate offence	*N*	*%*
Arms	5	2,5
Drugs	20	10
Swindle	4	2
Fraud	14	7
Forgeries	1	0,5
Sex offences	1	0,5
Receiving	150	76
Special offences	2	1
Total	197	
Missing	2	

Source: FIU Netherlands, database 2006

Unfortunately, a cross-break with the total and average amount of money involved could not be carried out at the time of writing. It would certainly have been worth while, because of the € 25 million confiscated monies, around € 1 million had to be given back in ten cases.

Money transfers

Since the introduction of the global anti-laundering regime the FATF has been on the alert of payment and money transfer systems which may be at risk of potential money-laundering. One of the systems of international electronic payments which raised concern was the electronic transferring of cash between countries which developed in the second half of the 1990s. If that would not be monitored owners of shady monies might abuse the system to disrupt the money trail which otherwise would be created by normal bank to bank transfers. Hence, from 1999 onwards money transfers above the value of more than € 2000 should be reported.

How important are these money transfers, which have such a low threshold that it is likely that the sums of money involved will be moderate. Unfortunately we have only Dutch data: the UK, Belgium nor the German annual reports mention the phenomenon of money transfers. Is that a regretful neglect? Money transfers may tell us something about the 'lower layers' of the criminal money management, again with the caution that (unless proven differently) there is some dust between the data (while the 'statistical afterbirth' continues to flow in).

In the Netherlands the recording of the suspicious money transfers started in 2001. Hence, I will only compare this time span. In terms of number of transactions the money transfers constitute a large slice of the total number of suspicious transactions: 57 % of the total recorded suspicious transaction (with an identified person, of which it accounted for 55,8 %). However, in monetary terms it accounted for only 7,2 % of the money volume of that time span. This

is in agreement with the lower reporting threshold, entailing lower average sums.

In the previous section I pointed at the phenomenon of the 'multiple player'. In the general picture of the total database the role of the multiple players seems a bit muffled. However, if we look more closely at the role of the multiple players in the subset of the money transfers, the contours of this phenomenon become a bit more visible.

Table 10.
Money transfers and persons involved (2001-2005)

N transactions per person	N. persons	% persons	% MT's	% money volume
1	7.915	47,7	10,3	10,0
2	2.619	15,8	6,8	6,5
3	1.442	8,7	5,6	5,5
4	885	5,3	4,6	4,5
5	644	3,9	4,2	4,1
6	464	2,8	3,6	3,6
7	327	2,0	3,0	2,8
8	273	1,6	2,8	2,7
9	210	1,3	2,5	2,5
10	217	1,3	2,8	2,7
>10	1.597	9,6	53,8	54,9
Total	16.593	100	76.915	€ 282.816.051

Source: FIU Netherlands, database 2006

Here we find a clearly skewed distribution: 63,5 % of the persons account for 17 % of the suspicious money transfers and 16,5 % of the money volume (of the transfers). But about 10 % of the persons carried out 56 % of the transfers and an almost equal proportion of the money volume (57,6 %). At the highest frequencies the distribution is even more skewed: 32 persons handled 5.090 money transfers and 1 person even 384. It goes without saying that this begs for an in-depth analysis of these industrious money pushers.

An aspect of particular interest is the cross-border movement of the monies. This movement can give us a hint of the potential criminal financial involvement between countries. The *nature* of that involvement has not been coded as a variable, for which reason we can only speculate about it.

As the data about these movements in and out of the country proved to be a bit complex I separated the money transfer movements with the industrialised countries from those of the other –mainly drug producing– countries.

Table 11.
Money transfers to and from NL: industrialised countries

Going to	€	€	Coming from	Surplus/deficit €	
Italy	3.143.000	13.229.000	Italy	+	10.086.000
USA	4.247.000	10.405.000	USA	+	6.158.000
Germany	1.803.000	4.528.600	Germany	+	2.725.000
Austria	972.000	4.020.000	Austria	+	3.049.000
Spain	5.596.000	3.424.000	Spain	-	2.172.000
UK	3.307.000	4.039.000	UK	+	732.000
Total	19.068.000	39.645.600		+	20.577.600

Source: FIU Netherlands, database 2006

As can be observed, the Netherlands have a clear 'criminal payment surplus' with a number of EU countries as well as with the US. The main surplus is with Italy, followed by the US, while there is a deficit with Spain. It is of course tantalizing to interpret this from the angle of drug traffic, like the export of ecstasy pills to the US and hash to Germany. But Italy is not known to be a major buyer from the Netherlands.

An interesting phenomenon is the surplus with the United Kingdom. Not because of the size, which is modest, but because of the nature of the currency: while in Britain no *Scottish* pound is found south of Hadrian's Wall, in the Netherlands about € 21.000.000 of this currency were reported (2001-2005).

As the next table reveals, the suspicious financial flows between Latin America, Morocco and the Netherlands have a clearly different pattern.

Table 12.
Money transfers to and from drug related counties

Going to	€	€	Coming from	Surplus/deficit €	
NL Antilles	127.304.000	530.000	NL Antilles	-	126.774.000
Surinam	10.343.000	116.000	Surinam	-	10.227.000
Turkey	26.731.000	2.159.000	Turkey	-	24.572.000
Morocco	3.608.000	9.000	Morocco	-	3.599.000
Dom. Rep	9.934.000	172.000	Dom. Rep	-	9.762.000
Colombia	14.227.000	71.000	Colombia	-	14.156.000
Total	192.147.000	3.057.000		-	189.090.000

Source: FIU Netherlands, database, 2006

It is clear that the Dutch Antilles are by far the main recipients of the suspicious money flows, followed by Turkey and Colombia. Naturally, one thinks of drug import from those countries in the first place. Whether that explains all remains uncertain: Morocco is a main cannabis exporting country, but shows hardly an interesting financial relation with the Netherlands, while from Turkey some two million euros went the other way.

Like the money flows to and from Germany (table 5), these patterns raise more questions than generating answers. The unanswered questions are partly

due to the difficulty of connecting these reported transfers to suspected predicate offences. That may be solved when eventually these reports can be connected to the police and prosecution databases. More important is the lack of connection to the receiving or sending country. Are there suspicious transaction matches between receiving and sending countries? To do justice to the assumed *global* money laundering threat, a commensurate global information regime should be in place to shed light on this purported phenomenon. However, not even the beginning of it is to be observed on the horizon.

Insight into the social-economic impact of crime-money?

The statistical data about the suspicious money flows, even if more detailed, still do not reveal much about the function of crime-money in our society. There are all kinds of threat images about the disrupting impact of crime-money on the economy and the integrity of our financial system. But how does the financial criminal reality looks like?

Despite the proclaimed importance, the 'real life' crime-economy has been somewhat neglected. Much evidence is anecdotal, collected by law enforcement agencies to illustrate their stand concerning the big threat posed by wealthy criminals. Only Meloen *et al.* (2003) explored the financial activities of criminal 'big earners': 52 cases of crime-entrepreneurs who made profits of more than € 450.000 (elaborated by Van Duyne, 2003). As is to be expected, the picture is very diverse: on the one hand, the nature of criminal money-management depends on the kind of business and on the other hand, on the social and economic environment of the perpetrator.

The questions the research project addressed was what wealthy criminals do with their ill-gotten monies: their criminal money-management as well as what they actually did with their money in economic terms.

The criminal money-management (or laundering in common parlance) was carried out with a sophistication geared to the available acumen as well as what was required in the given circumstances. In general the sophistication hardly mirrored the imagery of criminals-getting-smarter and always-'ahead-of-us'. Ethnic minority crime-entrepreneurs with a social-economic home elsewhere used to take their money cash out of the country, while indigenous entrepreneurs faced always the requirement of justifying the acquired registered assets, like cars, boats, real estate and of course well-filled bank accounts. Apart from a few complicated and well thought-out exceptions, extensive chains of financial cross-border transactions had a low frequency. The use of exotic off-shore jurisdictions or the so-called 'facilitators' did not reflect their prominence in the literature either. Most crime-money owners did not venture very far: Belgium,

Luxemburg, Switzerland, Spain or Germany, unless they had some far-away social bridgehead, like a girlfriend in Thailand. With one corrupt bank clerk, lower law firm employee and a failed accountant the story of the dreaded phenomenon of 'buying brains', 'hiring facilitators' was told. One cocaine smuggler established a money exchange office where he could co-mingle his crime-money with normal currency exchanged. Unfortunately (for him) it had to shut down after a dead body was found on the premises.

More important than such anecdotes is the question of the impact of crime-money on financial institutions and the system as a whole. The expended volume of the crime-money of these big earners was about 100 million euros. About € 15,5 million was spent on gadgets or was hoarded as cash while € 4,5 million was invested in the own criminal enterprise. What did the remaining € 80 million of these monies (€ 24 million for real estate) do to the integrity of the Dutch financial system or all the foreign financial arteries through which they flowed unnoticed? Is there an operational criterion for measuring this 'integrity impact'? Though the phrase 'integrity of the financial system' has a high frequency in the literature, an 'integrity impact' yardstick does not appear to have been designed yet.

The same impact question must be addressed to the expenditure side, when the crime-money is withdrawn. Here we know somewhat more. Summarized the following was observed:

- corruptive permeation of the upperworld was observed in six cases, half of them with some success. The crime entrepreneur in on case spread his interest from real estate rental (200 apartments), to a football club and the corruption of a middle ranking policeman. One fraudster invested in friendly licit entrepreneurs (middle range and small size) and an investment swindler bought shares in a supermarket chain (no further strings attached: just investment);
- investing in firms (some loss making) must be differentiated between the investments of ethnic minorities in their home countries and investment in the Netherlands. Apart from investments which ended in bankruptcies, we could observe investments in garages, sport clubs and a pub, actually businesses with small or moderate economic weight;
- investments in the own crime-enterprise concerned mainly means of transport of international drug wholesalers, and outlets (pubs, coffee shops) for middle level distributors. Organised fraud with social security contributions entailed direct investment in terms of black wages, which is almost equivalent to the fraud being committed;
- 'rainy day' provisions (or rather, savings and investment interpreted as such) could be derived from cases of export of money abroad and/or investment in real estate in the Netherlands and abroad;
- lifestyle is frequently referred to, particularly when it is conspicuous. The extent to which this has a real economic weight is difficult to assess. The es-

timated € 8,8 million (of which € 6,5 for cars and boats), was spread over about five years.
- one form of asset which only *potentially* could affect the economy consists of hoarded money: cash at home, buried in the garden, in a safe in the vaults of a bank or a 'sleeping' bank account. Together about € 24 million.

If we abstract from the predicate offences, it remains difficult to discern an objective or measurable 'integrity impact'. Stating that there is a 'potential of abuse' is too thin and too unspecific. Also the social and economic impact is difficult to assess. Certain unwanted social and economic consequences could be discerned, but locally and certainly not on a big scale – granted with the one exception mentioned.

Looking at the whole

A sample of 52 cases of big earners may be too small and biased for reaching valid conclusions. Therefore the project got a follow-up: I got access to the confiscation database of the Public Prosecution Office responsible for seizures and court recovery orders. In this database, stretching back a decade, every single confiscating object, ranging from knickknacks (the well-known gipsy girl painting with one naked breast), ear rings, a weed plantation to boats and real estate, is described, if possible with an estimated value. Though at the time of writing the heavily polluted database is still in the process of cleaning (donkey work), some snapshots of the 'criminal possessions' may be derived from it.

The big snap shot concerns the seizures of assets themselves. These have been recorded since the Crime-money Recovery Act has been in force: 1994. Measuring the effectiveness of the efforts to strip the criminals of their ill-gotten profits according to the value of the seized assets seems to show a big effect indeed as demonstrated by the following table.

Table 13.
Value of the confiscated assets 1994-2006

Year	Sum seized €	Mean €	Median €	Total cases
1994	21.883.952	1.151.787	459.634	19
1995	999.235.679	13.688.160	521.779	73
1996	1.140.839.735	5.732.863	553.593	199
1997	1.003.948.575	4.994.769	640.997	201
1998	1.669.875.692	7.228.899	442.642	231
1999	1.047.263.424	3.922.335	518.506	267
2000	2.284.739.573	5.711.849	966.055	400
2001	2.453.035.825	5.812.881	595.162	422
2002	866.789.145	2.049.147	65.400	423
2003	788.316.898	1.736.381	22.459	454
2004	441.365.534	730.738	15.660	604
2005	538.660.626	1.064.547	9.047	506
2006	45.620.948	215.193	7.692	212
Year missing	2.366.615.343	2.086.962	105.317	1134
Total	15.668.190.949	3.045.324		5.145
Adjusted for year missing	13.301.575.606			

Source: Public Prosecution Recovery Office

These figures should convince even the most sceptic criticaster that the law is really effective: more than € 15,6 billion seized assets with 2000 and 2001 as 'top years'. However, this shiny outcome is a bit marred by the records in which the first year of seizures was missing. This is 22 % of the seizures database and from a point of view of statistical analysis they should be left out: 'missing data'. The total euro value of the confiscations should therefore be reduced accordingly to € 13.301.575.606. This is less impressive, but still sizeable.

However, in Dutch law, seizing (and freezing) assets does not imply loss of ownership. The Public Prosecutor still has to present the court with his estimate of illegally earned profits and after the court (wholly or partly) confirms this demand by issuing a recovery order, seized property may be sold to the amount of the sum stated in the recovery order. Hence, we have to look not at the beginning of the cases, but at their procedural tail: the motion of the Public Prosecutor *and* the recovery order.

As the detailed analysis is still in progress, I can present at any rate the total (preliminary) totals:

Table 14.
The amount of illegal profits: demanded by prosecution and recovery orders of the courts

Number of cases fully finalised		2.139
Total demanded by prosecution	€	340.360.073
Total confirmed by courts	€	19.375.640

Source: Public Prosecution Recovery Office

This means that of the initially seized value of € 13,3 billion 2,6 % has been presented in court for recovering, resulting in a 0,1 % recovery orders (of that initial value). If we take the total recovery value demanded by the PP as a basis, the courts awarded just 6 % of these demands.

It is tempting to give these outcomes a 'failure interpretation', like: "94 % of the crime-money" is still with the criminals" and that it still allows them to threaten the integrity of our economic life. It could also imply that the PPO and the courts do a miserable job or that the laws are defective, which could be taken as another encouragement to tighten them again. I do not join this popular choir: statistics like these –at the moment actually snapshots– contain an invitation for deeper analysis in the first place, not for more severe laws.

Firstly, it has to be determined what it means that "94 % of the crime-money" would remain with the criminals. The confiscation inventory of this subset of finished cases mentions a huge range of objects with equally huge differences in value. To mention just a few categories: 3.079 tokens of cash; 1.545 seized golden objects (998 rings, ranging from cheap items to very expensive pieces); 551 watches; 178 necklaces; 761 cars; 148 pieces of real estate; 234 pieces of crystal (usually Swarovski), and . . . 27 fishing rods.[15] All these objects were seized as a guarantee for the payment of fines and the recovery orders. It still has to be determined what portion of these assets has actually been acquired with crime-money. This is particularly important concerning real estate: what was already possessed legally before the offences were committed and what are actually the 'fruits of crime'? The seizures list does not mention this.

In the second place, all these assets must be connected to relevant criminal entrepreneurial areas: money earned on drugs markets, economic crime (VAT and excises), investment fraud and grand theft, just to mention the main categories. In addition, a classification must be made according to the nationality or ethnic status (if known and recorded) of the perpetrators in connection to the predicate crime and the flows of money (if observed).

Returning to the question of gaining insight into the social and economic impact of the crime-money, it is clear that the present findings are far from

[15] This is just an odd sample, which can be extended with confiscated horses, drilling machines, telephones, audio-visual equipment, computers, bicycles, kitchen utensils (including fridges), and other objects of uncertain value and unclear criminal origin.

conclusive. But if the 'big threat' imagery of the FATF and other agencies were to be converted into a testable hypothesis (which is not the case), the Dutch findings would lend it no support.[16]

Policy making in camera obscura or enlightenment

Returning to the world of belief (and make-belief) which characterizes the global anti-laundering policy, and comparing it with the empirical evidence we and a number of FIU's scrambled together, one can observe a solidly founded political belief system, working in an empirical *camera obscura* in which there are a few cracks through which small beams of light are penetrating. These scattered (statistical) patches of light hardly allow us to see the dim outlines of some of the purported 'big' phenomena. That, together with a collage of anecdotes constitutes our total insight into the social and economic impact of crime-money and criminal money-management, at least in countries such as the Netherlands.

The basic creed of the FATF, the collective of the FIUs (Egmont group), the UN, OECD and other international bodies, concerns a big financial threat against the integrity of the financial institutions. This threat automatically increases to the extent that the circle of predicate offences is widened: the world becomes financially more ungodly when the set of sins increases.[17] One does not need to learn reality itself to realize that. Consequently, what reality looks like appears to be ignored. This picture may remind the reader of the historical (religious) landscape before the Age of Enlightenment: there is no general need to know, because all there is, has already been clearly formulated. All that matters is refining the legal net to catch the sinners, as set out by the contributions of Tilleman and Rietrae in this volume.

Nevertheless the situation seems to have changed somewhat. Belatedly, civil servants involved in drafting the 3rd directive on money-laundering seem to recognise the importance of statistics and the need of (electronic) feedback by means of a quantitative system. Rietrae (in this volume) shortly elaborates this requirement as formulated in art. 33 and 35. However, the authors of this EU directive seem to live in another world than that where real databases are made and maintained and real statistics can play a real role. Their inadequately formulated recommendations do not reflect an observable beginning of insight into the requirements of proper database management, nor do they demonstrate a proper knowledge of the present poor state of statistical affairs in the 25

16 In countries with a smaller, more fragile and badly regulated economy and mal-governance the situation may be quite different. See for an impression of Serbia Van Duyne and Stefano (forthcoming).

17 I have not even included terrorism in this elaboration: that would have yielded even more financial horror.

Member States: there is not any indication or recommendation in this direction. In this regard this first faint inkling falls far short of breaking out of this pre-enlightenment stage of anti-money laundering with its concomitant policy making in *camera obscura* (Van Duyne *et al.*, 2005).

A more enlightened policy making is supposed to be built on facts and not on unproven dogmas and axioms. We do not need the dogma that crime-money in the financial system affects its integrity, unless we succeed to design such a waterproof operational definition with which to measure it. At present such a definition does not exist and I do not have witnessed any serious attempt to design something approaching it. How to address this thesis? Reasoned *a contrario*: if a global total of trillion euros crime-money really flows into the financial system, year after year, and also cleaned year after year, one could make a nice accumulative calculation of the staggering illegal wealth finally amassed, which of course must be converted into, yes, into what? Shares and stocks hardly figure in our confiscation databases and if they occur they are not different from normal conservative private investment behaviour. For investments in firms or real estate banks may be used, but intermittently for channelling funds which is tantamount to 'going into and out of' these institutions. Conversion into golden Dupont lighters, Cartier watches, cars and Swarovski crystal is of course wrong, but can certainly not be interpreted as a threat to the integrity of the financial system, not even of the firms of Cartier or Swarovski. But what about the trillions of euros in foreign saving accounts resting in the banks for a modest interest of a few percentages? Do these dirty monies pose the real threats to the global financial integrity? The politically correct answer is of course 'yes', though the concrete ways in which such 'sleeping' saving accounts demonstrably affect the integrity of the benefiting banks, must still wait for a precise formulation, particularly in relation to the purported huge volume. Granted, there are jurisdictions with an inefficient or even corrupt banking system, but the impression is that mismanagement precedes the entry of crime-money into such banks.

In the absence of a proper operationalisation of such dogmas, there is a simpler foundation to act against crime-money, namely the restoration of the injustice due to the illegal income: *restorative justice*. From this angle the focus is not on the number of suspicious transactions or on other deeds of the FIUs, but on the recovery of ill-gotten profits. It is common to drag in another foundation: "(organised) crime prevention". Those criminals who are deprived of their ill-gotten monies are supposed to be no longer capable to invest in the organisation of their crime. Apart from the given that we face again a lot of unsolved operationalisation and measurement problems, there is little substantiation to this argument. The organisation of most crimes-for-profit is relatively cheap, while the expenses are often shared among the 'criminal investors'. Large scale smuggling may be expensive because of the size of the cargo which increases the transport expenses. But with other forms of organising crime the

operational costs are moderate. For VAT fraud schemes one needs a number of firms, (blank) invoices and preferably a straw man for the 'bust firm'. For (black) labour fraud, investment fraud and illegal cartel building one needs social networks in the first place. Environmental crime is virtually free of costs: it is a costs *saving* crime.

With a minimum of dogma, the main challenge should be to get a clearer view on the phenomenon for which one does not need to suspend the enforcement of the law to restore justice. What is lacking is a system of enforcement in which database management is integrated in the investigative routine. The present fragmentation of data collection and processing methods is the product of an unprofessional approach in which bureaucratic goals (legislation, institutions and number of suspicious transaction reports) prevail over the real objective: bringing the criminal to his financial *status quo ante*.

What is a real case of concern is the tendency to remain within the *camera obscura* while serving the anti 'Mammon' laundering system for its own sake or to satisfy (or stave off) the regulators (Harvey, 2005). This is perhaps more worrying than the dreaded 'criminal money management'. It is expensive and it has contributed to an unwieldy and costly system of reporting, fanned more by politically sustained fears than by facts. Nevertheless, the conditions for moving towards a more enlightened system are all in place. For example, the final report of the project Assessing Organised Crime provides the methodological framework for an integrated law enforcement data management. One of its principles, the ('bill of lading' principle), was derived from the transport industry (Van Duyne and De Miranda, 2001)[18], where most of the hardware and software problems of following cargo have been solved. Replace 'cargo' by 'criminal file' or 'transaction report', apply the statistical analysis programs which have been used in social science and economics for half a century, and a proper monitoring and analysis support system of detected cases is no longer a utopia.

In such an approach we can dispense of the concern loaded rhetoric and belief systems, or simply ignore them – if these prove to be politically inextinguishable. Our concern is not primarily the financial system (still looking pretty healthy), but the lack of knowledge.

[18] Research project supported by the EU and carried out by the National Dutch Police, Analysis and Research Unit, with the cooperation of FIU partners of Belgium, Finland and Nordrhein-Westfalen. Whether the report has ever been sent to the European Commission remains uncertain.

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Trafficking in human beings: policy problems and recommendations

Kauko Aromaa and Martti Lehti[1]

The problem

There exists a considerable volume of published texts about trafficking in human beings for the purpose of sexual exploitation or otherwise. However, there is not very much that would be based on strong documentation. Volume estimates are vague and variable and often not possible to trace back to research sources. Also, it is often unclear what counting rules have been applied when volume estimates are given. A major problem when analysing the estimates is not only that neither the definition of trafficking nor the sources of data are usually mentioned, but that it is also rarely said what the figures refer to. Do they refer to persons or border-crossings? Do they comprise only those trafficked across international borders or also the victims trafficked within countries? Do they include only new recruits or also victims of earlier years whose exploitation is still continuing? With regional estimates there are additional problems, because the same persons can appear in the estimates of several countries at the same time. For example, a victim transferred through the Balkan route from Ukraine to Belgium is in theory included in the figures of six to ten countries, and would appear as six to ten victims in a joint European statistics compilation. On the other hand, a victim can also appear in the statistics of one single country several times. A foreigner who is trafficked into a country, exploited there in several different towns, and then again trafficked out of the country, should appear at the same time in the statistics of those trafficked into, out of, and within that single country, and thus as at least three different victims. Considering these problems one should use only data concerning native victims trafficked out of and within each country as the basis of international estimates. Such a rule is, however, impossible to apply. For most countries only estimates concerning the aggregate total number of victims are available, the use of which inevitably inflate the regional and global numbers.

Keeping these problems in mind, we have attempted to summarise the main facts of which there seems to be at least a low level of consensus in the available literature.

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Trafficking for *prostitution* and other forms of *sexual* exploitation[2] dominates the trafficking debate and policy planning in Western countries. This is partly because of the lack of information and an even greater confusion of concepts in the case of other forms of trafficking in persons, with the phenomena even harder to conceptualize. The sex industry is also more visible than other forms of exploitation (domestic servitude, sweatshop industries etc.) and seems to arouse stronger moral implications. It is also economically less important than the other industries using large numbers of trafficked workforce and has less powerful interest groups to defend its interests in Western societies (IOM 2004, 12).

All this does not mean that trafficking for sexual exploitation would not be a major problem. According to some estimates, 70 to 90 percent of the traffic in women and children in Europe and Asia serve organised prostitution (Omelaniuk, 2002). As for traffic in adult men, sexual exploitation has, however, played only a marginal role. Or is it only the impression we get out of the "data full of gaps"?

Europe and Russia

The highest estimates of prostitution-related trafficking in Europe come from Human Rights Watch, the Swedish NGO 'Kvinna till kvinna', and from Maltzahn in the Australian Women Conference (2001) (it is probable that they all are based on a common unmentioned source), which give 500.000 women and children as the annual volume of trafficking *to the old EU member countries* (EU-15) (or, alternatively, to "Western Europe"). According to the latest IOM estimate, the volume of trafficking *to and within the whole continent* is 500.000 annually (whether this is based on the same source as those above is not clear, but it is significantly more modest, since it also includes the countries outside the pre-2004 EU borders). Trafficking to the European Union (EU-15) from and through the Balkans would be 120.000 women and children a year, and from the whole of Eastern Europe about 200.000 women and children. Ac-

[2] The term *trafficking* is used in this report as defined in the UN Palermo Protocol on Trafficking in 2000: "Trafficking in persons shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs". The terms *trafficking in women* and *prostitution-related trafficking* are used in this article as synonyms for trafficking for sexual exploitation regardless of the sex and age of the victims; the term *traffic in women* refers to trafficking in female victims and the term *traffic in children* to trafficking in minors.

cording to the latest estimate of the U.S. Drug Enforcement Administration (DEA), 200.000 women and children are trafficked through the Balkans each year (a figure fairly similar to that of IOM) (*Organized crime situation report* 2001, p. 41; Hajdinjak 2002, p. 51; Laczko, Klekowski von Koppenfels, and Barthel 2002, 4; 'Trafficking in Persons Report' 2004, 46; *Trafficking of Nigerian Girls to Italy* 2004; fpmail.friendspartners.org; www.janes.com; www1.umn.edu/humanrts/usdocs

The volume of trafficking for prostitution has been increasing in Europe for the last fifteen years. Table 2 presents recent estimates, drawn from sources discussed in this text. The demand for prostitution and other sexual services seems to have been increasing in Western Europe, while the former socialist countries in Central and Eastern Europe with their current economic and social problems offer a source area from which trafficking to Western Europe can be organised far more easily and more economically than from the old source areas (Southeast Asia, West Africa, and Latin America). Estimates of the annual turnover vary from 100 million euros to several billions of euros (*Organized Crime Situation Report* 2001, p. 41; Hajdinjak 2002, p. 51; fpmail.friends-partners.org).

The majority of victims come from Albania, Lithuania, Moldova, Romania, Russia, and Ukraine. Of the victims of coerced prostitution assisted by the IOM in the last few years, about half have been Moldavians, a quarter Romanians, and a tenth Ukrainian. Trafficking in women to Europe from other continents has significance mainly in the Mediterranean countries and in Western Europe. The main source areas are Southeast Asia (Thailand), Latin America (Colombia, Brazil, and the Dominican Republic), and North and West Africa (Morocco, Nigeria, and Sierra Leone). According to Europol, the extent of this trade has remained about the same in recent years. The increase in Europe is due to trafficking from Eastern Europe (*Organized Crime Situation Report* 2001, p. 41;
fpmail.friends-partners.org/pipermail/stop-traffic).

Concerning trafficking in women, Europe may be divided into two parts: the old member countries of the European Union serve as a destination area, and Central Europe, the Balkans, and the Confederation of Independent States (CIS) countries serve as source and transit areas.[3] Irregular immigration as a whole has six main routes to and inside Europe:

- from Russia (mainly Moscow) through Lithuania, Poland, or the Czech Republic to Germany and Austria;
- from Ukraine through Slovakia, Hungary, the Czech Republic or Poland to Austria and Germany;
- from the Middle East and Turkey to Greece and Italy;

[3] However, see Almir Maljevic (2005).

- from North Africa to Spain and Italy; from Turkey through the Balkans to Italy and Austria; and
- from South and Central America to Portugal and Spain.

These routes also serve as the main routes of trafficking in persons (NCIS 2002, p. 34).

Tables 1 and 2 show the volume of victims of prostitution-related trafficking and numbers of persons engaged in prostitution in the major geographic regions of Europe based on the latest data and estimates available in different European countries. The main sources are the reports of the IOM and the STOP-project (Hollmen and Jyrkinen 1999; *A Study*; *Trafficking in Women* 2001; Laczko, Klekowski von Koppenfels, and Barthel 2002), and some national summaries (Mon-Eu-Traf 2002; Mon-Eu-Traf II 2004). The data mainly describe the situation in 1999-2001.

Table 1.
Global volume of prostitution-related trafficking
(source: national and regional estimates)

Region	Annually identified victims in reported crimes/assisted by NGOs	Estimated annual number of victims trafficked within the region	The estimated annual number of victims trafficked to/ through the region	The estimated annual number of victims trafficked out of the region	Estimated number of people engaged in prostitution in the region	Estimated number of child prostitutes in organized prostitution
Nordic Countries	0-50	0	100-1.000	0	<10.000	<100
Baltic Countries	50-500	1.000-10.000	1.000-10.000	1.000-10.000	<25.000	>1.000
Western Europe	3.000-5.000		50.000-100.000		260.000-500.000	>20.000
Central Europe	500-2.000		100.000*		60.000-70.000	<5.000
The Balkans	1.500-2.000		>70.000	200.000*	>200.000	>60.000
Mediterranean			10.000-50.000		100.000-140.000	>5.000
Eastern Europe	>300			5.000-100.000	>200.000	>100.000
North America			50.000-120.000		>1.000.000	200.000
Central America		10.000-20.000**			>100.000	>10.000
The Caribbean		10.000-20.000**			>300.000	>30.000
South America		300.000-2.000.000***		>110.000	<10.000.000	<3.000.000
East Asia		300.000-1.500.000**			>3.000.000	>1.000.000
Southeast Asia		200.000-3.000.000**			>2.500.000	>1.000.000
South Asia		250.000-500.000**			<10.000.000	<3.000.000
Central Asia				1.000-15.000*	>10.000	
The Middle East			10.000-50.000**		>20.000	
Oceania			<10.000		>30.000	5.000
North Africa			>10.000**		>500.000	<100.000
West Africa				50.000-100.000**	>500.000	>100.000
Central Africa				10.000-100.000**	>500.000	>100.000
East Africa				10.000-50.000**	>500.000	>50.000
Southern Africa		50.000-100.000**			>500.000	>100.000

* Trafficked through and out;

** Trafficked within, to, through and out;

***Trafficked within, to, and through

Table 2.
Annual volume of prostitution-related trafficking in the industrialized countries

Countries	Estimated number of annual victims of trafficking	Estimated number of minors engaged in prostitution
Western Europe*	60.000-150.000	>25.000
Central Europe	<50.000**	<5.000
Israel	<5.000	
Canada	8.000-16.000	>1.000
USA	14.500-50.000	>100.000
Japan	50.000-250.000	<100.000
Australia; New Zealand	<10.000	5.000
Total	200.000-550.000	>235.000

* Western Europe, the Mediterranean, and the Nordic Countries;

** An estimate of victims trafficked to the region and from the region elsewhere than western Europe.

Northern Europe:

Denmark, Estonia, Finland, Iceland, Latvia, Lithuania, Norway, Sweden

Trafficking in northern Europe is regionally to a large extent an internal affair. The main destination area is the Nordic countries: Denmark, Finland, Norway, and Sweden. The source areas are the Baltic countries and north-western Russia. A secondary destination area consists of the Baltic countries, to which women are trafficked from Russia, Ukraine, and other CIS countries. Prostitution from Lithuania and Latvia is mainly directed to Germany, Sweden, and Denmark; and prostitution from Estonia and North-Western Russia to Finland, northern Norway, and Western Europe. A significant number of Baltic and Russian prostitutes are also active outside Europe, in North America, the Middle East, and the Far East (*Kännedom om prostitution* 2000, pp. 27-29; *Trafficking in Women* 2001, pp. 71, 110-11, 123-28, 210-26; *EU Organized Crime Report* 2002, pp. 45, 76; *Norwegian Report on Anti-trafficking Activities*; Lehti and Aromaa 2002, pp. 50-69; Moustgaard 2002, pp. 4-9; Leskinen 2003, pp. 9-28).

Prostitution from Russia and the Baltic countries to Scandinavia is mostly mobile: prostitutes come as tourists and work for a few days or a couple of weeks. The level of organisation of this activity usually seems to be fairly loose. The recent entry of the Baltic countries into the European Union (and the consequent relaxing of border controls) has further loosened the grip of panders of Baltic prostitution in Scandinavia (Kontula 2005, p. 39).

The volume of foreign prostitution in the Nordic countries increased rapidly in the 1990s, but the number of cases of coerced prostitution reported to the police remained almost non-existent. The number of women from Russia and the Baltic countries who work in Nordic prostitution is estimated to be 5.000-10.000. The annual number of victims is probably a couple of hundred at the highest, although much higher figures have occasionally been referred to in public discussion. The low number of reported crimes and the overall loose organisation of prostitution do not, however, support these claims.

Internal prostitution in the Baltic countries and north-western Russia is likely to employ full-time 30.000-50.000 persons. The number involved in part-time prostitution is considerably higher. Most prostitutes working in the Nordic countries also work in prostitution in their home countries. No estimates are available of the number of victims of trafficking in the internal prostitution of the Baltic countries or north-western Russia, but it is probably higher than in the Scandinavian countries (Lehti and Aromaa 2002, pp. 50-69; Lehti 2003, pp. 9-14; Leskinen 2003, pp. 13-14).

In all three Baltic countries, most workers in the sex business are natives, especially members of the Russian-speaking minority formed by immigrants of the Soviet era. The core of Baltic prostitutes in Western Europe and Scandinavia consists of local professional prostitutes, whose numbers are estimated at 2.000-3.000 in Estonia, 2.500-9.000 in Latvia, and 3.000-10.000 in Lithuania. The number of foreign prostitutes is largest in Lithuania: 20 to 30 percent of all full-time prostitutes in the country. Most come from the Kaliningrad enclave of Russia, Ukraine, and Belarus. In Estonia and Latvia, the source areas are the same: Russia, Ukraine, and other CIS countries; but the number of foreign prostitutes is estimated to be considerably smaller. Local prostitution, the import of foreign prostitutes, and the export of local prostitutes are partly controlled by 'organised crime' in all three Baltic countries.

The known number of minors in prostitution directed to the Nordic countries seems to indicate that the problem of trafficking in children for prostitution is almost non-existent. In the Baltic countries and the St. Petersburg region the volume of underage prostitution is, however, considerable. The number is estimated to be hundreds in the Baltic countries and thousands in the St. Petersburg region. Their customers include many Scandinavian sex tourists (*Trafficking in Women* 2001, pp. 71, 110-11, 123-28, 210-26).

Prevention, legislation, and crime control

The factors which create, motivate and direct the global flows of trafficking are the same as those directing the global migration flows as a whole, these are: the deep differences in the standard of living between and inside different geo-

graphic regions. It is unlikely that any fundamental positive changes can be achieved unless these differences are removed. The most effective means of preventing trafficking is thus to support, and remove obstacles to a more equal global social and economic development.

Concerning crime control and preventive policies, all measures ought to be global to be effective. It follows, therefore, that measures taken in Europe or North America alone will only have a minor impact on the global situation, as most trafficking takes place outside these areas. The crucial questions for crime control at the moment are:

1. creating extensive and reliable data collecting systems;
2. criminalizing the trafficking in women globally with relatively uniform criteria;
3. developing and increasing the cooperation in crime prevention both internationally and inter-regionally (for example, using as a model the experiences of the European countries);
4. the improvement of the victims´ status and rights in the legislation all over the world;
5. creating efficient witness protection legislation and programmes applicable to the victims of trafficking; and
6. creating effective social and economic shelter programmes for the victims globally.

There is no reliable, comparative information available anywhere on the extent of any type of trafficking. In order to improve the situation, international efforts (for example, by the UN) should be made to create and harmonize national statistics concerning reported trafficking crimes, using relatively uniform criteria and composed by relatively comparative standards. The mere statistics are, however, able to produce only indicative information. In order to obtain better knowledge of the situation and to create a basis for more efficient data collection systems, it is important to increase basic research concerning trafficking and organised prostitution.

The legislation concerning trafficking in women is heterogeneous. The target of the international community should be a harmonisation of the national legislation and an improvement of the legal status of the victims of trafficking:

1. trafficking should be made a special offence;
2. courts of law should have the right to seize assets belonging to convicted traffickers, and
3. victims of trafficking should receive help and protection when necessary: Governments should set up agreements to facilitate the victims' return to their native countries (if they so wish), and victims should be granted, if necessary, temporary residence status on humanitarian grounds.

The ratification of the Palermo Protocol as extensively as possible and an adoption of its obligations in national legislation should be a primary goal.

Some European countries have introduced special witness protection legislation applicable to the victims of trafficking. All of the laws are relatively recent, and there is not yet much experience of how they will work in practice. All include the possibility of issuing temporary residence permits. In Belgium and the Netherlands the consent of the victim to co-operate in the investigation and prosecution is required. In Italy all victims have similar rights whether they co-operate or not. In Spain the stipulations of the general witness protection law are applicable. Only Italy and Spain offer the victims police protection, which continues also after the court proceedings have been closed; but even in these countries the right for this kind of protection is largely theoretical. It is also questionable how effectively the victims' willingness to co-operate with the authorities, crucial for the combating against trafficking, can be improved by granting only temporary residence permits (Pearson 2001, 10-13).

The routes of trafficking are so numerous and variable and the organisation of the crime is so flexible that it is not possible to close all the routes and eliminate all the trafficking networks. It makes more sense to focus the crime prevention efforts on the main source countries and on the most important junctions of the trafficking routes. It is also crucial for the effective prevention of all types of trafficking to continue and invigorate the combat against corruption in police forces and on all levels of government, which is rampant not only in many source countries but also in many of the main destination countries (NCIS UK 2002, 34-36; EU Organized crime report 2002).

Conclusions

The current global extent of trafficking for prostitution is based upon rough estimates only, and in most cases it is unclear how these estimates have been reached. In spite of the wide political and media publicity, trafficking for prostitution is not among the high priorities of everyday crime prevention work in any single country. As a result, exact data about the crime is scarce, and information and studies on the phenomenon are to a large extent based on the same few original sources, and usually repeat tautologically the same story. The topic and data collection is also ideologically biased, which does not always help the interpretation of the data or of the research results. The need to collect and exchange comparative information on trafficking throughout the world, and to allocate sufficient funds to monitor trafficking, to create databases and to carry out further research on this issue should be underlined.

It is usually assumed that prostitution-related trafficking makes up the bulk of up to 70 to 80 % of all global trafficking in persons when measured by the

numbers of victims. It is also assumed that the volume of this kind of trafficking and forced prostitution is much larger than shown by available sources.

If we use the Palermo criteria as the definition, it is probable that the first assumption is false. Although available data are sporadic and full of gaps, it is likely that other forms of trafficking, especially traffic of men, women and children for economic exploitation as domestic servants and as workers in agriculture, construction, and sweat-shop industries are globally at least equally common as trafficking for sexual exploitation. In some regions, for example in Africa and North America, this form of trafficking is prevalent.

In spite of this, it is probable that the current estimates of the total volume of prostitution-related trafficking underestimate rather than overestimate the volume. Although the police authorities and the NGOs tend rather to exaggerate than underrate the role of trafficking in international prostitution of adults (the new paradigm of organised crime can easily lead to this kind of exaggeration and many NGOs have an ideological tendency to see all prostitution as trafficking-related), most of the existing estimates underestimate the volume of domestic prostitution of minors, or at least do not include it in the numbers of victims of trafficking. In order to obtain a better knowledge of the situation, and to create a basis for more efficient data collection systems, it is important to harmonize the definitions of trafficking in persons used within national legislations and statistics. The creation of an international database (an idea presented for the first time in the 1913 Madrid Conference) would considerably improve the present situation.

Most of the global trafficking for sexual exploitation is short-distance. According to the available estimates, 60 to 80 % of the crime takes place within countries. The percentage of cross-border trafficking is 25 to 30 of the global volume, and also the bulk of it is regional, taking place between neighbouring countries. The major flows run from rural areas to cities and from economically disadvantaged regions to affluent ones. The proportion of traffic to the major industrialized countries is only 10 to 20 % of the entire global volume; most of the prostitution-related trafficking takes place within and between the third world and the eastern European countries. However, industrial countries have an important indirect role in the crime outside their borders, as Western and Japanese sex tourists forms a substantial part of the clientele of the local prostitution in several Third World countries and in Russia.

Although current statistics and studies very likely overestimate the proportional importance of prostitution-related trafficking for all global trafficking in persons, there are good reasons for keeping the focus of preventive and legislative measures against this particular type of crime. Studies carried out in different countries show that aggravated abuses of human rights are substantially more common in trafficking for sexual exploitation than in other types of trafficking. The victims are submitted to violence and grave intimidation more often than the victims of economic exploitation; their living and working con-

ditions are worse, and their economic exploitation is more outrageous than for the victims of other types of trafficking. The victims are also usually younger than those of trafficking for other economic exploitation, and are less capable of defending themselves or of escaping the abuse without outside help.

The question whether prostitution as such should be allowed or abolished, is a moral and ideological one, and does not belong to the scope of this article. However, there is indisputable evidence that both the criminalisation of the activity of individual prostitutes, as well as the current policies in many countries which criminalise the exploitation of prostitution by third parties but leave the status of prostitutes unclear, creates favourable circumstances for all forms of abuse, including trafficking, of individual prostitutes. It is, therefore, important for the prevention of prostitution-related trafficking, that the rights and the status of prostitution and prostitutes are defined clearly in national legislation and that the prostitutes will be given the same economic, civil and social rights that other citizens and foreigners enjoy.

It is also important to harmonise the legislation concerning trafficking in persons in national legislation globally, as regards the criteria of crime, sanctions, and the status and the rights of the victims. The victims of trafficking should be given legal rights for help and protection when necessary and governments should set up agreements to facilitate the victims' return to their native countries if they so wish. The ratification of the Palermo Protocol as extensively as possible and the rapid adoption of its obligations in national legislations would hasten the harmonisation process and should be a primary goal for the international community. However, even the most effective legislation is not enough if the will and resources for implementation are lacking.

In the long run the best and only way to prevent prostitution-related trafficking as well as prostitution as a whole is to support and facilitate the general social and economic development in the countries on the losing side of the current globalisation process and to make an effort for a more equal and balanced global economic and social development.

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The illicit movement of people across borders. The UK as a destination country and the disorganisation of criminal activity[1]

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Introduction

The movement of people across borders is not a new phenomenon: human beings have traversed land and sea over time and for a variety of reasons. For some people migration met the need of discovery, to find out what lay beyond the horizon, for others it was to find a place more hospitable and productive, for others it was to escape persecution and exploitation and for many it was to seek a new beginning in more stable and predictable economic circumstances. Those who cross borders in the twenty-first century, other than for reasons of tourism, do so for very similar reasons as those who have gone before them; essentially in an attempt to improve their life and the lives of those for whom they feel responsible. Depending on national economic and political situations such cross-border movements have been welcomed, rejected or strictly regulated. One of the consequences of this rejection or regulation of mobility has been the criminalisation of the migrant (Melossi, 2003).

There are a number of key ideas that inform the day to day practice of law enforcement professionals in their work in the area of illegal immigration. In many respects the practice of law enforcement in this area is built on a shared operational experience and the application of intelligence that has been gathered by law enforcement personnel across EU member states. This relationship between the practice of law enforcement in this area and the use of intelligence is further complicated by a series of professional and cultural perspectives that contribute to the construction of how professional practice is undertaken. Law enforcement professionals have perceptions of law enforcement officers in other member states and of their own professional practice. One particular member state's law enforcement practice may be viewed either positively or negatively and these views, many based either on anecdotal evidence, personal experience, stereotyping and the implementation of organisational policy based on co-operative working shape how law enforcement personnel interact with

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each other and to what extent they are prepared to share information, intelligence and operational strategy.

Finally, the political and media environment within which law enforcement professionals operate is also a critical determinant of the manner in which the problem of illegal immigration is constructed. There is an interplay between the political and the news gathering processes and the media reporting of illegal immigration. This makes for a difficult and unpredictable terrain across which law enforcement personnel have to operate. There is a need to maintain credibility with the media (and ultimately 'the public') and politicians in order to ensure that funding is forthcoming. There is also an imperative to ensure that the law enforcement operation is also maintained at a level that reproduces the definitions and construction of the illegal immigrant and the process of illegal immigration.

This chapter is concerned with the movement of people across borders: particularly the illegal movement of people into the European Union (the UK in particular), and the relationship between the illegal movement of people and 'organised crime'. The chapter is based on research carried out between 2004 and 2006 for the EU AGIS Programme. This research was undertaken in three countries: Estonia, Finland and the UK, however, this chapter only draws on that data relevant to the UK experience. The chapter is concluded with a discussion that explores whether the conceptualisation of illegal immigration as an activity of 'organised crime' is one that assists the law enforcement process or whether it actually hinders the understanding of illegal immigration as the relationship between crime and illegal immigration may be disorganised and chaotic.

Defining the problem

In 2005 the publication by UK Home Office of 'A survey of the illegally resident population in detention in the UK' (Black *et al.*, 2005) was an attempt to "increase understanding of the illegally resident population by describing in depth the characteristics of that part of it that is in detention" (Black *et al.* 2005: 2). However, the report only interviewed those people deemed to be in the UK illegally at five UK immigration centres and so excluded a significant number of people being in the UK illegally who were either in the community or in prison. Consequently, the research is lacking data. This deficit is acknowledged by the authors, as are the problems of classification and definition between 'illegal immigrant' and 'asylum seeker'. This highlights at least two problems in this area; first the difficulty in accessing and obtaining reliable representative data and, second, the definitional lack of clarity. The definitional problems are further exacerbated when refugees and the victims of trafficking

are included as potential 'illegal immigrants'. All of the definitional groups – asylum seeker, refugee, trafficked person, illegal immigrant, migrant labourer– come with either stark differences in their legal status or nuanced shifts in emphasis that make them more or less deserving. So, for example, an asylum seeker is considered to have a genuine reason for crossing a border illegally as does a 'trafficked person' as they are constructed as a victim of crime. A woman working in the sex industry who crossed the border illegally does not have any other genuine reason for crossing the border but pursuing her profession elsewhere and is therefore not constructed as a victim of crime but rather as the 'criminal' unless she can invoke the status of victim by being perceived as having been 'trafficked' into the sex industry. However, the differences in the two life histories of the trafficked woman and the woman who crossed the border illegally may not be so very different. In understanding how these processes of definition operate it is important to identify those who have the power to define:

> ". . . service providers and state agents define trafficking, and especially the extent to which they introduce additional requirements which do not appear in the protocol in order to construct a category of deserving victims or ration scarce resources . . ."
> (Kelly 2005: 238)

So, the definers are generally those who are providing victim services or enforcing the law. The process of definition is also political. The trafficked person, for example, acquires a status of victim, although this status is highly conditional on them accepting the concept of victim, or in playing the part (Kelly 2005). Chapkis (2003) argues that the process of defining victims is a complex interaction between social anxieties and the use of the law to manage these anxieties and the control of immigration, so the ". . . law mobilizes anxieties surrounding sexuality and gender in the service of immigration control" (Chapkis 2003: 924).

The definitional process is further complicated by the introduction of 'organised crime' as a driving force behind illegal immigration and trafficking. For example Kelly notes that organised crime is a:

> ". . . major issue for Europe, both in terms of the countries where crime groups are based, where the illicit economy acts as a brake on both the movement out of economic transition and democratization processes, and on the Western countries where organised crime has taken advantage of diasporas to put down roots. The Netherlands, for example, has identified 100 different ethnically organised crime groups operating within its borders."
> Kelly 2005: 252)

A problem with a perspective such as this is that the myths concerning 'organised crime' are reproduced (Van Duyne, 2004) and so the complexity of the

relationship between criminalisation, criminal networks and structures and victimisation are subsumed under the heading of 'organised crime'. This term is rarely helpful and in relation to illegal immigration it only serves to further definitional confusion by reifying the concept of 'organised crime'. Van Duyne (2006) has compared the attempts by law enforcement officials to measure 'organised crime' as being similar to counting clouds. This comparison is drawn because as Van Duyne argues clouds change, split and reform, disappear and re-appear in a new form in another place. These constantly changing formations of clouds are similar to the constantly changing formations of organised crime (Van Duyne 2006: 1). Furthermore as von Lampe *et al.* (2006) point out there is no one standard definition of organised crime. The approach seems to be that law enforcement professionals know organised crime when they see it but what they see may not be the same thing:

> "there may be many people who are convinced that they know organised crime when they see it. But they obviously see different things."
> (von Lampe *et al.* 2006: 17–18)

They further argue that the professionals tend to describe what they see as fitting into one of three models: the hierarchical model, the local or ethnic model and the enterprise model (Albanese 1989 cited in von Lampe *et al.* 2006: 18). The process of describing organised crime as fitting into one of these models only serves to reduce the concept of organised crime to one that loses any sense of complexity and ambiguity (von Lampe *et al.* 2006). However, it is not surprising that law enforcement professionals experience this sense of confusion in relation to organised crime because as von Lampe *et al.* (2006) argue there is no 'common theoretical understanding' (von Lampe *et al.*, 2006: 41) in the literature on organised crime and this 'allows a confusing picture to emerge'(von Lampe *et al.* 2006: 41). Van Duyne (2006) takes this argument one stage further by noting that if the research is not based on a theoretically unified definition then research findings are problematic in terms of comparison (Van Duyne 2006: 2). This is of particular importance as Van Duyne (2006) claims that threat assessments derived from such problematic research have no firm basis: their statements lack validity.

So, all of this only adds to the confusion and lack of intellectual rigour that is applied to the idea of 'organised crime'. The research on illegal immigration reported on here suggests that policy implementers especially find solace in locating criminal behaviours within the structure of 'organised crime' as it allows for the panoply of threat assessments and strategic responses to be generated and reproduced. In this world of confusion, law enforcement professionals need to know that they are practicing in a world of certainties and an ever changing nature of criminal activity means that their world of practice is anything but certain. So, the standard and accepted definitions of 'organised crime' are invoked to provide a sense of knowing the unknowable. This suggests that

a myth of understanding the problem is created because with the social acceptance of the words 'organised crime' law enforcement professionals act as if they know the underlying meaning. However, in many cases it is apparent that they do not understand the complexity of the term 'organised crime'.

The problem of definition also contributes to the political dialogue in relation to illegal immigration because not only is the definition of organised crime problematic, so is that of the status of the migrant, as Kelly (2005) notes:

> "Assessing what data we do have is made more complex by the fact that governments, the media, and even researchers continue to conflate migration, asylum, refugees, trafficking, and smuggling. Indeed it may prove impossible to resolve this conceptual confusion, since in some instances it serves political and ideological ends."
> (Kelly 2005: 239)

The ideological and political ends served by the confusion over the status of migrants combined with the ambiguity of the definition of organised crime can result in there being a discourse that links a popular conceptualisation of organised crime with the confused and negative stereotypes of migrants. At times such a conflation of different ideas is utilised by politicians to justify repressive and harsh immigration policies, for example in the case of Roma people attempting to gain access to the UK from the Czech Republic in 2001 (House of Lords 2004) and other more targeted policing, for example the formation of The Serious and Organised Crime Agency (SOCA) in the UK in 2006.

Illegal immigration and the UK response

Illegal immigration during the 1990s in the UK was a high profile political issue. The system of dealing with asylum applications was slow and there was a large 'backlog' of pending cases so that in October 1995, there were 66.655 pending applications for asylum (Hansard, 1995: 96). By 2005 this number had been significantly reduced but there had been a peak in applications for asylum between 1999 and 2002. Newspapers frequently reported that immigration would be the cause of significant increases in the population, for example in 2004, the Daily Telegraph reported that "4,4 million immigrants will boost the population" (Daily Telegraph 2004a) and in the same edition it was also claimed that "Immigration has hit record levels" (Daily Telegraph 2004b). The Daily Telegraph was concerned at the influx of 'Eastern European' nationals due to European Union enlargement and noted the flow of UK citizens migrating who are replaced by 'non-British nationals'. In attempting to grapple with the reasons for immigration into the UK the Daily Telegraph sets out what the newspaper considers the reasons for large scale migration to the UK:

> "It is important to dispense with some additional myths surrounding immigration. First: asylum-seekers are not the major cause of migration into the UK. Refugees and others granted special leave to remain under the asylum rules account for only 10 % of immigration to Britain. Most permanent immigration consists of people who are economic migrants together with their dependants."
> (Daily Telegraph 02.07.2006)

Here we witness the definitional confusion in full flight with asylum seekers and refugees gaining a positive status whilst 'economic migrants' are attached a negative significance. The article goes on to argue that such migrants are a drain on the UK's resources:

> "Unskilled migrants and their families often are net consumers of taxes: their children are educated in state schools, they are looked after when they have medical problems by the NHS, and they are eligible for state benefits if they are unable to find work. The new arrivals place a significant strain on the housing stock and delivery of public services in the neighbourhoods where new immigrants live: schools, hospitals and GP surgeries become more crowded, and state-subsidised housing gets more difficult to obtain."
> (Daily Telegraph 02.07.2006)

There is a total absence of any reporting of positive effects that migrants may have on the economy or any positive contribution they make to civil society. The Daily Telegraph was not on its own in reporting the effects and costs of migration. In 2003 the Daily Mail newspaper reported that migrants were responsible for the increase in HIV/Aids in the UK and the newspaper takes no time in reporting the costs of this increase to the National Health Service (NHS).

> "Immigration is spreading HIV into new parts of the population; 70 % of all heterosexual HIV infections in Britain in 2000/1 were in people from Africa. This hits the taxpayer. Each case costs on average £15.000 a year to treat, and new drug treatments mean longer lives for patients; ten years on that level of treatment would be common."
> (Daily Mail 05.08.2003)

The paper also uses the label of immigration to highlight what it intimates is preferential treatment for migrants at the expense of justice, so the headline "Migrant drunk-driver free in days after killing boy" sums up those anxieties and concerns related to migration and the lack of authority of the criminal justice system. These examples illustrate that within the UK during the late 1990s and up to the present time immigration is seen as a volatile and sensitive topic for politicians and can interrupt and end political careers. In 2004 the Minister of State for Immigration, Beverly Hughes, resigned because of her perceived lack of action in relation to a 'visa scam' that was alleged to be taking place in Bucharest (The Guardian 2004). In 2006 the then Home Secretary,

Charles Clarke, admitted that the Home Office did not know where over one thousand 'foreign' prisoners were after their release from prison. Whilst Charles Clarke rode out the political storm that followed the revelations in relation to 'foreign' prisoners, he was axed in the subsequent cabinet re-shuffle. One of the key issues that resulted in Clarke's sacking was the perceived failure to 'remove' these 'foreign' prisoners from the UK after their release (BBC 2006). These examples demonstrate that governments walk a particularly fine line in the UK when dealing with immigration. Opinion polls taken during 2004 and 2005 in the UK indicate that respondents generally disapproved of the government's policy towards migration with the Conservative Party, at a time of particularly low popularity, leading the government in the polls on the immigration issue (UK Polling Report 2007).

In the UK over the past decade one strategy of government has been to place illegal immigration within the criminal justice sphere and there have been a number of criminal justice 'initiatives' to reduce illegal immigration. During the latter part of 2006 and the early part of 2007 the government published a number of policy papers in relation to immigration (see for example Home Office 2007a&b). The government's understanding of illegal immigration is that:

> "Organised crime feeds on the migration pressure from those seeking a better life for themselves outside the country where they live and we estimate that as much as three quarters of illegal migration is facilitated by criminal gangs."
> (Home Office(a) 2007: 9)

Once again we see here the definitional confusion with organised crime and criminal gangs being conflated when they are very different types of criminal 'organisation'. So, the 'facts' begin to form an official narrative of how and how many, people cross the UK border illegally. As with drugs and money-laundering the threatening imagery is inflated by a deliberate numbers game (Reuter and Greenfeld, 2001; Reuter and Truman, 2004; Van Duyne and Levi, 2005; Van Duyne *et al.*, 2006). The estimation of the total amount of illegal immigration facilitated by 'organised crime' or criminal gangs as seventy-five percent is an interesting figure especially when the government has little or no accurate estimate of the number of people illegally in the country. Woodbridge (2005) utilises the *Residual Method* as a means of estimating the number of illegal immigrants in the UK. As can be seen the *Residual Method* is not a very accurate means of estimating the population without a legal right to stay:

> "The Residual Method takes as its starting point the foreign-born population recorded in the UK census conducted in April 2001 and then deducts an estimate of the foreign-born population here legally. The difference is an estimate of the number of unauthorised migrants in the UK."
> (Woodbridge 2005)

Woodbridge estimates the illegal population in 2005 to be 430.000 (Woodbridge 2005: 1). According to the Home Office some three-hundred and twenty-two thousand people were brought into the UK illegally by 'organised crime' or criminal gangs. If this is accurate, this is an organisation with very special entrepreneurial skills matched only by those that avoid detection. However, the combination of press reports, political pressure and the constructions of illegal immigration methods and figures that emanate from law enforcement agencies only serves to compound the myths of organised crime and criminal gangs as the perpetrators of people smuggling. The threat imagery conveyed by these narratives justifies the increase in police powers, the re-organisation of policing and its removal from democratic accountability.[3] In addition, it provides a cover of toughness and 'Britishness' for politicians eager to exploit the populist seam of public opinion. The construction of organised crime within this 'official' narrative is one that is 'transnational' and 'structured' to exploit global opportunities. The setting up of SOCA in 2006 indicates that the government views organised crime as a threat and as having transnational ties. This view fails to take account of the work of scholars such as Hobbs who argue against such a pervasive view:

> "The notion of organised crime, particularly in the current vogue form of 'trans-nationality', needs to be reconsidered in the light of empirical research, which indicates that ever mutating interlocking networks of locally-based serious criminality typifies the situation."
> (Hobbs 1998: 419)

So, Hobbs cautions against putting our trust in the usual constructions of organised crime and argues for a local understanding of such form of criminality (Hobbs 1998). It is with this in mind that we can now turn to the findings of research that informs this chapter.

Getting into the UK without permission

One of the aims of the research was to investigate how individuals cross borders illegally and the relationship between crossing the border, organised crime and corruption. As noted above, the research was undertaken in three countries, Estonia, Finland and the UK, however, the findings reported here refer solely to the UK.

[3] This is not typically British: the whole organised crime policy development in the US and subsequently in the EU is characterized by fear mongering, sometimes deliberately orchestrated (Van Duyne, 2004) and covered by policy supporting 'research'.

Research design and execution of the project

The research investigated the issues of corruption by 'organised crime' in relation to border controls and immigration using as a case study the Finnish – Russian and the Estonian– Russian border, the methods of illegal facilitation of people across borders, the role of crime groups and networks as well as 'organised crime' and the relationship between illegal facilitation and exploitation in the labour market.

The project investigated the flow of people illegally from Russia (3rd Country) into Finland (destination and transit country) and Estonia (transit country) and how facilitated people are moved onward. Particular attention was focused on the possible processes of corruption in relation to existing structures. The research also investigated how illegal immigration results in new forms of organised crime. The four key research questions were:

1. How is corruption used to secure the passage of people across borders?
2. Is there evidence that border controls are weak?
3. How are people moved from one EU member state to another?
4. What is the impact of illegal forms immigration on crime rates and organised crime and criminal groups/networks in destination countries?

The fieldwork was undertaken between July 2005 and July 2006 and included interviews with law enforcement practitioners and policy makers, direct observation with immigration officers at border crossing points and focus groups with key personnel working in the UK immigration service, police and government officials. The qualitative data was analysed using Atlas.ti software package.

Findings: the official UK narrative and what people do

The UK's relative 'popularity' with migrants has resulted in a number of strategic responses to prevent illegal immigration. SOCA was established in 2006 and one of its areas of activity was to tackle 'organised immigration crime':

> "The UK is an attractive destination for illegal migrants from all over the world. Serious organised criminals see immigration crime as lucrative and relatively low risk."
> (Home Office(c) 2007: 7)

Consequently a significant amount of resources have been committed by the UK government with the establishment of SOCA and the re-organisation of the Immigration and Nationality Directorate into the Border and Immigration Agency. At the same time the EU has also committed resources to securing the

external borders with the establishment of FRONTEX[4] in 2005 with the aim of securing co-operation between member states to ensure border security. FRONTEX is in addition to EUROPOL which has a mission to combat serious and organised crime across member states. This plethora of agencies securing external borders and combating internal serious crime demonstrates that the UK's position although specific to the political conditions within the UK is in step with the EU approach to illegal immigration. That is: strengthening borders and using law enforcement as a means of ensuring border security. Both the EU and the UK government share a concern over the activities of organised crime.

The official perspective on the issue of people smuggling and trafficking forms an official narrative that is invoked by policy makers and implementers. It is understandable that in order to appear to be efficient, and to be effective to their political masters, the official narrative is the means of establishing both effectiveness and legitimacy.

The 'official' narrative is that of the person who has gained entry as victim. This is usually a woman who has been trafficked into the UK. She enters an agreement to go to the UK for work and once she has arrived she finds herself imprisoned and forced into prostitution. A UK case that received a high level of media coverage and was frequently quoted by research respondents was that of the Demarku brothers who ran brothels and forced trafficked women to work in their brothels as prostitutes. The reporting of the case contained a language which suggested an 'organised crime' approach. For example the Demarku brothers were called a 'family firm'. However, whilst there is no doubt of the seriousness of their crime there is little else in the reporting that suggests they were part of organised crime (see BBC(a) 2007) other than the headline *Sex Trafficking Gang Sent to Jail*. Other news reports of similar incidents also fail to discuss or provide any substantial evidence of the involvement of 'organised crime'. However, what many of the accounts suggest is that trafficking and the exploitation of women is usually undertaken by small groups of men, sometimes supported by women[5], who are either closely related or known to each other and live in the same locality (see for example BBC (b&c) 2007). However, the establishment of REFLEX[6] teams in 2000 by the UK government "was set up to deal with organised immigration crime" (Home

4 "Frontex, the EU agency based in Warsaw, was created as a specialised and independent body tasked to coordinate the operational cooperation between Member States in the field of border security. The activities of Frontex are intelligence driven. Frontex complements and provides particular added value to the national border management systems of the Member States"
http://www.frontex.europa.eu/

5 Women appear to be not only victims, but perpetrators too. Female victims turned into active supporters, particularly in the stage of recruiting, being better able to instil trust with targeted victims (Maljević, 2005).

6 REFLEX is a joint operation between police, immigration and customs and located across the UK. The aim of REFLEX is to combat 'organised' immigration crime through intelligence and policing operations.

Office 2006). The provision of an additional sixty million pounds of funding in 2004 was designed specifically to engage in combating trans-national organised crime in a number of 'key' areas including people smuggling and trafficking. The lessons in understanding of the nature of serious crime as described by Hobbs (1998) are not incorporated into this narrative form and this further supports van Duyne's argument that:

> ". . . organised crime is mainly a political construct and otherwise ill defined with no observational value or explanatory power."
> (Van Duyne 2006: 14)

However, the official narrative of organised crime as a 'transnational' threat and as one of the drivers of people smuggling and trafficking appears to be deeply embedded in the ideas of policy makers.

In contrast to this official narrative, amongst some law enforcement practitioners there is a realisation of the local nature of serious crime; and they frame both their understanding and action within this context. Firstly, they understand the nature of illegal migration as means of people attempting to improve their economic situation as one law enforcement practitioner commented on 'rescuing' women working in a local brothel:

> "In general people want to stay here and they come of their own free will . . . There were 3 [overseas] girls there and we thought we were rescuing them but at the airport they started demanding the money they had earned and their mobile phones back. It turned out that they were students and came over for 3 months at a time and they knew they could leave at any time and they earned lots of money."
> (AGIS Research Respondent 12)

This respondent also understood the local nature of serious crime:

> "The Criminal families and gangs in [this area] are pretty tough, they will hassle you and stand up and fight."
> (AGIS Research Respondent 12)

They also had a pragmatic view of people smuggling that demonstrated a degree of scepticism towards the idea of 'trafficking':

> "The snapshot we have is that there is no trafficking but people are smuggled in of their own free will . . . It is doubtful that once people are smuggled into the sex industry they are then forced to do other things that they don't want to as there are that many girls that come you can always get someone who will do whatever out of their own free will."
> (AGIS Research Respondent 12)

However, on occasions the official narrative makes a guest appearance, as in this statement concerning forged documents:

> "If it is a good counterfeit then it is likely to come from the Russian Mafia as them (sic) have the expertise to make them . . . After the Iron Curtain

broke down KGB officers were not getting much money and therefore they diversified into this sort of thing."
(AGIS Research Respondent 12)

The view of this respondent, and shared by other law enforcement practitioners interviewed, is that illegal immigration is a result of people moving of their own free will in order to advantage themselves economically. This respondent links illegal immigration to criminal activities but views this is an activity at the local level rather than as part of 'trans-national organised crime'.

The 'international' aspect of illegal immigration is also understood by law enforcement practitioners and it can be seen how this understanding tends to support the 'official' narrative:

"There is a growing acknowledgement, I think, internationally . . . that the problem of . . . illegal immigration . . . is no longer a national problem. Forged documents are not simply a problem that we have in the UK of people crossing our border, it's a global problem which everybody now appreciates is an issue they have to become actively involved in."
(AGIS Respondent 3)

So, the international aspect of forged documents, which can be understood as a 'support industry' to illegal cross-border mobility, and the market in such documents, prompts an international response by law enforcement agencies. This to some extent provides an explanation for the way in which law enforcement practitioners are seen to accept the official narrative. However they appear to be more cautious in their adherence to the narrative structure as in the quote below; so that adherence to the 'official' narrative is measured:

"So we have met individuals who have travelled through Europe to a number of European countries and arrived in the UK at some point or other. And have been in contact with lots of different organised criminal gangs who have charged different rates for different things."
(AGIS Respondent 29)

This respondent recognises implicitly the localised nature of the criminal enterprise but uses the word 'organised' as a form of deference to the 'official' narrative. This is not uncommon as law enforcement personnel describe their experiences in their own words and at times translate this into the 'official' language of their profession. This respondent is less deferential:

"So what we did find is groups that facilitate certain bits of the journey, but not all of it. They also provide contacts for the next leg of the journey."
(AGIS Respondent 16)

These views of practitioners on illegal immigration are much more in step with Hobbs (1998) and the argument that the criminal enterprise should be understood at the local level.

Criminal disorganisation

There is a problem in attempting to understand the activity of illegal immigration through the concept of organised crime.

> ". . . 'organized crime' is a notoriously difficult concept to define and to measure, and relative to the confident claims that are made about it, little is known about 'its' operation in practice in many European (and for that matter, non-European) countries."
> (Levi and Maguire 2004)

However, the 'official' narrative persists as the website for the UK Human Trafficking Centre (UKHTC) says: "Organised criminals see human trafficking as a lucrative and relatively low risk crime, viewing the individual victims merely as another profitable commodity" (UKHTC 2007). For all of this 'official' narrative what is apparent from the qualitative data is that law enforcement practitioners understand the process of the illegal crossing of borders as being the consequence of localised criminal enterprises. The participant observation data also confirms this view. On one occasion at a cross channel crossing point the author observed the apprehension of a man and a woman. They were claiming to be a married couple whereas the male had driven from the UK to the Russian Federation and collected the woman who was travelling on false papers. The immigration officers' responses to this situation were that it was not possible to know how this situation had come about because neither of the two people apprehended would provide any information. They could speculate from a simple scenario, that the woman had been refused a visa to join her male partner and so they had resorted to illegal entry, to a scenario that placed the male as a courier bringing women into the UK illegally as a commercial operation for 'organised crime'. The immigration officers tended towards a view that if there was any gain through criminal activity it would be at a local level and that the male was probably either doing a 'favour' for a friend rather than being a full-time courier facilitating women into the UK from the Russian Federation.

The interview data, the participant observation data, and an analysis of press reports indicate that organised crime is neither a significant feature of the experiences of those who enter the UK illegally nor of law enforcement personnel. The localised nature of the criminal activity is accepted and also its ephemeral nature. What the data suggests is that while illegal migration presents criminal opportunities –the provision of forged documents, the taking of people across border or the corruption of officials– all this can happen at a number of different levels and for different reasons. So, it might be that the person providing the service does so at a market rate, or because they have the wherewithal to provide the service, mode of transport regularly crossing borders, and they take the advantage to make illicit gains from their opportunity. It may be

that the person providing the service does so because they have the opportunity to do so only occasionally and they exploit that opportunity when it arises. It may be that the person providing the service does so because of kinship, family or local loyalty and the economic benefits are a by-product of their activities. All of this suggests not an organised criminal network but rather a series of criminal opportunities, exploited at a local level, that are not established and concretized but rather criminal associations that 'change, split and reform, disappear and re-appear in a new form in another place' (Van Duyne 2006: 1).

Illegally crossing borders provides for criminal networks and groups, entrepreneurial opportunities that are similar to the opportunities of other 'contraband' goods. So we can expect to see similarities between tobacco smuggling, illegal labour subcontracting and moving people, illegally, across borders. There is evidence in the data to suggest that the organising models as detailed by Bruinsma and Bernasco (2004) has a degree of validity. They argue that there are essentially three organising models. First of a defined network where there are linkages between each person who is critical to the enterprise. This is the form of network that is involved in the movement of drugs because the drugs need to be protected from the time they are acquired by the crime network to the point of sale and this requires there to be a closer network where there are connections between those involved with their illegal importation and distribution. This form of network would also apply to trafficking enterprises as it does to cigarettes. However, as Hornsby and Hobbs (2006) describe, the network may not look like an 'organised crime gang' as in one of their case studies it was older people and benefit claimants (Hornsby and Hobbs 2006):

> "Within such networks, familiarity generates sponsorship, followed by acceptance. This is based upon the knowledge of network participants who are familiar by sight, referral or association, and convene via a network of acquaintances"
> (Hornsby and Hobbs 2006: 4)

Van Duyne and Houtzager (2005) have described the processes of criminal subcontracting in the Netherlands and the Dutch 'koppelbaas' as *crime entrepreneurs*. This appears to be a much more professionally organised form of entrepreneurship than that described by Hornsby and Hobbs (2006), yet it is clear that the organisation described by van Duyne and Houtzager (2005) bear little relationship to the fictional accounts of organised crime that rely on Mario Puzo and Hollywood as the describers of 'organised crime'. This description of the 'koppelbaas' highlights a different form of organisation to that of a highly structured network but more one that is comprised of small groups interacting with an upperworld constructor having a common interest.

The 'illegal migration service providers' on the other hand, are not so much engaged on a large scale enterprise but more on smaller 'bits of businesses'

where they are undertaking an illegal task for some reward. So, for example it might be a driver of a truck and two or three 'friends'. The friends are the contacts for those people wanting to try their luck in crossing the border in the back of a truck. They put the person making the illegal journey in touch with the driver. There is an exchange of cash which is divided between the 'partners'. This organisation is much looser in terms of criminal enterprise but it is an important feature in organising the illegal movement of people across the border. Furthermore the truck driver may have contacts with 'partners' in the new country who will provide further services, here the truck driver acts as an introduction agent and he may or may not receive cash benefits for his 'recommendation'. To the external gaze this form of interaction between the parties appears much more disorganised and random than the highly structured hierarchical organisation of the fictional organised crime groups. The activities of these criminal entrepreneurs are market based and as Van Duyne comments:

> "Such illegal markets are not the realm of sinister, evil forces, but dynamic, interactive places in which criminal entrepreneurs meet the demands of many ordinary, usually law-abiding citizens."
> (Van Duyne 2003: 1)

This description highlights the entrepreneurial nature of the criminal enterprise and this is also evident, as noted by some respondents, in the illegal movement of people across borders. There is one final model as described by Bruinsma and Bernasco (2004) in which there is no connection between one small group of entrepreneurs and another group. In this instance the person would be driven over the border and once in the 'new' country they would be left to their own devices and make their own contacts. Such contacts are usually established through word of mouth within the illegal immigrant community.

These three strategies for organising the illegal movement of people across borders suggests that there is a level of organisation, but that which is only necessary and beneficial to the enterprise. However, people are slightly different contraband to drugs and cigarettes: usually the smuggler has had to invest in the contraband goods or has a significant investment in their disposal. In relation to people they pay to be moved prior to departure. If apprehended the driver will in many cases say that he had no knowledge of them in the back of the truck and they must have got into the truck when he stopped for food. He declares himself innocent of any intention to facilitate a person across the border. There are few prosecutions for facilitation and so the driver is warned to be more vigilant next time and the person attempting to cross the border is refused entry. The driver has still been paid for his troubles and the immigrant is less likely to be able to afford another ride in the future and so will have to resort to trying to conceal themselves under trucks which is exceptionally dangerous and can have tragic consequences.

What these research data suggests is not a form of 'organised crime' but rather a form of criminal disorganisation, where opportunities are exploited, economic advantage taken but also where there is no 'firm', no organised 'gang' or hierarchical structure to people smuggling. The acceptance of a different and more complex narrative, one that accommodates the local and the ephemeral, would provide those who are attempting to enforce border controls with a more dynamic view of what is taking place and for governments to take a more humanitarian approach to the problems of illegal immigration rather that the pursuit of policies that are oppressive and punitive.

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Criminals are not alone

Some observations on the social microcosm of illegal entrepreneurs

Klaus von Lampe[1]

Introduction

The concept of 'organised crime' can be understood – historically – as a fundamental reinterpretation of the crime problem. It juxtaposes the image of psychopathic and sociopathic criminals who exist on the fringes of society with that of socially skilled offenders well embedded in associational and cooperative structures that span both the illegitimate and legitimate spheres of society. This conception, in a sense, is counterintuitive. Everything else being equal, it is surprising to find criminals exposing themselves to others at all, because accomplices, friends 'in-the-know', and bystanders increase the level of risk for offenders in one way or the other.[2] Yet, the notion as such that 'organised crime' is determined by certain patterns of social interaction has not received much attention. For the most part its implications are either ignored or taken for granted. Relatively little has been done to systematically examine the patterns of relations and interactions which define a particular criminal conduct.

In this chapter I will examine the patterns of interaction of offenders involved in the importation and wholesale distribution of contraband cigarettes in Germany. Data were obtained from a sample of 63 criminal cases. Assuming for argument's sake that under 'normal' circumstances offenders would operate alone and in complete isolation I will describe in what ways and to what degree smugglers and wholesale distributors of contraband cigarettes come into contact with other individuals in the course of their illegal activities. In so do-

1 Klaus von Lampe is researcher at Freie Universität Berlin, Germany. Some of the research for this chapter was conducted as part of the "Assessing Organised Crime" project, sponsored by the European Commission under the 6th Framework Programme (CIS8-CT-2004-501767). Tom Herberger, Nicola Krause, Khubaib Ali Mohammed, and Mariann Szabo assisted in the raw data collection. The author also wishes to thank the *Staatsanwaltschaft beim Landgericht Berlin* and the *Amtsanwaltschaft in Berlin* for providing access to the criminal files referred to in this chapter.

2 Another peculiar facet is the societal power ascribed to criminal structures. Conventional wisdom in political science stresses that in the long run power requires legitimacy because it cannot rest on the tip of bayonets alone, as Talleyrand reportedly told Napoleon. Against this background it is difficult to accept that criminal structures of all structures should emerge as a challenge to state authority, After all, by definition they negate the normative consensus of society and therefore, at least in theory, should not have any legitimacy.

ing I will present empirical evidence in support of the notion that the patterns of interaction of offenders are to a substantial degree shaped by the scale of criminal activities (Arlacchi, 1986: 202; van Duyne, 1997: 206; 2006: 186).

The social microcosm of illegal entrepreneurs

The social microcosm of an illegal entrepreneur, one might say, includes all those individuals he or she encounters in the course of his or her criminal activities who are in a position to influence the success or failure of that particular illegal enterprise.

The concept of the "social microcosm of illegal entrepreneurs" encompasses three aspects that have variously been addressed in the criminological and organized crime literature: co-offending, the social embeddedness of criminal networks, and the interaction between illegal and legal spheres of society.

Co-offending embraces the actual collective execution of an offence (Weerman, 2003: 398). In a broader sense, as proposed by Pierre Tremblay (1993: 20), the term "refers not only to the subset of an offender's pool of accomplices but rather to all those other offenders he must rely on before, during, and after the crime event in order to make the contemplated crime possible or worthwhile". From this view emerges the picture of egocentric "networks of criminally exploitable ties" through which an illegal entrepreneur is linked to all those actors who wittingly contribute to a criminal venture, be it in the form of business partner, employee, contact broker, supplier, customer or in the form of someone who provides relevant information or merely moral support (von Lampe, 2003a).

The second aspect, social embeddedness, places criminal networks in a broader societal context, recognizing that criminals do not exist in a vacuum: they belong to social networks and they participate in social transactions that do not have a criminal connotation as such but nonetheless may have some bearing on the commission of crime (Best and Luckenbill, 1994: 244). One example for this "social embeddedness of organized crime" (Kleemans & Van de Bunt, 1999) is provided by the phenomenon of "borrowed loyalty" where, for instance, familial or business relations form a basis of trust for criminal cooperation (von Lampe & Johansen, 2004). However, the social embeddedness can manifest itself in far more practical and tangible forms, for example when friends or relatives unwittingly provide information or infrastructure that is used by illegal entrepreneurs for their criminal purposes.

The third major aspect encompassed by the concept of the "social microcosm of illegal entrepreneurs" is the interaction between the legal and illegal spheres of societies, more specifically the interaction between actors adhering to a criminal lifestyle and being embedded in criminal networks with individu-

als holding positions within legitimate institutions such as government and legal business. In the organized crime literature this aspect is typically addressed in terms of corruption and infiltration (see e.g. Albanese, 1995). However, illegal entrepreneurs may also take advantage of the legal infrastructure outside of collusive patterns of interaction, for example when they use communication and transportation systems to pass criminally relevant information or move illegal goods (see e.g. Vander Beken *et al.*, 2005).

The concept of the "social microcosm of illegal entrepreneurs", thus, is broader than most conceptions of criminal collectives which, although distinguishing between core and peripheral actors, are confined to the circle of criminal co-conspirators (see e.g. Lemieux, 2003: 12-13). At the same time the concept is more exclusive than, for example, Dwight C. Smith's conception of multi constituencies (Smith, 1994: 132) or the concepts of 'buffer' and 'support group' proposed by the President's Commission On Organized Crime (1986, Appendix A). These embrace individuals and institutions such as regulatory agencies and the media which only play an abstract role for a particular criminal endeavour.

While research on all of the key aspects referred to above (co-offending, social embeddedness, and illegal-legal nexus) in some way or other deals with the social dimensions of 'organised crime', as far as can be seen no attempts have been made yet to systematically take stock of the patterns of social interaction of offenders or to provide comprehensive explanations in response to the original puzzlement over offenders who choose association and cooperation rather than isolation (see also Tremblay, 1993).

It is interesting to note, for example, that one of the first exercises in studies of criminal networks is typically to single out the circle of criminal co-conspirators for analysis and thereby excluding other individuals who without being criminally liable, nonetheless play a role in the overall context of crime (see e.g. Lupsha, 1983; Morselli & Giguere, 2006; Natarajan, 2000; 2006). One exception to this rule is provided by Finckenauer and Waring's (1998) study of Soviet Emigré crime in the US. They include in their analysis a broad range of individuals that had been linked to certain target persons through various law enforcement and open sources irrespective of the connection with any criminal activity. Attending the same social event as a known criminal, for example, led to the inclusion of an individual. However, by proceeding in this way, Finckenauer and Waring analyze the web of social contacts of alleged criminals, not the patterns of interaction that define criminal conduct.

The key questions which need to be answered within the conceptual framework of the "social microcosm of illegal entrepreneurs" refer to the individuals an illegal entrepreneur comes into contact with in the course of his or her criminal endeavours, how the observable patterns of interaction are shaped in terms of size and structure, and how variations in these patterns of interaction can be accounted for.

When we examine (organised) crime we can expect to find a continuum ranging from an offender who tries to avoid any exposure to and interaction with others in his or her immediate and broader social environment, to offenders who take advantage of existing social relations within confined, cohesive networks, to offenders who establish and use social relations beyond tightly knit networks in furtherance of their criminal undertakings. On a theoretical level, these variations in the patterns of interaction can be linked to two countervailing though potentially complimentary factors: safety and effectiveness. Safety is provided by cohesive, trust based networks whereas effectiveness is derived from exploring new opportunities through newly established contacts without a basis of trust (Kadushin, 2002; see also Burt, 2005). These same considerations which have been discussed for legal settings have also been applied to criminal contexts, although with an indication that under conditions of illegality other mechanisms may come into play (Morselli, 2005: 27-28; Morselli, Giguère & Petit, 2007; Tremblay, 1993: 26-27).

In this chapter, I am attempting to make a modest contribution to this debate by presenting some empirical findings on the offence-related social contacts of cigarette smugglers and by formulating some tentative hypotheses on the safety and effectiveness implications of particular patterns of interaction. The data I am drawing on are limited in their usefulness especially because they give no direct indication of the motivation and rationale behind the observed patterns of interaction. Furthermore it must be noted that the cigarette black market in Germany may not necessarily be representative of other areas of crime. On average, the offender population appears to be comparatively old, shows no involvement in other criminal activity and, correspondingly, does not seem to be embedded in any discernible underworld milieu (von Lampe, 2003b; 2005; see also van Duyne, 2003; van Dijck, this volume; for a deviating assessment of the cigarette black market in the UK see Hornsby & Hobbs, 2006).

Data

Data for this analysis were obtained from two sources, the German Customs Service data base INZOLL, and a sample of criminal files (n=63) which document investigations conducted by the German customs service into smuggling and wholesale distribution networks that were active in the Berlin area during the time span 1990 until 1999.

The database INZOLL *inter alia* stores records on all cigarette-related proceedings initiated by the branches of the Customs Service at the German borders and across Germany, encompassing import, transit smuggling, and domestic wholesale and retail distribution (von Lampe, 2005: 213). Extracts from this

database were obtained for the years 1990 until 1999 including information on the number of cigarettes and the number of suspects per case.[3]

The 63 criminal cases used for writing this chapter constitute a sub-sample of some 100 case files included in a comprehensive, yet to be completed study of the cigarette black market in Germany (see also von Lampe, 2003b; 2005). Accordingly, the findings presented here are only tentative.

All files, which were accessed through public prosecution offices in different parts of the country, have been selected with the intention of grasping only the upper levels of the black market and those investigations which promised to have produced the most insights into illegal enterprise structures. To this end, only files with at least three suspects and with the highest number of cigarettes in each calendar year were considered for analysis. However, some cases turned out to pertain merely to the lower market levels, including retail selling, and some cases, even those on smuggling (import level), only involved minor amounts of cigarettes.

The 63 criminal files in the sub-sample were accessed through the Berlin public prosecution offices (*Amtsanwaltschaft* and *Staatsanwaltschaft*). These files contain information on the upper levels of the cigarette black market in the Berlin area, including import (smuggling) enterprises and wholesale enterprises where a vertical integration with smuggling operations appears to be likely so that in fact all enterprise structures in the sample may have operated on the import level. This selection method is intended to ensure some level of comparability with regard to logistics and modus operandi.

Some of the 63 files also contain information about enterprise structures on lower market levels which are separated from the import level structures by contractual supplier-customer relations. Where information on these lower-level operations has been available it is not included in the present analysis. Similarly not included are smuggling operations where only one individual has been identified. This means that the core units of analysis are co-offending networks of at least two known members, not counting other, less directly involved individuals.

In view of the underlying research question regarding the social microcosm of offenders it must be emphasized that the sample is highly biased towards offender collectives by selecting only case files with at least three suspects. The criminal file analysis, accordingly, cannot address the question under what conditions offenders in the cigarette black market cooperate with others in the first place. This would require comparing lone offenders and co-offenders. Rather, the focus will have to be on the criminal and broader social environment of those market participants who have been found to operate within some form of collective structure. In contrast, the INZOLL data, to a limited extent, allow a comparison between lone offenders and co-offenders in that they provide in-

[3] Data were also obtained for the year 1989 which, however, are not included in this analysis.

formation on the number of suspects per case, but it is an open question to what extent valid inferences on co-offending can be drawn from these figures.

A tentative statistical analysis of co-offending

In the INZOLL database at least one suspect is listed for every cigarette-related investigation. In other words, there is no case without a suspect. For the years 1990 until 1999 the number of suspects per case ranges from 1 to 21. This does not mean, however, that the number of suspects listed in INZOLL necessarily corresponds to the actual number of co-offenders. As both the communication with customs officers and the criminal file analysis indicate, limited investigative resources in many instances prevent the detection of co-offenders where single perpetrators are apprehended. One typical case, for example, would be the truck driver who is unwilling or unable to provide information on who is responsible for hiding contraband cigarettes in his cargo (see also Van Duyne, 2003: 293). Such a case would show only one suspect in the INZOLL database, the truck driver, even though numerous individuals may have been involved in the smuggling operation, and even though the truck driver himself who has brought the contraband across the border may only have been an unwitting accomplice.

These caveats not withstanding, a glance at the available statistics on cigarette-related investigations may provide some insights that can be translated into hypotheses for further examination.

Table 1 shows the number of cigarette-related cases investigated by the German Customs Service in each year from 1990 until 1999. These numbers are broken down, for each year, to the number of cases involving one suspect, two suspects, and three or more suspects. The case files analyzed for this chapter, as indicated, exclusively fall in the latter category. The table also shows the percentage of cases in each category per year. As can be seen, the share of multiple-suspect cases (three or more suspects) is very low, ranging from 1,4 to 4,0 percent with a slight upward trend when one compares the period 1990-1994 with the period 1995-1999.

Table 1.
Cigarette-related investigations by number of suspects in Germany 1990–1999

	Investigations	1 suspect		2 suspects		3+ suspects	
Year	N	N	%	N	%	N	%
1990	3.932	3.653	92,9	223	5,7	56	1,4
1991	10.200	9.163	89,8	755	7,4	282	2,8
1992	15.398	13.766	89,4	1.156	7,5	476	3,1
1993	31.830	28.894	90,8	2.077	6,5	859	2,7
1994	33.241	29.660	89,2	2.553	7,7	1.028	3,1
1995	34.622	30.428	87,9	2.991	8,6	1.203	3,5
1996	32.724	28.641	87,5	2.978	9,1	1.105	3,4
1997	23.472	20.432	87,1	2.212	9,4	828	3,5
1998	18.089	15.443	85,4	1.927	10,6	719	4,0
1999	12.857	11.139	86,7	1.277	9,9	441	3,4
Mean	21.637	19.122	88,4	1.815	8,4	700	3,2

Source: INZOLL

While these figures have to be viewed with considerable caution it is interesting to note that there appears to be a connection between the number of suspects and the amount of seized cigarettes per case. Taking the year 1995 as an example, the year with the highest number of investigations (n=34.622), the data show that on average the higher the number of suspects, the higher the number of seized cigarettes: Cases against single suspects (n=30.428) on average involve the seizure of 10.926 cigarettes (median=3.400) and cases against two suspects (n=2.991) on average involve the seizure of 23.980 cigarettes (median=7.200). In contrast, proceedings directed against three or more suspects (n=1.203) show an average amount of seized cigarettes of 110.025 sticks (median=12.800). These figures may simply be indicative of greater investigative resources spent to investigate large scale smuggling and distribution, thereby increasing the chance that additional suspects are identified. But they could also be interpreted as reflecting the increasing practical need of black marketeers to work collectively the larger the volume of contraband that is being handled.

In the following sections, the information gleaned from the case file analysis will be reviewed to further examine this question and to describe in greater detail the patterns of social interaction among offenders and between offenders and their environment.

Criminal file analysis

Criminal files in general, and the 63 files analyzed for this chapter in particular, do not consistently contain information, or information with the same level of detail, on every aspect of the phenomenon under study potentially relevant from a criminological point of view. And by far not all the available information appears to be reliable. Still, compared to crime statistics, media reports, expert interviews and offender interviews, criminal files permit the in-depth retrospective analysis of a fairly large number of criminal events and structures in a fairly standardized fashion. Criminal file analysis therefore is a valuable tool for criminological research, especially in the area of organised crime, as long as the shortcomings of this method are duly taken into account.

Similar to the INZOLL data, the information contained in a criminal file is not necessarily exhaustive, or accurate, especially not with regard to the extent and nature of the involvement of particular individuals. For example, a file documenting the investigation against three suspects charged with smuggling cigarettes may be confined to just three suspects because there simply were no other accomplices. But it may also be the case that the existence of additional accomplices has escaped the attention of the investigating officers, or that individuals are known but their criminal involvement has not been recognized on the basis of the available evidence, or that known co-offenders are not formally listed as suspects in a criminal file because they are already the subject of another, parallel investigation. In yet other cases it seems that the available information on accomplices is deemed insufficient to provide leads that could result in their identification and arrest. In the end it is up to the researcher to draw inferences about the number and different roles of suspects independent from the formal classification made by the investigating authorities, including police, customs service and public prosecutor, and also independent from the final verdict, if there is one (see also Natarajan, 2000: 290).

In many cases the file content is confined to information collected from one law enforcement intervention, for example the search of a suspicious vehicle by the police. In such a case the criminal file typically contains the most detailed information on the mode of transport while less, and less reliable information is available on the source and destination of the cigarettes, including the role of potential investors and background organizers.

On the other hand it is important to note that the criminal files, in contrast to the INZOLL data, often also contain information on the involvement of individuals below the level of co-offending, such as owners of transport vehicles or employees of hauling companies. Thus, the social dimensions of an offence beyond the circle of accomplices are captured to some extent as well.

In general, the amount of information contained in the criminal files used for writing this chapter varies depending on the type and diversity of the evidence collected in the course of an investigation. The most conclusive infor-

mation typically comes from suspect statements. Other types of information sources include witness statements, visual surveillance by police and customs, and documentary evidence such as freight manifests. Extensive use of modern investigative tools in the form of wiretaps was only made in one of the 63 investigations under study.[4]

No single piece of evidence can be taken at face value. All information contained in a criminal file has to be weighed in context and also with a view to patterns that emerge from the analysis of other criminal files and other types of sources. In the end, what can be achieved is only a more or less well empirically supported and more or less plausible version of the truth.

Patterns of cigarette smuggling operations

The patterns of cigarette smuggling operations will be examined on the basis of the sample of 63 criminal files pertaining to investigations of the Berlin branch of the customs service. The information contained in the case files cover to various degrees the following typical phases in a smuggling scheme: procurement of cigarettes abroad, concealment for transport, cross-border transport, transport within Germany, unloading and reloading for immediate distribution or the storage of contraband in cases where the distribution further down the market chain is delayed.

Not surprisingly given the geographical location of Berlin, the observed smuggling schemes typically involve the Polish-German border. The most prominent pattern in the sample shows Polish offenders organising the cross-border transport and Vietnamese mid-level and low-level dealers being on the receiving end who in turn supply Vietnamese street vendors (see also von Lampe, 2002; 2003; 2005). 34 of the 63 cases fall into this category. Other patterns include smuggling schemes involving offenders based in countries other than Poland, namely Hungary and Bulgaria, smuggling schemes that employ container transport by sea or small-scale smuggling by boat across the Oder river in addition to road transport, and finally smuggling schemes that supply other than Vietnamese dominated distribution channels.

Theoretically it is possible for a single person to run a smuggling operation without any assistance. This is obvious for small amounts, but even for large amounts of contraband cigarettes, provided an individual has a truck, a fork lift and sufficient warehouse space available. Therefore, the high share of cases involving a single suspect that show up in the INZOLL-data can not be dis-

[4] One reason for the limited use of wiretapping is that tax offences, including the smuggling and illegal distribution of cigarettes, are not contained in the list of offences that may serve as predicate for the issuance of a wiretap order under German law (Harms and Jäger, 2004: 196-197).

carded off hand as a misrepresentation of reality. However, the analyzed cases indicate that individuals can usefully combine their efforts to run a smuggling scheme more effectively and that the interaction with outsiders in some form or other increasingly becomes a necessity the larger the volume of contraband cigarettes that are being handled. To clarify this point, three broad types of smuggling schemes can be distinguished from the data contained in the analyzed criminal files. This threefold typology is based primarily on one dimension, the level of interaction with legitimate third parties, but it is also largely consistent along the dimension of shipment size, i.e. the volume of contraband cigarettes handled at one time. Finally, some link can be observed between the three types and the number of individuals involved in a smuggling enterprise.

Small-scale smuggling operations

The most common pattern emerging from the criminal file analysis, characterizing 50 of the 63 cases, is constituted by self-sufficient small-scale smuggling operations that apparently do not rely on any interaction with legitimate third parties that could hint to the fact that commercial goods – legal or illegal – are being transported or stored. Where third parties are involved, this occurs in an inconspicuous way in a purely private, non-commercial context. For example, cigarettes are smuggled by train or overland coach in carry-on luggage, which involves –unwitting– interaction with conductors, drivers etc., or stored in private apartments, which involves, though very indirectly, the interaction with landlords. In most cases, however, cigarettes are moved using private cars which are either registered in the name of one of the smugglers or in the name of some other private person who may be a friend or relative but is likely to claim ignorance of the use for illegal purposes.

Small-scale smuggling schemes in the sample are mostly run by partnerships or small teams of three to five individuals, typically Polish nationals residing in Poland who smuggle minor amounts of cigarettes for direct retail sale or for sale to mid-level and low-level dealers. The *modus operandi* does not differ fundamentally from that of individual smugglers, judging from anecdotal evidence drawn from interviews and media reports. In fact, some of the cases in the sample involve suspects who have been apprehended at the same time at the same place but it appears that they have not cooperated in any way. This is true for passengers in overland coaches *en route* from Poland to Germany who each have a few cartons of cigarettes concealed in their luggage. Occupants of the same car who are caught in the possession of contraband cigarettes sometimes also claim that they are acting independently from each other.

On this level, the patterns of co-offending appear to follow a simple logic. Cooperation occurs to meet an immediate need, namely the pooling of resources. Resources include transport vehicles, a driver's licence, investment capital for purchasing cigarettes and covering transport costs, and knowledge

regarding distribution outlets in Germany (see also von Lampe, 2003). Where information on previous and later involvement of suspects in cigarette smuggling is available, cooperation involving the same individuals is a rather rare occurrence while continuity in *modus operandi* appears to be fairly common.

Hierarchical structures are the exception rather than the rule. Where they do exist they typically involve relations between an employer and an employee who is recruited on a one-time-only basis or for a short series of transports. Employees are typically used as courier drivers by which means employers can insolate themselves from the contraband. In a few cases employers were apprehended in the same car but the courier drivers, apparently following a prearranged plan, accepted all the blame for themselves.

The main security strategy adopted in small-scale smuggling operations is stealth and camouflage. The greatest threat, accordingly, emanates from law enforcement agencies who use offender profiling, and from witnesses who become aware of activities that are not in line with the conduct of private citizens. Numerous small-scale smuggling operations failed because they fit a certain pattern, namely involving a car with Polish licence plates and young male occupants appearing in the middle of the night in front of a housing complex inhabited by Vietnamese. In other cases neighbours alerted police or customs after they observed suspicious behaviour in the form of the unloading of bulky bags or packs from cars into cellars or apartments.

Medium-scale smuggling operations

In contrast to small-scale operations, medium-scale smuggling operations, of which eight appear in the sample, involve some interaction with outsiders in a way that is not typical for the daily routines of an average private citizen, for example renting a van for transport or, most commonly, leasing a garage for storage. In some cases the interaction may even occur under the guise of a commercial business, but one that is not connected to the importation of goods. In one case, for example, a garage was leased under the pretence of storing items for a snack bar; in another case a garage was sublet for storing "foodstuff".

The smuggling operations in the sample fitting this pattern of interaction with legitimate third parties on average move higher volumes of contraband cigarettes at a time and involve higher numbers of co-offenders than small-scale operations.

Medium-scale operations also have a greater tendency than small-scale operations not to be just one-time-only events and to display a structure with some vertical and horizontal differentiation. Like in the case of the more sophisticated among the small-scale operations, the cooperative structures characterizing medium-scale operations appear to facilitate certain tasks while also

insulating, through employer-employee relations, illegal entrepreneurs from the contraband.

The main security strategy of medium-scale operations seems to be camouflage rather than stealth, because the activities they are involved in, namely the moving and storing of boxes, is in line with the kind of interaction with legitimate third parties (garage owners and van rental companies) defining the category of medium-scale operations. In other words, there is nothing suspicious as such about transporting boxes in rental vans, as opposed to private cars, and storing these boxes in rented garages, as opposed to private apartments. So should this kind of behaviour come to the attention of outsiders it is not likely to trigger criminal investigations.

Large-scale smuggling operations

Large-scale smuggling operations are by definition characterized by the embeddedness in legitimate business processes. Interaction with legitimate third parties occurs on a continuous or at least recurring basis within the context, and following the logic of international business. This includes the setting up of front companies, the leasing of warehouses and the renting of trailer trucks on behalf of these front companies, the use of hauliers for cross-border transport and of dispatch forwarding agents for the clearing of cover loads with customs.

Smuggling operations embedded in the legal economy consistently involve large amounts of contraband cigarettes and high numbers of participants, and they can have a long life-span of up to several years. All of the five large-scale operations in the sample had a vertically and horizontally differentiated structure, typically with a multi-level hierarchy, and some division of labour.

While front companies are being set up, the adoption of business practices does not go so far as to integrate all accomplices into legitimate business structures. In interactions with the outside world it is only the individual entrepreneur who has registered the front firm in his or her own name, or a 'representative' who in some form claims power of representation for a company, who is formally linked to a legal business. Internally, relations between co-offenders are not framed in a legal context so that individuals working for an illegal enterprise are not formally employed by or otherwise legally associated with any front company. Only in one case in the sample the attempt was made to give the appearance of formal employment by handing overalls with the logo of a front company to those individuals who were (informally) recruited for unloading cover goods and boxes containing contraband cigarettes from a container truck into a warehouse leased in the name of this same front company.

In contrast to small- and medium-scale operations, the main security strategy of large-scale smuggling operations is mimicry by blending into the legal economy (see also Van Duyne, 2006: 186). The illegal nature of the activity is concealed, but not the fact as such that goods are commercially moved across

borders and commercially distributed. The greatest threat to large-scale smuggling operations emanates from random customs controls of cross-border traffic and from profiles developed by customs based on successful random controls, for example relating to certain types of goods frequently used as cover loads. Otherwise, suspicions raised further down the distribution chain may lead back to large-scale smuggling operations, or, as is the case with all types of smuggling operations, 'unfortunate' coincidences such as a traffic accident lead to exposure.

A more detailed analysis of the three types of smuggling operations

A fairly consistent link between the level of interaction with legitimate third parties, the amounts of cigarettes involved, and also –to some degree– the number of participants emerges from the initial analysis of the smuggling enterprises found in the sample of 63 criminal files. This connection can be further explored through a more systematic and more detailed review of the available data. Table 2 summarizes some of the data pertaining to small-, medium- and large-scale operations, respectively.

Table 2.
Cigarettes and co-offenders per smuggling operation, sample from Berlin 1990-1999 (n=63)

		Maximum seizure per case (no. of cigarettes)				*No of co-offenders*		
Type	N	low	high	mean	median	range	mean	median
Small	50	1.660	639.960	65.990	39.400	2-7	3,50	3,00
Medium	8	253.200	2.735.000	986.962	769.040	2-6	4,38	4,50
Large	5	3.395.200	11.465.000	6.093.080	5.700.000	4-19	9,00	8,00
All types	63	5.920	11.465.000	661.279	48.000	2-19	4,05	3,00

Source: Analysis of selected criminal files

Illegal-legal interaction and amounts of cigarettes

As mentioned above, the classification of three types of smuggling operations by the level of involvement with legitimate third parties is fairly consistent with the volume of cigarettes that are being moved. The highest amount of seized cigarettes per investigation ranges in the case of small-scale smuggling operations from 1.660 to 639.960 sticks, which on average (65.990 sticks; median=39.400 sticks) is significantly lower than the amounts recorded in investigations against medium-scale operations (253.200 – 2.735.000; average =

986.962; median = 769.040) and against large-scale operations (3.395.200 - 11.465.000; average = 6.093.080; median = 5.700.000). It is interesting to note that except for two cases of small-scale smuggling involving the seizure of 265.000 and 639.960 sticks, respectively, there is no overlap between the three categories in this respect. This may be taken as an indication of the existence of critical levels which, once reached, force offenders to fundamentally change their patterns of interaction with the outside world. The first critical level appears to be at shipment sizes of around 200.000 – 250.000 cigarettes when it becomes impossible to use a single car for transport. Likewise, it is difficult to imagine that shipments of this size could be unloaded and stored in an outwardly purely private setting without raising suspicion.

The two deviant cases underscore these points. The case where 265.000 cigarettes were seized from an alleged small-scale smuggling operation, the cigarettes had reportedly been transported across the border in a truck, of which the ownership remained unclear, and had then been loaded on to two separate cars for further delivery to Vietnamese customers. In the case involving the seizure of 639.960 cigarettes, the exact conditions under which these had crossed the border remained obscure. It is only known that a Polish individual was hired on the spot by fellow countrymen to drive a van from a highway rest area outside the city to a meeting place in Berlin. In both cases it is quite possible that the cigarettes had been brought across the border as part of large-scale smuggling operations and perhaps the cigarettes that were seized were only part of larger shipments. One may also speculate that the customers in the latter case, most likely Vietnamese whole-sale dealers given the fact that the van was owned by a Vietnamese individual, would have stored the shipment in a garage or warehouse and not in an apartment or a cellar in an apartment building, provided they had not arranged for immediate redistribution of the cigarettes to low-level dealers.

The next critical threshold level seems to be around 1 million cigarettes. There are three cases in the sample classified as medium-scale operations based on the available evidence, where amounts of about 1 to 2,7 million cigarettes have been seized. However, two of them involved storage facilities as opposed to transport, so that shipment sizes in all likelihood were smaller than the seized amounts. The accompanying circumstances illustrate the challenges offenders face when handling amounts of cigarettes of this magnitude without the protection of an outwardly legal business facade. In one case 1,18 million cigarettes had been stored in a sublet garage. Interestingly, some of these cigarettes did not stem directly from smuggling but from a break-in into a customs warehouse where seized contraband cigarettes had been stored. An anonymous tip-off led the police to search the garage. In the other case resulting in the seizure of 1,25 million cigarettes from a rental truck no information was produced during the investigation about the mode of smuggling and the apparent warehousing of the contraband cigarettes prior to distribution to Vietnamese whole-

sale dealers. There is a good chance, however, that here too in reality a large-scale smuggling operation was at work. The vulnerable spot of the operation turned out to be the repeated use of rental trucks from the same company which attracted the attention of a customs service patrol. Finally, in one case involving the seizure of 2,7 million cigarettes hidden on the premises of a junk yard by what appears to be a smuggling operation, the owner of the junk yard was aware of the illegal activities. Otherwise it would be hard to imagine how the smugglers had been able to find sufficient warehouse space without the cover of an outwardly legal import-export business.

Group size, group structure and amounts of cigarettes

From the INZOLL data it could be surmised that increasing amounts of cigarettes put pressure on smugglers to develop collective patterns of cooperation with increasing numbers of participants. From the sample of 63 smuggling operations in the Berlin area a more complex picture emerges, although overall a fairly clear connection remains. At this point it must be re-emphasized that the figures taken from the INZOLL database and the information gleaned from the criminal files are not fully compatible. The INZOLL datasets list the sum total of all seizures made during a particular investigation so that in cases of multiple seizures a series of small shipments is assigned the same value as one large shipment. From the case file analysis, in contrast, it is possible to obtain data specifically on the highest seizure per case which appears to be a more valid measure for determining the scale of an operation.

As Table 2 (above) shows, the threefold typology of small-, medium- and large-scale operations does not neatly group co-offending networks according to their size. On the contrary, the ranges in the numbers of co-offenders greatly overlap. Still, the average group size does increase with each category, from 3,5 co-offenders in small-scale operations (median=3,00), to 4,38 co-offenders in medium-scale operations (median = 4,50) and 9,00 co-offenders in large-scale operations (median = 8,00).

The increasing group size, as indicated, corresponds to an increasing degree of vertical and horizontal differentiation and a longer life-span of an illegal enterprise. Whereas only 11 out of the 50 case files on small-scale smuggling operations (22 percent) contain information on a hierarchical structure, 6 out of the 8 case files on medium-scale enterprises and all of the 5 files on large-scale operations do so. Likewise, all medium- and large-scale enterprises display some division of labour, mainly between organizers and menial labourers, but also among these respective role sets. In contrast, the division of labour in small-scale operations is largely confined to the fact that in a smuggling vehicle only one can be the driver at a given point in time. And whereas only 10 out of 50 case files pertaining to small-scale enterprises contained evidence of continuous cooperation, all medium-scale and with one exception all large-scale

enterprises showed signs of continuity. In the one case of a large-scale smuggling operation with no indication of continuous operation it is likely that the one seizure that was made involved the first of a number of planned smuggling shipments, given the fact that the smugglers had set up a front company and had rented a warehouse.

Other involved individuals

Up to this point the focus of the analysis has been on the size of illegal enterprises. But, to return to the initial research question, it is not just the number of co-offenders that is of relevance here, but the overall number of individuals with whom the members of a given smuggling enterprise interact. Several types of other involved individuals have been distinguished in the preliminary analysis. These individuals demarcate the social microcosm of cigarette smugglers: contact brokers, suppliers, customers, persons in-the-know, involved outsiders possibly aware of illegal conduct, and involved outsiders who are apparently unaware of the illegal conduct. A separate but also highly relevant category, demarcating the social microcosm of offenders from the outside, is formed by bystanders who become aware of illegal activities by accident or due to the carelessness of offenders.

Contact brokers, without directly participating in activities of the illegal enterprise in question, connect individuals either on the same market level (business partners, employer/employee) or on different market levels (supplier/customer). *Suppliers* and *customers* are those individuals who operate on a market level above, respectively below, the smuggling enterprise in question. *Persons in-the-know* socially interact with members of the illegal enterprise in question in such a way that they become aware of the criminal conduct. Typical examples of persons in-the-know are family members of suspects who are privy to the storage, transport or exchange of contraband cigarettes. *Involved outsiders possibly aware of illegal conduct* are individuals who interact with offenders in the context of the illegal enterprise in question and who with varying degrees of probability have become aware of the fact that crimes are being committed. It is often difficult to determine with any degree of certainty whether or not an outsider such as a dispatch forwarding agent has grown suspicious. Involved outsiders tend to claim ignorance irrespective of indications to the contrary. Grounds for suspicion could be, for example, the apparent lack of expertise in international trading by self-proclaimed representatives of import-export businesses who contract a forwarding agent on a cash basis. *Involved outsiders apparently unaware of illegal conduct* are individuals who interact with offenders in the context of their illegal activities and who thereby are in a position to detect what is transpiring, but from the available evidence have not taken the necessary steps to actually uncover illicit activity. A typical example

for this category would be customs officers who check a truckload without discovering the contraband.

Some of these categories do not seem to be closely linked to a particular type of enterprise (small-, medium-, or large-scale). For example, there are small-scale as well as large-scale smuggling enterprises supplying just one customer, respectively, according to the available data. Other categories, by definition, are typical for medium-scale and even more so for large-scale operations, but not for small-scale smuggling enterprises. This is particularly true for involved outsiders with varying degrees of awareness of criminal conduct. In the case of medium-scale enterprises, offenders have to interact with outsiders for renting transport vehicles and leasing warehouse space. For large-scale operations embeddedness in legal business structures may also entail dealing directly with authorities when registering a company or clearing a shipment with customs. In addition it may entail contracting legal businesses for transporting and storing cargo and for clearing shipments with customs.

While there does not seem to be a clear distinction between small-scale, medium-scale and large-scale enterprises with regard to the number of involved individuals, similar to the number of co-offenders (see Table 2), possibly due to incomplete data, it seems that core offenders in medium- and large-scale operations find themselves in increasingly complex patterns of interaction. They have to deal with individuals with increasingly diverse roles and across increasingly greater social distances.

In the case of small-scale enterprises interaction related to criminal conduct tends to be confined to the immediate circle of co-offenders. In 29 out of 50 cases (58 %) the criminal files do not give any indication of the involvement of other individuals. And where others are involved, these individuals tend to belong to the close social environment of co-offenders or their customers. In one case of small-scale smuggling, for example, three Polish smugglers delivered cigarettes to two Vietnamese buyers in an apartment where another six Vietnamese individuals were present. These six individuals were apparently aware of the illegal transaction without taking a part in the deal. In other cases, individuals involved in small-scale operations outside the circle of co-offenders are typically the owners of the vehicles used for smuggling. These persons are often designated in suspect statements as relatives or friends.

In contrast, medium-scale and large-scale operations, by definition, involve the interaction with third parties who provide transport vehicles, storage space and a number of relevant services. Interactions of this kind tend to take place across substantial social distances. Transport vehicles and storage space, it seems, are typically provided by third parties without pre-existing ties. Illegal entrepreneurs, in these cases, are walk-in customers or answer to classified adds in a paper. For medium-scale operations, these contacts appear to be confined to one or two third parties whereas large-scale operations fully embedded in legal business are linked up to outsiders in multiple ways, including interaction with

legitimate businesses and government agencies. It is important to note that in all of these cases no indications were found of attempts by cigarette smugglers to infiltrate legitimate businesses or to bribe public officials.

Interpretation

Overall, the information gleaned from the customs statistics and the 63 criminal files suggests that there are critical levels in the volume of contraband cigarettes which, once reached, force smugglers to adapt their patterns of interaction in the direction of more and more complex relations with a more diverse and socially more distanced set of individuals.

Size and internal structure of smuggling enterprises

There appears to be a tendency, first of all, that the larger the consignments of contraband cigarettes the more individuals are directly involved in a smuggling enterprise and the more differentiated the internal enterprise structure. This tendency, which has already been noted in other contexts (Arlacchi, 1986: 202) and which is discernible in the customs statistics as well as in the criminal files, can be explained by both efficiency and security concerns. Fairly straightforward, it becomes more and more difficult for a single person to load, unload and carry cigarettes as the volume increases. A carton of 200 cigarettes weighs only about 300 grams. But the average shipment handled by a small-scale smuggling operation, 66.000 cigarettes according to the criminal file analysis, already constitutes a load of around 100 kilograms, whereas the average shipment of a medium-scale operation (987.000 cigarettes) weighs around 1.500 kilograms, and the average shipment of a large-scale operation (6.093.000 cigarettes) weighs around 10.000 kilograms. Apart from the pure weight of the cigarettes (including packaging), the unloading of large consignments of contraband is a fairly time consuming activity. From the case files it seems that to unload a container and to separate the contraband from the cover load takes a team of three to five persons at least 3,5 to 4 hours and may take up to 12 hours depending on the circumstances. Therefore, it is in the interest of efficiency that smugglers join forces or recruit additional labour to handle large amounts of contraband cigarettes. At the same time, larger numbers of participants may translate into increased security in the sense that core offenders can insulate themselves from actually handling the contraband. In fact, this insulation strategy is widely assumed to be a defining characteristic of sophisticated criminal enterprises (Morselli, Giguère & Petit, 2007: 152; Potter, 1994: 87-88; Zaitch, 2002: 241). On the other hand, every additional employee is a potential informant and witness who poses an additional risk to illegal entrepreneurs (Reuter, 1983: 115). This is especially true where employment is not based on

trust (von Lampe and Johansen, 2004), as seems to be true for many of the analyzed enterprises. Employees are often recruited on the spot, for example in bars (see also von Lampe, 2003b: 59). This is a pattern that has also emerged in other areas of crime, namely trafficking in stolen motor-vehicles, and may be particularly typical for Polish offenders (Bundeskriminalamt, 1999: 49), although in the analyzed sample of cigarette related cases precarious relations also linked, for example, Vietnamese and Germans. While such weak links add to the insulation of core entrepreneurs, they increase the likelihood that in the event of an arrest, employees are willing to disclose what information they have about their employers.

Use of legitimate third parties

A second tendency discernible in the analyzed data concerns the use of legitimate third parties. Once the size of consignments of contraband cigarettes goes beyond critical levels, smugglers extend their interactions into the legal spheres of society (see also Van Duyne, 1997: 206; 2006: 186). Here, also, practical considerations in all likelihood come into play. From a certain volume (around 200.000 to 250.000 cigarettes) it appears no longer feasible to transport and store contraband cigarettes within a private person's normal infrastructure of private residence and private car. At this point it becomes necessary to obtain appropriate transport vehicles and storage facilities, which in the analyzed cases are mostly rented instead of purchased. This entails repeated interaction with garage owners and employees of rental truck companies. Typically no pre-existing relations link the illegal entrepreneurs to these third parties. In a double sense this move into the legitimate spheres of society can be seen as a security measure. First, as mentioned before, large volumes of cigarettes can be moved in a less conspicuous way than would be the case in a purely private setting. Second, by renting vans and leasing storage space instead of acquiring ownership protects assets from confiscation. However, illegal entrepreneurs also expose themselves to the scrutiny of outsiders they have little control over. Illegal entrepreneurs in most of the analyzed cases had to present a cover story about the intended use of garages with which they had to conform in order not to raise suspicion. The same was not true for renting vans. As far as can be seen, no explanation had to be given to rental company agents about the intended use of the rented vehicles. Still, avoiding suspicion seems to have been a concern for illegal entrepreneurs given the fact that preference was given to particular rental companies where, one may speculate, no questions were asked. The preference for particular companies, in turn, proved disastrous in several cases where this had come to the attention of the customs service and the mere sighting of a vehicle from one of those companies gave customs agents on patrol sufficient reason for closer inspection.

At a volume of around 1 million cigarettes per shipment another threshold appears to be reached where smugglers seem to feel the need to integrate their operations into the legal cross-border traffic of goods. This means that the cigarettes are transported in trucks and container trucks with false documents describing inconspicuous goods, or concealed with such goods (see also High Level Group, 1998: 12). In these cases, at a minimum some form of interaction with customs is required for officially clearing the shipment. Many smugglers seem to avoid direct interaction with customs and instead contract a dispatch forwarding agent for the purpose of customs clearance. In addition, trucks for transport are rented from commercial businesses or the entire transport is outsourced to a haulier. Dealing with these legal companies requires the smugglers to be reachable by phone and mail. In some of the analyzed cases, cell-phone numbers and private addresses were used, but also an office service and an actual business. Overall, the integration into legal cross-border traffic forces smugglers to interact with legitimate third parties who in all likelihood are able to quickly detect the lack of expertise and experience a smuggler will show without a background in legal foreign trade, which in turn puts at least less sophisticated smugglers at risk of exposure. Furthermore, the use only of cell-phones or payments only in cash which, on one hand, protects the identity of a smuggler, on the other hand may give rise to suspicion. These vulnerabilities are aggravated by the fact that even more so than in the case of medium-scale operations illegal entrepreneurs operating on a large scale have to bridge social and cultural cleavages as they typically do not share the same social and ethnic background as the representatives of the businesses and agencies they have to deal with. It must be added, though, that from the available evidence it appears that hauliers and forwarding agents are not necessarily eager to report their observations to the customs service. In one case a self-employed haulier subcontracted by a large transport company, which in turn was contracted by a front company set up by smugglers, to bring a cover load of lumber from a Baltic Sea port to a warehouse in the Berlin area was bought off with one carton of cigarettes after he became aware of the true nature of the cargo.

Exposure to bystanders

Another related aspect is the visibility and vulnerability to uninvolved outsiders. Assuming that cigarette smuggling is met neither with hostility nor with acceptance, but rather with indifference, it seems that small-scale and medium-scale operations are far more likely than large-scale operations to be exposed to bystanders who happen to observe illegal activities and recognize them as such. Out of the 63 investigations under study, ten were triggered by tip-offs coming from private citizens. In another four cases investigations were initiated following up on intelligence provided by police or customs service informants. Of the ten cases triggered by reports from private citizens, eight involved small-scale

operations and two medium-scale operations. These cases illustrate the vulnerability of illegal enterprises with a *modus operandi* that does not blend into an inconspicuous social context. In most instances, accidental onlookers observed unloading and transaction activities which seemed out of place or which could be directly identified as involving contraband cigarettes. Indicators included the removal of packages from Polish cars, the transaction of packages between European and Asian looking individuals, or, most obviously, the markings on boxes where the cigarettes were still contained in the original packaging. In one case, involving a medium-scale operation, a private citizen observed the reloading of contraband cigarettes from a rental truck to a small vehicle on the parking lot of an apartment complex. It so happened that the onlooker was an employee of the very same tobacco manufacturer from which the contraband cigarettes originated. In the second case of a medium-scale operation failing because of the visibility to uninvolved outsiders, a private person repeatedly observed the distribution activity of a smuggling enterprise in the form of the delivery of boxes to an apartment building. Three cases are unusual in that they involved private citizens with some proximity to the offenders. In two cases, tip-offs referred to particular apartments where Vietnamese dealers received deliveries from Polish smugglers, and in another case a taxi driver alerted the police after he had driven two Poles to deliver contraband cigarettes to Vietnamese customers. It is noteworthy that all of these constellations pertained to transport and loading activities but not to the storage of contraband cigarettes by smuggling enterprises, which can be explained in part by the fact that most small-scale smuggling schemes do not involve the storage of cigarettes on German territory. As regards medium-scale operations, authorities received a tip from a private citizen in only one out of six cases where garages were leased for storage; and this occurred at a point in time when investigations were already ongoing. In all other cases leads picked up elsewhere eventually led to the discovery of the garages used for storage of contraband cigarettes.

The five large-scale operations under study proved immune to bystanders, presumably because they successfully blended into legitimate business and their visible activities raised no suspicion. This is underscored by the one case of a large-scale operation where a private citizen did indirectly trigger an investigation. An employee of a smuggling operation caused a minor traffic accident when driving a customer's van from a pre-arranged pick-up point to the warehouse in which a container with contraband cigarettes was being unloaded. While manoeuvring the van, the employee hit a parked car and without stopping proceeded to the warehouse. A bystander informed the police who quickly discovered the van and subsequently the contraband cigarettes.

Conclusion

Cigarette smugglers, like any other offender, do not operate in a social vacuum. They interact with and are exposed to other individuals who may or may not be directly and wittingly involved in these illegal activities. The patterns of interaction between illegal entrepreneurs and their social environment vary along different dimensions. One crucial aspect typically addressed in analyses of organised crime is to what extent and in what way they integrate their social environment through the recruitment of accomplices, which in turn affects the size and internal structure of illegal enterprises. Another crucial aspect, less often considered in analyses of organised crime, is the level of interaction with legitimate third parties from which illegal entrepreneurs obtain resources and services in support of their illicit activities. Finally it is an often neglected question of some relevance to what degree illicit activities are (potentially) exposed to the attention of uninvolved outsiders.

From the analysis of the customs service statistics on cigarette related investigations and from the analysis of 63 criminal files a fairly consistent pattern emerges: while most cigarette smugglers operate within self-sufficient, small sized enterprise structures, those entrepreneurs who move beyond critical levels in the scale of contraband shipments are bound to interact in profoundly different social microcosms comprising larger and more diverse sets of individuals across greater social distances.

The different patterns of interaction characterizing small-, medium- and large-scale smuggling operations entail different risk profiles. Interestingly, as the stakes increase, cigarette smugglers increasingly rely on actors from outside their immediate social environment. Labourers integrated into illegal enterprises have typically been recruited on the basis of weak or even absent pre-existing ties. This also means that there is no indication that cigarette smugglers are embedded in a criminal milieu from which new recruits could readily be drawn. Likewise, contacts with legitimate third parties are seemingly established *ad hoc*, and also across social and cultural cleavages and, as far as can be seen, without the safeguards of corruption and intimidation. The expanded social microcosm of medium- and large-scale cigarette smugglers, compared to small-scale smugglers, can in part be explained by gains in efficiency and also in security as certain risks, namely the detection by uninvolved outsiders, are minimized. But at the same time new risks emerge with the increased exposure of illegal entrepreneurs to other individuals they likewise cannot easily predict or control.

The present analysis could only tentatively highlight some aspects that come into play when offenders are conceptualized as actors operating within a specific social microcosm populated by individuals who are in a position to influence, in one way or the other, the success and failure of an illegal enterprise. A more in-depth analysis drawing on a broader database, and also covering other

crime-markets, may provide a better understanding of the mechanism at play. This analysis would also have to pay attention to factors such as differences in the material incentives for small-, medium- and large-scale smugglers, their respective perception and management of risks, and the resources in terms of the financial, human, and social capital they have at their disposal. However, the data presented here do suggest that the patterns of interaction of offenders are to a substantial degree shaped by the scale of criminal activities and the nature of the commodity. And at least large-scale smuggling operations, it appears, cannot be understood without taking the complete patterns of social interaction of illegal entrepreneurs into account. More generally, it seems necessary to examine the social microcosm of offenders more systematically and more consistently in the future in order to obtain a better understanding of 'organised crime'.

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Cigarette shuffle: organising tobacco tax evasion in the Netherlands[1]

Maarten van Dijck[2]

Introduction

According to Netherlands Statistics more than 30 % of the Dutch population consumes tobacco products on a regular basis. Between 35 and 40 % of these consumers smoke more than one pack of cigarettes a day. For a standard pack of 19 legal cigarettes the smoker pays € 3,80.[3] The combined taxes, encompassing excise and VAT, amount to € 2 and € 0,77, roughly 73 %! So, if the seller of duty unpaid cigarettes sells his packs at a discount of € 1,77, then he would still be able to make an extra profit of one Euro compared to his licit counterpart. Conclusion: contraband cigarette smuggling is yet another lucrative illegal market. Even if accidental losses are taken into account, e.g. as a result of the seizure of a discovered load of cigarettes, then still cigarette smuggling can be a profitable business, attracting many entrepreneurs willing to run some risks for a fair share. Whereas law enforcement activity is relatively slack and prison terms considered relatively low, there is no lack of aspirant smugglers. The Netherlands, worldwide known as a nation of transit and transport, provide also an excellent setting for grey economy goods, such as untaxed cigarettes. Confiscated payloads amount up to several million cigarettes per cargo. In 2005 alone the Netherlands Customs and Fiscal police have seized 107 million illegal cigarettes and 50.000 kilos of tobacco, estimating the total fiscal loss of EUR 87 million.[4]

In a recent court ruling in which three smugglers were convicted, the Hague Court of Appeal qualified the activities as 'organised crime' and ex-

1 This paper is based on a case file study of cigarette smuggling in the Netherlands as part of the research Project 'Assessing Organised Crime' (AOC). This project was funded by the European Commission under the Sixth Framework Programme. The author would like to thank the officers of the Dutch Expertise Centre on Excise Fraud, in particular Ank Nieuwschepen and Marcel Joziasse, for their assistance in studying the case files.

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3 This is, at the time of writing this paper the price for a package of Marlboro Red cigarettes containing 19 sticks. This price is also known as the Retail Price (*Kleinhandelswaarde*), which forms the basis of part of the calculation of the excise rate (expressed in eurocents per 1000 cigarettes). In 2006 the Retail Price was set to € 200,- per 1000 cigarettes. The excise rate for 1000 cigarettes is set at € 114. See: http://www.minfin.nl/nl/actueel/kamerstukken_en_besluiten,2006/01/bijstellingsregeling_sigaretten_en_rooktabak_en_wijziging_douaneregeling.html (last visited at 2007-04-12).

4 ANP Press Release 10 March 2006.

pressed his concern about the consequence of large scale cigarette smuggling, which according to the court posed a 'severe threat' to society. To an increasing extent cigarette traffickers are prosecuted for the participation in a criminal organisation, which indicates how serious the public prosecution takes cigarette smuggling nowadays.

In the United States, and to a lesser extent in Europe as well, cigarette smuggling has been associated with the financing of terrorism[5], which –from a policy making perspective– nowadays is the most effective way to put an issue on the top of the political agenda and to rally for extra funding.[6] The formulation used by the Court of Appeal will lightly invoke the traditional organised crime image of violent cigarette smuggling as part of a criminal underworld of thugs and hoodlums. This image, however, is not reflected in the case itself, nor does it correspond with our findings from a recent investigation into Dutch cigarette trafficking.

The findings of a Dutch research of cigarette smuggling by Van Duyne (2003) are also in sharp contrast with The Hague Court ruling and the allegations of links between cigarette smuggling and the financing of terrorism. Apart from a few more complex cases Van Duyne describes the average cigarette trafficker as a rather ordinary citizen in need for some extra income. The number of smugglers with a retirement or disability allowance was surprisingly high![7] How do these very different views relate? What is the social and organisational reality of cigarette smuggling? These are the questions underlying this chapter.

In the course of 2006, simultaneous research into cigarette smuggling has been conducted in five European countries: Estonia, Germany, The Netherlands, Belgium and the United Kingdom. This research was part of the project *Assessing Organised Crime* (AOC) in which the main focus was on the establishment of a new format for the reporting on profit oriented crime in Europe. The five countries are geographically positioned in the 'Northern Trade Belt', as identified by Van Duyne in 2003 and reaffirmed by von Lampe in 2004. Within the context of the Assessing OC research project the investigation into cigarette smuggling served as a pilot study in order to test the assessment method developed in the course of the project. This paper discusses some of the findings of the Dutch research.

5 Gerechtshof 's Gravenhage, 17-04-2002, LJN AF0904, publicly available (in Dutch) at http://www.rechtspraak.nl

6 De Telegraaf, 8 juni 2004, 'Terreurpeuken' in de Verenigde Staten'.

7 Somewhat similar results were found by Johansen in his study of the Norwegian clandestine alcohol trade (2005).

Methodology

The investigation of the cigarette black market encompassed various methods of data collection. The core of the investigation consisted of close-reading and analysis of 43 files concerning tobacco-related crime. Supplementary to these files access was obtained to electronic files, provided by the Netherlands Customs, containing data of 314 cigarette seizures over the period 2000-2005. In addition interviews were held with law enforcement officials (customs investigators, customs analysts and a public prosecutor) and a security manager of a Dutch production site of British American Tobacco.

In the period between the beginning of February and the end of September 2005 a total number of 43 files concerning tobacco-related crime, were scrutinised by way of close reading. All cases where (physically) located in the office of the Knowledge Centre on Excise, EU and Environmental Fraud (*Kennispunt Fraude Accijns, EU-middelen and Milieu*).[8]

At the Knowledge Centre virtually all cases relating to excise fraud are brought together. The cases were further selected at random, simply by taking these from a cupboard. In a single case, mentioned by officers working at the Knowledge Centre in informal conversations, specific inquiry was made and the case was retrieved from a distinct place within the office. The cases encompassed substantive case descriptions (including suspect statements, transcriptions from wire-tapped recordings, police reports and copies of documents and photo-material). Some cases consisted merely of letters containing requests for international assistance and the responses to these requests. In a few of these cases hardly any substantial information could be derived from these international communications. These cases were ignored.

Based on information obtained during conversations with the staff of the Knowledge Centre it can be estimated that the 43 cases encompassed approximately 45 % of the existing volume of case files within the Knowledge centre. However, the majority of the remaining 55 % were kept in other rooms undisclosed to the researcher. Access to these files was incidentally obtained upon specific request. A quick glance reassured the researcher that this set did not contain anything exceptional compared to the set he was working on.

[8] This department is a temporary joint venture of the Dutch Fiscal Police (*FIOD-ECD*) and the Customs (*Douane*) which both reside under the Dutch Inland revenue Service (*Belastingdienst*).

Some legal aspects

Tobacco related crime

In the Netherlands tobacco related crime is mostly, but not exclusively, dealt with by the agencies enforcing excise regulations. 'Cigarette smuggling' is a generic name encompassing a number of different offences, but all concerning tobacco related products. The most frequent crime dealt with in the case files is the evasion of excise duties (and along with that import duties and VAT). In many cases the evasion is accomplished by forging of trading documents, such as the CMR (which stands for 'Convention Relative au Contrat de Transport').

Many 'smuggling' schemes involve counterfeited cigarettes. The counterfeiting of and trafficking of cigarettes is a violation of intellectual property rights (in which the tobacco manufacturer, who is holder of the brand name, is victimised). In the case the buyer (at any level) is unaware of the counterfeit nature of the products then from a legal technical perspective, he is a victim of fraud too. Though, to the extent information about formal charges have been included in the case files cigarette traffickers are never charged with defrauding customers. In reality the customer is seldom unaware of the counterfeit nature of the cigarette: even slight differences in taste and aroma are easily detected by a more experienced smoker.

Although at least one case of (ending an) illegal Dutch cigarette production facility was mentioned during the interviews with customs officers, none of the 43 investigated cases included the illegal production of cigarettes as an offence committed by the suspects involved.

The EU

All goods that are brought within the European Union are under the Council Regulation (EEC) No 2913/92. This regulation is implemented in the European Member States by way of specific national regulations. These regulations oblige importers of goods within the European Customs Area that the imported goods are brought under the supervision of the customs authorities and that the import of goods requires registering with the customs office. Subsequently the goods can either be kept under 'customs regulations', meaning that the goods are not further traded within the EU but wait to be transferred outside the EU. Or the goods can be brought into free commerce under condition that the applicable import and excise duties have been or will be paid. Many attempts have been made to harmonise excise rates within the European Area, but thus far these attempts were in vain: each of the member states has still its own excise rates (see the Table 1).

Table 1.
Excise rate per country per 1000 cigarettes in Euros (July 2005)

	Country	Excise rate		Country	Excise rate
1	Latvia	13,48	14	Cyprus	84,86
2	Lithuania	20,49	15	Austria	88,05
3	Estonia	32,54	16	Belgium	102,58
4	Poland	32,96	17	Netherlands	105,04
5	Czech Republic	35,68	18	Sweden	105,73
6	Slovakia	40,17	19	Malta	109,77
7	Hungary	45,57	20	Denmark	113,90
8	Slovenia	53,96	21	Finland	115,13
9	Spain	63,69	22	Germany	127,85
10	Luxembourg	72,30	23	France	160,00
11	Portugal	73,93	24	Ireland	190,64
12	Greece	77,63	25	United Kingdom	227,47
13	Italy	81,90			

Source: Netherlands Customs

Netherlands

In the Netherlands the trafficking of untaxed cigarettes is a criminal offence under the Excise Act (*Wet op de Accijns*). Section 5.1 criminalises the manufacturing of excise goods and the keeping of excise goods for which the required excise duties have not been paid outside a designated excise warehouse (*accijnsgoederenplaats*). Any person in possession of untaxed or improperly taxed cigarettes in an amount exceeding the reasonable amount for personal use[9], can be punished with a maximum fine of € 11.500 or imprisonment for a maximum period of four years. If the amount of evaded taxes exceeds the maximum fine, then this amount can be charged as a fine (supplementary to a fiscal claim regarding the evaded taxes).

In the case of tobacco products the same system is used elsewhere in Europe: excise stamps are attached to the tobacco products. The stamps can be bought from designated custom distribution points. The retail price (on which the amount of excise partially depends) is printed on the stamps. If these stamps are missing or appear to be forgeries and if no proper documents can be shown which provide evidence for a license to keep unstamped cigarettes, it is assumed that the duties have not been paid. Licences to handle untaxed cigarettes are provided to legal tobacco manufacturers and expedition firms, which on a

[9] In the Netherlands up to 800 cigarettes (40 sleeves) is considered the limit for 'personal use'. However, additional import duties need to be paid for any amount over 200 cigarettes.

regular basis deal with cigarettes. Incidental licenses, limited to a specific time, place and amount of cigarettes can also be granted. Because the excises are country-specific, paying taxes in one country prior to import will not exonerate the importer from paying taxes in the country of transit or destination. Buying cigarettes in a country with low excise rates (and paying the duties) in order to sell these below market price in a country with high excise (without paying the duties) constitutes bootlegging. From a legal perspective there is no difference between bootlegging and import of cigarettes without any duties being paid.

Several other laws can be violated during a cigarette smuggling operation. As a part of the smuggling trading documents or tobacco stamps are often forged. If the stamps are 'properly' falsified and therefore it is difficult to distinguish them from authentic stamps, detection by law enforcement can be effectively prevented. Two on-the-spot detection methods, the container X-ray scan and the use of 'sniffer dogs', are circumvented because the cigarettes are transported overtly. A different form of documentary fraud is committed when the cigarettes are transported under the cover of another cargo. In that case the bill of lading is not in conformity with the actual cargo.

Increasingly untaxed contraband cigarettes are actually counterfeit cigarettes: they are packed in cartons with a design exactly copied from existing regular brands. Whether or not the cigarettes are sold *as* brand cigarettes, in either case the Act of Intellectual Property (*Auteurswet 1912*) is violated.

Lately, cigarette smugglers are to an increasing extent pressed with additional charges for participation in a criminal organisation (Section 240 Dutch Penal Code). This development indicates that (large scale) cigarette trafficking is increasingly looked upon as a very serious offence.

The demand for (untaxed) cigarettes

Tobacco consumer goods have a long history in the Netherlands. Today the demand for tobacco products guarantees a steady annual turnover for those (legal) companies who have acquired a firm position in the market. This market is dominated by a few globally operating internationals, such as Philip Morris, Gallaher, British Tobacco and RJ Reynolds. These companies all produce a large number of different brands of cigarettes, some of which are distributed internationally, such as Marlboro and Lucky Strike, while other brands are distributed in a geographically limited area, such as Benson and Hedges and Superkings, which are primarily produced for the British market and Caballero for the Dutch market.

Measurement

Various methods can be used for the measurement of the demand for tobacco consumer goods. In most cases the measurement involves the calculation of the volume of the legal production in comparison to retail and consumption rates. In the Netherlands, unlike for example France, no sales figures of licit cigarettes are available. Therefore, an estimation of the annual consumption is often derived from production figures. Calculating the demand or consumption rate of licit cigarettes is one thing, to estimate the volume of illegally traded cigarettes is quite another. Untaxed cigarettes are only in part produced by the licit companies (Joossens and Raw 2003; Joossens, 2001). The remainder is produced in illegal production sites, often small cigarette factories located in Eastern Europe and the Far East (for example China, Singapore and Malaysia).

Several methods are used to estimate the market share of untaxed tobacco products. One method is the Top-Down Calculation Method, which compares the total retail sale of licit cigarettes with the total of cigarette consumption. The difference between the latter and the former is deemed to indicate the volume of the untaxed cigarette consumption. This method requires the availability of complete and reliable data. Because these are lacking, the Netherlands Customs refrained from this method.

A method which has been used in the Netherlands is the counting of discarded packs. In this method a team of officers collects all cigarette packages thrown away by visitors of a mass event, such as a soccer match. It is assumed that the population of people visiting the event is a representative sample of smokers and that a representative proportion of smokers will have finished their package during the event and throw away the empty package. The proportion between the legal cigarette cartons and hand rolling tobacco packages and their untaxed equivalents is assumed to be representative too. The volume of the black market is calculated on the basis of this proportion and production or sales figures from legal tobacco products. When this method is repeated during a longer period, the proportion of the demand of/consumption of untaxed and legal tobacco products can be estimated more accurately.

The relative volume of the cigarette black market is expressed in a percentage labelled 'penetration rate', which refers to the ratio between the total (estimated) consumption and the (estimated) consumption of contraband cigarettes. Table 2 shows that in absolute figures the cigarette black market increased between 2003 and 2005 whereas the total cigarette consumption decreased. Table 3 shows that in close to 40 % of the cases the fiscal loss was estimated at more than € 500.000. Nevertheless a few high loss cases push the average loss per case to an amount slightly over € 900.000 (Table 4).

Table 2.
Estimated volume cigarette black market in the Netherlands

	2003	2005
Total consumption	17 billion	13 billion
Volume cigarette black market	500 million	640 million
Penetration rate	3 %	5 %
Fiscal loss	€ 55.500.000	€ 87.000.000

Source: Netherlands Customs

Table 3.
Estimated fiscal loss per case – nominal scaling

Estimated fiscal loss in EUR		N	%
10.000 -	100.000	10	27
100.000 -	500.000	13	35
500.000 -	1.000.000	4	11
1.000.000 -	5.000.000	9	24
5.000.000 -	10.000.000	1	3
Totals		37	100
Records (N)		43	
No value (N)		6	

Source: case file analysis

Table 4.
Statistical data estimated fiscal loss per case

Total number of cases	N = 37
Total of estimated fiscal damage in €	33.574.758
Mean €	907.426
Median €	334.191
Highest extreme value	7.727.250
Lowest extreme value	10.207

Source: case file analysis

Factors influencing the demand and supply of (untaxed) cigarettes

A few factors, most of which are deliberately invoked by the government, affect the demand for cigarettes. Some of these factors, such as the typical ban-on-smoking measures, may affect negatively the demand for both taxed and untaxed cigarettes. Other factors, such as a raise of excise on cigarettes, may have an inverse effect: legal cigarettes become too expensive and people not willing to pay resort to untaxed, therefore cheaper, cigarettes. Governments that consider a raise in excise usually calculate the effect on the consumption of legal cigarettes. The key indicator is the price-elasticity of the product. Price elasticity of demand is an elasticity that measures the nature and degree of the relationship between changes in quantity demanded of a good and changes in

its price.[10] A price elasticity of 1,0 means that the demand will drop with the same percentage as that of the increase in price. What governments in general do not calculate is the effect on the demand for illegal cigarettes as a cheaper substitute for their taxed counterparts.

It is generally assumed that the increase in excise (in almost all European countries) of the past decade have led to a decrease in overall cigarette consumption, but most probably it may have led to an increase in the market share of untaxed cigarettes. Another, partially related trend is that the proportion of counterfeit cigarettes has increased at the cost of untaxed genuine brand cigarettes. It is generally assumed that counterfeited cigarettes contain more toxic substances than brand cigarettes. Therefore, raise of excise as part of a discouragement policy may have an adverse effect on public health.

Apart from these health concerns, it is uncontested that any raise in excise provides new profit opportunities invoking existing and aspirant cigarette traffickers to capitalise on the cigarette black market. Van Duyne *et al.* (2003) have labelled this phenomenon the price wedge effect. Any artificial increase in price (in this case the levying of excise taxes) will increase the profitability of trading the goods illicitly, especially when productions costs will remain the same or increase to a lesser extent. Either the black market prices will be raised accordingly (that is, to a slightly lesser extent) and/or the demand for illicit goods will increase because price increase creates an extra incentive to find cheaper but illicit alternatives. This is especially occurring in the case of cigarettes, since people in general find it hard to understand why cigarettes are taxed to such a high rate whereas other consumer goods (either or not equally unhealthy) are not taxed with excise at all. This effect is increased by the fact that smoking is particularly prevalent in lower income categories.

Both on the side of supply and demand incentives will develop as a result of the increase of taxes. These effects can only be partially compensated by additional measures, e.g. by stepping up law enforcement activity (*e.g.* Hornsby and Hobbs 2006; *see also* Joossens & Raw 2003; Joossens 2001).

A 'pushers' market?

There are indications that the demand for untaxed cigarettes exceeds the supply (e.g. Hobbs and Hornsby 2006). Still, the trafficker may experience difficulties in linking supply and demand at a given time. In one case, for example, offenders discussed over the phone the question whether they would accept a substitute shipment of counterfeit Marlboro cigarettes instead of the original brand cigarettes they bought at previous occasions. The supplier of the original brand cigarettes could not continue his delivery because the police had raided

[10] For example, if, in response to a 10 % fall in the price of a good, the quantity demanded increases by 20 %, the price elasticity of demand would be:
20 % / (− 10 %) = −2 (Case and Fair, 1999).

one of the main warehouses and confiscated all cigarettes. Though there is a market for counterfeit cigarettes in the Netherlands as well, these offenders were afraid that their customers particularly favoured brand cigarettes, more precisely Marlboro and that they would not be able to get rid of other brands than Marlboro cigarettes. Generally, the files show that cigarette traffickers rely on quite limited networks: either one or two regular suppliers and up to a dozen of regular buyers (often less). At the retail end of the commercial chain the buyers are not consistent in their demand: in some cases they were reluctant to buy, expressing the fear of not being able to resell the cigarettes. In many cases the cigarette black market showed itself a 'pushers' market in which the suppliers actively seek potential buyers. At first sight this statement seems contradicted by the previous statement that the demand exceeds the supply. Ultimately this is a matter of definition or perspective. The case files provide support for the hypothesis that, ultimately, the demand for *certain* types of cigarettes exceeds what mid-level suppliers are able to deliver. However, this applies only to a certain type of (scarcely available) cigarettes: in the Netherlands untaxed but genuine cigarettes of the brand Marlboro are hugely popular. In general the case files sketch a situation in which mid-level buyers hesitate to buy large volumes of cigarettes because they are not sure whether they will find a sufficient number of buyers to get rid of the merchandise in time.

Interesting in this respect is that it is not uncommon for Dutch buyers to buy from Dutch mid-level suppliers on a credit basis, whereas these mid-level suppliers themselves buy from foreign wholesalers on the basis of advance payment. This indicates a difference in the level of trust which, in turn, reflects the nature of the social/commercial relationships: Dutch counterparts in a transaction are more acquainted with one another and sometimes consider each other friends, whereas the relation with foreign wholesale suppliers is much more of a business-like nature. In addition, it tells us something of the creditability (in financial terms) of the buyers: apparently they are not able to pre-finance their trade and resort to credit facilities provided by the supplier. The reverse side implication of this, is that, apparently, the suppliers do not have more potential buyers then they can serve, because in that case they would be able to select only those buyers who are able to pre-finance their trade (which in turn would result in a mitigation of the risk on the side of the supplier, who will get his money up-front). On the basis of this information the qualification of the cigarette black market as a (at least partial) 'pushers' market seems justified: at the level of negotiating (upcoming) shipments, the supply seems to precede the demand.

An open market with a low threshold

The illicit cigarette market is a relatively 'open' market, meaning that the threshold to enter this market is rather low and that it is fairly easy for newcomers to set up a cigarette trafficking scheme. This can be explained by a few interdependent factors.

As has been argued in the section about the demand for cigarettes, the trafficking of cigarettes is in general not seen as a very serious offence. People knowingly buying illegal cigarettes are aware of the illegality, but do not consider their actions particularly criminal. Consequently, the 'moral' threshold to step into the world of illegal cigarette trafficking is rather low. Especially in case of bootlegging, offenders do not tend to see themselves as criminal crooks, let alone as being involved in a 'criminal organisation', as in the eyes of the District Court, discussed above. After all, they do pay excise (and VAT) in the country of procurement. The low moral threshold expands the range of potential cigarette smugglers and justifies the assumption that –if applicable at all– not merely one but several offender profiles are required to capture the 'typical' cigarette trafficker. Indeed, the case files show a broad spectrum of offender types, ranging from the more 'experienced' criminal shifting between drug trafficking and other illegal activities, to freelance truck drivers smuggling up to several hundreds of sleeves on their (licit) professional journeys throughout Europe.

In addition, the cigarette black market provides ample opportunity to make a good profit. These profit opportunities outweigh the relatively low risks involved. In the Dutch investigation not much information was found on the actual net or gross profits made by cigarette smugglers and/or counterfeiters. The information in some of the case files indicates that at the mid-level (at which cigarettes are traded by the thousands) and at the retail-level gross profits where made of one to two Euro per sleeve of 200 cigarettes. However, it is unknown what the production costs are, e.g. for a sleeve of counterfeit cigarettes or at what price cigarettes change hands at the intermediate stages of the commercial chain. Offenders, in general, are for obvious reasons not very devoted to proper bookkeeping. As a result, it is difficult to obtain reliable information on the profits involved. Nevertheless, seizure data combined with suspect statements during Customs hearings indicate that annual net profits range from several thousands of euros for the relatively small-scale smugglers to hundreds thousands of euros for the large scale and wholesale traffickers. In one case, for example, a large truck with trailer was bought by a network of cooperating offenders, purely for the purpose of smuggling cigarettes. The roof of the trailer was mechanically adjusted in such a way that it contained a space for cigarettes which had to be removed by using a lifting mechanism built in a storehouse and especially designed for that purpose. Together this was quite an

investment which the offenders were prepared to make expecting a proper return.

The high profits may even have greater appeal when the relatively low risks are taken into account. The total of (anticipated) risk is composed of several independent risk factors:

- the risk of single loads being detected and confiscated;
- the risk of being caught for cigarette smuggling and/or counterfeiting;
- the risk of subsequent prosecution and conviction;
- the risk of a severe punishment in case of a conviction;
- the risk of non-matching demand and supply;
- the risks stemming from other criminals e.g. in the case of extortion of one trafficker by another or in case of a rip deal.

As has been stated in the chapter on law enforcement, counteracting on cigarette trafficking is not the top priority of customs and law enforcement agencies. Despite the allegation that cigarette smuggling has become *the* primary source of funding for a number of terrorist groups (Van Dijck 2007), cigarette smuggling has not been declared 'war' like drug trafficking, terrorism and the financing of terrorism. Although several sophisticated instruments are deployed to detect untaxed cigarette shipments and the offenders –container scans, tobacco 'sniffer' dogs and profiling, to name just a few instruments– the huge volume of cargo transported through Europe makes the finding of untaxed cigarettes a matter of luck. Consequently presumably only a fraction of all trafficked cigarettes and the persons involved are detected. The Netherlands Customs rarely track down or request extradition of foreign suspects when these are not apprehended with the other suspects when caught red-handed.

Even when busted, the offender faces relatively mild punishments when compared to other offences. In the Netherlands the maximum prison term for cigarette trafficking is four years (section 97 of the Excise Law).

Another deterring factor is virtually non-existent as far as the cigarette black market is concerned: violence between rival criminals or groups. In general the cigarette black market knows very little violence among competing groups or networks and also very little violence amongst members of the same group or networks. In the Netherlands and Belgium the cigarette black market is constituted by relatively small cooperation structures of (business) acquaintances/friends forming a small group and engaging in commercial relationships with other groups/cooperation structures. Although hard evidence can not be provided, the case files give the impression that networks are limited and that black market participants are not aware of each other beyond these limited networks of three layers, in which traffickers (middle layer) only know their (regular) suppliers (supply layer) and their (regular) buyers (demand layer). Internal and external relations appear to be similar to licit trading relations and

disputes, though evidently not settled by an appeal to the legal system, are not settled by violence (or the threat of violence) either.

However, there are a few cases in which violence or the threat thereof plays a role. In some Dutch cases the suspects, in custody, refused to answer to some of the questions raised by the investigators because of fear for repercussions by the suppliers of the cigarettes. In these cases, it was rather the violent reputation causing the fear: no actual threat or act of violence was reported. In Germany one cigarette trafficker and his daughter apparently had been killed by a car bomb, which allegedly was related to an extortion racket in which the victim refused to pay his 'protection' fee. Though a cigarette trafficker was involved, this violent incident seems to have no relation with cigarette trafficking as such (Van Dijck and Van Duyne 2007). An example of violence and the threat of inflicting harm is found in the English research, which encompassed an ethnographic study into a large scale cigarette smuggling ring organised from the United Kingdom. The key persons in this smuggling operation, in which cigarettes were bought in Luxembourg and France, claimed to have quit their activities after a number of quite successful years. One of the reasons for retirement was that more violent criminals started ripping off the 'runners' by beating them up and threatening them with guns (Hobbs and Hornsby 2006). But again, this is not violence caused by the traffickers themselves.

Summarising one can say that the contraband cigarette market is easily accessible for new players in the field and relatively attractive as well, due to the fact that profit opportunities are only to a minor extent mitigated by the various risks involved.

Amount of cigarettes seized by the Customs

Cigarettes seized

One way of gaining insight in the magnitude of cigarette smuggling is to observe operations at the micro-level and observe the volumes of the payloads of untaxed cigarettes. Because customs investigation practice does not include many long term observations of cigarette smuggling activities –a practice related to the policy of 'short blows' (Kleemans 1999)– seizure data only reflect incidental seizures. From these data hardly any conclusion can be drawn with regard to the overall turnover of cigarette smuggling groups, let alone that the overall size of the illicit trade can be measured. Nevertheless seizure data do inform us about the magnitude of the illicit cigarette trade and the way this trade is organised.

Table 5.
Amount of cigarettes per seizure (in intervals)

		Case file analysis		Seizure sample	
Amount of cigarettes		N	%	N	%
0 -	1.000	0	0	1	0
1.000 -	10.000	2	5	2	1
10.000 -	100.000	2	5	41	13
100.000 -	500.000	6	14	43	14
500.000 -	1.000.000	1	2	33	11
1.000.000 -	5.000.000	19	44	130	42
5.000.000 -	10.000.000	4	9	45	15
10.000.000 -	20.000.000	3	7	11	4
	> 20.000.000	6	14	1	0
Total		43	100	307	100
Records (N)		43		314	
No value (N)		0		7	

Source: Netherlands Customs seizure sample and case file analysis

Table 6.
Statistical data on cigarettes per seizure and case

	Case file analysis: data per case	Netherlands Customs seizure sample: per seizure
Total seizures and cases	n = 43	n = 307
Total cigarettes seized/trafficked	35.7150.319	778.520.696
Mean	8.305.821	2.535.898
Median	2.949.780	1.760.800
Highest value	79.580.000	21.519.790
Lowest value	4.600	800

Source: Netherlands Customs seizure sample and case file analysis

With respect to trafficked number of cigarettes, the most reliable figures are provided by the Netherlands Customs seizure sample, since this sample contains data of a total of 314 seizures (of which only seven did not have data on cigarette amounts). Between 2000 and 2005 more than 778 million cigarettes were confiscated, which on average is almost 130 million per year and 2,5 million per seizure.[11] A single case can involve more than one seizure, e.g. when several storage locations are searched. The lower amount of cigarettes

[11] According to a press release of 12 June 2001, one trafficking group was indicted that year by Public Prosecution of having trafficked over 300 million cigarettes along with 1500 litres of untaxed beverages and hundred thousands of illegal CDs. The main suspect faced six years of imprisonment.

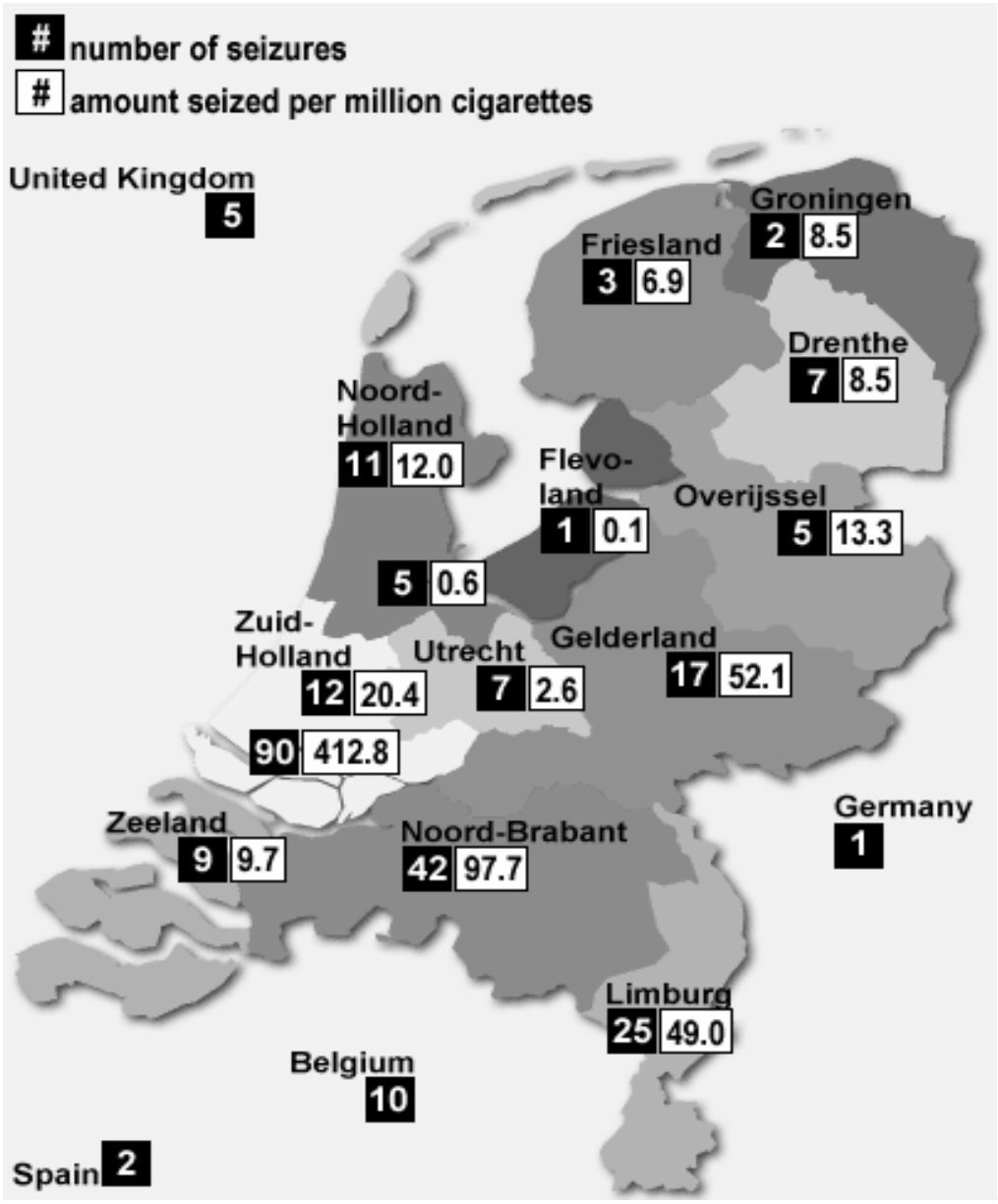
(up to 10.000) are either samples found at another location than the central storage unit used by the offenders, or untaxed cigarettes detected by the authorities in other investigations, e.g. drugs trafficking or other types of excise evasion. Also then the seizure of cigarettes is often reported to the Excise Fraud Knowledge Unit. The relatively high average of cigarettes per seizure of 2,5 million (Table 5) and the even higher average of more than 8 million cigarettes per case (Table 6) provide support for the hypothesis that the Netherlands is primarily a transit country. In line with the metaphor of a trade Delta, these larger volumes are typical for cigarette shipments destined for transit, whereas domestic distribution typically involves smaller volumes which much better meet the more diversified demand of mid-level and retail buyers.

In only 31 % of all registered seizures (period 1999-2005) the country of destination was the Netherlands. In the 43 investigated cases the Netherlands was only in 13 % the only mentioned country of destination. In another 7 % the Netherlands figured as one among several countries of destination. This is partly the result of a frequently occurring phenomenon: cigarette traffickers handling large shipments of contraband tend to take a few boxes either for their own consumption or for distribution among family and friends: a circle which over time grows wider and wider as these friends start to deliver to their friends and family as well. Apart from a few exceptions, the retail level does not appear on the customs 'radar', even when a cigarette smuggling ring is investigated.

Regional differences

In the Netherlands regional differences divide the country into three parts: the western urban region (Randstad) in the mid-west (Rotterdam, Amsterdam, the Hague), a northern part and a southern part (see Figure 3 and Table 7). 60 % of all seized cigarettes is seized in Rotterdam; the three most southern provinces account for 23 %.

Figure 1.
Number of seizures and seized cigarettes in the Netherlands 1999-2005.



Source: Netherlands Customs seizure sample

Table 7.
Number of seizures per county in or related to the Netherlands

Region	Seizures		Cigarettes per million		
	N	%	N	%	Mean
North	53	22	104 M	15	15 M
West	107	45	434 M	62	217 M
South	76	32	156 M	23	52 M
Belgium*	10	4	n/a	n/a	n/a
UK*	5	2	n/a	n/a	n/a
Spain*	2	1	n/a	n/a	n/a
Germany*	1	0	n/a	n/a	n/a
Total	254	100	694.000		
N Records	251				
No value (N)	63				

Source: Custom seizure database

* Seizures outside the Netherlands on behalf of or in coordination with Netherlands Customs.

The vast amount of cigarettes seized in South-Holland and especially Rotterdam is no surprise. Most of the large-scale cigarette smuggling operations involve the use of cargo containers, which are transported either by ship, by train or by truck. The millions of containers passing through the harbour of Rotterdam (which is the largest industrial harbour in the western world) on a weekly basis provide for the perfect cover for all kinds of contraband. The more 'interesting' shipments (from a law enforcement perspective) concentrate in Rotterdam, and naturally the Customs focus strongly on the area of Rotterdam.

Although the southern province of North-Brabant has a long history of smuggling, probably this is not the main cause for the relatively high occurrence of illegal cigarettes traded in this region. Other causes can also explain this activity. First, the large number of transport companies and, related, the number of warehouses which are situated in the southern region. Second, the geographical position. Neighbouring two 'popular' transit countries, Belgium and Germany, and in the proximity a number of transport hubs, such as the ferries crossing the Channel to the United Kingdom, the southern region, more than the eastern or northern region have become an important transit region.

Contraband cigarette geography

International trade

The trans-national nature of cigarette smuggling can be reflected in at least two sets of variables: those concerning the nationality, place of residence and country of birth of the offenders and those concerning the countries of origin, transit and destination of the cigarettes. In this paragraph only the latter are discussed.

Both cigarette consumption and cigarette trafficking are global phenomena. As far as the cross-border trafficking is concerned, differences in excise rates and in retail prices invoke cross-border trafficking from 'cheap', low excise countries to more expensive, high excise countries. Sometimes cigarettes are trafficked in a U-turn construction: legally produced in and exported from country A to country B and clandestinely smuggled back into country A (Von Lampe 2006b). In our investigation we did not come across such a scheme.
The data sample contains several data sets with geographical indications of cigarette smuggling: what is trafficked from where to where? And: in what volumes and by what means?

a. Origin of the cigarettes

The findings in this section are based on two data samples: the case files and the electronic cigarette seizures file of the Customs. For a survey of the countries of origin they have been combined. In the combined set the top five countries of origin are China, the United Arab Emirates, Lithuania, Malaysia and Poland. Whereas Poland is the most frequently mentioned country in the case files, it does not seem to play a very important role in the seizure data.

Table 8.
Country of origin

	Seizures sample (314 seizures)		Case file analysis (43 cases)	
Country	N	%	N	%
China	5	17	31	17
United Arab Emirates	1	3	18	10
Lithuania	4	13	16	9
Malaysia	0	0	13	7
Belgium	0	0	12	7
Germany	1	3	10	6
Rumania	0	0	9	5
Latvia	1	3	6	3
Poland	7	23	6	3
Russia	2	7	6	3
Austria	1	3	4	2
Hungary	0	0	4	2
Netherlands	2	7	4	2
Other	6	20	39	22
Totals	30	100	173	100
Records (N)	43		314	
No value (N)	13		141	

Source: Netherlands Customs seizure sample and case file analysis

The difference in the two samples might be due to the data included. The seizure set contains data on 314 individual seizures, among which are 'single' seizures not related to any investigation or any identified suspect. The case files were randomly selected from a larger sample (see above) but the selected cases did not include mere reports of seizures: all cases did at least have one suspect and most of the cases involved a more or less full investigation. Poland appears as a frequent country of origin in these case files, simply because the cigarettes are often trafficked from Poland by truck: the apprehended driver provides a first lead in the investigation. Cigarettes originating from the Far East are often transported by container over sea and detected in Rotterdam Harbour without any lead to justify further investigation (and the allocation of means involved).

Table 9.
Amounts of cigarettes seized or known per country of origin

	Total cases	Total amount	Counterfeit /genuine
Netherlands	1	33.165.000	Both
Malaysia	1	10.023.000	Both
China	4	32.692.400	Counterfeit
Hong-Kong	1	9.430.000	Missing data
United Arab Emirates	1	4.400.000	Genuine
Greece	1	4.00.0000	Missing data
Germany	1	2.708.939	Counterfeit
Poland	3	6.529.800	Counterfeit
Russia	1	700.200	Counterfeit
Switzerland	1	469.800	Missing data
Austria	1	243.440	Counterfeit
Lithuania	1	140.000	Counterfeit
Latvia	1	100.420	Missing Data
Totals	18	100.602.999	

Source: case file analysis

Table 9 shows –to the extent included in the records– shipments with counterfeit cigarettes are the rule. The exception is the Arab Emirates.

b. Destination of the cigarettes

In general the top destination countries are all countries with a relatively high excise rate. Cigarettes flows lead to the highest excise rate point, like water tends to flow to the lowest grounds.

Table 10.
Country of destination of the cigarettes

		Seizure sample		Case file analysis	
Country of destination	Excise rate 2005 in Euro per 1000 cigarettes (rounded)	N	%	N	%
United Kingdom	227	104	44	25	51
Germany	128	7	3	0	0
Netherlands	105	75	32	16	33
Belgium	102	13	5	1	2
Ireland	191	20	8	4	8
Bulgaria	n/a	0	0	1	2
France	160	0	0	0	0
Portugal	74	3	1	1	2
Russia	n/a	0	0	0	0
Spain	64	2	1	0	0
Sweden	106	0	0	1	2
Other	-	13	5	0	0
Total		237	100	49	100
Records (N)		314		43	
No value (N)		77		0	

Source: Netherlands Customs seizure sample

The findings of the case file analysis and additional seizure data support the hypothesis that the United Kingdom is by far the most prevailing country of destination (*see for example* von Lampe 2006b). In our files the U.K. appeared in 51 % of all records in which at least one country has been identified as destination country (no value-records were not counted) and in 44 % of the Dutch seizure files. By implication, between 40 and 50 % of the means allocated by the Netherlands Customs to counteract contraband cigarette trafficking is, in fact, spent in the service of the British excise system.

Offender characteristics

Though scarcity of data prevents making firm conclusions, the low threshold of the cigarette market may very well be reflected in the data on cigarette offenders in the Dutch case files. The scope of this paper does not allow to include all data on offender profiles, hence only some 'highlights' are presented here.

a. Age

Similar to the findings of Van Duyne in 2003, the average age of the offenders is rather high: slightly less than 40 years, with a median age of 38 years.

Table 11.
Age of offenders at the time of the investigation

Age category	N	%
15 – 20	22	10
21 – 30	44	20
31 – 40	62	28
41 – 50	46	21
51 – 65	44	20
65+	2	1
Total	220	100
Records (N)	272	
No value (N)	52	
Mean:	40 years	
Median:	38 years	
Range:	18-79 years	

Source: case file analysis

b. Nationality

Due to the inherent cross-border dimension of cigarette trafficking, cases often involve suspects of different nationality. Table 12 displays the number of nationalities of the total sample of offenders.

Table 12.
Nationality of the offenders per region

	Nationality	Residence	Origin
	%	%	%
Netherlands	76	73	66
Belgium	1	6	2
Poland	6	5	5
Germany	1	1	1
United Kingdom / Ireland	3	3	4
Middle East	8	1	8
Central or East Europe	3	3	11
Baltic States	1	2	2
Other	1	6	1
Total	100	100	100
Records (N)	272	272	272
No value (N)	30	61	79

Source: case file analysis

c. Employment situation

Of the general employment situation we are less well informed because of missing data. Nevertheless the findings shed some light on the social situation.

Table 13.
Employment situation of the offenders

Employment / income source	N	%
Employed (no extra info)	58	43
Employed by other	27	20
Self-employed	25	19
Unemployed (no extra info)	12	9
With social security allowance	7	5
Without social security allowance	1	1
Retired	4	3
Total	134	100
Records (N)	272	
No value (N)	138	

Source: case file analysis.

Of 134 suspects 110 (82 %) were employed one way or another. In most cases (43 %) no extra information is provided about the nature of the employment or

such information was not or could not be extracted from the additional information (such as job description). Approximately 18 % was at the time of investigation employed in the service of a third person or firm. The 'self-employed' category (19 %) is quite ambiguous, because this category includes those persons who have established a small legal entity (e.g. in the Netherlands a single-person-firm), in which the suspect/owner appointed himself as director, manager or employee. In some cases these firms were set up as bogus firms and strictly used for the purpose of trafficking untaxed cigarettes.

From the data on unemployed persons it can be concluded that the majority benefits from a social security allowance. These people seek additional income by illegally buying and selling cigarettes. Needless to say, that in these cases the state is doubly wronged, because people are not allowed to receive social security benefits while making an illegal earning at the same time: the social security fraud supplements the excise fraud.

Of 47 persons (a meagre 17 %) in the sample a job description was provided. Not surprisingly in 54 % the offenders were truck drivers, who can be involved in cigarette smuggling schemes in various ways: drawn into it after a number of unwitting transports; as a freelance driver asked in the local pub or by acquaintances; organising contraband transports by themselves. Sometimes being a truck driver is merely a practical skill and not (any more) the real profession of the suspect with a longer criminal career. It nevertheless may show up as a profession in the files. We defer more detailed description to the section in which the *modi operandi* are discussed.

The sample included five tradesmen (11 %). These are mostly registered as free entrepreneurs having one or several firms in their name. The hauling of bulk volumes of contraband cigarettes hidden in other cargo requires the use of a licit front firm to divert attention. Except for the involvement of one security employee, no evidence was found indicating corruption.

Modus operandi

The modus operandi is largely determined by a limited number of factors such as:

- general product features of cigarettes and tobacco;
- the volume of the shipments / the level of (commercial) exchange;
- the route from the location of origin to the location of destination;
- customs practice and law enforcement practice;
- the expertise and skill of the smugglers.

Cigarettes are light-weighted as well as voluminous. The light weight enables traffickers to smuggle cigarettes on air flights and still make a profit, but the sheer volume of a sleeve and a master case (mostly 50 sleeves) put a limit to air

trafficking. The larger shipments are transported in containers which can be loaded onto a container ship or picked up by a truck and trailer. Transport in containers by train is frequently used by legal tobacco manufacturers. However, no evidence of smuggling over rail-road has been found. Transport over land is mainly carried out by truck, whether or not in a container.

Table 14.
Modus operandi of cigarette traffickers

Modus operandi	N	%
Hiding the contraband in hidden rooms	9	19
Use of cover load (dispensable)	13	28
Deception	5	11
Use of cover load (non-dispensable)	5	11
Use of cover load (only `paper` cover)	3	6
Decoy measures	4	9
Bribery	1	2
Smuggled in person cars without any deck load	1	2
Appointment by telephone	1	2
Meeting at (semi)public location	1	2
Document fraud	1	2
Hidden rooms in cover-load	1	2
Smuggling by hiding goods in trailer	1	2
Use of cover packaging	1	2
Total	47	100
Records	43	
No value	17	

⋆ This amount may exceed the total of 43 cases, since multiple modi operandi may be used in one case.

Source: case file analysis

Tobacco has a very particular smell, which enables the customs to make use of specialised tobacco 'sniffer' dogs. In at least one case the offenders had hidden the cigarettes in wooden tables, hoping that the wood would prevent the 'sniffer' dog from detecting the actual cargo. In another case a smuggler/truck driver conducted the legally mandatory decontamination of his trailer (he transported chickens on his commercial trips to Poland) just prior to passing the boarder control. It is assumed that the strong gasses released during the decontamination procedure would deter the customs from taking a closer look in the seemingly empty trailer. However, the suspect in this case denied that he used the decontamination as a decoy measure. In general it can be observed that

smugglers only rarely deliberately choose some kind of cover load to prevent detection by scan or 'sniffer' dog.

Cover loads are sometimes chosen for other, specific reasons, such as the capacity to hide cigarettes or the ability to create secret compartments. In the case of bootlegging, often no special measures are taken to hide cigarettes: the sleeves are packed in plastic bags, weekend bags or standard suitcases. Sometimes use is made of existing hidden rooms, such as the empty space within a cooling device in a truck or the space behind the wind shield on top of the roof of a truck. In other cases secret compartments are constructed in the vehicle, such as in the case discussed above, in which a double roof was constructed on top of a trailer. These hidden rooms do not require the forgery of the bill of lading and other transport and customs documents, since no cover load has to be presented explaining the volume of goods inside the vehicle.

This is different in the case where use is made of existing or constructed hidden rooms within the cargo which functions as a cover load. In one case empty computer hulls, which were in accordance with the truth reported as shells (and not as working computers), functioned as boxes for the cigarettes. The cases were probably imported under the disguise of a firm dealing in hardware and which showed up in another investigation, also included in the files. In another case a number of garbage bins were stashed into one another after the bottoms had been cut out. This created one large open space in which the cigarettes were hidden. The massive amount of daily international pallet transports triggered a smuggling group to construct hidden spaces in the blocks supporting the pallet surfaces. In general three types of cover load can be discerned:

- legitimate, non-dispensable payload;
- dispensable (fake) payload;
- fake payload altered for the hiding of the contraband.

The legitimate cover load sometimes represents true commercial value and is not dispensable. This type of cover load is used when smaller volumes are smuggled, e.g. by individual drivers. A legitimate load and a real transportation agreement (with genuine and mostly unwitting consignees) provide for a pretext and justifies the trip; a limited number of cigarettes (up to a few of thousand sleeves) is smuggled along. In many cases the cargo merely functioned as cover load and did not represent any actual commercial value. Traffickers did not really care what happened with it; if they could make some profit out of it then it was okay, but otherwise the goods were just discarded. As has been seen in some of the case descriptions above, the cover load is modified (e.g. pallets, electricity frames, waste bins, tables, doors) for hiding the contraband. To profit from the investment in effort and money the adapted objects are often recycled and used for multiple shipments in a row.

Sometimes there is no 'hidden space', e.g. when the cover load literally forms a front for the sake of outside appearance, whereas the contraband is stashed in the middle of a pallet or container. One case involved large scale transports over land through Germany to the Netherlands and Belgium by a convoy of trucks under the cover of an actual load of wooden beams. The smugglers were very cautious. The first and last truck contained only the beams and no cigarettes. The trucks in the middle contained wooden beams to keep up the appearance in case of a superficial routine check by the customs. The cigarettes were dropped off in a number of warehouses in the Netherlands, and the trucks ware (re)loaded with additional wooden beams. With this cargo the trucks would drive to a customs office in Belgium to declare the cargo. The wood served well as a cover load as it was recycled for an undetermined number of transports, making use of the fact that wood does not have an expiration date. This was not the case with another group of smugglers who once used pears as cover load. In the end the offenders had to put some extra effort in getting rid of the pears which began to rot. (In the end the pears were taken over by a sheep farmer as food for his live stock), after being declined by a syrup manufacturer because of the poor quality).

The case files often mention the use of blank boxes with no print on them. Sometimes boxes containing cigarettes have the outward appearance of untaxed products, such as grocery products, with label, bar code and other commercial features.

Different forms of hiding require different levels of organisation. In the case of the boxes with a fake print, these boxes or the prints have to be designed or copied and ordered. In the case of the hidden double roof a mechanic was involved who designed and built the construction, including a lifting mechanism to lift up the roof. In the case of the wooden beams a sufficient number of beams were kept in storage in the Dutch warehouses to replace the cigarettes after unloading. In case the smugglers do not themselves run a transport company, they need to arrange for the transport. Often free-lance truck drivers, owning their own truck or driving the truck of their unwitting employer, are involved.[12] As in regular business the smugglers may run into practical problems which need to be solved at the spot. In one case an unwitting hired truck driver backed off from transporting a container once he sensed something was wrong with the cargo. The smugglers had to seek for a replacement, but they forgot to inform the second driver about the particular type of container. Having arrived at the spot he was unable to take away the container because its unusual height required a special type of trailer. The smugglers had to arrange for a third driver.

[12] It is quite common practice for transport firms to allow the truck drivers in their service to use the firm's trucks in the weekends and on days of leave to make a small extra earning.

Underworld-upperworld symbiosis

Cigarette smuggling almost always involves some kind of interaction between what is called the 'upperworld' and the 'underworld'. This section will discuss the legal-illegal nexus of cigarette smuggling, in particular the use and abuse of legal entities as cigarette smuggling vehicles or as (unwitting) providers of facilities and tools. Whereas the smuggling of cigarettes, self-evidently is an illegal activity and therefore has some 'underworld' aspects (black market, hiding of illegal nature of the activities) many aspects of contraband cigarette trafficking invoke the smuggler interact with upperworld society and make use of upperworld infrastructure:

1. Brand cigarettes are by definition produced by legally operating tobacco manufacturers[13];
2. In the case of bootlegging cigarettes are bought from legitimate suppliers and excise is paid in the country of procurement;
3. Larger quantities of cigarettes and shipments with a larger volume need to blend in the overall handling of legal goods. Use of the normal procedures will give the operation an outward appearance of legality;
4. In case the cigarettes are sold 'under the counter' a legal (tobacco) store or pub may serve as an illegal distribution point.

Ad 1. Although it is commonly assumed and in some cases also proven that some tobacco manufacturers have been (and are) wittingly involved in the supply of cigarettes to the black market (or should have been aware), these firms operate on a legitimate basis. The bulk of their production and distribution activities are in accordance with the legal provisions of the applicable jurisdiction. In general, these tobacco manufacturers can not be considered part of the 'underworld' but unless their brand cigarettes are stolen by cigarette smugglers, the existence of duty unpaid brand cigarettes indicate some legal-illegal interaction at this level of distribution.

Ad 2. As has been discussed above cigarette smugglers do not always acquire the cigarettes from illegal sources; sometimes they buy these legitimately from legal suppliers. In one case, for example, the 'smugglers' ran a grocery store in

[13] Although frequent reference is made to multinational tobacco manufacturers, such as Philip Morris, British American Tobacco and Japan Tobacco, as wittingly supplying the cigarette black market, both in the past and in the present (see e.g. Joossens and Raw 2003, Joossens in Boucher 2002, Von Lampe 2006a), a major breakthrough was the agreement between Philip Morris and the European Commission, in which Philip Morris, among other things, agreed to pay the excise duties for each duty unpaid genuine PMI brand cigarette that is confiscated. (In fact this might serve as an incentive to PMI to deny the genuineness of cigarettes or (in a worst case scenario) to produce packaging that give genuine brand cigarettes the appearance of counterfeit. It is intriguing in this respect that the Netherlands Customs seek close cooperation with tobacco manufacturers in determining whether packaging of confiscated cigarettes indicates the counterfeit nature of these products).

the Netherlands and bought the Spanish cigarettes in regular Spanish supermarkets for the local retail price. The suspects were not professional smugglers, but the evasion on the excise duties on cigarettes (and alcoholic drinks) had become an intrinsic part of their import of Spanish specialities. In this particular case, all phases of procurement, transport and distribution were in the legal framework of their grocery shop operations.

Ad 3. The legal-illegal interaction most commonly observed in the case files is the use of legal entities to provide a legitimate appearance to the illegal handling of contraband cigarettes. Cigarettes and other tobacco products are too voluminous to keep the handling of these goods hidden in the underworld in cases of large scale transport. This is bound to lead to the use of legal entities to cover the illegal nature of the contraband (*see also* FATF 2006). Two types of (front) firms appear in the files with some frequency: the import-export firm and the transport firm. As can be observed in Table 15 in 42 % of the cases there was no use or no known use of legal entities. This figure has to be interpreted with some caution. Finding out and recording the use of legal entities is not a top priority in each of the smuggling cases. In many cases the suspects are simply apprehended when repacking the contraband and no further investigation is conducted into the organisational aspects. The involvement of legal entities involvement may vary.

Table 15.
Involvement of legal entities

Involvement	N	%
No (known) use of legal entities	20	42
Legal entities set up for illegal purposes	14	29
Legal entities originally set up for legal purposes	9	19
Unwittingly misused for illegal purposes	3	6
Name misused for illegal purposes (identity theft)	2	4
Total*	49	100
Records (N)	43	
No value (N)	0	

* This amount my exceed the total of 43 cases, since (multiple) legal entities can be used in multiple ways in one case.

Source: case file analysis

In the remaining 58 % of the cases at least one legal entity was used. In 29 % the entity was set up for the purpose of facilitating illegal activity. In 19 % the entity was not started as a cigarette smuggling vehicle, but as a legal firm which somehow got involved in the contraband cigarette trafficking. This involvement may vary from the take-over of the firm by a person who intends to utilise the firm for cigarette smuggling to a transport company that still func-

tions as such, but in which the drivers smuggle clandestine loads of cigarettes, including the company owner himself. In seven cases the mere identity of the firm was abused, for example, mentioned as consignor or consignee on the transport documents. Sometimes, to uphold the licit appearance a 'man-in-the-middle' acts as a representative of the firm, e.g. when further inquiries are made by the expedition firm transporting the goods. In another case, a suspect stepped in the shoes of an immigrant company owner who, most probably, had left the country. He conducted the business in the immigrant's name and pretended to be the rightful owner and representative of the firm.

In most cases, the principal shareholder or owner of the entity was one of the main suspects. In some cases a minor suspect or involved person functioned (wittingly or unwittingly) as a front man. In one case, the main suspect proved a real juggler in front firms. He even lured his son and his son's best friend into the illegal business. His son was wittingly involved and caught because he continued a VAT carrousel fraud for too long, which in the end caught the attention of the fiscal police. He ignored his father's timely suggestions to appoint a front man and the customs had no difficulty in connecting the fraud to the son. His friend was lured into the cigarette business by the father, under the false pretence of helping him set up his own business. He arranged a firm for him and suggested he start trading in DVD and CD cases and (it is assumed) empty DVDs and CDs, whereby he introduced him to some business partners. The investigation revealed that this was a setup in which the firm, formally owned by the somewhat naive friend, was used as a front to smuggle cigarettes to the United Kingdom. During previous trips the main suspect had discovered that the material of which CDs and DVDs were made effectively shielded the rays of the scan used by the customs to detect hidden loads.

The main suspect of this particular case showed himself a true 'firm'-juggler. He had bought an empty shelf company from a dubious attorney office in the Netherlands, who advertised corporate constructions under the slogan 'The legal way to evade taxes'. The corporate structure bought by the suspect was a holding encompassing multiple entities, of which at least one was located in Panama. To fellow suspects the main suspect spoke of 'divisions' of his firm: plans which needed further development in the near future: a snack bar and a restaurant ('food' division), an import/export division, a transport division, *et cetera*. The suspect, who also trafficked amphetamine and Kammagra (some kind of illegal Viagra), combined heroin with cigarette trafficking under the false pretence of exporting flowers from the Netherlands to the United Kingdom. He was also suspected of money laundering but no additional clues to underpin this allegation were found in the customs files (which focused on the cigarette part).

Criminal cooperation structures

There are several parameters which enable us to rate criminal cooperation. One of these is the number of suspects or involved individuals identified during an investigation. One has to be careful not to label such a concentration of persons *a priori* as a group or a network, because that might easily invoke the idea of a more structured cooperation form than is actually the case. In fact, the labels 'group' and 'network' must be applied with due caution: either on the basis of an well-informed interpretation of the case under investigation or, more methodically, by setting quantitative standards of modalities of interaction (frequency, interval, type, *et cetera*) between two or more offenders. Although we included some data in the database for this purpose, here we will not elaborate on the results or methods to quantify offender interaction.

Labels denoting common 'roles' in a criminal cooperation, such as 'leader' or 'ring-leader', are easily attached to individuals, but again may falsely invoke the image of a 'group' with well defined boundaries indicating who does and does not belong to this group. In the reality of cigarette smuggling[14], however, offender structures are mostly *ad hoc* or of an undetermined duration as long as a certain composition of people yields success. These offender structures do not work with membership lists nor does the notion of belonging to a group seem very pivotal to the activities if the various offenders. Dyadic ties, therefore, are more correctly described in term of interaction frequency, intensity and, when possible, in terms of hierarchy (who tells who what to do and whose authority seems to be accepted in these matters?). Sometimes these indicators can be deducted from telephone conversations in which offenders clearly demonstrate that a certain occurring problem is a shared responsibility (in which the offenders both try to come with a solution and seem willing to help each other out) or that the burden of damage or compensation for the damage rest on the shoulders of one persons in particular. The use of terms such as 'we' and 'us' opposed to 'they' and 'them' may indicate the division line between one 'group' and another.

Container shuffle

The group of people involved in a number of container thefts involved no less than 21 suspects. Most of them worked for an expedition firm in the harbour of Rotterdam, at the premises of which containers were stored. The files tell us the story of two thefts involving two containers per theft. Two desk employees at the expedition firm were informed about the arrival of two containers containing cigarettes. Subsequently these people informed the organiser and main suspect which had

[14] One needs to bear in mind that this social reality is not accessed directly, but through the Netherlands Customs case files, which already puts an extra filter between the researcher and the social reality he wants to study.

recruited several helpers for various tasks. These included first the removal of the containers from the premises and bringing them to another place where they could be opened and unloaded. One employee of the expedition firm was assigned the task to watch the firm's moving security cameras to prevent recording. Two truck drivers were recruited (not at the same time) to pick up the container and to return it after it was emptied. A female security employee (who worked for a private security firm) was bribed to assure a safe exit when leaving the premises with the container. The main suspect had arranged a storage facility at which the containers were opened and emptied. There the containers were placed out of sight by positioning two other trailers in such a way that the stolen container was invisible from the street. Two accomplices were recruited to provide for extra bolts to replace the bolts in the cargo door because these were destroyed in the process of gaining access to the container. By removing the bolts, and replacing them afterwards with substitutes, the seal on the door remained intact and the theft would only be discovered when the containers reached their final destiny. The emptied containers were returned to the expedition firm and placed into their proper position by another accomplice. Apparently the containers were not very quickly reported stolen by the non-involved employees of the expedition firm. This quite elaborate organisation of cigarette theft had one major weak spot: sooner or later the victims were to find out that the cargo was stolen. The informed police traced the whereabouts of one of the containers reported stolen and traced the 21 suspects who were arrested.

In cigarette trafficking the ties between these 'groups' and individuals within a cooperation structure are primarily of a commercial nature. For example, a 'group' of Dutch suspects buys shipments of cigarettes from a group residing in Poland. Though dealing with only one or two 'representatives' of the group of Polish suppliers, the Dutch suspects believe they are dealing with a larger group of whom they do not know anything, including the number of people or identity of the persons involved. Although quite often reference is made to the 'big unknown bosses' in Eastern Europe, both by suspects during police hearings and by custom officers during the interviews we conducted, virtually nothing is known about these alleged leaders. The image of a hierarchically structured organisation controlling a large part of the commercial chain of cigarette trading, contrasts with the findings in Belgium and the Netherlands, where offender groups seem to be structured according to (often very loose) lines of friendship and/or family.

Table 16.
Number of persons involved in a case

Case file sample		
No. of persons involved	N	%
1	8	19
2	13	30
3	3	7
4	3	7
5	2	5
6 - 10	7	16
10 -15	3	7
16 -20	2	4
> 20	2	4
Total	43	100
Records (N)	43	
No value (N)	0	

Source: case file analysis

As can be observed in the above Table, the largest cases contain information on more than 30 persons. Again this does not imply that all these persons belong to one and the same 'organisation'.

In one, rather typical, cigarette smuggling case, included in the Dutch sample, 18 suspects were involved of whom 12 were arrested. However, as is often the case, the exact role of all suspects is not always known to the customs or documented in the files, as is documented by the following case.

Dark Coffee

An amount of 4.400.000 cigarettes was detected behind a cover load of wooden coffee tables in a container in the harbour of Rotterdam. A tobacco sniffer dog detected the cigarettes during a routine check. The Rotterdam Customs decided not to seize the cigarettes immediately, but to observe the container and to follow whatever lead might present itself. The container was picked up by a number of suspects and brought to the Hague, were it was unloaded. During the unloading the first suspects were apprehended and the cigarettes seized. The investigation showed a number of interesting details.

It appeared that the main suspects operated an import- export company. Under the cover of importing (and exporting) legitimate goods, such as the wooden tables, cigarettes were smuggled into the Netherlands, repacked in smaller loads, either for distribution in the Netherlands or to be exported to the United Kingdom.

The use of a legal entity in the form of an import-export company is quite com-

mon among cigarette traffickers. In this particular case the main suspect not only took over an existing (shell) firm, but also took over the identity of the former owner, who –after some further investigation– appeared to have migrated back to his home country Iraq. The firm had operated (and was still registered) both as a labour agency and as a furniture trading company.

Another suspect was apparently involved either as supplier or as spokesman for the actual suppliers, possibly two Turkish Cypriots, who never came in clear sight of the customs. Another suspect, a Greek, acted has his aide, taking orders to meet the buyers (among whom was the main suspect) and to assist in all kinds of affairs. According to some suspects this hierarchical relationship was at least partially related to previous and ongoing business relations, concerning some real estate deals and the acquisition of a RoRo-boat (roll-on-roll-off-boat). If money requests and payments are considered key factors in determining the actual hierarchical and cooperation structures in a group of offenders, then this case proves a hard nut to crack. Although the Greek suspect executes the tasks requested by the spokesman, it is this spokesman who repeatedly requested money from the Greek, presumably to cover the costs made by the main suspects, who above have been identified as the buyers (?). According to wire tap accounts, the money ultimately, should be provided by the Turkish Cypriot principals, for whom the Greek apparently works as a contact person. In his testimonies the spokesman denies any command over the Greek's activities, claiming the opposite, namely that he is a subordinate of the Greek who acts on behalf of the actual principals. The spokesman depicts his role as that of a commissioner intermediating between the main suspect as buyer and the Greek suspect as supplier.

Wire tap reports also reveal that the main suspect has plans to continue the cigarette smuggling activities in the future and he discusses with a co-offender the possibilities of starting a (bogus) firm under his own name and without the need of using another person's identity. It would surely make things easier for him.

The main suspect does not entirely trust his Greek partner in smuggling affairs or the mysterious suppliers in the background. In (tapped) telephone conversations he frequently expresses the fears that the suppliers might use the cigarette shipments to smuggle (other) forbidden substances, such as drugs, something which the main suspect does not want to get involved in.

The main aide of this suspect is apprehended during the raid as described above, while he was unloading the cigarettes with two or three other suspects who were also apprehended. Investigation revealed that this aide was the handyman of the main suspect, helping him with all kinds of practical issues because of his better knowledge of the Dutch language.

Later, after being caught, the main suspect will declare to the customs investigators that he was unaware that the cigarettes were imported illegally and that in his opinion all taxes and duties had been paid. Not a very reliable statement in the light of the hiding of the cigarettes in wooden tables and the use of a stolen identity. However, it might be the case that this main suspect did not even know the cigarettes were hidden in tables, a fact which might not only exonerate him to some extent,

but also degrades him to a much 'lesser' suspect in terms of criminal cooperation and hierarchy.

In the customs hearing the main suspect repeatedly expressed his fears for the spokesman suspect, claiming that he might be a member of the mafia, an allegation which has been firmly refuted by the concerned person.

Conclusion

Cigarette trafficking will continue to exist, at least as long as two conditions are fulfilled: 'punitive' high excises and the national differences between geographically neighbouring countries. The huge and constant demand for cigarettes and the moral indifference towards untaxed, hence cheaper, cigarettes have created a black and grey market with plenty of profit opportunities. The cigarette black market is characterised by a low threshold, enabling all kinds of individuals to step in and get a piece of the action. Much like the consumers of (untaxed) cigarettes, cigarette traffickers are mostly ordinary people. The open market attracts truck drivers, merchants, entrepreneurs and even some pensioners venturing into cigarette trafficking to make an extra income by organising or participating in a profitable trade, the victim of which is only the Tax Service (and ultimatley the tax payer). This does not mean that cigarette smuggling is not a form of *organised* crime. Untaxed cigarette import, export and/or domestic distribution require a great deal of organisation and cigarette traffickers never act alone (except 'retailers'). However, a description of the involved 'groups' and 'networks' can do without the rhetoric usually connected to the 'organised crime' theme. Violence or even the threat thereof is virtually absent. A few exceptions aside, criminal cooperation structures are characterised by relative loose ties between one or two key organisers and a limited number of accomplices. The exceptions concerned a group of cigarette stealing employees working at the same expedition firm, or larger groups of multi-national composition trafficking cigarettes over a longer period of time. The networks of the central organisers seldom reach farther than one or two suppliers (and occasionally one or two contact persons) and up to a dozen of individual buyers. No indications have been found that trafficking groups are aware of or know other groups active in the same business, nor was any awareness found of central market players dominating 'the scene'.

In case of mere transit, e.g. to high excise countries such as the United Kingdom and The Republic of Ireland, contacts were maintained with only one or two regular wholesale buyers. Ties between networks/groups of cigarette traffickers are primarily of a commercial nature. This, and the fact that there is no evidence of any rivalry between groups claiming monopoly over

territory, may explain the lack of violence. Hardly any evidence of disputes or dispute settlement has been found.

Profits are generated by the transhipment or redistribution of large shipments, which vary from several hundreds of thousands of cigarettes up to 20 million sticks per shipment. To a minor extent, cigarettes are transported by airplane or person's car; most trafficking involves the use of trailer trucks and/or containers which are transported around the globe by ship. Both the 'Northern' and the 'Southern' trade belt, as identified by Van Duyne (2003), seem to reappear in the two data samples analysed in this study. Some unexpected findings, such as a cigarette route in reverse direction to Southern Europe, need further investigation.

Cigarette traffickers are entrepreneurial business people trying to deceive the Customs and the Receiver by creating an outward appearance of legitimate trade. To this purpose use often is made of legal entities, which can be deliberately established for the illegal purpose or which are existing entities, providing opportunity and a platform for (gradually expanding) cigarette trafficking activities. Those offenders who know how to set up a (front) business and play the game according to the rules of business and good trademenshipXXXXX, will have a considerable better chance of avoiding Customs interference and defy the Dutch government to discourage the bad smoking habit by manipulating the market.

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Cigarette black market in Estonia[1]

Anna Markina[2]

The problem

Before analyzing recent developments in the cigarette black market in Estonia, it is useful to look back to the early 2000s when Estonia made the required steps to join the European Union. One of the requirements of the EU was harmonization of excise taxes on cigarette and tobacco. To comply with these criteria the Ministry of Finance has prepared a schedule for a gradual increase of excise taxes for the period 2001–2009.

For an ordinary smoker the harmonization of the excise tax meant nothing else than a considerable increase in cigarette prices within a relatively short period of time. One of the main reasons for such increase was to reduce price differences between the 'old' and 'new' EU member states and in this way reduce the driving factors for cigarette smuggling within the EU. The second argument, mostly brought forward by the health organizations stressed reduction of smoking. In fact, research has shown that higher cigarette prices could result in decreased cigarette consumption but this may have different effects on price sensitive smokers. This category of customers may seek lower priced or tax-free cigarette sources as a strategy to maintain their smoking behaviour (Hyland *et al.*, 2005).

A study by the Estonian Institute for Economic Research (Ahermaa *et al.*, 2002) found that 60 % of the respondents were ready to purchase illegal cigarettes as a reaction to a price increase. In general, the pre-accession report on the influence of cigarette excise tax increase concluded that if the increase in income developed at the same pace as the price increase while all other measures to control the illegal market remained in place, the share of illegal cigarettes will remain at the same level which at the time was 26–27 % of total cigarette market. The law enforcement officials in Estonia also shared concern for possible growth of the cigarette black market: a study conducted in 2003 demonstrated that Estonian experts expected an intensification of alcohol and tobacco smuggling after accession to the European Union (Markina & Saar, 2005).

Harmonization of excise tax to the level of other EU countries resulted in remarkable cigarette price differences between Estonia and neighbouring coun-

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tries: especially with Russia but also with Latvia. Today, in 2007, the situation on the illegal cigarettes market is similar in all Baltic countries. In Lithuania, for example, a growth of cigarette smuggling has been observed since 2004 at both the Russian and Belarus borders (Ceccato 2007). The latest OCTA report also indicates the problem of illegal tobacco as a specific problem for the Baltic region. It is stated that:

> "Some regional patterns in OC in the EU can be discerned. The OC situation in Estonia, Latvia and Lithuania, for instance, is mainly conditioned by its proximity to Russia. The latter is source for illegal tobacco, alcohol and heroin in transit from Central Asia but also represents a market for stolen vehicles and synthetic drugs". (OCTA 2006: 7)

The smuggling of tobacco products from Poland and the Baltic States through Germany and the Netherlands to the UK is not a recent phenomenon, invoked by the requirements of the EU. It has a long history as has been described by Van Duyne (2003: 301), using a northern 'trade belt' metaphor.

This paper aims to answer two questions.

1. first, what is the volume of cigarette black market in Estonia and
2. second, what are the structural patterns in 'organization' of illegal cigarette trade in Estonia.

To answer these questions several open data sources will be used, including annual cigarette black market reports by Estonian Institute for Economic Research, statistics on confiscated tobacco and press releases by the Customs and Taxation Board. Additionally, media reports on largest smuggling cases will be also taken into account.

General overview of cigarette black market in Estonia

Surveying an illegal market is generally fraught with uncertainties. This applies particularly to open sources. Nevertheless, they cannot be discarded as useless: they document what surfaces from the underlying commercial dynamism, though they should be used with due caution. For example, data from open sources provide evidence for activities on both levels of the cigarette black market: procurement and retail. Combination of the information received from press, customer surveys and customs data allows for discussion of the features of illegal market in details.

First, on the level of procurement one can find evidence for large-scale smuggling operations, bootlegging as well as counterfeiting of cigarettes.

On the basis of research on cigarette smuggling Merriman *et al.*, (2000) conclude that "cigarette taxes that increase cigarette prices are only one, and probably not the most important, factor in cigarette smuggling. The perceived level of corruption statistically explains more of the variance in experts' estimates of cigarette smuggling than do cigarette prices. Other important determinants of the level of cigarette smuggling in a country include cigarette prices in nearby countries and the amount of travel between the home country and lower-priced countries." (2000: 385)

As it will be observed below, cigarette price differences between Estonia and neighbouring countries are remarkable. While cigarettes in Estonia are considerably cheaper compared to Scandinavian countries, the prices in Russia are twice as low as in Estonia. This makes Estonia attractive: not only as a transit country but also as a destination country for illegal cigarettes trafficking. Profits can be made both ways.

But price differentials alone cannot explain the high share of the illegal cigarette market. Another issue raised by Merriman *et al.*, (2000) is the influence of corruption. The Corruption Perception Index (Transparency International, 2006) for Estonia in 2006 was 6,7.[3] This indicates considerably higher levels of corruption compared to neighbouring Finland (9,6) and Sweden (9,2). On the other hand, countries from which cigarettes are smuggled: Russia (2,5), Latvia (4,7) and Lithuania (4,8) should have a more serious corruption problem, according to Transparency International criteria. This index indicates a relatively high level of corruption in Estonia, but does that also affect the contraband cigarette operations, particular in the risky cross-border phase? There are indications that this is the case.

In recent years several scandals have brought corrupt practices of customs officials to light. The most significant case was sent to the court in 2005. In total 19 custom officers (nearly all staff) from one of the Estonia-Russia border crossing point were prosecuted for organised corrupted activities. Two schemes were in use. First, drivers paid € 40-70 to facilitate a smooth border crossing. Second, a Russian haulage company paid monthly about € 6.500 to custom officers in exchange for avoiding border checking of the firm's trucks. The money collected from 'customers' was placed in a common fund. One of the custom officers was responsible for keeping account of the dirty money. In the course of one shift custom officers collected € 1.300 of bribes (Ojakivi, 2005). A similar corruption case was discovered in another Estonia-Russia border crossing point the same year. The Customs board reacted to these cases by complete replacement of personal, re-organization of work and increasing

[3] The index defines corruption as the abuse of public office for private gain and measures the degree to which corruption is perceived to exist among a country's public officials and politicians. The scores range from ten (squeaky clean) to zero (highly corrupt). A score of 5,0 is the number Transparency International considers the borderline figure distinguishing countries that do and do not have a serious corruption problem (Transparency International, 2006).

wages of customs officers. These changes resulted in 70 % increase in smuggled cigarettes seizures within one year (Aav, 2006).

In addition to factors already mentioned in this section Joossens *et al.* (2000: 399) note that smuggling "requires a good local distribution network, most often involving extensive street-selling, through which the smuggled cigarettes can be easily and quickly sold" The authors also note that in general "unregulated street-selling is much more common in low-income and middle-income countries, implying that the potential for large-scale cigarette smuggling into these countries is greater than for high-income countries" (*ibid.*).[4] The data from surveys by Estonian Institute for Economic Research to be discussed later refer to the existence of such distribution networks. The places were illegal cigarettes are sold are quite well-known to the consumers. These are usually either street sellers' meeting points or particular places or persons in local markets. A small fraction of consumers – only 1 % – reported purchasing illegal cigarettes from shops or bars. However, press releases analyzed for this paper contained two cases when illegal cigarettes were found in normal shops. The cigarettes seized from the shops had Estonian fiscal marks. Media publications from the 2006-2007 also report some cases when contraband cigarettes were found in shops. The purchase of illegal cigarettes marked with Estonian fiscal marks will not be reported by customers in the survey as they will not distinguish between legal and illegal products.

Retail level of illegal cigarette market

Von Lampe (2006) suggests that for analytical purposes it is useful to look at the black cigarette market on two levels: procurement and distribution. While Customs press releases and media reports provide insights on how cigarettes are supplied to the market, consumer surveys analyzed in this section provide insights mainly about distribution level. In addition, the annual reports by the Estonian Institute of Economic Research provide a valuable source for estimation of the illegal cigarette market (Ahermaa 2006, 2007). The research is conducted using a consistent methodology since 1998 that gives opportunity to follow the dynamics of illegal cigarette market for almost 10 years.[5] The estimates for the volume of the illegal cigarette market use several criteria, including smoking prevalence, average number of cigarettes smoked and illegal cigarette consumption habits.

[4] This observation is partly invalidated by Von Lampe's (2005) description of the German contraband cigarette market and the apparently insatiable British market (Hornsby and Hobbs, 2006). In addition, such an unregulated street market is common to all retailing of illegal merchandise, depending on the interaction with law enforcement repression (Paoli *et al.*, 2000).

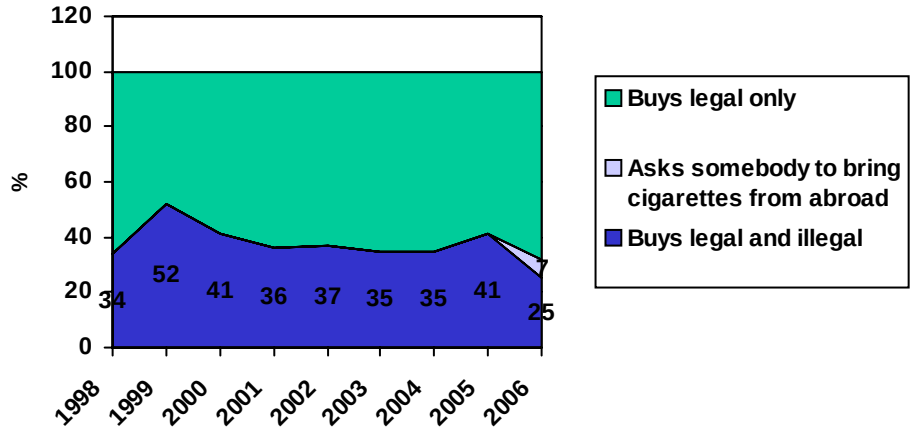
[5] Some changes in methodology were introduced in 2006 (Ahermaa 2007).

a. Smoking prevalence

As mentioned above, the cigarette tax has been increasing in Estonia since 2001. It was believed, that smoking prevalence and, consequently, cigarette consumption would decrease. Opposite to the desired effect, the consumption of cigarettes has not decreased as a result of higher excise tax. Since 1998, the proportion of everyday smokers has remained stable around 21 %-22 %, moreover, though their number increased somewhat in 2006 (24 %). The average number of 15 cigarettes smoked per day has not decreased either.

Figure 1 demonstrates cigarette purchase preferences by smokers. For the last nine years around one third of customers either occasionally or permanently purchased illegal cigarettes. The last year show some decrease in proportion of illegal cigarettes buyers. These changes could be partly explained by the fact that in order to curb rocketing inflation the Estonian Government decided not to follow the schedule for excise tax harmonization and tax was not increased in 2006.

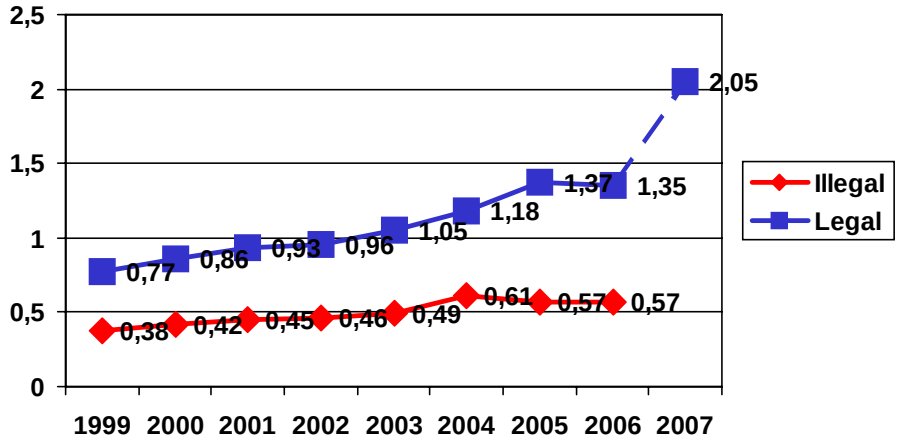
Figure 1.
Estimates of cigarette purchase preferences in Estonia 1998-2006, in % of total consumption.



Source: Estonian Institute of Economic Research (Ahermaa, 2006, 2007)

b. Prices

Figure 2.
Prices for legal and illegal cigarettes (per package, in EUR)



Source: Estonian Institute of Economic Research (Ahermaa 2006, 2007)

Combined with growing average income and inflation this made legal cigarettes more affordable for customers. It is interesting to note that while the excise tax was growing, the price for illegal cigarettes has not followed the increase. It seems that the illegal market has stabilized within last few years – it has its own customers and price stability. The 2006 report states that of all respondents who reported ever buying illegal cigarettes, 95 % did so during the month of the study. Again, this data suggests that illegal cigarettes are easily available to those ready to purchase untaxed goods.

c. Retail locations

The places were illegal cigarettes are sold are quite well known to the public. Customers purchase illegal cigarettes either directly from the retailer on the streets (53 %) or at the trader's home (35 %). The percentage of customers who bought illegal cigarettes either from a shop (1 %) or a bar (0 %) by 2006 (Ahermaa, 2007) suggests that personal networks dominate the distribution market.

d. Countries of origin

A considerably large share of the cigarette market in Estonia falls into the category of smuggling, called 'legal circumvention' (Joonssens *et al.*, 2000: 395). Cigarettes are cheaper in Latvia and especially Russia compared to Estonian prices. In 2006 the price of the most popular brand of cigarettes in Estonia was

€ 1,15 while in Latvia customers paid € 0,93 and in Russia a package of L&M cigarettes, the most popular brand in Estonia, will cost the buyer no more than € 0,55 EUR. These two states are the main actors in cross-border shopping and bootlegging activities. In 2006 nearly a quarter of all smokers in Estonia had bought cigarettes from abroad (of those 41 % were from Russia and 29 % from Latvia), 20 % of smokers have asked somebody to bring them cigarettes from abroad (of those 68 % from Russia and 27 % from Latvia). Cigarettes distributed on the illegal market have mostly Russian fiscal marks. However, some cigarettes sold illegally had no fiscal marks at all (8 %) or were marked with counterfeited Estonian fiscal marks (6 %) (Ahermaa, 2007).

Table 1.
Estimated illicit share and volume of the overall cigarette market in Estonia 1999–2006, % and millions

	1999	2000	2001	2002	2003	2004	2005	2006
Illicit cigarettes in % of the total market	33	20	28	22–25	22–25	22–25	25–30	20–25
Volume of illegal cigarette market, million cigarettes	1,11	0,83	0,68	0,64	0,64	0,56	0,67	0,53–0,70

Source: Estonian Institute of Economic Research (Ahermaa 2007)

The estimates by the Estonian Institute of Economic Research indicate that 15 % of cigarette consumption in Estonia is smuggled. Although the 2006 report concluded that the illicit share of the overall cigarette market in Estonia has decreased (see Table 1) to the level of 20–25 %, considering the trend as of 2002, it is more accurate to say that the share is rather constant. Despite the fact that, compared to other countries this share is still big (Merriman *et al.*, 2000: 374), the trend seems to be fairly positive.[6] However, the situation may change soon. In July 2007 the tax on tobacco will increase markedly: the price of most popular cigarettes will increase from € 1,35 to € 2,05 per package (20 pieces). With cheap cigarettes available from neighbouring countries this price growth will most probably have impact on illegal cigarette market.

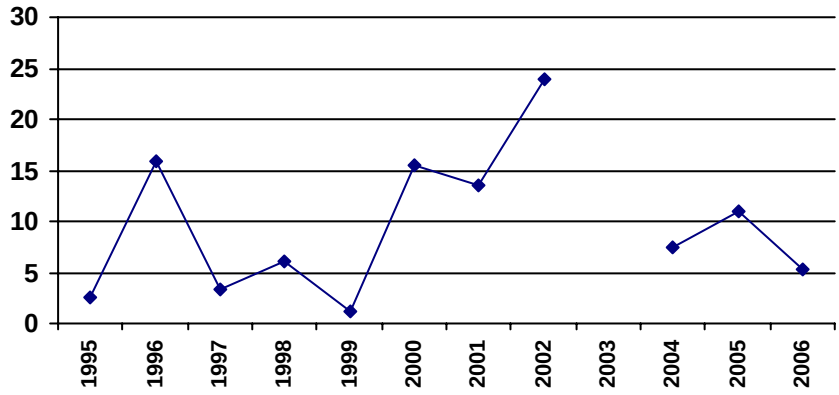
Large-scale smuggling: is Estonia part of the northern "trade belt"?

Figure 3 shows the dynamics of the seizures of illegal cigarettes by Estonian Customs. One can distinguish two periods in this development. First, from

[6] Estimates of the black market share for several European countries are also provided in: Luk Joossens, Martin Raw, Cigarette smuggling in Europe: who really benefits? Tobacco Control 7(1), 1998, 66–71 (67).

mid- 1990s until 2002[7] one can see the tendency for an increase of illegal cigarettes seizures. Some of the years bring more confiscations, some less but the trend is clear. Following this growth, the last three years evidence rather modest numbers of seized cigarettes.

Figure 3.
Seizures of illegal cigarettes in Estonia, 1995-2006



Source: Department Of Statistics

What has caused the decrease in the number of seizures since 2003 or 2004? There is a possibility that with accession to the EU border crossing regulations have changed resulting in less control on Estonian-Latvian border. Consequently fewer seizures of contraband cigarettes were observed. An equally possible explanation is that border control has tightened, especially on Estonian-Russian border, and the smaller numbers of seized cigarettes actually reflect decreased contraband trade. Or has something else changed? The picture is far from clear but one trend seems to take shape: the 'Northern Trade Belt'.

The history of contraband cigarette export indicates a regular wholesale flow from the Baltic States to the western consumer countries. Van Duyne (2003) notes that in 2000 in the Netherlands the share of the confiscated cigarettes from the Baltic region was 26 %. These shipments from the Baltic States and especially from Lithuania indicated that an industry of pre- or re-packing cartoons of cigarettes in all kind of cover goods has developed as a kind of support craft.

Media reports on large-scale seizures of cigarettes in Estonia tell similar stories. In November 2001 a load of 40 million illegal cigarettes was found by North-Ireland customs on board of a ship operated by Estonian company. The cigarettes were hidden within the timber load. Just a couple of days before this

7 2003 data is not available.

event an estimated 20 million cigarettes were recovered within a shipment of timber which had travelled to the Republic of Ireland from Estonia (Kagge, 2001).

The data on large, over one million cigarettes, seizures confirm the existence of the 'northern trade belt'. Several shipments of illegal cigarettes recovered by customs were smuggled through Estonia within the last ten years. As a rule, the cigarettes originate from Russia or Lithuania and then continue through Latvia, Estonia either to Scandinavian countries (mainly Sweden) or to EU countries with high rate of excise tax. Estonian customs have recovered contraband cigarettes within transport directed to Belgium, Germany, Ireland, UK, Sweden and Norway. Irish Revenue's Customs Service reports about two million smuggled cigarettes being seized monthly at Dublin Airport, most coming from the Baltic States (Irish Examiner, 2006). This does not conform to the decreased interception rate of the last three years.

Interesting information on large-scale smuggling is provided by the Swedish Customs. In 2003, according to their data, the quantities of seizures reached the record level of 74,2 million cigarettes. The major part of the large seizures was made in the trade flow from Poland, Russia and the Baltic States. In recent years the number of seizures and quantities of contraband cigarettes has decreased remarkably. In 2006 the number of cigarettes seized by the Swedish Customs was 10,3 million pieces. The reason for this, it is believed, is that Sweden is not used as a transit country to the same extent as it was before (Swedish Customs, 2007).

It is quite interesting, that data from Estonia and from Sweden suggest the same trend: the importance of the northern "trade belt" has decreased after the accession of the Baltic States to the EU.

The structure of illegal cigarette market

This section is based on the analysis of press releases by the Estonian Customs and Taxation board made public in March 2004 – May 2006. In these documents a total of 66 seizures of illegal cigarettes were listed.

- In February 2004 a truck with nearly 1,2 million cigarettes *Prima Nevo* with Russian fiscal marks was stopped by Estonian Customs. The load came from Lithuania and was destined for the Estonian market.
- In September 2004 on the Russian-Estonian border 2,7 million illegal cigarettes were seized. The shipment contained brands popular in Estonia: *North Star*, *L&M*, *Bond* and *More*. The smuggled brands suggest that destination of illegal shipment was again the Estonian market.
- The largest seizure reported during this period was 10 million pieces. In September 2005, an illegal factory for cigarette production was found in

Rummu near Tallinn. The production capacity of the equipment found there was 2000 cigarettes per minute; 10 tons of raw tobacco was found. The counterfeited cigarettes were an inexpensive brand understandably not available on the legal market. It is believed that illegal cigarettes were produced for the local market.

- Another large seizure was reported a month later, in October 2005. A container containing 6 million cigarettes (*Marlboro*) was found in a bonded warehouse. The seized cigarettes had no fiscal marks. The container came from Russia and, according to the customs information, was destined for the Estonian market.

Excluding these four largest seizures, the average quantity of cigarettes per seizure was 32.000 pieces or 160 cartons. This is the amount that can be stored in the hidden places of a car – specially modified gas tank, double roof or floor of a vehicle. Indeed, in most cases, illegally shipped cigarettes were found in such hiding places.

This particular type of smuggling, called bootlegging, involves the purchase of cigarettes in a country where cigarettes are low-priced and transporting them either for personal consumption or resale to the high-priced country in quantities exceeding limits set by custom regulation (Joossens *et al.*, 2000: 397-398). Joossens *et al.* note that bootlegging involves transporting cigarettes over relatively short distances, usually between neighbouring countries. The data from Estonian Customs press releases confirms a wide spread incidence of this kind of illegal circumvention in Estonia.

Routes, actors and destinations

Press releases are definitely not the best sources for information on how the smuggling activities are organised. However, even a brief survey of the seizure contained in press releases provides some information about the country of origin and destination, together with nationalities of persons involved. In most cases listed cigarettes were smuggled from Russia in some cases from Latvia and Lithuania. Cigarettes had Russian fiscal marks or, on rare occasions, had no marks at all.

Ethnicity is considered an important aspect that characterizes criminal suspects. A similar situation for Germany is noted by von Lampe (2006). Von Lampe writes that the nationality of suspects is regularly emphasized and used to stress that the supply of illegal cigarettes is in the hands of Eastern Europeans. The situation in Estonia with regards to crime reporting is similar. The ethnicity is always mentioned when crime is reported by the media. The press releases by the Customs Department also contained information on the nationality of the suspects. In most cases, suspects were Estonian residents. In nine cases

Lithuanian suspects were mentioned. Suspects from neighbouring countries were mentioned less often: Russian residents three times and Latvian residents twice.

With the exception of a few cases (for example. the underground cigarette factory described above), no information about the organizational structure of the smuggling activities is mentioned in the press releases. However, mass media brings reports about "highly organized gangs that are sending people across to get these and bringing in and selling them on" (*Irish Examiner*, 09.06.2006). The newspapers also mention distribution networks: smuggled cigarettes are sold to Baltic nationals through their own shops.

In April 2007 the press reported a successful operation by the Estonian and Swedish Customs resulting in the arrest of three Estonian residents organising the smuggling of cigarettes via Estonia to Sweden. This is one of the few cases where suspects were discussed in detail. The group used legal haulage companies. Cigarettes were smuggled within shipments of clothes. No information was provided on whether Sweden was a destination or transit country and how cigarettes were sold in the destination country.

One of the distinctive features is that large-scale smuggling "typically involves international brands produced by the large multinational tobacco companies given that the demand for these products in most markets allows them to be sold nearly everywhere" (Joossens *et al.*, 2000: 398). However, data show that quite often cigarettes are destined specifically for a particular country's market. Smuggled cigarette brands provide good information about the destination of smuggled goods. *Regal* is smuggled to UK, *Prince* to Sweden and Norway *et cetera*. Shipments of inexpensive Russian brands like *Prima*, *Prima Nevo*, *North Star* or *Arktika* will usually end in up Estonia. These brands are not available at the legal market in Estonia and could be purchased only illegally. The majority of large seizures in the late 1990s up until the beginning of the 2000s, were seizures of popular western brands. This indicates that Estonia played a transit country role on this northern 'trade belt'. Recent reports on significant cigarette seizures (over one million) suggest that the routes are changing. In the resent years large seizures of inexpensive Russian brands occurred more often. These contraband cigarettes are smuggled specifically for the Estonian market.

Conclusions

All these factors contribute to the high level of illegal activities on the illegal cigarette market. However, these illegal activities look far from spectacular, nor is there much evidence that they differ in essential aspects from illegal cigarette markets in other jurisdictions. We meet again networks of cooperating entre-

preneurs, either at import/export level or at the level of distribution. In addition, there is the obvious effect of geographical proximity to low price countries and the 'smoothing' circumstance of corruption at both sides of the borders.

As with most commodities, the market opportunities are determined not by 'organised crime', but by the 'price wedge' in the form of excises imposed by the authorities. The expected increase of excise tax on tobacco from € 1,35 to € 2,05 EUR per package (20 pieces) will push more people to buy illegal cigarettes. This, in turn, will make the Estonian market attractive for smuggling (large-scale as well as bootlegging). However, compared to other countries, this market is quite small. The size of the Estonian population of 1,3 million sets its natural limits.

Transit smuggling to Scandinavian countries and high-priced jurisdictions such as the Netherlands or the UK will still be profitable and will attract crime-entrepreneurs. Open source data suggests that some changes occurred in smuggling routes across Europe. It is still uncertain whether and to what extent new patterns are taking shape: in the fluid dynamics of the underground economy the literature abounds with references to this capacity of operating in a continuously changing economic landscape of brooks and creeks with some larger flows emerging as long as it lasts (Van Duyne and Levi, 2005). It is also uncertain whether all this should be projected against a broader 'organised crime screen' in Europe, as Europol has done in its OCTA 2006, and what that will yield. Though Estonia is included in the OCTA 2006, the reference is quite unspecific: "In Finland the crime-system is heavily affected by Estonian-based OC groups acting as main providers of illegal goods and services". The trade flows we discern do not lead to Finland, but to the western consumer countries. Likewise, our open data sources are less affirmative concerning this issue of criminal organisations, which may be more realistic than an unspecified and (non-confirmed) reference given in the OCTA 2006. Irrespective of that, the price wedge policy of the authorities will continue to create and shape the organisations of crime-markets for normal risk-takers and ordinary bargain hunters alike. Indeed, the history of the crime economy contains few surprises.

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The come back boys of the illegal markets

"The winners; Christian is one of them, may be the very best; so discreet for all those years. No one knows what he is up to. Failures; look at Jens and me. Jens does even drink while he is smuggling! "
Einar; smuggler.

"There have always been A - teams and failures. The A teams have been on top for many years. The failures are repeaters too, with assistants who rat and papers which should not have been there, and so on."
Ivar; police.

Per Ole Johansen[1]

The Norwegian style

The illegal import, distribution and illegal distilling of alcohol have been organized crime the Norwegian style since the Prohibition of the 1920s. Through the years the illegal entrepreneurs in this business were forced to adapt to sudden changes time and again, as demand and supply shifted, wars broke out, moral crusades against alcohol consumption were launched, new and aggressive police methods were introduced, and other criminals found, from time to time, cargoes of bootleg liquor a suitable alternative target for income. Despite these challenges however, there are still market players who have managed to cope with these problems and have survived as 'professionals'.

This article is primarily about this breed of successful entrepreneurs and how they succeed. They are no myth, although they may not be as rich as rumours say. The focus will be on their *modus operandi*, the general culture and the relation between the illegal entrepreneurs and the changing levels of police and customs control.

Data were obtained from interviews with investigators and market participants, over the years more than 500 at least, from very long interviews to short talks, both semi-structured and open. Media and official reports and an analysis of case files have also provided insight.

The smuggler 'Einar' and the police officer 'Ivar' are two of my best contacts. They have a very long experience, a broad knowledge about persons and episodes and a talent for analytical perspectives. They are similar in other ways

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too: open minded and respectful of the other counterpart as long as he follows 'the rules of the game'.

The starting point, as far as history is concerned, is drawn by the First World War, although the historical core example I will discuss is a recent story about the illegal alcohol market in Norway adjusted after the unintended import of methanol in 2001. The methanol, assumed, to be 96 % pure alcohol, killed 18 customers, who had mixed the lethal substance with water and essence of vodka, gin or whisky.

The methanol tragedy was front page news for at least a year, while the demand for 96 % alcohol effectively collapsed. Politicians and temperance activists chose to believe that they had been witnessing the demise of the illegal alcohol market, but history would prove them wrong.

'A' teams and 'B' teams

The difference between fiascos, wins or just easy going businesses have always been a part of the illegal alcohol market. The fiascos resulting in arrest and conviction have been most in the open for obvious reasons; that is why we know so much about them. They are also the ones who match the liberal definition of the criminal as a poor, pathetic, lowly educated male who is rather irrational in his criminal endeavours. But that is not the whole picture. Besides the 'B-teams' of unsuccessful bootleggers, there are collectives who are (and have been for a long time) successful in their undertakings. One may call these the 'A-teams' of the illegal alcohol business.

Changing fortunes and an unequal distribution of talent and luck are not unique to illegal markets. Legal business is also familiar with losers and winners, good times and bad times. But while not that different from legal markets in certain respects, the illegal markets in alcohol have their own ways and style. Some teams are repeaters in mistakes. They never advance. You may wonder why they never give up.

Frederick J. Desroches sees a similar pattern among Canadian drug dealers: ". . . there appears to be little upward mobility in the drug trade and most street level dealers make no attempt to move into wholesaling or beyond." (Desroches 2005: 4.)

More Norwegian teams have been successful for long periods, and have learned from their mistakes. For the latter, the A-teams, crime does pay. And more often than not, they are not *that* illegal all of the time either. Some illegal enterprises are embedded in legal firms which do not merely serve as a cover but have a legal existence of their own. This grey zone of overlapping legal and illegal business has been a familiar aspect of Norwegian criminal history since the Prohibition (Johansen, 2004).

Classic mistakes

A-teams and B-teams can be distinguished by the mistakes they avoid or commit respectively. Success can turn into failure when complacency sets in. Some of the mistakes committed while importing and distributing illegal alcohol give a feeling of *déjà vu*, "the same procedure as last year". The same place to meet, the same day of the week have been a downfall, even for smugglers who should have known better. Initial success is followed by routines. Smugglers and dealers ask for attention that way, which of course is very risky in illegal business, although necessary to a certain degree for recruiting customers. Record keeping, reminiscent of legal bookkeeping practices, is another trap, typical for smugglers with a background in legal business. "He had a lot of records in his office like he used to keep when he was a merchant," an investigator tells about a smuggler who was nicked. "It almost seems to be a part of their character to take care of all kinds of documents and to keep archives, even when they do not have to." Other smugglers have exposed themselves just by *forgetting* to get rid of receipts, and ordering lists after the job has been done.[2]

Size has been identified in the literature on organized crime as an important risk factor (Reuter, 1983; Davis and Potter, 1991; Johansen, 1996; Fijnaut, 1998; Bouchard, 2005; Desroches, 2005). Big illegal business is particularly risky in a small and transparent society like Norway, where rumours about sudden wealth travel faster than lightning. The more assistants an illegal entrepreneur gets to keep in line, the greater the chance that there will be someone who talks and brags. At the same time it is no easy task to sack an illegal employee. They may rat for less.

"Not all clients take being cut off in stride, particularly if they are losing their main source of income," writes Frederick Desroches with reference to the drug market in Canada (Desroches, 2005: 134).

"You do not sack people in *this* trade," tells a Norwegian bootlegger. Even before a big business is set up, risks abound. Competitors get envious and upset when they lose market shares to a rising star. From the police point of view a rising star is *the* target for a crackdown. It is relatively easily done if he is growing, and entails a new record in the police book of seizures.

Expressive lifestyle as a security risk is as old as the illegal markets in Norway. So also for the drug dealers Patricia A. Adler was living amongst and studying in California, although they were rational in their *modus operandi*, at least for a while. "They act rationally for the ultimate end of living irrationally" (Adler, 1985: 1). The switch from paranoia to invulnerability and back again added to their peculiar mix of rationality and irrationality:

[2] This is not unique for Norwegian alcohol smugglers. Van Duyne (1996) found a similar and useless bookkeeping habit with a large ecstasy smuggling ring, archiving details of turnover, net profits and investments.

> "Despite the dangers and tensions with which they lived, drug traffickers did not always brood on disaster; in fact, they generally ignored that possibility. When not stricken by pangs of paranoia, they commonly felt inordinately safe, flaunting their illegal activities and gains within the group. Their moods vacillated erratically, seesawing up and down from one extreme to the other." (Adler, 1985: 97)

Drinking and driving is also a very stupid thing for a Norwegian smuggler to do, but it actually happens nonetheless. A timid Norwegian loves to brag after some drinks. Smugglers with working class background who socialize in "west end" restaurants with gold chains, fancy suits and odd manners are a similarly easy target, and even more so when they "forget" about their wives. The betrayed wife is a classic informer (Kellner, 1971; Maurer, 1974; Junninen, 2006).

Not knowing the profession as practical craftsmanship has been and is a problem for newcomers and the semi-professionals. Driving an overloaded lorry down town with almost flat tires in the middle of the night is one example of a lack of the necessary skills and brains. Sailing a stormy ocean without maritime competence is another. Selling in the open where everyone may see, a third one.

Not paying on time has always been bad for business and one of the reasons why so many 'assistants' have been ratting on their bosses. Even some veterans have made that mistake. "Economic planning has never been my strongest side," one of them admits, although concerned about his crew in other ways. "He has his own lifestyle to blame," tells 'Gabriel' about a known smuggler who was nicked because his assistant informed on him because he did not get his money, in spite of several warnings.

Bad nerves are a never ending problem for the B-teams. The inexperienced lose their nerves when facing arrest and custody. Even those who have been trained to meet such traumas often fail the test in real life. 'Gabriel' complains about some ex-partners in crime: "Men with experience, even an ex-military; I told them a lot of arrest and interrogation, but in vain. They all 'talked'!"

Some custom officers call themselves babysitters; you may guess why. Even veterans may lose their nerves, after years of excitement and stress. "I had got too much excitement," an ex-smuggler told, after retiring to a safe and legal life in the countryside. The career of the professional smuggler is not always an easy road from debut of the youngster to the successes of the elderly veterans. Some of them have switched to the lower levels of distribution for that reason; just to be on the safe side.

To be prepared

For the successful illegal entrepreneur practical precautions are the first rule of thumb. A professional smuggler drives a certain trailer just once or twice before he switches to a new one. He does not own the trailer that often anymore

either. Renting is the new *modus*, to prevent loss in case of interception. A new route across the border every time is their next move. Some teams even have hideaways along the borders as a place to rest, or isolated farms in Sweden or Denmark where they split up the cargo before crossing the border. Limiting smuggling loads to between 500 and 2000 litre helps to reduce the severity of sanctions because contraband in these dimensions, due to the increase in smuggling in the 1990s, is not seen as *professional* smuggling by the court anymore. Importers and drivers are very concerned about the timing, and adjust their driving to the hours of the day, or the days of the week and the month of the year when customs officers are known to be absent. Some customs stations even provide information about when their offices are open, as a service to legal importers who want to pay the duty and need papers which show they have done so.

Most A-teams have established a kind of intelligence system, very simple compared to the police, but effective nonetheless. For example, a car in front of the trailer and another one behind, who give warnings by cell phones in code if the police show up.

Contacts within police and customs are seldom compared to the level of the corruption in Italy or Russia, and it is not a *must* either, because their logistics are that flexible. Bribes, in fact, are even seen as a security risk by more of the Norwegian smugglers, like the top dogs in the Canadian drug market: "Most believed that police and Customs officials were difficult and dangerous to bribe, and that their business could function without corrupt officials." (Desroches, 2005: 132)

Information management and disinformation is another important part of the Norwegian game. Drivers and wholesalers are told nothing in detail before the Big Day, including *when* that day is supposed to be. Where to meet and when, may be changed up to a few hours in advance, just to be on the safe side. Storing and unloading are a question of hours, as a precaution against police and criminal gangs. The wholesalers are not told where the cargo is supposed to be unloaded. Their orders are secretly brought to *them*. The alcohol is often "legally" imported, by cover loads with genuine documents stating the content accurately except for the contraband hidden under the legal cargo, like 'juice', 'food', 'books', 'machines', 'building components' or 'marble' for example.

The professionals know how to play a role, and *act* like they are unknown or hostile to smugglers who they actually are very close to as business partners. Their lifestyle is very discreet. They seldom or never go downtown, and when they do, wives and girlfriends go with them. Spain, Portugal, Thailand or Brazil are seen as much safer places to spend money. The literature knows of smugglers who have *never* tasted alcohol (Van de Vater, 1931). There have been few of them in Norway. Most smugglers are temperance men. They may go for a drink after a big job, but never while on job.

Violence avoidance, mostly

Threats and violence, and even worse, against informants or dishonest partners have happened even in a peaceful country like Norway. At least some examples are known from early 1990s to about 2001, like two partners who were kidnapped, two very brutal 'visits' to some informers' home to scare them off, two 'inside' killings, two shootouts between ex-partners and, and the son of an ex- partner who was threatened to tell about his dad's hide away. (They held his hand in boiling water.) At least two of those incidents may have gone out of control.

Mark Haller wrote about the young pioneers of the American prohibition. The American smugglers were first and almost all up coming businessmen who had to make deals because of the enormous size of the market of the import- and distribution infrastructure. No one could do everything on his own: "The emphasis on gang rivalries, however important, has nevertheless obscured what was far more significant about the structure of bootlegging: The systematic and ongoing cooperation among bootleggers that was necessary to supply alcohol to major metropolitan markets." (Haller, 1985: 140) But some times they had to be willing to use violence too if someone crossed their way.

"Smuggling was all fair enough," people would say, and "there was no harm in cheating the Government, because the Government cheated you," writes Teignmouth and Harper with reference to England in 1819 and 1820. "But shooting and killing was quite another matter, and could end only in the gallows and the total suppression of the trade." (Teignmouth and Harper, 1923: 48)

Even the anti-prohibition opinion and the liberal newspapers turned against the Norwegian smugglers at the height of the Prohibition midst 1920s when they started shooting at police and custom officers (Johansen, 1985).

Ruggiero sees some 'civilizing' benefits by the closer links between organized crime and legal business. The costs of violence seem to exceed the benefits it brings (Ruggiero, 1996).

Norwegian businessmen who have turned to smuggling may also have had a certain calming influence, as long as their rational credo has been intact, although that has not always been the case. A "west end" smuggler with background in legal business showed a willingness and capability for violence in the mid 1990s, when his interests were threatened, which stunned everybody.

The main rule is that "violence is bad for business" though, irrespective of one social background or the other. Most smugglers keep a non-violent profile because they know how easily their violence may be used against them: the customers get upset and the police get more money to fight organised crime. One day they may even meet a madman more violent then themselves. Drug dealers in Sweden seem to have learned the same lesson (Vesterhav, Skinnari and Korsell, 2007).

When the heat is on

Few smugglers actually try to avoid the law by leaving Norway when the police are after them, even if they get the chance, except an investor in booze who recently bought himself a new citizenship and immunity as a "diplomat". Most of them stay in Norway waiting for the trial and try to make the best of it. By leaving the country they would have left much of their business behind them.

Big shot runaways already have a kind of base in other countries as investors or as go betweens, for instance Portugal, which has become the new hot spot of Norwegian smugglers after the Spanish customs service started to go after the illegal export of alcohol from Spain, because of the tax evasion side of it. Other runaways are on-offs lower in the chain of import and distribution who do not *have* to run, as far as punishment is concerned. A third group *act* as they are abroad in Spain, Portugal or Thailand, while they visit Norway pretty frequently to stay in business.

Smugglers who know their trade do not talk to the police before a trial, or talk nonsense to confuse them. They prefer to be in control of the information stream. Rattling characters chat with the police officers, and drive them crazy with relentless banter. Some, however, also chat on purpose to confuse the investigators. "Our problems is his *amount* of talking; it takes up hundreds of pages," an investigator complains. "Smart guys" make deals by offering the investigators inside information to get off the hook (Johansen, 2005). Cynics sacrifice and name weak partners, while protecting the strong ones in the network.

Only the dumb refuse to talk when questioned by the judge. Paying an understanding doctor or psychologist to say how ill they are, has been a better way out for those who neither want to meet in the court nor do the time. The teamwork between an intelligent smuggler with an interest in law and a memory for details, and a respected lawyer with long experience in the court stand a good chance against young police lawyers, fresh out of law school. Professional smugglers confess only what they "have to", but get the respect of the court for saving its time anyway, unlike the ultimate denier who provokes the jury and makes a fool of himself.

Taking care of the economy of partners and their families, while the partner are doing time, is probably the best insurance in this business, and a good investment for an entrepreneur who wants to build his reputation.

Rebuilding the optimism of the team after a downfall is the bottom line of the collective mind building. "This is not the end of the world"-philosophy is a pretty good therapy, combined with studies in navigation, data or business management while doing time. Smugglers are known as model prisoners, not because they have been rehabilitated, but because it pays. They are quite similar actually to the American moonshiners David Maurer is writing about.

"Once he is arrested, tried and convicted, he usually makes a model prisoner in a federal penitentiary" (Maurer, 1974: 94). More Norwegian smugglers have even done some pretty nice business while in prison, like the professional Finnish criminals that Mika Junninen interviewed: " . . . those interviewees who did not regret what they had done but only that they had been caught, said that time spent in prison is not completely wasted. Instead, it can be spent usefully: you can rest, make new acquaintances, continue with criminal activities and plan new crimes" (Junninen, 2006: 33).

A tradition for restarts

Hard times, crises and restarts are nothing new concerning Norwegian alcohol smuggling. After some good years for the smugglers, from 1918 to 1922, things changed to the worse in the mid 1920s when the custom service got a brave new navy, military style with officers who loved the fight for the sake of it. The smugglers just changed logistics, and landed the cargo far away from the traditional coastline of moonshine. The Repeal in 1927 was the next challenge, which the smugglers met by adjusting the price.

The German invasion in Norway in April 1940 represented a very sudden stop for traditional maritime smuggling. The smugglers answered by buying legal, rationed alcohol and alcohol imported by German soldiers, and resold it on the black market. The maritime, international connections which were opened after the war, with passenger ships sailing regularly to England and America, was more of an invitation than a challenge, as far as the logistic of smuggling goes. A new crisis for the smugglers seemed to be on its way late 1960s when the airplanes took over the passengers and the trailers most of the cargo. The smugglers adjusted by investing in trailers themselves, or by hiring professional drivers.

The strikes at the Norwegian State Monopoly of Wine and (hard) Liquor in 1978, 1982 and 1986 were a new opportunity as well as a challenge. The strikes represented a possibility because "everybody" had to buy the booze on the black market, and a challenge because it was impossible to meet all the demand. Veterans met some of the demand by a more speedy logistic while most of the rest was taken care of by a new generation of smugglers who saw the possibility and grabbed it.

The early nineteen nineties were a kind of hard for the smugglers, due to a new generation of police investigators and customs officers who were very professional and willing to work together against their common 'enemy'. The team work was something new, as the police and the customs had been rather competitive and mutually suspicious of each other, almost since the Second World War. Some smugglers became paranoid and switched to cigarettes, or took a break while hoping the best for the future. The smart ones calmed

down and started it all over again after a while, with new partner with a clean record, and new business contacts abroad.

After the methanol disaster

The demand for 96 % pure alcohol, which was very popular in the 1990s, almost dropped over night in 2001 when the media started to report about the import of methanol.

Methanol has the same colour as 96 % pure alcohol, and even the same taste as alcohol mixed with water and essence, although with a much lower alcohol percentage. Methanol which is meant for industrial purposes, is very damaging for a human being; it can easily blind or kill.

The smugglers did not intend to import methanol. Why should they ruin their business? The prices of methanol and pure alcohol in Portugal were not that different either. Only the distillery in Portugal knows the answer. The methanol was wrongly taken as alcohol by the exporter, is one hypothesis. The distillery had large amounts of both 96 % pure alcohol and methanol, and delivered methanol instead of alcohol. An employee tried cynically to get rid of some of methanol, is another hypothesis. The Portuguese distillery was not very serious, anyway. The Norwegian smugglers should have checked its reputation, before they stopped buying from the Spanish distilleries.

The smugglers felt the heat as they had never done before, due to the biggest criminal investigations in modern Norwegian criminal history. "The time of the great importers are gone by now", one of them said pessimistically in 2005. He was right as far as 96 % pure alcohol was concerned, but he was wrong about other kinds of alcohol. Beer and wine showed up as the new illegal source in a tempo which stunned everybody. It was just a question of days actually, before huge quantities of beer and wine started crossing the Norwegian borders. "We don't import "water", veterans told in the 1990s when asked about beer and wine. Today they do that kind of smuggling as the most natural thing for a smuggler to do.

In the nineteenth century the moderate wing of the temperance movement campaigned for beer and wine as an alternative to hard liquor. They were never taken seriously by stubborn politicians, who saw *all* kind of alcohol as poison, and continued taxing beer and wine. Today the ideal of moderation is accomplished though, by *illegal* import of beer and wine. A lot of Norwegians without any kind of tradition for wine whatsoever have had their first wine 'lessons' by now, and seem to enjoy it. The shift to beer and wine was both supply and demand driven. The supply had not been there before, because the smugglers saw more money in smuggling 96 % pure alcohol, but the methanol crisis made the demand for illegal beer and wine bigger than ever before.

Because of the difference in volume, it is (still) more expensive to transport beer and wine compared to pure alcohol. However, the transport *distances* are

shorter than they used to be, when the smugglers used to buy the booze in Spain or Portugal. The beer and wine smugglers get all they need in Northern Germany. They don't transport in industrial quantities like they used to do before the methanol. They use more gasoline because they drive many small cargos over the border instead of one big haul, but it is safer that way. The driving is a question of hours. It is easily done, even for a newcomer who is willing to start the small way to make a niche, over time.

Smugglers who live along the borders know when and where to cross. An increasing number of Norwegian smugglers have actually moved to Sweden, where they have bought houses to live and farms where they may store the cargo, while waiting for the right time to cross.

Even "Einar" the pessimist is back on track, and more veterans with him, although by paying younger men to do the driving. Foreign drivers are increasingly preferred by the veterans because those drivers do not talk Norwegian, and do not socialize with Norwegians, who may rat and tell.

Some veterans had to do time, but bad news are good for someone, like a brave new generations of young smugglers who got a flying start due to the methanol, while veterans were in prison and the market was crying for beer and wine. Smugglers, police investigators and custom officers tell the same story about the success of beer and wine. The confiscations of 96 % pure alcohol have been next to nothing since the methanol tragedy.

"A new jungle is evolving out there, totally unknown to the police," according to 'Ivar'. The total number of smugglers and dealers has increased. The police may handle each and every one of them if they really want to; veterans as well as freshmen, but never more than a few at a time. The smugglers know that, and they know how to calculate risk against profit.

The illegal alcohol market in Norway has a long history. It is much older than the drug markets, and organised prostitution and gambling which is a small kind of vice in Norway. 96 % pure alcohol became stigmatized in 2001 - 2003, but not alcohol as such. Quite the opposite actually, beer and wine gained a much higher standing in the illegal market, just because of the methanol.

Still a demand

Alcohol is expensive in Norway, compared to most other countries. The availability is restricted, although not as extreme as in the 1930s with only 13 state liquor stores for all Norway. The opening hours for the near by liquor store are Monday to Wednesday 10.00–16.00, Thursday and Friday 10.00–18.00 and Saturday 9.00–15.00. That's convenient for the neighbours, but not for customers who have to drive for miles and hours.

The net income is one of the highest in Europe. The price of alcohol has declined compared to the increase of the average income, but the price level is

not only a question of economy, it is also a question of psychology. "We do all want it cheaper, if possible", says "Odd" a veteran from the 1950`s who had his first customers among directors and millionaires. Poor people can hardly afford to buy that much alcohol anyway, legal or illegal.

The Norwegians have been more mobile since the 1970s, and became used to other countries and cultures. They know how inexpensive alcohol may be. A poll conducted in 1996 documented a kind of ambivalence to *professional* smuggling among Norwegians in general (Rossow and Johansen, 1996; Rossow, 2003). The respondents were tolerant to bootlegging when asked about the relations between smuggling and the taxes, while they showed a more law abiding attitude when smuggling was presented as organised crime. The morally 'correct' answers may have been a lip service. When asked about their willingness to buy illegal alcohol if the price was low and the quality high, more of them answered like customers among customers: about 40 % of were willing to buy.[3]

Strength in white money

The average Norwegian customer is a law-abiding, hardworking citizen, who wants a tasty and cheap drink for the weekend. He pays for the booze with his own legal money. (Buying booze is still a man's job, mostly.) He does not have to steal or rob to raise the money. Huge amounts of white money are poured in to the black economy every year, due to the strong and legal income of the drinking mainstream.

Alcoholics are unpopular among dealers. The dealer wants his money on time together with a discreet deal.[4] Alcoholics as customers are for 'losers" who are hard up themselves, or cynical. "I do not want my moonshine to travel in *those* circles," tells 'Gabriel' who has been in the lead of illegal distilling for many years.

The illegal market has a long tradition for company smugglers who combine legal and illegal business. Smugglers who run legal companies for real have an interesting investing potential, by using their legal money to buy illegal alcohol and the infrastructure of the companies as a cover for import and distribution. Parts of the illegal profits are reinvested in those companies. Smugglers and dealers who know how an account is supposed to be kept, talk about money laundering as a pretty easy transaction as long as the laundering is spread over time, and the amount of black money is adjusted to the amount of the

[3] In this regard their attitude does not differ from the 'overtaxed' buyer of smuggled cigarettes in the UK, happy to evade the 'extortionist' excises imposed by a greedy state (Hornsby and Hobbs, 2006).

[4] Similarly, professional dealers are averse of junkies, as their habit makes them unreliable (Reuter and Haaga, 1989).

legal capital.[5] "It is actually very easily done", according to 'Jens' who has been big both legally and illegally.

Company smugglers are more competitive that way legally too, compared to competitors who do not cut corners, but they are not *taking over* legal firms as such with their crime-money, because that is not their ambition either. Corruption through money laundering is not a topic, as far as we know. Some extra money to invest in their own companies and to buy a nice house in Norway, and sometimes in Spain, Brazil or Thailand too, makes the day anyway. Crime does pay, although not that well as rumours tell, but most of the smugglers do not ask for more.

Smugglers and dealers who can not take care of their money are well known, but those who do take care, are very mainstream Norwegian: to have your own house and cabin is *the* Norwegian Dream. It is something very basic in most Norwegians. If you want to flatter the host, tell him you like his house and he will remember you for ever! A nice boat on the fiord and a new car are other popular investments. We *all* cannot afford, but company smugglers may as long as they are not flashy.

What we know about Norwegian smugglers and laundering so far, is actually quite similar to what Van Duyne says about money laundering in the Netherlands. No legal trades as such are taken over, neither the police nor the political system. "The principle at stake is much more basic than some economic threat supposedly posed by elusive crime-money. The fight against criminal money-management, including laundering, should be driven by the simple desire to see the *restoration of justice*. The offender should not retain the money or any other criminal advantage in the first place." (Van Duyne, 2003: 102.)

Crimes without victims, used to be

Smuggling of alcohol was for many years seen as crimes without victims. "The least criminal we can do", according to a veteran who has been involved in many kinds of crime. "It must have been smuggling, if I should have switched to the other side", a policeman told. "I draw my line there."

Local police used to show a certain tolerance, as long as bootleggers and distillers were discreet and kept things at a small scale. To keep small were the pro for them for practical reasons anyway, so why provoke the Law? "Very nice fellows to talk with", says a police investigator. "We have different positions, but we do respect each other as human beings, although I should not say that in public?"

[5] This raises some question marks about the dogma of the threat to the integrity of the financial system. See the contribution of P.C. van Duyne in this volume.

The Prohibition is still a bottom line in our cultural heritage when it comes to the folklore of alcohol. Existing stories has been told for many years. There are still Norwegians who remember the Prohibition, and even some who have met veterans of the 1920s. Districts which were big on smuggling and illegal distilling in the 1920s, are still big.

The smugglers kept a certain dignity up to the methanol, because of the folklore and the demand for cheaper alcohol than the State was willing to offer. As elaborated before, the demand dropped over night. The customers turned against the 96 % *en masse*. The Norwegians had not seen 'The Light'. Their reactions were only a question of self interest. The thirst for Life was stronger than the thirst for 96 % pure alcohol. Smugglers who were involved in the import of methanol lost prestige: their names and faces were media headlines for more than a year. "The national bandit of the year," one of them called himself. He was not kidding. "The charm is gone by now," an old time customer thought as well.

Nevertheless, we have seen that the customers did not turn against illegal alcohol as such, but asked for other (illegal) alcoholic substances: beer and wine which was seen as more safe and even more *moral* than 96 % pure alcohol, after the methanol crisis. Illegal distilling of alcohol has also gained a new standing, in the market as well as in the culture, after a stagnation in the 1990s. The moon shiner knows how important it is to stick to the principle of "small is beautiful", and has a position in the local community as a man of tradition and quality. The police ignore him just because he keeps small.

The future of 96 % pure alcohol is an open question, although a short memory is a genetic part of the (Norwegian) psychological character, at least as unpleasant memories go. The present smuggling of 96 % pure alcohol is very small scale and concentred to certain districts with a very long tradition and demand for the strong stuff, unlike the smuggling of beer and wine which is a national commercial success story of a lifetime, and a scenario no one even used to joke about few years ago.

Not an omnipotent state

The police may be tough on crime if they have resources and backing from the top to go after a chosen target for a while, but they still have to use discretion and set priorities. They have to decide whether to go after drugs, illegal alcohol, trafficking, gangs, illegal immigrants, organised thefts or domestic violence, for instance. The police may fight a two front 'first priority war' for a while, but not against all its 'enemies' at the same time, if we are talking about *real* 'warfare'.

The police are not that unified either, different parts of the police have traditions and priorities of their own. Division stands against division, leader against leader. "Who is going to 'milk' that one," is pretty often the agenda when the politicians give the police more money for crime fighting, according to a police veteran. This rivalry has all the well known elements: like money, turf, prestige and personal enmity.

Investigating organised smuggling and regional and national networks is very time consuming. Local police are not unfamiliar with the "never again message" from their leaders after an expensive investigation, even if the investigation has been successful, and even more if a police lawyer has tried a 'career killer' in the court and lost it.

It is a common response to go after well known smugglers who are easy targets compared to the A–teams and new teams with a clean record. "We know the East End boys are on", an investigator tells. "It is just like grab and go, to catch *them*", unlike the discreet smugglers with links to legal business. "Why go after ten unknown when we know about ten, old crooks already?", a custom officer asks rhetorically. Even obvious cases with seizures and confession have been given up, not because the police did not want to prosecute, but because they ran out of time. "I don't like to plead an old case before the court", tells a prosecutor. "Old because of me or the smuggler, it makes no difference".

When police leaders think the "war" is won

Time and again some police leaders think the "war" on booze is won, and transfer their 'troops' to other fronts. This happened after the repeal in 1927, the Second World War, the strikes in 1978, 1982 and 1986, the spectacular seizures in the 1990s, and just recently after the crackdown on the methanol. "That team does not exist anymore", a police leader admitted when asked about a successful police unit who had caught some of the biggest illegal distillers in Norwegian history. He was right about the end of those big distilleries, but forgot about a new wave of small distillers who worked on and off in his district.

The methanol attracted a lot of heat because of the involuntary manslaughter involved. The media was also very pushy. The importers were caught. The police got a victory in the court, but then it all calmed down. "No one in the police investigates illegal alcohol any more", says a frustrated policeman. "When the time comes for a new boom, we have to start it all over from scratch". The media did not show any interest either, except a couple of local newspapers close to the border with an occasional small notice on the last page.

The picture seems to be pretty clear: Contemporary entrepreneurs keep a low profile, mind their own business, think and remain 'small', stay away of

violence and adjust their projects to the strategy of the police, or its lack of strategy.

Political signals from the top

The Norwegian Police is highly professionalized, with a college education, qualified leaders and a strong identity as police, and sensitive to political signals. The crime stopping agenda of the politicians is not linear. It is changed pretty often, depending on the profiles and the agendas of the leading politicians, and pressure from the media. Crime stopping was not party politics a generation ago, but it is today with a strong influence on the game of politics. The cabinet ministers with a law enforcement portfolio are on and off. The priorities from minister to minister change concerning what *kind* of crime fighting they believe in. The switchovers from year to year, from booze to drugs, from drugs to human trafficking, from domestic violence to gangs, or from organised crime to terrorism bear the mark of the individual ministers.

Crusades are good for the police if they get more money and bad when highly competent investigators are ordered to start from scratch against a new enemy and to forget about their 'old' competence. Smugglers and distillers who have been in the trade for many years are very familiar with this kind of swing from police and politicians, and know that time is on their side. To be professional is nothing absolute; the professionals of yesterday may be the amateurs of today or *vice versa*, depending on the priorities of the politicians in power and the crusade of the year. Organising crime-for-profit is not an absolute thing: to understand its meandering nature and its resilience, one has to let history tell its story of semi-ordered or semi-chaotic interactions of upperworld and underworld.

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The bitter pill of a corrupt heritage: Corruption in Ukraine and developments in the pharmaceutical industry

Anna Markovska[1]

Introduction: the heritage of corruption

Corruption, bribery and theft are not novel problems in the countries of the former Soviet Union (FSU), including Ukraine. Historically, these phenomena appeared differently, especially in the autocratic era. "I believe you and I are the only people in Russia who don't steal" Nicolas I told his son and heir during the Crimean War (Chalidze, 1977, 28; also discussed in Van Duyne, 2001). However, he didn't mention that, as he held ultimate power, theft held little attraction. Van Duyne (2001) argues that absolute power excludes corruption: "being an absolute, unaccountable decision maker, he [Nicolas I] was too powerful for corruption" (73). An earlier example of such decision making by the powerful supports this statement. For example, at the beginning of the 19th century Emperor Paul I was considering reducing his investment in Odessa. The Odessits collected thousands of oranges, then an exotic fruit, and sent them to St Petersburg as a bribe. Was it really a 'bribe', as in a corrupt exchange of favours? It could be argued that it was a public gift, which Paul graciously accepted, and "immediately became more receptive to Odessa, restoring credits and privileges" (Gubar and Herlihy, 2005). Two hundred years after the event, the people of Odessa built a monument to "The Orange that Saved Odessa". It is a moot point as to whether this celebrated corruption or the people's triumph over it!

This does not mean that corruption was unknown in Tsarist Russia. Chalidze (1977: 149) discusses two forms of bribery in pre-revolutionary Russia: the first is bribery as "government or public officials taking rewards for performing acts within the area of their competence which were not contrary to their official duties", the penalties for these acts were very no more than fines. The second is corruption, where "the acts were contrary to the official's duty . . . and the penalty was considerably greater" (*ibid.*, 150).

In Pre and Post-Revolutionary Russia, officials were often expected to "live off the job; this they did by extracting every penny they could from those

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who were obliged to have dealings with them" (Estrin quoted in Chalidze, 1977: 146). The country had a long tradition of extremely complicated attitudes to private property, and for example in the 19th Century "the peasants actually applauded theft or swindling if the victims were outsiders" (*ibid.*, 4). Chalidze (1977: 24) has argued that the Bolsheviks did not manage to put an obstacle to such an attitude, but rather "sanctioned theft on a national scale". Did the Bolshevist regime also inherit the attitude to corruption? To a certain extent they did: officials were also often expected to live off their job.

Discussions of bribery and corruption in Soviet legislation is an interesting topic in its own right, especially the development of drafting of anti-bribery and anti-corruption legislation. In the 1930s, Soviet courts interpreted the concept of bribery widely. Chalidze (1977: 151) gives an example where "cases of a woman's favours being treated as a bribe". The author explains how, in 1924, The Supreme Court of the Ukraine declared that the objective of a person receiving or demanding bribes might be "to satisfy his needs with money or food and other material things, or to gratify his sexual needs and receive physical pleasure in one form or another" (Chalidze, 1977: 151).

In 1929, the official ruling of the Supreme Court of the USSR stated that "all forms of entertainment offered to an official in return for services are to be classed as a bribe" (Chalidze, 1977: 152). In the late 1940 the Courts were accused of being lenient "towards the officials who offer bribes owing to a false conception of administrative necessity" (*ibid.*, 153). Some authors (Chalidze, 1977; Simis, 1982) argue that the Soviet system of planned economy and the delivery of the party targets created a system where corruption and bribery were the escape routes from the fear to be prosecuted for inefficiency (Chalidze, 1977: 153), explaining why official Soviet Union statistics were notoriously untrustworthy. From the fulfilment of the Five Year plans to the official crime figures, the numbers were edited to suit the ideology, or to avoid punishment. Soviet citizens were informed that "crime in the USSR is steadily diminishing and is many times less frequent than in pre-Revolutionary Russia" (Chalidze, 1977: 197). According to Chalidze (1977), even these spurious numbers remained unpublished.

Simis (1982) discusses corruption and industry in Soviet times and the underground business world of the Soviet empire. He discusses the case of Liberman, who was questioned by the KGB officer as to why he needed so much money. Liberman replied "Yes, only 200.000.000. I had wanted to make 220.000.000; one ruble from each Soviet citizen" (*ibid*, 118). The reality of Soviet society was that "the incomes of the big underground businessmen are so large that Soviet society cannot provide the scope for spending for them" (118). One of the examples provided by Simis (1982) is the 'double-life' of one underground millionaire. His family shared an eleven-room apartment with seven ordinary families, and his wife would cook the dinner at the communal kitchen using the cheapest available ingredients. However, once in their back

room they would serve a most luxurious meal after discarding the more humble fare. The man, who always dressed in old clothes, was "a millionaire owner of a factory which provided him with an annual income higher than the combined wages of all the other six families in the apartment" (*ibid*, 102). His problem was not being rich, but being seen as rich.

Starting in the early 1990s, the obstacles to spending such monies inside, as well as outside, the countries of the former Soviet Union have receded. Times are good for the rich in the successor countries such as Ukraine, who can now openly enjoy the world's luxuries in addition to acquiring economic and political clout. Indeed, the transition to a market economy, coupled with the privatisation and liberalisation of the Ukrainian market in the early 1990s has opened new opportunities for fraud, embezzlement and corruption. ". . . The Ukrainian *nouveau riche* has privatised certain properties and accumulated fortunes with fraudulent transactions on the security market. Very soon, the public discovered that the capital and properties have been captured by the former communist party and Comsomol bosses who had been in power when the Soviet Union collapsed" (Dryomin, 2004: 56). Several authors have argued that organised crime in Ukraine, and other post-Soviet countries, has emerged as a result of collaboration between the former party leaders and criminals (see Simis, 1982; Dryomin, 2004; Shelley, 2004, Williams and Picarelli, 2004). Williams and Picarelli (2004: 142) rightly identified the issue of the political-business-criminals troika and the importance to understand the problems experienced by the country through the peculiar features of these relationships. This was not a post-soviet development, but a continuation of politico-economic relationships developing from the Brezniew era onwards: the corrupt heritage (Rawlinson, 1996).

Analysing the development of anti-corruption legislation in the contemporary Ukraine, this chapter considers the decades of Soviet rule, associated crime, including, underground business development (Simis, 1982) and 'red-collar' crimes (Los, 1986). Ukraine has been described as a country where corruption is endemic (Rose-Ackerman, 1999) and, yet has developed extensive legislation to respond to corruption. In 2006, Ukraine had over 50 anti-corruption laws and regulations in place. The revolution of 2004 provided many Ukrainians with the hope of change and democratic reform. Has the situation really improved for the better, and how realistic is it to expect ingrained corruption, political abuse and concomitant economic crime might be tackled successfully?

Corruption and organised crime: a brief overview

There are many problems in studying corruption. "The people involved may be powerful, the offences they commit are poorly defined in law, they do not consider what they are doing to be illegal and their 'crimes' are often considered 'victimless" Tupman (2005: 247). Alemann (2004: 26) argues that it is perhaps wrong to search for one universal definition of corruption. For some, it could be a symptom that something has gone wrong in the management of the state (Rose-Ackerman, 1999, 9), while others may stress the importance of understanding political corruption as "a part of informal political processes . . . termed 'shadow politics'" (Alemann, 2004, 32). Alemann (2001) discusses five dimensions of corruption: corruption as social decline, as deviant behaviour, as a logic of exchange, as a system of measurable perceptions and as shadow politics. These dimensions may assist in critical analysis of the concept.

Van Duyne (2001) approaches corruption as an illegal decision-making process in which three components are essential: discretionary power, known-decision rules and accountability. The outcome of the decision maker is not pre-programmed, but should be accounted for. He argues that one important element in the development of corruption is the role of leader (*ibid.*, 87), stating that 'corruption and successful leadership could go well together'. Aleman (2004) suggests that corruption is not necessarily concomitant to the decline of a state, or the general decay of other moral values (p.33). Van Duyne (2001) identifies different stages in the evolution of corruption, including extravagance, the erosion of accountability, ownership, and favouritism and clientism. Most of these stages can be applied to Kuchma's presidency (1994 – 2004) when dabbling in politics became an attractive commercial opportunity. In 2002, the BBC reported that, economic growth in Ukraine was underpinned by a record 14,2 % increase in industrial production, while average annual inflation plunged to 6,1 % in 2001 from 25,8 % in 2000. However, during his 10-year rule, Mr Kuchma was accused of "cronyism and presiding over one of the most corrupt countries in Europe" (BBC, 2002). There is a number of different views on the Kuchma presidency. National Security Advisor Evgeny Marchuk argued that "the situation in Ukraine is not ideal, but it's predictable and stable" (Business Week, 2002). Whilst the others, such as Former Deputy Prime Minister Yulia Tymoshenko says the opposition must isolate the regime through street protests. "The old system was all corrupted. Business and politics were interconnected. People would just walk around with kilos of cash and they used to believe they could do what they liked" (Fawkes, 2005). To understand corruption is to understand the context and the situational mechanisms of the society.

Since the early 1990s, corruption, organised crime, and more recently, transnational organised crimes, have attracted the attention of the European policy makers. Levi (2004: 823) points out that organised crime "has the politi-

cal advantage but the analytical disadvantage to possess the characteristic of a psychiatrist's Rorschach blot, into which everyone can read their own image". According to Levi (2004: 823), the political advantage of the concept of organised crime is that every politician wants to do something significant about such serious crime problems. This is comparatively easy as "doing something about organised crime" often requires limited justification.

Analysing organised crime in Russia, Shelley (2004) states that the impetus for such activity did not come from the demand for illegal or scarce goods and services. In her hypothesis, the rise of organised crime was a consequence of the transition from a socialist to a capitalist economy. The privatisation of state property provided opportunities for illegal enrichment while the opening of borders was a facilitating factor (*ibid.*). The same can be said about the experience of post-Soviet Ukraine though it would underestimate the pre-transition roots of corruption and organised crime, as argued before.

In an attempt to develop risk assessment instruments to evaluate organised crime Albanese (2004) identifies three general factors that explain the existence of organised crime (*ibid.*, 23). The first consists of four types of opportunity factors: economic issues, the role of government, the role of law enforcement agencies, and finally social and technological factors. The criminal environment is second set of factors. It includes the history of both organised criminal activity and corruption. Special skills or access is the third factor, as they also "might be needed in order to exploit these criminal opportunities" (*ibid.*, 27).

These factors are relevant in the analysis of the Ukrainian experience, as they may provide a basis to understand the relationship between corruption and organised crime. It informs the discussion of more general issues of corruption in the Ukraine dating back to Soviet times, especially the economic climate and the double standards of party leaders, the identification of the special 'business-politics-criminals' relationships and the development of the Ukrainian political elite in the 1990s. Also, the discussion of these factors enables a more elaborate understanding of the issues of transnational crime, and the questionable conduct in certain industries.

Corruption in Soviet times: red collar crime

We are all aware how prevalent bribery has become in many branches of our economic life.[2]

To understand the criminal environment of modern day Ukraine is to understand the Ukrainian inheritance from the Soviet Union as stated in the introduction. The term 'red-collar' crime was introduced by American researchers in the early 1980s to refer to crimes committed by those who occupied important positions in Soviet countries (Los, 1986). Party members, top-level state

[2] Felix Dzerzhinsky, People's Commissar for Communication in 1922, quoted in Chalidze, 1977: 147.

officials and the ruling elite were among those who potentially constitute the group of so-called 'red-collar criminals'. As mentioned earlier, although large-scale bribery and embezzlement of state property were punishable by death in the Soviet Union, these types of crimes were well practised in different republics. Los (1986) identified political reasons to prosecute corruption in a few selected republics, namely Uzbekistan and Azerbaidzhan. She suggested that it gave officials on the one hand the opportunity to claim that corruption is being tackled, but on the other, it would not uncover the prevalence of corruption in the USSR and closer to the centre, Moscow. Chalidze (1982) explains how the ruling elite in the Soviet Union enjoyed many privileges and luxuries in life, and yet, would still be involved in corruption and bribery. According to Chalidze (1982) several factors predisposed the highest ruling members of the country to corruption (p. 33). The most important one is that fact that "none of the material benefits showered on a member of the ruling elite belongs to him" (*ibid*). Another factor is the social habituation: after years of "working through the levels of the Party-state apparatus, the future ruler of the country psychologically adapts to a situation in which bribes and gifts are a daily routine" (34).

How wide-spread corruption became at this time was described by Simis, a former lawyer in Moscow who acted for underground business (Simis, 1982). He describes a day in the Moscow Municipal Law Court where people were informed about the sentences in "a case concerning an underground business, in which a group of sharp dealers had used a number of state knitted-goods factories to set up an illegal private company" (*ibid*., 67). A number of sentences of different length were announced, but with one defendant the court announced "he is acquitted owing to lack of evidence. He is to be released from the custody of this court" (67). According to Simis (1982: 68), this person was acquitted not because of a brilliant defence, but because "a bribe had been handed over by another lawyer involved in the case to the judge, a member of the Moscow Municipal Law Courts".

Simis (1982) argues that the Soviet judicial system was ravaged by two parallel scourges: dependence on the party and state authority and on corruption. He traced the root of corruption in the judicial system from the end of the Second World War, when "a people's judge's monthly salary would just about cover the cost of a dinner in a commercial restaurant" (*ibid*., 69). At that time the prosecutor's offices and judges were all trading in justice simply to improve their standard of living. However, when the financial situation of the judges improved in the 1960s, corruption and bribery did not disappear. At the beginning of the 1960s, when the "anti-bribe raids" began, there were some courts in Moscow where not a single former people's judge or public prosecutor remained, since it had been necessary to replace whole corrupt groups with completely new group (Simis, 1982).

Restrictions on private enterprises and developments in underground business further deepened the corrupt traditions in the Soviet Union (see Chalidze, 1977 for the discussion of the private enterprise in Soviet Union). Simis (1982, 66) explains the paradoxes of the Soviet system where the "organised crime [. . .] bears the stamp of the Soviet political system, the Soviet economy . . .". The growth in illegal business in the 1950s "became easy prey for the police, the prosecutor's office and judges, who were all trading in justice . . ." (Simis, 1982: 69).

Setting up a new business in the Soviet Union could be an expensive business. Simis describes how "the first expense was the bribes which had to be given to any state official whose permission was required to establish a new enterprise and to the heads of the organisation under whose auspices the new business was being set up. Once permission to go ahead was secured, the next step was to acquire the premises for the factory or the workshop, and again a state official had to be bribed. The prospective owner of the enterprise also had to shoulder the worries and expenses of acquiring the equipment: bribes for officials in ministries which authorise orders for machinery, and the cost of purchasing equipment stolen from state facilities" (Simis, 1982: 111).

The 1980s witnessed two different approaches to tackle corruption and criminalisation of officials in the Soviet Union (Los, 1986). One was introduced by Andropov in the early parts of the decade, and focussed predominantly on discipline, responsibility and organisational improvements. Another approach was introduced by Gorbachev and mainly consisted in replacing the 'old' political mode (*ibid.*), taking ultimately fruitless measures to replace corrupt staff. It was clear that without restructuring the system, the simple replacement of people was meaningless (*ibid*). This applied to the new Ukraine as well as the old Soviet Union.

How can the prevalence of corruption in certain countries be explained? Zimbardo (2007: 8) addressed the question how good people turn evil, suggesting that one alternative understanding is to ask questions such as "what conditions could be contributing to certain reactions? What circumstances might be involved in generating behaviour? What was the situation like from the perspective of the actors?" He explains how "people's character may be transformed by their being immersed in situations that unleash powerful situational forces" (*ibid.*, 8). To apply these questions to this study is to understand the activities of corrupt officials in Ukraine since 1991 by considering the general political and economic situation in the country. By doing so is not to excuse the activities of corrupt state officials in Ukraine, but rather trying to understand the environment politicians and governmental officials at different level work in.

The political elite formation in the independent Ukraine

Where did all the politicians come from in the newly-independent Ukraine and what were the stages of the political elite formation in the country? After the collapse of the Soviet Union, Ukraine had been left with almost no central authority, including central government or effective democratic institutions, including parties, civic movements and non-governmental organisations. These institutions generate political processes and can guarantee the foundation of the democratic political regime. Karasev (2002) argues that the paradox of Ukrainian situation was the coexistence of the vacuum of the political centre, and the presence of an old administrative mechanism of the Soviet type of politics. The vacuum of the political elite allowed the formation of a new elite of politicians who came from obscurity to power in a very short period of time.

By the end of the 1990s the centre of the political power in Ukraine was formed on the basis of an alliance between the representatives of the resourceful regions and representatives of central power. All the 'pure' party activists were pushed to the periphery of political life (*ibid.*, 2002). The basis of the state was formed not on the united cultural and political platform, but rather on the administrative pressure, regional sabotage and those who have enough resources to influence most.

Karasev (2002) discusses two pillars of post-Soviet political regime in Ukraine. The first one is the presidency, the *administrative pillar*, with the president at the top and a cascade of loyal individuals within regional, administrative and military hierarchies. These individuals ensure control of different regions and local self-governance and forge an alliance with the regional authority and business elite to control resources in the regions. According to Karasev, in a number of regions such allies created a culture of 'fathers' ('fathers'- regional leader) that can be very powerful if it consolidates administrative and financial resources, and a number of powerful people.

Karasev's second pillar concerns the *socio-economic* structure. It comprises of three systems: financial, budget and tax. It is the dependence on a number of privileges which is the core of this pillar. For example, loyalty towards the central authority means more privileges while planning the regional budget.

Kalman (2004: 93) argues that "364 of 450 national deputies have ties to the economic activities of 3,100 businesses that were responsible for 23,5 % of the country's exports and 10 % of the country's import. Taken together these businesses had a 4,1 billion Hrv debt to the state budget". It is rather naïve to expect all these officials, once in office, to be operating democratically and resistant to corruption. The business-politics and criminal connections can be forgiven if not reincarnated in parliament. Osyka (2003: 177) writes how one motive for pursuing a parliamentary career is to obtain immunity from prose-

cution. Once this has taken root, a shared protection mechanism developed. Politicians are often reluctant to vote in favour of lifting their colleagues' immunity, as they may have to face the same prospect. Even when confronted with overwhelming evidence of criminal misconduct they prefer not to wave immunity. In this, the Ukrainian justice system resembles certain mediaeval approaches, where to avoid the prosecution in the secular courts, one had to claim clerical or noble status and thus immunity from prosecution (Dean 2001). The main defects of the medieval justice sound similar to modern day Ukraine, and Dean (2001: 31) states that these defects are: "the ability of noblemen to commit crimes with impunity, and the extortion /bribery of justice".

Researchers argue that criminals in Ukraine can be divided into two groups which reflect social, political and economic facets of the country: syndicates of businessmen and corrupt officials, and various criminal groups involved in petty crimes (Transcrime, 2000). In the 2000 annual report to the Ukrainian Parliament, the President suggested ways of preventing corruption in society. It has been stated that the most profitable sectors of the Ukrainian economy have been divided between criminal groups and some were associated with the highest office. Former President Kuchma demonstrated this in June 2004 when a company owned by his son-in-law won a tender to buy Kryvorizhstal, the country's biggest steel plant (BBC, 2004) for $800m (£429m), after several higher bids from foreign companies were rejected. Kryvorizhstal employed 52.000 people, and had pre-tax profit of about $300m at the time. A consortium of international firms, including LNM and US Steel, had offered $1,5bn for Kryvorizhstal for the company (*ibid*.). In February 2005, one of the first decisions undertaken by the new Prime Minister of Ukraine was to annul the steel firm sale.

The report conducted by Transcrime cited one Ukrainian official who pointed out that "criminal groups are dividing spheres of influence in Ukraine among themselves" (Transcrime, 2000: 57). According to some Ukrainian state officials the main areas affected by economic crime (as of 1997) were "the transfer of hard currency funds to foreign bank accounts, money laundering through investments in real estate, securities, hard currency and legal commercial activities" (Transcrime, 2000: 57).

It was not surprising that the main points of Mr. Yuschenko's presidential manifesto in 2004 addressed corruption and suggested a number of anti-corruption measures. The manifesto suggested that the country needs "[t]o separate the power from the business, to defend the entrepreneurs from rent-seeking behaviour of the officials; to stop using the criminal justice agency in order to pressure entrepreneurs; to cleans the tax authority from the corrupt officials, to raise salary to the honest officials; to liquidate the tax police and to make sure the oligarchs pay their taxes" (Yuschenko, 2004). Yuschenko said that he is against the re-distribution of property, but oligarchs should pay the real price for the enterprises they purchased (*ibid*.).

In order to make authorities work for people and fight corruption Yuschenko (2004) suggested the country has to:

- Fire corrupt officials, who take bribes, [and] employ only honest people
- Reduce the bureaucracy level. The 'cheap bureaucrat' can be very expensive for people. It is important to raise the salary for officials. Each civil servant should sign the ethical code of the civil servant
- Clearly formulate the functions of renewed structures. The state should not interfere with the life of ordinary citizens
- Fire the corrupt judges. The courts should reinstate the rule of law
- Implement the real political reform, so that all the ordinary people understand that power work for them, and works effectively"
- Change the priority of those who work in the criminal justice system. The main part of their activity should be not to protect the rich, but to protect each citizen in the country
- Cleanse the criminal justice agencies from corrupt officials, only the highly qualified and honest officers should be appointed on the leading posts
- Begin a fight with criminal elements and organised crime.

Yuschenko's (2004) statements reflected much of the feelings of the population. The problem is how do you begin all these reforms and where do you start such reforms? The political power struggle which followed showed that is would be a long and difficult road.

Two years after this speech, the Kiev International Institute of Sociology conducted a survey of judicial corruption in Ukraine[3] (KIIS, 2006), interviewing both the general public and lawyers in a number of locations. According to the results, 85,6 % of the respondents think that corruption is wide-spread in Ukraine. Interestingly, 31 % of the respondents who were personally involved in court cases suggested that the "money paid to the 'mediators', including legal or/and lawyers, included unofficial payments to the court officials" (*ibid.*, 26). 31,3 % of the respondents believed that in order to get a successful outcome, an unofficial payment should be made (*ibid.*). 19,5 % of the respondents named judges as the most corrupt element of the judicial system (*ibid.*). 46 % of the lawyers named "compulsory income declaration for judges" as one of the possible steps to tackle corruption in the judicial system in Ukraine (*ibid.*, 45).

These observations underline our thesis that the criminal environment that developed during Soviet times has evolved to suit the special features of the Ukrainian political and economic sphere, and that the endemic nature of corruption present during the Soviet times has survived the transformation. This abstract statement can be brought to life by looking at the impact of this transformation to the development of the international trade and cooperation. Be-

[3] This survey was conducted in 5 regions of Ukraine, covering 90 cities and towns. A total of 1.028 interviews were completed, and of these, 62 respondents had first hand experience of the judicial system. The additional survey also included respondents inside or outside of the court buildings in 48 cities and towns in the country.

low, we briefly examine the recent development in the pharmaceutical industry in Ukraine to exemplify these issues.

Transnational corruption, public health and the recent developments in pharmaceutical market in Ukraine

Tupman (2005) differentiates between 'old' and 'new' corruption. Old corruption would include the types of activities described above, whereas new corruption involves situations where "'external' companies seek to corrupt government officials to obtain a monopoly position, either as a supplier of goods and services or as a purchaser of a primary product. This type of corruption involves local economic and political players dealing with transnational actors . . ." (*ibid*., 252). The transnational era and globalisation present vast new opportunity structures for corruption (*ibid*., 253).

How does this affect present-day Ukraine? The following is a brief overview of the development of the Ukrainian pharmaceutical market, and considers the way global pharmaceutical companies have built relationships with Ukrainian medical practitioners. This study begins with a brief overview of the corporate social responsibilities of pharmaceutical companies globally, and describes the specific features of Ukrainian market.

Corporate social responsibilities: global pharmaceutical companies

The majority of global pharmaceutical research and development (R&D) and marketing and sales (M&S) originates in a triumvirate of key markets, namely the USA, EU and Japan. The USA has been the largest pharmaceutical market by value ($ 192 billion in 2002, or about 50 % of global sales) (ABPI, 2007). Non-triumvirate countries are expected to retain around 11 percent of the total between them. Note that these data are by value: non-triumvirate countries produce a large volume of low-value, generic medicines.

In criminology, studies involving specific industries are comparatively rare. The classic study of large-scale pharmaceutical corporate crime was conducted by Braithwaite (1984). The current interest in the problem has been furthered by reports of prescribing information or issues of reporting of rare but serious side effects of certain drugs (Medawer and Hardon, 2004). Whilst such reports have identified certain issues with the global pharmaceutical market, they do not necessarily address the specific problems of corruption and control of the market by Fully Integrated Pharmaceutical Companies ('FIPCos'), which undertake early stage research on novel medicines, drug development and clinical studies and have significant sales forces in major territories.

For example, current treatments for anxiety, depression and mental distress are often based on the selective inhibition of serotonin reuptake in the brain, and date from the 1990s. Following the introduction of the first generation of these Selective Serotonin Reuptake Inhibitors (SSRIs) such as Prozac (fluoxitine, Lilly), doctors progressively began prescribing for longer and in larger doses (Medawar and Hardon, 2004). In mid 2003, GSK (GlaxoSmith-Kline) published a small printed amendment to the prescribing instructions for Seroxat (paroxetine, GSK, also known as Paxil in certain territories) upwardly revised its 2002 estimate of the risk of withdrawal reactions from 0,2 % to 25 %. Although, strictly, this amendment complies with regulatory requirements, the accepted risk of Seroxat/Paxil withdrawal problems had suddenly increased from 1 in 500 to one in four. This implies that there may be a greater potential for modulating prescription policy if amendments are introduced in this way. Is this a criminal activity, or a failure of the pharmaceutical companies', or regulators, internal procedures, or simply good clinical medicine policy?

There is no unambiguous answer to this question, but the marketing methods are could be considered to be at the limit of what is morally acceptable. The marketing practices of certain pharmaceutical companies have attracted some criticism ("legalized bribery", Arie, 2003). In Italy in 2003, 40 GSK staff and 30 doctors were under investigation for *comparaggio* – the prescribing of drugs in exchange for gifts, such as computers or holidays (*ibid.*).

In the USA, TAP Pharmaceuticals was fined $875m by the US Department of Justice for giving doctors free samples of drugs on the understanding that they would then bill the federal government. Pharmaceutical firms paid over $2bn between 2000 and 2003 in cases brought by the US Justice Department, principally for pricing and marketing crimes (The Economist, 2003).

Direct-to-customer ('DTC') advertising of prescription drugs is another grey area. In 1997 the pharmaceutical companies were permitted to market directly to US consumers, resulting in the creation of more than 100 'disease awareness' days a year. Targeted groups may involve people who can easily be scared and willing to begin self-treatment. As Jerome K. Jerome observed in Three Men in a Boat "with me it was my liver that was out of order. I knew it was my liver that was out of order, because I just been reading a patent liver-pill circular, in which were detailed various symptoms by which a man could tell his liver was out of order. I had them all".

Given what happened in the pharmaceutical market in industrialized countries in the last twenty years, it would be interesting to investigate if Ukraine learned anything from the experience.

Pharmaceutical market in Ukraine

Pharmaceutical companies around the world have been accused of a variety of dubious activities involving oligopolistic behaviour, such as exaggerating developmental costs, misleading marketing practices and patent and trademark issues to maintain market dominance (Medawar and Hardon, 2004). It is interesting to see the role of the global pharmaceutical companies in the development of the Ukrainian pharmaceutical market.

The Ukrainian pharmaceutical market has developed rapidly over the last ten years. Espicom (2006) suggests that "with a population of almost 50 million Ukraine represents a potentially lucrative pharmaceutical market. In practice, this is not the case. Most domestic manufacturers are very small and focus on the production of generic drugs". A number of pharmaceutical manufacturers produce products to Good Manufacturing Practice ('GMP') standards, which is required for sales in most western markets, although realistically they can only compete with Western imports in terms of price (*ibid.*). One of the serious problems identified is that of the enforcement of intellectual property rights. "Domestic companies tend to produce copies of Western drugs and the judicial system's lack of experience in dealing with intellectual property violations enables this kind of activity to continue. The US government has listed Ukraine on its Priority Watch List in 2006, as more protection is required against the unfair commercial use of pharmaceutical test data" (*ibid.*).

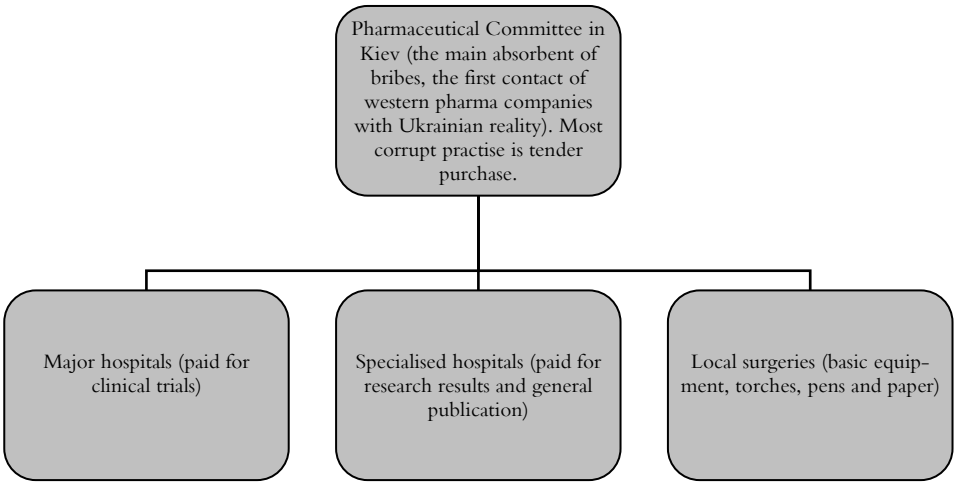
The development of the pharmaceutical market in Ukraine goes in parallel to the decline in the state expenditure on the health system, resulting in rapid decline in the salaries of medical doctors (see Ensor, 2004; Rashid 2005 for more details on Ukrainian health system). In terms of 'old' style corruption, informal payments to medical doctors may promise better attention and care from doctors and according to Ensor and Savelyeva (1998) can be recognised as a significant part of overall spending on health care. In terms of 'new' corruption (Tupman, 2005) it presents some pharmaceutical companies entering the market in Ukraine with an opportunity to 'buy' the respect by entering the complex web of relationships with state officials from relevant department.

A pilot study conducted by Markovska and Isaeva (2007) suggested that many Ukrainian medical practitioners have been approached by foreign pharmaceutical representatives on a regular basis, and on a number of occasions some sort of agreement was reached as to the way how to promote certain drugs in return for favours (financial or others) from the companies.[4] About half of the general practitioners interviewed admitted that they prescribed drugs in return for financial inducements from the pharmaceutical companies (*ibid.*). This is a rather grey area of the relationship between representatives of pharmaceutical companies and medical doctors. From one side, doctors should be

[4] For more detailed results of this study see Markovskaya and Isaeva (2007): Public sector corruption: lessons to be learned from the Ukrainian experience.

aware of the most recent development on the pharmaceutical market, and the representatives of the industry can provide them with this information. However, from another side, representatives of the pharmaceutical industry should act to obtain new areas of influence (from local surgeries to specialised hospitals) to promote their product and increase the sales, that can potentially lead to such activities. It might be unreasonable to single out one group of individuals, what is important is to understand the system that allows such situation to happen. It is possible to argue that because of the absence of a clear regulatory framework, the corrupt legislative drafting of the 1990s and non-transparent rules as to the registration of the new medical drugs all contributed to the creation of system where fraud and mismanagement can survive. It is useful to consider Tupman's concept of 'new' corruption in the pharmaceutical sector in Ukraine, especially in the light of the commercial opportunities arising with the development of pharmaceutical market. The following figure suggests possible outcomes of unhealthy relationships between representatives of pharmaceutical companies and the public health sector in Ukraine.

Figure 1.
Different grades of corrupt involvement of pharmaceutical companies into the medical sector[5]



On entering the Ukrainian market, pharmaceutical companies first encounter the officials from the relevant department, such as the Pharmaceutical Committee. Anecdotal evidence suggests that this is the first and a very important stage in the negotiation about the structure and scale of prospected activities in Ukraine, to ensure the 'green light' and access to the hospitals and medical profession. In the late 1990s there was a practice in place, whereby through bribing state officials companies could ensure that regulations issued for medical

5 See Markovska and Isaeva (2007) for more details.

doctors would include the brand names of the medicines to treat certain medical problems.

Once the first stage is completed, the company should establish relationships with specialists hospitals and medical professionals to allow for the more direct advertising of the drugs. Markovska and Isaeva (2007) suggest that the danger of this situation is in leaving doctors in a position to negotiate access to the hospitals and patients, thereby open to some informal negotiation with the representatives of pharmaceutical companies. As mentioned earlier, a number of doctors admitted taking some forms of financial inducement from representatives of Western pharmaceutical companies. This behaviour is neutralised by the long-established tradition of bribery and corruption. In both Soviet and post-Soviet Ukraine, gifts or cash from patients both ensure timely treatment and are also a necessary part of a doctors remuneration. Writing about the Ukrainian emergency service, Wright, *et al.* (2000: 832) suggested that the service operates on a budget that is inconceivably low by Western standards.

The endemic nature of corruption in the country described earlier in this chapter prevents the formulation of specific anti-corruption strategies targeting certain industries. It could be considered that there are too many points of entry for corrupt relationships. Ensor (2004: 237) argues that "unofficial payments can be characterised into three groups: cost contribution, including supplies and salaries, misuse of market position and payments for additional services". In the countries where corruption is a part of daily life, one of the ways to tackle the problem in a specific industry is to create strategies that addresses the phenomena in an inter-sector way (*ibid.*). Ensor (2001: 244) argues that "formalising some unofficial fees, with careful monitoring of their impact" may help reduce the prevalence of corruption and bribery in certain areas. To ensure the success of these strategies it is important to have interested policy-makers and politicians, a clear understanding of the consumers rights, and fair legal system (*ibid.*). Going back to the beginning of the chapter it is important to ask, whether these 'ingredients' are available in Ukraine.

Conclusion

The 19th Century Russian author Saltikov-Shedrin said that life in Russia would be impossible without a bribe. In general, this remains broadly true in Ukraine. After16 years of transition to democracy, and pious attempts to establish the rule of law, 52 legal provisions to fight corruption richer, the country is still battling the old style corruption, only with the new players. This has been aggravated by international new style corruption.

In an attempt to address why corruption has dominated the international agenda in recent years, Bratsis (2003: 48) argues that "as capital becomes more

mobile and more trans-national in its scope, the demand upon all states to become increasingly similar to those in advanced capitalist societies become more pronounced, and in ways that go beyond the usual arguments regarding the pressures to adopt neo-liberal policies". He continues to argue that the idea of corruption now also functions as a way of bringing nation-states into line with the demands of international capital by becoming increasingly bureaucratic, predictable, understandable and uniform (*ibid.*).

It can be argued that the legal framework to fight corruption is an important tool for global capitalism to ensure the success of the global business enterprise. But the conduct of the Western pharmaceutical firms is far from impeccable creating confusion and moral ambiguity, to say the least. One aspect of corruption is its impact on the life of ordinary people, and the other aspect is its role in the globalisation and internationalisation of business of which the Ukrainian pharmaceutical industry is an example.

This chapter considers the systemic nature of corruption in Ukraine, and the importance to understand the situational framework of corruption, looking back to the Soviet times. It has been argued that political corruption can shape the reform process, supporting weak financial institutions which in turn become vulnerable agents in a corrupt system (International Bank for Reconstruction and Development and World Bank, 2001). It appears that the fight against corruption in Ukraine is two dimensional, national and international. Due to the nature of the economy, during the Soviet era, the scope of corruption was generally hidden and considered a rather localised problem. Corruption in post-Soviet Ukraine, aiming to become a member of the global community and to attract foreign investment, is a more international problem due to the globalisation of the market and proposed democratic reforms. However, what is normal for Ukraine can be considered as prognostic for other countries. For example, discussing what is normal in American politics, Bratsis (2003) argued that "there has never in the history of the modern state been a law against *political corruption as such*. There are only laws against *particular* examples of what could be classified as political corruption: bribery, embezzlement, nepotism, and so forth" (p.25; Italic added.). He further asks why is it normal for a US congressperson "to go on a 7 day trip that is paid for by a lobbyist but not 8 days?" (*ibid.*: 25). He finds the answer in a summary memo of ethics rules, establishing the "limit on a number of days at the expense of the trip sponsor" (Committee on Standards of Official Conduct, 2001 as quoted in Bratsis, 2003: 26).

Fighting corruption is a delicate field of social engineering, in which well intended but psychologically wrong designed measures can produce counter-productive reactions. Take the following anecdote: a businessman leaving the tax authority office in Eastern Ukraine was complaining that with the introduction of the new rules on how to enter the building of the tax inspection the life of ordinary people became more expensive. If previously one would take a

bottle of sparkling wine and a box of chocolate as an appreciation of good service, now with the introduction of the bag search at the entrance the only thing one could get through would be the money in the envelop. Some call it 'the tax' on the fight against corruption. Policy makers should do better than this.

Considering the relationship between pharmaceutical companies and doctors in Ukraine, some authors suggest that it is possible to reduce the instances of corruption in health sector by formalising informal payments, developing a more transparent system of the patients' rights and employment contracts (Ensor, 2004). Does it mean that creating the regulation, thus allowing the medical doctors to enjoy the paid-for conferences organised by pharmaceutical companies and be transparent about the amount of financial help received from a certain company, will make the fight against corruption successful? It would clear a backdrop to address the issues of corruption.

Success of these regulations should not be excluded *a priori*, but may well be limited and not applicable to the other political and economic spheres. Success in regulating corruption in certain industries is very important. Although one can learn from the global environment, local problems require local solutions, and Ukrainian corruption should be tackled according to its nature, taking into account the issue of a leadership disease.

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Post 9/11 developments of the EU criminal law-related initiatives and their implications on some basic criminal law principles

Katja Šugman and Matjaž Jager[1]

"I am not a good "naturalist" (as they call it) and I hardly know by what springs fear acts in us; but at all events it is a strange passion, and the doctors say that there is none which carries our judgment away sooner from its proper seat"
(Montaigne, Essays, Book 1, Ch.18 Of Fear)

Binding the weakness of the will

In the course of their lives individuals and social groups from time to time face challenges that require a specific kind of reacting. Despite experience, the way of reacting is not always fully rational. For example, we may know that a specific set of circumstances overpower our sound judgment and make us do rash and regrettable things in the circumstances of the momentary "weakness of the will". This kind of situation of "being weak and knowing it" are known to anybody and are as old as the mankind.

In Homer's Ulysses the cunning hero performs the classical solution to the problem of overcoming the future weakness. Even more, he manages to eat the cake and have it too, albeit with a little divine help on the side. A friendly nymph Circe gives him unambiguous guidelines that should bring him safely through the upcoming dangers. Forewarning him of the dangerous singing Sirens that could cause his ship to wreck she advises the following: ". . . pass these Sirens by, and stop your men's ears with wax that none of them may hear; but if you like you can listen yourself, for you may get the men to bind you . . . If you beg and pray the men to unloose you, then they must bind you faster".[2] Ulysses abides her counsel, hears the singing and saves his ship, his crew and himself.

In the by now classical elaboration of this kind of future oriented decision making, Jon Elster pointed out that the predicted sub-optimal decisions of the "weak will" can be looked upon as a deviation from the so-called rational deci-

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2 The Ullysses, book XII.

sion-making.[3] Since we can predict what kind of future events will push us to rash responses in a way we will later regret, past experience allows us to overcome and resolve the crisis. While preparing for the upcoming temptation that threatens to delude our best judgment, we perform a kind of strategic self-management for the future. Foreseeing the future we try to prepare by thinking things over calmly and judiciously.

There are many ways to outsmart our future weak self. One of the very effective ones is (more or less literal) 'binding'. It can come in many forms. One is pre-commitment: individuals as well as societies may try to bind themselves by pre-commitment. By pre-committing they effectively prepare themselves beforehand; they do A today in order to make sure that they will do the right thing (B) when facing the future crisis.[4]

In this chapter we apply the idea of binding against the rashness and impulsiveness to the recent EU legislature in the field of criminal law policy making. In our case the weakness of the will manifests itself in the decision making process on the scale of a large social group. In our case it concerns a confederation of states. We argue that some recent developments in the rapidly expanding EU criminal law show insufficient self-management and point out some specific examples of haste and fear-driven criminal law legislation. These examples of rash decision making call for establishing more effective pre-commitment devices that ought to restrain the legislator in this sensitive area. The first step in that direction could be to reaffirm the respect for the *ultima ratio* principle as one of the pre-commitment principles that is already at hand. This imperative principle of criminal law legislature –the accomplishment of the age of Enlightenment– requires that we should only use criminal law legislation as the last resort. The alternative, 'impulsive' and rash use of criminal law remedies as *prima* and *sola ratio* systematically neglects alternative, more (potentially) effective policy measures and inflates criminal law legislation.

Short historical survey of the EU criminal law development

In the first decades of its existence from its establishment in 1951 until 1992, the European Union (or its ancestors EEC, EC *et cetera*.) was not interested in criminal law. Things started to change with the Maastricht Treaty (TEU) in 1992[5] when the Union got its three-pillar structure; criminal law constituting

3 Elster, 1979: 36-37.
4 Elster 1979: 39. For additional requirements of his technical definition of binding, see Elster, 1979: 37-47.
5 Treaty on European Union (TEU), OJ C191, 29.7.1992. Entered in force on 1.11.1993.

the third pillar in the "Justice and Home Affairs" field (JHA).[6] The Treaty of Amsterdam (1997)[7] changed the contents of the third pillar and strongly emphasized the criminal law topics by creating the so-called area of "freedom, security and justice"[8] that should be guaranteed to the citizens of the Union. The criminal law area was renamed "police and judicial cooperation in criminal matters" and the cooperation between judicial and police authorities was promoted as one of the major goals of the Union.[9] In addition, the Amsterdam Treaty introduced important new legal instruments: the Framework Decision (FD) which plays the crucial role in the third pillar.[10] The EU has been very active on adopting FD and the list of the recent ones alone shows an amazing activity on the side of the Council.[11] The most famous examples obviously being the Framework Decision on the European Arrest Warrant (FD EAW)[12] and the recently discussed FD on European Evidence Warrant.[13]

The next keystone of the development was the 1999 Council meeting in Tampere, dedicated to "creating European area of freedom, security and justice" and "placing it at the very top of the political agenda".[14] The Tampere Council opened the door to two principles guiding the third pillar matters:

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6 See Title VI, Provisions on Cooperation in the Fields of Justice and Home Affairs, Art. K – K9.

7 Treaty of Amsterdam, OJ C340, 10.1.1997. Entered in force on 1.5.1999.

8 The concept of the AFSJ incorporated migration law, family reunion law, asylum law, police cooperation, and cooperation in criminal law.

9 For and excellent overview of the development of the EU criminal law and an analysis of the decisions making process and legal instruments in the third pillar see Peers (2006).

10 FD are used to approximate the laws and regulations of the MS. They are binding on the MS as to the result to be achieved, but leave the choice of form and methods to the national authorities.

11 E.g. FD of 24 February 2005 on attacks against information systems, FD of 24 February 2005 on the application of the principle of mutual recognition to financial penalties, FD of 24 February 2005 on confiscation of crime-related proceeds, instrumentalities and property, FD of 20 September 2005 establishing the European Police College, FD of 21 November 2005 on the exchange of information extracted from the criminal record.

12 Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the Surrender Procedures between Member States (2002/584/JHA) http://europa.eu.int/eurlex/pri/en/oj/dat/2002/l_190/l_19020020718en00010018.pdf (20.7.2007).

13 Proposal for a Council Framework Decision on the European Evidence Warrant for obtaining objects, documents and data for use in proceedings in criminal matters COM (2003) 688 final. http://europa.eu.int/eur-lex/en/com/pdf/2003/com2003_0688en01.pdf (20.7.2007) and a later version of July 10, 2006, (Council document 11235/2006) http://eurocrim.jura.uni-tuebingen.de/cms/en/doc/794.pdf (20.7.2007).

14 Tampere European Council (15.-16. October 1999). See the conclusions on: http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/ec/00200-r1.en9.htm (23.8.2006).

1. principle of mutual recognition of judicial decisions[15]; and
2. approximation of legislation.[16]

Until the Tampere meeting, acts regulating the international cooperation on the field of criminal law were the international instruments, especially the instruments of the Council of Europe. The EU mostly adopted documents that defined those instruments in details.[17] After Tampere EU policy regarding the criminal law became much more ambitious: it started adopting the instruments that would, in a long term, replace the Council of Europe Acts.[18] At the intergovernmental conference in Nice (2000),[19] two proposals with the purpose of enhancing the cooperation were launched:

1. the European Public Prosecutor (EPP);[20]
2. Eurojust.[21]

Because of the strong opposition to the idea of the EPP, only Eurojust, as the co-ordinator of judicial investigations, was put into place.[22] In Nice the Charter of Fundamental Rights of the EU was signed.[23] It is not legally binding, but

15 The concept of mutual recognition was launched in March 1998 by the UK Home Secretary during the UK presidency. Among MS the principle of mutual recognition is replacing the previously existing principle of reciprocity. It means that the judicial decision issued by one MS has to be accepted and legally valid in all other MS (even if such a decision could not be issued according to the legal system of the MS accepting such a foreign decision). See Nilsson, 2005, pp. 29-45 and Alegre, 2005, 41-47.

16 For that purpose they decided that: "Enhanced mutual recognition of judicial decisions and judgements and the necessary approximation of legislation would facilitate co-operation between authorities and the judicial protection of individual rights. The European Council therefore endorses the principle of mutual recognition which, in its view, should become the cornerstone of judicial co-operation in both civil and criminal matters within the Union. The principle should apply both to judgements and to other decisions of judicial authorities". Tampere conclusions, no. 33. Both principles were already mentioned in the TEU (approximation Art. 29 TEU). The first instrument enshrining the principle of mutual recognition was the European Arrest Warrant.

17 E.g. the EU Convention on mutual assistance in criminal matters between the MS of the EU (29.5.2000, OJ C 197/1) was conceived as the supplement to the Council of Europe Convention on mutual assistance in criminal matters and its protocols (20.4.1959, European Treaty Series, No. 30).

18 A good example is a FD Council Framework Decision on the European arrest warrant and the surrender procedures between the Member States (2002/584/JHA), replacing all the previously existing instruments concerning extradition (including the system of multilateral extradition built upon the European Convention on Extradition (1957), Title III of the Convention implementing the Schengen Agreement regarding extradition etc.).

19 Treaty of Nice, OJ C 80, 10.3.2001. Entered into force on 1.2.2003.

20 The idea of the EPP was first designed by the Corpus Juris project. See Delmas-Marty, J.A.E. Vervaele, 2000.

21 The idea was already mentioned in Tampere Conclusions, see. concl. 46.

22 Art. 29. and 32. PEU.

23 Charter of the Fundamental Rights of the European Union http://europa.eu.int/eurlex/lex/Notice.do?val=393952:cs&lang=en&pos=1&phwords=human%20rights~&checktexte=checkbox (20.9.2006).

it contains series of rights of various kinds, as known by other international instruments and Constitutional Acts of Member States.[24]

After Nice came the Draft Treaty Establishing a Constitution for Europe,[25] from the June 2003 Council meeting. The idea was that the whole three-pillar structure would be abolished which would, of course, have vast consequences for the EU criminal law development. As we know, the process was followed by the negotiations on the Treaty establishing a Constitution for Europe, signed on 29 October 2004 in Rome. The Treaty would become legally binding after the ratification by all Member States. Since the result of referenda in France and the Netherlands in 2005 was negative, it does not seem very likely that the Constitution will come to force in its drafted form. Despite this, both the Draft Treaty and the Treaty are worth studying, since they show us the political tendencies of the EU in the criminal law field as well.

In 2004 the Commission made public its political agenda for the coming five years – the list of ten priorities in the area of freedom, security and justice – The Hague Programme (2005-2009). This Programme is the successor to the Tampere Programme of 1999.[26] It is accompanied by an Action Plan in which the aims of the ten priorities are translated into specific actions and measures together with a specific set of deadlines.[27] The Action Plan consists of more than 300 concrete actions and measures and needs to be read in conjunction with other strategies that already exist regarding this area. For example, the programme introduces a new principle of availability: meaning that a law enforcement officer in one MS would be able to obtain the information needed to perform his legal duties for a certain stated purpose from another MS which holds this information, taking into account the requirement of ongoing investigation in that MS.[28]

Parallel to the main stream of adopting the Treaties, the EU was involved in other activities of interest of criminal law. One of them was the *Corpus Juris* project.[29] The project starting following an initiative of the European Commis-

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24 This Charter later on became a constituent part of the Draft Treaty Establishing a Constitution for Europe.

25 http://europa.eu.int/constitution/futurum/constitution/index_en.htm (25.8.06).

26 They even intended to call it "Tampere II" Programme. http://europa.eu/scadplus/leg/en/lvb/l16002.htm (20.7.2007).

27 Communication from the Commission to the Council and the European Parliament – The Hague Programme: Ten Priorities for the next five years – The Partnership for European renewal in the field of Freedom, Security and Justice (COM(2005)184 final). See, http://europe.eu.int/eur-lex (11.4.2006).

28 An example of the implementation of this principle is the Proposal for a Council Framework Decision on the organisation and contents of the exchange of information extracted from criminal records between Member States from December 2005, COM(2005) 690 final, 22.12.2005. The principle should come in full force on 1.1.2008.

29 The project was followed by the so-called "Green Paper on criminal law protection of the financial y Community and the establishment of a European Prosecutor" issued by the Commission of the European Communities on December 2001, elaborating the idea of the EPP. http://europa.eu.int/eur-lex/en/com/gpr/2001/com2001_0715en01.pdf (20.9.2006).

sion by which a group of criminal law experts from all of the Member States of the European Union (MS) worked on setting up the guiding principles in relation to the criminal law protection of the financial interests of the EU.[30] The project started in 1995, was first published in 1997 and after the wide spread discussions and also numerous criticisms the new version appeared in 2000.[31] The result was some kind of "model criminal and procedural code" protecting the EU financial interests. *Corpus Juris* was, therefore, a first serious attempt of creating a "European Criminal Code" and despite its limited range and the fact that it was never adopted had a great symbolic role (see more in Šugman 2004).

It is obvious that EU is becoming intensively interested and heavily involved in criminal law issues. If we only compare the two 'action plans': the Tampere and the Hague one, the immense growth of the interest in criminal law is evident. While the Tampere Conclusions are relatively vague and general, the Hague programme is much more extensive and detailed. It contains plans ranging from comprehensive measures against terrorism and "fight against organised crime" to the regulation of criminal justice, privacy and security. The same impression is confirmed by following the EU's activities in the JHA field, since its obvious expansion in the criminal law field in the last years. We will try to reveal some of the reasons for this speedy and extensive development of the criminal law measures.

Characteristics of the post 9/11 criminal law-related development

The above presented factual survey of the EU's criminal law developments is not enough to bring to light the major causes for such a change in the EU's interest in the criminal law. Although the Tampere Council Meeting (1999) produced the first strong EU 'statement' for strengthening the area of freedom, security and justice, nothing much had happened until the attacks on WTC on September 11th 2001. Whoever thought that the consequences will affect the US only couldn't be more mistaken.[32] In what follows we point out specific aspects of the new trends that the terrorist attacks in 2001 brought to the EU criminal law legislature.[33]

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30 Of course, those were not the only reaction of the EU to the trans-national crime. The first formal plan to combat crime was adopted in April 1997 (EU Justice and Home Affairs Council) and later on in June 1997 (Amsterdam European Council). In March 2000 the so-called EU Millennium Strategy on Organized Crime was adopted by the EU Justice and Home Affairs Council. For details see, Vermeulen, 2001/02.

31 See http://www.euroscep.dircon.co.uk/corpus.htm and http://www.era.int/domains/corpus-juris/public/index.htm (10.9.2003).

32 See e.g. Canadian reactions in Daniels, 2001.

33 See as well Padfield, Šugman, 2006.

Haste

As already mentioned, one of the first 'serious' criminal law legislative projects of the EU was the *Corpus Juris* project, designed to protect the Union's financial interests. Its origins date from the time (1995) when Union's primary occupation in the criminal law field was focused on the protection of its financial interests. The project took years of detailed and well-thought-out work done by the top criminal law specialists (academics at the like) from all the MS. It also included a wide and well-spread debate from governmental and non-governmental circles. Notwithstanding its shortcomings, the *Corpus Juris* can serve as an excellent model of how criminal law statutes need to be written: slowly, with a lot of deliberation and attention to detail, carefully considering the effects and future impact of the solutions adopted, engaging top criminal law specialists, and including wide professional discussions on the proposed solutions.

The Tampere Council stated the general direction of the "enhanced mutual recognition". In March 2000 the JHA Council adopted the Prevention and Control of Organized Crime: A European Union Strategy for the Beginning of the New Millennium (known as EU's organised crime "Millennium Strategy") stating as one of the a long-term goals a possibility of creating a single European legal area for extradition. The target date was 2010.[34] The next step was the "Mutual Recognition Plan" adopted at the JHA Council in November 2000.[35] It is justly described as ambitious, but at the same time gradual and realistic.[36] In point 2.2.1[37] this Plan refers to the "Millennium Strategy" and its long-term goals. As we can see the EU's ambition was to gradually till 2010 establish mutual recognition including a single judicial legal area in the extradition field.

Following the terrorist attacks the pace of deciding the 'appropriate' measures and of drafting the criminal legislation speeded up drastically. There was a Council Meeting already on September 21 2001, which agreed to the Conclu-

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34 See Recommendation 28 of The Prevention and Control of Organized Crime: A European Union Strategy for the Beginning of the New Millennium: ". . . An evaluation of extradition procedures, based on the Joint Action adopted by the Council on 5 December 1997, should begin no later than 30 June 2001. In this respect consideration should be given to the long-term possibility of a creation of a single European legal area for extradition. . . ." The target date for the long-term objective was set for 2010. http://eurex.europa.eu/LexUriServ/site/en/oj/2000/c_124/c_12420000503en00010033.pdf (7.2.2007).

35 Program of measures to implement the principle of mutual recognition of decisions in criminal matters, OJ C 12/1, of 15 January 2001. http://eurlex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=32001Y0115(02)&model=guichett (7.2.2007).

36 Vermeulen, 2001/02, p. 609.

37 2.2.1. Arrest warrants Aim: To facilitate the enforcement of arrest warrants in connection with criminal proceedings. In this connection it is necessary to bear in mind recommendation No 28 of the European Union's strategy for the beginning of the new millennium that consideration should be given to the long-term possibility of the creation of a single European legal area for extradition.

sions and Plan of Action for the combating of terrorism.[38] Referring to the previously non-accomplished Tampere conclusions, they especially emphasized the urgent need for the European Arrest Warrant and the adoption of a common definition of terrorism. The Council also instructed the JHA council to implement 'as quickly as possible' the entire package of measures decided in Tampere, among which there was special emphasis on developing the international legal instruments against terrorism, combating of the financing of the terrorism, strengthening of the air security, and the coordination of the EU's global actions. After the September 11 those measures were truly quickly adopted. FD on the European Arrest Warrant (EAW) was adopted in June 2002,[39] as well as the common definition of terrorism,[40] freezing of the assets,[41] additional powers granted to the Europol,[42] which also gained the anti-terrorist unit, Eurojust finally became active and EU adopted some other economic, financial and operational measures.[43] Suddenly, in the atmosphere of fear and pressure the 'gradual development' and reflection were forgotten and politics used the unique opportunity to achieve its goals without a lot of debate, let alone opposition.

We witness a similar development after the London terrorist attacks (8. 7. 2005). An extraordinary JHA Council meeting announced, among others, a FD on the Retention of the Telecommunication Data (October 2005), European Evidence Warrant (December 2005), and a FD on the exchange of the information between law enforcement authorities (December 2005),[44] Decision on the exchange of information concerning terrorist offences (September 2005),[45] and other measures on combating terrorist financing, intensifying the exchange of police and judicial information, prioritising the use of the biometrics, and making full use of the joint investigation teams.[46]

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38 Conclusions and Plan of Action of the Extraordinary European Council Meeting on 21 September 2001 SN 140/01.
http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/ec/140.en.pdf (25.8.2006).

39 "Its rapid birth following the relatively long gestation period has, however, produced a legal instrument which is both premature in terms of the development of EU-wide substantive and procedural law and under-developed in terms of technical detail." Alegre, Leaf, 2003, p. 8.

40 FD on combating terrorism, (13.6.2002, OJ L 164).

41 Council Common Position of 27 December 2001 on the application of specific measures to combat terrorism (2001/931/CFSP, OJ L 344, 28.12. 2001). According to the Common Position the European Community can freeze the funds and other financial assets of the individuals and groups on the established list of terrorists and ensure that they do not gain access to them. See as well FD on the execution in the European Union on orders freezing property or evidence, COM 2003/577/JHA, of 22 July, 2003.

42 Council Decision extending Europol's mandate to deal with the serious forms of international crime listed in the Annex to the Europol Convention (OJ C 362, 18.12.2001).

43 Overview of action in response to the events of September 11 and assessment of their likely economic impact, COM (2001) 611.

44 Framework Decision on the exchange of the information between law enforcement authorities http://europa.eu/scadplus/leg/en/lvb/l14151.htm (20.9.2006).

45 Council Decision of 20 September 2005 on the exchange of information and cooperation concerning terrorist offences (2005/671/JHA).

46 Press Release on extraordinary JHA Council meeting

The first worrying tendency regarding the development of the EU criminal law is, therefore, the speed with which the legal documents are adopted after the September 11th events. As we could see, most of the Tampere conclusions remained just on the level of ideas for nearly two years, until they received the crucial push after the terrorist attacks. The tempo started speeding up after 11 September and without many obstacles ideas quickly found their way into concrete legal forms. We can infer, not without cynicism, that the much promoted goal of mutual trust which was not really flourishing before and after Tampere, only seemed to come to life after the terrifying terrorist attacks. Suddenly there seemed to be a political will to adopt solutions that previously could not be realised. The worry about the way the decisions were adopted can additionally be accompanied by the concern that the Council debated its decisions in secrecy,[47] and that in the third pillar decisions are adopted with the minimum involvement of the European Parliament.[48]

What makes the whole process even worse is the lack or an abolition of the classical democratic principles. Firstly, the judicial control over the third pillar is insufficient, since the European Court of Justice has a very limited jurisdiction in third pillar matters. Secondly, some of the EU solutions agreed and adopted only on the ministerial level abolish previously established legal instruments that were adopted by the Parliaments . A good example is a FD on the European Arrest Warrant adopted by the JHA ministers, which replaced previously binding Conventions[49] adopted by the national Parliaments or agreed on referendum.[50] The speed is therefore accompanied with a huge democratic deficit.

Expansion of initiatives

The second worrying trend regarding the EU criminal policy is its expansionistic tendency. This is evident on the level of initiatives in relation to the scope of the EU criminal law 'jurisdiction', on the level of the establishment of the new institutions and as well on the level of initiatives regarding the introduction of new measures, which often even limit the previously existing principles. Initiatives that are at first conceived as fairly limited or are designed for certain criminal offences only, without further explanation or reasoning begin to spread or are applied to a much wider range of criminal offences. What was at first designed as an exception became a rule. Again, this usually happens after a

http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/jha/85703.pdf (16. 7. 2005).

47 As R. Laming puts it: "By contrast, in the Council, meetings were held in private, documents were not published formally, amendments were introduced into the text with neither proposals nor reasons being specified, there was no procedure for voting at the very final stage, and decisions were not always clear". Laming, 2006, p. 1. http://www.fedtrust.co.uk/admin/uploads/PolicyBrief28.pdf (25.8.2006).

48 Art. 35 and 230 TEU.

49 Article 31 of the FWD EAW provides for the replacement of the previously existing conventions and provisions such as the European Convention on Extradition (1957) or Convention relating to extradition between the MS of the EU (1996).

50 Vermeulen, 2001/02: 610.

certain serious event of an extreme nature, under the impression that such measures are indispensable and vital for the prevention of the most serious criminal offences. But later on we notice that they were also applied to many other criminal offences or that they unreasonably limit the area of freedom. Thus, e. g. the measures that are designed to prevent very specific and relatively rare criminal offences, turn into a general EU or MS policy.

a. In the field of the wideness of the scope of EU criminal law interests

The "expansionistic" tendencies are obvious as well when one observes the broadening of the EU's criminal law area. The first EU criminal law concern was the 'Eurofraud' and money laundering.[51] In the second stage, EU's interests expanded to the 'cross-border' crime (for example drugs, organised crime). The third, the most expansive stage, followed the 11 September attacks after which the development of criminal law seems to be developing in highly unpredictable pace. Nowadays legislation and measures spread to practically all the criminal offences[52] and are seriously limiting the MS sovereignty in deciding their criminal policies by dictating the substantial changes in previously existing criminal law principles.[53]

b. In the field establishing the new institutions

Following the idea of the supra-national authority authorized to prosecute Union-wide, the European Public Prosecutor (EPP) first came to light in the *Corpus Juris* project in 1997. Even if we leave aside the question of it never being realized, we cannot help being amazed by the expansion of its presumed authorizations with literary each consecutive document providing for its possible powers.

In *Corpus Juris* and later on *The Green Paper*, EPP was supposed to be authorized to prosecute criminal offences regarding the Euro-fraud. Once the idea was put forward, it started to spread despite of the strong opposition from the MS. For example, according to the Draft Treaty Establishing a Constitution for Europe, EPP should have the competence to 'combat serious crime having cross border dimension as well as crimes affecting the interest of the Union'.[54] Those duties are defined as 'investigating, prosecuting and bringing to judgement . . . the perpetrators of and accomplices in serious crime affecting more

51 It is clear that in Tampere conclusions terrorism was low on the list of priorities since it is mentioned only once, while, for example, money laundering is mentioned ten times. The priority was clearly the protection of the financial interest of the EU.

52 The Proposal for FD on European Evidence Warrant includes 38 categories of criminal offences.

53 There is also a trend of EC getting powers in criminal law field, especially after the crucial ECJ decision C-176/03 Commission v. Council. http://curia.europa.eu/jurisp/cgibin/form.pl?lang=EN&Submit=Rechercher$docrequire=alldocs&numaff=C176/03&datefs=&datefe=&nomusuel=&domaine=&mots=&resmax=100 (20.7.2007).

54 Art. III-175(1).

then one Member State and the offences against the Union's financial interest . . .".[55] It may seem that the later Treaty establishing a Constitution for Europe steps back, since it states that 'in order to combat crimes affecting the financial interests of the Union, a European law of the Council may establish a European Public Prosecutor's Office . . .'.[56] But it basically stayed on the same position since paragraph 4 provides for the possibility of the European Council to extend the powers of the EPP to include serious crime having a cross-border dimension and serious crimes affecting more than one Member State.[57]

Impact of the post 9/11 criminal law-related initiatives on some basic criminal law principles

The double criminality principle

We can follow this pattern in the tendency to increasingly limit certain safeguards. Double criminality principle is a legal safeguard applied regarding certain legal procedures between two or more states in which one of the states (the issuing state) requires something from the other state (the executing state): e.g. extradition, execution of the sentence, transfer of proceedings. The double criminality principle requires from the executing state to check whether the criminal offence in question for which a certain 'help' from the other state is required, is a criminal offence according to its national law as well.[58] The double criminality principle stems from the idea of a sovereign state that communicates with other sovereign states on the basis of the reciprocity. According to the structure of the EU, the sovereignty is being replaced by the principle of mutual recognition.[59]

Taking as an example the three EU documents that abolish the double criminality principle, we can observe the widening of the scope of criminal offences for which the abolition of the double criminality principle applies. FD on the execution in the European Union on orders freezing assets or evi-

55 Art. III-175(2).
56 Art. III. 274(1).
57 Art. III. 274(4).
58 If a state receives the extradition order it therefore, checks whether the offence for which the extradition is ordered is a criminal offence according to the national law as well. If it is not, then it rejects the extradition order.
59 For the purpose of this article we leave aside the question of what complications the abolition of the double criminality in the 25 MS with different legislations can create. See e.g. Council of Europe's expert opinion on possible ways to reduce the double criminality requirement.
http://www.sbg.ac.at/ssk/downloads/PCTJ%20(2005)%2006%20E.%20Lagodny.Poss%20ways%20to%20reduce%20the%20double%20Crim.pdf#search=%22qualified%20double%20criminality%22 (20. 9. 2006).

dence,[60] refers to the six categories of criminal offences (one of which mentions two different criminal offences): participation in a criminal organisation, terrorism, corruption and fraud, trafficking in human beings, racism and rape.[61]

The next document is the FD on EAW. It abolished the double criminality principle for 32 categories of offences if they are punishable in the issuing Member State by a custodial sentence or a detention order for a maximum period of at least three years (Art. 2(2) FD EAW).[62] This entails that the executing MS has to surrender a required person even if the criminal offence in question is not punishable or is not even a criminal offence according to the executing MS's national legislation. The most far reaching, as far as the scope of the criminal offences is concerned, is the Proposal for a FD on the European Evidence Warrant (EEW) for obtaining objects, documents and data for use in proceedings in criminal matters. It provides for the double criminality principle to be abolished in two cases: when it is not necessary to carry out a search of private premises for the execution of the EEW and/or if the EEW was issued for one of the listed offences. The list contains 38 categories of offences; therefore, an even more extensive list than that for which the EAW can be issued.

It is not difficult to see that the safeguard of double criminality is increasingly abolished or at least watered down. The general tendency is its completely abolition in the 'area of freedom, security and justice'. This not only entails that the MS will have to execute other MS's orders without questioning whether the criminal offence in question is punishable according to the national legislation, but it also implies that the differences in legal cultures are being suppressed and annulled.[63] In this way the most repressive, punitive penal culture will prevail. All for the common good of the European peoples.

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60 See fn. 45 *supra*.

61 For all those categories there is no possibility for the executing MS to check the double criminality if they are punishable by the issuing MS by a custodial sentence of a maximum period of at least 3 years (Art. 3). The list is not exhaustive, since the Council may decide to add further categories. We are leaving aside the question how the list of offences can possibly reasonably refer to the freezing of property of people who are accused of rape.

62 There are also other offences for which the EAW can be issued for which the judicial authority of the executing MS may refuse the execution of a warrant if the act on which the European arrest warrant is based does not constitute an offence under the law of the executing Member State (Art. 4(1) FD EAW).

63 See as well an excellent analysis of the gradual abolition of traditional extradition principles of 'political offence exception' and the 'non-discrimination rule' in Vermeulen,2001/02. Gradually the EU was abolishing those two traditional principles under the political pressure put on by countries fighting their internal terrorism problems. Those countries, frustrated because other MS in certain cases did not want to extradite the terrorist offenders (under the 'political offence exception' principle) pushed the ideology of 'other Member States being regarded as safe countries of origin'. After September 11, such an ideology finally prevailed and 'mutual trust' actually replaced the classical extradition safety mechanisms.

Proportionality principle

Finally, the most worrying tendency is the lack of proportionality in designing EU criminal law legislation. In other words, designing criminal law measures under the impression of an extreme threatening event is considered obviously sufficient for abolishing most of the previously existing safeguards, the principle of proportionality among them.[64] Arguably the most competent bureaucracy in Europe rashly draws up legislation that seriously limits human rights especially a right to privacy; giving the impression that those measures are inevitable and vital for crime prevention and the investigation of criminal offences. As an example we shall use the data retention initiatives.

Data retention

Data retention in criminal law context refers to the storage of the telephone call details or internet traffic (for example emails, web sites visited) by the governments or telecommunication providers for the purpose of prevention, investigation and prosecution of terrorist acts. The idea of data retention is not new: a Draft FD on data retention[65] was already rejected by European Parliament in June 2005 (just before the London attacks). The Parliament specifically held that there was no legal basis for such an authorization and that it was contrary to the principle of proportionality. The Parliament considered that the goal does not justify the means, which heavily breach the right to communicative privacy. It found the measures unnecessary and disproportionate.[66] The FD proposal aimed to keep the data of all traffic and location data generated by telephony, SMS and Internet protocols for 12-36 months, but it would not apply to the contents of the information. After the terrorist attacks the Parliament was asked to reconsider its position. Meanwhile in September 2005 the Commission proposed a slightly more liberal Proposal for a Directive on the data retention[67] and shortened the retention periods to six months for internet

64 Principle of proportionality is a basic legal principle of supra-legal nature. It was developed by many national Constitutional courts (or their analogues) and by the ECJ as well. It states that any layer of government should not take any action that exceeds that which is necessary to achieve the objective of government. Obviously it has wide application in criminal law issues. See an analysis of the proportionality principle in Clayton, 2001.

65 Draft Framework Decision on retention on data processed and stored in connection with the provision of publicly available electronic communications services or data on public communications networks for the purpose of investigation, detection and prosecution of crime and criminal offences including terrorism, Doc. No. 8864/05 COPEN 91 TELECOM 33, May 24, 2005 http://www.statewatch.org/news/2005/jul/8864-rev1-05.pdf (25.8.2006)

66 Unfortunately in the third pillar the Parliament does not have the right to stop certain act to become law if the Council so decides. See http://www2.europarl.eu.int/omk/sipade2?PUBREF=-//EP//TEXT+PRESS+DN-20050607-1+0+DOC+XML+V0//EN&LEVEL=2&NAV=S#SECTION3 (16.7.2005).

67 Proposal for a Directive of the European Parliament and of the Council on the retention of data processed in connection with the provision of public electronic communication

data and phone data to one year. The Parliament once again rejected the FD with the same retention time-limits on the same grounds in September 2005, but supported the Commission's more liberal approach.[68] In December 2005 the Parliament finally 'gave up': it supported the idea of the stricter Directive on data retention with the period of storing data for up to two years.[69]

The solution is questionable and disproportionate. It establishes the preventive system of surveillance on the general population, without regards to the principle of proportionality. It tries to prevent the specific harm by controlling everyone without distinction. A measure that is supposed to be an exception to the general right to communication privacy, used only in the most severe cases, became a rule directed against everyone.[70] Despite the constant protests and opposition by different bodies and citizens accompanying the process of adopting the data-retention decisions,[71] the Directive was adopted by applying pure political force and pressure on the European Parliament.[72]

The data-retention story teaches us, how it is possible to adopt a decision despite the strong and fierce opposition, despite the multiple rejection of the democratic element (the Parliament) and despite the traditional legal safeguards especially established to prevent such decisions (principle of proportionality).

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services and amending Directive 2002/58/EC http://eur-lex.europa.eu/LexUriServ/site/en/com/2005/com2005_0438en01.pdf (20.7.2007).

68 Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communication services or of public communications networks and amending Directive 2002/58/EC
http://www.ispai.ie/DR%20as%20published%20OJ%2013-04-06.pdf
See as well comment on http://www.euractiv.com/en/infosociety/data-retention-parliament-caves-council-pressure/article-150891 (20.7.2007).

69 "Opponents criticised the proposal's content as being disproportionate and reminiscent of 'Big Brother'. They also criticised the procedure, which involved pressure being put by the UK presidency on the Parliament to adhere to the UK's position."
http://www.euractiv.com/en/infosociety/data-retention-parliament-caves-council-pressure/article-150891 (25.8.2006).

70 See also the European Data Protection Supervisor's Peter Hustinx's opinion on data-retention
http://www.edps.eu.int/legislation/Opinions_A/05-09-26_Opinion_data_retention_EN.pdf#search=%22hustinx%20data%20retention%22 (5.9.2006).

71 "A letter was sent in May 2002 to all European Parliament members and heads of European Union institutions after more than 16.000 individuals from 73 countries endorsed it in a matter of days. The letter asserted that data retention (for reasons other than billing purposes) is contrary to well-established international human rights conventions and case law."
http://www.epic.org/privacy/intl/data_retention.html#humanrights (5.9.2006)

72 The UK foreign Minister Clark supported the measures: "in the fight against terrorism in Europe, security must take priority."
http://www2.europarl.eu.int/omk/sipade2?PUBREF=-//EP//TEXT+PRESS+NR-20050713-1+0+DOC+XML+V0//EN&LEVEL=2&NAV=S#SECTION9
(20.9.2006).

Human rights

It is not too daring to assert that human rights do not rank high on the EU agenda, despite occasional lip service. Most of the EU initiatives aim to achieve greater criminal investigative and prosecutorial effectiveness, and the issue of human rights is usually left aside. Either it is dealt with in the general referral in the introduction of a certain document[73] or human rights are tacitly considered as a hindering factor while drafting legislation at all.[74]

It is true that all the MS are signatories to the main Council of Europe Conventions regarding human rights and that the European Convention of Human Rights is a part of the EU legislation, but they keep being convicted for the breach of it as well as the case law of the European Court of Human Rights constantly proves. One would expect that while designing the MS's authorizations with such eagerness and expansion, the EU legislators would pay more attention to the protection of human rights in the field of criminal law as well.

Instead, the EU's deeds in the human rights field have been reluctant and ineffective. A Draft FD on certain procedural rights in criminal proceedings throughout the EU was first published on 28 April 2004 and was much criticized. After an extensive discussion on different options (e.g. introducing a less legally binding document or limiting the scope of rights) the solution focused on introducing minimum rights for the accused persons. The April 2004 proposal contained 19 Articles providing for the rights such as a right of free legal advice, obligation of MSs to provide for legal advice in certain cases (e. g. those concerning minors or of great complexity), a right to free interpretation, free translation of relevant documents, a right to specific attention, a right to communicate (e. g. with relatives, consular authorities) and a duty to inform a suspected person of his rights in writing. The latest version (June 2007)[75] contains only the rights to information, right to defence, free legal advice (much more limited than in the first version) and rights to interpretation and translation of documents of the procedure.

The question therefore remains, whether it makes any sense to adopt the document at all, since the proposed minimum rights are much narrower in scope than the European Convention on Human Rights. It certainly does not help that the jurisdiction of the ECJ in the third pillar is very limited. The tendency to produce documents that even narrow the scope of rights compared to the existing documents (for example the European Convention on Human

73 See pt. 13 FD EAW, fn. 259.
74 See the data-retention FD story above.
75 Proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union http://www.statewatch.org/news/2007/jun/eu-suspects-rights-draft-directive-jun-07.pdf

Rights) and introducing such a low level as 'minimum' standards potentially presents a danger of understanding these as the 'only standards' and not the minimum ones. It also reveals the EU mentality in the field: MS are obviously able to agree on repressive measures, but, unfortunately, cannot agree on a serious list of procedural rights of the defendants.[76]

Is there a need for the "EU criminal law central bank"?

We can think of more than one reason for such a fast and expansionistic development of the EU criminal law area in last years.[77] One of the most important ones is undoubtedly of a psychological nature. Until the shattering US events the MSs did not feel threatened. The most notable EU worry in the field of criminal law was the protection of its financial interests. But after the terrorist attacks the promoters of criminal law remedies were unstoppable and heavily supported and facilitated by fear. The political priorities changed and the inclination to act rashly, impulsively and repressively started crashing many of the previously existing barriers of human rights and procedural safeguards. Suddenly the consensus was achieved on radical measures that could not be decided before.[78]

The unique opportunity of the atmosphere of fear was (ab)used to achieve the unanimity on the measures that would not be adopted otherwise and also on the measures that have no connection at all with the terrorist events. While in the USA the foundation for such changes was almost a paradigmatic ideological shift from 'classical' criminal procedure to the 'war regime',[79] even to such extent that some scholars refer to it as a 'new criminal procedure' ,[80] we, in Europe, have experienced no such shift, but are still acting similarly.

When rational societies know that in moments of fear they tend to control their violent responses insufficiently, they try to strategically influence their future behaviour by binding. Past experiences tell them that this may be a good idea. The whole array of modern democratic institutions imposes a variety of safeguards that in fact act as pre-commitments. Important elements of a written Constitution and the system of the rule of law can be seen as a device for counterbalancing the fury of revenge that accumulates in certain times of the

76 Alegre, 2002.

77 Other reasons include legal and political factors. Before the September 11 the crucial reason for the relative slowness was a delicate connection of criminal law and state's sovereignty. The states are generally not eager to accept outside interventions, especially when criminal law is in question. The second reason was the legal framework of the decision making in the third pillar: legal instruments are adopted unanimously. Therefore, it was very difficult to obtain consensus among the MSs before 11 September 2001.

78 "It is highly unlikely that either of these [FD on EAW and the FD on Terrorism] would have been agreed in such a short time had it not been for the unique political atmosphere produced by September 11 that made Member States keen to show a united front against terrorism." (Alegre, Leaf 2003: 327).

79 Neuman, 2004.

80 Parry, 2007.

polity. Institutions and norms should reflect the deeper, long-term values that ought to override and restrain the Siren's song of the emotionally loaded circumstances and/or too impulsive policy makers being prodded by the heat of current affairs.

We have demonstrated a few examples of how the EU in a kind of "collective impulsiveness" introduced some important recent criminal law measures in extraordinary circumstances fanned by fear. This is exactly the heated state of affairs that ought to be avoided in particular in case of criminal law legislation. However, the history of criminal law making has proven differently. The criminal law legislating on drugs from the First World War onwards[81] and the reactions of the authorities when they fanned the organised crime imagery,[82] shows that this 'heated state of affairs' has long roots and still casts long shadows onto the future. The Sirens remain while the defences against their temptations are often weak and rarely unselfish.

Instead of legislative overreaction, procedural priority must be given to restraint, informed reflection and research-based responses. In formulating new crime policy measures the guiding values must be long-term effectiveness against the causes of crime and respect for individual human rights. This can only be achieved by a well thought-out long-term strategy that is composed of a wide range of activities that seek to address the roots of the problem and not merely symptoms. The impulsive reaction that automatically increases powers of the state on behalf of the civil rights may produce hard to reverse long-term policy shifts in the socially and legally sub-optimal direction.[83]

For example, the present day predictable reaction to terrorism resembles the mindless reflex of Pavlov's dog. The whole 'strategy' is highly predictable and was nicely summed by one commentator like this: "After the terrorist act occurs, demand for the emergency driven extended investigative powers to find out who and where the perpetrators are (and even when you already know that), hit them soon, hit them hard, and thereby teach a lesson to other miscreants who may be thinking of hatching similar plots.".[84] This approach may be fundamentally mistaken and counter effective. Obviously, to retaliate in the moments of grief and fear is intuitive and psychologically understandable.[85] But

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81 Van Duyne and Levi, 2005.

82 Van Duyne, 2004.

83 In this respect it is perhaps not surprising to see that the now obsolete Treaty Establishing a constitution for Europe enables the further expansion of criminal law competencies of the EU. In this respect it does not in fact fulfil its primary function as a constitution, which is the instrument of binding and pre-commitment *par excellence*. Another indication of the trend is the idea that the decisions in the area of "police and judicial cooperation in criminal matters" ought to be made by a majority vote instead of the consensus. Even the traditionally very eurosceptic Great Britain is seriously considering to give up the right to veto in this area. Cf. *Se bo London odrekel vetu na področju policije?* Večer, 5.5.2006.

84 Silke and Miller, 2006: 134.

85 But also rationally, from the point of the wily policy maker, it is the right time to react: all the objections can be muffled and any critical debate is avoided.

it is a sub-optimal policy. For example a violent retaliation to terrorist acts may be fundamentally mistaken. In the case of terrorism it sets in motion the wheels of violence and counter violence which in the end brings about more instead of less of the bad thing, i.e. terrorism.[86] It is like instinctively starting to scream and run away when confronted by a bear in the wood.

It is more than plausible that many politicians, interested law enforcement agencies and other 'problem owners' (in particular media) share an interest in a representation of a prolonged security problem driven and fuelled by sporadic extraordinary events like London terrorist attacks in July 2005.[87] The 'problem owners' do not want the EU to be "soft on terrorism and organized crime". The politicians are structurally tempted to be more present oriented. In the extreme cases their decision-making time horizon is fixed up to the next elections where they need to maximize votes.[88] If "[m]ature democracies need to find ways to be reflective and contain the violence in moments of fear",[89] then the effective pre-commitment devices have to be introduced.

A nice example of pre-commitment institution functioning in the system of checks and balances is the central bank. It is conceived as the institution of control and restraint in the field of monetary policy; it is supposed to function as "the repository of reason against the short-term claim of passion" on behalf of the executive branch of government.[90] Such institutions are supposed to bind the policy makers in times of temptation. Their existence and mandate reflect meta-rationality, meta-policy making, meta-politics.[91] Is there a need for a some kind of a "EU criminal law central bank", too?

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86 Miller 2006, p. 134. For example, the Netherlands recently introduced the new anti-terrorist act that considerably lowers the standard of proof needed for an arrest and prolongs the police detention without a formal charge to up to two weeks. Cf. *Nizozemska: novi protiteroristični zakon*, Pravna praksa 8.6.2006. The Russian president Putin recently issued a public *ukaz* to the members of the secret service to "likvidate" the (at that time not even identified) members of the terrorist group that killed Russian diplomats in Iraq. In a way this practice brings us back to the times of the former Soviet Union's NKVD and KGB. Nonetheless, even at that time these kinds of operations were never announced publicly. And as a rule the operation took place only after the targeted individual was legally condemned to the death sentence by the court (Cf., *Putin je ukazal ubiti morilce diplomatov*, Delo, 30.6.2006).

87 Van Duyne, 2004.

88 In addition the votes maximizing politicians once elected tend to introduce unpopular measures at the beginning of the term and popular ones towards the end. This may again produce sub-optimal policy.

89 Elworthy and Rifkind 2006: 17.

90 Elster, 1979.

91 For the specific idea of the "emergency constitution" as the insurance policy against overreacting and for preserving civil liberties in an age of terrorism in the USA, see Ackerman, 2006.

Ultima ratio

The question with which we closed the last section is not a rhetoric one with only an affirmative answer. In our case, the criminal law legislator is bound by a well-established doctrine that the criminal law – the roughest and the most intrusive means the society can employ against an individual – should be used only as an *ultima ratio*. Using criminal law as *ultima ratio* means that we should only use it as the last resort. We should resolve to it sparingly as "uttermost means in uttermost cases".[92] If we do not heed this principle, the criminal law can easily and conveniently be used as *prima* and many times *sola ratio* which leads us to the "criminal law inflation"[93] and the consequent depreciation of its value, respect and efficiency as a policy tool. Actually, legislative history on many field, among them drugs and organised crime, have demonstrated this depreciation already.

The idea of the *ultima ratio* is that criminal law is and ought to remain a subsidiary policy tool. It defines the specific precondition for the use of criminal law as a policy measure. This principle is one among the the basic principles that ought to govern the criminal law legislative ethics. It is also a specific requirement of the rule of law (*Rechtsstaat*).[94] The convenient use of criminal law as *prima* and *sola ratio* can easily be misused to avoid the dispute of other alternatively possible and perhaps more suitable and effective policy measures. It can also lead to muting a critical debate.

In order to avoid rashness, lack of proportionality and the inflation of EU criminal law remedies we argue for an effective mechanism of restraint in the EU criminal law legislative process. As the first step in that direction the EU needs to honor the well established *ultima ratio* principle in legislating criminal law measures. Legislative restraint needs to be complemented by a coherent consensus based EU crime policy that aims at effectively addressing the causes of crime. Such a crime policy is lacking at the moment, which makes it easier to resort to impulsive common sense, *ad hoc*, circumstances of fear driven and overly invasive criminal law measure.

92 Jareborg, 2004: 523.
93 Jareborg, 2004: 524.
94 Jareborg, 2004: 522.

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