

**The relativity of wrongdoing:  
Corruption, organised crime, fraud and  
money laundering in perspective**



Petrus C. van Duyne  
Almir Maljević  
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Klaus von Lampe  
(eds.)

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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 fifteen times:

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# **The Moral Relativity Pride Parade: an introduction**

*Petrus C. van Duyne*

Whether history is useful or not, it is full of moral winks and smiles: what once was good is bad today or the other way round and who looks back far enough will resign at the erasing power of time and memory. No ‘absolute’ value can withstand its steady grinding millstones. Of course, this is to the disgust of the ‘righteous ones’ usually suffering from a lack of relativity. There are many good reasons for such changes, in particular when new insights emerge, new values come to the fore and some old norms fade away because they are no longer ‘fun’. We know now that tobacco kills. But 50 years ago cigarettes were a welcome present or even presented as a gesture of mercy. For example, in an episode of the Western *The Good, Bad and Ugly*, Clint Eastwood (‘The Good’) let a dying soldier take a last puff from his cigar. Nowadays voices are raised to cut such episodes retrospectively out of movies as a morally reprehensible conduct. Of course, such a moral change can be justified on solid scientific grounds of physical harm by nicotine consumption.

There are many other fields in which historical moral winks abound because norms and values faded. What once in Christian societies was criminal blasphemy, punishable by pulling out or piercing the tongue with a hot pin (Lensen and Heitling, 1990; Radner, 2012), is now a matter of freedom of expression. Of course, contemporaneous sinners had little to laugh about, just as there is little to smile at the ‘punishment’ of the blasphemous Charlie-Hebdo editors, though the dauntless cartoon designers thought and (if surviving and persevering) still think differently. These themes concern norms, values and aspirations of groups or peoples which they feel they are far removed from the spiritual field of humour and relativity.

These historical retrospective winks and smiles may be taken as examples of moral relativity, not quite the favoured stand of criminal law practice and criminology in which there is little laughing anyhow. Nevertheless, it remains fascinating to look back and observe how negative evaluations of norms, attitudes, historical events and persons, sometimes change in less than a lifetime. To grasp such changes it is instructive to look at the list of

prominent terrorists/freedom fighters, turned into peace settlers, some of whom even earned the Nobel Prize: Arafat, Begin, Al Sadat, Rabin, Mandela and De Klerk. Change from moral damnation to acceptance is also prominent in sexual values and orientations: performing homosexual acts was not only looked at as repugnant, it was also punishable. Only half a century ago it was gradually decriminalised (1967 in the UK, 1971 in the Netherlands) while in the UK police reports continues to figure in personal criminal records, even up until today. At present, in most industrialised countries opponents of Gay Pride Parades are viewed as intolerant, even a bit morally suspicious.

Is embracing moral relativity, researching and questioning all morals and values, an indication of nihilism or something to be proud of? Taking stock of the history of (in)tolerance and enlightenment I think it a matter of pride. With the exception of the violation of physical integrity, personal ownership and public safety, it is not difficult to stage an imaginary 'Moral Relativity Pride Parade' analogue to the Gay Pride Parade in the canals of Amsterdam. Imagine a parade with various floats, each with themes like drugs, organised and economic crime, corruption, money laundering and related criminal law subjects: a colourful procession of libertarians waving their multi-coloured official policy and morality provoking flags while blowing kisses to the onlookers.

Like a Gay Pride Parade, such a Moral Relativity Parade will not be uncontested. Institutions which may feel threatened in their *raison d'être* – upholding traditional moral values – will frown at it or protect themselves by ignoring them. For example, Europol, the Financial Action Task Force on money laundering, the World Bank, Transparency International, United Nations (with numerous specific offices, like the one on crime) and a host of NGO's advocating the interests of various groups will certainly not be found among the fans along the canals. This may be due to a genuine belief or underlying institutional interests in terms of budget and staff which are a natural consequence of a successful institutional 'ownership' of moral issues. This may be one the reasons why one hardly finds a debate between the dissident occupants of our imaginary floats and representatives of these 'righteous' institutions. Moral ownership is at odds with open debates. This 'silence of the righteous' is regrettable: there are so many colourful shades to be observed as input for lively debates.

Looking at the chapters in this volume dealing with various moral issues, such as corruption, organised crime, money laundering and economic crime policy, there are many colours and shades to be discerned between black and white. Some are in the middle where colours are adjacent or overlapping. For example, organised crime, policy and public administration can form

patterns of interaction where you can hardly tell the one from the other. Daily life can be so leavened with corruption that it is difficult to imagine a life without it or without criminal organisations. Indeed in many countries it is more burdensome to operate without than with corruption, given the state of the civil administration (Jager, 2003). Sometimes it seems that there is no nuance and only one shade of morality: black (= bad), as with the underground contraband markets. Still, human reality may again put the door of relativity ajar. What means morality if one lives in poverty stricken quarters with few alternatives to make a living? *Erst das Fressen, dann die Moral.* (Bertold Brecht)

Relativity is not always 'happy'. Amidst much misery only a selected few do financially better than just surviving. Their accumulation of wealth has little to do with a relativist philosophy, but with a practical (or cynical) attitude that knows only success as a criterion. One should not only think of the corruption in Italy, which has got far more international attention in the media and from researchers than Greece or Spain. Against a nationwide awareness, these manifestations of grand corruption were left alone and would have continued for ever if the bursting of the financial bubble in 2008 had not put a spoke in the wheels. Despite flagrant law breaking, few have been held accountable in court (Keršmanc and Ahtik, 2013; Levi, 2013; Dorn, 2010), while the EU has laid more emphasis on budget matters and austerity than on the (im)morality of an irresponsible elite of bankers and politicians. The EU primary demand was not: "fight corruption", but "cut your expenses". This is also a reflection of moral relativism, but with a sour cynical smile and in our Moral Relativity Parade should be placed at the very rear: in the float of Greed & Moral Indifference.<sup>1</sup> Small wonder that the impoverished populations of the affected countries revolted against a purely financial austerity policy put in place without addressing the moral decay of the ruling elite. It looked like a repetition of the way the EU dealt, for fifteen years, with the 'friendly statesman' and master-corrupter Berlusconi (Stille, 2007): a perfect Europe-wide manifestation of moral relativity. So be it; if we do not learn from history, it is at least entertaining. Let us have a look at the imaginary floats in this volume.

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<sup>1</sup> See the 2014 Cross-border Crime Volume: *Corruption, greed and crime money: sleaze and shady Economy in Europe and beyond.*

## **The ‘state and corruption float’**

How puzzling the many shades of morality concerning the corruptive state of a country can be described in the chapter on *Ukraine* by *Anna Markovska* and *Alexey Serduyk*. The basic question is: what is Ukraine? Is it a state seriously victimised by high-level criminals or a criminal state in which criminals run the country. Or is there a shade in between: a country with pervasive corruption, but as a kind of sick ‘alien body’? The picture the authors sketched is far from reassuring: the sick state of Ukraine has more than a chronic ‘moral flu’. The authors illustrate this with a telling opening story of the short military career of conscript *Mykola* who had to become tank commander. As this position was the last thing he wanted, he bribed himself out of service and out of his tank. Other examples range from institutions of higher education with a ‘hierarchical’ exam bribery system (bribes passed higher up in the line of management), to a whole town corruptly run as an organised skimming facility for the local boss. Indeed, since its independence the country has been ruled top-down as a kind of medieval state for the personal gain of ‘tsar’ (president) and boyars (oligarchs) (Jansen, 2014). The president as lord could be a convicted juvenile offender or accused of beheading a journalist, all that did not matter as long as he could hand out fiefs to his vassals/oligarchs. Elite criminals becoming office holders and office holders becoming elite criminals: in such a political landscape there is no way to discern a difference between criminals capturing the state or the other way round. What about civil society and the population in general? Civil society is not strong and needs protection against the state. This requires an independent judiciary, which is lacking in Ukraine. Meanwhile, the monitor carried out by the authors reveals a population left to its own contradictory devices. While half of the interviewed thinks corruption a ‘cancer’ and accuses the state and the corrupt criminal justice system, most condone corruption as ‘oil’ for bureaucracy and businesses or think it just an ‘old tradition’ observed earlier (Osyka, 2003). This tradition actually allows the happy young conscript *Mykola* to bribe his way out of military service. As a beneficiary of this tradition he may attribute corruption a brighter colour; perhaps with a small qualm, but certainly not conscience-stricken.

A companion on the state–corruption Relativity Float is *Anna Sergi* who waves charmingly at you with a sickening description of the permeation of the public administration in the region of Calabria, the ‘toe’ of the Italian peninsula. Though there are many shared characteristics of public administration corruption with Ukraine, this is not a repeat story in a sunny Mediterranean landscape. South Italy has established criminal families which

are different from political annex criminal business clans in Ukraine (and Russia). But that does not imply that the criminal colour palette of corruption differs very much. Both countries are characterised by a fusion of colours from upperworld and underworld, determined either by criminal oligarchs or the 'ndranghta. The upperworld is mainly the local public administration: the usual gravy train. Family relationships in addition to close friendships, financial and mutual interests weave the many ties into a ramified network. Other than in Ukraine, the police and the Prosecution Service do not (always) stand idly by: apart from the prosecution of individual offenders, a whole town council can be punished by an administrative dissolution because of suspected mafia-infiltration. However, apart from publicly demonstrating "doing something", such measures do not solve much as many town councils prove to be 'repeat-offenders'. The elite (in public administration and private sectors) is so connected to the local 'ndrangheta families and morally indifferent that criminal mismanagement soon returns followed by a new dissolution of the council.

With such intricate connections it is difficult to know who rules what or which office holder or politician one can trust. Instead of infiltration, assuming something penetrating from outside, the author speaks of *concurrence* as a form of government. In Reggio Calabria, the largest provincial town, corrupt administrators, politicians and 'ndrangheta members, are so intricately connected, that in combination or singly, one never knows who sits with whom at a table during business discussions. There is no divide between the criminal elite and the elite criminals. All moral colours of civil society are smeared on one palette till there is only some differentiation on the edges.

In such a situation the palette has become so messy that the idea of relativity gets buried under a brownish-grey murky layer. Naturally, to prevent this from happening, important counter forces have to be recruited. In sovereign jurisdictions such counter forces may have to be recruited from the (ruling) elite or disgruntled middleclass. This does not guarantee success when the elite and middleclass share the spoils of corruption – the elite gets the big chunks and the middle class smaller bits (Holmes, 2007; Tsyganov, 2007). However, in rare circumstances in which national sovereignty has not yet been established, such as in *Kosovo* after the withdrawal of the Serbian troops, one could work from a kind of *tabula rasa*. This is described by *Joschka Proksit* in his chapter on the international community and *Kosovo*.

Ideally, the outside forces of the NATO, the UN and the European Union could sow their 'seeds' of democracy, rule of law and transparency on the Kosovar 'empty soil'. But the Kosovo soil was neither empty nor fertile. The lawless country Serbia left behind had many local strong men

who had prestige because of their role in the resistance forces or their local connections (or both). These bosses operate economically in their own local (family) as well as transnational informal/criminal networks (Anastasijevic, 2010). They also have their political power networks with which the United Nations Interim Administration Mission in Kosovo (UNMIK) had to deal. That required on-going compromises with organised crime bosses who were deemed important for the stability of the country: ‘untouchable’ and sometimes “close partners and friends”. The successor of the UN, the European Rule of Law Mission (EULEX) did not fare much better. Fighting organised crime depends to a large extent on witnesses and eventually their protection. That proved to be difficult. In addition, *transnational* organised crime with Kosovo as transit country was not felt as victimising: it was beneficial to many local aides to guarantee additional income (and silence). But, considered being harmful to the international (western) community these crimes were prioritised by the international representatives. Therefore, crime bosses operating only locally, oppressing the common people in the village, were left alone. These political choices were not counterbalanced by the moral status of various high-placed EU and UN officials who added their own idea of relativity to the scales of morality. There were many accusations of improper conduct, corruption and fraud, hardly investigated but sufficient to undermine the trust of the population. How shall we dress up the float of the Kosovo missions, whether of the NATO, UN or EU? The international ‘goodies’ who failed to be good should certainly have a place, next to their corrupt officials from the mission’s own ranks sided by the criminal crime bosses they failed to prosecute because of their own interests.

### **The float of OC fighting: the Righteousness Floats?**

Of course, there are also the ‘genuine righteous ones’ who abhor of such shamelessly displayed relativity. One would almost grant these moralists a parade of their own (The Righteousness Parade) if they would not reject such an idea beforehand as unacceptably frivolous. Instead, we will design a Righteousness Float from the following chapters, beginning with *Ireland* by *Colin King*.

The author presents a cunning variety of relativity in his chapter on Irish legislation as a response to a perceived threat of organised crime. The relativity does not concern the issue of ‘organised crime’ itself (an indisputable thing), but the issue of *proportionality*: the intrusiveness of introduced crime control tools balanced against values of due process and human rights. According to

the author proponents of a visible crime control policy treated the last part of this equation as something of lower priority: a *really* 'relative value'. Reacting to incidents without knowledge of the broader picture, measures have been taken to fight organised crime while reducing due process principles and increasing the powers of the prosecution and the Criminal Asset Bureau. But this increase of power was not counterbalanced by a commensurate increase of accountability. These measures concern: the use of non-jury trial; accomplice testimony and the witness protection programme; seizure of assets in the absence of criminal conviction and offences related to criminal organisations. These measures have been introduced piecemeal and *ad hoc*, responding to a momentary political and public upheaval, with "*stop-gap statutes and emergency responses . . . seldom tempered by rational debate.*" Relativity is an inherent aspect of a rational debate, putting arguments in perspective. This rational kind of relativity is clearly lacking in the Irish law making: the float's crew can wave the Irish Righteousness banner at the stem, maybe upside-down. Which party will stand mid-deck? The righteous Dutch.

The Irish example does not stand alone in its lack of rational, balancing relativity: organised crime as an absolute threat on one scale and the values of due process being of a lighter weight on the other scale. We find a similar imbalance in the Netherlands as elaborated in the chapter by *Petrus C. van Duyne* and *Benny van der Vorm*. What is the case? In the 1990s, there was a Europe-wide fear of organised crime (Van Duyne, 2004). It was supposed to be everywhere and 'on the march' while infiltrating the upperworld. The public administration of municipalities was also threatened because of their routine direct interactions with local (sometimes suspicious) entrepreneurs. To safeguard the public administration's integrity a law was enacted enabling city councils and other local authorities to bar applicants suspected of (organised) crime by withholding their permits or licenses required to operate in a sector of the licit local economy.

Studying the development and application of this special administrative law, the researchers raised the question: "*How genuine was this fear?*" The legislator gave the answer by its actions: where one would expect an energetic approach, the legislative process dragged on for years, while references to 'organised crime' popped up and disappeared again, depending on circumstances. In the end the phrase 'organised crime' did not figure at all in the text of the law, though it has been its initiating driver. Notwithstanding this, ten years after enactment the phantom of 'organised crime' was anew taken from the shelves, only to be shelved again later. This wavering made the objectives of the law uncertain. And what achieved the 'law in action' with its wide powers to snoop in soft data, police reports and fiscal data concerning

applicants for licenses? Did it prevent (serious or organised) criminals from participating in the local underworld economy? Yes, during the ten years of its application a number of subjects were suspected of having organised crime connection, but most of these ‘suspicious’ applicants had a record of minor or median serious offences. Naturally, there are good reasons to keep economic sectors clean by barring inapt entrepreneurs, what the law also achieved. But that was not the aim of this law. Could this silently broadened aim not be achieved by simpler legal means? Yes, but politicians wanted a stronger tool for which the ‘organised crime threat’ was opportunistically (or flexibly) abused.

This is a good indication that also the Absolute Threat erodes as time passes by. Naturally, that is wisdom by hindsight, as *Tom Vander Beken* and *Jelle Janssens* make clear in their chapter on organised crime in the Belgian debate. Even if ‘time passes by’ is a banality, its implications for the issue of organised crime are frequently overlooked. Its meaning comes to the fore when it is combined with another truism: organised crime as just a collective *product of mind*, or, in socio-psychological terms: a social and political ‘construction’. A third truism is that nothing is more changeable than a product of mind, something many people feel uncomfortable with. They prefer ideas as solid ‘things’ to the changeable and thus in our field they cling to the thing-like nature of the organised crime idea.

Following the authors’ lively narrative, this organised crime ‘thing’ became a kind of ‘Christmas tree’ adorned with all kinds of (mental) ‘baubles’: lofty political intentions and complicated concepts, all likewise products of the mind. (Another image I have is that of medieval scholastic philosophers struggling to find ‘the essence of’). The authenticity of this chapter is that the first author himself was one of the main architects of this piling-up of mind-products on and around the basic organised crime ‘thing’. He did so by hanging various ‘baubles’ in this Christmas tree: ‘threat’, ‘forward looking’, ‘vulnerability’ of economic sectors and ‘harm’. To this were added: ‘environmental scans’ and ‘scenarios’, all good ideas which were adopted by Belgium as well as the EU-Commission. However, they proved to be disconnected to other ‘baubles’ and to (organised crime) data for further use. They also proved to be difficult to operationalise, as happens often with ‘mental things’.

Meanwhile the place of the feature ‘organised’ in the EU policy thinking was eroding also: it was ‘flanked’ (or diluted) by ‘serious crime’ (whatever that is supposed to be) which also got into the mandate of Europol which was happy with its broadened circumference. That is how organisations grow, by broadening their subject definition. At the same time the concepts of ‘*harm*

to' and 'impact on' society of (serious) crime came more to the fore in the thinking of the authors, the EU and national law enforcement agencies.

At present, looking back after two decades, 'organised crime' starting as a clear and bright 'thing' became discoloured and put 'into perspective'. That is, it faded into the background as a kind of 'reserve-idea'. It can be used symbolically or for political reasons such as in the UN Convention on Transnational Organised Crime (Van Duyne and Nelemans, 2011), (S)OCTAs (the Serious Organised Crime Threat Assessments). Or as a socially accepted stopgap in parliamentary debates, as was the case in the parliamentary debate on the Dutch public administration integrity law discussed in the previous chapter. It is like any other folk-devil (Levi, 2008): what mind product is not relative and therefore malleable? We invent it all ourselves and allow it to fade as time goes by. It smacks like good old Schopenhauer: "*Die Welt als Wille und Vorstellung*" ('The world as will and presentation').

### **The perspective of poverty: all moral colours bleach**

In the first section of this introduction I mentioned the 'humane' act of allowing a dying soldier a last puff of Eastwood's cigar. Irrespective of the nowadays public opinion of the health effects of tobacco consumption, the history of this consumer product remains that of moral ambiguity. In the 400 years we have come full circle: from King James I who made his palace the first 'smoke-free' working place, to his son Charles I who discovered the potential of this weed to replenish his coffers by imposing taxes, to the present smoke ban in all public and working places. Nevertheless, the authorities still value the 'tobacco vice' as a profitable taxable commodity: praise the sinners! But to add to this moral duplicity, many authorities have imposed an extra high 'deterrence' tax with the inevitable outcome of a thriving contraband market. This depends on social and economic conditions as this contraband trade is not everywhere equally intense (Van Duyne and Antonopoulos, 2009).

In economically depressed regions with low law enforcement and a smuggling tradition, the illegal cigarette trade may provide many poor citizens with a complementary income. This is described by *Srdan Vujović* in his chapter on the illegal cigarette traffic in the region of Bileća, in the Southwest of *Bosnia-Herzegovina*, a problematic weak state (Sadiković, 2010). One may call the region a somewhat 'forgotten' pocket: a small town amidst a rural province having much unemployment, with Montenegro – also known for its thriving smuggle economy – as eastern neighbour, while west of Bileća there is Croatia one of the nearby offset markets. All the conditions

are present to neutralise or bleach the blameworthy colour of this trade: financial needs and a crime that victimises nobody, except the state when the contraband is sold locally. If not, it is an illegal transit shipment that only victimises a neighbouring state. These are Montenegro or Croatia, for which nobody feels any pangs of conscience. It is not surprising that the number of participants on this market is large, leaving room for some stratification in 'middle level' bootlegging (additional household money) as well as higher level organisations which are flexible in the execution of tasks. The fulfilment of functions is variable, with the exception of two fixed functions in the hierarchy: the bosses who invest and organise and the corrupt officials essential for a smooth passage.

Looking at this crime economy in a forgotten remote corner of Europe, with a lot of low income traders, a bit of criminal organisation and a lot of corruption, one gets the feeling of the relativity concerning the pomp and rhetoric around 'organised crime'. Underlying this surface are broad social layers of misery and poverty that sustain illegal markets and put the organised crime trade into a more human perspective. That observation is strengthened by the chapter on illegal cigarette trade in the South Bronx, written by *Klaus von Lampe, Marin Kurti and Jacqueline Johnson*. Where poverty reigns, illegal markets do not shrink but obtain an adapted complexity. Impoverished street traders find themselves squeezed between providers and the police, being an easy prey to arrests and to exorbitant prices. Naturally, at this level transactions are in small quantities: no boxes but single packets or even 'loosies', driving transaction costs up, though lowering the loss in case of arrest and confiscation. As is the case with any illegal market, much of the transactions are performed in the shadow of risk: the actors have to organise their traffic avoiding being manhandled by the police. Opportunities are also meagre, the most important being the access to the small shops where the contraband can be bought under the counter, sometimes on credit. But cigarette street dealers remain exposed to arbitrary police actions. These may be justified with the argumentation that fighting the relatively 'poor underside' of a crime market is also an aspect of fighting organised crime or even terrorism. The poor buggers of the Bronx slums will think differently given their poverty determined criminal economic horizon.

### **The 'virtual traffic' float**

While the fight against the illegal cigarettes continues on the streets of slum areas (as well as on the wholesale market), another market place has

unfolded: the on-line illegal medicine market as described by *Alexandra Hall* and *Georgios A. Antonopoulos*. That is not the criminal world of windy street corners but of the key-boards and screens from which illegal offers of (among others) medical commodities are made. How criminal is this market and is it the platform of a new transnational organised crime? That is again 'relative': the illegality ranges from offering genuine *non*-brand products under a genuine brand name, to counterfeit but real medicines with the proper ingredients, to complete fakes which may at best be neutral. There are many subtle variations between these forms of deceptive offers of medicines on the internet.

As abusing the internet for illegally selling commodities implies an upperworld undertaking, the criminal trader has to pass a small row of guardians who have the potential power of putting him out of business: the internet providers, registrars (domain names) and payment processors and gateways. But not all the guardians may be equally alert while the perpetrators are skilled in the cat and mouse play in the virtual space, flexibly spreading their businesses over numerous IP addresses. So many smart law breakers slip through using diverse deception techniques. As far as the relative seriousness and innovativeness is concerned, the authors raise the question whether we face a new (global) threat or old garments in a new 'virtual' appearance. As a matter of fact, the basis is not very new: in essence it is *intellectual property* theft with the *disappear-quickly-without-trace* as *modus operandi* and *identity theft* in which the 'disappearance act' is included. Otherwise one observes many similarities to the old swindles in which fake products are sold in look-alike wrappings by phantom firms, if real delivering takes place at all. The authors point at other usual characteristics: a few big well-organised illegal pharmacies alongside numerous small opportunistic undertakings. Of course, it is not only 'old (fake) wine in new sacks': what is really new are the added time and space dimensions, which allow an almost unlimited speed and geographical coverage. That may imply a global threat, though a very relative one: the reverse side of the internet market medal is that internet traders leave traces for law enforcement which are more difficult to delete than physical traces.

## **Belief and pretences**

In contrast to the seemingly intangible nature of the digital medicine market, the green grass of the football matches is solid and tangible and so are the medicines to boost the performance of the players. Also the risks of corruption are always looming. This tension is elaborated by *Anita Lavorgna*

and *Anna Di Ronco* in their chapter on (codes of) ethics in *Italian professional football*. Behind the actual performance on the field there is a world of endless temptations which may (criminally) influence sporting behaviour. The regular scandals surrounding football testify of the multi-faceted risks, ranging from doping to plain bribery to fixing the outcome of a match.

To counter this temptation and to provide the teams and trainers a suitable framework for proper conduct, codes of ethics are drawn up, as a kind of “*from now on you know how to behave*”. But that is not how it works. Codes of conduct must be sharp, clear, practiced and rehearsed as well as their compliance monitored. In short, they must be considered as far from relative; actually kind of absolute. However, when codes of conduct are treated as shallow routines, neglecting the requirements needed to keep them “*sharp in the mind*”, they will function as a panacea and a general excuse to have done something (“*We do have codes of conduct, don’t we?*”). While the contents may be sharp and sound, the functional erosion will make them of a relative effectiveness. The authors sigh that ethical codes of conduct may still have some positive effect – as a placebo: it is empty but works as long as people *believe*.

Belief . . . in our secular, seemingly rational world of law enforcement with risks and cost benefit assessments, there is little so enduring as *belief* in the good works that are being done. And where there is belief there is the persistent denial that all these lofty aims are as relative and changeable as the emotional history of a marriage that turned sour. This metaphor is used by the authors *Jackie Harvey* and *Simon Ashton* in their description of the *anti-money laundering policy*. In their chapter they describe the long-term interaction between two actors in the money laundering field: the regulated financial sector with their compliance officers and the supervisors or regulators.

These actors are in many ways tied to each other and as time passed by it became a sour old marriage: each knows what to expect from the other thereby maintaining a kind of minimum stale satisfaction. But within their shared extensive ‘regulatory dwelling’, which adopted the dimensions of a kind of *Downton Abbey*, they developed their own interests: a real anti-laundering household with a huge expanded staff, equipment and design, first intended to protect the financial industry, now an interest of its own sake.<sup>2</sup> Irrespective of unanswered questions of efficiency or effectiveness, each partner has his own stake in maintaining the *status quo* in their elaborate (sub)-household and formal protocols. While after 20 years success still remains elusive, their

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<sup>2</sup> Verhage (2011) speaks of a AML complex and industry, though the metaphor of the old marriage in an imaginary extended mansion with the FATF as the Lord points at the internal social aspects.

(expensive) existence is intermittently justified by broadcasting new financial horror stories. This appears to be sufficient to maintain within their colourless marriage a careful balance while presenting ritually the common belief in the absolute good of financial purity they profess to serve. But do they really do so? Very little is known of the real effectiveness of the anti-money laundering policy, nor has the tired couple ever made serious attempts to know it for themselves. While a lot may be going on in the criminal financial world, the grumbling partners are mainly watching out for each other's possible regulatory mischief. This regulatory washed out marriage is symptomatic of the given that everything becomes relative as time passes by. Still, the sour couple being expert in keeping up appearances, will prevent the onlookers from observing anything of that on their float: belief in the goodness of the anti-laundering mission must not be shattered.

### **Severity instead of relativity**

When it comes to economic crime, the author *Sabina Zgaga* makes clear that in Slovenia there is no place for moral relativity as far as it concerns the victimisation of creditors by *criminal insolvency*. That is an interesting finding given the almost global tenor that business crime is not that much 'real' crime or as 'bad' as other offences: "*Illegal but not criminal*", let alone organised (transnational) crime. This ambiguity can still be discerned in the way in which this type of crime did not get a place on the Lisbon Treaty 'serious crime list' with a 'cross-border' dimension. This is remarkable. On the one hand, insolvency fraud can be a practical instrument in organised economic cross-border crime, fraud against the EU and money laundering. On the other hand, the EU, remarkably, did not include this crime within its perimeter of harmful crimes against the interests of the EU finances. As such a special moral relativity float on economic crime would be deserved.

However, this would be at odds with the present Slovenian law and enforcement practice which displays a clearly unambiguous (repressive) attitude to criminal insolvency cases. But still, some ambiguity had to be overcome. Since the economic crisis of 2008, the number of insolvency cases increased steeply in Slovenia. But in contrast, the criminal insolvency prosecutions lagged behind due to the very narrow definition of the criminal offence after an unexplained amendment in 2008 which impeded successful prosecution. Subsequently it took three years before this strange legal hurdle was removed which was subsequently reflected in the statistics of prosecutions, convictions and punishment. It makes us aware of the fact that an unwanted moral relativity reflected in unsuited

legislation can be removed given sufficient political will, also in the field of economic crime. As the reader can learn in a later chapter on EU fraud policy, this was only a local development concerning one type of economic crime.

Moral relativity may potentially be more salient in the combination of economic crime and political parties, as elaborated by *Sunčana Roksandić Vidlička* and *Aleksandar Maršavelski*. They raise the point of the criminal liability of political parties, taking the case of the *Croatian* CDU party and its defrauding and corrupt leader and former Prime Minister Ivo Sanader as an exemplar *cause célèbre*. Mr Sanader was accused of and convicted for abusing his official power as president of his party and Prime Minister to enrich his party and himself. Apart from the personal criminal liability of Sanader, there was the legal question of criminal liability of the political party itself. What to do with a party benefitting from the crimes of its leading elite? Croatia has complied with the EU requirement of legal person criminal liability (Žunić Kovačević, 2012). But political parties? The authors discuss the dilemmas in a democratic state: severely punishing a political party for economic crimes can be at odds with a free democratic order as a political party can be ‘punished out of existence’. The more severe sentence of dissolution is really controversial, in particular within a two-party system. Also a fine that will be so high that the party will be crippled in its constitutional performance or even would go bankrupt is effectively equivalent to its dissolution. Indeed, there is an uncomfortable balance in holding political parties criminally liable because of its criminal leadership: the political legal person is punished for the sins of its leader(s). Isn’t that stretching the morality too much towards the absolute?

### **The last float: EU-fraud and OLAF**

The volume ends with a surprise: the biggest and most magnificent Moral Relativity Float is about an institution anything but known for its frivolity or relativity: the organisation against EU-fraud, the OLAF (Office de la Lutte Anti-Fraud) described by *Brendan Quirke*. The reader may think that there is no stuffer subject than the EU and its funds which are constantly threatened by irregularities and fraud. Why is this such a persisting problem? Would the correct and simple answer not be: ‘Put a strong watchdog in place and the problem would be solved’, possibly accompanied by a European public prosecutor (Ingelram, 2011). But here comes the traditional irony of the EU where simple answers are hard to find: there is a watchdog put in place, the OLAF, but not before its teeth have been removed. It cannot bite, but only bark (not too much and not too loud): that was all the Member

States allowed. So it became an administrative body with no investigative competence which has to coordinate the anti-EU fraud policies of 28 states that all have different ideas about the priority to be given to this subject. That is a huge task, even for a better equipped organisation.

According to the author, despite the generally recognised seriousness of the EU-fraud problem, the institution's position was from its inception not well thought-out. It started with a difficult birth and was burdened with the legacy of its severely criticised predecessor, UCLAF. It was intended to function as a streamlined 'communication channel' between national focal points (AFCOS) of the Member States and the European-Commission. However, that rational idea was soon undermined by OLAF itself by creating parallel communication channels with the Member States. To aggravate matters, the Commission took the problems with the new Member States, Bulgaria and Rumania, too lightly, showering hundreds of millions Euros in support over their governments, that did not have the institutional capacity to handle these large sums properly, even if there had been no dubious conduct. Also, where the OLAF officials had a recognised added value because they operated within the country directly with executives, they were withdrawn, nullifying the local efficiency they achieved.

Though the European anti-fraud flag was proudly hoisted, the public sees an untidy float bobbing up and down, with a toothless dog at the stem (even false teeth were not granted) with a motley crew of serious and not so serious fraud fighters blowing kisses to the astonished audience.

Back to where we started, our moral winks of history: looking at the content of the chapters with a Voltairian philosopher's sardonic smile and a bit of distance, may reveal a lot of happy relativism underneath the seriousness. If that is not convincing enough, then look further back into history. Not for a lesson, because there is none unless we invent it ourselves, but as a *déjà vu* and counterweight for the pomp and seriousness of the angle of 'absolutism'.



General footnote: Anticipating Brexit all numbers are in normal European writing; the comma for the decimal and the dot for the thousands.

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# Black, grey or white? Finding the new shade of corruption in Ukraine.

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

## **Introduction: why Mykola never saw his tank**

Ukraine was a part of Soviet Union for about 70 years. Inevitably, after the collapse of the USSR, Ukraine inherited many Soviet institutions. The Soviet-like military education provides us with an interesting example of the social institution that has a particular concern and attitudes of ordinary people. The situation was such that “*those who graduated from the military institutes had to serve in the Soviet army; those who graduated from the civilian institutions had to attend military training at the military faculties*” to get “*the status of ‘reservist’ and the officer’s rank*” (Gerasymchuk, 2008, p. 4). In the last decade there was a change: many young Ukrainian men entering high education had an interesting new choice. They could either join the Military Faculties within the institution of their choice and become a reservist; or they could wait to the end of their degree to join the army for one year to fulfil compulsory military service. In regard of the latter option and knowing the precarious existence of military personnel in Ukraine, as well as the abuse of the leadership and issues with harsh discipline, for many the choice was clear. At this point the other legacy of the Soviet Union comes to the rescue: corruption. They could either bribe their way in or pay ‘entrance fees’ to join a Military Faculty which has a better social climate. Once they were in, duties were not onerous as long as official or unofficial payments were maintained, and thus the young men could end up with a reservist status at the end of their degree. Not obtaining a genuine military training was not necessarily an issue for our hypothetical Mykola, whose close family often covered the costs of bribes. Mr Mykola avoided formal training by paying the required bribes, and was happy to receive reservist status, presuming that

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no one was actually planning to start an armed conflict. In summer of 2014, Mr Mykola realised that this was a wrong speculation; although he is a junior lieutenant in the tank division, he has never seen a tank, and doesn't want to see any, but given the ongoing military conflict in the East it is only a matter of time until he will receive the feared letter that will summon him to fulfill his duty and defend his country. He may not want to fight, perhaps doesn't fully understand the ongoing situation, nor whom is he going to protect. What does he do? Together with his parents he considers how to avoid conscription. Fortunately there are different ways, and different amounts of bribes, that might help Mr Mykola keep out of the tank he has never seen.

The story of Mr Mykola illustrates the story of a pervasive corruption that destroys the system as well as individuals. It is about pretending to do something whilst paying for it. On paper, Mr Mykola and many of his friends, are building the military capability of the country. In reality, they were building the military equivalent of a Potemkin village. Only the difference is that Potemkin villages did exist and were shown to Catherine the Great when inspected. Unfortunately, when Ukrainian military service was called to defend the country, it was apparent that a large part existed only on paper while those in authority had stolen everything from tanks to pants. Corruption had completely sapped the state defences.

In the last 20 years a lot has been said about Ukraine as 'transitional society' and about corruption in the country (Osyka, 2003; Markovska and Isaeva, 2007; Markovska and Serduyk, 2011). Ukraine, the second biggest country in Europe, suffered decades of poor governance, and lack of political and economic reforms (Kupatadze, 2012; Markovska and Serduyk, 2013). Kupatadze (2012) discussed Ukraine as the best country to test theories "*about the underworld-upperworld networks*" (p.91). Markovska and Serduyk (2011) argued that the criminal underworld developed and infiltrated the political upper-world in the country over the last 15 years. The Orange revolution of the 2004 promised to fight corruption and improve transparency of the government. However, events of the autumn of 2013 and winter 2014 in Ukraine showed that these promises were not fulfilled: the transition of Ukraine had been one towards a criminal state. Subsequently, a lot more was promised in the summer of 2014. On a visit to Singapore in December 2014 President Poroshenko said that the two most important wars Ukraine has to win are the war in the East of the country and the war against corruption. In Singapore Mr Poroshenko visited the Corrupt Practices Investigation Bureau and suggested that Singapore's anti-corruption policies can be a benchmark for Ukraine (Channel NewsAsia, 2014). It is interesting to note that when Mr. Poroshenko was appointed to a high governmental position after the

Orange revolution, it “*generated speculations on replacing ‘Kuchma-era oligarchs’ with ‘new ones’*” (Copsey, 2005, as cited in Kupatadze, 2012, p.108).

This chapter aims to discuss two important and inter-related issues. The first is the development of Ukraine as a criminal state, and further the analysis of the statement that in the last 20 year organised criminal groups in Ukraine have integrated into the political sphere of the country and captured its administrative functions. The second and related theme is corruption. Corruption is considered as an important tool in the process of criminalisation of the state, the tool employed at many different levels in the hierarchy of the state apparatus. This chapter explores the functionality of corruption within the dysfunctional system of the public administration.

Generally, it is agreed that corruption is an obstacle to the development of the country. Anti-corruption slogans moved thousands of people to protest in the winter of 2014, and the movement saw the fall of the President Yanukovich, the “*absolute autocrat who was accountable to nobody*” (borrowed from Van Duijne’s (2001) description of tsar Nicholas I). Against the background of this popular revolt, what is interesting to study is the attitude of the ‘common man’ to corruption and how far the ordinary people are prepared to act to stop corruption. The chapter presents results of two monitorings of corruption in the city of Kharkiv: the first one conducted in December 2013 and the second in October 2014. The monitorings were conducted by the second author under the auspices of the University of Internal Affairs, Kharkiv.

## **Criminal elite and political power**

Before moving on to discuss the most recent past, it is worth noting the position of organised criminal groups during the Soviet times. Although presented to the outside world, as the system that promoted the equality and thus low level of criminality, Soviet Union was far away from this imaginary ideal. Many researchers commented on the fact that during Soviet times, organised criminals stayed outside of political circles (Cheloukhine, 2008). During Soviet times, an extreme shortage in food and consumer goods facilitated the development of the shadow economy and thus organised criminal groups took advantage of this scarcity to provide coveted goods and services prohibited by law (*Ibid.*, p.363). According to Yarmysh (2001, p. 145), traditionally ‘a thieves’ code of honour’ prohibited engagement with outside institutions or affiliations, and law enforcement agents. However,

from the late 1970s, this code has been transformed. During Brezhnev's rule major criminal bridgeheads were developed within the highest echelons of ministerial power (Cheloukhine, 2008). With the implosion of the socialist state ten years later, post-Soviet capitalism further challenged the previously held perception not to cooperate with politicians. The money-making opportunities were great and fast. Cheloukhine argued that the contemporary criminal syndicates emerged during the collapse of the USSR. During the last decade of the 20th Century many criminal groups accumulated illegal wealth by engaging as criminal entrepreneurs with politicians. The chaos of those years was such that it is difficult to separate legal from illegal or corrupt from honest. It can be argued that democracy 'the Ukrainian way', worked for the selected few, and actually increased corruption. In the first decade of the 21st Century a number of rich individuals with a criminal past invested in politics, raising their profiles by corrupt means. How was that possible? Rushenko (2014) answered this question by arguing that criminal leaders offered something that was missing in ordinary politicians: charisma, bravery and charitable activities. It can be compared it to the behaviour of some drug barons in Columbia, who invest in social infrastructure in order to allegedly help ordinary people. These ordinary people seem to accept the token of support from their masters without questions asked: obedience to authority is a key issue here. Those who disobey, question and investigate can be considered as enemy.

Glenny (2008) narrates a gangland killing of a young Ukrainian journalist<sup>2</sup> and the Melnychenko tapes that accelerated the demise of the regime of President Kuchma (p. 103). He argues that "*this was not a conventional gangland killing: higher powers were involved. In this instance, the mafia organisation was the Ukrainian state itself*" (p. 99). The MP who headed the Investigative Committee into Organise Crime and Corruption, Hryhory Omelchenko, has stated in Ukraine's parliament that "*the country's chief capo was none other than the President himself, Leonid Danilovych Kuchma*" (p. 99). In order to secure absolute power Kuchma controlled and exploited the political system and the state institutions (*Ibid.*). Glenny wrote how "*away from Kiev, where the spotlight of domestic and international scrutiny shines brightly, powerful criminal interests continue to dominate*" (*Ibid.* p.103).

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<sup>2</sup> In September 2000, after writing about corruption among Ukrainian elite, Georgy Gongadze was kidnapped and killed. His decapitated body was found several months later (see *The Guardian*, 2009). The Melnychenko tapes implicated the president in the killing of the journalist.

Analysing the example of two organised criminal groups, Markovska and Serduyk (2011) noted how the criminal underworld that has always existed in the country came to dominate the political upper-world in the first few years of new millennium. This process was completed in September 2010 with the appointment of a member of an organised criminal group to a senior ministerial position within the Ministry of Defence. Against this background it is not surprising that in 2015 Ukrainian military personal had to wear second hand clothes collected by the ordinary members of the public. Not surprising, but so humiliating. It looked like the capture of the state organs by criminals or their associates has been completed.

Kupatadze (2012) analysed the development of a corrupt economy in the Donetsk region. He argues that “*the industrial city of Donetsk provides an interesting account of the establishment of political-economic groups and clan dominated of heavy industry. The industrial development of the region generates more opportunities for large scale corruption than the more rural and agricultural Western regions*” (p.101). Although much destroyed in 2014–2015 military conflict, but in the mid-2000s the regional economy produced roughly 62 per cent of the country’s industrial output (*Ibid.*). Williams and Picareilly (2004) argued that organised crime in Donbas was one of the most developed in the country, abusing the state resources on a massive scale (as discussed in Kupatadze, 2012, p.102). The Donetsk clan managed to take control of most of the regional economy, “shielding it from international business competition by making deals to restrict market access” (*Ibid.*, p.103). The clan has managed to use a strong sense of regional identity in order to achieve its goal of economic success.

So, is this a question of domination or capturing the state? The concept of ‘state capture’ is addressed variously in the literature. Hellman, Jones and Kaufman (2000) discussed the differences between state capture, influence and administrative corruption. State capture is defined as “*shaping the formation of the basic rules of the game (i.e. laws, rules, decrees and regulations) through illicit and non-transparent private payments to public officials*” (*Ibid.*, p.2). Influence is about the ability of the private interests to interfere “*without necessary resources to private payments to public officials*” (*Ibid.*), and administrative corruption is defined as “*private payments to public officials to distort the prescribed implementation of official rules and policies*” (*ibid.*). Hellman and Kaufmann (2001) defined state capture more specifically by referring to oligarchs who manipulate policy formation and “*even shaping the emerging rules of the game to their own, very substantial advantage*”. The above definitions require the captors (legally or illegally present at the scene) and the

government (state officials). Hellman *et al.* (2000) “*understand state capture as the extent to which firms make illicit and non-transparent private payments to public officials in order to influence the formation of laws, rules, regulations or decrees by state institutions*” (p.5). The way the capture metaphor works here is that these groups capture the state functions when needed and leave it. Wedel (2005) criticised this concept by pointing to two issues. Firstly, is the idea of “capture”, and the need to address the issue of “uncaptured” state. Secondly, Wedel argues that for example, in Russia “*many of the people who amassed wealth during the years of ‘reform’ did so because of the state, not by capturing it*” (p.114). These people simply used their networks and opportunities to access goods and privileges (*Ibid.*).

In this chapter we will discuss the mechanisms used by organising political criminals in capturing the administrative functions of the state. We extend the capture metaphor even further and argue that in Ukraine the organised criminal groups bought their state and political party positions from officials representing the state. Starting from the early 2000, and perphas earlier, criminals came to dominate political world by means of offering payments to the existent system. Finally, by 2010, most of the state positions were bought by members of different criminal groups. Below, we discuss the mechanics of capturing the state.

## **The mechanisms of capturing the state**

There are two questions we need to answer: how do the criminals capture the state and what do they do when they come to power? To answer this question we elaborate on some of the propositions discussed by Markovska and Serduyk (2011) previously and Rushenko (2014) most recently.

Firstly, political corruption is employed as a tool to impose criminal authority. This tool was employed during the poorly implemented privatisation (Cheloukhine, 2008) by buying votes and Parliamentary positions (Rushenko, 2014). Members of organised criminal groups bought their MPs seats, different ministerial positions in the capital, and local regional authority (*Ibid.*).

Secondly, there was the introduction of social innovations. For organised criminals, political corruption works smoothly only when it is institutionalised and its proceeds are collected effectively and managed collectively. Similarities may be found with an old ‘*obshchak*’, the common cash that used to be collected and kept by the thieves-in-law as cash to be

used for some specific projects. Cheloukhine (2008, p.360) described that the thieves' moral code included the:

“organisation of the thieves' communal fund and dedication to enlarge it. . . the thieves' obshchak does not supervise individual crimes, but governs the criminal community based on a functional-territorial principle. The obshchak has a designated person in charge of a specific spectrum of criminal activity, as well as for a certain territory of operations. These persons collect taxes from those individuals and businesses, which are under organised crime protection.”

The revenue of the all-Ukrainian 'state' obshchak originates from corruption. Proceeds of corruption should be collected and passed from junior to senior, depending on the sphere of the activity. In higher education, cash can be collected by lecturers as exam payments, than moved up to the higher levels to be sent to the relevant Ministry in Kiev. Obedience to authority is again key to this process. Those who do not obey will be labelled 'corrupt', and be subjected to the “*artificial 'control wave'*” (Nelsen and Levi, 1996), the new 'clean hands' operation which is another token of Potemkin-village law enforcement.

Rushenko (2014) argued that a watchmen is needed to overview and control the processes. He described the example of Zaporozhje, a small industrial city in the East of Ukraine. Rushenko (2014) names a well-known figure in the city who created a multi-layered structure of racketeering in the city. He was a well-known figure who supported one prominent party and controlled the 'state-organised criminal enterprise'. This individual was in charge of the following activities:

1. Racketeering in the city;
2. The VAT return that could be done only under the condition of operating via the specific company controlled by the watchmen, the charge for which was 25% of the total amount.
3. The use of specially-designated intermediaries in all payments, from utility bills to licensing.
4. Most of the small businesses operating with cash (city transport, local markets, parking facilities) were controlled by the watchman. The watchman was instrumental in moving businesses from legal into illegal spheres, and using dedicated conversion centres to launder criminal funds.

For Rushenko (2014) the above criminal management is exemplary of the parallel taxation mechanisms created in the country over the last few years, the system that sustained the old criminal 'obshchak' within the public administration.

The fourth important point, is how to know what is right and what is wrong? The important point here is that the criminal elite is above the law (Cheloukhine, 2008; Rushenko, 2014). From one side, one has MPs protected by the immunity provisions, and from the other side the criminal justice system working under strong political guidance and those who exercise that guidance are criminals in political or executive office. Varese (2001) discussed the emergence of different protection mechanisms in post-Soviet Russia: understanding what is right and who is right is very important here, as *“criminal protectors offer protection services beyond the limits set by the law, some policemen compete directly with criminals and double as racketeers or private protectors unconstrained by the law”* (p.61). Even within police work it is not necessarily very clear to the outsider who is right and who is wrong. There will be written and unwritten rules for the engagement with the criminal underworld, but in this Ukrainian example, the criminal underworld has become fused with the political elite, making the work of police less questionable for them, as they protect authority, albeit a criminal one. It is another question that this authority is not accountable and transparent. Given that police institutions may be so closely linked to this criminal elite, the elite is free to design and test their own illegal mechanisms of social control. The system has to work for the whole country, so how do you enforce it? This is explained in the next section.

The fifth and the last point is how do you make sure the above arrangements work for the whole country. Luneev (2004) and later Rushenko (2014) argued that the concept of criminal terror is worth considering here. Consider the needs of the organised criminal underworld that came to dominate the political system in Ukraine. They need to establish absolute control over public activities and in addition make sure that the citizens behave obediently. What do you do with recalcitrant citizens, those who, for example, want to demonstrate against the removal of a children’s playground or the cutting of trees? Police should be seen as protecting ordinary citizens, and on these occasions, it is important to show police restraint to use force in the event of public protest. So with police force withheld, in order to deal with civil disobedience, compliant but violent criminal groups are hired by the interested criminal bosses. Indeed, the criminal elite has experience in employing such violent groups to deal with such public protest or to resolve administrative disputes in their own ranks. The providers of criminal terror are often criminal politicians themselves who hire violent groups during public protests to steer their dynamics in the required direction. Violent groups may have the required organisation to beat ordinary protestors and the police is allowed to interfere when they are given the right signal to remove the

protesting citizens (*Ibid.*). It resonates with the early 1990s and the use of 'sportsmen' in organised racketeering. According to Rushenko (*Ibid.*) such mechanism of dealing with public protest was developed in Kharkiv in 2006 (there are a number of youtube clips of such confrontations, where the use of these criminal groups can be clearly seen). It was seen as a very effective way of settling disputes with political rivalries or guarantee the public order, and was transposed to different regions in the country. When criminal politicians engage with violent groups they aim to deter competitors and scare ordinary citizens by means of illicit force.

These five points discussed help to understand how the Ukrainian criminal state is formed and the role of corruption in the conduct of criminal elite. Nelsen and Levi (1996) argued that corruption and anti-corruption should be considered together and not regarded as independent phenomena. Given the endemic level of corruption in Ukraine, it is important to understand the engagement in corrupt conduct at different levels.

## **Opportunity structures for state capture and corruption**

Sung (2002, p. 141) employs a convergence approach in order to understand political corruption and provide "*a macro level analysis of the formation of opportunity structure for corruption*". Sung argues that corruption as a social problem "*is ultimately the aggregation of rational choices made by utility-maximising participants that in the long run become parameters for subsequent choices in determining the nature of norms and obligations in similar situations*" (*Ibid.*, p141). Holmes (2008) added to this that the concept of utility maximisation can be applied to "*individual agents, including single corporation, which typically works individually, very much in competition with other firms*" (p. 389). Discussing the conduct of transnational corporations Holmes notes that given the opportunity, good guys turn to bad guys, political or 'criminal muscle' 'for help' in order to be good again, but meanwhile have become bad guys themselves.

The readiness of the bad guys in politics to help, or "*the state of readiness for political corruption depends less on the psychological or personality characteristics of the individual public servant, and more on the socioeconomic environment and institutional context in which the state and the market are constructed*" (Sung, 2002, p. 142). Depending on the context public servants can have a very different view on corruption (*Ibid.*). Sung argues that opportunities for corruption are observed and maintained through structural, cultural and institutional forces

(*Ibid.*). “*They are structured by the temporal and spatial convergence of three minimal contributors: structural incentives, risky governmental policies, and the absence of effective institutional guardians to monitor and punish corrupt officials*” (*Ibid.*, p.141).

Analysing the first point, structural incentives, in terms of Ukrainian realities, it is interesting to consider the application of cultural particularism and the tradition of political unaccountability (Sung also considers third element, economic hardship). Sung notes that “*the ideal types of particularism and universalism indicate how a society applies morals, and ethics*” (p.142). Universalist values are the values of transparency and clearly defined rules for public office holders (*Ibid.*). In contrast to this is particularism. Sung argues that particularism looks at “*relationships and circumstances in a specific situation to decide what is appropriate . . . trust is often developed through a sustained exchange of favours and obligations, which evolves into a stable patron-client relationship*” (*ibid.* p.142). Going back to the mechanics of capturing the state, the reason why criminal elite came to dominate the political sphere in the country was partly because individual members of the criminal groups were able to negotiate their access into the diverse state functions. The decision of what is ‘right’ was formed not on the basis of morals and duties of public office holders, but as a profit-motivated response that was deemed appropriate in the situation of exchange of favours. In public service, this profit motivated response is only possible if office holders are not accountable for their actions.

The second point of analysis is the employment of risky policies: “*Motivated officials need adequate and effective tools to exact, illegitimately, proceeds from state coffers or the citizenry*” (*Ibid.*, p. 143). In the case of Ukraine, motivated officials were the criminal elite who introduced risky politics by establishing the network of collecting, controlling and laundering proceeds from the ‘*obshchak*’ parallel taxation discussed by Rushenko (2014).

The third point of analysis is the existence of institutional guardians (Cohen & Felson, 1979). Amongst them Sung (2002) lists strong civil society, free press, political opposition and independent judiciary (p. 146). Criminal political elite will not be able to survive openly where there is an independent judiciary. In the case of Ukraine, the judicial system only works in order to support the elite, and punishes the weak and those who have no influential friends (or the wrong one). The very nature of the captured state is that it loses the independence of the judiciary and thus the ability to enforce the rule of law and the equality of everyone in front of the law. In 2007 Ukraine’s courts were rated among the top five most corrupt national institutions (USAID, 2007).

“Those [judges] who are not corrupt, are obliged to leave . . . those who act alone, without sharing in the upper echelons get fired, or even prosecuted on corruption charges . . . over the past nine months, only three out of 20 cases I was working on ended without the payment of bribe” (Vasiliev, as quoted in Kapatadze, 2012, p.109).

What is important is the fact that political corruption not only corrupts the power structures, but it instils the norms and expectations of corrupt conduct in all the areas of life in the society, making the fight against corruption really difficult. Lambsdorff (2010) looked at the acceptance of bribery and gift-giving in 66 countries and argues that culture matters as “*bribes are not globally condemned to an equal extent*” (p. 18) and it is “*those who paid bribes who are usually more accepting*” (p.18).

Heidenheimer (2004) notes that in recent years there is much more consensus of the concept of democracy, and much more ambiguity about the concept of corruption. To Heidenheimer, the previously-established concept of black-grey-white corruption has been overturned. “*The resultant perceptual dilemma may be characterised as a problem of colour-luminous ambiguity*” (*Ibid.*, p.100). To define corruption on a black-grey-white scale one has to find answer to two problems: i) if “*the particular type of unethical activity was tolerated . . . or . . . demonised*”; ii) the type of community and ‘the social grouping’ (*ibid.* p.100). Following Heidenheimer’s example of Sicilian communities, in Ukrainian communities the acts that will be defined as corruption by Western standards are here “*standard procedure deeply rooted in more general social relationships and obligations*” (*Ibid.* p.101). For Ukrainians the decision (according to Western standards) not to make an unofficial payment to the ambulance crew may result in low standard of treatment received. For Mr Mykola bribing somebody to avoid military services may be considered as a necessity that will save him his life.

Varese (2000) discussed the issue of pervasive corruption on the examples of Italy and Central and Eastern Europe. Varese argued that

“the interplay between widespread corruption, beliefs and social norms produces behaviours that support norms of reciprocity, ‘honesty’ and co-operation but discourage public spiritedness. Social ostracism is then not directed towards those who engage in crime and corrupt exchanges but, rather, against those who break the norms. In the case of *omerta*, for instance, those who testify are ostracized by their community” (p.13).

As the study cited early in this work suggests, the judges who are not complying with the rules of corrupt conduct in Ukraine will be dealt with by their ‘community’.

Zaloznaya (2012) studied corrupt practices within Ukrainian universities to explore the experiences with university bribery and argues that “*exposure to organizational cultures shapes actor’s ideas regarding acceptability and inevitability of bribery and influences their propensity to commit the acts of corruption . . . the actors make projections about the necessity, possibility or inevitability of corruption*” (p.311).

Challenging the organisational structures, be it within the high educational establishment or within the Ministry of Defence, is a tricky and challenging issue. In a simplified way we have described the system where criminal underworld is the state, and corrupt conduct is at the very heart of the system. Challenging the culture at the top requires strong political will and an independent judiciary, both only exist only on paper or as a front in a Potemkin village. It is interesting to see if and how the events of the winter 2014 in Ukraine challenged ordinary people’s perception about corruption.

## **Kharkiv residents on corruption: the results of 2013 and 2014 monitoring**

Serdyuk (2014) conducted two studies to monitor corruption in the city of Kharkiv, Eastern Ukraine. The first study was conducted in December 2013 and the second in October 2014, 673 respondents aged 16 and above were interviewed. The timing of the monitoring is of importance for us here. The first monitoring conducted during the first wave of peaceful protest in Kiev in December 2013, and the second monitoring was conducted at the time of the full scale military operation in the East of the country.

The respondents were asked to comment on the seriousness of the problem of corruption for their country. More respondents in 2014 believe that corruption is a very serious concern for the country.

**Table 1**

**“In your opinion, how serious is the problem of corruption in Ukraine?”**

<b>Rating</b>	<b>2013</b>	<b>2014</b>
Very serious	44,8	53,2
Rather serious than not	34,6	29,3
Difficult to say	17,3	13,1
On the threshold of seriousness	3,3	2,4
Absolutely not serious	0	1,7

The increase in the number of people believing that corruption is a serious concern for the country is connected to the dramatic events of the 2014.

Table 2 sheds light on opinions of the level of corruption in the country and in the home city. The estimation of the level of corruption in the country has risen sharper than in the estimation about the home city.

**Table 2**  
**Opinions of the level of corruption in the country and Kharkiv (in %).**

Rating	2013		2014	
	In Ukraine	In Kharkiv	In Ukraine	In Kharkiv
Very high	38,7	31,6	62,8	42,0
Higher than average	39,1	39,5	26,4	31,4
Average	16,0	21,9	9,2	19,3
Below average	2,0	3,9	0,3	2,8
Very low	0,6	0,4	0,3	1,2
Difficult to say	3,7	2,7	0,9	3,2

The estimated level of corruption in Ukraine has increased by 24%, and in the city of Kharkiv only by 11%. There are some researchers who argue that “*concentrated power is an aggravating factor in corruption*” (Andvig *et al.*, 2000, p. 86). In Ukrainian context the rising worry about corruption in general may be explained by the anti-corruption slogans of the winter 2014 appraising in Kiev which prompted awareness finding its expression in a higher rating.

The respondents were asked to say whether the level of corruption in the city of Kharkiv has changed in the last 12 months. Table 3 shows that 35.6% of respondents believe that the level of corruption has increased in 2014.

**Table 3**  
**In your opinion has the level of corruption changed in the last 12 months? (%)**

Rating	2013	2014
Increased dramatically	17,2	17,1
Increased a little bit	26,6	18,5
Hasn't changed	46,4	46,1
Decreased a little bit	3,9	9,8
Decreased dramatically	0,6	1,2
Difficult to say	5,3	7,3
Total %	100,0	100,0

In order to understand the subjective opinion about corruption the respondents were asked to comment if corruption has an effect on welfare of the citizens and on their own welfare.

**Table 4**

**In your opinion, does corruption threaten the welfare of the citizens of the country, your own welfare?**

Opinion category	2013		2014	
	Welfare of the citizens	My own welfare	Welfare of the citizens	My own welfare
Yes, it does affect	56,6	39,5	68	55,7
Rather threatens than not	37	41,5	23,9	19
Rather not threatens	3,9	9,9	2,9	12,5
No, it doesn't threaten	0,6	5,4	1,6	9
Difficult to say	1,9	3,7	3,6	3,9

Table 4 shows that the respondents consider corruption to be a threat. The threat of corruption to their own welfare is lower than the threat of corruption to the whole country. Only 15,3 % of the respondents thought that corruption does not threaten them personally in 2013, this number increased to 21,5% in 2014.

Corruption studies in Serbia make an interesting comparison here. Begović and Mijatović (2007) compared the attitude to corruption in Serbia in 2001 and in 2006 and note the impact of politicisation on people's perception of corruption. Generally, people think about corruption as a serious problem for the country, but not for them personally (*Ibid.*). Interestingly, this finding resonates with the Kharkiv sample. For respondents in the Serbian sample, what was important is the issue of poverty, low standards of living, political instability and bad health care (*Ibid.*). One can argue that some of these issues are the direct result of corruption.

In the Kharkiv study, in order to understand the readiness to participate in corrupt exchanges the respondents were asked if they believe that bribery or unofficial payments and presents can be justified if it is necessary to solve their own problem. Only 16,1% of the respondents believe that corruption cannot be justified, and 62,9% believe that sometimes corruption can be used in order to resolve personal issues. Compared with 2013, the readiness to participate in corrupt conduct has increased. This readiness may be explained as a defence mechanism. Varese (2000) argues that even those people who dislike the corrupt system, but have to live in the country, over time will adapt to it in order to reduce 'cognitive dissonance': "*the psychologically difficulty involved in constantly despising one's own country and oneself*" (p.11). Varese quotes a respondent in Ukraine who says that "*at first you feel uncomfortable [giving bribe], then you get used to it. You also feel satisfaction*" (p.11). Young Mr Mykola may dislike the corrupt system, but for the time being, for him, the ability to pay a bribe to avoid military conscription is essential.

The respondents were asked to select four statements out of 8 in order to answer question what does corruption mean to society and people. The results are presented in Table 5.

**Table 5**  
**In your opinion what does corruption mean for people and society?**  
**(2014 monitoring only)**

	%
Corruption is like a cancer, destroys any positive developments	50,9
Corruption changes people, teaches not to obey the law, enrich quickly	48,2
Corruption discredit the state and the criminal justice system	45,3
Corruption is a fast way of solving difficult issues with little bureaucratic involvement	36,3
Popular proverb says, "Doesn't move without the oil"	33,0
Corruption means throwback and obstacle to European integration	26,7
It is an old tradition that may be justified	18,4
Corruption is a stimuli and motivation for many professions and for the management	16,7

About quarter of the respondents answered that corruption prevents the development of the country. One in five stated that corruption is an old tradition that may be justified. To understand the personal conduct in response to corruption the respondents were asked about their personal attitude to bribery.

**Table 6**  
**Personal attitude to corruption (2014 in % )**

	%
As a last resort, in the exceptional situations, when you need the result, bribery is allowed	44,5
Never and under no circumstances bribery should be allowed	24,7
It is possible to avoid bribery, just need to be more philosophical to life	24,2
Bribes are allowed as it is a fast and convenient method of problem solving	4,9
Giving and taking bribes is an important part of the system	1,7

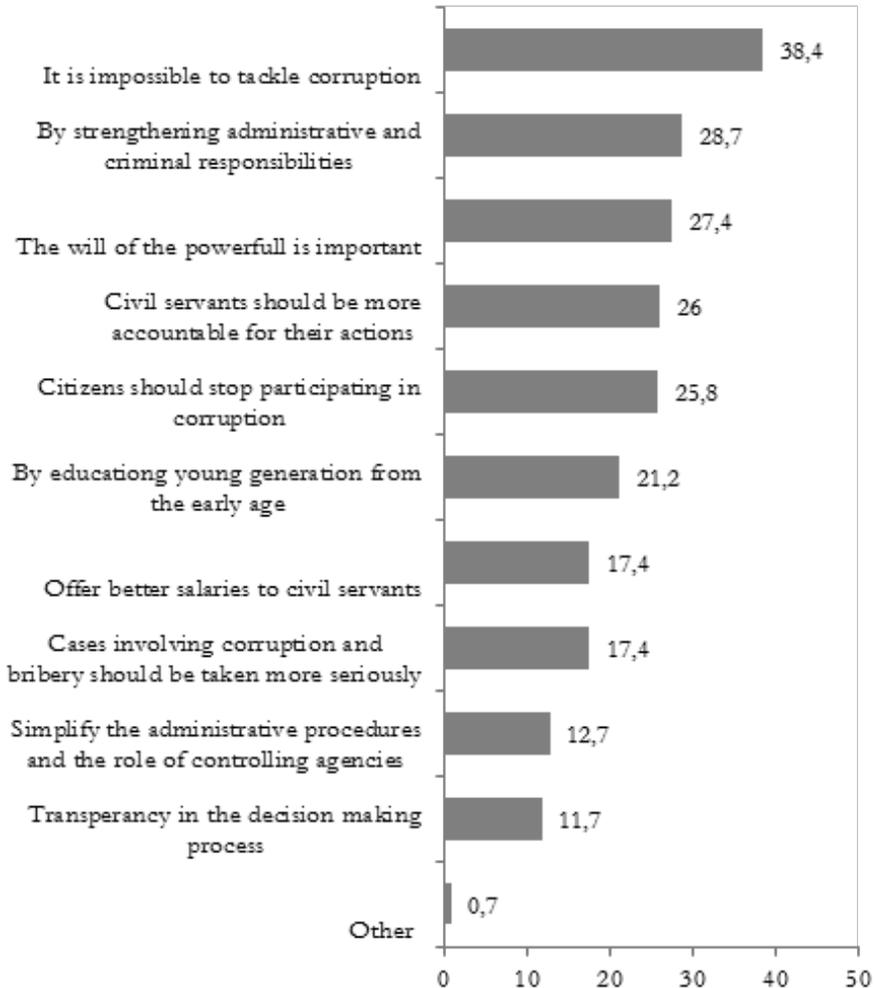
The answers show that a tolerant attitude to corruption is more prevalent than an intolerance one. Interestingly, the results of the Global Household Survey, as presented by Lambsdorff (2010) suggest that respondents who paid bribes in the preceding 12 months report a higher level acceptance of such conduct. Lambsdorff (2010) argues that "*the impact of whether a bribe was paid may not only result from the respondents' cognitive dissonance*" (p.13). Lambsdorff (2010) offers two reasons for consideration. First is about the norms. "*Norms are eroded where they are violated by others. A modified attitude is then sought that does not deliver the constant unease that is felt when observing violations*" (p. 13). The second point is about collective acceptance of bribery. "When

collectively bribery is accepted individuals face fewer social constraints when paying and taking bribes” (*Ibid.*, p.13). In this situation it is important to know what is the best way to tackle corruption once self-serving excuses have become a reflection of a shared attitude.

Graph 1 represents what the respondents thought of the ways of tackling corruption. 38,4% of respondents said that it is impossible to tackle corruption. What is interesting in the chart is that corrupt conduct is very often blamed on the others or outside circumstances: the powerful elite is to be blamed (27,4%) or the legal provisions are weak (27,4%). Only 25,8 % of respondents stated that citizens themselves should stop participating in corrupt conduct and 21,2% suggested education as a preventative measure.

**Graph 1. The ways to tackle corruption.**

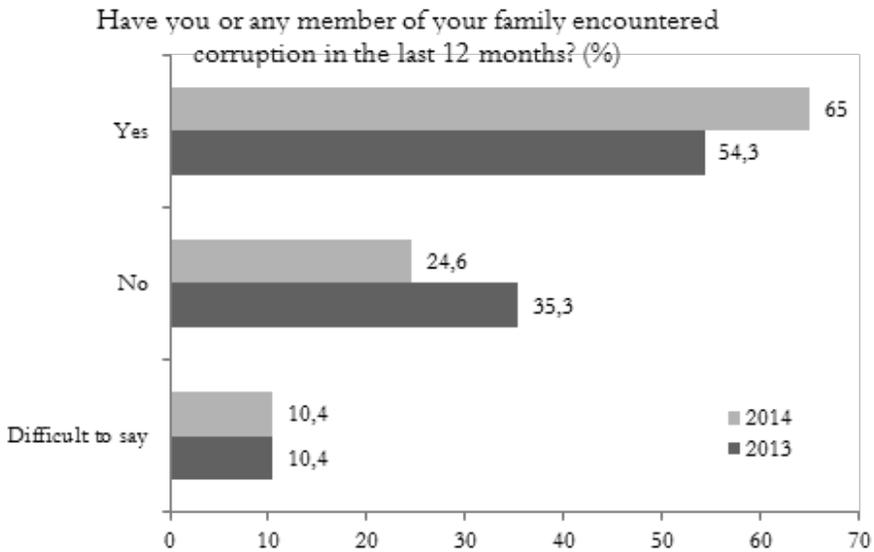
**The ways to tackle corruption (% from all respondents)**



Graph 1 also makes an interesting comparison with Serbia. In 2001 people in Serbia saw the causes of corruption as very much the political issue (Begović and Mijatović, 2007). The politicisation of corruption is a very difficult issue to tackle. It promotes a pessimistic attitude that results in “*nothing*’ can tackle corruption’ statements; it excuses the personal use of corruption and stresses the functionality and usefulness of corrupt exchange. At the end of the day, it can save your life if you don’t want to join the army”.

Graph 2 moves the subject of personal attitude closer to the personal actions, and asks about personal experience of corrupt exchange.

**Graph 2. Personal encounter of corruption.**



It is interesting to observe that the number of respondents who had personal encounters with corruption has increased compared to 2013. In 2014, from one side there is an increase in the occurrence of anti-corruption slogans while the movement to fight corruption dominates the political agenda. From another side, the actual occurrence of corruption is on the increase if we assume a correlation between attitude, opinion and occurrence. It can be explained by political instability and anxiety, the need to grab something quick and now, because tomorrow one may not keep the same job. Anecdotal evidence suggests that as Ukraine announced compulsory military conscription earlier in the 2014, corruption was rife within the agencies responsible for the exemption from military duties. Bribes are justified as “life-saving” opportunity.

## **Corruption as a ‘pet monster’**

In 2014 respondents showed an acute awareness of corruption as a social problem. Respondents note that the level of corruption remains the same in the city of Kharkiv, and say that corruption is hurting the others more than themselves. About half state that corruption has a negative impact on society, but a third state that corruption is the fastest way of resolving problems. Compared with 2013, the number of those who are prepared to justify corruption has increased, the number of those who are categorically against corruption has decreased. About half of the respondents are prepared to use corruption as a tool to achieve results in difficult situations. Respondents are not united in the ways how to tackle corruption with more than a third believing that tackling corruption is an impossible task. Most of those who encountered corruption did not report it to the police. People do not report because they do not believe in the system’s ability to deal with these issues. This is understandable, given that the criminal state offers little hope for the rule of law, police as an institution of social control has discredited itself with connections to corrupt politicians and violent organised criminal groups. On the other hand, many are willing to bribe if that offers an easy solution to their personal problem, like avoiding a traffic fine or getting a license.

Van Duyne *et al.* (2012) studied anti-corruption policies in Serbia and reported that 20% of the respondents will pay a bribe given the favourable outcome of the corrupt transaction: “*Many do and few care*”, conclude the authors (*Ibid.*). Van Duyne *et al.* observe an interesting issue in Serbia, where generally people don’t perceive corruption as a serious issue. On a personal level, if you need to rebuild your life after the war you worry about the issues that concern you, unemployment, health care, and education. Only the problem is that political corruption can be an obstacle in the progress with the development in all these spheres.

The results from the Kharkiv study and other countries, suggest that people treat corruption with ambivalence. On the one hand, they believe corruption is bad, it has negative consequences for society. In Ukraine, corrupt officials sold governmental offices in such numbers that it allowed criminal underworld to capture all state functions. On the other hand, people are prepared to live with corruption and justify corrupt exchanges. Corruption has become a social habit legitimised by the state authority (see above, the state authority in itself is corrupt and criminal). Given this ‘dirty hands reputation’ many people think corruption is the only acceptable way of solving the day-to-day issues. The monitorings in 2013 and 2014 showed that on an individual level respondents accept corruption, because it has

a function as a problem solver. In order to fight corruption respondents propose to accuse and to punish somebody else, the change of personal conduct is not a priority.

This is a tricky situation for a country that proclaims the war on corruption. Traditional hue and cry doesn't work here, as the cry to stop corruption has a peculiar self-interest attached. Corruption is a pet monster, when needed is taken out and beaten publicly; in other situation it will be fostered and kept under control.

What is questionable is the ability of Ukraine to adopt the approach developed in Singapore, the country where "*a uniquely low level of corruption has been achieved at some cost to democratic civil rights*" (Heidenheimer, 2004). Singapore has managed to create the world strictest rules on illegal drugs, but at the same time it created the third largest gambling market (BBC, 2013). The country with the population 10 times smaller than in Ukraine operates within the legal framework. Ukrainian legal framework is not operational because the state administration and criminal justice system are dysfunctional. The only tool that functions within the state is the tool of corruption, and corrupt exchange.

Revolutions and public protests encourage people to be loud about corruption that is harmful to them personally. Revolutions and public protests do not deal with corruption that is useful to you. To eliminate situations where corruption is a useful tool for an ordinary citizen the state mechanism should be dealt with: first, by insuring transparency in state decision making from purchasing medical vaccines for children to porridge for soldiers; and, second, by making the rule of law principles work and putting an independent judiciary in place even if that will have severe consequences for the personnel. Fighting corruption without reforming the system is impossible, it will only make corruption cheaper. The state functions and the state services should gain their lost functionality; so that corruption will become so expensive it will be dysfunctional. Reforms should be visible, have a credible impact and inspire confidence among the people. Untill then, we remind the reader of the appropriate song: "*My dear Ukraine, all in ruin . . . and the only people who live are the MPs, the rest are in trenches, and they were there even before the war started*".<sup>3</sup>

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<sup>3</sup> The words from the song 'All in ruins' of the late singer Skryabin.

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# **Mafia and politics as concurrent governance actors**

## **Revisiting political power and crime in Southern Italy**

*Anna Sergi*<sup>1</sup>

### **Introduction and research question**

This chapter focuses on the local side of the transnational criminal organisation known as the ‘ndrangheta, which is rooted in Calabria, Southern Italy. In line with studies on the local character of organised crime (Hobbs, 1998), the chapter aims to look at the relationships between politics and ‘ndrangheta clans at the local level. The focus of this research is on Reggio Calabria because Reggio City Council was dissolved for mafia infiltration in September 2012<sup>2</sup>, after an *ad hoc* Investigation Commission presented its findings on the status of the public administration of the city to the Minister of Interior.

Through a narrative of facts, the case study aims to offer a clear example of how mafia power and political negligence intersect in Calabria. The main argument of this chapter is that, in the territory where the ‘ndrangheta clans are most powerful, infiltration by criminal clans in the political process is rather through collusion, while political corruption is confirmed as an endemic characteristic of public life. Together, mafia clans and political elites are responsible for the (bad) governance of the city.

Organised crime groups infiltrating and corrupting governments’ sectors or engaging in alternative forms of governance in post-conflict countries have been object of policy and research (Miraglia *et al.*, 2012). As ‘alternative

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<sup>2</sup> A town/city council can be dissolved because of mafia infiltration or collusion under article 143 of law 267/2000. The procedure was firstly introduced in 1991 through law decree 164/1991. It essentially aims at restoring impartiality and good functioning of the town/city administrations through an administrative procedure.

government' it thrives in a weak state, such as developed after 1945 in Italy. This has been discussed in literature on the subject in Italy for years: that the link among mafia clans, politicians, business class and professionals is facilitated by low ethical standards in public administration (Ruggiero, 2010; Sciarrone, 2011; Mete, 2013). What about other mafia-like criminal organisations, such as the 'ndrangheta? As indicated in the first section, there are indications of a similar intertwining of organised criminal underworld and upperworld?

The motivations to propose the present analysis are various. First, the strength and the structure of the Calabrian mafia are, for the authorities, still rooted in Calabria; the organisation would not be the same without the power and influence enjoyed in Calabria. Second, in Calabria the characteristics of the 'ndrangheta clans are necessarily different from the features they present elsewhere where the clans might need to adjust to other, local structures and opportunities (Lavorgna and Sergi, 2014). However, because of the primary role of the Calabrian clans across Italy it is necessary to understand these differences. Third, in recent times, both politics and organised crime manifestations have been investigated in Calabria more than anywhere else in Italy. Drawing from these investigations, the analysis in this chapter looks at the shared space between criminal clans and local politics.

## **Methods of research**

Considering how complex the topic is and how difficult is to penetrate such an intricate net of political and criminal interaction, this chapter shall employ the following narrative line.

After introducing the 'ndrangheta and the political system of Calabria with emphasis on Reggio Calabria, the data on the relationship between the mafia clans and politics will be elaborated. Of special interest will be the dissolution of local Councils (Reggio Calabria in particular) for mafia infiltration.

In terms of methods, this chapter will be based on four main data sets. With this combination of sources I aimed to approach the targeted phenomenon from different points of view – judicial, historical, narrative – to portray its interrelated facets (Ritchie and Spencer, 2002; Denzin, 2002).

Firstly, background information and studies about the relationship between politics and the 'ndrangheta have been gathered. To this end I relied, amongst other things, on the latest reports published by the DNA (National

Anti-mafia Prosecutor Agency) and the research centre Autonomie Calabria, for data related to local councils dissolved because of mafia infiltration.

Secondly, local, national and even international press news related to the case of Reggio Calabria in the years between 2010 and 2013 have been selected to complement the official documents and understand the social responses to this case.

Thirdly, the confidential report of the Investigative Commission, obtained through personal journalistic connections, which requested the dissolution of the city council of Reggio Calabria, has been read in concomitance with other sources, such as the official reports from the Italian Court of Accounts (or Court of Auditors) regarding the latest financial assessment of the city.

Fourthly, interviews with five Anti-mafia Prosecutors, lasting on average 45 minutes each, as part of a larger research study conducted between 2011 and 2013, have been included as tools with which to interpret the relationship between politics and mafia power in the area of Reggio Calabria specifically.

## **Background: An Overview on the ‘Ndrangheta**

The criminal organisation known as the ‘ndrangheta is referred to as the most powerful Italian mafia (Paoli, 2005; DNA, 2012). The term ‘mafia’ indicates a specific form of organised crime, supported by social prestige and accepted and/or tolerated by communities while also capable of infiltrating legal economy and politics (Sciarrone and Storti, 2014). Mafia is the prototypical case of criminal structures transcending class divisions and the divide between illegal and legal (von Lampe, 2008: p.14). Sciarrone (2011) describes mafias in the South of Italy as social forces with the power to accumulate and employ social capital. Paraphrasing Coleman’s (1990) social capital definition, Sciarrone (2011: p. 7) defines mafia networks – and the ‘ndrangheta must be included – as social structures whose resources can be employed to realise ‘strategic goals’. Individuals having access to such resources can be internal to the mafia group, but often they are external and populate a ‘grey area’ surrounding and strengthening mafia influence (Ciconte, 2011, 2013; Mete, 2011).

The mafia-type organisation known as the ‘ndrangheta has its roots in Calabria, a region in the extreme South of Italy, at the ‘toe’ of the peninsula. Using Block’s (1980: p.129) famous understanding of New York’s criminal organisations, we can describe the ‘ndrangheta both as *power syndicate* – retaining control over the territory – and an *enterprise syndicate*, as the clans

are successful in pursuing a number of illegal activities, extortion racket primarily (Paoli, 2003; Ruggiero, 1996; Asmundo, 2011). When discussing the 'ndrangheta', especially in its territory of origin, reference is not only made to a rational criminal organisation, but also to a set of behaviours, a subculture, embedded in the local culture and kinship ties that shape criminal activities (Seindal, 1998; Paoli, 2004; Busso and Storti, 2011).

The origins of the 'honoured society of valorous men' (which is the meaning of the etymology *ανδραγαθια* in Greek) go back to Italy's post-unification history. Until the 1970s, the clans have been essentially confined to Calabria (Ciconte, 2011), engaged in violent feuds and accumulating money asking for ransom in dozens of kidnappings (Sergi, 1991; Ciconte, 1992; 2011; Casaburi, 2010). After the 1990s the criminal clans have radically changed their structure and have heavily invested in the drug trade with the money they had collected through kidnappings and extortion (Ciconte, 2011; Forgione, 2009).

At present it is still uncertain, for social researchers, whether the term 'ndrangheta identifies a multitude of family clans unified under the same 'brand' name, or an integrated criminal association with one structure and one centre of power. However, Italian authorities agree in addressing the 'ndrangheta as one organisation (which is also the case in this paper for convenience) having a centralised unit of power, where, nevertheless, the clans maintain a very high degree of independence and business autonomy within their territories (Commissione Parlamentare Antimafia, 2008; DNA, 2014). After Operation Olimpia, in the mid-1990s, it was believed that the structure of organised crime in Calabria was indeed of a duplex nature: the family clans on one level and a structure of coordination, the *Santa*, on another, superior and elitarian, level.

Moreover since *Operation Crimine* in 2010, under the lead of the DDA (District Anti-mafia Prosecutor Office) of Reggio Calabria, the 'ndrangheta has been presented not only as 'one' but also as a well-structured and cohesive coalition, (DNA, 2012; 2014). Prosecutors have described the 'ndrangheta as divided into three geographical '*mandamenti*' (sections), which are respectively one for the city of Reggio Calabria (*mandamento città or del centro*), one for East Calabria (*mandamento ionico*) and one for West Calabria (*mandamento tirrenico*). Moreover, within the *Mandamento* of Reggio Calabria the function of the '*Crimine*', the general coordination and strategic organ directing the clans is exercised. Notwithstanding the existence of a centralised function, the division of power appears horizontal, with every *locale*, consisting of at least 50 individual members of the various '*ndrine* (family clan units), having equal power. In addition in recent years the National Anti-mafia Directorate

(DNA, 2012; 2014) has declared the supremacy of four families in Reggio: De Stefano, Condello, Libri and Tegano. This mapping derives primarily from the latest law enforcement operations, such as ‘Operation Crimine’ and ‘Operation Meta’, which, since 2010, have revealed the criminal panorama in the city. It seems that in Reggio the four families operate in a Quadriumvirate, with shared risks and profits while maintaining the extortion market stable and under control (DNA, 2012); other clans—some of them also very powerful as well—have limited space for independent movements. The importance of these four families within the criminal organisation when considered in its entirety is crucial. The families in the *Mandamento del centro*, in fact, are responsible for granting authorisation to other families on new memberships and structural changes or strategic decisions that require collegiality, and they can do so also because of their international force (DNA, 2014).

In February 2014 the Appeal trial for Operazione Crimine confirmed the prosecutorial hypothesis of the unified nature of the ‘ndrangheta as described by *pentiti* and witnesses (DNA, 2014). The national anti-mafia prosecutors within the DNA (2014: p. 128) describe very clearly how, even though the business heart of the ‘ndrangheta is elsewhere (in the north of Italy, in Lombardia or in Rome or even abroad), strategic decisions are still made in Calabria and within the area of Reggio Calabria primarily. As described by the National Anti-mafia Prosecutors (DNA, 2014: p.109): “*We talk about an organisation having a group of shared prescriptions [and] unitary structures. . .*”

In the past twenty years the attention paid to the phenomenon of the ‘ndrangheta has undoubtedly been increasing both in academia and in public interest (see for example publication by Paoli, 2004; Forgione, 2009; 2012; Ciconte, 2011; 2013; Sciarrone, 2011; Calderoni, 2011; Arlacchi, 2009; Pignatone and Prestipino, 2012; Sciarrone and Storti, 2014, Sciarrone, 2014). However, there is a gap in the time between the official recognition by ‘naming’ in the criminal code and its scientific and social representations in written sources. Only in 2010 was the organisation by a change of the law added to article 416bis of the Italian Criminal Code (mafia-type association offence) as a mafia-type criminal organisation.

The late recognition of the power and reach of the Calabrian clans as it appears today, can be called a more than overdue response, given that journalists mentioned the ‘ndrangheta or ‘ndranghita already in the 1970s (Sergi, 1991). However, in those years the authorities were much more preoccupied with the growing influence of the Sicilian Cosa Nostra. Indeed, in the past two decades the ‘ndrangheta has not only enjoyed its consolidated power in Calabria itself, where its territorial control is broadly undisputed, at least in public opinion (Forgione, 2009; Gratteri and Nicaso, 2009), but

also expanded its business beyond the region (Ciconte, 2010; DNA, 2014). In fact, as confirmed in another recent sentence from the Corte di Cassazione (Italian Supreme Court) there are clans of Calabrian origins in Lombardia, North of Italy, that enjoy the highest degree of autonomy even if they maintain the connection with the brand in Calabria (De Riccardis, 2014). News related to criminal groups of the 'ndrangheta in the North of Italy have been increasing in the past decade (Lavorogna *et al.*, 2013; Mete, 2014) and the investigations involving members of Calabrian clans outside Calabria have been well published to reach wider audiences (Reski, 2012; Dickie, 2011; 2013). Additionally, various studies have focused on the migration of the 'ndrangheta (see for example, Varese, 2011; Macrì and Criconte, 2009; Sergi, 2012, 2013, 2014; Sciarrone and Storti, 2014; Calderoni, 2012).

With hindsight, even if many seminal texts have been exploring the phenomenon, from sociological and historical points of view (Paoli, 2003; Sciarrone, 2010, 2011; Varese, 2011; Arlacchi, 2009), the unprecedented escalation of power attributed to this criminal organisation in and out of Italy for the most diverse criminal activities, has often shifted the attention away from the *local* dimension within Calabria itself.

Even though, according to all the interviewees, in Calabria, the criminal clans care for power and social status before profits, many activities contribute to the wealth of the organisation, especially the drug trade. Through Calabria and its port in Gioia Tauro, arrives half of the cocaine shipped to Italy (DNA, 2014: p.128). Other criminal activities in Calabria – mainly extortion, procurement of public contracts, fraud schemes in construction contracts, usury, embezzlement and exploitation of European funds assigned to local authorities – are not only a way to increase the profits, but also a way to ensure that the control on the territory is maintained (DNA, 2014: p.177). Indeed, whereas the main activities of the criminal group concern the drug trade, the 'ndrangheta's core business as a *mafia* organisation, is still locally focused: maintaining its control over the territory (Ciconte, 2011; Paoli, 2003; Varese, 2011). In addition there is a penetration into, and conditioning of, the public sector (Calderoni, 2011; Arlacchi, 2009; Sciarrone, 2010; Vittorio, 2009). It is in this regards that the 'ndrangheta clans share the same characteristics of the more general mafia typology whose power is “*largely based on exercising violence, whether actual or threatened, and on exploiting traditional cultural codes and manipulating social relationships in order to establish mutual exchanges in political and economic circles*” (Sciarrone and Storti, 2014: p.41).

## **Political elites in Calabria and in Reggio Calabria**

Calabria is one of the 20 regions of Italy, with a population of less than 2 million divided into five provinces and 409 municipalities of which 155 are in Cosenza, 80 in Catanzaro, 97 in Reggio Calabria, 50 in Vibo Valentia, 27 in Crotona (ISTAT, 2013). According to national statistics as elaborated by the Chamber of Commerce in Reggio Calabria (Camera di Commercio Reggio Calabria, 2012), the region, in 2011, was behind the national average both in terms of productivity rate (48,8% out of the national 62,2%) and in terms of unemployment rate (12,7% out of the national of 8,4%).

Within the European Union Regional Policy, Calabria belongs to Objective 1 of the Structural Funds as the region's GDP per capita is below 75% of the EU average. Objective 1 is the Convergence Objective and aims at accelerating economic development in the identified depressed areas through development funds and social funds (European Commission, 2014).

Whereas unemployment and underdevelopment have been characteristics of the territory during all of its history, they are also the main manifestation of the presence of mafia, which, in Calabria acts as a governing (alternative) player and is the main, sometimes the only, investor (Arlacchi, 2009; 2010). Indexes that measure mafia infiltration and presence in Italy also include regional factors, such as unemployment and underdevelopment rates, within their indicators for more accurate calculation and ranking (Calderoni, 2011; Eurispes, 2008).

In such a scenario, it is not surprising to also find in the region a governing class unable to address the most demanding tasks for innovation and development as well as being prone to corruption and low morals. As noticed by Arlacchi (2010: p.10) in Calabria "*corruption is endemic, civic association is fragile, political participation is very low and elections are fake because consensus is not free*". It can be argued that problems of the Calabrian governing class are only the mirror-image of old issues at the national level, never solved and never properly addressed (Arlacchi, 2009; 2010), the so-called '*questione meridionale*' (the Southern Issue; Gramsci, 1966) that has seen the whole South of Italy undergoing a steady decline while the North received support for growth.

The presence of the central state in Calabria to suppress organised crime has been considered insufficient in a number of occasions. This, together with ineffective structures of authority and malfunctioning institutions at the local level has placed Calabria within that power vacuum framework identified by scholars in Sicily at the rise of Cosa Nostra (Gambetta, 1993; Arlacchi, 1986; 2010). The persistent lack of an efficient administrative machine has been witnessed throughout the years. In 2012, for example, a

scandal regarding misuse and frauds of EU funds in a project related to the main highway of the South of Italy has thrown Calabria and its political class on the pages of international media. The New York Times titled “Corruption Is Seen as a Drain on Italy’s South” (Donadio, 2012, p. 54) and noticed that “*the ties between organized crime and local politicians run deep. Today, 3 out of 51 members of Calabria’s regional council have been arrested on charges of Mafia ties.*” This marriage of interests between organised crime clans and political elite seems to be understood primarily within the culture of political patronage – often under the protective wings of corrupted Masonic lodges, at least in public and/or media perception. Historically, it has not been an exception – in Calabria as well as in other parts of Italy—to have Masonic lodges interact and act in concert with mafia affiliates while at the same time undertaking political roles to secure investments and power relationship (Ganser, 2009; Ciconte, 2013).

As declared by one of the interviewees (Chief Anti-mafia Prosecutor in Calabria):

“We always talk about relationships and connivance between the mafia and politics, the mafia and the State, as if they were completely separated entities . . . The enormous amount of money they get from drug trafficking allows them to be an active political power because with such monetary volume they are able to influence legislative, judicial and political decisions.”

This declaration is revealing in a number of ways: first, it does address the difficulty in understanding what comes first – political inaptitude or mafia power – and second, it does warn against the tendency to separate all the mentioned actors as different and competing entities. Not only are they not separate entities – as often one individual serves in different functions and for different interests – but they also interfere with the implementation of transparent management which gets compromised. Examples of this can be found in the political life of Reggio Calabria, which represents a good example of this mixture of interests and unethical behaviours from different actors, criminal and non-criminal.

With more than 180.000 inhabitants, Reggio Calabria is the largest city in Calabria, it is a province city and administrative capital of the region. By the end of 2012, the Council of Reggio was declared nearly bankrupt (Corte dei Conti, 2012). At the same time, the Council was also dissolved for mafia infiltration, a procedure that had never touched cities as large and as crucial for the life of the region as Reggio Calabria (Mete, 2013). The chain of events leading to this result will be presented later in this chapter. In addition

to the financial disarray and the dissolution for mafia infiltration, other events – very significant for the interviewees and in public perceptions through the media coverage – are illustrative of political life in Reggio Calabria.

First, the events surrounding the suicide of Mrs. Orsola Fallara in December 2010 are worth mentioning. Mrs Fallara was the director of the Treasury Department and had been appointed directly by the former mayor, in gross violation of the procedure regarding the appointment of externals in such roles. After an internal investigation finding serious incorrect alterations of the accounts, Mrs Fallara was suspended (Petrasso, 2013). As the Commission declared, the documents provided by the Treasury were not considered reliable because of “*artifices to disguise the real financial situation of the institution*” (Ministero dell’Interno, 2012: p.2). Following this enquiry, Orsola Fallara committed suicide and, amongst other things, the former mayor of Reggio Calabria (2002-10), Mr Giuseppe Scopelliti, was charged with abuse of power and forgery of public financial statements. In late March 2014, he was convicted by the court of first degree for all charges, and sentenced to six years imprisonment. After this sentence, Mr Scopelliti, at the time Governor of Calabria, resigned while still awaiting for the appeal (Corriere Online, 2014). By far not being the only example, this case, however, touches the highest political authority of the region and can therefore be considered exemplary.

Other cases that have been flagged up relate, for example, to irregularities in the way the unit managers within the Council of Reggio Calabria had been appointing directly by the mayor and not, as provided by national regulations (law decree 267/2000), by sector managers. Such irregularities had been frequently pointed out to subsequent political regimes, but no action had been taken to correct these illegal practices which instead, was recognised as a usual procedure within the council (Commissione di Accesso, 2012: p.52).

These examples, some of many, already show irregularities and problems at the local level with politics and management. All this considered, what remains to be fully investigated and understood is whether the inefficient and corrupt governance in Calabria generally and in Reggio specifically, corresponds to a ‘plan’ of *governance* pursued by the criminal clans that rationally decide on the nature of their involvement with political power or whether, instead, the negligent management of the political class is what makes administration of the region permeable to criminal interests. This chapter, in this regard, argues that, considering the state of knowledge of Calabria as a whole and in particular of the city of Reggio Calabria, the political elite of Calabria cannot just be seen as a passive and incapable

actor in the decline of the regional economy. Instead, the most plausible interpretation is that it calculates the benefits of joining forces with criminal actors when convenient and in so doing, supports the interference of the clans in public affairs in a state of concurrent or shared governance. At the same time, political participation, both to increase power and influence over the territory and to access investment money, seems to be a plan of criminal clans, as it will be elaborated in the next sections.

## Measuring Mafia Presence in Italy, Calabria and Reggio Calabria

The 'ndrangheta in Calabria seeks power and influence and aims at operating as political actor (Santino, 1994; Fiandaca, 1995) while, at the same time, maintaining criminal leadership (DNA, 2014). It is necessary therefore, to understand how mafia interests interplay with those of the political elite in the region and especially in the city of Reggio Calabria.

As previously said, according to the latest, most important, judicial reconstructions, Reggio Calabria, is one of the three 'mandamenti' (three agglomerations of clans) within the current structure of the criminal association (DNA, 2014). Reggio Calabria has historically been the theatre of many events linked to both the mafia and Anti-mafia (Ciconte, 2013) and had been under scrutiny even before the City Council was dissolved in 2012. Furthermore, the mafia clans in Reggio Calabria, alongside other 12 provinces (all in Sicily, Calabria, Campania) are considered having *high power syndicate* (Asmundo, 2011:58). Asmundo (2011) considers having high power syndicate those provinces, which have high numbers of mafia membership prosecutions, high levels of confiscated assets and they also 'excel' for high numbers of extortions or violent crimes, such as murder.

The Institute of Political, Economic and Social Studies (Eurispes) designed the *Indice di penetrazione mafiosa* (IPM) in 2004, to measure the level of infiltration of organised crime in Italian regions and provinces (Calderoni, 2011). In the IPM index of 2010 – measuring the numbers of mafia-type offences – Reggio Calabria has a score of 50,5 (with a maximum of 65,4 scored by Naples and the lowest scored by Lecce, with 18,3) (Eurispes, 2010). Reggio therefore, is at the very top of the list. Even though issues with the methodology of the Eurispes index have been addressed (Calderoni, 2014), the Centro Studi Investimenti Sociali (Censis, 2009) had also stated that the density of criminal clans in Calabria is, in accordance to various indicators,

above average. In a study carried out by Calderoni and Cannepale (2009), which has produced an index for mafia infiltration in public procurement, Reggio Calabria scores first. The risk of mafia infiltration in public contracts in Reggio is the highest. Similarly in the mafia permeability index produced by Calderoni in 2011, the city appears the highest in ranking.

In addition to mafia indexes in order to grasp the degree of mafia presence at an official level, both locally and nationally, it is useful to look at procedures of dissolutions of town councils in Italy. Data related to this specific procedure have not always been available (Mete, 2009; 2011) and in general, the policy itself is mostly meant to target the political strength of mafia groups, by aiming at impacting indirectly also the clans' territorial control (Mete, 2009). Law Decree 164/1991 has introduced the possibility to dismiss town and city councils following enquiries on mafia infiltration. Whereas, on one side, these data are an indication of the growth of mafia influence over political institutions in Calabria, on the other side it needs to be reminded that the motivations of city council dissolutions are diverse and the degree of infiltration and penetration found in the investigated councils also varies. After the modification of the law in 2009, the requirements for dissolution are now stricter, but the ability to directly remove employees from the councils is more intrusive (Commissione Parlamentare Antimafia, 2011). The reports of investigative commissions prior to dissolutions have to show in detail how the presence of a mafia group interferes with the democratic process, what kind of anomalies can be identified in the way the council works, how compromised and/or illegal/unethical political choices have been found (Commissione Parlamentare Antimafia, 2011). An Anti-mafia Prosecutor in Reggio Calabria refers to this procedure as "*only an administrative formula*" that, as such, does not attempt to affect attitudes, mentality and cultural practices. As noted by Mete (2009:174) government interventions in this sense have often aimed to demonstrate anti-mafia efforts rather than to actually focus on how to cut the mafia-politics nexus on the long term. In other words, this policy has been criticised for not providing durable solutions. In fact, mafia criminals – so strong and comfortable in their own territories – can easily replicate profitable occasions in the newly imposed political context, *de facto* having an opportunity to re-confirm their hegemonic power over the territory. This is well represented by the fact that some municipalities have been the object of the dissolution procedure twice or three times or have been subjected to longer periods of compulsory administration for complications in re-establishing legitimate democratic procedures.

It can be argued that mafia clans in Calabria do not require infiltration, but rather use a silent and unnoticed, yet visible, system of overlapping roles

and authority functions: it is a functional strategy that is part of the *status quo* in the region (Aresu and Gasparri, 2012). In this view, a policy that tries to capture the level of infiltration of mafia members in political and administration functions is difficult to implement. This has been confirmed by a Chief Anti-mafia Prosecutor in our interview:

“At the table of politics seat politicians, entrepreneurs and Mafiosi, you can’t have one without the others and there is no point in separating them, it is a complex system, but there are often the same persons serving in different roles or functions.”

When, like in Calabria, corruption is endemic – as it takes advantage of the low ethical levels in the ruling class as a constant feature of their exploits (Lavoragna and Sergi, 2014) – then it is not easy to identify clearly the hidden connections between politics and criminal clans.

According to the data related to the council dissolution procedures, as shown in Table 1, since 1991 until the end of 2012, 227 councils have been the objects of this procedure and most of these are in Campania, Calabria and Sicily (Autonomie Calabria, 2012). Interestingly though, even if *prima facie* the record is held by Campania (and the Camorra), in proportion, the ‘ndrangheta seems to have been more active in recent years, or at least it reflects more activities against Calabrian clans. Generally speaking, the ‘ndrangheta’s peak was in 2012 especially if we consider also councils dissolved because of the ‘ndrangheta’s influence outside Calabria. Even though the number of cases in Calabria is lower than those of Campania overall, Campania reached its peak in 1993, a sign that the focus of these procedures has been shifting towards Calabria and the ‘ndrangheta in the recent years (Mete, 2009; Ciconte, 2013).

Of the 64 cases in Calabria, some relate to the same towns whose councils were dissolved more than once. Among repeat-offenders are traditional strongholds of the ‘ndrangheta (like Platì, Gioia Tauro, Rosarno, Taurianova, Lamezia Terme). Without the duplicates, 56 is the effective number of dissolutions of which 38 are in the area of Reggio Calabria. This means that 39% (38) of dissolved councils are in the province of Reggio Calabria (counting in total 97 municipalities; this is 9% of the total number of 409 municipalities in Calabria) have undergone this procedure and therefore found under mafia influences. Additionally there was an increase from 4 procedures in 2011 to 11 in 2012 in Calabria, giving the region the highest ranking in Italy for 2012 (see Table 1).

In this framework the case of the city council of Reggio Calabria represents a very good example of the combination of interests between politics and ‘ndrangheta clans, captured by the dissolution procedure. This

excursion on the available data regarding the dissolution procedures—even in consideration of the problems that have been linked to this procedure – shows that the case of Reggio Calabria, does not surprise and most of all mirrors the trends within the region where dissolution procedures against the ‘ndrangheta have been increasing in the recent years.

**Table 1**  
**Lega Autonomie Calabria (2012): dissolution procedure database**

<b>year</b>	<b>Calabria</b>	<b>Campania</b>	<b>Sicilia</b>	<b>Puglia</b>	<b>Other</b>	<b>Italy</b>
1991-1995	14	36	24	7	2	<b>83</b>
1996-2000	7	16	8	0	0	<b>31</b>
2001-2005	13	15	11	0	1	<b>40</b>
2006-2010	15	18	9	0	0	<b>42</b>
2011-2012	15	6	6	0	4	<b>31</b>
<b>Total</b>	<b>64</b>	<b>91</b>	<b>58</b>	<b>7</b>	<b>7</b>	<b>227</b>

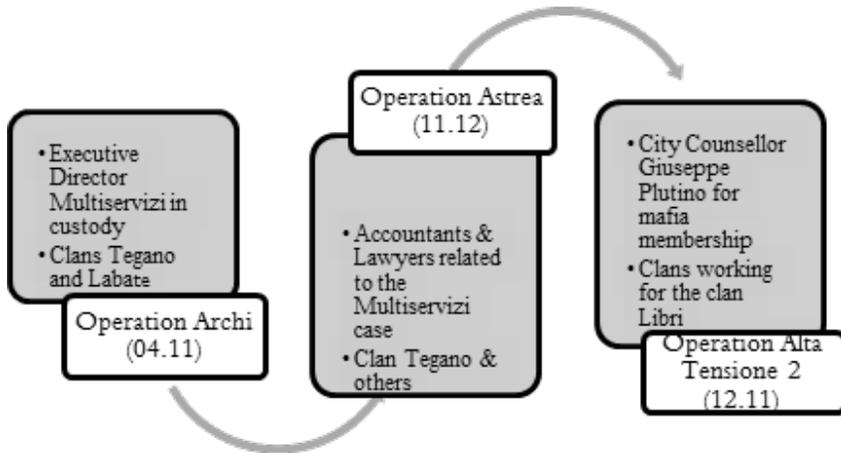
## **‘Ndrangheta City: the Dissolution of the Council in Reggio Calabria**

### **a. The Investigation Commission in Reggio Calabria: an overview of facts**

On the 9<sup>th</sup> of October 2012, the Italian Council of Ministers ordered the dissolution of the City Council of the capital city of Calabria for collusion with the local mafia clans, following the proposal from the Ministry of Interior, and based on the report of the Investigation Commission in Reggio Calabria. The Italian national newspaper ‘*La Repubblica*’ featured an opinion article titled ‘*Ndrangheta City*’ on the 11 October 2012 (Bolzoni, 2012) not because the news came as a shock to the population of the city, but mainly to show an unreal scenario of calm and absolute indifference that followed this ‘news’ in Reggio. It is not the first time that a large city was found to be in the hands of the local mafia: Lamezia Terme, the third largest city of Calabria and a very strategic hub because of its international airport, was dissolved two times. Nevertheless the case of Reggio should have raised more than one question also at the national level (Mete, 2013). A historical narration of the events is needed to understand what lead to the dissolution (see Figure 1 for a summary).

On the 20<sup>th</sup> of January 2012 the Prefect Office of Reggio Calabria authorised the access of an Investigation Commission on the premises of the city council. This decision stemmed from a series of four very complex investigations in 2011 related to contacts and relations between individuals arrested or under investigation for mafia offences, and private companies in which the city council was a majority stakeholder. The investigations are summarised in the following Figure.

**Figure 1**  
**Summary of Investigations in Reggio Calabria before dissolution**



- In ‘Operation Archi’ in April 2011 (DNA, 2012), prosecutors arrested high-level members of two major clans of Reggio (Tegano and Labate), and the executive director of the company Multiservizi s.p.a. (Giuseppe Rechichi). The latter had been later associated by a witness to the clan Tegano. The Multiservizi s.p.a. (see later on this chapter), of which the City Council owned 51% of shares, was in charge of a number of outsourced activities for the public administration.
- In November 2011, ‘Operation Astrea’ (DNA, 2012) targeting specifically the Multiservizi s.p.a. involved accountants and lawyers suspected to be in contact with members of the Tegano clan and also of other clans in Reggio.
- In December 2011, during the ‘Operation Alta Tensione 2’ (High Tension 2) (DNA, 2012), members of the clan Borghetto – Caridi –Zindato, working for the more powerful clan Libri, were arrested together with city counsellor Giuseppe Plutino. Plutino was arrested for mafia membership and considered the political contact for the criminal clan within the council.

The Investigation Commission authorised to investigate the Council was, therefore, established in January 2012, and published its findings in a report presented to the Government at the end of 2012. The report portrays a very gloomy picture of the political life of Reggio. Even beyond prosecutorial events, the Commission noticed that:

“During the months of work this Commission has found that, in many aspects of the administrative life of the Council of Reggio Calabria, there are grave irregularities, inefficiencies and incongruencies, gross negligence, actions and misbehaviours, which certainly have made the Council more easily permeable to the interests of the local mafia clans.” (Commissione di Accesso, 2012:4)

Such irregularities and malpractices, in the view of the Commission, are not only due to the presence of ‘ndrangheta clans, but are linked to endemic corrupted dynamics in local politics. Moreover, in October 2012, when the Council of Ministers finally agreed on the dissolution of the Council, yet another operation, ‘Leonia’ (DNA, 2012), started investigating the connections between ‘ndrangheta clans and other private companies and confirmed that the events of the Multiservizi were not isolated occurrences.

### **b. The ‘ndrangheta in Reggio Calabria’s administration: the case of the Multiservizi s.p.a.**

The Commission scrutinised employees and professionals working in and for the council, in the various departments and functions of the city council and in companies where the council held 51% of shares, both in relation to their family ties and in terms of judicially-ascertained mafia affiliations. Amongst the findings the following are of particular interest and are examples of negligence and indifference to certain suspicious phenomena in Reggio Calabria:

- In the *public works sector* a large number of companies have been found having direct (family) or indirect relationships with clans members; in practice this has meant that conspicuous public works has been repeatedly allocated to companies with ‘red flags’ for mafia and other contraindications.
- In the *production activities sector*, amongst other things, various economic operators, owners or leaseholders of properties and warehouses in areas of communal markets not only were linked to local clans, but had also been

transferred from one municipal market area to another without being authorised or controlled in any way by the Council.

- In the *treasury department*, controls were omitted in assigning public housing and 75 of them had been assigned to mafia members; also, in this department there were cases of buildings confiscated in mafia proceedings but still inhabited by members of the clan instead of being disposed of differently by the Council (Commissione di Accesso, 2012: 230).
- In the *legal advisory service*, legal cases have been assigned to professionals following unethical and unchecked standards. In particular, cases had been repeatedly assigned to a lawyer whose family ties have been ascertained as being of a mafia-type.
- In the *social works sector*, substantial amounts of money (around 2,5 million Euros) have been supplied to companies and cooperatives with clear connections to local clans.

In addition to these examples, the case that ultimately brought about the dissolution of the council – the case of the company Multiservizi s.p.a. – offers a very interesting example of the strategic planning of the clans for their participation in public affairs. The results of the investigations (telephonic interceptions) revealed the extent of relationships between the Multiservizi and various mafia members to secure the interests of the clans. The same interceptions also revealed the connections between these individuals and members of the city council. This strategy corresponds, according to the investigators interviewed on the case, to a rational planning of the *'ndrine* to secure money from investments and funds for public services. 51% of the Multiservizi's capital was held by the Reggio Council while 49% by a private company, Gestione Servizi Territoriali s.r.l (G.S.T. s.r.l.). Even though the Multiservizi had received the Anti-mafia certification<sup>3</sup> to deliver services for the council and manage public assets since 2005, an analysis of the various changes in the company and the scrutiny of executive members, shows proximity to, or collusion with, criminal groups. In fact, investigations revealed that certain shareholders had already been suspected for mafia membership (Pietro and Domenico Cozzupoli for example were majority shareholder of Gruppo Cozzupoli, partner of G.S.T.) or had their assets confiscated following mafia investigations or had family members investigated or convicted of mafia memberships. Furthermore, subsidiaries of the Multiservizi appeared to be registered at the same company address

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<sup>3</sup> Administrative procedure for companies over a certain capital, engaged in public works.

in Milan with other companies whose managers were already under investigation for collusion with the clans in Reggio. The Investigation Commission talks about a “*convergence of corporate interests in Milan, via Durini no. 14*” (Commissione di Accesso, 2012:208) to indicate the peculiarity of these business and human relationships.

In April 2011 the District Anti-mafia Prosecutor’s office in Reggio (DDA) announced the arrest of Giuseppe Rechichi, Executive Director of the Multiservizi, indicated as the “*entrepreneurial soul*” of the Tegano clan (Commissione di Accesso, 2012: 187), thus revealing the presence of the mafia clan in the choices of the company. The intervention of the DDA led to the dissolution of the Multiservizi with its Anti-mafia certification obviously revoked by the Prefect in June 2012.

The case of the Multiservizi does not stand alone and provides a very telling example of both the pervasive nature of some of the main clans in Reggio and the recklessness or the negligence if not collusion of the city council when choosing business partners. This case also provides a good understanding of how easy it is for the ‘ndrangheta clans to participate in, benefit from, and control public affairs and public money. The Investigation Commission, in line with the Ministry of Interior (Ministero dell’Interno, 2012), hinted that the partnership between the Multiservizi and the city council was intentional and that it was a conscious decision to involve a company with dubious links with mafia members in the management of public services and assess. Some of the interviewees also deem it very unlikely that the interests of the mafia bosses controlling the Multiservizi, were unknown or went undetected by administrators of the Council in charge of checking the work of the private companies contracted by the institution; “*we all know how certain things work in Reggio, the names are always the same after all*”, said a prosecutor in Reggio Calabria.

### **c. Collusion and malpractices in Reggio Calabria’s political life**

By the end of 2012, the Council of Reggio was not only in a difficult position because of the dissolution for mafia connections, but the municipality was also nearly bankrupt. In fact, the city of Reggio had obligations for € 679.244.753,17 in 2010, and this was only with reference to the previous five years (Corte dei Conti, 2012). As noted by Mete (2013:205) as well as by the major Italian newspapers, right before the council was dissolved, Reggio Calabria was torn, “*in between*” the dissolution for mafia infiltration

and the dissolution for financial disarray. The former related to the current administration, the latter involved also the previous ones. In fact, concurrently to the assessment of the city council by the Investigation Commission, Reggio Calabria was also subjected to scrutiny from the national Court of Accounts. The Court of Accounts has published a review of the books of the municipal administration in December 2012 and painted a grave picture of the financial situation of the council. This also suggests how the situation of financial strain had been affecting political decisions. As the Court noted “*the consistency and the oldness of the passive balance (...) highlight a condition of delay in payment and in the realisation of investments*” (Corte dei Conti, 2012: p.26). The Court is very critical towards the overall management of the council; the council has neither paid its debts nor has invested. Furthermore the council has off-balance debts (*i.e.* not justified in terms of expenses) for a total of almost 3,5 million Euros for 2010 alone. Expenses for legal defences were also too high (around 215 million Euros): the Council has been involved in more than 30.000 judicial cases since 2008. This confirms previous scrutiny of the financial situation of the council (Corte dei Conti, 2013: p.26): Reggio suffers from a “*situation already stratified of substantial insolvency, quasi vis cui resisti non potest.*”<sup>4</sup> However, in abstract, the normative framework of the council looks healthy if there was an intention to implement existing regulations in an appropriate manner. This intention – it is implied in the words of both the Court of Accounts and the Investigation Commission, as well as in the words of the interviewees – is not there. Things in Reggio tends to stay the same and do not evolve to protect the interests of a feudal-type elite way too keen on “*shaking hands or dine*” with affiliates of criminal clans (as put by one of the prosecutors pointing out again how the nature of these relationships are both personal and professional), “*when they don’t look in the mirror instead*” (with reference to mafia affiliates also having political roles).

When the council in Reggio was dissolved for mafia infiltration, to declare bankruptcy did not seem a timely choice, as it would have been unlikely to reinstate the correct functioning of the system given the political dysfunction (Mete, 2013). As the Court of Accounts noticed, there is in Reggio a

“vicious circle regarding management and finance (overestimated incomes, scarce collections, (. . .), followed by a substantial alteration of the reliability of outcomes and administration), which has characterised

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<sup>4</sup> Latin for ‘Almost like a force which cannot be resisted’.

the past political governance and has contributed to determine today's deficit and the grave financial crisis of the council" (Corte dei Conti, 2013: p.10).

It seems, therefore, that criminal groups and the ruling class of Reggio shared the same tactic: they both consume resources without intent to support innovation or development and allow instead a careless accumulation of debts for personal gains. However, as noticed in the interviews, whereas it might seem logical that a financially shaky council is more inclined to welcome illicit funds of dubious origin, it is not necessarily logical that a mafia-infiltrated council is a financially shaky council. The conditions of the council in Reggio, both financially and politically, depend on a combination of factors and on the behaviours of both criminal forces and political class. Indeed, negligent/reckless politics and careless financial administration of public resources in Reggio go beyond only mafia infiltration. The political class is as blameworthy as the mafia. The reason why both political elite and mafia share responsibility can be found in their social proximity as well as in their business calculations for convenience. The ministerial decree that finally agreed on the dissolution of the council also mentions proximity of council members with mafia members, attending weddings, having dinners and even participating to funerals together (Ministero dell'Interno, 2012). It was/is a social connection before being a criminal or even a political one. As said by one of the interviewees (Anti-mafia Prosecutor in Reggio Calabria), "*the density of mafia presence in Reggio is so thick that every contact, personal or professional, counts*". This means that it is very difficult to avoid mafia contacts in the city and this becomes even more relevant when considering how this proximity makes it more difficult to remove people from their positions in public offices (Mete, 2013), as connections are so strong and patronage is the norm.

Finally, the Investigation Commission also assessed elected politicians in the council. In total, since the elections of the 15-16 May 2011, 41 counsellors formed the political administration; 10 of them, some already part of the previous administration, have been found very close to mafia businesses/activities or mafia families. At the very least this may have induced the political class to be willing to 'close an eye' on the presence of politicians connected to the 'ndrangheta. It also prompts the consideration that – even if the ratio of mafia infiltration in the political administration was really 'only' of 1 in 4 counsellors – the remaining 'clean' individuals still carry responsibility for the negligent management of the institution, especially considering the high numbers of re-elected officials.

In addition to the analysis of the Investigation Commission and the Court, three other examples – recognised by the interviewees and mentioned widely in local or national newspapers – are also significant to identify malpractices of Reggio's political life and complete the picture of the dissolution procedure. First, the events surrounding the suicide of Orsola Fallara in December 2010 are worth remembering. This event, as earlier described, is only a small part of the overall financial disarray of the council, but it does point to mafia connections while, at the same time, it prompted judicial scrutiny on the former mayor and governor of the region (Mete, 2013; Petrasso, 2013). Furthermore, the Investigation Commission highlights those irregularities in the way the unit managers had been appointed directly by the mayor and not by the sector managers, as mentioned earlier in the chapter.

Last but not least, another example of the scarce efficiency of the city administration can be detected in the management of the assets confiscated in mafia proceedings. The confiscation of assets of mafia members is crucial as it attempts to use the assets for socially relevant purposes (Law 109/1996). In Reggio, the events surrounding a dwelling confiscated from a well-known boss in 2004 and assigned to the previous city administration for management and social use in 2007, constitutes an emblematic example of negligent management. In 2010, records declared the building as being under maintenance. However, the police found out that the family of the boss was still living there and no maintenance work had ever been carried out. Again, in 2012, the Council informed the National Agency for the Management and Destination of the Confiscated Assets (established in 2010) that finally the building was free of people or things. But also this report proved to be untrue as the family of the mafia boss was still living there (Commissione di Accesso, 2012; Ministero dell'Interno, 2012).

All these examples, among many others, are symbolic of the many ways in which the political life in Reggio Calabria is not only weak because of mafia presence but also, and more importantly, because of widespread practices of negligence and laziness from the political class.

## **Concurrent Governance in Reggio Calabria**

Reckless political management on one side and 'ndrangheta clans on the other have created a lethal grip of corruption, sleaze and crime that has compromised the performance and the impartiality of the public

administration in Reggio Calabria and brought the city to a severe financial and democratic crisis. From the findings of this work it emerges that even when the administration has not willingly supported or acted in favour of individuals close to mafia clans, still public activities have *de facto* facilitated criminal activities and have, willingly or unwillingly, met mafia interests. It can be inferred that predatory politics and mafia clans in Reggio are mutually attractive for each other. As the Minister of Interior pointed out prior to dissolving the council in Reggio (Ministero dell'Interno, 2012:3):

“An administration aware of the risks to which it is exposed, in a territory with an historically strong tradition of organised criminality – which enjoys visible influence on public administration and socio-economic relations – cannot avoid implementing every suitable measure in order to prevent and remove every risk of mafia infiltration.”

When this does not happen, either the political class is too weak or the criminal power is too strong while the elite is willing to go along. That ‘ndrangheta clans are strong because of their influence and socio-economic power is not news (Paoli, 2003; Sciarrone, 2011; Varese, 2011). Similarly, it is not news that political power in Southern Italy is severely lacking integrity (Sciarrone, 2011; Newell, 2010). At a closer look, the dividing line between the underworld of public administration and the mafia underworld appears in Reggio Calabria and the wider region to be completely permeable. In this framework, the conclusions that can be drawn within this work are twofold:

1. ‘Ndrangheta families in Reggio are not actors ‘from below’, only meant to fill a vacuum of power left by the governing actors ‘from above’ (Lea and Stanson, 2007) but rather they complement the power ‘from above’ and share the same space of governance quite blatantly (Aresu and Gasparri, 2012).
2. In the case presented, governance is the space where public administration, private institutions and criminal clans coexist and decide on the affairs of the city of Reggio and of Calabria according to their needs and motivations. It is not just a sum of different parts, but rather a new dimension resulting from overlapping functions of individuals pursuing different interests and in different roles at the same time.

As for point 1, this means that both ‘ndrangheta families and political elite at different times and for different motives take steps towards each other. It is not, therefore, only a rational plan of mafia families to secure investments and public money, but it is as well the propensity of the ruling class to incentivise mafia’s entrance in public affairs through corrupt conduct and the same

logic of accumulation of wealth and power that is always attributed to mafia groups. The view according to which mafia clans represent the common front against another 'front' of the Italian authorities reflects a too abstract notion of state authorities. This idealistic abstraction certainly does not apply to Calabria.

The existing scholarly debate on what roles mafiosi and mafia organisations play in the political realm and the successful theorisation of mafia groups as brand organisations existing in an extra legal governance dimension (Gambetta, 1993) is certainly applicable in this case. However, it cannot be said for Calabria that mafia power acts solely as a protecting industry presenting an alternative to an absent state power (Gambetta, 1993; Arlacchi, 1986; Anderson, 1995). In the case of Reggio, where both mafia infiltration and political negligence have conspired and contaminated the democratic process, both mafia clans and state power participate in local governance; state power is not (apparently) absent, but it is defective at the point of collapsing. In other words, mafia clans and mafia members *concur* with politicians and entrepreneurs in governing the territory. The governing elite as seen in Reggio for example, is made of mafiosi, politicians, entrepreneurs and elitarian/masonic alliances, together in *concurrence*, not by mere *infiltration* of the formers in the zone of the latter. A process of infiltration by mafia clans would imply gaining access *surreptitiously*, which is not what we have seen.

As for point 2, the conceptualisation of 'governance' seems to come to the rescue when describing the situation presented. 'Governance' generally indicates "*governing styles in which boundaries between public and private have become blurred*" (Stoker, 1998: p.17) and by governance we indicate the result of interaction among different and autonomous players—including both state and extra-state actors—performing collective actions (Peters, 2002; Pierre and Peters, 2000; Rhodes, 1996). In the case of Reggio, it seems particularly difficult to grasp the existing concurrent governance in its entirety; the state of affairs is perceived as utterly immutable. We have seen cases where the same individual acted both as contact to the mafia clan and in a political function as city counsellor. His legitimation to participate to the governance of the city was *de facto* strengthened by his participation to mafia affairs. Indeed, mafia involvement represents a justification for social prestige and political influence, as indicated by classic scholarship. At the same time, another *style* of governance, with mafia power separated from politics, does not seem to be possible, at least not in the short-medium term, because of old and stratified practices that perpetuate corrupt practices of the ruling class and political patronage. In this "*structural and not transitory status quo*", as put by one of the

interviewees, there is no point to draw the line between mafia and politics as “*in Calabria mafia is politics and politics is mafia*”. When looking at the way Reggio has been governed, the division of mafia from politics is not only just a fiction, but it seems also irrelevant.

## **Conclusion**

This chapter has presented a case study of Reggio Calabria on the occasion of the dissolution of the city council for mafia infiltration as an example that shows how ‘ndrangheta clans can act in a *concurrent governance capacity* intersected to local administrators. Concurrent governance goes a step beyond *infiltration*, as it is endemic and systematic, but also ineluctable and rationally accepted, wanted and endured by both mafiosi and politicians. Malpractices at the political levels in Reggio Calabria show a condoning approach to mafia presence while interference of criminal power with the political life of the city has become normality. The scenario presented is indeed much more ragged and multi-faceted such that the boundaries get blurred, sometimes at unpredictable points. A discourse on the legal-illegal tension in Calabria and in Reggio Calabria had to involve reflections on the very essence of governance and power relations in the region in particular when the licit-illicit divide often does not exist and where criminal, social and political worlds essentially occupy the same space.

The findings presented in this work are limited but are a starting point to question not just mafia presence in the south of Italy on its own, but also in conjunction with political incapacity as they both are reasons – together and not separately – for underdevelopment and the general lack of innovation and growth in Calabria. While this might seem intuitive – to say that underdevelopment is caused by both mafia presence and reckless politics – it is not obvious to many how the two worlds, criminal and non-criminal, are not divided but actually overlap and serve each other’s plans in a convergence of interests to the detriment of the whole community.

Civil society has the duty to create and sharpen the divide between itself and the alternative criminal power structures. So, while we live in a world of many shades, we cannot but strive to distinctive colours. Though, it is advisable to take the murky shades seriously and use it as a stepping-stone for removing these criminal alternatives.

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# Organised crime in post-war Kosovo: Local concerns vs. international responses?

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## Introduction

Organised crime has become one of the most heeded topics in the context of modern peace operations. United Nations (UN) peace operations have been confronted with the disrupting effects emanating from local and transnational networks of organised crime in environments as diverse as the Balkans, Central and Southeast Asia, Latin America and East and West Africa. The UN-led peace-building mission in Kosovo has been a case in point. Like in other contexts, also in Kosovo organised crime networks formed a part of the war economy and were entrenched with the conflict parties and local authority structures. The United Nations Interim Administration Mission in Kosovo (UNMIK) which assumed government functions and administered the former Yugoslav province after the end of the war in 1999 has been in many ways adversely affected by the presence of local and transnational criminal networks. Despite targeted efforts to tackle locally operating organised crime structures, UNMIK's success in curbing organised crime in Kosovo has been at best limited. After almost a decade of international, UN-led administration (1999–2008) the newly independent Republic of Kosovo remains rife with organised crime. The fact that the subsequently installed European Union Rule of Law Mission Kosovo (EULEX) (the most encompassing EU mission ever deployed) explicitly included fighting organised crime in its mandate evinces both, the Western perception of Kosovo as a safe haven for organised crime and the importance that (Western) European nations attach to the issue. However, so far, EULEX' presence has not been able to significantly alter the rule of law situation in Kosovo and close the prosecution gap with regard to organised crime and high-level corruption (see UNODC, 2013, p. 49).<sup>2</sup>

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<sup>2</sup> Author's interview international police officer, Pristina, February 2012

While international law enforcement professionals that worked in the respective police and justice components of UNMIK and EULEX faced numerous practical and tactical difficulties in investigating and prosecuting organised crime networks in Kosovo, one recurrent *strategic* obstacle appears to remain central: the lack of active support and ‘ownership’ of the problem of both, the local elites and the population at large. Against this background, the article addresses both local and international perceptions of organised crime in post-war Kosovo, highlighting discrepancies between local and international concerns with respect to crime-fighting. Moreover, it also discusses the extent to which international responses towards organised crime in Kosovo have reflected the interests of the most powerful contributing nations, rather than the concerns of the local population. Finally, it is debated whether the international presence in Kosovo missed out on opportunities to mobilize public support against organised crime in post-war Kosovo. Hence, the analysis addresses the following set of questions:

1. To what degree and with regard to what specific forms of organised crime in Kosovo have ‘international’ and local threat perceptions differed from each other?
2. Did international-led law enforcement address those forms of organised crime perceived to be the most threatening by locals?
3. What did the international presence do (or fail to do) to encourage and reassure local support for international law enforcement initiatives against organised crime?

By means of a qualitative case study the available evidence on local perceptions on organised crime in post-war Kosovo is analysed. As the conclusiveness of the existing survey data remains limited, additional qualitative data found in reports of international organisations as well as in local and international media reports is included to complement the picture. The analysis also draws on a number of personal interviews with (former) UNMIK and EULEX personnel, conducted between June 2009 and May 2013.

Addressing the possible discrepancies between local and ‘international’ (threat) perceptions of organised crime may not only be of interest with regard to a better understanding of the difficulties of international-guided law enforcement in Kosovo, but also with a view to other scenarios where peace operations are mandated to tackle local and transnational organised crime structures.

## **Organised crime in post-war Kosovo: A brief overview**

The spectrum of organised crime activities conducted by criminal crime groups in post-war Kosovo is wide and ranges from forms with a local focus (such as blackmailing, racketeering, fraud, (sexual) exploitation, organised theft, burglary, kidnapping), to regional cross-border crime activities (such as the smuggling of licit and illicit goods and other fraudulent trade practices), to (sophisticated) forms of transnational organised crime (such as the large-scale trafficking of narcotics to Western Europe, human trafficking, automobile theft etc.) (Council of Europe, 2006, p 106-108). Moreover, many serious crimes committed in the post-war phase such as assaults, murders and even terrorist attacks have been linked to organised crime activities (UNDP, 2003, p.26).

One of the most lucrative fields of criminal activity in post-war Kosovo remains the trafficking in narcotics. Since the rise of Kosovo Albanian networks in heroin trafficking in the late 1980s, Kosovo functions as a transit zone and storage site for heroin on its way to Western European markets (see UNODC, 2008, p.45-46; Anastasijević 2006, p.4). In 2004, a UNMIK report estimated that 80% of the heroin supplied to Western European markets passed through Kosovo and/or Macedonia (UNMIK, 2004, p.35). Although a 2008 UNODC report suggested an overall declining role of ethnic Albanians in the trafficking of heroin (based on seizure and arrest statistics in Western European countries) (UNODC, 2008, pp.14, 97), anecdotal evidence suggests that the large-scale transit of heroin through Kosovo is ongoing (see for example *Stratfor*, 2008; *Zëri*, 2011). This has also been confirmed by Kosovo's Minister of Interior, Bajram Rexhepi (see *inSerbia*, 2014). In addition to heroin, large amounts cocaine have been detected transiting through Kosovo and individuals originating from Kosovo have been repeatedly arrested in several European countries for trafficking marijuana (see, for example, Laskaris, 2007; Kimeswenger, 2009).

Another field of organised crime activity is the trafficking/smuggling of human beings, which are formally different offences. According to trafficking reports, "*Kosovo is a source, transit and destination location for women and children trafficked transnationally and internally for the purpose of commercial sexual exploitation*" (Embassy of the United States, Serbia, 2007). In the post-war years, women (and girls) primarily from Eastern European countries such as Ukraine and Moldova, but also from Asian countries such as Sri Lanka and Thailand have been trafficked to Kosovo where they are exploited as

sex workers (United States Department of State, 2014, p.234). Although the heyday of women trafficking in Kosovo (and international attention) seems to have passed, as the demand for sex services in Kosovo had been fuelled by the large presence of international staff, the trafficking in women for their sexual exploitation has not ceased to exist, particularly as a local market for sex services has emerged (see Council of Europe, 2006, p.109; Polman, 2005). Reports by international organisations monitoring the situation in Kosovo have diagnosed changed patterns in this field of criminal activity, such as an increase in “*hidden or more sophisticated methods of operation*” and a higher use of private locations where victims are being held (Rahmani, 2006, p.89). Another trend that has been observed is the increasing number of internally trafficked victims that originate from Kosovo (Embassy of the United States, Serbia, 2007). Apart from the sex industry, children (primarily from Albania) have also been trafficked to Kosovo for their exploitation in organised begging rings (see United States Department of State, 2014, p.234; Unicef, 2004, p.2).

Besides the trafficking in women, illegal migrants seeking entry into the EU have been smuggled from and through Kosovo. Some citizens from Kosovo seek entry into EU-countries and thus make use of (or fall victim to) local and regional trafficking networks that organise the passage (see, for example, Tabak, 2011). Additionally, migrants (mostly from the Middle East and other parts of Asia) transit through Kosovo on their way to Western Europe as Kosovo’s ‘green borders’ remain porous. Reportedly, “*police sources estimate that over 1.000 [undocumented migrants] pass through [Kosovo] every year*” (*The Economist*, 2012). Particularly the strong links between Albanian and Turkish criminal networks are said to have fostered the ‘Istanbul-Pristina connection’ (IOM, 2004, p.68). In support of trafficking and smuggling activity there has been a rise in production of forged travel documents such as passports, visas and identity cards.

A further common criminal activity is the smuggling of both licit and illicit consumer goods, such as cigarettes, alcohol, fuel, but also cars and counterfeit clothing and pharmaceuticals (see for example *Bundesnachrichtendienst*, 2005, p.4; Xharra, 2010). Oil smuggling, in particular, through the volatile Serbian dominated Northern part of Kosovo has been one the most profitable smuggling activities with an estimated annual profit of \$100 million (see Carvajal, 2011). Apart from trafficking activities, organised crime groups in Kosovo have also been engaged in organised fraud, counterfeiting money and numerous forms of economic crime, including large-scale money laundering (see Schulz and Spindler, 2013; Karadaku, 2012). Organised criminal groups have also been active in extortion and have established local racketeering

rings. Noticeably after the war, Kosovo was beset by numerous cases of kidnapping for ransom (see also Phillips, 2007, p.28-30).<sup>3</sup> Many of these organised crime activities have been brought in connection with networks related to the former Kosovo Liberation Army (KLA) and in particular to the unofficial secret service SHIK<sup>4</sup> (National Information Service/*Shërbimi Informativ Kombëtar*) that after 1999 has been affiliated with Democratic Party of Kosovo (PDK), led by former KLA-commander and Prime Minister Hashim Thaçi. David Phillips (2010) notes that credible sources affirm “*that SHIK members permeate public and private life in Kosovo, generating inestimable sums from bribery, extortion and racketeering*” (Phillips, 2010, p.94).

In addition, Western intelligence documents have frequently linked this clandestine organisation to organised crime activities. According to a classified report of the German federal intelligence service, *Bundesnachrichtendienst* (BND), from February 2005, the SHIK has spied out, intimidated and, through the use of hit-men, even physically eliminated rival actors in politics and organised crime (BND, 2005, p 18; see also, for example, *derStandart*, 2011; McAllester, 2011). In fact, the SHIK’s involvement, if not a central position, in organised crime activities in post-war Kosovo can be credited with the status of ‘common knowledge’ among many locals and international staff. However, besides the PDK-affiliated SHIK also other local political parties such as the Democratic League of Kosovo (LDK) ran their own unofficial intelligence services suspected of organised crime involvement (UNDP, 2005a, p.14). According to McAllester and Martinović (2011) a local source involved in human trafficking in Kosovo stated that “*the whole thing, as well as any other illegal business, is controlled by the state [ . . . ]. No one can do [smuggle] drugs, women, cigarettes or anything without blessing from above*” (quoted from McAllester and Martinović, 2011).

Organised crime reports on Kosovo usually distinguish between smaller criminal groups, often organised along family ties and involved in one particular field of organised crime and more sophisticated, transnational and multi-ethnic criminal networks (Council of Europe, 2003, p.76; IOM, 2004, p.13). Also UNMIK police officers have suggested that there is no “*central authority*” or “*big boss*” controlling organised crime in Kosovo, but rather regional structures of authority that control criminal activities along specific (smuggling) routes or in a particular area or sector (Chapell and Fletcher, quoted from UNDP, 2002a, p.25). Hence, the overall evidence points to oligopolistic patterns of control of much of the organised crime business.

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<sup>3</sup> Author’s interview with former KOCB/DOC police officer, May 2013

<sup>4</sup> Also referred to as K-SHIK.

Given the limited evidence available, it is difficult to estimate the economic scale of organised crime activities in Kosovo. In 2008, the European Agency for Reconstruction (EAR) estimated that between 2004 and 2006 Kosovo's "black economy" amounted to at least 301 to 386 million euros (EAR, 2008, p.39). However, estimated profits from the drug trade alone suggest higher figures. A 2008 Stratfor report claimed that "*transportation of heroin [ . . . ] is Kosovo's main resource and source of income*" (Stratfor, 2008) and in August 2013, Viktor Ivanov, the Director of the Federal Drug Control Service of the Russian Federation, stated that annually 50 to 60 tons of heroin are transiting through Kosovo reaching an estimated profit of up to 3 \$ billion (see *Stimme Russlands*, 2013; *International Radio Serbia*, 2013). In addition there are the proceeds from other drugs such as marijuana and cocaine. Hence, the combined evidence suggests that drug trafficking alone remains a significant source of income for Kosovar trafficking organisations. It follows that the total of organised crime activities in Kosovo is likely to reach macro-economic proportions given Kosovo's GDP of US\$ 6.960 billion (as of 2013) (*The World Bank*, 2014). Reportedly, UNMIK estimated the share of organised crime in Kosovo's economy at between 15 and 20% (Rosenthal, 2008) but the actual share of organised crime activities is likely to be even higher. Consequently, Muhamet Mustafa of the Riinvest research institute estimated the share of Kosovo's 'black economy' at between 30 to 40% of the country's GDP (Mayr, 2008).

## **KFOR and UNMIK: actions against organised crime**

In the immediate post-conflict situation the NATO-led military presence KFOR found itself confronted with a chaotic environment, characterised by a status of lawlessness and a high level of violence. At that time, in many municipalities leading elements of the Kosovo Liberation Army (KLA/UÇK) and respective underlying networks and clan structures constituted the only (self-appointed) authority. As has been noted: "[. . .] *an international military presence was by no means a safeguard against the predominance of self-appointed local structures in this early phase of operation*" (Borcades Zaalberg, 2006, p.386). During this period, there was a high degree of impunity and violence erupted against Serbs and between rivalling Albanian clans and political groups (Kaltcheva, 2008, p.119). KFOR and the first UNMIK police units were generally unable to halt the erupting intra-ethnic turf wars.

Lucrative smuggling channels and respective cross-border networks that had been established during wartime often remained intact and constituted an important source of income for those who controlled the supply chains. During the first years, KFOR could do little to interrupt the cross-border smuggling operations (UNMIK, 2000, p.13). Since KFOR soldiers with their heavy military equipment were neither trained nor equipped to tackle organised crime (let alone to investigate complex crime cases) the international military presence could not stop the expansion and consolidation of (often KLA-related) criminal networks. Consequently, the first report of the UN Secretary General to the UN Security Council urged the deployment of international police forces and the establishment of a local police service.<sup>5</sup>

The arrival of international civilian police forces (CIVPOL) and the formation of the Kosovo Police Service (KPS) contributed to the restoration of basic social order and security in many municipalities, however, it could not end the prosecution vacuum with regard to organised crime. Initially, post-war law enforcement under UNMIK concentrated on the areas of war crimes, inter-ethnic crimes and homicides, (UNMIK, 2000, p.21; UNMIK, 2001, p.19). The first targeted measures against organised crime came about with the establishment of the Trafficking and Prostitution Investigation Unit (TPIU) in October 2000, and the Drug Trafficking Unit (DTU) in June 2001 (Stefanova, 2004, pp.261, 263).

However, despite some early successes against criminal gangs operating in Pristina and against several prostitution rings, UNMIK police remained in many places unable to disrupt local criminal networks (UNMIK, 2001; Stodiek, 2004, p.213). Consequently, the UNMIK police report of December 2002 states that “*organised crime and official corruption remain problems that threaten the stability of Kosovo, and the tools needed to address the problems are not yet in place*” (UNMIK, 2002, quoted from Stefanova, 2004, p.258). Hence, after more than two years UNMIK’s beginning, criminal networks still operated with near-impunity and ‘divided’ Kosovo into regional zones of influence, which (at least initially) remarkably resembled the territorial division of operational zones of the various KLA-commanders (see NATO/KFOR, retrieved from *Global Post*, 2011).

While KFOR and UNMIK were long in the know about the criminal networks intelligence gathered and pooled by KFOR and UNMIK’s Central Intelligence Unit (CIU) was rarely used for criminal prosecution of local crime figures. Indeed, KFOR and the CIU collected intelligence with a

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<sup>5</sup> UN (1999), S/1999/779.

primary focus on security and political aspects. Thus, the information gathered on criminal networks and individual crime figures was often not suitable to be presented as evidence in front of a court (Rausch *et al.*, 2006, p.121).

The establishment of the Kosovo Organised Crime Bureau (KOCB)<sup>6</sup> in late 2001 was UNMIK's first notable effort to systematically counter organised crime activities in Kosovo. The KOCB started out with a small team of merely eight international police officers (initially relying on local staff only as translators) before it gradually built up its capacities, which remained limited (see also Stefanova, 2004, p.261)<sup>7</sup> and largely unable to penetrate deeper into local networks, especially into those that were intertwined with local political authorities. Reportedly, in some cases, the KOCB/DOC's leadership would be informed that "*the state is involved*", meaning that they were not supposed to interfere.<sup>8</sup> Thus, although the international UN-led peace-building presence employed dedicated measures against organised crime when it established the KOCB, cases of successful prosecution against organised crime must be seen as isolated instances, rather than a concerted international-led effort to systematically weed out higher levels of organised crime in Kosovo.

There is further evidence that the failure to prosecute leading crime figures in Kosovo was at least in as much the result of a lack of political will among the dominant powers involved in peace-building in Kosovo, as it was due to the inherent difficulties of international law enforcement. In fact, the international presence often displayed an acquiescent disposition towards the criminal entanglements of former KLA-potentates. In some cases, this lenient attitude of the mission's leadership can only be described as connivance, since in several cases UNMIK/NATO officials actively obstructed the prosecution of influential local power holders (see Strazzari, 2008, p.158; King and Mason, 2006, pp.60-61; Deliso, 2006; Wood, 2000). As a consequence, high-level crime figures, especially those who were shielded through politics, remained almost untouched throughout the UNMIK years. It has been consistently observed that, "*the past United Nations administration (UNMIK) failed to offer Kosovo's citizens an administration that prioritised respect for the rule of law. [. . .] because of the pressures exercised by powerful foreign countries in order to preserve 'peace and stability' in Kosovo*" (Qosaj-Mustafa, 2010, p.5).

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<sup>6</sup> In 2005, the KOCB was renamed the Directorate of Organised Crime (DOC) after some organisational changes.

<sup>7</sup> Author's interview with former KOCB/DOC officer, May 2013.

<sup>8</sup> Author's interview with former KOCB/DOC officer, May 2013.

Overarching security concerns, various dilemmas emerging from conflicting goals on the international peace-building agenda and a security sector reform that relied on the inclusion of influential local stakeholders – these circumstances can account for this neglect (see Proksik 2013). In particular it was feared that a direct confrontation with the KLA-related politico-criminal elements would endanger stability in Kosovo and lead to a serious deterioration of the security situation for the international presence (see, for example, Deliso, 2006). The course taken by the international mission and the attitude it displayed towards some local power structures intertwined with organised crime has given rise to the perception of an implicit collusion between the international presence and local organised crime structures. Some observers have come to the conclusion that criminal prosecution has fallen victim to a tacit deal between the international and the local power centres: “*If you are trying to set up a new government, you hire thugs because they run the criminal circuits, they know everyone and they’re more effective at keeping the peace*”, as Father Sava Janjić, Archdeacon of the Visoki Dečani monastery remarked (quoted from Taylor, 2011, p.17). Moreover, cooperation during and after the Kosovo conflict between Western powers involved in peace-building and local underground secret services, such as the SHIK, has further encouraged some of the most notorious post-war actors in their grab for political and economic power (Sopjani, 2011, p.124). Similarly, a former UNMIK judge opined that by declaring some influential local players “*untouchable*”, these players became even more impudent, eventually outgrowing international control.<sup>9</sup>

In the tight-knit fabric of Kosovo Albanian society, news and rumours pass swiftly through the small country and many locals (including members of the diaspora) are well aware of the accusations and the criminal entanglements of the local elites (if only for all of the unaccounted wealth that has been accumulated). This state of affairs has led to the muddled situation that (international) police investigators and prosecutors were largely unable (and sometimes hindered) to prove what ‘everyone’ in the street seems to know.

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<sup>9</sup> Author’s interview with former UNMIK judge, June 2009.

## The role of public support in fighting organised crime

In any society, public support is a crucial, if not a necessary condition, for tackling organised crime. Both, law enforcement practitioners and the academic literature, have acknowledged the important role of civil society support for the fight against organised crime. This is all the more true in the context of international-led law enforcement, as international investigators and prosecutors are generally alien to the society in which they operate, do not speak the local language(s) and often lack sufficient understanding of the culture and the political economy in the theatre of operation. Therefore, the degree of political will of local elites, active support of civil society groups and the general level of grass-root support directly affects the chances of success of internationally guided law enforcement efforts.

The importance of the political will of local elites to combat organised crime and to prosecute high-level crime figures cannot be underestimated. Local elites often determine the quality of cooperation between an international presence and the local (law enforcement) institutions of a given host state (see Rausch *et al.* 2006, p 29). As outlined above, in the case of post-war Kosovo, the relation between the state, political authority, and organised crime can best be described as symbiotic. Against this background, it does not come as a surprise that the 2010 International Crisis Group (ICG) report on the rule-of-law situation in Kosovo remarks that

“[. . .] virtually none of Crisis Group’s interlocutors in the judiciary, police and associated institutions and among EULEX [. . .] believe the government fully supports the rule of law [. . .] and that the government prefers a weak judiciary. An unregulated society and economy is an ideal environment for corruption” (ICG, 2010, p.1).

Given the “*inexplicable wealth*” that many of Kosovo’s post-war political elites have amassed during the UNMIK years, the lack of political will of leading political figures to move support for the fight against organised crime and corruption beyond lip service is far from imaginary (Qosaj-Mustafa, 2013, p 4). In the same vein, Cornelius Friesendorf (2010) remarks that “*besides shortcomings of international crime-fighting, prosecution lagged behind because, paradoxically, prosecution depended on support from the same people in positions of power who might be target of prosecution*” (Friesendorf, 2010, p.108).

Since most of Kosovo’s post-war political establishment cannot be expected to mobilise political support for fighting organised crime, support

from other stakeholders in the society such as local law enforcement personnel, civil society groups or grass-root movements must be valued as an even more important asset for the international presence. These parts of society can form a counterweight to the criminal local elites and offer direct and indirect support for international efforts against organised crime. As has been pointed out: “*Without citizens’ collaborative efforts, it is not possible for a judicial system to function*” (Buscaglia, 2013, p.68).

In Kosovo, international investigators as well as prosecutors and judges have repeatedly pointed out the lack of cooperative behaviour when it comes to fighting organised crime (and high-level corruption) (see UNDP, 2002b, p.2).<sup>10</sup> A EULEX judge described the situation as follows: “*Imagine there is someone who has witnessed everything. We ask him in court, ‘did you witness this and that?’ – ‘No.’ – ‘How do you know it then?’ – ‘Everyone knows.’ – We walk against a wall of silence*” (quoted from Diemer, 2010). This example can be viewed as symptomatic for the (witness) situation to such an extent that Kosovo has been labelled a “*country of public secrets*” (Strazzari, 2008, p.164). Little, if anything, has changed over the years of international presence.

## **Local perceptions on organised crime in Kosovo**

So far, only limited research has been conducted to shed light on local perceptions on organised crime in Kosovo. Yet, local perceptions and concerns vis-à-vis organised crime may provide important insights for international law enforcement, particularly regarding the question of how to mobilise public support for measures against influential local criminal networks. In this line, Colette Rausch *et al.* (2006) stress the importance of an assessment of public perceptions and of an understanding of the political economy of organised crime in a particular environment: “*it is important to assess how [ . . . ] high a priority they [the public] place, and their allegiances to or acceptance of criminal activity (via ethnic, tribal, or familial connections)*” (Rausch *et al.*, 2006, p.30).

Reliable data on local perceptions on organised crime in Kosovo is scarce. The available survey data are limited to quarterly opinion polls conducted between 2002 and 2005 and to Gallup Balkan Monitor surveys carried out between 2008 and 2010. The survey data provides indications about the (perceived) prevalence of organised crime and about the entities

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<sup>10</sup> Author’s interviews with (former) UNMIK and EULEX judges, June 2009, February 2011, February 2012.

associated with organised crime and allows for some general conclusions regarding level of concern that organised crime inspires among the local population. However, the conclusiveness of the survey data is limited partly because of uneven data collection efforts and partly because of the use of imprecise terminology. Frequently, the use of terms such as ‘organised crime’ or ‘economic crime’ reveals little about the underlying forms and modes of criminality. Further, it remains unclear what manifestations of (organised) crime local respondents subsume under such terms.

Several UNDP opinion polls between 2002 and 2005 show that most local respondents perceive organised crime to be present either at “*medium*” or a “*high*” scale, with little variation over the years (UNDP, 2002–2005).<sup>11</sup> Evidence on what exact forms of criminal activity locals subsume under the broad term organised crime remains sketchy. Moreover, it is difficult to discern changes among local perceptions over time. According to an opinion poll from July 2003,

“respondents of all nationalities think that organised crime is almost equally present in trafficking of human beings and drug smuggling, as well as in economic and serious crimes (murders, kidnappings, robberies, arson). Nevertheless, more respondents think that organised crime is more present in the domain of serious crimes [ . . . ]” (UNDP, 2003b, pp.26–27).

Subsequent quarterly opinion polls from September 2003 and July 2004 reaffirm this finding. (UNDP, 2003c, p 35; UNDP, 2004b, p.25).

The outcomes indicate that locals relate organised crime in as much to ‘prototypical’ forms of organised crime such as human and drug trafficking as to violent crimes and more primitive forms of (organised) crime such as street crime. While some forms of street criminality, may as well display some degree of organisation (*e.g.* robberies), it remains unclear, however, whether respondents strictly distinguish between organised crime and other forms of (petty) criminality. Several UNDP reports indicate that people link organised crime to a considerable degree to their perception of personal and public security. This finding has been corroborated by a regression analysis that found that all respondents that “*think that organised crime is present, [ . . . ] also feel insecure in the street and are unsatisfied with the current political situation*” (UNDP, 2004a, p.26). Consistently, Kosovo Serbs ranked the problem of organised crime somewhat higher than Kosovo Albanians (UNDP, 2002–2005, 2013). Among other factors, this may be attributable to the volatile

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<sup>11</sup> UNDP, 2003 – 2005, Early Warning Report Kosovo #4, p 26; #7, p 25; #12, p 2; #13, p 10.

situation in the predominantly Serbian inhabited Northern part of Kosovo and/or to the general atmosphere of insecurity and intimidation that many Serbs have been confronted with after the war.

According to two surveys from mid-2003 and late 2005, the “*business community*”, the “*international community*” and “*political parties*” were the entities most frequently linked to organised crime by all respondents (UNDP, 2003b, p 33; UNDP, 2005c, p 36). As of July 2003, the majority of Kosovo Albanian respondents viewed the business community as connected to organised crime, whereas Kosovo Serbs and other minorities considered the international community to be most linked to organised crime. In a subsequent survey from December 2005, the ranking somewhat changed, with the majority of Kosovo Albanians and other than Serbian minorities viewing political parties as most connected to organised crime, while Kosovo Serbs ranked the business community in the first place (UNDP, 2005c, p 36). However, a significant share of respondents of all ethnicities continued to view the international community as linked to organised crime.

That respondents of all ethnic groups perceive the business community as involved in organised crime is consistent with the overall picture that many criminal networks took advantage of their economic and political influence obtained during and after the conflict years and successfully infiltrated the legal economy (see Strazzari, 2008; Pugh, 2005). The view of Kosovo Serbs that the international community is linked to organised crime in Kosovo may partly be explained by a general disregard of the international presence among many Kosovo Serbs, as evinced by the continuously negative approval rates for the international presence (UNDP, 2002-2005). International political and military support for the Kosovo Albanian cause during and after the war, the inability to protect Serbs (and other minorities) from harassment, revenge attacks and expropriations as well as the overall refusal to accept the new Albanian-dominated political and security institutions created under international supervision, may have influenced these polling outcomes among Kosovo Serbs. However, the fact that large numbers of Albanians and other minorities linked organised crime to the international community, suggests that ‘dissatisfaction’ with the international presence alone, cannot account for this perception. Apart from instances of criminal collusion between international peace-building personnel and local criminal networks, it can be presumed that the close (working) relationships between high-ranking international officials and a number of former KLA-figures contributed to this public perception (see for example Rosenthal, 2008; Mayr, 2008; Glenny, 2005). The indifference among representatives of international community towards the (alleged) intertwining between local elites and organised crime

is thus likely to have further spurred local perceptions of complicity.

Overall, the public perception of organised crime being related to the business community, the international presence and political parties in Kosovo, illustrates that it is perceived to flourish in co-existence and collusion with the nodes of political and economic power rather than in opposition to them. It remains difficult, however, to determine the level of public concern attached to organised crime, particularly as matters differ with the various forms of organised crime. In general, the opinion poll data as well as local media reports indicate a high awareness towards the problem of organised crime and would suggest considerable public levels of concern. However, the picture appears to be more complex. Despite persistent perceptions of a medium or high presence of organised crime, the overall evidence from UNDP opinion polls between 2002 and 2005 suggests that organised crime has been a declining and, compared to other issues, a secondary concern for Kosovo's majority population. In fact, several other problems (including corruption) were persistently ranked above organised crime in the list of "*the biggest problems faced by Kosovo*" (UNDP, 2002-2005; Proksik, 2013).

As noted above, the combined fragmentary evidence suggests that predatory forms of (organised) crime victimising individuals and families cause the most public concern. The gradual downturn in violent crimes after the war has somewhat decreased these immediate concerns. Consistently, UNDP opinion polls from 2013 indicate that "*organised crime/mafia*" is not perceived as a major security threat to families among Kosovo Albanians compared to other issues (UNDP, 2013, p.27). Yet, according to Gallup Balkan Monitor surveys from 2009 and 2010, a declining but still large share of respondents states to be affected by organised crime in their daily lives (53% in 2009, and 23% in 2010) (Gallup Balkan Monitor, 2010, p.36). However, it remains unclear what forms of organised crime people feel most affects them.

In general, local concerns arise *vis-à-vis* those forms of organised crime that have direct negative repercussions for communities. Usually, these are organised crime activities with a local focus. Burglary, theft, kidnapping and acts of intimidation including coercion of businessmen are likely to be the most pressing manifestations of (organised) crime that affect people in their daily lives. The Riinvest Enterprise Barriers Survey 2011 revealed that 64 per cent of entrepreneurs perceived "*organised crime/mafia*" as the 6<sup>th</sup> in a list of 22 most intense business barriers (UNDP, 2012, p 44). Although the 2013 business survey conducted by the UNODC found that only a mere 0,4% of businesses in Kosovo are subject to extortion (UNODC, 2013, p.64) anecdotal evidence suggests that organised crime networks able to

issue credible threats, strongly affect social, political and business relations in Kosovo. Particularly, the fear of reprisals for reporting on crimes remains high (Aliu, 2012; UNODC, 2013, p.6) Thus, the bullying and intimidation of people constitutes one of the major avenues through which organised crime groups exert their influence and worry people in their daily lives. These more subtle but nevertheless very effective forms of criminal influencing may not necessarily be captured in opinion polls and even less so in crime statistics though such conduct creates a general atmosphere of anxiety and intimidation, in which the visible application of violence by organised criminal groups becomes only a measure of last resort.

Clearly, not all organised crime activities in Kosovo victimise locals to the same extent. A significant share of organised crime in Kosovo can be seen as ‘transit crimes’, where the negative effects are to a considerable degree externalised. The transiting of drugs and people through Kosovo and many other forms of cross-border crime are much less visible for the average citizen and thus unlikely to constitute a major concern for most people. Even though most Kosovars consider trafficking and other forms of cross-border crime as criminal activity and may thus not be indifferent towards these activities, it remains questionable to what extent they inspire large scale public concern. Thus, externalised negative effects of organised crime, such as stolen vehicles, illegal immigration and drug abuse in (wealthy) Western European societies are unlikely to raise general domestic concerns.

Moreover, during the time of war and much of the Kosovo’s troubled history, proceeds from cross-border and organised crime activities constituted a source of income rather than a direct threat for the population. During the 1990s funds obtained from smuggling and other organised crime activities played a significant role in financing the Kosovo Albanian ‘parallel state’ and were used to fund the armed resistance (see UNDOC, 2008; Hajdinjuk, 2002, p.12). Hence, in Kosovo’s recent history many high-level criminals assumed a “*crook-and-patriot*” (Fleishmann, 1999) role, traversing the boundaries between social and anti-social behaviour. Francesco Strazzari gets to the heart of the relation between organised crime, Kosovo’s political elites, its new independent statehood and the population at large:

“On the one hand, local elites and civil society organizations repeat the mantra of organised crime as a ‘major threat to Kosovo society’. On the other hand, [. . .] criminal actors are not regarded as a threat to the (nation-) state, but – on the contrary – as working in its defence” (Strazzari, 2008, p.166).

In the same vein, Chris Patten, former Commissioner for External Relations in the United Kingdom reportedly, “[. . .] *described the situation of organised*

crime in Kosovo as one of ‘incredible penetration; social because if it involves all sections of society, political because these practices appear to be accepted, and economic because resources are being diverted to the grey economy’” (quoted from Saint-Claire, 2007, p.8). Consistently, to some degree citizens display a compatible set of customary values, which could be described as a certain form of bounded morality.<sup>12</sup> While in abstract terms organised crime is perceived as inherently negative and a burden to Kosovo’s society, criminal practices are to considerable degree acceptable when benefiting one’s own family, clan, community or peers. This is further illustrated by the widespread practices of clientelism and nepotism (UNDP, 2012, p.91). Consistently, opinion poll respondents opined that “*part of the responsibility for corruption and organised crime falls on citizens themselves*” (UNDP, 2002b, p.30). Thus, in some regards, Kosovo’s (rural) society suffers from what Edward C. Banfield (1958) coined “*amoral familism, [. . .] whereby family interests and values are put first and pursued even at the expense of the interests of the larger communities and in defiance of state rules*” (Paoli et al., 2009, p.213). As has been noted for Balkan organised crime in general, also in Kosovo, organised crime groups “[. . .] are deeply embedded into the communities and cultural mind” and escape prosecution due to “[. . .] local passivity and complicity” (Saint-Claire, 2007, p.6).

The social embeddedness of organised crime in Kosovo, is also evinced by the fact that the omnipresent allegations of corruption and organised crime against the major political parties and leading political figures, have not translated into a significant exodus of voters or serious unrest among the parties respective constituencies. Regional networks bound together by overlapping family ties, wartime loyalties and patron-client relationships based on rent-seeking arrangements continue to form an anti-pole for the development of a more encompassing cross-societal moral, legal and social consciousness.<sup>13</sup> Widespread unemployment, economic hardship and a lack of prospects of many of Kosovo’s youth complement this situation and create further push and pull factors for the engagement in organised crime activities.

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<sup>12</sup> The concept of bounded morality describes the discontinuity between an internal/domestic set of moral values and an outside/international moral order (see Beitz, 1979).

<sup>13</sup> In public choice theory rent-seeking is defined as investing resources to influence political authorities with the aim to achieve a re-distribution of existing wealth, rather than to invest resources in a productive way that would lead to wealth creation (see, for example, Krueger, 1974). In Kosovo, rent-seeking activities frequently relate to public sector employment and the awarding of public contracts.

## **International perceptions and priorities in law enforcement**

Long before the outbreak of the violent conflict in the 1990s, Balkan organised crime groups have been a point of reference for many law enforcement agencies in Europe. Already during the Yugoslav times under ‘Tito’s rule’, many criminal elements, including Kosovo Albanian groups, used their freedom to travel to establish ties to Western Europe and to operate as smugglers (UNODC, 2008, p.48). Since the 1960s, Western Europe witnessed a constant influx of emigrants from Kosovo, primarily to Germany, Switzerland and Italy, but also to Austria, Belgium, Great Britain and the Scandinavian countries, among others. Kosovo Albanian migrants that came to Western Europe often faced difficulties to find employment as many of “*these emigrants were mainly unskilled, uneducated and from rural areas*” (Mustafa et al., 2007, p.27). Low levels of education, lack of language skills and at times illegal residence status contributed to their involvement in low-level crime and their entrance in criminal milieus in Western Europe. “*In addition, the subsequent generations of young men who wanted to integrate into the ‘new society’ of Western Europe were easily recruited by local criminal gangs*” (Arsovska, 2006, p.45). However, some Kosovo Albanian criminal networks gradually ascended in the criminal hierarchy and became leading actors in a number of key criminal markets in various European countries.

Since the mid-1980s, both European and US law enforcement officials recognised the rise of (Kosovo) Albanian groups in the trafficking and distribution of heroin (and other organised crime activities, including trafficking in human beings and running illegal prostitution rings). By 1998, the US Drug Enforcement Agency (DEA) judged that “*Kosovo Albanians had become second most important traffickers on the Balkan Route*” (Center for Peace in the Balkans, 2000) and in 1999, Interpol estimated that 40% of the heroin smuggled to Switzerland, Germany and Scandinavia passed through Kosovo (Teran, 2007, p.9). Moreover, in many criminal milieu’s, both in Europe and the United States, Kosovo Albanians had gained a reputation for their ruthlessness and their readiness to resort to violence. Hence, long before the international peace-building and rule-of-law missions were deployed to Kosovo, the former Yugoslav province had earned a reputation for its links to transnational organised crime activities (see, for example, Mappes-Niediek, 2003).

Since the rise of organised crime in the Balkans was closely associated with the vicissitudes of war, the collapse of the old political and social order

and the breakdown of law enforcement systems, the continued post-war status of lawlessness in Kosovo was perceived as a security threat by Western nations. In this regard, Kosovo has frequently been labelled a “*black hole*”, “*breeding ground*”, “*hub*” and “*safe heaven*” for organised crime (and terrorism) at the doorstep of the EU (see Anastasijević, 2010, p.159; Ridely, 2012, p.48; Falk, 2015, p.54; Bellamy and Wheeler, 2011, p.517). Moreover, there have been concerns that Kosovo serves as a ‘planning office’ for criminal activities that reach far beyond its borders.<sup>14</sup> In addition, it has been feared that Kosovo could become a fertile ground for Islamic terrorism (see Deliso, 2007).<sup>15</sup> Among many, this has nurtured the perception of Kosovo as a ‘Mafia state’ – a view that has also been held by high-ranking European politicians such as the former Czech foreign minister and UN Special Envoy for Human Rights in former Yugoslavia, Jiří Dienstbier, (*Reuters*, 2000) or the Vice President of the European Commission, Frans Timmermans, who, according to a US Embassy cable, stated that “*Kosovo is run by people who live off crime*” (Marzouk, 2011).

UNMIK’s first targeted effort against organised crime was directed at the specific issue of women trafficking and illegal prostitution. The timely establishment of the TPIU as the first specialised unit against the trafficking and sexual exploitation of women can be ascribed to early concerns raised within the UN (*UN Wire*, 2000), by alarming media coverage, (see, for example, Finn, 2000) and the respective outcry of several NGOs monitoring the situation.<sup>16</sup> After the establishment of the KOCB/DOC, more concerted efforts have been made to counter organised crime and respective priority areas of criminal activity were defined.

As noted the 2004 UNMIK Police and Justice report, a “*Strategic Overview assessment of the present threat from Serious and Organised Crimes in Kosovo [ . . . ], has identified the following specific criminal activities as having a significant impact within Kosovo:*” “*Drug Trafficking*”, “*Weapons Smuggling*”, “*Trafficking/Smuggling of Persons*” (UNMIK, 2004, p.35). As examples for progress in the fight against organised crime the report notes the “*takedown*” of a major drug dealer ring “*relate[d] to large-scale shipments of heroin into western European countries, which were coordinated from Kosovo*” and the progress in border control at Pristina Airport as a means to curb illegal migration (UNMIK, 2004, p.35).

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<sup>14</sup> Author’s interview with former KOCB/DOC police official, May 2013.

<sup>15</sup> Author’s interview with former UNMIK official, Department of Justice, February 2012.

<sup>16</sup> Author’s interview with former UNMIK official, Department of Justice, February 2012.

Moreover, the mission has put considerable emphasis on the development of “[. . .] a legal framework and procedure for the transfer of sentenced persons between these countries and Kosovo” (UNMIK, 2004, p.35). The promulgation of extradition agreements between UNMIK (and later the Republic of Kosovo) and a number of European countries can further be identified as a concern of EU states, as it allows for the extradition of Kosovars as well as for the prosecution of persons sought after for serious crimes committed in Western European nations (some perpetrators have defected to Kosovo, using it as a hideout).<sup>17</sup>

Similarly, the Kosovo Progress Reports by the European Commission (2007–2013) stress primarily border control and migration related issues and focus on transnational organised crime activities such as drug trafficking and human trafficking/smuggling. The 2010 report states that, “*organised criminal networks active in Kosovo are involved in international drug trafficking, smuggling of migrants, trafficking of stolen vehicles and firearms and smuggling of cigarettes*” (European Commission, 2010, p.55). Additionally, counter-measures against money laundering and (other) mechanisms in place to fight terrorism are addressed. Tellingly, neither UNMIK documents, nor the EC Kosovo Progress Reports (2007–2013) highlight organised crime activities that do not have significant transnational implications (with the exception of the internal human trafficking situation).

Overall, Western concerns appear to have been inspired primarily by the repercussions that (transnational) organised crime and lawlessness in Kosovo have on European countries in terms of security and criminal infiltration, rather than by the effects of organised crime *inside* Kosovo and its impact on the local population. Thus, to a considerable extent, priorities of international-led law enforcement in post-war Kosovo have reflected Western perceptions of organised crime in Kosovo and respective preferences in law enforcement.

## **The lack of local support: mission failures and missed windows of opportunity**

Given the recurrent strategic problem of low levels of local support for international-led law enforcement efforts against organised crime in Kosovo and particularly the lack of local witnesses willing to testify, it seems worth analysing in what ways the international presence has affected the situation

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<sup>17</sup> Author’s interview with international police officer, February, 2012.

by its handling of the post-war peace and state-building process in Kosovo. It is argued that this process negatively affected the willingness of the local population to actively support international efforts against organised crime and discouraged individual citizens and civil society at large to play a more active role in supporting the rule of law in post-war Kosovo.

Four main factors can be identified that have had a detrimental effect on the generation of public support against organised crime activities:

1. the uneven and biased application of the law under UNMIK including the obstruction of the prosecution of several local political stakeholders;
2. the close relations between international officials with local power holders accused of organised crime involvement (among other transgressions) as well as isolated instances of criminal collusion;
3. the strategic prioritisation of organised crime activities and that affect Western (donor) countries, rather than the application of a more balanced approach that would take local (threat) perceptions and concerns into account;
4. the inability to protect local citizens, witnesses and law enforcement personnel from security threats posed by those targeted by criminal prosecution.

First, the obstruction of the criminal prosecution of influential local power holders by international actors involved in the peace and state-building process has send out dire signals to Kosovo's society. Many of Kosovo's post-war political elites were already surrounded by networks of (regional) supporters and were often successful in creating an atmosphere of intimidation around them. Thus, any civil opposition to their (criminal) rule and influence requires courage and determinism. In this context, the restraint of the international presence to prosecute these actors even for the most serious crimes must be seen as a discouragement for anyone hoping for international backing. As two former UNMIK officials have stressed:

“Many cases were blocked by senior officials in KFOR and UNMIK. In the name of ‘stability’, the mission betrayed many of the brightest, most idealistic people in favour of the most thuggish. This handful of unpunished crimes had a far-reaching ripple-effect: critics of the most powerful figures understood that if they confronted hard men, the international administration would do nothing to support them” (King and Mason, 2006, pp.60-61).<sup>18</sup>

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<sup>18</sup> Iain King was the Head of Planning for UNMIK in 2003; Whit Mason was a speech-writer and public affairs strategist for UNMIK.

The political protection has made it difficult for individuals and civil society to challenge these actors and nurtured the perception of local society that these are ‘untouchable’ and closely allied with powerful Western nations.

Secondly, the close cooperation and, in some cases, cosy private relationships between local power holders and some high-ranking UNMIK officials have further added to the picture and have reinforced the status of some of the incriminated post-war figures as legitimate political leaders. An example provides the former SRSG, Søren Jessen-Petersen who publicly called Ramush Haradinaj “*a close partner and friend*” (Petersen, quoted from Perritt, 2008, p. 167) despite the International Criminal Tribunal for the former Yugoslavia (ICTY) investigation for war crimes against him. Among others, Haradinaj also featured frequently in intelligence documents in relation to organised crime activities (see NATO/KFOR retrieved from *Global Post*, 2011; BND, 2005, p.22). A further example provides the former Principal Deputy SRSG, Steven Schook, whose contract with UNMIK was not renewed, because his personal relations with Ramush Haradinaj (and Ethem Ceku) were deemed “*too close*” (see Rosenthal, 2008; Mayr, 2008). Former KFOR commander, Fabio Mini, commented on the problematic proximity between high-ranking international officials and local power holders: “*It is extremely frustrating for law enforcement to spend their working day collecting evidence against leading criminals and then to find themselves invited together with them to a social event in the evening – something that happened to me on several occasions*” (quoted from Friesendorf, 2010, p.120).

Moreover, UNMIK officials such as Steven Schook, but also high-ranking diplomats, such as the former chief of the OSCE Kosovo Verification Mission (KVM), William Walker, as well as the former US Ambassador, Christopher Dell, have come under fire for alleged conflict of interests related to their active roles in securing lucrative procurement contracts for foreign companies (Rosenthal, 2008; Lee, 2007; Rettman, 2014).<sup>19</sup> Even if this conduct may be nominally legal, they “*cast a very bad shadow*” (Capussela quoted from Rettman, 2014).

Additionally, UNMIK and EULEX were haunted by a number of allegations implying corruption and criminal collusion of international staff members with local criminals. Corruption among international officials has been suspected among UNMIK and KFOR (customs) officials (see Mappes-Niediek, 2003; Palokaj, 2010) and over the awarding of public contracts and jobs at Pristina Airport (see for example Rrahmani and Zogiani, 2007,

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<sup>19</sup> Author’s interview with representative of the Foreign Policy Club, Pristina, February 2012.

p.369). A major UNMIK corruption scandal was the case of Jo Trutschler who abused his position at Kosovo Energy Corporation and embezzled some \$4,3 million.<sup>20</sup> Collusion with organised crime has also been suspected with regard to UNMIK and KFOR personnel and local criminal groups involved in the trafficking in women (see Cerone, 2007, p.95).<sup>21</sup>

Against this background, the above mentioned local perception of the “*international community*” being one of the main entities linked to organised crime in Kosovo should not come as a surprise (UNDP, 2003b, p.33; UNDP, 2005c, p.36). Consequently, the UNDP report notes, “*such perceptions on corruption in the very institutions that should be fighting corruption and organised crime serves as a clear indicator that many things should change in relation to how these institutions conduct themselves*” (UNDP, 2003b, p.30). The recent allegations of corruption among EULEX judges raised by EULEX prosecutor Maria Bamieh in November 2014 have further weakened the credibility of EULEX (see Borger, 2014). Overall, both missions charged with law enforcement against organised crime, have frequently provided cause for the public to question their integrity as well as their commitment and ability to target higher levels of organised crime.

Thirdly, as argued above, evidence from UNDP opinion polls and strategic UN/EU documents suggests that priorities in law enforcement against organised crime in Kosovo have reflected the concerns of Western European nations, rather than local concerns: drug trafficking and illegal migration have been defined as priorities. Although the majority of Kosovo’s population regards these activities as criminal, it remains nonetheless questionable (if not unlikely), whether these forms of organised crime inspire considerable local concern. In contrast, the ability of local criminal figures to exert pressure against citizens as well as against public officials and local police officers has remained largely unaddressed by the mission. Consistently, the UNMIK 2004 police and justice paper notes that “*there is a need to foster a greater sense of civic responsibility and counter the climate of fear on which crime networks thrive*” (UNMIK, 2004, p.30). The mission itself, however, failed to display ‘a greater sense of responsibility.’

Fourth, both missions, UNMIK and EULEX, have repeatedly been unable to protect witnesses and local law enforcement staff from being targeted by prosecuted criminals. While the structure and culture of Kosovo’s close-knit society of only 1,8 million inhabitants makes witness protection *a priori* a challenging task, both missions failed to generate sufficient trust in their

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<sup>20</sup> UN General Assembly, A/58/592, 13 November 2003.

<sup>21</sup> Author’s interview, former UNMIK official, December 2013.

ability and to provide protection of locals targeted by criminals. By 2004, the UNMIK police and justice report admits that, “adequate measures need to be put in place to protect police officers, judges, prosecutors and witnesses who are on the front line of the fight against organised crime” (UNMIK, 2004, p.36). In fact, many local police officers displayed “[. . .] real fear of being involved in investigations against persons with considerable power and influence, capable of bringing pressure upon officers (and their families)” (EU Planning Team for Kosovo, 2006, p.76). In several criminal cases, witnesses have been intimidated and assassinated (see Farquhar, 2005; Brunwasser, 2011). Moreover, European nations have been reluctant to offer protection for witnesses from Kosovo.<sup>22</sup> Even though EULEX has somewhat improved its witness protection capabilities, the “psychological effect” created by previous failures of protection has had an enormous impact and cannot be easily undone, as EULEX judge remarked.<sup>23</sup>

## **Conclusion**

In answer to the research questions it can be stated that, first, the overall picture of local threat perceptions on the various forms of organised crime in Kosovo remains sketchy. However, the findings suggest that local threat perceptions deviate significantly from those of the international presence. While most respondents in Western European countries perceive transnational forms of organised crime that entail direct negative cross-border effect as the most pernicious (e.g. smuggling of migrants and drug trafficking), locals are rather concerned with those manifestations of organised crime that immediately and directly affect them (e.g. violent crimes, extortion, racketeering, intimidation).

Second, from the outset Western-led law enforcement has neglected a more ‘ethnographic’ approach that would identify local perceptions and concerns and deal with the most threatening manifestations of organised crime for Kosovo’s population. Instead, the focus has been laid on transnational organised crime activities that affect Western countries (while being profitable to many Kosovar households).

Third, the combined evidence strongly urges the conclusion that UNMIK and EULEX not only missed important windows of opportunity

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<sup>22</sup> Author’s interview with KOCB/DOC officer, May 2013; author’s interview with EULEX judge, February 2013.

<sup>23</sup> Author’s interview with EULEX judge, February 2012.

to generate more public trust in international law enforcement against organised crime, but also, through their own conduct, suffocated the potential to generate active citizen support. International-led law enforcement has failed to demonstrate to the public the merits of engaging in cooperative and courageous behaviour. In fact, through its (in)actions they frequently contradicted their own rhetoric.

The high expectations that were raised among the local population and among international observers when EULEX was deployed have been evaporated by its inefficiency and its inability to prosecute high-profile criminals. Meanwhile, EULEX is facing similar allegations as its predecessor: a purposive restraint to prosecute Kosovo's political elites out of fear of unintended political repercussions (see Borger, 2014). Against this background, the near absence of local support for international-led crime fighting in Kosovo should not come as a surprise.

Although the conclusions drawn from the case of Kosovo cannot be readily exported to other cases, a number of striking similarities can be found. In Bosnia-Herzegovina, the situation resembles the one in Kosovo in many regards: under international tutelage, local strongmen intertwined with war-time organised crime networks could successfully tighten their grip on political power which led to the persistence of organised crime. Moreover, the internationally-driven process of (unchecked) economic liberalisation bestowed these actors with ample opportunities for corruption and economic crime. Thus, the international presence has been charged with having created "*enabling conditions*" for organised crime networks to infiltrate state institutions and the legal economy and has been accused of "*tacit complicity*" (Bliesemann de Guevara, 2013, p.224).

In Afghanistan, intervening forces adopted a similar strategy of non-confrontation with some local power holders, out of the fear that active interference in local power structures would endanger their security and lead to an escalation of violence. Critics remarked that this approach effectively "*cemented the existing power distribution*" and that, over time, the local population perceived the international presence as "*accomplices of the ruling class*" (Münch, 2013, p.2). Lessons drawn from the case of Haiti, where the UN mission actively fought criminal gangs, equally suggest that international efforts in organised crime-fighting remain ineffective or prove unsustainable when structural economic or security conditions provide local elites and segments of the population with strong incentives to sustain the *status quo* (Hansen, 2013, p.163).

This inability to effectively shape the local context against the background of perceived political and/or security risks emanating from

local stakeholders, compels international forces to adopt implicit strategies of bargaining, co-existence and non-confrontation. Intervention forces may view such approaches as the most effective, or in cases of precarious security, as the least risky. However, it often makes them (unwillingly) *de facto* allies of a given ruling (partly criminal) elite. In contexts where state apparatuses and economies are infested by organised crime and corruption, these approaches are predestined to prompt local perceptions of double standards, connivance and/or (tacit) complicity. Such approaches are thus unlikely to be compatible with the generation of more active citizen support.

Research that sets out to illuminate local perceptions on organised crime can contribute to a better understanding of the structural political, economic and cultural context in which organised crime activities are embedded. International-led law enforcement can profit from an improved empirical knowledge of local perceptions on organised crime. This may reveal areas where local and international concerns overlap or differ and, ideally, shed light on avenues along which more active public support can be generated.

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# Legal responses to organised crime in Ireland: Erosion of due process values

Colin King<sup>1</sup>

## Introduction

In the mid-1990s, organised crime came to the forefront of public/political attention in Ireland, in the wake of particular high profile events. These events included the shootings, in separate incidents, of a member of An Garda Síochána (Irish police) and an investigative journalist in 1996.<sup>2</sup> Subsequent to these shootings, a ‘Summer Anti-Crime Package’ was introduced. Other high profile events that sparked legislative action included the collapse of a murder trial (and subsequent two-fingered salute to the press by the individual concerned) after witnesses refused to testify against the accused. Deaths of innocent bystanders (*e.g.* Anthony Campbell; Donna Cleary) and instances of murder following mistaken identity (*e.g.* Shane Geoghegan) also attracted considerable attention.

There followed a series of different anti-organised crime measures in the wake of such events. Over the past two decades in particular, there has been a significant amount of legislative action in the area of organised crime.<sup>3</sup> While, of course, it is important that State agencies have appropriate powers to tackle organised crime,<sup>4</sup> the legislation enacted in this area has, all too often,

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<sup>2</sup> Detective Garda Gerry McCabe was murdered on June 6, 1996 and Veronica Guerin was murdered on June 26, 1996.

<sup>3</sup> From 1994 to the present, legislation has included the Criminal Justice Act 1994, the Criminal Assets Bureau Act 1996, the Proceeds of Crime Acts 1996 – 2005, the Disclosure of Certain Information for Taxation and Other Purposes Act 1996, the Bail Act 1997, the Criminal Justice Act 2006, the Criminal Justice Act 2007, the Criminal Justice (Amendment) Act 2009, the Criminal Justice (Surveillance) Act 2009, to name a few

<sup>4</sup> This chapter does not engage with the definition of ‘organised crime’ which has attracted a great deal of comment elsewhere. Klaus von Lampe has collected some 180 definitions of ‘organised crime’:  
<http://www.organized-crime.de/organizedcrimedefinitions.htm>  
(Accessed October 30, 2014).

been piecemeal and lacking a coherent vision. As Walsh (2007: p.58) points out, some of the legislative enactments

“can easily be justified as a necessary and balanced response to the crime challenge. Others, however, bear the hallmarks of an unbalanced preoccupation with crime control; a surrender to an exaggerated, media-driven perception of the levels of crime or the threat posed by certain types of crime. They are eating away at the due process foundations which have secured a reasonable balance between the state and the individual in criminal justice matters for generations.”

He goes on to state:

“It is equally important to appreciate that this damage is being inflicted in a piecemeal fashion through a rapid succession of separate enactments. It is in the combined effect of these measures that the full damage to due process values is to be found. By introducing them on a piecemeal basis successive governments have managed to obscure the full extent of that damage and have averted any serious, informed public debate about the associated re-orientation in the values underpinning our criminal justice system” (Walsh 2007: pp.58-59).

Amidst ‘intolerance’ (O’Donnell and O’Sullivan, 2003)<sup>5</sup> and ‘penal populism’ (Campbell 2008) there has been a sustained attack on due process values in Ireland. This chapter provides an overview of four aspects of the legal response to organised crime, namely the use of the Special Criminal Court (non-jury trial), the witness protection programme, seizure of assets, and membership of an organised crime group, each of which illustrates the move away from due process towards crime control.<sup>6</sup>

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<sup>5</sup> While O’Donnell and O’Sullivan (2003: p.57) did note, in 2003, that “*A shift in the emotional tone of crime policy became evident from the mid-to-late 1990s, but this hysterical edge has not endured*” it was not long before public outcry against criminal activity returned to centre stage: for example, ‘Thousands take to Limerick’s streets to pledge solidarity in fight against gangs’ *Irish Times*, May 11, 2009.

<sup>6</sup> While the origins for each of these can be traced to anti-subversive powers, the influence of ‘emergency’ powers on responses to ‘ordinary’ crime will not be discussed here. There is already extensive literature on the Irish experience in this regard, for example Walsh (1989), Kilcommins and Vaughan (2004).

## **Non-jury Trials (The Special Criminal Court)**

Article 38.3.1 of the Irish Constitution (*Bunreacht na hÉireann 1937*) provides for the establishment of special courts to try offences where the ordinary courts are deemed inadequate to secure the effective administration of justice, and the preservation of public peace and order. Provision for such non-jury courts is contained in Part V of the Offences Against the State Act, 1939. In May 1972, the Government issued a proclamation establishing the current Special Criminal Court (for discussion see Hederman Committee, 2002; Davis, 2007). There are two routes by which a non-jury trial can be held, the first is where a person is charged with a ‘scheduled offence’ while the second is where the Director of Public Prosecutions (DPP) so directs. But, as Campbell (2013: pp.135-6) asserts:

“The decision of the Irish legislature to ‘schedule’ certain offences precludes any intervention by the courts regarding the form of trial, as the decision is solely a political one. Generally speaking, the Irish Supreme Court has been oriented strongly towards the demands of due process in its interpretation of the Constitution in the context of criminal law, notwithstanding that this may compromise the control of crime in certain instances. The scheduling of offences and the judiciary’s deference in relation to the broad application of counter-terrorism legislation means that the courts have no determinative function regarding the holding of non-jury trials. The erosion of a constitutional right is governed by prosecutorial discretion and legislative action, neatly encapsulating the crime control model of justice. In this scenario the location of the trial of organised crimes in a special court constructed in an emergency situation plays to populist and sensationalist rhetoric but permits the contemporary compromising of a core legal principle on a questionable basis.”

We now turn to the two means by which non-jury trial can be held.

First, where a person is charged with a *scheduled* offence that is an indictable offence, the accused shall (unless the DPP directs otherwise) be sent forward for trial before the Special Criminal Court. Where a person is charged with a *scheduled* offence that can be dealt with summarily the DPP can require that the accused be sent forward for trial before the Special Criminal Court.

Secondly, where a person is charged with a non-scheduled offence, whether indictable or not, the DPP can require that that person be tried before the Special Criminal Court if she is of the opinion that the ordinary courts are inadequate to secure the effective administration of justice and the

preservation of public peace and order. One difficulty here is that there is a distinct lack of transparency and accountability. As Casey (1996: p.307) notes, the disclosure of the grounds on which the DPP formed her opinion as to the inadequacy of the ordinary courts “*would seem an essential preliminary to meaningful judicial scrutiny of their adequacy, and it would be normal in relation to the review of any other administrative discretion.*”

The Irish courts have, however, been reluctant to interfere with the exercise of the Director’s discretion: a certificate issued by the DPP is not susceptible to judicial review in the absence of evidence of *mala fides* or where the Director was influenced by an improper motive or policy (*Savage and McOwen v DPP and Attorney General* 1982; *O’Reilly and Judge v DPP and Attorney General* 1984; *Kavanagh v Ireland* 1996; *Byrne and Dempsey v Ireland* 1999; *Gilligan v Ireland* 2001). The effect of the courts’ refusal to look beyond the DPP’s discretionary opinion is that the Director has the freedom to decide what cases will be heard by the Special Criminal Court.

Such prosecutorial discretion came in for criticism in the case of *Kavanagh v Ireland* (2001).<sup>7</sup> In that case the UN Human Rights Committee held that the decision to try the applicant before the Special Criminal Court did not, of itself, violate the presumption of innocence. The Committee did, however, conclude that the decision to try the applicant before the Special Criminal Court was not shown to have been based upon reasonable and objective grounds. Central to this was the fact that,

“No reasons are required to be given for the decisions that the Special Criminal Court would be ‘proper’, or that the ordinary courts are ‘inadequate’, and no reasons for the decision in the particular case have been provided to the Committee. Moreover, judicial review of the DPP’s decision is effectively restricted to the most exceptional and virtually undemonstrable circumstances.”

An additional difficulty with the use of non-jury trial concerns the hearing of inadmissible evidence that is prejudicial to the accused. In *The People (DPP) v Conroy* (1986 at 472) Finlay CJ acknowledged,

“Experience as a judge indicates that even as a trained lawyer there is a very significant difficulty in excluding from one’s mind incriminating evidence on the trial of a criminal case which is inadmissible.”

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<sup>7</sup> Note, though, that when Mr Kavanagh sought to rely upon the UNHRC decision in the Irish courts it was held that the ICCPR did not form part of Irish law: *Kavanagh v The Governor of Mountjoy Prison* 2002.

In the ordinary courts, issues pertaining to the admissibility of evidence will be dealt with at the *voir dire*, in the absence of the jury. As such, the jury will not hear prejudicial evidence that is ruled inadmissible. In a non-jury court, it is unrealistic to expect that judges will be able to exclude prejudicial evidence when they play a dual role of trier of law and trier of fact.<sup>8</sup> This can be seen in *The People (DPP) v Ward* (1998) where the non-jury trial court heard a number of inadmissible statements allegedly made by the accused; despite these statements being ruled inadmissible, it is clear that they weighed on the minds of the judges when convicting the accused.<sup>9</sup> When that case subsequently came before the Court of Criminal Appeal the conviction was overturned (*The People (DPP) v Ward* 2002).

Although originally enacted against a backdrop of terrorist activity, the Special Criminal Court is not confined to dealing with cases of a subversive nature. Its remit extends far beyond such activity, and Campbell (2013: p.126) describes restrictions on the right to jury trial as “a paradigmatic example of the seepage of emergency powers into a wider context.” This is particularly important in 21<sup>st</sup> Century Ireland, where there are significant concerns surrounding serious/organised crime. As Walsh J foresaw in 1986,

“There could well be a grave situation in dealing with ordinary gangsterism or well financed and well organised large scale drug dealing, or other situations where it might be believed or established that juries were for some corrupt reason, or by virtue of threats, or illegal interference, being prevented from doing justice” (*People (DPP) v Quilligan and O’Reilly* 1986 at 509-510).

Examples of where so-called ‘ordinary’ crime has come before the non-jury Special Criminal Court include a series of cases subsequent to the murder of Veronica Guerin in 1996 (*The People (DPP) v Ward* 1998; *DPP v Meehan* 1999; *The People (DPP) v Gilligan*, 2001) and the murder of Shane Geoghegan in 2008 (*DPP v Dundon* 2013). Whilst upheld by the courts (*People (DPP) v Quilligan and O’Reilly* 1986), the use of non-jury trial for non-subversive activity has proved controversial. Charleton and McDermott (2000) emphasise,

“It is undesirable to deprive people of jury trials where it is their ordinary constitutional entitlement. However, in cases of armed gangs, be they

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<sup>8</sup> In proceedings heard before a jury the role of the trial judge is trier of law only.

<sup>9</sup> The Special Criminal Court must, unlike juries, provide a written judgment setting out the reasons for its decisions.

subversive or not, who are determined not just to commit crime, but to set up structures to subvert the State and destroy the administration of justice as it applies to them, it seems to us that it is expecting too much to expect citizens to sit on juries and face the prospect of intimidation or trickery.”

Robinson (1974: p.35), in contrast, has argued that this

“amounts to an erosion of the right to trial by jury, and a denial to the individuals concerned of their right to trial in the ordinary courts. There is no doubt that any open attempt to abolish trial by jury . . . would be greeted by howls of protest. Yet, to channel persons charged with purely criminal offences to the Special Criminal Court is to abolish trial by jury by the back door.”

Little is known as to the extent of jury intimidation in Ireland today or, indeed, if there is in fact an issue of jury intimidation. Empirical research on jury experiences, jury deliberations etc. is lacking in Ireland. Yet, notwithstanding this, recent reform has proceeded on the assumption that jury intimidation is indeed a widespread problem.<sup>10</sup> The right to jury trial has been subject to significant change under the Criminal Justice (Amendment) Act, 2009.<sup>11</sup> This Act was introduced in the wake of the murder of Roy Collins in April 2009: a relation of Roy Collins had previously given evidence in a criminal trial and it was widely reported that the murder was retaliation against the Collins family for standing up to a particular family (*e.g.* Woulfe, 2009; Comyn, 2014). Following this murder, there were widespread demands that the Special Criminal Court be used against those engaged in so-called gangland crime in order to protect witnesses. This, however, is rather paradoxical. The use of non-jury courts does not offer protection to those prepared to give evidence in a criminal trial: witnesses still have to testify in open court in front of an accused person. It is not clear how changes to non-jury trial were supposed to bring about change in this regard.

Non-jury trials are designed to combat problems of jury intimidation.

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<sup>10</sup> For discussion of jury tampering, see Law Reform Commission (2013: ch.7).

<sup>11</sup> Section 8 of the Criminal Justice (Amendment) Act, 2009 schedules a number of offences relating to organised criminal activity. It might well be argued that this, in fact, goes some way towards answering some of the criticisms expressed by the UN Human Rights Committee in *Kavanagh* (2001). Persons charged with such offences will no longer only be deprived of the right to jury trial on the say-so of the DPP; it is now the case that all persons charged with such offences will automatically be deprived of the right to jury trial (unless the DPP directs otherwise).

There is, however, little evidence to suggest that intimidation of juries is a widespread problem in Ireland. The expansion of non-jury trials under the Criminal Justice (Amendment) Act, 2009 is, arguably, a knee-jerk reaction by the executive in an attempt to appear tough on crime. In practical terms, the reforms brought about under the Act of 2009 merely shift the goalposts as it were: instead of the DPP having a discretion to send an accused person forward for trial before the Special Criminal Court it is now the case that certain offences relating to organised crime are scheduled offences and will automatically be sent to the Special Criminal Court unless the DPP directs otherwise. While, in one sense, this is a radical shift in approach, it offers little, if anything, in the way of protecting witnesses from intimidation – which was the backdrop against which such reform was brought about.

## **Accomplice testimony and the Witness Protection Programme**

In November 1997, the Minister for Justice, Equality and Law Reform, John O'Donoghue, authorised the setting up of a witness protection programme to safeguard persons prepared to give evidence in court against those engaged in organised criminal activity.<sup>12</sup> This was a direct consequence of the murder of Veronica Guerin. And the courts have acknowledged that:

“A Witness Protection Scheme may well provide one of the few effective ways of dealing with [drug offences and gangland killing], a consideration which must be kept in mind if the community’s right to see serious crime being prosecuted is to be respected.” (*DPP v Meehan* 2006).

Similarly, it has been said “*the capacity of the Garda Síochána to combat organised crime is ever increasingly dependent upon the cooperation of criminals which, in turn, necessitates the existence of a witness protection programme*” (*The People (DPP) v Gilligan* 2001). In this section, focus will be on the use of accomplice testimony and the witness protection programme. Notwithstanding the obvious personal difficulties (*e.g.* Woulfe *et al.*, 2014; Carey, 2014; Fyfe and McKay, 2000), from an evidential perspective it might be seen as straightforward where an ‘innocent witness’ (in the sense of someone who is

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<sup>12</sup> See ‘Protection for Witnesses’ *Irish Times*, November 07, 1997 where the witness protection programme was described as a “*powerful new tool*” in the fight against organised crime.

not an accomplice of the accused) gives evidence and also participates in the witness protection programme. Different considerations should apply where the witness is an accomplice.

While obviously undesirable, in certain circumstances it might be necessary to rely on the evidence of an accomplice. Information and/or testimony of an accomplice could prove key in investigating and prosecuting criminal activities. As Lord Holy (quoted in *Despard* 1803 at 34) has pointed out: “*conspiracies are deeds of darkness as well as of wickedness, the discovery whereof can properly come only from the conspirators themselves.*” Contrariwise, there are many obvious dangers associated with accomplice evidence. As Ingoldsby (1999: p.34) notes,

“accomplice evidence is notoriously unreliable. Thus the cases where the interests of crime control demand the inclusion of accomplice evidence are the very cases where the rights of the accused must be protected from the very real dangers associated therewith.”

The dangers of reliance on accomplice evidence include: an accomplice might seek to avoid his own punishment as a reward for testifying; he may attempt to downplay his own involvement in crime; he may attempt to falsely implicate an innocent party, rather than the real perpetrators; or he may use the opportunity to extract revenge against a rival (see Heydon, 1973; Gifford, 1984; Bonner, 1988; Martin, 2013). As Heydon (1973: p.266) notes, the inherent danger associated with the evidence of an accomplice

“will be increased by the fact that though the accomplice’s evidence may be false in implicating the accused, it will usually have a seeming plausibility because the accomplice will have familiarity with at least some details of the crime.”

In *People (Attorney General) v Phelan* (1950 at 100) it was said that “*the accomplice knows all the details of the crime and will be able to relate them accurately and in order to involve another person has only to introduce him into a story which in its main essentials, is true.*” The danger is that a person who was not involved in the offence might be implicated – for whatever reason – by someone who was involved.

Clearly there are concerns as to the reliability of accomplice evidence. This can be illustrated by reference again to the murder of Veronica Guerin. Following a series of investigations in the wake of that murder, a number of people were faced with charges relating to drug offences, firearms offences, and murder. The prosecution cases relied heavily on testimony given by accomplices – who were participating in a witness protection programme

– much of which was uncorroborated. One of the accomplices, Charles Bowden, was described as “a self-serving, deeply avaricious and potentially vicious criminal” who “would lie without hesitation and regardless of the consequences for others if he perceived it to be in his own interest to do so” (*The People v Ward* 1998). Another, Russell Warren, was said to be “a self confessed perjurer, a proven self serving liar . . . and a person who, apparently, did not care who he hurt, if by doing so there was some benefit to himself” (*The People (DPP) v Gilligan* 2001).

In *DPP v Gilligan* (2005) the Supreme Court considered, for the first time, the operation of the witness protection programme. Central to its considerations was the credibility/reliability of those participating in the programme. In this, the court drew an analogy with evidence given by an accomplice.<sup>13</sup> Denham J (at para 8.4) stated:

“there is no rule of law to the effect that the uncorroborated evidence of a person in or going into a Witness Protection Programme must be rejected. The rule should be that the trier of fact must clearly bear in mind and be warned that it is dangerous to convict on the evidence of such a witness unless it is corroborated; but having borne that in mind and having given due weight to the warning, if the evidence is none the less so clearly acceptable that the trier of fact is satisfied beyond reasonable doubt of the guilt of the accused to the extent that the danger which is generally inherent in acting on the evidence of a witness in a Witness Protection Programme is not present in the case, then the trier of fact may act upon the evidence and convict.”

However, while it may be justifiable to not require corroboration from those in the programme who are not accomplices of the accused, different considerations should apply where the witness in question is an accomplice. In the absence of corroborating evidence, the courts should be extremely reluctant to place reliance on the evidence of an accomplice.

The witness protection programme was established on an ad hoc basis in the wake of the Veronica Guerin murder. Today, the witness protection programme continues to operate on an ad hoc basis. Indeed, there is no ‘programme’ as such. The only statutory provision dealing with relocated witnesses is section 40 of the Criminal Justice Act, 1999 which provides:

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<sup>13</sup> To re-iterate, while those participating in the programme might be accomplices of the accused this will not always be the case.

1. A person who without lawful authority makes enquiries or takes any other steps whatever, whether within or outside the State, for the purpose of discovering –
  - (a) the whereabouts of a person whom he or she knows, or reasonably suspects, to be a relocated witness, or
  - (b) any new name or other particulars related to any new identity provided for such a witness, shall be guilty of an offence.
2. A person who without lawful authority discloses, whether within or outside the State, to any other person any information (including information lawfully obtained pursuant to *subsection (1)*) concerning –
  - (a) the whereabouts of a person whom he or she knows, or reasonably suspects, to be a relocated witness, or
  - (b) any new name or other particulars related to any new identity provided for such a person, shall be guilty of an offence.
3. In this section “relocated witness” means any person who intends to give or has given evidence in proceedings for an offence and who as a consequence has moved residence, under any programme operated by the Garda Síochána for the protection of witnesses, to any place, whether within or outside the State.

To date, the Oireachtas has resisted calls to place the witness protection programme on a statutory footing, content to leave An Garda Síochána to run the programme as desired.<sup>14</sup> When a private members bill, the Witness Protection Programme Bill 2007, was placed before the Oireachtas in 2007 it was rejected. One of the reasons for rejecting that Bill was the need to maintain flexibility in the operation of the programme. As Campbell (2013: 150) points out:

“the Witness Protection Programme remains a police-operated system rather than a judicial one, and no legislation exists governing its parameters and procedures. Again, this is a typical illustration of the crime control model, where administrative, ad hoc and fluid mechanisms in the criminal justice system are favoured.”

She goes on to say: “*This state of affairs arguably contravenes the Council of Europe Recommendation which requires an ‘adequate legal framework’ for WPPs.*” (*ibid*: 150).

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<sup>14</sup> At the time of writing there is an ongoing civil case in the High Court involving allegations that the Gardai failed to abide by promises supposedly made to a person in order to persuade that person to give evidence in a criminal trial (Healy, 2014; O’Loughlin, 2014).

Before moving on it is worth mentioning that the Office of the Director of Public Prosecutions has no formal involvement in the witness protection programme. While the question of admitting a person to the programme does involve discussion with an official from the DPP's office, once admitted there is no further role for them. For the DPP's office, reliability and credibility of a person in the witness protection programme is the primary focus.<sup>15</sup> Where a witness is in the witness protection programme this should ordinarily be disclosed to the defence (DPP 2010: para. 9.11). Interestingly, in 2009 the then-DPP, James Hamilton, was critical of the witness protection programme saying that it was of limited use against organised crime (quoted by McDonald, 2009).

A final point to mention on the Irish witness protection programme is that, given its closed nature and lack of transparency, it would seem almost impossible to evaluate the effectiveness of the programme, the costs involved,<sup>16</sup> value for money etc. There is a wealth of comparative material on witness protection programmes in countries such as the United States and Italy, yet such material has largely been ignored by both policymakers and An Garda Síochána. Even in a small jurisdiction like Scotland there have been efforts to assess the impacts of their witness protection programme (*e.g.* Fyfe and McKay, 2000), but this too appears to have been ignored. The witness protection programme is but one of many areas of the criminal justice system that are urgently in need of research and evaluation. But instead we see a programme that typifies many areas of criminal justice policy in Ireland – stumbling along aimlessly, dealing with various issues on an ad hoc basis as and when they arise. That, it must be said, is a damning indictment of the policy-making process in Ireland.

## **Criminal assets**

The Proceeds of Crime Acts, 1996 – 2005 (herein POCA) are concerned with property that constitutes, directly or indirectly, “*proceeds of crime*”, which is defined as “*any property obtained or received at any time (whether before or after the passing of this Act) by or as a result of or in connection with criminal conduct*” (POCA, s.1(1)). Crucially, there is no requirement that a person be convicted

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<sup>15</sup> Interview with a representative of the Office of the Director of Public Prosecutions, November 2013.

<sup>16</sup> Both financial and psychological.

of a criminal offence before action may be taken under the Act. Indeed, it is not even necessary that criminal proceedings be instituted against a person. The Proceeds of Crime Act operates in the civil sphere. What follows is a brief overview of the statutory scheme (for further consideration, see King 2013; Gallant and King 2013).

An application for an interim order under section 2 of POCA can be brought by either a member of An Garda Síochána not below the rank of Chief Superintendent or by an authorised member of the Revenue Commissioners. An interim order can be granted where the court is satisfied that the property concerned is, or was acquired with, the proceeds of criminal activity and is of a certain value (€13,000). The applicable standard of proof is the civil standard (POCA, s.8(2)), namely the balance of probabilities, and opinion evidence<sup>17</sup> can be admitted (POCA, s.8(1)). Where such an order is granted the respondent is prohibited from disposing of, dealing with, or diminishing the value of the property during a 21 day period from the date the order was granted. This is to ensure that assets will be preserved pending the full hearing.

The trial of the action is the application for an interlocutory order under section 3.<sup>18</sup> Opinion evidence is again admissible at this stage. Although usually preceded by an interim order, there is no requirement that an interim order be in place before an application for an order under section 3 can be brought. An interlocutory order is similar to an interim order: where it appears to the court that a person is in possession or control of specified property that represents proceeds of crime, and the value of that property is not less than €13,000 then the court shall grant an interlocutory order (POCA, s.3(1)). An interlocutory order prohibits a specific person(s), or any other person having notice of the order, from disposing of, dealing with, or diminishing the value of the property concerned (POCA, s.3(1)). Subject to being discharged, an interlocutory order will normally continue until the determination of any appeal against the granting of the order or the determination of an application for a disposal order under section 4 (POCA, s.3(5)).

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<sup>17</sup> Certain witnesses are permitted by legislation to state their opinion as to specified matters and such opinion evidence is admissible as evidence. There are many examples of statutory provisions permitting opinion evidence, including s.3(2) of the Offences Against the State (Amendment) Act, 1972 (concerning membership of an unlawful organisation), s.8(1) of the Proceeds of Crime Act, 1996 (concerning possession or control of proceeds of crime), and s.71B of the Criminal Justice Act, 2006 (concerning the existence of a criminal organisation).

<sup>18</sup> Notwithstanding the name 'interlocutory order' the s.3 application is the trial of the action: *Murphy v GM, PB, PC Ltd, GH; Gilligan v CAB* 2001.

Where an interlocutory order has been in force for not less than seven years, the court may grant a disposal order under section 4 directing that the property, or part thereof, be transferred to the Minister for Finance or to such other person as determined by the court. Post-2005, there is now provision for a disposal order to be granted before the seven year period has elapsed where all the parties to the action so consent (POCA, s.4A). The effect of a disposal order is to deprive the respondent of his rights (if any) in the property concerned; consequent to the making of an order the property will be transferred to the Minister for Finance or to any other person to whom the order relates (POCA, s.4(4)). The Minister may sell or otherwise dispose of any such property and any money thus realised shall be for the benefit of the Exchequer (POCA, s.4(5)).

The body tasked with implementing the Proceeds of Crime Act is the Criminal Assets Bureau (established by the Criminal Assets Bureau Act, 1996 – herein CAB Act) which brings together State officials from An Garda Síochána, the Revenue Commissioners and the Department of Social Protection under the umbrella of one multi-agency body, thereby avoiding traditional barriers to cooperation between different agencies. The objectives of the Bureau are: to identify assets that derive, or are suspected to derive, directly or indirectly, from criminal conduct; to take appropriate action to deprive persons of such assets or to deny them the benefit of such assets; and to carry out investigations, or other preparatory work, in relation to the above objectives. (CAB Act, 1996, s.4, as amended). The remit of the Bureau involves: the confiscation, restraint of use, freezing, preservation or seizure of assets identified as deriving or suspected of deriving from criminal conduct; ensuring that the proceeds of criminal conduct, or suspected criminal conduct, are subjected to tax; and the investigation and determination of claims for benefit under social welfare legislation. (CAB Act, 1996, s.5, as amended). The Bureau is afforded significant powers – including police, revenue and social welfare powers (CAB Act s.8(8)), sharing of powers (*ibid*, s.8(6)), information gathering (*ibid*, s.8(5)) and powers to disclose information (*ibid*, s.8(7)) – yet is not subject to the same checks and balances that apply to the police (for discussion, see King, 2013: p.281 *et seq*).<sup>19</sup>

The enactment of civil forfeiture and the establishment of a multi-agency body, under the Proceeds of Crime Acts and the Criminal Assets Bureau Act, further illustrate the move towards crime control in Ireland. There is no requirement that a person be convicted of a criminal offence

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<sup>19</sup> The ‘impact’ of POCA and the Criminal Assets Bureau is discussed in King (2014: 159 *et seq*).

before he may be deprived of property under POCA. In fact, no criminal proceedings need be instigated against that person. Enhanced procedural protections of the criminal process are thereby avoided. For example, the presumption of innocence does not apply; nor does the heightened criminal standard of proof beyond reasonable doubt – instead the civil standard, the balance of probabilities, applies. A person can thus be subjected to what is, arguably, a criminal punishment in the absence of important due process protections. This represents what Lea (2004: p.83) has described as “*a frontal assault on due process*”. The Bureau is allowed to: rely upon hearsay evidence (POCA, s.8(1)), establish its case on the balance of probabilities (*ibid*, s.8(2)), require disclosure from both the respondent and third parties (eg solicitors, accountants) who have dealings with the respondent (CAB Act, s.14A, as amended). Campbell (2007: p.455) argues that the POCA and the CAB Act “*indicate a realignment of the approach adopted by the agents of the State in the fight against organised crime, and demonstrate a preference for the needs of the State over the individual’s right to due process*”. Gallant and King (2013: p.91) argue that “*the development of civil forfeiture . . . shows remarkable resistance to the idea that standard criminal justice safeguards govern the forfeiture process.*” This can be seen in *FMcK v SG* (2006) where the defendant had been suspected – though not charged – of involvement in an armed hijacking. During the police investigation, a quantity of money had been seized at the defendant’s home. The District Court ordered that this money be returned to the defendant under the Police Property Act 1897. Proceedings were subsequently initiated under POCA based on opinion evidence (POCA, s.8) of a Garda that the defendant had been involved in the armed hijacking as well as a number of other similar hijackings. In granting an Order under s.3 of POCA, White J stated:

“I accept that the Defendant was never prosecuted in any respect in relation to the armed hijacking. Nevertheless this fact alone does not persuade me that the monies are not directly or indirectly the proceeds of crime, on the contrary, in all the circumstances of the case, I am more than satisfied, on the balance of probabilities, that they are.” (*FMcK v SG* 2006 at para.7)

Enhanced procedural protections of the criminal process are avoided by such resort to the civil process. The interests of efficiency and expediency, once again, triumph over due process values.

## Offences Related to a Criminal Organisation

The Criminal Justice Act, 2006, as amended by the Criminal Justice (Amendment) Act, 2009, defines “*criminal organisation*” as “*a structured group, however organised, that has as its main purpose or activity the commission or facilitation of a serious offence*” (s.70(1) of CJA 2006, as amended by s.3(1)(a) of the CJ(A) A 2009). A “*serious offence*” is one that carries a punishment of four years or more imprisonment (s.70(1) CJA 2006). A “*structured group*” is a group of at least three people not randomly formed for the immediate commission of a single offence, and the involvement of two or more people in that group must be with a view to their acting in concert (s.3(1)(b) of CJ(A)A 2009). For the avoidance of doubt, the legislation explicitly states that a structured group can exist even in the absence of formal rules or formal membership, or indeed any formal role; any hierarchical or leadership structure; continuity of involvement by persons in the group (*ibid*). Opinion evidence of a Garda or former Garda (described as an ‘appropriate expert’) is admissible as to the issue of the existence of a particular criminal organisation (s.71B, as inserted by s.7 of the CJ(A)A 2009). In forming such an opinion, the appropriate expert can take into account any previous convictions for arrestable offences of persons that that expert believes to be part of the organisation to which the opinion relates (*ibid*, s.71B(3)).

Part 7 of the Act of 2006 provides for a number of offences, including:

- conspiracy (s.71);
- directing a criminal organisation (s.71A, as inserted by s.5 of the CJ(A) A 2009);
- enhancing the ability of a criminal organisation or its members to commit a serious offence, or facilitating the commission of such an offence (s.72 CJA 2006, as substituted by s.6 CJ(A)A 2009);
- commission of an offence for a criminal organisation (s.73 CJA 2006).<sup>20</sup>

Section 71 provides that a person who conspires, whether within the State or elsewhere, with one or more persons to commit a serious offence is guilty of an offence, even if that offence does not take place. Section 71A provides that a person who controls or supervises the activities of a criminal organisation,

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<sup>20</sup> Of the four offences listed here, the latter three (namely ss.71A, 72 and 73) are scheduled offences for the purposes of Part V of the Offences Against the State Act 1939 (see above section on non-jury trials). A further offence is also scheduled: s.76 of the Act of 2006 concerning an offence under Part 7 of the Act by a body corporate. (s.8 of the CJ(A)A 2009).

or who gives an order, instruction or guidance, or makes a request with respect to the carrying on of such activities is guilty of an offence punishable by life imprisonment. It is irrelevant that such activities might be carried on outside the State or that they might not be illegal. The legislation also provides for an offence of participating or contributing to certain activities (illegal or otherwise) intending to enhance the ability of, or facilitate the commission by, a criminal organisation or its members to commit a serious offence or being reckless to such enhancement or facilitation (s.72). To be liable under s.72 a person must have knowledge of the existence of the criminal organisation. The maximum sentence that can be imposed is a fine or imprisonment up to fifteen years, or both (s.72(2)). It is also an offence to commit a serious crime for the benefit of, at the direction of, or in association with, a criminal organisation, which is punishable by a fine or imprisonment for up to ten years, or both (s.73).

Offences related to a criminal organisation are relatively new in Ireland,<sup>21</sup> and have not been frequently used to date. Nevertheless, there are important concerns here. For example, the provisions are broadly drafted with significant potential for abuse.<sup>22</sup> There is also concern as to legal certainty, specifically that a person might not be able to tell if he is part of a criminal organisation (Campbell 2013: 26). The use of opinion evidence in this context is again reminiscent of anti-subversive legislation,<sup>23</sup> though under s.71B of the Criminal Justice Act 2006 opinion evidence is only admissible as to the issue of the existence of a particular criminal organisation, and not as to membership of that criminal organisation. The use of opinion evidence

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<sup>21</sup> In the Italian context, Sergi (2014: p.190) has stated: “*The criminalisation of unlawful association, simple or mafia-type, responds to a need to promote cohesion in the community by protecting the public order against criminal organisations. These groups reject the exclusivity of the legal system and therefore represent a threat to the public order. Such a rejection is expressed by the criminal plan of the organisations, which, if carried out, will break trust bonds with the rest of society, which is non-criminal. Due to the extraordinarily disruptive capacity of some criminal associations, criminal law intervenes to prevent the danger as soon as the association is established and starts planning criminal activities.*”

<sup>22</sup> While these offences have not been frequently used, this might be due to a lack of familiarity on the part of members of An Garda Síochána, prosecutors, etc. Interview with a representative of the Department of Justice and Equality, February 2014.

<sup>23</sup> S.3(2) of the Offences Against the State (Amendment) Act 1972 makes provision for opinion evidence to be admitted in relation to membership of an unlawful organisation. For detailed discussion of this provision, and its application, see Heffernan (2009). The use of such opinion evidence was upheld by the Irish Supreme Court in *The People (DPP) v Kelly* (2006) and by the European Court of Human Rights in *Donohoe v Ireland* (2013). For discussion see King (2014b).

presents many difficulties, including: the use of hearsay evidence, an accused person being disadvantaged by not knowing the source of the opinion evidence (where privilege is claimed), difficulties in cross-examining the person tendering opinion evidence, and reliance on previous convictions of persons that that person believes to be part of the criminal organisation concerned.

## **Conclusion**

During the course of the past two decades in Ireland there has been a sustained move in the direction of a crime control approach to organised crime, with a significant shift in the relationship between the State and the individual. This chapter has outlined four areas that are indicative of the current dominance of crime control over due process in Ireland:

1. the use of non-jury trial;
2. accomplice testimony and the witness protection programme;
3. seizure of assets in the absence of criminal conviction, and
4. offences related to criminal organisations.

These, and other changes, have been welcomed – and at times encouraged – with little political or public resistance. But, as Coen (2008: p.10) notes,

“an important question merits consideration: whether we are falling into a short-sighted trap of legislative reactionism, in which measured criminal justice debate is jettisoned in favour of stop-gap statutes and emergency responses, presented as a panacea whenever there is a public outcry.”

And, as Kilcommins and Vaughan (2006: p.111) note, “*Any voices of discontent are met with the common-sense mantras that the ‘public must be protected’ and ‘the innocent have nothing to fear’.*” Significantly, there is an absence of evidence-led policymaking here: it is not unusual for criminal justice reform to be adopted in a haphazard, reactionary manner. For example, in an article on penal policy in Ireland, O’Donnell (2004: p.254) refers to a remark by a member of the cabinet to the effect that

“the decision to quadruple the estimate of the number of prison cells required was a ‘back of the envelope’ calculation made in the absence of even the most rudimentary information about trends in crime, sentencing or imprisonment. It was a purely political move rather than being evidence-based.”

O'Donnell (2008: p.121) also describes the prison expansion policy as “a striking example of the ability of politicians to make sudden, and difficult to reverse, decisions in the absence of supporting evidence.”

O'Donnell (2005: p.101) identifies a number of areas where the Irish criminal justice system has experienced radical transformation<sup>24</sup> and states:

“These developments have always been expensive, sometimes manifestly unnecessary and occasionally retrograde. In virtually every case their origins lay in the political reaction to a perceived crisis. They were never informed by research findings and seldom tempered by rational debate.”

Responses to a consultation on ‘Organised and White Collar Crime’<sup>25</sup> were critical in this regard noting, *inter alia*: the absence of empirical research on the nature and extent of organised crime in Ireland relative to other countries; the large volume of legislation that has been introduced since 1996 to address organised crime; and the need for an assessment of the impact of the current statutory framework (Department of Justice and Equality 2011).<sup>26</sup> The Irish legislature has enacted a raft of legislation to tackle organised crime, legislation that undermines due process values and represents a victory for crime control ideology (Walsh 2007: pp.44 - 45). At the same time, much less consideration is given to whether such legislation actually *works*, or indeed whether it is strictly necessary in the first instance.

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<sup>24</sup> Including expansion of the prison system, changes to the bail laws, the use of mandatory sentences, increased funding for policing, and the establishment of the Criminal Assets Bureau.

<sup>25</sup> In 2009 it was announced that a White Paper on Crime was to be developed, looking at different aspects of the criminal justice system, including 1. Crime prevention and community safety, 2. Criminal sanctions, 3. Organised and white collar crime, and 4. The community and the criminal justice system. It was acknowledged that “it is timely and necessary to assess the systems and measures in place to prevent and combat crime and to plan for future policy development.” Available at: [http://www.justice.ie/en/JELR/Pages/White\\_Paper\\_on\\_Crime\\_Overview](http://www.justice.ie/en/JELR/Pages/White_Paper_on_Crime_Overview) (Accessed November 20, 2014). At the time of writing, the White Paper is still awaited.

<sup>26</sup> Significantly, there is an absence of independent research in these areas. This can be contrasted with the position elsewhere, where evidence-based assessment has been used to inform the policy making process on a wide range of issues (see, e.g., Amey *et al.* (1996), Kock *et al.* (1996), and Maguire and John (1995)). Not only can evidence-based research play an important role in the policy making process, it also brings an element of credibility to criminal justice reforms.

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# From organised crime threat to nuisance control

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## **Introduction: the long shadow of the organised crime fear**

The emergence of the awareness of organised crime and its perceived threat to the peaceful and affluent world of the EU seems far away: around a quarter of a century ago. That awareness and related threat emerged at an interesting time: right around the time when the Cold War was nearing its natural end, the East-West tensions evaporated and the global economy was booming. The dissolution of the 'East block' opened new windows of commercial opportunities, legal as well as criminal (Joutsen, 2001). Despite concerns about 'East-West' organised crime, the EU embarked on a process of enlarging its membership (Tatham, 2009; Ginsberg, 2010). Was a new 'Golden Age' approaching? Naturally, the qualification of 'Golden Age' is attributed by hindsight, usually when the gold does not shine so brightly anymore. Nevertheless, up until the credit crisis and the subsequent euro crisis, it was a time of growing prosperity and modest optimism. Russia and the Middle East were far away, and though the environmental threat was recognised by many, it received some modest attention if it was not too expensive to adapt the policy; otherwise paying lip service was enough.

Was the horizon really clear and sunny? According to some law enforcement agencies and researchers this was only outward appearance. In their view, behind the horizon loomed a big danger: 'organised crime', ready to take advantage of any liberalisation of border controls in the EU (Von Lampe, 2002). This awareness raising and the political developments did not perfectly synchronise as some of these warnings preceded the fall of

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the Berlin Wall in 1989. Apart from the US and Italy with their traditional varieties of organised crime, in the EU some higher policemen, prosecutors and a rare researcher gave an early warning against the growth of (cross-border) organised crime (Freiberg and Thamm, 1992). As the issue of crime in general and organised crime in particular has a high sensation value, these awareness raisers did not eschew close interaction with the media, in particular the press (Van Duyne, 2004). Classified policy papers and confidential situation reports were regularly leaked to the press, followed by questions in Parliament and delivery of firm policy statements. But after 1989 this activity increased in intensity and frequency. Even if in terms of content the results were a meagre recycling of the same or similar stories, an all-winner situation developed: the police and prosecution got more staff, the media more to publish while new legislation to tighten the criminal law was no longer opposed (Van Duyne, 2004).

Around 1990, this was the awareness situation in the Netherlands and to a certain degree also in Germany (Rebscher and Vahlenkamp, 1988; Peters, 1990; Sielaff, 1992; Sieber and Bögel, 1993).<sup>2</sup> Elsewhere in Europe the response was still modest. This changed after the murder of the two Italian judges in the summer of 1992: first the internationally famous Falcone was killed by a car bomb, a few months later followed by his colleague Borcellino. These shocking events were at first interpreted as an 'Italian issue', but after some prodding by the Italians at the EU Council of Ministers of Justice, these killings were interpreted as dangerous forebodings of the Italian Mafia heading northward over the Alps (Van Duyne, 1995).

It is difficult to determine whether all such events were genuinely felt as a real threat: if one observes the policy making pace with which the EU moved forward, the hypothesis of politically 'ritual dancing' forces itself quite naturally (Van Duyne and Vander Beken, 2009). Alternatively, were policy makers rather taking advantage of the moral panic to reach specific aims that can be summarised under the catchwords: budget, power and legislation? Of course, all for the good cause of fighting 'organised crime'. But what about the threat to society for the common man? Was there fear among the people? One can say there is always fear of crime, but that concerns daily street crime. Otherwise organised crime remains a matter of public entertainment: thrilling stories with a pleasant shiver.

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<sup>2</sup> See also K. von Lampe (2013) who compared the various expressions of fear of organised crime which could be observed in Germany: no measurable organised crime threat realisation in the past 25 years.

In 1990, the organised crime fear (at the political level) received considerable support from the US in the form of the propagated fight against crime-money and money laundering that allegedly threatens the integrity of the financial and economic upperworld, if not governments themselves. In order to prevent such an infiltration, an international anti-money laundering regime was put into place (Stessens, 2000) of which one aspect is of relevance for our study: creating a preventive, regulatory barrier against 'organised crime'. Preventing organised crime by addressing its finances was considered not only a matter of the law enforcement agencies, but also of the financial sector (later extended to many other service providing sectors) and the 'administrative' supervisory institutions (Huisman, 2010).

Once the idea of involving non-police actors in barring organised crime took root, the next step to be taken was, with hindsight, obvious to involve the local civil administration of municipalities and regional bodies such as provinces or regions as defenders of public integrity against (organised) crime. The philosophy is that 'organised crime' would be furthered if it could obtain licences, permits, subsidies and other facilities from the public administration for operating its 'upperworld' businesses. Such services to (organised) criminals were supposed to affect the integrity of the public administration.<sup>3</sup> To counter this risk it was proposed that the administration should become legally empowered to act as gatekeeper to prevent 'organised crime' from sneaking into the upperworld and exploiting its facilities. The administration should be "iron clad" (Van der Schoot, 2006).

This empowerment did not happen overnight: special legislation had to be enacted and institutions and procedures had to be put in place. These measures have been successfully implemented, leisurely but in due time. In 2003 the Act Furthering Integrity of Decisions by Public Administration (Dutch acronym in this article: 'Bibob'<sup>4</sup>) came into force, together with the National Bureau 'Bibob'. Now that has all been in place for ten years, it is relevant to investigate three questions:

- how did the organised crime theme figure in the debate around the drafting of the bill to empower the civil administration against (organised) crime and
- what is to be observed 'in the field': the law 'in action' keeping *serious* and *organised* criminals out?

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<sup>3</sup> See also Van den Berg, Tollenaar and Veldhuis (2009) who argue that is not about the integrity of the public administration, but it concerns the integrity of the applicant.

<sup>4</sup> In Dutch this act is called: Wet Bevordering integriteitsbeoordelingen door het openbaar bestuur.

- did the law function in the way it was intended: maintaining the integrity of the public bodies against *serious, organised* crime?

To answer these questions two approaches have been followed: (a) a study has been made of the debate in Parliament and (b) the functioning of the law has been investigated by analysing submitted advices by the National Bureau 'Bibob' to the permits and licenses dispensing authorities – in this research project the municipalities. Before elaborating the methodology and presenting the findings we will first provide a short outline of the legislation.

## **The essentials of the Act Furthering Integrity of Decisions by Public Administration**

The aim of the Bibob Act, is to prevent that the public administration facilitates (organised) criminals to participate in the economic underworld in those commercial sectors which are licensed by the local authorities. Such a facilitation is considered a threat to the integrity of the public administration against which this law will protect them. Therefore, applicants for a license required, for example, to exploit a bar or a restaurant, can be screened to determine whether there is information which gives reasonable grounds to believe that there is a (grave) risk that the applicant may abuse the permitted facility for criminal ends, such as laundering, or is connected to criminal offences related to the operation of the licensed enterprise. If such information points at the presence of a serious risk, the mayor (burgomaster) can refuse to give a licence. Similarly, the burgomaster can also withdraw an existing license, for example when abuse is observed in the facility or if the license has been obtained by means of fraudulent information or other criminal acts.

The broad reach of the law is to a large extent determined by concepts of 'connected' or 'related to' which widens the scope of application considerably. For example, a suspected uncle financing his non-suspect nephew may spoil the application of the latter, unless it can be proved that the money has a legal origin and the firm would not be 'fed' from criminal proceeds. The central provision in the Bibob Act is contained in the article 3 paragraph 1, which mentions two grounds for refusal or withdrawal: the 'a-ground', which means using financial advantages from criminal offenses, such as money laundering, fraudulent bankruptcy, theft, handling stolen goods, embezzlement and drug trafficking. These crimes should already have been committed. The 'b-ground' means there is a (serious) risk of committing

criminal offences once the license is granted. This could include the situation of a serious risk that for example, the person applying for an environmental permit for its waste management company, will commit environmental crime. In addition to these powers, article 3 paragraph 6 Bibob deserves special attention, as its grounds of refusal and revocation are substantially different from the others (Van der Vorm, 2013). It states that a license can be refused or revoked if facts and circumstances suggest or do reasonably suspect that the applicant has committed a criminal offense for the purpose of obtaining the license. However, neither this article nor the accompanying explanatory memorandum (presented during the parliamentary debate) indicate which are the intended specific criminal offenses. One can think of serious crimes, such as extortion, public violence, coercion and forgery in the application. This means the governing body must check whether or not there is a criminal offense. Therefore, the Bibob Act *appears* to be intertwined with criminal law. However, this is not the case. The refusal or withdrawal of a license is not – in general – considered as a criminal charge as referred to in article 6 European Convention of Human Rights. Therefore, the Bibob Act is not considered as a punitive administrative law, but as an administrative measure or tool. To apply this tool the Bibob Act allows the use of criminal information (from the police and prosecution), but that does not imply the Bibob Act has a criminal law role. Its aim is the prevention of serious and (organised) crime in view of the integrity of the public administration.

Sometimes, there is no serious risk, but a lesser degree of risk of abuse. In those cases governing bodies can grant the permit with so-called Bibob-conditions. When there is no risk at all, the permit or license can be granted to the applicant. Overall, for the purposes of this chapter it is important to stress that nowhere in the Bibob is there a reference to ‘organised crime’, the main reason for drafting the law.<sup>5</sup>

## **Organised crime in the debate: the Bibob Act**

As mentioned in the introduction, fear of ‘organised crime’ was widespread (either genuine or as an entertainment) and many interested persons and institutions (together constituting the group of ‘problem owners’) were

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<sup>5</sup> However, in article 28, paragraph 2, Bibob Act a reference is made to the regional partnership organised crime. This provision shows that personal data can be provided to this partnership.

intended to keep it that way. This heightened the pressure on policy makers, police and prosecutors “to do something”. Actually they did not need much prodding (mostly self-evoked), but nevertheless, outside pressure was not unwelcome to maintain momentum. ‘Organised crime’ seemed to be on everybody’s lips (Van Duyne, 2003).

Unfortunately, in the Netherlands the pressure for capturing the very top of ‘organised crime’ stimulated some organised crime squads to apply inadmissible investigative methods. In 1993, this resulted in a major scandal, the dissolution of the crime squad and the resignation of the ministers of Interior and Justice. But most important, in 1995 Parliament decided to carry out an inquiry of the methods used by the police against the backgrounds of the nature and extent of ‘organised crime’ (Bovenkerk, 1996).

This inquiry became a major public event during which reputations were made (or broken) and which had many legislative consequences for the fight against ‘organised crime’. One facet, relevant for our study, concerned (a) business sectors which may be at risk of being infiltrated by organised crime and (b) the integrity of the public administration in cases it had to deal with ‘organised crime’ operating a licensed enterprise.

The Parliamentary Commission “Van Traa” appointed an expert research group of four professors headed by Fijnaut who – among other things – surveyed the risks of ‘organised crime’ infiltration in various business sectors such as: catering, transport, car dealers, construction sector, waste processing industry and textile industry. What were the findings of the research group? In general the research group found no indications that ‘organised crime’ succeeded in controlling a commercial sector. Some sectors are adjacent to organised crime, such as the transport sector, which goes without saying, as a central aspect of the organisation of contraband trade is transport. Bars, restaurants and clubs have also been mentioned in relation to ‘organised crime’ due to potential protection rackets, though supporting evidence for that risk was thin. In general it had to be conceded that in the Netherlands ‘organised crime’ did not hold social and economic sectors ‘in its grip’: there was no octopus having its ‘tentacles in everything’.

This surprising conclusion should have had a tempering effect on the organised crime fear, reducing the urgency to establish ‘defence lines’ or reflect on the proportionality of anti-organised crime measures. However, that did not happen: undaunted, the policy makers moved on autonomously, as did the BIBOB Bill. This brings us to our first question: how did the ‘organised crime’ theme figure in the parliamentary debate on this Act?

A few months after the issuing of the report of the Parliamentary Commission, 10 October 1996, the minister of Justice sent a letter to

Parliament about the need to give (local) authorities more powers to vet applicants of their services, such as issuing licenses and permits. This empowerment would avoid the dual position of, on the one hand, fending off 'organised crime', while on the other hand, facilitating crime by issuing licenses and permits to the same criminals when they intend to operate in upperworld business sectors. This would affect the integrity of the public administration. Another aim is to prevent the intertwining of underworld and upperworld, particularly if the authorities play a facilitating but unwitting role by providing licenses or worse still, subsidies.

However, it soon appeared that the intended reach of the law became much broader. 'Organised crime' got a second position: the law should address *all* systematic and structural serious criminal activities if these activities would be furthered by obtaining licenses and permits. Furthermore, the proposed administrative law instrument would further the integrity of the authorities who became enabled to avoid deals with serious criminals (of any sort and calibre).

This was to be elaborated and refined in the coming five to six years because beginning in 1996, the minister of Justice initiated an inter-ministry project group that picked up earlier proposals for further legislative preparation. Concerning the sectors at risk, the ministers took an easy shortcut by adopting all the sectors mentioned in the report of the Parliamentary Commission, even if there was no evidence of a connection (infiltration or otherwise) to 'organised crime' beyond a few anecdotes. These concerned mainly the city of Amsterdam with its flourishing half-criminal sex industry and tolerated hash outlets, the 'coffee shops' which the town council tried to clean up. The Bibob Bill was submitted to Parliament on 11th November 1999.

As mentioned before the two words 'organised crime' do not feature in the text of the Bill. As a matter of fact, the text could have been completely written outside the whole organised crime issue.

Given this absence, the Bill encountered some opposition as many MPs expected a more 'organised crime' oriented proposal. Some MPs even wondered whether this legislation would be adequate to counter 'organised crime'. It is of interest to observe that the minister answered that the application of the law is not restricted to 'serious crime', almost reducing 'organised crime' to a subordinate target. 'Almost', but not forgotten: 'organised crime' appears to pop up in various places as a stopgap for justifying particular choices. For example, the application of the law to specific sectors, such as the construction industry and transport is justified by referring to 'organised crime', despite lacking evidence. And if the evidence is slim, listed sectors may be at least

‘vulnerable’ to ‘organised crime’ penetration. In such a list of vulnerable sectors one finds the sectors of transport, waste processing and construction packed together with the catering sector and the sex service industry. While for the last two mentioned sectors there are some grounds for concern, their mentioning in one breath with other sectors created an argument by association (without much evidence) which was accepted without much demur.

This relative indifference for facts and logic in argument can be explained from the multiple objectives of the Bill: it started with ‘organised crime’ prevention, then simple crime prevention soon sided with the fear of facilitating crime in between, while preserving the integrity of the authorities was subsequently brought to the fore. During the Parliamentary proceedings these lofty aims had to be related to the principles of good governance, proportionality and human rights, which we cannot discuss in this chapter. In the end the Bill passed with two little words missing: ‘organised crime’, with which the whole legislation started.

## **The extension of the Act**

With the coming into force of the law on the 1st June 2003, the story was not finished as it was stipulated that the law would be evaluated after three years for further debate and its potential extension. This happened in 2006. The evaluation consisted of interviews with experts and practitioners and no real independent fact finding. The methodology was shallow and did not take account of a potential ‘agreement bias’.<sup>6</sup> The evaluation did not change the political thinking of the proponents, who declared the law anyhow effective, irrespective of its not always supporting findings. Therefore we will only mention a few findings.

The evaluation had been planned long before, for which reason a kind of zero-measurement has been carried out in 2003. This showed that only 11% of the responding municipalities had ever had experience of unwittingly facilitating the commission of crime by means of licenses and other facilities. Of course, there is a circularity in this question: being ‘unaware’ implies a low score unless there is a *post hoc* awareness. Nevertheless, the lack of experience does not point at a burning issue, though 46% thought the new law had added value, which may be just a politically desired response.

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<sup>6</sup> During the legislative process, the results of this evaluation were, without a critical attitude, taken over. Without much of a debate new industries were placed within the scope of the Bibob Act, such as the martial arts industry.

Three years and much awareness raising later the percentage of municipalities mentioning experience with the unwitting facilitation of crime slightly increased to 16%. The Bibob Act had a slow start indeed and its implementation has been mainly directed at bars, restaurants, the sex industry and the (soft) drug business (coffee shops, growth shops): the ‘usual suspects’.

As far as ‘organised crime’ was concerned, the interviewed experts were of the opinion that “*no forms of organised crime were detected due to this instrument*”. Also Van der Schoot (2006) among others studying the external effects of this law (Huisman and Koemans, 2008), could find no indication of outward effects. That was all that was published about the new law in combination with organised crime.

However, one can say that while it remains uncertain whether the law has any impact on any crime, it had at least affected the civil servants who have to apply it. And given the many objectives conveniently referred to during the parliamentary debate, in his letter to the Second Chamber, the minister of Justice could declare the law ‘very effective’. This concerned in particular the (non-measurable) objective of enhanced integrity of the public administration, though the letter also touched upon ‘organised crime’ about which there was no evidence.

In the follow-up (desk-) research to find support for an extension of the law, the researcher tasked with the evaluation once more provided a summary of objectives (integrity protection and crime-fighting), but now without ‘organised crime’.

Still this was not the end of ‘organised crime’, at least not in the political debate in the Second Chamber which babbled on leisurely. In a letter to Parliament (27th April 2010) the minister outlined criteria for extending the law to other sectors (e.g. gambling, ‘bell-shops’ and ‘head-shops’)<sup>7</sup> and mentioned as the first criterion: “*preventing the facilitation of organised crime by the public administration.*”<sup>8</sup> So, ‘organised crime’ was back again and now explicitly as a prime objective. However, the political vicissitudes of the organised crime subject can change from minister to minister, because in the presentation of the new Bibob Extension Act, almost a year later, (7th March 2011) the next minister went back again to the main objective of protecting the integrity of the public administration while mentioning the fight against ‘organised crime’ as a second priority. In a following memo of

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<sup>7</sup> Bell shops are outlets for telephonic services and equipment. Head shops are outlets for drug consumption tools, but do not sell any drugs themselves.

<sup>8</sup> Parliament Papers Second Chamber 2009/10, nr. 9, 32 676, p. 1-2.

the minister the ranking is reversed again, only to be turned back again in the oral debate.<sup>9</sup>

It is clear that the evasion of clear objectives in the text of the law, lay at the root of a continuous wavering in formulations and a sloppy use of terms. ‘Organised crime’ appears to be reduced from a phrase with a threatening content to a stopgap, to be used wherever suitable in explanatory statements. This lack of precision of objectives and also the slow progress of legislation contrast strongly with the preceding history of the organised crime policy, the moral panic in the 1990s (Van Duyne and Vander Beken, 2009; Van Duyne, 2011) and the Parliamentary Inquiry in 1995.<sup>10</sup> Of course, with only statements instead of facts, the real presence of organised crime in the licensed local sectors remains unknown. That will be the subject of our database analysis (among others).

## **The National Bureau Bibob**

The National Bureau for the Bibob Act is part of ‘Justis’ – Ministry of Safety and Justice – and performs an integrity screening on the basis of the Bibob Act on request by the public administration agencies. This Bureau has become the centre of expertise of Bibob due to continuous running of investigations. It has two legal tasks. The first task is advising administration agencies (such as the Mayor, the Board of Mayor and Aldermen<sup>11</sup>) and legal entities with a public tasks of the degree of risk of abuse of permits, grants, contracts and real estate transactions (article 9 Bibob) by applicants. The Bureau is regarded as a legal advisor and it may provide three kinds of advice: a ‘serious risk of abuse’, a ‘lesser degree of risk’ and ‘no risk’. It is most likely that organised crime is to be found in the serious risk category. The governing body must ensure that the investigation of the National Bureau Bibob was performed carefully.

The second task is informing and advising governing bodies on the implementation and application of the Bibob Act (article 10 Bibob Act). It is very rare that a local competent body refuses or revokes a license without

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<sup>9</sup> Oral Debat Second Chamber 2010/11, nr. 63, p. 55.

<sup>10</sup> Report ‘Inzake Opsporing’, Parliament Papers Second Chamber 1995/96, 24 072, nrs. 10–11.

<sup>11</sup> At the level of the municipality the Mayor and/or the Mayor and Aldermen are the competent authorities to grant licenses. These authorities are called ‘governing bodies’.

seeking the advice of the National Bureau Bibob. In this perspective, the role of the National Bureau Bibob is very important. To ensure the quality of the advice, some advice are annually audited by a quality committee (the so-called Bibob Quality Committee).

In the jurisprudence has been stipulated that governing bodies may use the expertise of the National Bureau Bibob. The conclusions of this Bureau have two important advantages: they come from an independent body and it has some harmonising effect concerning formulation and content. In general, the jurisprudence of the appeal courts<sup>12</sup> shows that the advice of the Bureau are assessed in the same manner. Mostly, the appeal courts judge that the advice was carefully drafted and its content conclusive. However, in some cases, the courts decide that the refusal or revocation of the license is unjustified. This means that the applicant will get his license (back).

## **Researching the working of the Bibob Act**

Our survey of the origins of the Bibob Act and the documents of the legislative proceedings produced a puzzling and roving course: from (organised) crime prevention to non-facilitating crime and back again to organised crime with the undefined “integrity” as stable ‘Pole Star’. In addition to this uncertainty, no mention of organised crime in the law itself while otherwise, in the debates and memoranda it was held in an on-off modus; kind of policy flashlight. Given this observation, we had reasons to investigate the functioning of this Act. The evaluation carried out by the firm Consultancy Berenschot in 2006 was considered dated, shallow and too much ‘opinion-directed’: it is nice to know what civil servants agree with statements put forward in a questionnaire, but better to learn what they actually do (De Voogd *et al.*, 2007). For this reason we decided to investigate the actual decision making under this law: given this legal instrument, how do local authorities decide on applications for licenses and other facilities (or their withdrawals).

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<sup>12</sup> Administrative Jurisdiction Division of the Council of State, the Board of Trade and Industry and the various courts.

## **Method of research**

The authors decided to research the application of the law on a case-by-case basis. However, it soon became apparent that selections had to be made.

In the first place, we decided to narrow the selection of cases to those handled by *municipalities*: they form 91% of the institutions requesting an integrity advice (a total of 1.334 for the time span 2003-2011).

In the second place we selected cases in which an integrity advice was requested from the National Bureau Bibob. In cases without integrity advice there is insufficient documentary background information as these applications are 'not problematic' and do not lead to further investigations. These cases without advice form 94% of all 19.335 requests for a license/permit of which only 1% was rejected in this time span. This set may contain 'false positives' slipping through, but vetting these would go beyond our capacity.

In the third place we limited the sampling of cases to the decisions on *licenses* as these constitute 97% of the subset of integrity advice cases leaving out subsidies and tenders.

In the fourth place we had to limit the number of cities to be selected as researching 183 municipalities (the number asking Bibob advice up until October, 2012) would not be feasible. As most requests for integrity advices were submitted by the bigger cities (> 500.000 inhabitants), we started by taking three of them in our sample. The selection of the other municipalities was further stratified according to the population size. Divided over the population size classes Table 1 represents the following frequency division of cases.

**Table 1**  
**Selected municipalities classified by population size**

<b>Population size</b>	<b>N municipalities</b>	<b>Number requests for advice</b>	<b>In %</b>
> 500.000	3	251	56
100.000 – 500.000	4	118	26
50.000 – 100.000	2	53	12
< 50.000	3	27	6
Total	12	449	100,0

As one can observe, the selected cities are reasonably equally divided over the population size intervals. However, measured according to number of requested advices the division is skewed: the big cities submit more requests

for advice than the cities with up to 100,000 inhabitants, which of course corresponds with their population as well as their economic size.

The degree of cooperation by the departments for licenses and permits was generally encouraging, apart from a few unexpected refusals. More important are the varieties of imperfection in the local administration: the field researchers' nightmare. Such imperfections ranged from untraceable decisions (only the advice of the National Bureau Bibob being available) to missing data within the reports such as missing birth date, price of the location or enterprise, etc.

This dependence on local circumstances had an effect on the methodology concerning the case sampling. At first, having scouted within the administration of one big city, an elaborate plan for sampling of cities and within (big) cities of specific cases was drawn up: layered sampling taking account of the size of the population of the cities to be selected. However, this methodological approach was soon nullified by the reality of non-responding local administrators and the number of available cases. There is little to sample when the number of cases per year is under a critical level. Given the frequencies of the advice requests of the small and middle size cities, we took all cases handled between 2003 and 2013. Sampling was to be carried out in the three big cities only. But that approach did not work either, as in some of these cities cases were missing or "elsewhere": because of decentralisation they were handled at other offices in the town. In the end it was decided to take all the available cases in the big cities too, knowing that more cases were "around somewhere".

Another methodological problem concerned the matching of the decision made by the local authority to the advice of the National Bureau Bibob. The decisions proved not to be always available. That could have been for various reasons, such as a different file for decisions, separated from the application/advice file. One city was not happy with seeing the final decisions being compared with the advices: as this could raise questions in the Town Council which they might wish to avoid. In one city, 50% of the decisions were missing (we were told they were "in the archive"). Retrieving them requires more time and cooperation. Therefore, this part of the project is still in progress, for which reason we base the present account of this research on data derived from the advice only of the National Bureau Bibob.

Concerning the economic sectors for which licence decisions were made we selected the catering sector (pubs, bars restaurants), the coffee shops (tolerated soft drugs outlets), related growth-shops and head-shops and commercial sex facilities and entertainment facility providers (e.g. space to rent for social activities). According to the annual reports of the National

Bureau Bibob, this represents around 81% of all the advices it received in the period 2003 – 2013 (62% catering; 8% sex and 11% soft drug ‘coffee shops’).

For the analysis of the advice we designed a list of standard variables concerning the nature of the firm and applicants derived from the advice of the National Bureau Bibob.

- Year of advice;
- Number of persons listed in the application and their intended role;
- Date of birth of each person;
- Nature of the enterprise;
- Location;
- Financial data of the enterprise;
- Antecedents: misdemeanours and criminal offences;
- Final assessment of ‘danger’ by the National Bureau Bibob.<sup>13</sup>

## Findings

### a. The population

The authors obtained access to the full database the advice from 12 municipalities. The database consists of 449 cases (requests for advice) from 2004 until 2013. The frequencies, broken down by the classification of the population size of the towns, are represented in Table 2.

**Table 2**  
**Towns by population size and requests for crime risk advice**  
**2004 – 2013**

<b>Population</b>	<b>2004</b>	<b>2005</b>	<b>2006</b>	<b>2007</b>	<b>2008</b>	<b>2009</b>	<b>2010</b>	<b>2011</b>	<b>2012</b>	<b>2013</b>	<b>miss</b>	<b>Total</b>
> 500.000	0	1	5	18	36	37	31	36	40	40	7	251
100-500.000	1	3	5	18	17	18	17	12	15	8	4	118
50-100.000	3	1	13	7	6	4	5	6	3	1	4	53
< 50.000	4	1	0	2	6	6	2	2	3	1	0	27
Total	8	6	23	46	65	65	55	56	61	50	15	449

When we abstract from the first two years in which the municipalities had to become acquainted with the Bibob procedure, we observe a rather flat distribution, particularly in the three cities with more than 500.000 inhabitants.

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<sup>13</sup> The decisions made by the authorities were not all available at the time of writing. They will be studied in the on-going research project (Van der Vorm, in preparation).

As the advice concerned applications for licenses in which several persons could be listed, the numbers of Table 2 do not represent the number of persons involved. In total 1.276 persons were mentioned in the applications, either as main applicant, as staff, financier or any other role which was considered relevant for the integrity evaluation by the city council. The population distribution was proportional to the relative frequency of the twelve towns as shown in Table 3.

**Table 3**  
**Distribution of applications and persons by population size**

<b>Population size</b>	<b>Number of applications</b>	<b>In %</b>	<b>Number of persons</b>	<b>In %</b>	<b>Mean</b>	<b>Median</b>
> 500.000	242	57	781	61	3,23	3,00
100-500.000	114	27	303	24	2,66	2,00
50-100.000	42	10	114	9	2,71	2,50
< 50.000	27	6	78	6	2,89	2,00
<b>Total</b>	425	100	1276	100	3,00	3,00

Missing values: 24

The mean of the number of persons involved was 3, ranging between 2,7 (the 50-100.000 inhabitants category) and 3,2 (the three cities of more than 500.000). The median followed the mean rather closely, so that there is no skewed distribution.

The advice provided information of the ethnic origin or nationality (further ‘ethnicity’) of the applicants and their (criminal) backgrounds from police reports, the Central Criminal Record Office and the tax administration. In addition, the advice contained information of the enterprises and background finances.

The ethnicity/nationality, determined by country of birth (and name), was very diverse, within as well as across applications. Using ‘ethnicity’ as shorthand we identified 35 ethnicities of which the most frequent were Dutch, Turkish and Moroccan. As applicants have to mention all persons involved in the (intended) enterprise, the applications could mention any kind of ethnic composition: from ‘single’ (one ethnicity) to any other mixture. For this reason we clustered the ethnicities per application as presented in Tables 4 and 5. In the first four categories we find only ‘single ethnicity’ participants. The last two are composed of more ethnicities per license application. We have a ‘*Dutch + other*’: a Dutch applicant together with any other ethnicity and the group of ‘*other ethnicity composed*’, comprising all ethnicities, but no indigenous Dutch. As it is clear from the absolute numbers of the two ‘other

ethnicity' categories: further differentiation leads to low frequency categories leading to statistics on a separate case level. Table 4 presents the ethnicity categories broken down by town population size.

**Table 4**  
**Ethnicity broken down per license applicant and town population size**

Ethnicity Pop. size	Dutch	Turkish	Morocc.	Other single eth.	Dutch + other eth.	Other eth. Composed	Total
	%	%	%	%	%	%	
> 500.000	45	53	73	60	70	67	57
100 – 500.000	41	21	9	20	15	27	27
50 – 100.000	7	22	18	0	10	7	10
< 50.000	7	3	0	20	5	0	6
Total = 100 %	<b>164</b>	<b>58</b>	<b>22</b>	<b>40</b>	<b>110</b>	<b>30</b>	<b>424</b>
In % of ethnicity	39	14	5	9	26	7	100

Missing 25

Table 4 shows that while the license requests with Dutch-only applicants are with 39% the largest single group they do not form the majority. Of the ethnic minorities the Turks are with 14% the largest group. The Table also shows that these two minorities are well represented in the large cities, but only with an overrepresentation of the Moroccans. A smaller overrepresentation of Turks and Moroccans is also observed in the smaller towns (50.000 – 100.000): 22 and 18%. Table 5 provides a distribution of the ethnicities over the economic sectors.

The municipal integrity screening policy covers a broad spectrum of business types. The main types concern the whole *catering* sector (65%; from snack bar to hotel, from cafeteria to five stars restaurant), the *tolerated soft drug* sector (16%), and the *sex service* branch (7%). One of the big cities also carried out integrity screenings in the construction industry: its prevalence (6%) must be attributed to that city only.

To obtain more differentiation we subdivided the catering sector into four smaller categories ('drink' (alcoholic +/-); food and 'other' (categories with small numbers). The resulting business typology was subsequently used to compare the ethnicity participation of applicants in each type. This comparison showed that the ethnicity was not equally distributed over the types of businesses. The Dutch applicants have some predominance in the soft drug and sex businesses, while more than half of the Turkish and other 'single ethnic' entrepreneurs were involved in the food-catering businesses (restaurants and snack bars). A sub-section of this category concerned

Chinese restaurants (scrutinised for hygienic reasons because of complaints). 27% of the Moroccan applicants aimed to get a license for a coffee or tea house (no alcohol or food). Most license applications for coffee and tea houses (10 of 13) were located in the three biggest cities coinciding with the highest Moroccan minority concentration.

**Table 5**  
**Ethnicity of license applicants differentiated by economic sector**

Business type	Ethnicity						Total N	%
	Dutch	Turkish	Morocc.	Other single eth.	Dutch + Other	Other eth. Composed		
	%	%	%	%	%	%		
Construction	14	0	0	3	1	3	25	6
Pub/bar	28	28	23	23	25	37	114	27
Rest/Snacks etc.	12	55	18	50	17	37	105	25
Coffee/tea house	1	5	27	0	2	3	13	3
Other catering/ hotel	14	7	9	8	11	10	43	10
Soft drug shop	19	2	18	5	25	3	67	16
Sex service	9	0	0	8	9	7	30	7
Other	6	3	5	5	7	0	25	6
Total N = 100%	162	58	22	40	110	30	422	100
In % of ethnicity	39	14	5	9	26	7		100

Missing values: 27

There is little information about the persons listed in the applications, apart from police and prosecution data. Apart from the age and ethnicity, socio-economic data are not systematically available.<sup>14</sup> The average *age* of the applicants (= the first mentioned in the advice) is 41 years (no difference between mean and median). The extremes were 19 and 75 years, both Dutch. Broken down by the main variables the differences around the general mean appeared to be small: the Moroccan applicants were slightly younger (37 years) and the Dutch older (43 years). The age differences between the cities was also small with a range between 37 and 43 for respectively the cities with 50-100.000 inhabitants and the three largest cities (> 500.000). Hence there were no old entrepreneurs in the province or young ones in the big cities. Only the business type showed some differences: applicants in the construction sector were the oldest (47 years), followed by the sex entrepreneurs (45 year) while the food caterers formed a somewhat younger

<sup>14</sup> Some abstracts of police reports provide some information of (criminal) conduct and relationships. But that is too incidental and more illustrative.

group (39 years). We can conclude that apart from a few youthful starters the population consists of older entrepreneurs of around 40 years, mainly Dutch with Turkish and Moroccan entrepreneurs as the two most numerous ethnic groups.

Finally there is the ‘economic value’ of the licensed enterprises according to the figures mentioned in their application. This implies some uncertainty concerning the reliability of the figures: the applicant can have reasons to mention a higher or a lower acquisition figure. In addition, we have about 25% missing values, for example because of a withdrawal of the application or the firm needed only to be relicensed.<sup>15</sup> For this reasons, this variable should be taken as an (ordinal) indication of the economic value of the applicants’ businesses.

The total value of the enterprises is € 117.497.664, which differs considerably per year, as presented in Table 6. The distribution is very skewed, with a general average of € 358.895 but with a median of only € 45.000 which indicates that the median is the proper central index. The median values range from € 26.603 in 2011 to € 70.000 in 2006, indicating substantial annual differences.

**Table 6**  
**Mentioned value of the enterprises to be licensed**

<b>Year advice</b>	<b>N</b>	<b>Sum stated value €</b>	<b>Median €</b>	<b>Maximum €</b>
2004	6	329.350	30.000	145.000
2005	5	817.722	56.722	600.000
2006	17	10.293.898	70.000	6.800.000
2007	30	10.591.346	57.500	4.000.000
2008	46	12.975.852	53.338	3.176.461
2009	45	22.737.767	33.500	10.750.000
2010	40	4.390.664	30.350	1.250.000
2011	48	3.637.317	26.603	650.000
2012	47	20.476.673	50.000	12.500.000
2013	40	31.247.075	59.500	23.600.000
Total	324	117.497.664	45.000	23.600.000

Missing values: 125

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<sup>15</sup> That can happen at the end of a term or when a business gets a new manager or is sold to another entrepreneur.

There are large differences in the stated value between the types of enterprises. Unsurprisingly we find the highest values in the construction sector and lower ones in the sub-category of coffee/tea-houses as can be read in Table 7.

**Table 7**  
**Value of licensed enterprises per business type**

<b>Business Typology</b>	<b>N</b>	<b>Sum stated value €</b>	<b>Median €</b>	<b>Maximum €</b>
Construction	20	52.456.377	532.603	23.600.000
Pub/bar	97	5.017.797	26.092	500.000
Rest/Snacks etc.	84	15.141.082	34.500	4.000.000
Coffee/tea house	10	442.558	15.001	300.000
Other catering/ hotel	35	6.960.436	71.451	1.325.000
Soft drug shop	43	10.462.901	90.000	2.500.000
Sex service	21	4.259.623	57.000	1.815.120
Other	18	22.976.941	167.295	12.500.000
Total	328	117.717.715	45.000	23.600.000

Missing values: 121

The differences between the value of the enterprises is also reflected in the differences between ethnicities and population size of the towns. As we have seen, the Dutch (median business value € 70.000) are dominant in the construction sector, the soft drug businesses and sex enterprises, while coffee/tea houses are mainly run by the Moroccans (median business value € 17.500). Likewise, the median value in the three big cities is € 60.700 against € 22.350 in the < 50.000 municipalities.

Summarised, within the research population of 450 applications the potential risk comes from persons with an average age of about 40, running a business (or intends to do so) of about € 45.000, mainly in the big cities. The three dominant ethnicities of the applicants are the Dutch, Turks and Moroccans having mainly (65%) an interest in catering, soft drugs outlets (16%) and sex service (7%).

## **b. “Serious danger”**

### **1. General aspects**

On the basis of strong indications and/or justified suspicions the National Bureau Bibob determines whether an application contains a ‘serious danger’ that the license may be abused (a) for committing crimes and/or (b) channelling proceeds into the licensed firm (laundering). We were interested

in interrogating our data to determine how frequently this occurred and in which towns. Table 8 provides the frequency distribution of ‘serious danger’ conclusions over the years and population size classifications of towns.

**Table 8**  
**Advice of National Bureau Bibob: ‘serious danger’ of ‘license abuse’:**  
**by year, town size & subset ‘participation in a criminal organisation’**

Year advice	Distribution ‘serious danger’ advices over town population size				Total N		Participation Org. Cr. N
	< 50.000	50.000- 100.000	100.000- 500.000	> 500.000	Serious danger N	Total advices N	
2004	3	0	0	0	3	8	0
2005	1	1	2	1	5	5	1
2006	0	13	5	3	21	23	6
2007	1	4	13	13	31	46	9
2008	3	3	4	22	32	65	5
2009	0	2	6	20	28	63	10
2010	0	3	7	14	24	55	5
2011	2	5	4	18	29	55	1
2012	1	0	5	25	31	61	5
2013	0	0	3	19	22	48	4
Total N	11	32	49	135	227	429	46

Missing values: 20

When we abstract again from the first two beginning years, we see that per year, on average, 27 advice notices of ‘serious’ danger were given. In 46 cases (11%) this warning was given because of a suspected ‘participation in a criminal organisation’. As can be observed, the density of the distribution of ‘serious danger’ over the towns per year becomes statistically rather thin. As a matter of fact, only the three major cities (> 500.000) had any worthwhile numbers, which was for one third concentrated in one town. The two other major cities accounted for another 27%. Given this ‘frequency dilution’ over time and geography we will add years and towns together in the further analysis and discussion of results of the analysis of the outcomes of the main variables.

We will first give an overview of the characteristics of the ‘serious danger’ cases, after which we devote special attention to cases in which a danger of participation in a criminal organisation was suspected.

The first relevant question is whether the occurrence of ‘serious danger’ is correlated with the population size of the towns: the common sense notion of ‘big city much crime’. Table 9 displays the relative frequencies of the three-point ‘danger scale’ over the population size classes: a direct relationship between population size and ‘serious danger’ is not identified.

**Table 9**  
**Danger assessment and city population size**

Population size	Serious danger %	Less danger %	No danger %	Total N
> 500.000	55	21	24	245
100 – 500.000	43	18	39	114
50 – 100.000	64	18	18	50
< 50.000	41	11	48	27
Total N	227	84	125	436

When we subsequently look at the ‘ethnicity’ variable we do not find significant differences of ‘serious danger’ between the various ethnicities either. With 52% ‘serious danger’ of the total number of applications, only the Turks are with 61% ‘serious danger’ clearly overrepresented. The lowest score of 40% has the category ‘other (*non*-Dutch) ethnicities combined’. Likewise, there was no difference in age between the three danger qualifications: they all clustered around an average of 41 years.

## **2. Finances**

The financial interest of the enterprises may be of importance for various reasons. They reflect the economic and social ‘weight’ of businesses (as such of interest) and – given the assumption of ‘big crime and big money’ – the attractiveness of financially large companies to shady entrepreneurs. This may result in more ‘serious danger’ conclusions. This was confirmed: we observed a significant relationship between financial importance and the ‘serious danger assessment’ ( $X^2$  sign. = 0,003). The relationship shows some non-linear exceptions for some classes: ‘€50.000 – 75.000’ is with 74% higher than the three highest financial levels (> € 100.000). Also, the category ‘€ 15.000 – 20.000’ has a higher percentage than the other financial levels under € 50.000. But in general Table 10 shows a positive relation between the level of financial interest and the seriousness rating.

**Table 10**  
**The degree of danger and the financial interest**

<b>Financial interest</b>	<b>Serious danger</b> %	<b>Less danger</b> %	<b>No danger</b> %	<b>Total N</b>
> 500.001	66	16	19	32
200.001 - 500.000	67	20	13	30
100.001 - 200.000	63	17	20	35
75.001 - 100.000	52	11	37	27
50.001 - 75.000	74	13	13	23
30.001 - 50.000	49	23	28	47
20.001 - 30.000	18	26	56	34
15.001 - 20.000	58	10	32	31
10.001 - 15.000	36	32	32	22
1 - 10.000	44	14	42	43
Total %	52	19	29	324
Mean €	503.957	352.949	127.245	358.895
Median €	65.000	34.250	30.000	45.000

Missing values: 125

**Table 11**  
**The financial interests: comparison of median of all applications and the ‘serious danger’ group, by business typology**

<b>Business Typology</b>	<b>‘Serious danger’</b> <b>N</b>	<b>In % of all enterprises</b>	<b>Median value all</b> <b>€)</b>	<b>Median value</b> <b>‘serious danger’</b> <b>€</b>
Construction	12	60	532.603	482.443
Pubs/bars	47	48	26.092	36.000
Rest/Snacks etc.	39	46	34.500	45.000
Coffee/tea houses	4	40	15.001	12.000
Other catering/ hotels	18	51	71.451	125.067
Soft drug shops	24	56	90.000	125.000
Sex services	12	57	57.000	62.225
Other	11	61	167.295	206.310
Total	167	51	45.000	65.000

Missing values: 59

\*) Taken from Table 7

Taken the ‘serious danger’ group together, we continue to analyse it by comparing its financial interests with the business typology as displayed in Table 11.

As can be observed, the median euro value of all but two business types is higher in the ‘serious danger’ group. The exceptions are the construction industry and the coffee/tea house group which as a whole has also the lowest euro value.

Looking for explaining variables we first looked at the *expressed doubts about the financing* (or lack of transparency) as stated in the advice. Unsurprisingly, the relation between doubts of financing and ‘serious danger’ was strong and significant ( $X^2 \geq 0,00$ ). Subsequent comparison of this financial doubt variable with two main forms of (informal) financing, namely (a) private financing (family, acquaintances) and (b) own funds, such as savings. Together they represent forms of ‘*informal banking*’. Other forms of financing, e.g. by banks or breweries (for pubs) were less frequent (banks 5% and breweries 1%), though the advisors could also judge these as suspicious (9 times = 2%). However, the frequencies were too low for meaningful statistics.

Informal (private and own funds) banking occurred more often: in 64 % of all cases (274) of which 74 cases were judged as ‘doubtful’ or ‘not sufficient transparent’: that is 27% of the informal banking subset. But not all ‘doubtful financing’ qualifications led to the conclusion of ‘serious danger’: that occurred in only 55 cases (75%, but only 20% of the informal banking). This implies that slightly more than a quarter of the ‘doubtful finances’ did nevertheless not lead to a ‘serious danger’ conclusion.

The conclusion we draw from this financial survey is that the ‘serious danger’ category is correlated with higher financial interests, either in terms of investment or acquisition (or both), but not necessarily by (suspicious) informal banking.

### **3. Antecedents**

The remaining variables for analysis are the ‘criminal antecedents’ which encompass also the reports of the Financial Intelligence Unit Netherlands, though technically they are frequently not connected to a predicate offence.

The antecedents of the applicants are important as they provide the authorities with data of all persons who intend to have a function in the enterprise: e.g. as bar tender, caretaker (in the absence of the manager), co-financier or the landlord of the premises. The data encompass *misdemeanours* related to general (police) regulations (e.g. for pubs prescribed closing times, noise levels and other public nuisance rules) as well as *criminal offences* from the general Criminal Code as well as by-laws (e.g. environment, labour and tax laws).

As the process of weighing risks is license directed, we will discuss the antecedents per business type. Important facets in the evaluations are the nature and frequency of the reported or suspected law breaking.

*a. Construction sector*

Of the 12 construction sector application judged ‘serious danger’ eight received this negative judgement because of serious suspicions of “participating in a criminal organisation”. The *time-space* spreading was from 2005 till 2013 and concerned only *two* municipalities: 6 in a town in the south and 8 in one of the larger cities in a northern province.

In four cases there were doubts about the finances. In one case the advice quoted a police report about the “toasting to the successful liquidation of a fellow criminal”. In seven cases references were made to (suspected) violations of the Opium Law, overlapping with “participation”. In four cases there were serious indications of extortion. Violations of environmental and labour laws and tax crimes were mentioned in four other cases as grounds for a negative advice. Four individuals re-applied because of a different building project: no success either. There were not many convictions in this group: only one conviction to two months unconditional imprisonment: *ten* years before the advice (2005).

*b. Pubs and bars*

Of the 47 pubs and bars with the label ‘serious danger’ of license abuse nine applications got the annotation of “participation in OC”. Spread over time and space, the years of application ranged from 2005–2013 while they concerned nine towns. This thin distribution contradicts the popular notion of organised crime’s interest in the catering sector.

The annotation “participation” deserves extra scrutiny. In two applications (2006 and 2007) the same suspected ‘organised crime’ person figured as landlord of the premise of the pub, though his last conviction (3,5 years imprisonment in Germany) dated from 1997. Nevertheless, the applicant-tenant evoked also concern: she had a cannabis plantation at home though she herself had no organised crime records. However, the ten year old data of her landlord still radiated negatively on her application or anyone who rented the place. The connection to organised crime of another applicant was also weak: in 2003 his *brother* was convicted for “participation” while the year of advice was 2012. But this old and indirect involvement was not the only reason for denying him a license. As a matter of fact he had a long catalogue of (old) criminal and regulatory offences: enough for not wanting him to serve pub-goers. In another case the applicant was a bodyguard of one of the nationally known organised criminals and ‘therefore’ connected to drugs, extortion and murder (but no convictions). Altogether seven of the “participation” suspicions referred to

a history of mainly hard drug offences and five persons with a history of violence (but no conviction).

The advice notices had many references to violent conduct. In 23 cases the advice listed police reports or convictions for assault, threats or possession of weapons (mostly pepper spray). These reports were usually “left out of consideration” because: they were mostly interpreted as incidents, did not generate income to be laundered in the licensed business or were otherwise not related to the running a pub or bar (no violence within or at the doorstep of the premise).

Of the 170 persons mentioned in the applications 27 had been sentenced to unconditional prison terms, ranging from 3 months to eight years, mainly for (international) drug trafficking. In five applications it was clear that there were no objections against the applicant him/herself, but against one of the other listed personnel of the pub or bar: the ‘rotten apple’. Removal of that ‘rotten apple’ could lead to a new decision to issue a license under specific conditions. In three cases the only ground for ‘serious danger’ was that the applicant did not answer the questions concerning finances.

There were some observations of a (suspected) connection to organised crime, but that did not meet the popular ‘infiltration’ notion. Instead of furthering the integrity of the public administration the main (unintended) effect of the law seems to protect the reputation of sector itself by uncouth elements out.

*c. Restaurants/snack bars*

More than half (56) of the applications in this sector were labelled ‘serious danger’ of which *eight* because of “participation”. In contrast to the group of pub and bar applications with “participation” annotation, there were only 3 mentions of drug violations in the restaurant group (one cocaine and one cannabis). Otherwise the underlying crime of “participation” proved to be fraud (tax and social security), illegal labour and human trafficking. All but two of such law breakers had a ‘prison history’ with sentences from 6 months up to eight years.

Spread over time and space, the years of the applications with the organised crime predicate ranged from 2007–2012 while they concerned three towns. The biggest town got in five cases a negative advice because of “participation”. In one case the negative advice was based on the concern of money laundering (by the financier) for a well-known organised criminal killed in 2005 in Thailand (the application is in 2008 and the financing (€ 2.200.000) was approved).

The 48 other applications had other grounds for ‘serious danger’. Reports on drug trade involvement of applicants and/or their proposed staff, financiers or others ‘involved’ were found in 21 cases, 15 of which concerned the soft drug trade. Another category is ‘opium +’ or ‘hash +’ implying reports on additional regulatory offences, such as illegal labour, closing times, food purity prescriptions etc. A fourth category concerned various forms of property crimes: theft, bankruptcy fraud. Of one intended entrepreneur the police and the tax authorities composed a long ‘shopping list’ of misbehaviour: the picture of a not very reassuring bar tender with ‘loose hands’, though all deeds remained below the threshold of prosecution. The Chinese restaurants had a similar ‘shopping list’ of violations: health and food safety violations and illegal labour. In this case the Bibob procedure contributed in ‘cleaning-up the kitchen’: a new manager re-organised and got the coveted license.

*d. The coffee/tea houses*

The seven coffee and teahouses, rated as ‘serious danger’, had no “participation” annotation. While the applications were submitted in four cities, four of them were located in one city in the western province (2007–2013). Most were Moroccan and Turkish enterprises. One application was ‘re-scaled’ from ‘serious danger’ to no danger after re-examination. The strong suspicions of misbehaviour concerned in the first place drug related offences: a possession of a few gram cocaine (14 months imprisonment), soft drugs (marijuana); laundering by exporting cash through the airport (€ 66.000 and 4 months imprisonment), gambling and ‘corporate corruption’.

*e. Other catering/hotels*

By its nature the ‘other’ category is a composite of different enterprises with too low frequencies for separate statistic classifications. We count five so-called ‘beach tents’ (restaurants and recreation enterprises at the beach), four hotels (two with restaurants) and the rest again ‘other catering/hoteling’. In eight of the 20 advices for this ‘serious danger’ category the National Bureau Bibob referred to “participation”. That should be reduced because of a double count of persons: two times there was a re-application with the same people. Because the given advice on the application is our counting unit, this led to four registration numbers.

In six cases there was mention of a history of wholesale drug trade: two cases involving soft drugs and two times hard drugs for which prison sentences from two to eight years imprisonment were meted out.

The rest of the ‘serious danger’ group displayed a broad spectrum of

antecedents: soft and hard drugs (4 and 3 cases), tax and fraud in applying for this license; regulatory misdemeanours and continuing misbehaviour of 'shopping list dimensions' (from 'weapons' to threats, illegal cutting of a tree, to public disturbance or violence) as a demonstration of a "wrong social attitude".

*f. soft drug shops*

Of the 35 soft drug shops labelled 'serious danger', four had the annotation of "participation". These advices were again spread over the whole period (2006–2012) half of them in a border town in the south (where two crime families with a long history were identified). Predictably, the predicate offences were mostly drug trafficking, but not necessarily soft drugs only. In one case a partner of the applicant was convicted for hard drug trafficking (3 years imprisonment) and in another case the soft drug shop owner committed tax fraud (undeclared turnover) while her partner had been convicted for trafficking of drug precursors (2 years imprisonment). Running a cannabis plantation was another offence for giving a 'serious danger' judgment, strengthened by "participation". But that was 1999–2000, some 12 years ago.

In the advice on the other license applications the most frequently referred transgression was having an excess of soft drugs in store, which was mentioned ten times. This is a consequence of the Dutch toleration regulations of coffee shops: under severe conditions they are allowed to serve customers, but it is not permitted to have more than 500 grams of weed or hash in store. In busy times this puts much strain on the shop managers: they must keep up the supply to meet demand which can only be met by a constant supply through the 'back door'. Bending or trespassing this regulation by keeping stock in a secret stash or having access to a cannabis plantation is a predictable outcome of bypassing this constraint. As the coffee shops are meticulously monitored by the tax service, a turnover made possible by exceeding the 500 gram norm has to be concealed in the paperwork. But then such tampering with the books automatically results in tax fraud which was another (seriously suspected) offence of seven of the applicants and/or their staff.

The logical consequence of this toleration arrangement is that many people are involved in the resulting underground economy of growing, storing and supplying the (officially criminal) commodity. In addition to this supply violation there are suspicions of other forms of illegal trade for judging 'serious danger': one applicant was convicted for selling several times heroin (3 years imprisonment) and another applicant was suspected of laundering money from arms trading (the ex-husband, owner of the shop had his own criminal history that made the application 'serious dangerous').

*g. Sex service*

Of the 17 sex service enterprises applying for a license *three* were suspected because of “participation”, mainly related to extortion. The backgrounds of two persons were lacking. Four others belonged to what may be called ‘the usual suspects’: “indications of having had contact with William H”; “contacts with motor cycle gang” and otherwise suspicions and some minor convictions (240 hours community service) for fraud, assault and extortion. In addition, there were more than 215 suspicious transactions reported by the FIU. No predicate offences or prosecutions are known.

Concerning the 14 other cases, (tax and bankruptcy) fraud, suspicious transactions and laundering were repeatedly mentioned. Illegal (sex) labour and also one time human trafficking were mentioned, but usually in connection with suspicions of past involvement or convictions for other offences, such as suspicious transactions or laundering. Connections to drug traffic was mentioned with two persons (one hard and one soft drug case). Ill-treatment of the sex workers was mentioned only once.

*h. Other enterprises*

Despite its heterogeneous composition, the group ‘other’ could yet be subdivided: nine enterprises had some entertainment function in the sense that they provided facilities like letting halls for parties, clubs and festivals. In addition we find taxi enterprises, a recycling facility and three car dealers/repair shops, there was also a discotheque.

The persons involved in applications with a ‘serious danger’ qualification were all Dutch. In three cases there were strong suspicions of extortion and (tax) fraud. In two applications the same persons were involved: they were rejected the first time in 2007 after which they tried their luck again in 2009 (in vain). The figures involved could be classified as belonging to an old criminal network of ‘usual suspects’ in one of the big cities. In two other applications cannabis growers were identified, among them a father and his son, who wanted to start a car breaker’s yard (useful for giving stolen cars a new identity: both have been convicted for handling stolen goods).

In the advices on the other applications, in which “participation” did not play a role, we find suspicions concerning a whole spectrum of law breaking: theft (3 years imprisonment), cannabis growing (1 year), on-going non-compliance in the entertainment facility business and a recycling firm (environmental regulations) displaying utter disregard for clean management, suspicious transactions, money laundering and violating transport rules.

## **Antecedents summarised**

The previous survey of the antecedents of ‘serious danger’ applications (of license abuse), illustrates the wide diversity of the people involved. We saw a broad spectrum of persons with all sorts of antecedents: innkeepers with ‘loose hands’ and a life history of unlawfulness (but rarely really serious if measured according to the punishment meted out); dirty restaurants; applicants and associates with (international) drug connections; ethnic minority entrepreneurs with informal financing and the ‘usual (organised crime) suspects’. The latter, mostly well-known, operate mainly in two bigger cities, making bells ring. So when one of the objectives of the Bibob act is to put up barriers against organised crime it appears to be mainly a tool for two big cities against well-known subjects. Spread over almost ten years with a maximum 10 “participation in a criminal organisation” in 2009 (yearly average 5), one can speak of a low-frequency phenomenon addressed with a ‘big law’.

When it comes to the ‘economic weight’ of the targeted enterprises we observed that the value of most enterprises was moderate: for the whole set the acquisition value amounted to an average of € 45.000 and for the ‘serious danger’ subset € 65.000 (both median value). That is an interesting difference, but it could not easily be related to other variables: a differentiation with other variables (number of antecedents, type of business) soon results in too small numbers, particularly if also broken down by year and town.

A final remark about the ‘population’: we repeat that the research population is the whole set of advices (= 100%) and not the persons listed in the applications. Of course, the advices are based on information of each person mentioned in the application. In cases in which more than one person are listed, one of them with sufficient serious criminal backgrounds can lead to a ‘serious danger’ annotation even if there are no objections against the other listed persons: (s)he is the ‘rotten apple’ in the basket, which was identified in 23 applications. However, in only one case the ‘rotten apple’ was actually the applicant. In all other cases he figured as subordinate staff, landlord, financier amidst other mentioned persons. Removing such a suspect stumbling block was in various cases sufficient to clear objections against licensing. Did that prevent abuse of license? Apparently all other conditions were positively fulfilled apart from one: “we don’t want to see his face in the premise”. Is that furthering the integrity of public administration decision making or keeping an economic sector clean?

## **Conclusion**

The analysis of the legislative process and the empirical observations allow the following conclusions. The lengthy path of legislation draped with much rhetoric did not only fail to reflect a real sense of urgency, it also did not impress in terms of consistency and coherence of argumentation. It had its roots in the period of intense fear of organised crime allegedly threatening the integrity of the public administration. Then a slow, almost leisurely path of legislation unfolded during which the organised crime argumentation appeared or disappeared according to the needs of the debate in Parliament. How 'serious' was organised crime taken seriously? In view of this wavering, it remains uncertain whether this law was really meant as a barrier against organised crime. In the end this phrase did not appear in the preamble of the Bibob Act, but in the debates accompanying the legislative procedure it figured from time to time nevertheless.

In 2013, at the occasion of the tenth anniversary of the Bibob Act, the organised crime argumentations, in the form of known rhetoric, were again extensively put at the fore by 'experts' while extolling the (unmeasured) effectiveness of this legal tool against the 'invisible enemy', as Van de Bunt and Van Wingerde (2013) called 'organised crime'. If they had only known that this enemy was barred only five times a year, sometimes only based on stretched assumptions or in the remote past, they may have reconsidered singing Bibob's praise. This restraint would certainly be appropriate against the still existing circumstance that the objectives of the law have remained unclear.

The ambiguity of the aims of the Bibob Act turns it into an instrument with an uncertain latitude of application if not arbitrariness. Is it a preventive tool against organised crime? The on-and-off use of this objective does not make it very convincing, certainly in view of the low prevalence of this assumed phenomenon. The official aim, expressed in the name of the law, is to protect the *integrity* of the public administration by taking precautions not to facilitate the commission of crime in licensed enterprises. In its application this laudable aim goes far beyond keeping serious and organised crime out of the 'threatened' sectors. We have seen that it extends its effective radius from the small coffee-house owner starting with unaccountable family savings of a few thousand Euros to the few multi-million firms in the construction industry; from the serious well-known criminal to the habitual violator of regulatory, fiscal and administrative rules. Without underestimating the need to prevent slovenly managed restaurants or bars by keeping the managers under control or to withhold unfit managers their license, this resembles rather a public nuisance control policy. This has certainly positive

effects, such as facilitating law enforcement by coercing entrepreneurs into compliance by subjecting them to a Bibob procedure when their license has to be prolonged while it improves the image of the licensed sector. These are positive side-effects, but not the reason for enacting this far reaching law with its many privacy intrusions.

Whether all this enhances the integrity of the Dutch public administration (internationally having already a high rating with Transparency International, with a high rank of 8 out of 177) is rather a matter of belief than an empirical question.<sup>16</sup> Therefore, from this perspective its actual impact is impossible to determine. With no discernible impact the foundation of the law is reduced to just another token of belief shared by a gullible congregation of right believers (Van Duyne, 2011).

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# The tides of thoughts and policy on the assessment of organised crime in Belgium

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## Introduction

Organised crime is not a ‘natural’ (criminal) phenomenon that can be observed, counted and classified like most other crimes, but is pre-eminently a social construct that strongly reflects policy choices and beliefs. Organised crime is something that is considered threatening or dangerous to society and, therefore, to be taken seriously. It is not a coincidence that the social construction aspect is frequently disregarded: indeed, organised crime is very often depicted as an acting, living being (von Lampe, 2008; Van Duyne, 2011; Vander Beken, 2012; von Lampe, 2013).

As the ‘organised’ character of the crimes is the single distinguishing feature (Finckenauer, 2005), the organised crime concept is only functional in an environment in which the organised nature of crimes is apparent and hence threatening, and in which traditional law enforcement strategies and results are geared to controlling the phenomenon. Not many European countries knew such an environment a few decades ago. Organised crime was something specific and exceptional. It was an issue for a country like Italy and its mafia problem with roots in the 19th Century. Or for policymakers across the Atlantic Ocean who were very worried about what was going on in some of their big cities and started to label a variety of criminal activities as ‘organised crime’ (Van Duyne and Vander Beken, 2009; Paoli and Vander Beken, 2014).

From the 1970s onwards, however, most European states started having problems with various forms of serious crimes and growing professionalism at the perpetrators’ side. Only in some countries questions were raised as to whether or not they were dealing with the same ‘organised crime’ as had been reported in the United States (Mack and Kerner, 1975). This was a slow but steady process. In Germany, for example, it took about 20 years before

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‘organised crime’ moved into the criminal policy debate (von Lampe, 1999 and 2001). But once there, it was there to stay. Even when in the early 1970s it became clear that what was happening in Germany did not quite fit the American mafia paradigm.

The next country to ‘discover’ organised crime, a bit later than Germany, was The Netherlands. It first popped up as a by-product of a 1985 policy paper on petty crime which contained a section on wholesale drug trafficking. It was further taken up by Cyrille Fijnaut who had studied the organised crime situation in New York (Fijnaut, 1985) and by the public prosecution service in a task force on serious and organised crime (Van Duyne, 2004). Although it remained rather unclear what organised crime exactly was, it was certainly something threatening and serious (van Duyne & Vander Beken, 2009), albeit there is some tautology here: there is no non-threatening or non-serious organised crime.

Nourished by the analyses and experiences Cyrille Fijnaut had brought to the Low Countries from the United States (Fijnaut, 1990), researchers increasingly became convinced that Europe had to pay attention to organised crime as well. Even more so as European countries began to think about their own interpretations and definitions of organised crime. For some European countries, Italy not included for obvious reasons, organised crime did not occur in a mafia sort of setting. That is why they started to develop their own definitions that put far less emphasis on pyramidal and hierarchical structures and on larger groups, but instead more on the objective to commit crimes in an exceptional manner in order to make a profit (van Duyne and Vander Beken, 2009).

The debates in Germany and the Netherlands, sparked discussions on organised crime in Belgium in return. In 1992, the Ministers of the Interior and Justice assembled the board of Prosecutors-General in order to define this phenomenon for operational and strategic reasons (*i.e.* prosecution purposes excluded) in comparable to the way the definition developed by the German *Bundeskriminalamt* (BKA). This definition was broad and included far more activities than what was understood as organised crime in the United States and Italy. Although Cyrille Fijnaut (Fijnaut, 1998) had warned of the dangers of overestimating the phenomenon as a result of an excessive definition, the choice for the BKA definition of 1992 was never really questioned. Nevertheless, a broad definition for operational and strategic purposes was not considered a problem as it was only to be used to categorise and understand perpetrators and groups and develop strategic reports about (the problems of) their containment. The fact that some criminal activities were labelled as ‘organised crime’ by this broad definition did not imply that these

groups could be qualified as ‘gangs’ or (later) as ‘criminal organisations’ in the sense of the Criminal Code and be prosecuted accordingly (see comparisons to other countries, Belgian Senate, 1998: pp.38-51).

The first, specific reports on organised crime in Belgium were not developed by the gendarmerie until 1996. For these reports, the Gendarmerie screened the investigations they were carrying out in order to determine which groups matched the BKA-definition. Subsequently it conducted analyses in order to develop assessments of the nature, the seriousness, and the scale of Belgian organised crime.

This chapter aims to trace the origins and future of organised crime assessments in Belgium. It presents a chronological overview of the evolution of the assessment and reporting on organised crime in Belgium since 1996 as a case of how ‘organised crime’ has been conceptualised and assessed in a European country and how ideas have developed and changed over time, influenced by the tide of policy interest and research. As the first author was a *participant observer* in many of the discussions on (the assessment of) organised crime in Belgium (as a policy advisor and expert to the Belgian federal parliament) and was involved in most of the Belgian organised crime research, this work is coloured by his own experiences and perceptions. His *quasi-monopoly* on research in Belgium on the assessment of organised crime combined with his position of ‘policy inspirer’, makes this paper special and vulnerable. It is as much a story on organised crime policy as on his own organised crime research (including unavoidable self-referencing): a kind of research autobiography. For this reason, ample room is given to list available scholarly comments and critiques on what was developed and proposed. The chapter is further co-authored by a researcher who has not been involved in either research or policy making on the assessment of organised crime in Belgium, but who has studied organised crime at an international level.

## **A new methodology for the Belgian organised crime (1996-2001)**

### **The 1996 government’s Action Plan and the short and long term methodology**

In an *Action Plan against Organised Crime* adopted by the Council of Ministers on 28 June 1996, the Belgian government declared its ambitions to step up

its efforts to not only combat organised crime, but also to better define the phenomenon. Aside from the statement that a special criminal law provision was to be drafted to make ‘participation in a criminal organisation’ a criminal offence, the policy plan emphasised that the prosecution of organised crime should be based on the most accurate perception of the phenomenon (Frans, 1998).

The 1996 Action Plan commissioned the Gendarmerie with the technical responsibility of analysing organised crime and of drafting strategic reports on its nature, extent and seriousness. This analysis was to be based on information from a survey within the Gendarmerie and analyses within the judicial police and brought together in a report authored by the Minister of Justice. Multiple sources were consulted for this analysis, *i.e.* the so-called soft and hard information on current investigations and open source data (Belgian Senate, 1998: p.208).

The Parliamentary Enquiry Committee on organised crime, which was established in the Senate to examine the prevalence of and the reaction to organised crime in Belgium, evaluated the new reports in 1998. It concluded that although the more elaborate data collection was a methodological improvement, the reports were still primarily drawn up on the basis of police information stemming from police investigations. In this context, the responsible officer of the Gendarmerie, Henri Berkmoes, declared before the Parliamentary Enquiry Committee that: “*Our way of working does not provide us insight in the number of criminal groups. We are only able to verify the number of investigations the gendarmerie conducted in a certain year that corresponds to the definition*” (Belgian Senate, 1998: p.209). Because of this limitation, the method used for reports regarding organised crime up until then was labelled as *short-term*. In the *long-term*, a method was needed that would process other and more forward looking information and involve new actors like the public prosecution services (Frans, 1998).

### **The 1999 proposal: a risk based methodology for the Belgian reports**

In the framework of the assignment to prepare and shape the annual reports on organised crime and following the ideas of the Action Plan and the recommendations of the Parliament, the Gendarmerie started to reflect on how these reports could be improved. One aspect was the search for a way to process information that did not come from law enforcement services, in order to reduce the strong police bias in the representation of organised

crime. Furthermore, the Gendarmerie wanted to transform the essential retrospective character of these analyses (a report on the situation from the previous year) to a product that also contains elements of prospection (a report on what is to come).

In the framework of this search, a public tender for a short-term external scientific research project was drawn up and finally granted to the *Institute for International Research on Criminal Policy* (IRCP) of Ghent University. In the final report of this six month study (Black *et al.*, 2000), a risk approach and method was suggested for the Belgian long-term methodology. It was believed that the reports could be more future-oriented in this way. Moreover, suggestions were made for the ways of data collection, from the (legal) environment of organised crime (by means of environmental analyses and vulnerability analyses), to be used to tell something about organised crime.

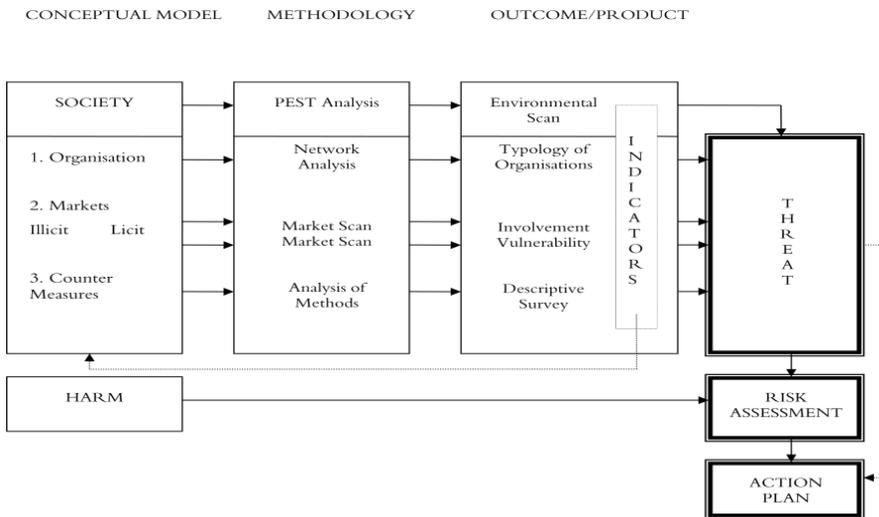
### **The proposal becomes the Belgian methodology (2001)**

When the (meanwhile new) Minister of Justice was appointed as the director of the new governmental *Federal Safety and Detention Plan* in 2000, several projects were included that were related to organised crime. The explicit objective of *project 27* of this plan was to improve the quality of the annual organised crime reports. On the one hand, an upgrade of the short-term methodology was suggested which to enable the collection of more and better data and would have to include more governmental services (such as the various special inspection services, the prosecution service, the state security service, the Cell for Financial Data Processing, etc.) in the development of the annual reports. On the other hand, the project aimed to pay more attention to the *long-term* methodology, explicitly mentioning the approach and components suggested in 1999, *i.e.* risks, threats, and economic sector vulnerability analyses (Vander Beken *et al.*, 2012). In order to realise the second component of *project 27*, the Minister of Justice decided to assign a follow-up study to the IRCP in which the results of the study conducted for the Gendarmerie in 1999 would be made applicable to the annual organised crime reports.

The follow-up study (Black *et al.*, 2001), that also benefited from the input from the (meanwhile) Federal Police, recommended to insert multiple risk analysis sections in the organised crime reports. It was deemed crucial to not only examine the probability/frequency/potentiality of criminal groups (*i.e.* the first aspect of each risk analysis), but to also take the

consequences or harm into consideration (*i.e.* the second aspect in risk analyses). Furthermore, it was recommended not only to develop a threat analysis of what criminal groups in Belgium are capable of, including the use of so-called counterstrategies, but also to draw up environmental analyses, economic sector vulnerability analyses, and studies regarding the involvement of organised crime in criminal markets (Vander Beken, 2004). The research report also proposed a conceptual model. In this model a risk assessment is based on the evaluation of harm and threat. Organised crime may cause harm and threaten society by the organisation of the criminal groups and the counter measures they use, the involvement in criminal markets and the exploitation of the vulnerabilities of the economy. It lists methods to make assessments of each of these aspects and reports in which the outcomes are summarized and translated into indicators and recommendations (Figure 1).

**Figure 1: Conceptual model for risk analysis**



Source: Black, et al., 2001: 16

Belgian policymakers, aware of the challenge to effectively use the study's recommendations in their organised crime reports, believed in the validity and applicability of what was being proposed by Ghent University and decided to give it a try. In 2001, the Minister of Justice ordered that the model and method suggested by the study should be gradually implemented and applied to the Belgian organised crime reports (Dienst voor het Strafrechtelijk Beleid, 2010: p.30).

## **The Belgian approach exported: the presidency of the European Union (2001)**

On the European level, discussions on the quality and the function of organised crime reports show striking similarities, both regarding timing and content, with those in Belgium, (for a specific description, see Vander Beken, 2005; van Duyne and Vander Beken, 2009). In 1993, the European Council decided to draw up annual strategic organised crime reports. During the first few years, these reports were called *Organised Crime Situation Reports* (OCSR) and were developed by Europol based on member state contributions. Both the quality and the quantity of these contributions differed greatly between the member states, and depended very much on what law enforcement agencies wanted and were able to report on this phenomenon (see Vander Beken, *et al.*, 2004a). At the end of the 1990s, the added value of the policy, the method applied, and the focus of these reports was, just like in Belgium, heavily criticised. German and Swedish delegations, the European Commission, and Europol itself stressed the importance of a new European reporting method and explicitly called for more future oriented and threat analyses as well (Vander Beken, 2005a).

Belgium's EU presidency in the second half of 2001 brought together the agendas of both policy levels. As the country had already been investing in developing concrete plans to improve organised crime reports, it does not come as a surprise that the issue was raised on the Council level under Belgium's presidency. During this presidency, Belgian representatives managed to have an extensive action plan approved by the Council that sought to thoroughly revise the European methodology (European Union Council, 2001). As this action plan had adopted the Belgian conceptual model and methodology, the Belgian methodology seemed to have received European (policy) validation.

### **It makes sense. But can it make a difference?**

Academic observers were more cautious. Von Lampe, for example, called the new approach a causal model that did not take any conception of organised crime as the dependent variable (von Lampe, 2011: p.296). While being rather positive about the global idea, the general opinion was that there were some conceptual flaws and that the plan was not yet ready for implementation:

“By getting academics involved in the design of its Annual Report on Organised Crime the Belgian Minister of Justice has made a giant leap that bridges a gap that all too often has hindered the emergence of a more rational understanding of organised crime. [. . .] However, from “*Reporting on Organised Crime*” it is not clear whether future Belgian organised crime reports will substantially differ from the previous ones, or whether the scholarly contributions by the Ghent University will merely serve as decoration for reports that continue to selectively represent portions of the social universe in accordance with institutional interests and preconceptions. “*Reporting on Organised Crime*”, despite a high level of theoretical discussion and an impressive penetration of the academic literature, contains too many loose ends and leaves too much to the discretion of officials to mark a definite parting from old established ways.” [. . .] “Finally, the conceptualisation of the link between particular manifestations of organised crime and their impact on society is such that stereotypical imagery is not challenged. The ‘risk-based methodology’ is not straightforward regarding the assumed linkages between the highlighted empirical phenomena and their perceived significance in terms of threat and harm. Rather, the enumerated group attributes and environmental factors are treated as if their relevance were more or less self-evident.” (von Lampe, 2004: p.97)

“Thus, as Vander Beken (2004) has argued effectively, a comprehensive approach to RA requires different forms of assessment. Principally, one needs an assessment of systems of control and regulation that manage risk, an assessment of OCNs themselves, including their attributes and activities, and finally an analysis of what Vander Beken terms ‘licit and illicit markets’ to identify emerging criminal opportunities” (Hamilton-Smith and Mackenzie, 2010: p.263).

“This approach is intellectually rigorous, but difficult to operationalise, given that in the words of Vander Beken, law enforcement agencies ‘fight criminals and organisations, not market situations’” (Alach, 2012: p.492).

“[w]hile attractive for the broad picture it promises to draw, Vander Beken’s risk-based approach presents some of the difficulties discussed in the previous studies and adds to them new ones, as it does not succeed in providing clear and reproducible – that is reliable – instructions for the tripartite analysis it suggests” (Zoutendijk, 2010: p.80).

One observer did not only point at the problems of the adopted approach, but suggested a way to embrace the uncertainties and the inherent normative nature of the concepts of threats and harms of organised crime by proposing

“a participatory approach, by giving voice to an extended peer-community and stakeholders. [. . .] Democratising strategic intelligence thus constitutes a way (in combination with empirical facts on specific and ‘measurable’ elements of organised crime) to ensure accountability and reasonability of the decision-making process related to setting police priorities” (Rønn, 2012: 61).

## **The methodology (not) applied (2001-2011)**

### **New chapters in the Belgian reports**

Following the decision of the Minister of Justice, the design and the content of the Belgian organised crime reports changed; at least to some extent. The introduction explicitly referred to the risk based methodology and the table of contents changed significantly. New chapters on vulnerability of economic sectors and environmental scanning were introduced (Dienst voor het Strafrechtelijk beleid, 2003, 2005, 2007 and 2010). Did something really change or was von Lampe right to predict that the new reports “*will [not] substantially differ from the previous ones*” and that “*the scholarly contributions by the Ghent University will merely serve as decoration for reports*” (von Lampe, December, 2014). A closer look shows a nuanced picture.

#### **1. Threat posed by criminal groups**

The cornerstone of the Belgian organised crime reports has always been the analysis of organised crime groups and a compilation of detailed and interesting information on identified groups and their crimes. As such, the quality of these analyses was high. According to some – but only few people knew and could consult them as they were classified – these reports were among the best in Europe (Fijnaut and Paoli, 2004: p.257).

From 2003 onwards and guided by research within the Federal Police, the analysis became more focused on the ‘organisation’ of criminal groups and the ‘danger’ they could pose because of their sophistication, efficient isolation or sustainability (Dienst voor het Strafrechtelijk Beleid, 2003: p.24). In later reports this was explicitly qualified as a threat approach, conceptualised through the analysis of the efficiency and sustainability of the criminal organisation (Dienst voor Strafrechtelijk Beleid, 2007: p.13; Zoutendijk, 2010: p.70). The 2010 report further developed this threat approach by the

assessment of operational and adaptive organisational processes of criminal groups and the ‘success’ of these groups. The application of this approach provided detailed pictures of the ‘criminal potential’ of identified groups and made ranking possible (Dienst voor het Strafrechtelijk Beleid, 2010). Without a doubt, this part of the Belgian organised crime report can be qualified as a threat assessment. The reports, though not literally, thus implemented an important part of the envisaged risk-based methodology.

## **2. Vulnerability of economic sectors**

While the Federal Police invested a great deal of time and resources in the development of the threat assessments, research at Ghent University focused on the creation of a tool to analyse the vulnerability of economic sectors and markets to organised crime.

The vulnerability approach can be traced back to Dwight C. Smith (1980) who was one of the first to realize the importance of analysing the context in which organised crime operates. He (partially) diverted from the traditional approach followed until then (which concentrated on the characteristics and the activities carried out by organised crime groups) by adopting a wider approach that paid attention to the markets where such groups operate. In his ‘spectrum-based theory of enterprises’, Smith (1980) concentrated on the structural forces that determine the logic of organised criminal forms and activities, and theorised that the contingencies and logistical requirements of particular activities lead to similarities between legal and illegal enterprises and differences across sectors. Following this reasoning, the next step is to acknowledge that there is a point where the two kinds of businesses—legal and illegal—meet. This point is profit, which is the main motive of both activities. This was picked up by Albanese (1987 and 2008), who made “*an exploratory attempt to predict ‘high-risk’ business conditions*”, rendering businesses vulnerable to organised crime infiltration (Albanese 1987: p.103). Albanese (1987) stresses that his model is designed to predict an intermediate condition (*i.e.*, high-risk business), rather than the ultimate behaviour of concern (organised crime).

In Ghent, a first methodological model for the assessment of vulnerability to organised crime was developed together with economists at the University of Antwerp (Vander Beken *et al.*, 2003) and applied for the first time to the diamond sector (Vander Beken *et al.*, 2004). That model was later specified and refined in a study for the European Union that had it incorporated into its research programmes to feed the Europol’s Organized Crime Threat Assessment (OCTA). This led to a road map known under the acronym

MAVUS (Method for Assessing the Vulnerability of Sectors) (Vander Beken *et al.*, 2005) and to applications to specific economic sectors such as the European transport sector (Bucquoye *et al.*, 2005), the European music industry (Brunelli and Vettori, 2005), the European pharmaceutical sector (Calovi and Pomposo, 2007), the fashion industry (Calovi, 2007) and the European waste management industry (Van Daele *et al.*, 2007; Vander Beken and Van Daele, 2008).

In the academic world, the vulnerability approach and its methodological roadmap were generally better received than the overall risk-based framework. Once again, the idea and the approach were more welcomed than the roadmap itself:

“There has been a great deal of law and enforcement activity addressed to organised crime, but much less attention to the possibilities for reduction and prevention of its occurrence. To what extent can the opportunities for organised crime be limited more effectively? Do organised crime control policies exert any preventive impact? To what extent can organised crime involvement in a market or geographic area be anticipated? These are the kinds of questions to which there has been granted too little consideration” (Albanese, 2009: p.416).

“Vander Beken’s study is important for emphasizing that organised crime thrives in sectors with a low-skilled workforce, high competition, and considerable ambiguity in formal protocol. The most important is that such parameters are conducive to the criminal setting above all since the participant is generally low-skilled, competition is typically hostile, and rules and regulations are commonly conceived on an ad hoc basis” (Morselli, 2010: p.54).

“In terms of sector vulnerability approaches to organised crime, I have found two approaches to be especially helpful: those of Tom Vander Beken in Belgium and Jay Albanese in the USA [. . .]. Vander Beken’s model contains considerably more factors, which makes it an impressively comprehensive tool for considering sector vulnerability. However, its breadth also makes it labour-intensive as a vehicle for regular use by police analysts, and it is rather too extensive for the purposes of a brief review of the vulnerability of the antiquities sector in the space we have here [. . .]” (McKenzie, 2011: p.75)

From 2003 onwards, the Belgian organised crime reports have a chapter on the vulnerability of economic markets or sectors. This chapter sometimes gives examples of vulnerable sectors (energy, diamond, real estate, telecom,

pharmaceutical products) (Dienst voor het Strafrechtelijk Beleid, 2003: pp.64-65), summarises the results of the vulnerability studies carried out by Ghent University (diamond, transport, music) (Dienst voor het Strafrechtelijk Beleid, 2005: 63-67), lists the economic sectors in which the identified criminal groups are active (Dienst voor het Strafrechtelijk Beleid, 2007: 80) or makes short statements about the vulnerability of the maritime sector, Authorised Economic Operator-certificates, specific professions and the pharmaceutical sector (Dienst voor het Strafrechtelijk Beleid, 2010: pp.124-127).

Formally, these chapters were an implementation of what had been proposed in the risk-based methodology. In reality, however, they were not. The main problem is that even if some of the studies and the materials presented in the reports could qualify as vulnerability studies or assessments they were entirely disconnected to the rest of the organised crime report. What does the vulnerability of an economic activity really tell about organised crime and criminal groups if it is not possible to ascertain whether vulnerabilities are or are likely to be exploited by criminals? Creating a 'vulnerability' chapter in the organised crime reports, did not bring vulnerability into the assessment of organised crime.

### **3. Environmental scanning and scenarios**

Environmental scans are conducted to gather and subsequently process information about the external environment of organised crime. It is a process that requires limited dedicated resources to identify major trends affecting an entity and enabling analysis to define potential changes. As such, it contributes to the development of a proactive focus and clarifies the relationships between identified trends (convergence, divergence, change in speed etc.) and the posture of the organisation. The goal of environmental scanning is to detect external changes as early as possible to give decision makers sufficient response time to react to the change (Vander Beken, 2004). Consequently, the scope of environmental scanning is broad (Morrison, 1992). There are numerous ways in which environmental scanning is done and its success depends predominantly upon providing a structure that reflects the broader environment. The most common method for examining the macro-environment capable of affecting organisational interests (directly and indirectly) is to consider its theoretically separate components or sectors. This generally means scanning for developments that fall under the broad headings of the political, economic, environmental, social and technological sectors.

As the environmental scan was another component of the risk-based methodology, the Belgian organised crime reports also had an environmental scan chapter. In the 2003 report the chapter consisted of one page (Dienst voor het Strafrechtelijk Beleid, 2003: p.11). In the 2005 report, however, the chapter was not only significantly extended but also conceptually changed (Dienst voor het Strafrechtelijk Beleid, 2005: pp.2-11). In the meantime the European Commission, confronted with a constant demand for better and more future-oriented reports (see below), funded research that sought to develop a methodology to conduct environmental analyses to be used in organised crime analyses. This study's results were rather surprising and even contradicted the basic principle that environmental analyses themselves are no useful tools to draw up future-oriented (organised) crime reports (for reports on the subject, see, for example, Vander Beken, 2006; Verfaillie and Vander Beken, 2008). Crime reports themselves create an overly static and past-oriented image that does not give enough freedom to anticipate to insecurities. Scenario exercises, however, can be more beneficial in this respect. In the framework of this European study, scenarios about the futures of organised crime were drafted for Belgium by the Ministry of Justice (Reynders and Van Driessche, 2006) and summarized in the 2005 report.

The scenario approach was not taken up again in later reports. Scenarios are not suitable if a mere two years outlook is envisaged. The 2007 report therefore listed, scanned and updated the driving forces that had been identified in the scenario-work, but did not provide new scenarios (Dienst voor het Strafrechtelijk Beleid, 2007: pp.84-99). The 2010 report did not even make any references to scenarios at all and provided a short scan of social trends instead (Dienst voor het Strafrechtelijk Beleid, 2010: pp.38-41).

Again, formally this aspect of the risk-based methodology was implemented. Over the years, the design and content of this implementation changed significantly from general scans to scenario's and back again. None of these scans and analyses, however, managed to demonstrate an added value to the organised crime reports. The results and conclusions of the scans or scenarios were too general and too disconnected from the other data of the report to have an impact on the report as a whole.

#### **4. Harm**

An assessment of the harms or impact caused by organised crime was envisaged in the risk-based methodology. But there were very little specific tools or methods in the initial studies about how to actually perform such an analysis. Over the years, very little was done to explore this avenue. In 2003

and 2005 the organised crime reports had a very short chapter on the impact, listing examples of harmful activities like VAT-fraud, money laundering, and car theft (Dienst voor het Strafrechtelijk Beleid, 2003: pp.77-78 and Dienst voor het Strafrechtelijk Beleid, 2005: pp.68-70). The 2007 and 2010 reports did not have anything on impact or harm.

## **Risk-based methodology in Europe absorbed and overruled by OCTA**

The momentum created under the Belgian Presidency to introduce the Belgian risk-based methodology in the European arena, did not immediately lead to the results some had expected or hoped for. Within the European Union, the Belgian action plan slightly faded away. Furthermore, a feasibility study of this plan (Vander Beken *et al.*, 2004b) indicated that the introduction of risk analyses on a European level was overly ambitious. For many member states, this was a totally new approach that was difficult to integrate within *their system*. Many member states simply did not have the data to execute such analyses or did not have the analytic knowledge or methods. Other member states such as Germany, the UK, Sweden and the Netherlands had similar, though other ideas about how risks and threats were to be introduced in organised crime assessments in both their countries and on a European level. One of the authors of the Belgian action plan summarised its implementation as follows:

“The Member State colleagues hide behind the competent and ambitious, but difficult to realise argument, because they have little to no experience regarding threat and risk assessment methodology and are not willing to adapt their national data collecting processes to the European standards, while Europol, the only partner that is able to guarantee continuity on a European level, has insufficient in-house expertise or invests insufficient means in further development” (Frans, 2005: p.51, own translation).

Eventually it was decided that as of 2006 Europol would draw up an *Organised Crime Threat Assessment* (OCTA) that should allow for setting policy priorities. Although there were implicit references to the Belgian action plan in the (first) OCTA reports (the conceptual model had been copied without mentioning the source), or at least in their so-called *closed* versions that were not meant for public eyes, there was hardly any real relationship with the final product (van Duyne and Vander Beken, 2009; Carrapiço and Trauner, 2013). Although the OCTA reports received significant visibility

and support on a European level, the reports did not redeem their promises: “Unless Europol provides evidence to the contrary, the evaluation of the instrument used leads to the conclusion of an unreliable and invalid threat assessment. Europol’s ‘knowledge denied’ policy is against this background significant and worrying” (van Duyne and Vander Beken, 2009: p.265).

What happened in Europe did not fully deviate from what the risk-based methodology stood for. Even if the OCTA-reports used another terminology, they introduced aspects of what could be called the threat of criminal organisations (Zoutendijk, 2010: p.69). The so-called “*key facilitating factors with regards to criminal markets*” and references to, for example, the road transport sector in the European Union being used to facilitate a varying assortment of crimes requiring the transport of goods or people (Europol, 2006: p.19; Vander Beken, 2012) certainly point to a sort of vulnerability approach. Nevertheless, the EU Action Plan founded on the Belgian risk-based model dropped from the European radar.

## **The all-encompassing risk-based model put into question (2008-2011)**

### **Risk, uncertainty and resilience**

By the end of the 2000s, it was clear that the risk-based methodology was confronted with two major challenges. On the one hand, there were serious implementation problems and difficulties in connecting the different parts of the model to allow for overall policy conclusions and priority setting. What was the relationship between what had been found in the threat analysis of criminal groups and the results of a vulnerability study of an economic activity or sector? What to do with the outcome of an environmental scan or scenario for general policy conclusions on organised crime? On the other hand, there were—and have always been—concerns about the concept and foundations of the risk-based approach. A risk discourse is characterised by the belief that a (crime) phenomenon is not only measurable, but also manageable. Risk-based organised crime reports have the underlying assumption that it is possible to catch criminals and/or shape the environment in a way that crime can be prevented. If there is structured and manageable knowledge about who and what to fight, effective tackling and prevention of crime is believed to be possible. This risk discourse has significantly lost its strength, particularly in discussions on serious crime. 9/11’s events, but

also the ones caused by the financial credit crunch, have indicated that some things – so called Black Swans (Taleb, 2007)–cannot be calculated, predicted, and prevented (Klima *et al.*, 2011). Our research on environmental scanning already pointed to the need to think less statically about the futures of crime and to accept uncertainties and try to integrate them in a dynamic, reflexive forward looking approach to crime (Verfaillie and Vander Beken, 2008; Vander Beken and Verfaillie, 2010). Accepting uncertainties about events that might happen but which we may be unable to influence, brings issues of harm and harm reduction (back) into the picture. If criminal activity cannot always be stopped or prevented, thinking about the consequences or harms of crime is unavoidable.

Both these concerns about the implementation and viability of the risk-based approach and the changes in thoughts about what relevant crime assessments can and should be, triggered new research in which there was room to put everything on the table and think again. Belgian Science Policy funded a three year (2008–2011) study to think about the relationship of perpetrator-based and environmental vulnerability-based approaches and assessment. The study was coordinated by Ghent University, but carried out both by the KU Leuven (with Letizia Paoli taking the lead there) and Ghent University. During the study it became clear that focusing on perpetrator-based threat approaches and vulnerability assessments was not enough. There was definitely a need to bring in discussions about harm and reflect on the place of these three approaches in assessments on organised crime (Vander Beken *et al.*, 2011).

### **Vulnerability to serious crime?**

Convinced of both the relevance and weaknesses of the MAVUS-model and eager to find the place of the three approaches in the reporting on organised crime, Ghent University embarked on a new research track on vulnerabilities of the legal environment to crime. Contrary to the initial concept, the plan was to study vulnerabilities to (organised crime) without predefined factors and indicators on the table and focus on building an approach on what could be empirically observed and analysed. On the one hand, this resulted in a significant revision of the vulnerability approach and a less complex model. On the other hand, the concept of vulnerability was broadened, with the introduction of the concept of *resilience* and a distinction between pre- and post-crime vulnerability. It was believed better to see vulnerability as a dynamic rather than a static concept that includes elements of recovery or

resilience after the impact of the crime (Klima, 2012; Vander Beken, 2011). This approach thus encompasses not only prevention oriented risk assessment elements, but also issues that relate to the uncertainty or unavailability of harm caused by crime (Klima *et al.*, 2011). Applications of this approach delivered other, but compatible results to what was found with MAVUS (Klima, 2011). It also became clear that a vulnerability study has different purposes and results than threat or harm assessments. Moreover, vulnerability studies are not suited to be integrated in assessments that specifically deal with 'organised' crime if this is conceptualised around the level and the nature of the organisation of criminal groups, unless it is about an assessment of the vulnerability of a certain environment to specific types of criminality, which may be rather labelled as 'serious' than 'organised' crime. As a consequence, it was concluded that vulnerability studies are useful tools, but not to be used as part of an assessment that has 'organised' crime as its subject.

## **Harms of crime?**

In his part of the Danger-study, the KU Leuven research brought the harms approach on the Belgian agenda. Letizia Paoli and her team developed a framework to assess the harms of crime (Greenfield and Paoli, 2013) and among others delivered an interesting assessment of the harms of cocaine trafficking in Belgium (Paoli, Zoutendijk and Greenfield, 2013). Again, this raised questions as to what can be done with the results of such analyses and, more specifically, what role this could play in the assessment of 'organised' crime. It became obvious that, when assessing harm of criminal activities, the term 'organised crime' serves little purpose anymore. Assessments of the harm caused by crime, or by 'serious crime' make much more sense than assessments of harms caused by 'organised' perpetrators. This shift from 'organised' to 'serious' crime is also clearly visible at the level of the European Union. Mandates of Europol and Eurojust are no longer about 'organised' crime, but about 'serious and organised' crime. EU Organised Crime Threat Assessments (OCTA) have developed into Serious and Organised Threat Assessments (SOCTA) and have a stronger harm focus than ever before (Paoli, 2014). For some, this might be a sign that the term 'organised' may become obsolete and disappear as a policy concept (Dorn, 2009). Why keep or have harm assessments in reports on organised crime? Why keep organised crime reports at all?

## **The threat of criminal groups**

Though highly critical about the confusing use of the term ‘threat assessments’ (Paoli, 2014) and the relevance and quality of such assessments (Zoutendijk, 2010), the Danger-study acknowledged the possible relevance of methodologically sound and transparent ‘threat’ assessments that focus on the challenges the organisation of crimes and groups pose to law enforcement authorities. For those tasked with the investigation and prosecution of crimes, reports on the ability and intentions of the perpetrators and groups they are dealing with can be very useful to set priorities, allocate resources and develop tactical responses. If there is room for an ‘organised crime’ report, it is for these groups of persons and their purposes (Vander Beken *et al.*, 2011).

## **The relationship between threat, vulnerability and harm**

Given the differences between threat, vulnerability and harm studies and the sometimes problematic relationship with organised crime reports, the Danger-project came to following conclusions:

- Challenge certainties that underpin the conceptualisation of organised crime (in Belgium);
- ‘Organised crime’ is only to be used for law enforcement policy and not as an umbrella policy concept;
- ‘Harm’ as a policy concept could be given a more prominent place in the analysis and priority setting of crime;
- Differentiate and link the various approaches: harm for general policy on security and (serious) crime, vulnerability for more specific (especially preventive) policy and threat for (especially repressive) law enforcement policy.
- Make the aim and the perspective within which an action is launched more explicit;
- List the existing approaches and combine them to policy cycles at various levels.

**Table 1**  
**Integration of harm, vulnerability and threat assessments into the Belgian policy framework**

Policy level	Questions	Aims	Focus	Approach	Belgian policy frame
<b>Macro</b> (society, company,...)	Is/will it be serious and harmful?	General policy on (social) prevention and repression	Harmful activities or events (crimes and other aspects of insecurity)	Harm/ Seriousness	General (security) policy and plans “Police Security Image”
<b>Meso</b> (part of society or company, department, sector,...)	How could/ can this happen?	Special policy on (situational) prevention and repression	Elements of the legal environment	Vulnerability	Absent for now. First attempts within Fed. Police, economic sectors and academic world
<b>Micro</b> (individuals and groups)	Who does/ did/could do it?	Policy to improve law enforcement efficiency and effectiveness	Persons or groups who can/could commit (serious) crimes	Threat (harm)	Belgian organised crime reports

Source: Vander Beken *et al.*, 2012: p.142, translation

The idea to integrate harm, vulnerability and threat assessments in a broad policy framework with different questions, aims, focuses and policy outputs, corresponds to the three dimensions and ‘frames’ Edwards and Levi (2008) have advanced in their conception of a comprehensive research programme on organised crime. By contrasting the research frames of external threat with routine activities and social relations they argued that a synthesis of the different analytical focuses could prevent criminological research on organised crime being overly event-oriented. The three research frames used by Edwards and Levi can be linked to the three approaches advanced by the Danger project. The external threat frame of reference corresponds to threat assessments, routine activities to vulnerability studies and social relations to harm analyses.

## **Time for a new framework for the organised crime reports**

In May 2012, the Belgian Minister of Justice decided to develop a new methodology for the Belgian organised crime reports. In line with the conclusions of the Danger-report, it was decided to have an annual ‘organised crime report’ that contains the analysis of the threat of criminal groups only. This analysis can also be used for the Belgian contribution to the SOCTA. These organised crime reports do not contain chapters on vulnerability and harm. It is possible to have ad hoc thematic analyses about specific types of crime if this is deemed necessary.

The analyses of specific forms of (serious) crime and discussions about their harm are integrated in the existing *Nationaal Politieel Veiligheidsbeeld* (National Police Security Image). This is a system to prioritise (crime) phenomena in which harm aspects play a significant role (Pattyn and Wouters, 2008). While this system leaves some room to include results of vulnerability studies, it is expected that such studies will be conducted within and for specific departments or economic entities.

The plan is to develop a more general and encompassing ‘organised crime’ report – which may then be called ‘serious (and organised)’ crime report – that draws from the annual organised crime reports and the *Nationaal Politieel Veiligheidsbeeld*. It is the intention to link reports and plans closer and better to conclusions and policy priorities. This was also the objective of the Harmony project. Initiated under Belgium’s EU Council’s presidency in 2010, Harmony aimed at improving the EU’s fight against organised crime by streamlining and improving existing EU instruments. The project was very critical towards the use of the existing instruments, in particular towards the OCTA. Harmony offered options and recommendations to improve the EU’s policy cycle and allow the establishment of priorities (Frans and Van Oost, 2011). The policy cycle as conceived by Harmony, was adopted by Europol and is clearly present in the latest SOCTA of 2013. Based on strategic documents, action plans and the priorities set forth in the SOCTA, the Council of the EU identified nine priorities for the fight against organised crime (Council of the European Union, 2013).

## **Conclusion**

After fifteen years of academic research on the assessment of organised crime, it is clear that while organised crime remains high on the political agenda, there is still much confusion about what exactly could constitute organised crime and how it can be assessed in a way that enables policy makers and law enforcement agencies to develop well-considered and informed strategies and action plans. As the research at Ghent University coincided with numerous policy initiatives, even at the European level, and has informed some of these initiatives, it is not surprising that ideas on the assessment of organised crime interacted.

Throughout the history of organised crime reporting in Belgium, the different policy makers and authorities took the academic input seriously. Considered to be more inclusive and offering more political, and strategic scope, the risks, threats, and economic sector vulnerability analyses were adopted by the Federal Police. Later additions to the methodology, such as the environmental scans and scenario studies were included in the methodology as well, albeit briefly.

While the Federal Police experimented with the concepts and tools offered by several studies from Ghent University, it became clear that what is relevant and useful for scholars is not always as useful and relevant to practitioners. From the start, academic observers had warned that the adoption of the new methodology proposed by Ghent University by both Belgian and European policy makers would either prove to be unpractical to the police or serve as window dressing. In retrospect, these observers were proven right.

What particularly seemed to be problematic was the interconnection of the different scans and analyses. Different analyses were conducted separately, but there was either no time nor capacity to connect the dots and provide a comprehensive, relevant and sensible picture of organised crime in Belgium or in Europe. Indeed, this raised questions as to whether or not the different components (risk, threat, vulnerability, environment, scenarios and harm) can be interconnected into one comprehensible report and whether or not this is even advisable or desirable for policy makers. Too much information might reduce policy makers' powers to take decisions, while too little information might lead to pointless – and at worst, bad – decisions.

These experiences with organised crime assessments led to a review of the concept of organised crime and the relevance of that concept to inform policy makers. The Danger project revised the assessments on organised crime using a blank slate. While the study did emphasise the need to synthesise the results of threat analyses, vulnerability and harm studies, the organised

crime concept received a less prominent role compared to studies conducted fifteen years ago. Instead, harm, the impact of crime was emphasised, which is also mirrored in the shift in the use of the term organised crime to serious crime.

By differentiating the objectives of vulnerability studies, threat assessments, and harm studies, different policies can be made which render these assessments more tailor-made to the needs of policy makers. It seems that this message has been understood both in Belgium and in Europe. It remains to be seen whether the practical translation of academic insights will be successful this time.

The tide of thoughts and policy on the assessment of organised crime has changed over the years through academic research and multiple implementations. Two decades ago, it was recognised that a short term (police) assessment of organised crime did not render sufficient data to draw a picture of organised crime. Today, it is recognised that a long term analysis is needed, but not always feasible and that a synthesis of different methods, answering different questions and informing different policies, is needed in order to provide a picture of organised crime. Tomorrow, we probably will talk far less about organised crime, but concentrate on the harms serious crimes can cause and how to prevent them.

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# Cigarette smuggling at the local level through smugglers' eyes: How and why?

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## The geography of a smugglers' landscape

In recent decades the smuggling of tobacco and tobacco products has received significant attention in many fields, including criminology. This global phenomenon has major negative impacts on the global and national economy (Europol, 2011) and public health (Joossenes *et al.*, 2000). Furthermore, cigarette smuggling is linked to other types of crime and offenders. For example, some authors highlight connections with terrorism and drug smuggling (Coker, 2003; Rollins and Wyler, 2013), as types of most serious crime which are significant challenges in the modern world. Nevertheless, that is not always the rule (von Lampe, 2011). Moreover, individuals without any criminal record are involved in cigarette smuggling (see, *e. g.* Van Duyne, 2003).

Despite this interest, relatively little research on smuggling in general, and especially on cigarette smuggling, has been carried out in Bosnia and Herzegovina (B&H). While some investigative journalists have explored the issue and policy research is conducted (CIN, 2007; 2008; Mrkaljević, 2008), empirical research in this field is still absent. This lack of knowledge in the B&H is a problem and one of the reasons for the current research.

While all this justifies the present research, the main inspiration for the research project is the current local situation. Cigarette smuggling in the Bileća municipality has been a frequent topic in the media and the subject of rumours deserving closer investigation. Also, the story is made more interesting if we consider the arrest of officers of Border Police of B&H and officers in other agencies (State Investigation and Protection Agency - SIPA, B&H Indirect Taxation Authority) due to their participation in cigarette smuggling (CIN, 2007; Hercegovina info, 2013). In addition, there is the

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wounding of policemen and murder of smugglers (Bileća OnLine, 2006). It is also important to bring the commonness of this smuggling industry to the fore; according to CIN (2008) in the territory of Bileća Municipality, cigarette smuggling occurs nearly every day, including all activities of *carriers, drivers, street-sellers* and *legitimate shop owners* (definitions of these terms are provided below).

**Figure 1**  
**Bileća town and its surroundings**



B&H – Bosnia and Herzegovina  
F B&H – Federation of Bosnia and Herzegovina  
RS - Republika Srpska

MNE – Montenegro  
CRO – Croatia  
SRB – Serbia

Source: Google maps, modified by the author

B&H is composed of two autonomous entities (the Federation of B&H and Republika Srpska) and a third region, the Brčko District. As of the 2013 census, B&H has total population of 3.791.622 (Agency for Statistics of B&H, 2013). There are 142 municipalities. Bileća Municipality, with a population of 11.536, is among the municipalities with the smallest number of residents (Agency for Statistics of B&H, 2013). Before the war (1992–1995) the size of the population was similar to today (according to the Agency for Statistics of B&H total number was 13.284), but the ethnic structure was different. During 1992, much of the Muslim and Croat population left the town. At the same time, Serbs who had to leave their own residence in Western Herzegovina (and in some cases South Croatia – Dubrovnik region) came to Bileća. A significant number of them stayed in this town permanently. Twenty years after the war, some families still live in provisional homes (Vlada Repulike Srpske, 2012). According to the classification of the government of Republika Srpska, in the past decade the Bileća municipality has been classified as an undeveloped or an extremely undeveloped municipality (Savez opština i gradova Republike Srpske, 2013). In these desolate circumstances the citizens are continuously trying to find a source of income. Sometimes trafficking illicit commodities, such as untaxed cigarettes (Hojić, 2004) provides an income opportunity. The close vicinity of the border with Montenegro (with its own smuggling tradition) provides opportunities in this regard. Wholesalers import untaxed cigarettes into Montenegro (primarily from Italy and Greece) through the Port of Bar in order to distribute them throughout the region (Hajdinjak 2002; Hojić, 2004; Estevez, 2013). Little is known about this illicit trading.

Given this lack of knowledge, the overall aim of this research project is to obtain insight into the *modus operandi* of cigarette smuggling in the area of the Bileća municipality and to shed some light on this phenomenon viewed from the angle of the routine activity prism. What are the characteristics of organised cigarette smuggling groups and what are the features of their actors? On the other hand, in order to describe the applicability of routine activity theory to this situation, attention must be paid to motives, characteristics of actors and the physical surroundings of the smugglers' activities, but through the offenders' eyes. It will be interesting to see if cigarette smugglers have a clear idea as to who the victim of their action is. Thus, it is very important to explore respondents opinions on who the victims are and what characterises the victim, at least when it comes to the public fund and the legitimate cigarette vendors.

Contraband smuggling has been defined in various ways by different authors, but also differences exist in legal definitions. In the context of this

chapter, cigarette smuggling should be understood as the evasion of excise taxes on cigarettes by circumvention of border control (Yurekli, Beyer, Merriman, 2002) and activities linked with that, such as procurement and ‘movement’ of cigarettes. That is similar to the definition of the “illegal cigarette market” by von Lampe (2011).

## **Prior research on cigarette smuggling: who, how and why?**

### **Who smuggles cigarettes and how?**

Generally, goods smuggling began as a simple, small-scale evasion of duty by individuals (Estevez, 2012). Since the beginning, governments have been trying to suppress smuggling and to put smugglers out of business or at least under control. On the other side, smugglers were trying to increase their financial gain and were improving their own skills and the organisation of their ‘work’ which consequently became better organised. Today smuggling of goods usually requires a position in one of the organised groups or more of them- (Šikman, 2011) which are at present the main operators (Joossene & Raw, 1998; von Lampe, 2001; Antonopoulos, 2006). There are many other players involved in the illicit cigarette trade: apart from (organised) criminal groups, there may be terrorist groups and the tobacco industry itself (von Lampe, 2011). Some authors maintain that the illegal cigarette trade could be the domain of well-organised criminal groups who have previously been active in other areas of crime, for instance drug smuggling and human trafficking (Antonopoulos, 2008b). On the other side, Van Duyne (2003) found little evidence that individuals involved in the illicit cigarette trade have long criminal records (*e.g.*, previous convictions or other criminal experience).

With respect to the above mentioned research, it is very important to address the following question: Who participates in organised cigarette smuggling? “*The illegal cigarette market can be qualified like relativity open to anyone who has time and opportunity to become involved*” (Van Duyne, 2003: p.292). Authors inform us about three separate levels of cigarette smuggling: upper level, middle-level, and street-level (von Lampe, 2001; Antonopoulos, 2006). The profile of organised smuggling groups and their actors depends on the level of smuggling. At the upper level, smugglers include persons with respectable lives, persons who have certain knowledge, employment backgrounds and sometimes, political backgrounds (Hozic, 2004; see also

Van Duyne, 2003). They are able to buy and sell large quantities of cigarettes. To accomplish this, actors from upper levels use their connections. On the other side, dealers in the middle-level tend to operate in a very different way. Von Lampe (2001) mentioned that they usually hold menial jobs or are unemployed and derive most of their income from the cigarette business. Also, some of them may be legally employed and try to earn additional amounts of money (Antonopoulos, 2008b). Actors from lowest levels are recruited as unskilled labour from marginalized segments of society for exposed tasks such as unloading cargo (Van Dijck, 2007; von Lampe, 2001). That is the street-level population of cigarette smugglers. All this seems pretty clear in theory, but results shows that sometimes it is not easy to make clear distinctions between the mentioned levels. Also, persons with diverse social-economic and social-demographic characteristics participate in cigarette smuggling networks (Antonopoulos 2006), making the profiling of a typical cigarette smuggler complex.

## **Why cigarettes are smuggled**

It is a well-known criminological given that people tend to law breaking, even criminal offences, if they expect an advantage. Even classical school criminologists believe in the principle of the offender's free will, and more precisely, that crime is the result of a personal decision of perpetrators (Mladenović, 2001). Whether the benefit of crime is higher than costs of crime is the benchmark for a potential offender in decision making. In this cost-benefit weighing the law is a major cause of smuggling, because if taxes are increased, expectations of profits from smuggling are, likewise, raised (Beccaria, 1990). Thus, the tobacco industry has a point in arguing that smuggling is caused by high taxes or significant price differences. That should mean that a country with the mentioned characteristics (high taxes and price differences) could expect cigarette smuggling more frequently than other countries. However, in countries with high excise taxes (*e.g.* Norway, Sweden, Denmark) a large smuggling problem does not exist (von Lampe, 2011; Joossens & Raw, 1998) or at least the incidence of illegally traded cigarettes is lower than in countries with lowers excise taxes (*e.g.* Greece). On the other hand, Joossens *et al.* (2000) present studies informing us that the ease and cost of operating in a country, the presence and strength of organised crime networks, the likelihood of being caught, the punishment if caught, corruption levels, among other factors, significantly influence the illegal cigarette trade.

Thus, it seems meaningful to apply Clarke and Felson's (1993) "individual approach" to studies of decision making among (would-be) offenders. Talking about smuggling at the local level and the retail cigarette market, Van Duyne (2003) mentioned the cost-benefit analyses by participants. Also, other authors highlight offenders' desire to earn money through cigarette smuggling (von Lampe, 2001; Antonopoulos, 2008b). For those from the upper level and some from the middle-level of smuggling that means an additional surplus saving above daily spending. On the other hand, for street-level cigarette smugglers that usually means only money to meet daily expenses. Thus, cigarette smuggling should be linked to socio-economic status in specific areas, because sometimes cigarette smuggling is understood as an alternative to the lack of legitimate opportunities (Antonopoulos, 2006).

Traditionally, both geographical location and difficulties in supervision of state borders play a significant role in the prevalence of smuggling (Beccaria, 1990). These factors offer opportunities for potential perpetrators. Also, goods smuggling is kind of the offense with multiple perpetrators between which there is much variation. Moreover, some communities have a high level tolerance for smuggling, especially for cigarette smuggling which is not considered as 'really bad' (Joossens & Row, 1998; Antonopoulos, 2006; Estevez, 2013). Thus, formal sanctions for smuggling should not be too harsh and reflect the moral feeling of the people (Beccaria, 1990).

## **Methodology**

The present study is a case study, which aims to answer the questions of why and how smuggling occurs. This type of research is the preferred strategy when the questions of "how" and "why" are being posed, particularly when the focus is on a contemporary phenomenon within a real-life context (Yin, 2003). The case study's unique strength is its ability to deal with a full range of evidence.

The primary data collection method consisted of interviews conducted with ten persons involved in the smuggling process in the area of municipality Bileća. *The snowball sampling* method was used with the aim of reaching/finding respondents. The author had two acquaintances involved in the smuggling process; their subsequent recommendations and acquaintances have enabled interviews with an additional eight persons. Semi-structured interviews were used in the data collection process. It is important to note that the protocol for conducting the interview was designed to be, on the

one hand, related to respondents' attitudes about themselves (hereafter the 'respondents'), and on the other hand, related to their attitudes toward all persons involved in smuggling in the area of the municipality Bileća (hereafter the 'smugglers').

Interviews were conducted face-to-face with respondents, and it was planned to audio record these sessions. However, seven out of ten respondents did not accept this way of recording information. These interviews had to be conducted such that the information was recorded after the conversations. However, the relatively short duration of the interview (20 to 40 minutes), allowed for the majority of the data to be captured.

In order to ensure greater data reliability, additional data were gathered and analysed from the contents of articles from the three most widely read newspapers in the Republika Srpska (Glas Srpske, Nezavisne novine, Press RS). These articles, which were published between 1-1-2005 and 1-1-2011, were on the detection of smuggling in the area of municipality Bileća. 47 articles were identified, and together, they describe 15 detected cases of smuggling registered by the police in which 25 individuals suspected of cigarette smuggling were involved. In order to conduct this method of data collection, a data collection form was used specially created for that purpose. The primary role of the content analysis in this particular project was to provide some form of triangulation, where possible, of the main interview data. Broadly speaking, the results of interviews and content analysis are in agreement on issues such as the socio-demographic characteristics of smugglers. Due to the limitations of the media-based data, it was not possible to confirm interview findings concerning motivation of offenders and attitudes of the offenders.

This study should be understood as an effort to explore a previously unexplored problem in B&H and is, therefore, not without limitations. One of these limitations concerns the sample representativeness in this case. Little is known about the broader population of smugglers (quantitatively or substantively), and the main characteristics of this groups (involvement in illegal activities) necessitated convenience sampling. However, it is useful to note that each respondent noted that they know more than 100 people who are involved in the cigarette smuggling business in the area of the municipality Bileća, and they estimated size of smugglers population on one fourth of the total population in Bileća (that is about 3.000 people). However, the respondents were unable to split this figure based on different roles an involved person takes part in the smuggling process. Thus it is difficult to estimate how many of these ca. 3.000 actually act as carriers, look outs, warehouseman, drivers, etc.

Interviews were conducted between May and September 2011. From the start, the aim was to collect data about cigarette smuggling in the last five years (2006–2011). However, respondents' answers referred to a much longer period of time. Thus, it is more accurate to say that this chapter discusses cigarette smuggling in period from the end of war in 1995 until 2011.

There are also some limitations of the instrument used for data collecting – the protocol for semi-structured interview. In order to encourage respondents to discuss about all variables freely, and to provide them with higher level of anonymity, some trade-offs were made with regard to the accuracy of the data. For instance, respondents were asked to report about their ages and ages of other smugglers using the following scale: (1) – under 18; (2) – from 19 to 30; (3) – 31 to 50; (4) – older than 51. Also, when asking about specific smuggling activities or characteristics of smugglers, respondents avoided providing absolute numbers, and preferred to use general terms, such as “usually”, “most of”, “significant”, etc. Thus, the interpretation of the results lacks precision or accuracy at times.

Despite these limitations, the findings of the first research project on cigarette smuggling in B&H provide insight into this illegal market and can be used in the criminal policy making. For example, the results of this study can contribute to the development of comprehensive practical, operational measures aimed at the repression of this type of crime.

## **Findings**

### **Cigarette smuggling phenomenology**

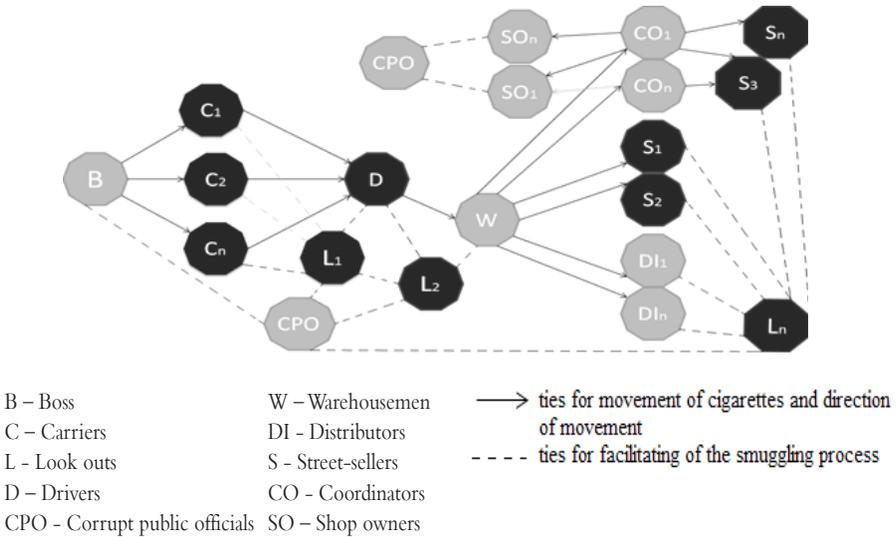
Many people from the Bileća Municipality are involved in cigarette smuggling. Every respondent reported about the involvement of over a hundred people in the black cigarette market at local level. Their activities are linked to two kinds of cigarette smuggling through roughly two kinds of *modus operandi*. The first one is characterised as an organised network, and the second one can be described as individual smuggling.

#### *Organised cigarette smuggling at the local level*

Organised cigarette smuggling groups operate in the town of Bileća. The groups are geographically rather static: more precisely, they always operate in the municipality of Bileća. Also, at the same time they are pretty flexible

concerning operation times. They are organised pragmatically when the opportunity for a “job” presents itself. Thus, the number and composition of members of smuggling groups can be quite different, and depends on the extent of the “job”. Sometimes it is just four to five individuals, but sometimes it could be more than fifty. Every person has a specific role in the network (sometimes more than one role), but on different occasions smugglers can carry out completely different roles. Using the respondents’ knowledge, the structure of the local cigarette smuggling network and its functional ties between actors can be composed according to Figure 2.

**Figure 2**  
**Structure of the local cigarette smuggling network<sup>2</sup>**



At the top of the local network is “the boss” (the local term used by smugglers). This is the man who buys large quantities of cigarettes in Montenegro and is trying to move them to the territory of B&H by circumventing border control. According to the respondents’ answers such operations involve 2, 3 or 10 trucks, where ‘truck of cigarettes’ means over 50 boxes of cigarettes (1 box contain 50 cartons or 500 packs). Our respondents could not answer questions about how and where in Montenegro the boss buys and stores cigarettes. He starts and organises the ‘job’ at local level, but the opportunity for the ‘job’ depends upon the broader smuggling network. He knows

<sup>2</sup> The black colour represents the roles of our respondents.

everyone in the network, directly or indirectly. To achieve his goals, the boss usually finds carriers. *Carriers* are people who carry packets of cigarettes from Montenegro to B&H for money. Usually that is a distance of 3 to 15 km, for a price of between 10 to 50 Euros per box. In addition to distance, price depends on the risk. If carriers take responsibility, the price is higher. At the end of that distance, *drivers* take the goods, and drive the cigarettes to the warehouse in the area of the Bileća municipality, and the *warehousemen* are in charge of the goods for a waiting period. For this job, warehousemen earn 30 to 50 Euros per day.

The boss then decides what to do with the cigarettes. The purpose of this is to move the cigarettes as soon as possible. There are three ways. The largest proportion of cigarettes is distributed to Western Herzegovina by *distributors* for other smuggling networks, who try to move cigarettes into Croatia. The second, smaller, proportion of the cigarettes are sold on the street. That is the *street-seller's* job. So far, the whole process is monitored by *look outs*. They have the role of watching and warning carriers, street sellers or distributors about the presence of police. Also, they have connections with police agencies, and get information about the movement of police officers (Border Police of B&H, Police of Republika Srpska and state level police - SIPA). For their job, they earn 30 to 100 Euros per day (depending on the quantity of cigarettes). The third part of smuggled cigarettes end up in legal shops in the towns. To achieve that, smuggling networks rely on *connectors* – the people who have connections with the boss and some street-sellers on one side, and *shop owners* on the other side. The connector's social position enables the coordination of important activities for the boss and shop owners who want to take their 'piece of the pie'. It is very important to keep in mind that the whole process of cigarette smuggling is practically impossible without *corrupt public officers*. Their role is to provide a smooth transit for vehicles with cigarettes, and to share information with look outs.

It is not necessary to organise a network with every mentioned actor. It is possible to organise the network with just a boss, carriers, corrupt public officers and distributors (B-C-CPO-DI). However, respondents have emphasised the importance of the CPO (corruption) factor. It seems that corrupt public officers are very often part of smuggling networks. On the other hand, the greatest numbers of actors are carriers, and then look outs and street-sellers. Due to their roles, these categories have the highest risk of arrest. Nevertheless, the roles within the network are not clearly divided, except the B(oss) and CPO component. Many actors can carry out multiple roles, or do different work in different actions. Also, there is no rule about who can be part of organised groups. That could be everyone who wants to

be involved. One respondent said: “*Everyone in the town knows everything about smuggling, and can do that just like me.*”

One might expect that actors have strong ties in the smuggling network, but ties are very different in different cases and in different groups. Nevertheless, they are usually weak ties and very rarely are they strong as is the case with ties between corrupt public officers and the boss are usually strong because that relationship requires significant trust.

### *Individual cigarette smuggling*

Some citizens from the Bileća Municipality go to Montenegro to buy a small quantity (usually up to 10 boxes) of cigarettes from street-sellers. Then, with their own vehicles (sometimes with buses) they drive cigarettes over the border into B&H, and store them in their own houses, garages or warehouses. Finally, cigarettes will be sold to consumers in Bileća or distributed to Western Herzegovina. Individual cigarette smugglers know many consumers in the local area which facilitates the job. Sometimes, they work on call. This kind of smuggling existed throughout period after the war. One of respondents said: “*In that way, me and friends of mine are providing subsistence for our families in the last fifteen years.*” There are also cases of smuggling smaller amounts cigarettes (from 2 to 10 cartons = 20 to 100 packs). Respondents have described that some individuals who are frequently crossing the border for their routine activities (e.g. students, bus drivers and so on) bring cigarettes into B&H.

There is no rule dictating who carries out cigarette smuggling in which of the mentioned ways. Independent smugglers are also included in some organised groups. Which method will be used is usually pragmatically determined. Smugglers usually prefer organised smuggling. According to the interviewed smugglers, individual smuggling is less profitable. Not only are the financial benefits lower (it takes more time for small quantity of cigarettes), but – most importantly – the chances of circumventing border controls are smaller. Police officers very rarely make a deal with independent smugglers, so the risk of identification and sanction is significantly higher.

### *Characteristics of offenders*

A significant part of every phenomenon is its actors and their characteristics. In this case, socio-demographic and socio-economic characteristics of smugglers could be very important. The following points of attention are deduced from the interviews and media data analysis:

- Organised cigarette smuggling networks include persons from all categories of age (less than 18 – minors; 19 to 30 – young adults; 31

to 50 – Middle age; more then 51– older age category). According to respondents’ statements, the most frequent categories in smuggling are older adolescents (15 to 18 ages) and young adults. One respondent declared: “*I was carrying boxes of cigarettes when I was twelve*”. Content analysis of media data provides the age distribution of all age categories as presented in Table 1.

**Table 1**  
**Age of smugglers – Content analysis**

<b>Age category</b>	<b>Frequency</b>
Children (under 18 )	4
Young (19 to 30)	15
Middle age (31 to 50)	5
Older (older than 51)	1
Total	25

Table 1 shows that the “young persons” category is the most frequent age category among smugglers. Also, it suggests that older people are least involved. The youngest person is a 16 year old boy and the oldest person is 72 year old man (mean = 26,4).

- Today, persons involved in the cigarette smuggling business are usually male. In that population women represent 10% to 20% approximately, respondents said. Respondents also suggested that in the period immediately following the war, women were the main street-sellers of smuggled cigarettes. According to content analysis results, in a population of 25 identified smugglers for the period 1-1-2005 to 1-1-2011, there were 5 women.
- Smugglers are usually persons with a high school degree but for some reason did not continue their scholastic education.
- A significant number of persons included in cigarette smuggling are displaced people and refugees (in the local community the only term used was “*refugees*”), precisely those persons who had to leave homes in Western Herzegovina at the beginning of the war. One smuggler conveys: “*Refugees began every kind of smuggling in Herzegovina*”.
- Respondents emphasize that smugglers generally are unemployed persons (of course excluding ‘public officials’ who also participate in cigarette smuggling). Some of the bosses were (self-) employed. Some of them were owners of bars, shops or car washes.
- Persons who are involved in cigarette smuggling are also involved in the smuggling of some other excise goods (coffee and alcohol) and oil. All

of respondents said that they have never been involved in smuggling in illegal goods (e.g., child pornography or illegal drugs) or goods which require license or permission (e.g. pharmaceutical drugs or explosive agents). Eight of ten respondents said the same for other smugglers, but two respondents believe that some of bosses are also involved in other contraband smuggling.

- Respondents did not have any experience with the criminal justice system. They also indicated that most others in their networks did not have such experience. Nevertheless, some of bosses have previous criminal records. It is interesting to note the attitude of respondents, who feel that smuggling generates violent crime in the town, particularly between smugglers.
- All respondents are citizens of B&H. According to their knowledge, most of smugglers in the area are also B&H citizens. Just small a number of smugglers are Montenegrins.

## **About the aetiology of cigarette smuggling**

This part of the chapter presents results that support the description of an aetiology of cigarette smuggling in the Bileća Municipality. According to interviews with respondents, the following factors are significant in perpetrators' decisions about smuggling:

- Cigarette smuggling was the only source of financing for most of persons interviewed, especially for displaced people who were trying to provide an existence for their families. Economically they had little of a free choice. First of all they were trying to provide food, home and school for children. On the other hand, cigarette smuggling provided additional income for some. Those people are originally from Bileća Municipality, who remained there during and after the war and who organised smuggling operations from the beginning of the post-war period till present. To others they offer opportunities for smuggling.
- Cigarette smuggling was not considered as a really criminal conduct, at least not by smugglers. Black cigarette trade and cigarette smuggling has existed in the area of Herzegovina since time immemorial that one can consider it as a kind of long-term side-job tradition. *“My grandpa and his father were doing that. I do that together with my son. We are trying to survive . . .”* Respondents actually think that they do the right thing. *“ . . . we provide cheaper cigarettes for smokers”*.

- Respondents believe that society approves of their decision and their work. Moreover, members of the local community and members of smugglers' families support cigarette smuggling and smugglers. *"I remember the day when my parents made me a harness for cigarette smuggling. I was able to carry 2 or 3 boxes of cigarettes with that. Harnesses were made of safety belts."* Also, respondents note that a number of citizens of high esteem, such as high school professors, were supportive of the activity and, at times, were involved in cigarette smuggling themselves. Thus, respondents did not recognize any kind of criticism of their activities.
- Respondents believe that cigarette smuggling offered a benefit for all. Thus, they think that the government is also involved in smuggling and tries to provide resources for their citizens. Also, it is interesting to note that respondents respect the legitimacy of the Government of Republika Srpska, and not that of the Government of B&H. Knowing that the border is controlled by the Border police of B&H (state level agency), and not by the police of Republika Srpska, they seem to believe that smuggling cigarettes across the border of B&H is for the benefit of the citizens of Republika Srpska, rather than an offence against the interests and the laws of B&H. The fact that they do not consider their acts to be victimising their government or their fellow citizens, could be a significant variable for smugglers in their conceptualisation of 'a victim' and of the damages to 'victims of cigarette smuggling'.
- The probability of being identified and arrested for smuggling was low, respondents explained. Firstly because most of police officers are involved in smuggling operations themselves. There was also minimal probability of being convicted and punished. If that happens, respondents do not expect severe punishment. More precisely, they usually expect a suspended sentence.
- According to respondents, the vicinity of Montenegro and Croatia gives them significant advantages for smuggling. The point is to buy cigarettes at a cheap place and to distribute them as soon as possible at another. Because of their everyday activities (education, health care, shopping, selling goods, family visits, etc.) they are linked to many cities in these countries. This situation provides opportunities for smugglers to meet people from Montenegro and Croatia who are included in the cigarette smuggling business.

## **Discussion**

Looking at the action radius of these organised groups, their geographically static nature, and the origins of members, we are obviously dealing with a local criminal market with some neighbouring connection for transit contraband trade. In a similar way Van Duyne (2003) describes local level of illegal cigarette market. As Antonopoulos (2008a), Van Dijck (2007) and Van Duyne (2003) found: the operations in the cigarette smuggling market are carried out in two ways: (a) by organised smuggling networks and (b) individual cigarette smuggling.

In the context of the three-degree classification of cigarette smuggling (upper-level, middle-level, street-level) most operations from Bileća town primarily represent lower-level tasks: loading and unloading of goods, carrying cigarette boxes through the border line, distributing, storing, lookout, street-selling, etc. These jobs, which offer smallest 'salary' and highest risks of identification and prosecution, are definitely are characteristic of street-level tasks (von Lampe, 2001; 2009). At the other end of the scale the 'bosses' could be classified at the middle-level of smuggling enterprises. These are persons who are able to buy significant amounts of cigarettes and then engage other actors from street-level. Also, they are involved in other illegal activities. Obviously, actors from the middle-level have good connections with smugglers in Montenegro and Western Herzegovina or Croatia. Also, they have (usually strong) connections with the police agencies or other parts of the criminal justice system. It seems that they are part of broader organised criminal groups. Their activities in the cigarette smuggling completely depend on the upper-level. Although our respondents did not provide information about that, according to previous research it is very likely that these are wholesalers, who were not present at the local level of Bileća. Hozíć (2004) identified wholesalers from Montenegro. These are the persons with high financial abilities and strong business and political backgrounds are not among the persons interviewed. Obviously, in the smuggling network described, it is possible to recognize many roles described by Antonopoulos (2006). All of them are important, but in this research the most important role is the 'boss' as initiators and organiser of the jobs, and corrupt public officials as facilitators of the process.

On the other hand, smuggling by individuals, as an older type of smuggling, is also a still existing mode of operation in Bileća town. Different from smuggling in organised groups, individual smuggling is obviously independent of other levels of smuggling. Because of that, this kind of smuggling is characterised by stability/consistency. It is occurring constantly

regardless of circumstances. Nevertheless, just a small number of citizens do smuggling individually. Working alone is quite risky for smugglers (Van Duyne, 2003), and this job is less profitable than organised cigarette smuggling. Two categories are dominant here (a) those who must to earn some money for livelihood and (b) occasional opportunistic smugglers (see also Antonopoulos 2008a). Van Duyne (2003) mentioned similar cases and named them the “retail marketers”.

A common characteristic for all respondents and most of other people included in cigarette smuggling from Bileća town is their bad economic situation leading from time to time to a virtual lack of basic means for maintenance. The Bosnian war and the arrival of many refugees and displaced people have significantly contributed to that desperate economic situation. Thus, participating in the illegal cigarette market could be a part of the struggle to survive (Antonopoulos, 2006; Estevez, 2013). Also, most smugglers are unemployed, so cigarette smuggling provided an alternative to jobs in the legal economy (see also Antonopoulos, 2008b and von Lampe, 2009). Smugglers from the middle-level and upper-level use Bileća’s available un- or underemployed population to recruit street-level smugglers (see also von Lampe, 2001).

Looking at smugglers’ characteristics in more detail we had difficulty in profiling the persons involved. Smuggling networks are really open, and they are available for everyone. Thus, there is a diversity of socio-demographic characteristics of smugglers. It seems that age and gender do not play a significant role. The distribution of these two mentioned traits is similar as in most of other types of crime (see Felson and Boba, 2010). As usual, young males dominate. On the other hand, as did Van Duyne (2003), I came to the conclusion that smugglers are usually ordinary people with families, who primarily come from working (and sometimes from middle) social classes, and usually do not have any criminal background. Nevertheless, some smugglers from the middle-level of smuggling (The Bosses) have experience with the criminal justice system, as consequence of different illegal activities.

Regarding the aetiology of cigarette smuggling in Bileća municipality I started with Routine Activity Theory (RAT). It seems that RAT is applicable on this type of crime. So, it will be helpful to discuss aetiology through “the crime triangle“ (see figure 3).

**Figure 3.**  
**The problem analyses triangle**



Source: Clarke & Eck (2009)

It seems that all inner elements of the triangle are present in this case, and all outer elements are weak or absent. So, on the first side, there are very motivated offenders and an absence of ‘handlers’ – the people who know the offender well and who are able to exert some control over his or her actions (parents, siblings, teachers, friends and spouses). On the second side, there are vulnerable victims and corrupted and indolent guardians. Finally, in third side this place is very suitable for smuggling and ‘managers’: governments are included in cigarette smuggling.

**‘First side’** – All persons on both the organised (von Lampe, 2001; Antonopoulos, 2006) and individual (Van Duyne, 2003) level of cigarette smuggling hope to earn money. For some of them it concerns additional income, but for most of them it is their only source of income. Clarke and Cornish (1985) are the first criminologists who consider crimes as the result of rational choice and decisions, based on the analyses of criminal behaviour. These authors paid special attention to economical moments as initial trigger for crimes. In our case cigarette smuggling could satisfy the needs of smugglers – the need for money being a paramount motivational factor. Nevertheless, it is necessary to keep in mind other main characteristics of the smugglers at the street-level, and consider variables such as impulsiveness, expressivity and moral ambiguity in their process of decision-making (see Han and Vos, 2004). Moral ambiguity can certainly be observed as a distinctive feature of the smugglers.

Potential offenders usually include moral inhibitions in a cost-benefit analysis (Clarke and Felson, 1993). Some people do not want break with

certain cultural or ethical values. Nevertheless, through the respondents' eyes, nobody loses self-respect due to cigarette smuggling. Even, some smugglers describe cigarette smuggling as useful thing for the community. Also, Antonopoulos (2008b) describes this situation in Greece in the same vein. There the smuggler identifies himself as a 'service provider'.

Threat of informal sanctions is an important variable for decision making of potential offenders. Sometimes offenders care much more about informal sanctions (e.g. rejection by family or friends, loss respect in society, etc.) than about formal ones (Clarke and Felson, 1993). In Bileća town, threats of the informal sanctions for cigarette smuggling do not exist. It seems that the local society is very tolerant to the cigarette smuggling. That is also the case in some other countries, e.g. Greece (Antonopoulos, 2006), Italy and Spain (Joossens, 1998). It is known that in some areas/countries participation in a cigarette black market or cigarette smuggling is not stigmatised, so perhaps for that reason the cigarette black market has higher chance of social acceptance than other illegal markets (von Lampe, 2011). It is useful to keep in mind that cigarettes are not an illegal commodity, but evasion of excises and customs duties makes it illegal. Thus, ordinary people do not see reasons to blame smugglers, and the smoking population usually support them (Antonopoulos, 2006; Joossens, 2012).

**'Second side'** - There is no absolutely clarity regarding victimisation. Through smugglers' eyes nobody is a victim. Hozić (2004) mentioned that cigarette smuggling offer opportunities for the Balkans countries to benefit, and described smuggling as "*a game dependent on politically or juridically constituted transit zone where the law of territorial states are temporarily suspended*" (p. 37). The latter remark points at the tax system of transit goods that remain untaxed during transit. According to our findings the largest quantity of cigarettes was transported under this transit regime and therefore (officially) not sold in B&H. So, in this significant part of cigarette smuggling, the state is not victimised (another state is, but that is nobody's concern). Also, it is known that governments, like government of Montenegro, have organised cigarette smuggling in order to finance their own policy (Hajdinjak, 2002; Hozić, 2004). Finally, sometimes the smoking population perceives their state as a repressive authority which takes a significant part of their income (see, for example, Antonopoulos, 2006) rather than a victim of smuggling. The situation in B&H was more complex due to the serious instability of the state during and after the war, making it extra vulnerable (Maljević, 2005).

In order to clarify the troubled situation it is useful to note that victims of cigarette smuggling are the state, the financial system (the public fund), and finally public order or the whole society (Beccaria, 1990) in which

social values get eroded. At the same time, cigarette smuggling is linked or intertwined with other forms crimes. For example, crossing a border with a stack of contraband usually requires bribing a border police guard or a customs officer. Likewise, distribution and selling smuggled cigarettes often require bribing police officers in the country and various inspection bodies. Thus, it can be argued that cigarette smuggling promotes corruption in the society and vice versa and thereby creates favourable circumstances for the commission of other types of organised criminal activity. Also, respondents report about violent behaviour in the local community, and linked that with smuggling and smugglers. However, the causal connection with cigarette smuggling is debatable: many people in the town lead a deviant or delinquent life other than smuggling. Sampson and Lauritsen (1990) suggest that people with deviant lifestyles or engaged in deviant activities are more likely to become victims themselves. For example, competition and conflict between smuggling networks can result in intergroup violence.

In the context of guardians, the situation is not really good. Perceived certainty and severity of formal sanctions are the most significant part in decision making by potential offender (Clarke & Felson, 1993). Our respondents believe that there is a negligibly small likelihood that they be identified by the police. Also, they do not expect sanctions for their crimes. Milutinović (1981) elaborates the small risk of identification and processing of perpetrators of offences with collective victimisation, and noticed that the risk for smugglers is negligible. Furthermore, domestic research reports about many limitations of the Border Police of B&H, mention primarily a lack of the staff, lack of the technical equipment, and lack of rulebooks and procedural documents (Mrkaljević, 2008), contamination with corruption (Datzer, 2011), and so on. According to these mentioned observations, there is lack of effective control and so an effective and efficient reaction on cigarette smuggling could not be expected.

**'Third side'** - the geographical position of a state/place plays a significant rule in cigarette smuggling (Nagy, 2012). B&H has a suitable geographical position for smuggling (Šikman, 2011), right on the Balkan route of contraband smuggling, where cigarette smuggling dominated in the post war period (Bozicevic, Gilmore & Orskovic, 2004; Šikman, 2011). At the local level, the geographical position of the Bileća municipality is conveniently connected with bigger centres nearby in the region (less than 100 km). These are Podgorica and Nikšić (Montenegro on East), Dubrovnik (Croatia on south), and Mostar (FB&H - Western Herzegovina). Thus, citizens' routine activities stimulate relationship-making with citizens in neighbouring countries. This geographic disposition means that smugglers from Bileća

meet smugglers from Montenegro, Croatia or Western Herzegovina, and they have the opportunity to procure cigarettes in one country and sell them in other country within a period of two hours (see Figure 1). Such situation reminds one of the beginning of black cigarette market, when travelling and movements of population from Soviet Block to the West become more and more common (see also von Lampe, 2009). A further circumstance is the comparative level of police and border control corruption in the three countries involved. Generally, the whole region was contaminated with high rate of organised crime and corruption. Some research show that political actors at highest level and representatives of the governments in South Eastern European countries were involved in organised crime (Stojarová, 2007; Gyarmati, 2003). These research findings support the conclusion that the mentioned situation makes police, judiciary, intelligence and custom service are ineffective and inefficient. In other words, “managers” of these states cannot provide adequate law enforcement, rule of law and democracy in their countries. This, probably leads to a mass occurrence of cigarette smuggling.

## **Conclusion**

Cigarette smuggling is a global phenomenon, but it is very important to understand it also at a local level. Nevertheless, that could be difficult because those who are involved in any kind of smuggling try to stay invisible. Also, when organised criminal groups use to be operating they may cultivate some kind of ‘code of silence’. Still, to address the aetiology and phenomenology of smuggling, collecting direct knowledge of persons involved in smuggling is appropriate, if they want to talk (Decker and Chapman, 2008). This enables us to learn of decisions by smugglers on individual level. Researchers and experts on the area of cigarette smuggling such as Antonopoulos (2006), Van Dijck (2007) and Van Duyne (2003) have also used a methodology which enables conclusions on an individual level. This research used a similar approach, though without criminal files as used by Van Duyne and Van Dijck, with results confirming some of the previous findings. The most important are:

- the existence of organised cigarette smuggling and individual cigarette smuggling side by side;
- the existence of three levels of cigarette smuggling (upper-level, middle-level, street-level) and characteristics of persons included in each level;

- cost-benefit analyses by offenders before proscribed behaviour;
- the greatest motive for the perpetrators is money (additional income or the only form of subsistence);
- circumstances and opportunities for smuggling play significant roles in decision making by potential offenders.

It seems that many factors that facilitate smuggling are common in low-income and middle-income countries (Joossens *et al.*, 2000). On the other hand, as expected, there are some specific findings which should be linked to the specific area and the time span covered by the research project. First of all, there are special circumstances like the war in B&H and the consequences of the war (*e.g.* settlement of displaced population and refugees, destroyed industry, etc.), the period of state building, geographical location, situation in the neighbouring countries, cigarette smuggling route, etc.

It seems in the area of Bileća municipality many people are strongly motivated to engage in cigarette smuggling. It is very important to keep in mind that many of these people from the region are motivated by lack of other income. In this situation persons without any criminal experience agree to commit the offences as result of their cost-benefit analysis. Against this background and that of a weak state with corrupt law enforcement, victimisation awareness in the smugglers' eyes is low or absent given the moral ambiguity as far as smuggling is concerned. Moreover, regarding the question of the public fund as a victim this could mean B&H or Republika Srpska to different people, but not evoking much loyalty. In any case, both states suffer from division, weakness and corruption impeding proper law enforcement.

In addition, the geographical position of the Bileća municipality provides strong links with bigger centres in neighbouring countries which are really close. That provides good connections with those who are involved in cigarette smuggling in other countries and enables efficiency and effectiveness in cigarette smuggling. Simply, in this case motivated offenders and the vulnerable victim meet each other at the border crossings (suitable for offending) without any effective control after a handsome bribe.

Creating recommendations for combating cigarette smuggling in B&H may not be an easy job. The well-known truisms and general recommendations for policy makers in this branch are Joossens *et al's* (2000) words: the appropriate response to smuggling is to adopt policies that make it less profitable, more difficult, and more costly to engage in smuggling. Today, the evidence based policy approach in suppressing unacceptable behaviour is preferred, so it is very important to start with question "*what works for whom*

*in what circumstances*” (Sherman and Strang, 2004: 590). According to the results of this research, cigarette smuggling seems to be a consequence of the system’s/state’s weaknesses. The biggest one is the high level of corruption. Looking at this problem from the perspective of the problem analyses triangle, reducing corruption could plausibly lead to the following:

- Better economic situation (revitalisation of the economy, new work places, opportunities for young people to study, etc.). That will reduce offender’s motivation. Also, we can expect stronger informal control, and lower levels of tolerance of unacceptable behaviours such as cigarette smuggling.
- Good governance and responsible public service. Public services and political actors will work in the best interest of citizens, and that will restore public trust.
- Among others, that means police who will truly combat every kind of crime. In the context of smuggling, that will guarantee greater risk and certainty of sanctions for offenders. In that case, the public fund will be significantly less vulnerable as a victim.

Obviously B&H is not at a suitable phase in its development to make strategies against cigarette smuggling. There are some bigger problems which require strong reactions. After solving these problems, one may expect that cigarette smuggling will face a new and less facilitating landscape.

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# **The link between poverty and crime**

## **Views from consumers in the cigarette black market in the South Bronx**

*Klaus von Lampe, Marin Kurti and Jacqueline Johnson<sup>1</sup>*

### **Introduction**

This chapter examines the link between poverty and crime with a close-up look at the illegal cigarette market in the South Bronx, drawing on the personal experiences of consumers of illegal cigarettes. The discussion is an outgrowth of continued efforts to understand the functioning and dynamics of the illegal cigarette trade (see von Lampe, Kurti and Bae, 2014). At the same time we make reference to the ongoing debate within criminology on whether or not poverty can explain crime. The link between poverty and crime is not as straightforward as it may seem at first glance. The empirical evidence is contradictory, and the controversy tends to take place on a rather abstract level so that the mechanisms of how poverty and crime might be linked are rarely addressed in detail.

The purpose of this chapter is not only to add to the debate on a causal link between poverty and crime but rather to take a magnifying glass and to look at the myriad ways in which poverty and illegal conduct may be linked. In essence, three questions will be addressed:

- How does poverty influence the demand for illegal cigarettes?
- How does poverty influence the relations between illegal market participants?
- How does poverty influence the relations between illegal market participants and law enforcement?

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## **The Link between Poverty and Crime**

The link between poverty and crime is a contested issue in criminology as part of the larger debate on the link between socio-economic status and crime that has been ongoing since at least the 1950s. Public perception and official crime statistics suggest that there is an inverse relation between socio-economic status and crime. Members of the lower classes are over represented among crime suspects and convicted offenders. However, criminologists disagree on whether a link between socio-economic status and crime does exist at all, and if so, in what direction; and, assuming that there is an inverse relationship between socio-economic status and crime, there is no clarity about how precisely lower socio-economic status, respectively poverty, influences crime. According to some, the link between poverty and crime is essentially a myth or at least highly overstated. They argue that official crime statistics reflect class biases in the criminal justice system rather than class differences in crime commission, and that crime is fairly evenly distributed across all strata of society (Tittle, 1983; Tittle, Villemez and Smith, 1978; Dunaway, Cullen, Burton and Evans, 2000). This position is supported primarily by self-report studies. Some of these self-report studies have even shown a positive relation between socio-economic status and crime, at least for certain categories of crime. For example, Gutierrez and Shoemaker (2008) found in a sample of school students in Manila, Philippines, that covert types of delinquency were high among middle- and upper-class students, and that among female students, upper-class girls consistently had the highest self-reported delinquency rates.

These findings are in line with the notion that members of the upper classes are encouraged to take risks and to abide less by conventional values while at the same time having the power to neutralise law enforcement (Wright *et al.*, 1999). The conclusion is not necessarily that members of the upper classes commit more crimes than members of the other classes, rather that there is a U-shaped relationship between socio-economic status and crime with members of the lower and upper classes, for different reasons, being more crime-prone than members of the middle classes (Wright *et al.*, 1999, p. 184).

Self-report studies that dispel the assumption that crime is linked to the lower social strata have been criticized on various grounds. It has been argued, for example, that these studies tend to explore only minor forms of crime and delinquency, tend to draw on too small sample sizes and tend to exclude those individuals, typically from the lower classes, who are most crime prone (Braithwaite, 1981; Dunaway *et al.*, 2000).

There is some research that tries to avoid both the limitations of self-

report studies and of official crime statistics, and that shows that there is indeed an inverse relation between socio-economic status and crime. Galloway and Skardhamar (2010), for example, examined the registered criminality of all 127.823 Norwegians with no migrant background born between 1982 and 1986 and found a strong correlation between parents' low income and crime. Gould *et al.* (2002) compared reported crimes in 705 counties in the United States for the period 1979 until 1997 with the state-level average wage and unemployment rate of non-college-educated men. They conclude that the wage trends for low-skilled workers explain more than 50% of the increase in both property and violent crime over the sample period. A similar study with similar findings was undertaken by Machin and Meghir (2004) in the UK. They examined crime data at the police force area level in England and Wales between 1975 and 1996 in relation to developments in the low-wage labor market and found that '(relative) falls in the wages of low-wage workers lead to increases in crime' (Machin and Meghir, 2004, p. 958). These studies imply that crime, more specifically acquisitive crime, functions as a substitute for legal income (Galloway and Skardhamar, 2010, p. 437). This does not mean, however, that individuals with low socio-economic status are more crime prone per se. Rather, the link between socio-economic status and crime appears to be confined to a small minority among low-income individuals. Oberwittler *et al.* (2001), for example, in a self-report study of school students in Germany, noted that half the reported crimes were committed by 9% of the boys and 5% of the girls and that these 'intensive offenders' were predominantly from the lower social classes. Foley (2009) established a link between available income and crime in a study that compares the effect of differences in the scheduling of welfare payments in 12 cities in the U.S. Some of these schedules distribute payments in the first 10 days of the month, and others which have a more spread payment. In the cities where welfare payments were concentrated at the beginning of each month, Foley (2009) found an increase in financially motivated crime towards the end of the month while no such increase in crime was discernible in the cities where welfare payments were relatively more spread over the month. Foley (2009) also found that given the ratio of crimes and welfare recipients, only "2% or less of welfare recipients, depending on the overlap of recipients across welfare programs, would commit such crimes in a typical month" (p. 25).

The studies by Galloway and Skardhamar (2010), Gould *et al.* (2002), Machin and Meghir (2004) and by Foley (2009) support strain and rational choice explanations of crime by suggesting that crime can be a way to make up for a lack of legal income. There are other explanations for a link between

poverty and crime at the individual and community levels, for example that poverty negatively impacts on family cohesion and parenting skills and on 'collective efficacy', which in turn reduces self-control and social control (see, e.g., Duncan *et al.*, 2003; Weatherburn and Lind, 1998). All of these approaches also apply to the notion that poverty and *illegal markets* are connected.

## **Poverty as a driver of illegal markets in general and of the illegal cigarette trade in particular**

An illegal market is an arena for the regular voluntary exchange of goods and services for money or other valuables where the goods and services themselves, their production, selling and/or consumption violates the law (Arlacchi, 1998, p. 7; Beckert and Wehinger, 2011, p. 2). Two basic types of illegal markets can be distinguished: markets for absolute contraband and markets for relative contraband (Naylor, 2003). Absolute contraband comprises all strictly prohibited commodities such as humans (slavery/human trafficking), counterfeit currency or child pornography. Relative contraband includes goods and services that can be transacted only under legal restrictions, for example prescription drugs, or only in certain ways, for example debt collection, and goods and services on which taxes and duties are imposed, for example cigarettes and labour.

Poverty has been identified as a driver of illegal markets in various ways. Poverty contributes to the supply of illegal goods and services, for example with respect to poor farmers opting to grow coca or poppies, poor families who sell their children into slavery (Shen, Antonopoulos and Papanicolaou, 2013), or poor individuals who sell a kidney to organ traffickers (Lundin, 2012). Poverty also contributes to the willingness of individuals to participate in the supply of illegal goods and services, for example drugs, just like there is an economic incentive to engage in any other form of profit-making crime (see, e.g., Paoli & Reuter, 2008; Valentine 1978; Venkatesh, 2006). Finally, poverty plays a role in creating demand for illegal goods and services, for example a demand for usurious loans where banks are unwilling to lend money (Graves, 2003), or a demand for goods that are cheaper when sold illegally, for example stolen goods or smuggled cigarettes or other high-taxed commodities (Besozzi, 2001).

The illegal cigarette trade provides some support for the notion that poverty and crime are indeed closely related. Wiltshire *et al.* (2001), for

example, report a link between economic hardships and the consumption of illegal cigarettes in an interview-based study of smokers in Edinburgh, UK. Stead *et al.* (2013) conclude from a focus group study in Nottingham, UK, that the consumption of illegal cigarettes is regarded as normal and legitimate in multiply disadvantaged communities. Similarly, Shelley *et al.* (2007) note, based on a focus group study in Harlem, New York, that the sale of illegal cigarettes is deeply embedded in disadvantaged neighbourhoods and that for low-income smokers the illegal cigarette trade provides welcome opportunities for saving money: “Bootleggers were uniformly viewed as a justifiable and appreciated response to the high price of cigarettes” (p. 1485). Tylor *et al.* (2005), drawing on a questionnaire survey in the North East of England, find that smokers who have bought smuggled cigarettes tend to be heavy smokers with high levels of addiction and tend to live in socially deprived areas. However, these individuals also tend to be in employment.

While there is no automatism between poverty, high cigarette taxes and the emergence of a cigarette black market (Joossens and Raw 1998; von Lampe 2005), the general assumption about illegal cigarettes is twofold: Cigarettes are expensive because they tend to be highly taxed. Low-income smokers who are price-sensitive demand cheap cigarettes outside the legal market. At the same time, criminals venture to supply cheap cigarettes to consumers illegally by circumventing taxation. They may do this through buying cigarettes in places where taxes are much lower for resale in places with high cigarette taxes (so-called bootlegging) or diverting untaxed cigarettes destined for export to the black market (so-called large-scale smuggling). Both assumptions resonate with the supply and demand for the illegal cigarette market in the South Bronx.

## **The Cigarette Black Market in the South Bronx**

The South Bronx is a section of the borough of the Bronx in New York City, and it is arguably one of the most notorious low-income urban areas in the world. Castells has called it one of the “*black holes of human misery in the global economy*” (cit. in Franko Aas, 2010, p.17). Here we have a large concentration of poor people and among them a relatively large population of smokers (17,8%) (New York City Department of Health and Mental Hygiene, 2013). These low-income smokers are faced with high New York City and New York State taxes on cigarettes that lead to legal prices for a pack of cigarettes of around \$12 or about €8,80 as of the summer of 2013. Elsewhere in the

U.S., taxes and prices are much lower. For example, in Virginia, just outside Washington DC, a pack costs less than half, about \$5,50 or €4.

When we compare the South Bronx with New York City as a whole we find the expected link between poverty and illegal cigarettes on a very general level. The poverty rate in the South Bronx is much higher than the city average: 38,9% as opposed to 20,1% (US Census Bureau, 2010). There is a similar difference in the size of the cigarette black market when we draw on the results of littered cigarette pack surveys. In the South Bronx, about 80% of consumed cigarettes are illegal (Kurti *et al.*, 2013; von Lampe *et al.*, 2014). In New York City as a whole the share of illegal cigarettes is only about 50-60% (Chernick and Merriman, 2013; Davis *et al.*, 2013).

## **Focus Group Study of South Bronx Smokers**

How exactly does poverty influence the emergence and the anatomy of the illegal cigarette market? This is what we have tried to understand with a focus group study carried out in the Summer of 2013. We were able to recruit 67 adult South Bronx smokers, via convenience, and to interview them in 13 separate focus groups organised by gender and by age. Our sample covers four age categories (*i.e.*, 18-24; 25-44; 45-65; 65 and older) and represents fairly well the gender and ethnic make-up of the local population, which is primarily Black and Hispanic. We do, however, have an oversampling of participants between the ages of 25 and 64 because this age group has a higher percentage of current smokers (New York City Department of Health and Mental Hygiene, 2013). The following discussion is based on a preliminary analysis of the data.

### **Why Smokers Opt for Illegal Cigarettes?**

We did not ask focus group participants why they smoke. However, it became apparent that smoking is for many a way to cope with the stress they are under in their daily struggle for survival. Practically all of the participants with the exception of one white woman regularly buy and smoke illegal cigarettes. When we asked our participants why they opted for illegal cigarettes, the expected link with poverty became apparent. Some people simply cannot afford to buy legal cigarettes at prices of about \$12 per pack because of their restricted budget. One female between 45 and 64 year old expressed that: “*Once you pay your rent and groceries and you’re buying household stuff, you’re watching your budget.*”

Some are even so poor that they feel they cannot even afford to buy a pack of illegal cigarettes at prices of \$7 or \$8. Instead they buy single cigarettes, called 'loosies'. Loosies are illegal per se because cigarettes in New York City have to be sold in packs of 20. This is how a woman in the 65-years-and-over group put it: "*Because you can't afford a pack, so they sell loosies.*"

This was not limited to older participants, who one might expect to live on a limited income. Rather, participants from all age groups stated that expense was a factor in their choice to purchase illegal cigarettes. Young respondents were more likely than older to express a preference for 'loosies'. People who buy loosies tend to get between 1 and 4 cigarettes at the same time. Some people can afford to buy legal packs, at least occasionally, but they opt for illegal cigarettes to reduce the cost of smoking. The rationale is: "*Why pay \$12 when you can get an illegal pack for \$7 or \$8?*" Or, as one participant put it: "*You're not going to go there and buy a \$12 pack when you can buy a \$7 pack.*"

For some of our focus group participants this is a matter of making ends meet. For others it seems to be more a matter of principle. We asked if they would still buy the cheap illegal cigarettes if they won the lottery. Many of our respondents spontaneously and matter-of-factly said that they would. Several voiced opposition to the level of taxation for legally priced cigarettes. Some thought that the purchase of full-priced cigarettes would be a waste of their newly acquired financial resources. This could be interpreted as a sub-cultural disposition towards defying the law. But we also came across another potential link between poverty and the purchasing of illegal cigarettes. Apparently some of our participants felt that they could only overcome their nicotine addiction if they were better off financially. Instead of saying that after winning the lottery they would still buy illegal cigarettes, or that they would buy their own cigarette factory, some responded spontaneously that they would then quit smoking.

### **Why smokers opt for particular kinds of illegal cigarettes**

A second major theme in our focus group discussions apart from deciding whether or not to buy illegal cigarettes was the choice between different types of illegal cigarettes. One choice is between buying loosies and buying cigarettes in packs. Another choice is between 'good', high quality cigarettes and 'bad', low quality cigarettes. Finally, the question was raised if smokers stay loyal to their preferred brand when they purchase illegal cigarettes.

We will not go into detail about brand loyalty here except to briefly mention that South Bronx smokers clearly prefer one brand: Newport; and

supply on the black market appears to adjust to this preference. According to our participants, it is difficult to get any other brand of illegal cigarettes other than Newport.

A question that would be difficult to answer without first hand data is why smokers would opt for loosies at a price of about 50 cents apiece as opposed to a pack of 20 cigarettes for 7 or 8 dollars. When one does the math it becomes obvious that buying loosies is more expensive than buying packs: 20 loosies cost about 10 dollars compared to the 7 or 8 dollars they would cost in a pack. This suggests that the decision to buy loosies is not motivated by price. However, as already indicated, it is a matter of affordability. A major reason for buying loosies is that smokers in the South Bronx simply do not always have 7 or 8 dollars on them when they go to buy cigarettes. They may only have 1 or 2 dollars, which according to some participants, allows them to purchase 3 or 4 cigarettes depending on their relationship with the seller.

However, buying loosies can be a measure to lower the costs of smoking in other ways. Buying 3 or 4 loosies instead of a pack helps smokers to reduce consumption because they are less tempted to smoke an additional cigarette. Buying 3 or 4 loosies is also helpful when smokers seek to avoid having to share cigarettes with others. Several of our participants indicated that smokers in their neighbourhood are constantly approached on the street to “bum a cigarette” by persons who are known and unknown. According to an unwritten code of honour, you must share a cigarette with others because, as one participant stated, “*you never know when you are going to need one.*” However, it is okay not to share a cigarette when you only have 2–3 cigarettes on you.

A third advantage of buying loosies instead of packs is to reduce the risk of police harassment. According to our participants, police harassment is a constant threat. Although street level intervention by law enforcement against smokers specifically for the purpose of deterring the illegal purchase of cigarettes is generally weak, smokers in the South Bronx are mainly concerned that illegal cigarettes are used as a pretext for being stopped, searched, or arrested by the police. More recently this threat has been magnified in the wake of Eric Gardner’s death. In July 2014, Gardner was targeted by NYPD plain-clothes officers for selling loose cigarettes in Staten Island, the southern most borough of New York City. Video footage, recorded by a bystander, shows that Gardner first argues with the police officers about why he is being targeted and proclaims that this harassment “stops today” (Fessenden, 2014). As two officers move in to arrest him, he resists by pulling his hand away (Fessenden, 2014). In response, one of the officers places Gardner in a chokehold and tackles him to the ground in

an effort to subdue him, later joined by other officers. Despite his repeated pleas, “I can’t breathe”, Gardner is held on the ground (Fessenden, 2014). Given the excessive force of the chokehold and his past medical conditions, Gardner dies shortly after the takedown. An autopsy performed by the New York City Office of Chief Medical Examiner rules the cause of death to be a homicide (Goldstein and Santora, 2014). Nonetheless, in December 2014, a Staten Island grand jury declined to indict the police officer on criminal charges (Goodman and Baker, 2014). Recent protests throughout New York City have scrutinized low-level arrests and championed claims that minority communities receive aggressive treatment from the NYPD. These claims may be merited given the dearth of research that has shown that Blacks and Hispanics in New York City are disproportionately more likely to be stopped on the street by the police, when compared to Whites (Spitzer 1999; Gelman *et al.*, 2007; Jones-Brown *et al.* 2013). Participants in our study also felt they are less likely to be harassed based on the possession of a few loosies, compared to the possession of a pack of cigarettes.

## **Differences in Quality among Illegal Cigarettes**

The illegal cigarettes that are being sold in the South Bronx, either as loosies or in packs, differ in quality. “Good quality” illegal cigarettes are genuine cigarettes that have probably been bootlegged from low-tax states like Virginia. “Bad quality” illegal cigarettes are either genuine, but stale because they have been stored or transported too long, or they are fake counterfeit cigarettes with bad tobacco and bad filter. Poverty seems to play a role in the exposure to the different kinds of ‘bad’ illegal cigarettes for two reasons. First, low-quality cigarettes tend to be cheaper. If you are poor, stale or fake cigarettes may be all you can afford. Second, poorer people seem to have less power to successfully complain about the quality of the cigarettes they buy. From what we have heard, the threat of poor quality cigarettes is a constant feature of the illegal cigarette market in the South Bronx. Participants stated that this was a major risk when purchasing from street vendors. The account of a male respondent in the 45–64 year group is just one example. He recalled one incident of a complaint about poor quality: “*He’ll tell you [that is the seller] – yo - you get what you pay for . . . You handle that. And you can’t argue.*”

Consumers in disadvantaged neighbourhoods are more likely to be sold low-quality cigarettes and are less likely to complain when this happens. This is one of the reasons why most participants expressed a preference for bodegas as a place to purchase illegal cigarettes over street vendors.

## **Where to Buy Illegal Cigarettes**

Another choice that smokers have in the South Bronx, and another choice that is influenced by poverty is where, or rather from whom to buy illegal cigarettes. Our respondents reported two main types of sources in the South Bronx, street vendors and legitimate convenience stores (also referred to as bodegas). Since around 2008 a shift seems to have taken place from street vending to the selling of illegal cigarettes in legitimate retail stores. This shift seems to have been brought about in part by police pressure on street vendors, and in part by stores offering loosies and thereby attracting customers.

In the Summer of 2013 it appeared to be quite common that stores not only sell directly to consumers but also to street vendors who then resell the cigarettes as loosies. What is particularly interesting for understanding the cigarette black market in the South Bronx is the relationship that exists between smokers and the stores that sell illegal cigarettes. Most of the stores that sell illegal cigarettes in the South Bronx are owned and operated by Arabic immigrants. This means that there are cultural cleavages between buyers and sellers of illegal cigarettes. These cleavages have surfaced in our focus groups in some of the remarks that were made. For example, some women who buy illegal cigarettes from Arabs referred to them as ‘Taliban’. In the group of females age 25 to 44, this is what we heard: “*Talibans. Arabs, Taliban - they all the same thing to me. Arabs sell the fake and the loose cigarettes.*”

In the same group we were told with respect to Yemenite store owners: “*They’re taking our money and sending it back to the Taliban.*”

Despite this resentment, buyers and sellers of illegal cigarettes seem to have established mutually beneficial relationships. One respondent from the group of males aged 45–64 put it this way: “*We don’t know each other. I doubt if we would like one another. But he likes my money, and I like to go get my cigarettes!*”

This mutually beneficial relationship is shaped in part by the poverty of South Bronx smokers. From what our respondents have told us, the stores heavily rely on the sale of cigarettes and the sale of other items to smokers. Smokers tend to buy not just cigarettes but also other store items, such as food and drink. Some do this as a cover in anticipation of being stopped by the police once they leave the store. Others do it to return a favour. Stores also increase their security by binding customers through the sale of illegal cigarettes. We have heard from respondents that stores can rely on regular customers to discourage robberies. In turn, smokers have an interest in establishing a relationship with stores.

Purchasing illegal cigarettes is not an option for everyone who resides in the South Bronx. This is because the sellers dictate the terms for who they will

and will not sell to. This is especially the case in bodegas where store owners fear raids from undercover police officers. Because of the risk of undercover policing, stores are very reluctant to sell to customers they do not know. This means that in order to be able to buy cheap illegal cigarettes in stores smokers have to become regular customers or being seen as someone who does not pose a potential threat. An aforementioned white female respondent stated that clerks do not usually sell illegal cigarettes to her because of her race. Store clerks will turn customers away if they suspect that they may be undercover police officers. One female respondent recounted the following encounter with a store clerk”

“ . . . They said you look like 5-O [that is the police], I said, really” I said, you serious? I say okay, because I’m not going to argue with you, because you insisted on I look like 5-O. I don’t know why . . .”

This does not mean that the sellers must know sellers personally before they will make a sale. Rather, the store clerk must recognize the buyer from the neighbourhood. This view is expressed in the following statement by a female respondent from the 25-44 age group:

“ . . . So basically, you know, they don’t want to get caught or anything so if you’re not from the area, they didn’t sell to you before, they most likely won’t sell to you.”

Being a regular customer also seems to reduce the risk of being sold poor quality cigarettes. As stated earlier, most complaints about quality we heard with respect to street vendors. Some respondents believe that poor quality cigarettes are offered to them because they are poor. As another female respondent from the 25-44 age group stated:

“Cheap cigarettes, them fake cigarettes. I’m not going to lie. They doing it to us because, they bring it to us because we’re in the South Bronx and we poor. I’m not going to lie. That’s truly what I believe.”

A further bond between smokers and stores is directly linked to poverty. At least some stores bind their customers by selling cigarettes and other items on credit. Likewise, some stores sell cigarettes in exchange for food stamps, which is illegal in itself. When asked whether they thought that store vendors were helpful or harmful to the neighbourhood, many respondents stated that they thought that stores provided a valuable service to the neighbourhood by offering consumers lower cost cigarettes and credit, despite their suspicious profit motives. One male respondent in the 25-44 age group stated: “*You don’t got money, they give you credit.*”

This was echoed in the statements by a female respondent from the same age group: “. . . *They give us credit when we need it. We go in there and get cigarettes or food or anything like that . . .*”

Several smokers listed access to credit as one of the reasons why they preferred to purchase illegal cigarettes from bodegas than street vendors. As another male respondent stated: “*And you can't get credit from people on the street.*”

Finally, many smokers also prefer to buy cigarettes in stores because they feel that this is a safer setting than the street. Once again, the threat of police harassment is a major concern. One female respondent in the 45-64 age group recounted the following story about her boyfriend's encounters with an undercover police officer:

“My boyfriend, one day he's standing by his truck, his car, and this guy comes up to him – “yo papa”, cause he had his pack of cigarettes with him. If I smoke a pack he smoke like three of them. So he's like washing the car, and all of a sudden somebody came and told him to – “yo papa can you sell me a cigarette?” And he said – “Papa, I don't sell cigarettes. But store's over there”. And he said “man, you know because I'm short” He was like “here but I don't usually sell my cigarettes” But when he went like that the guy cam like (indicating undercover showed badge) He was like “yo, you came to me. You know? That's not right”, so he was like – “I didn't care how it went. You going in”. He took the pack, turned it around, he said – “this bootleg too. You going.”

Fear of police harassment is also an issue for younger smokers and for those who appear to be young. Several women and men in the 18-24 age group mentioned being stopped by the police on the street.

This means that despite underlying resentments the Black and Hispanic smokers and the Arabic store owners have incentives to establish strong bonds. It seems fair to assume that it is these bonds that appear to be unique to low-income communities that account for the remarkable resilience of the sale of illegal cigarettes through legitimate retail outlets.

## **Discussion and Conclusion**

What does all this mean for the initial question about the link between poverty and illegal markets? We have seen that poverty drives the demand for illegal cigarettes. Quite simply: illegal cigarettes are cheaper than legal cigarettes. We have also seen that poverty shapes the demand for illegal cigarettes in many ways, for example with respect to the preference for loosies over packs, or the tolerance for 'bad' cigarettes as the cheaper variant of cigarettes. We have seen that poverty influences the relationship between smokers and stores that sell illegal cigarettes. Several factors, such as the need to buy on credit, bind buyers and sellers, make their relationship resilient against law enforcement intervention.

Poverty also impacts on the balance of power in the relationships between market participants and in relation to the police. The poorer the people, it seems, the more vulnerable they are to the sale of low-quality cigarettes and, because of their powerlessness, the more prone they are to police harassment. In turn, to reduce the risk of being harassed by the police, poor smokers buy loosies rather than packs which leads to a law violation separate from the evading of cigarette taxes.

To sum up our findings, poverty matters in a variety of ways when one tries to understand the cigarette black market in the South Bronx. But it is not just about saving money on cheap illegal cigarettes. The link between poverty and the cigarette black market is much more complex, affecting an entire web of social relations within which low-income smokers are embedded.

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# **‘License to pill’**

## **Illegal entrepreneurs’ tactics in the online trade of medicines**

*Alexandra Hall and Georgios A. Antonopoulos<sup>1</sup>*

### **Introduction**

Product counterfeiting is a long-established criminal pursuit that has increased at an exponential rate in recent times, so much so that the trade in counterfeit goods is estimated to account for anything up to 7 per cent of world trade, equivalent to \$500 billion (see Yar, 2005; 2008). This includes a burgeoning global trade in ‘fake’ medicines. With the advent of the Internet and e-commerce – increasingly seen as the cornerstone of the new global social and economic order (Castells, 2001) – this market has expanded significantly. It is estimated that the ‘fake’ medicine trade alone has increased by 90 per cent since 2005, with an approximate turnover of \$200 billion (IRACM, 2013: p.16). However, despite resultant criminal profits, as well as social and physical harms, the illegal online trade of medicines has received little scholarly attention, and research and preventative action remain largely ineffective.

The aim of the present chapter is to provide an original empirical account of the tactics and methods illegal entrepreneurs employ in order to market medicines online while avoiding being detected by law enforcements agencies and health regulatory authorities. The chapter is based primarily – although not exclusively – on our research in the UK, which is part of the FAKECARE project: a European Commission-funded project that aims to develop expertise that can help appropriate agencies to tackle the online trade of ‘fake’ medicines by, among other things, providing an in-depth knowledge of the supply and demand dimensions of this criminal market (see [www.fakecare.com](http://www.fakecare.com)).

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## The broader context of the illicit medicine trade

The nature and specifics of the chapter's objectives demands some preliminary contextualisation of the illegal trade in medicines. The 'fake' medicine trade can be categorised according to three distinct 'business' models that work across different sites, scales and networks:

1. 'Entities' trading exclusively offline in the 'real' world;
2. 'Entities' that were originally involved in the trade offline, but have now moved online to distribute their merchandise;
3. 'Entities' that focus their skills exclusively in the virtual world.

One specific example of the latter is Glavmed, which has been described as "one of the most significant cases of cybercrime in the pharmaceutical sector" (IRACM, 2013: p.70); a case we will return to in our analysis below. In this chapter we will focus primarily on the second and third models, whereby business is conducted either in part, or solely, online. Having said that, it is important to challenge the false dichotomy existing between online and offline processes involved in the formulation, manufacture and distribution of 'fake' medicines. Indeed, the online trade includes crucial offline dimensions. Here, we support the work of Guarnieri and Przyswa, who draw on the work of Sassen (2007), to argue that online and offline domains are not hybridised, but are interconnected with distinct characteristics (Guarnieri and Przyswa, 2013: p.219).

Furthermore, there is an on-going debate surrounding the definition of 'fake' medicines. For reasons of economy in the chapter we use the term 'fake' to connote:

▪ *Counterfeit medicines:*

Here we adopt the World Health Organisation's (WHO) definition: "*A counterfeit medicine is one which is deliberately and fraudulently mislabelled with respect to identity and/or source. Counterfeiting can apply to both branded and generic products and counterfeit products may include products with the correct ingredients or with the wrong ingredients, without active ingredients, with insufficient active ingredients or with fake packaging*" (WHO, 2012).

▪ *Falsified medicines:*

Part of the debate regarding the definition of 'fake' medicines relates to the separation of counterfeits from the market in substandard and unlicensed generic drugs. For this reason the European Commission prefers to distinguish between *counterfeit* and *falsified* medicines. Whereas counterfeits are those infringing intellectual property (IP) rights, falsified medicines are any fakes attempting to pass themselves off as an authentic medicine. The

term *falsification*, therefore, moves beyond merely legal-economic terms relating to copyright infringement and embeds public health and the 'sticky subject' of generics in the definition (see IRACM, 2013: p.14).

▪ *Legally produced yet illegally supplied medicines:*

One of the problems facing those involved in preventing the global trade in counterfeit medicines is the varied IP rights and licensing laws operating over different jurisdictional boundaries. This includes variations across European states, where trademark infringement in one country may differ in another. On occasion, traders dealing in generics or various branded products produced abroad yet sold in the UK seek to by-pass existing IP laws and patents; these products may have been legally produced but are illegally supplied. For example, in the UK legitimate generics are licensed and, therefore, authorised as copies of a once patented and branded drug. However, when a patent expires an opening in the market for genuine and fake generics is created (see Chan, 2013): the most recent example in the UK being Viagra (sildenafil citrate) in 2013. Fakes in this instance can be counterfeits falsely claiming to be the branded product, or unlicensed products claiming to contain the identical active ingredients found in the formerly branded/patented product. One example is that of Kamagra, a sildenafil citrate based erectile dysfunction (ED) drug legally produced in India, which is not licensed in the UK. During our research we found a variety of online sites offering this product for sale as 'Generic Viagra' to UK customers. There is also a growing market of legally produced yet illegally supplied medicines entering the legitimate pharmaceutical supply chain (Yar, 2012).

## **Infrastructure required for online trading (medicines)**

In order to identify the tactics used by illegal online traders in pharmaceuticals we must first consider the infrastructure required for online sales of medicines (although this is the infrastructure that is necessary for any type of e-commerce). An obvious primary component of the infrastructure is an *internet service provider*. An internet service provider is an organisation that provides services for accessing, using, or participating in the Internet. Internet service providers may be organised as commercial, community-owned, non-profit, or otherwise privately owned entities (*e.g.* Virgin Media, BT and Sky in the UK, Freenet AG and T-Online in Germany, Claranet and NLnet in the Netherlands, *etc.*).

Secondly, a *registrar* is an important node in the system. The Internet Corporation for Assigned Names and Numbers (ICANN) accredits commercial entities called ‘registrars’ that are authorised to sell domain names to the public. A very popular example is *GoDaddy.com*. Registrars are compelled to follow the law in their everyday business and are obliged to shut down illegal online pharmacies by suspending and ‘locking’ the domain name, therefore, ensuring that it is not transferred to another member of the public. A registrar that is found to be accepting fees from known illegal online pharmacies is considered to be a participant in the criminal activity. However, registrars respond to notifications from law enforcement authorities in various ways. Some cooperate, whereas others do not and are deemed non-compliant registrars.

Thirdly, a *payment processor* is required. A payment processor is a company (often a third party) appointed by a merchant to handle credit card transactions for merchants’ acquiring banks. Payment processors enable the merchants to receive debit or credit card payments online by providing a connection to an acquiring bank. These processors perform a number of functions, which include evaluating whether transactions are valid and approved, and providing anti-fraud measures to assure that a purchase transaction is initiated by the source it claims to be. An established payment processor is, for instance, Mastercard.

Fourthly, *payment gateways* are a vital part of the process. They send credit card transactions to the payment processors, who are appointed to handle transactions with the acquiring bank. Significantly, payment gateways encrypt merchant and customer information during e-commerce transactions and offer secure pages.

Registrars, payment processors and payment gateways are integral nodes of the infrastructure needed to trade in ‘fake’ medicines online, so much so that law enforcement consider them as the ‘choke points’ of the process (Burke, 2014); these are points that, if adequately controlled, can result in the closure of illegal online pharmacies.

Finally, an important part of the infrastructure is a *postal delivery service*, which guarantees that the merchandise traded online reaches customers in the ‘real’ world. This is one aspect of the infrastructure that largely involves legitimate companies (the large courier firm FedEx was recently indicted in the USA on charges of conspiracy to deliver illicit pharmaceuticals; see Walker 2014).

## **Methods and data**

As part of our broader exploration of the supply and demand of 'fake' medicines online, a number of methods and sources were used to provide an account of the tactics illegal traders in pharmaceutical products employ in order to, firstly, market their merchandise online and, secondly, avoid the efforts of law enforcement agencies to prevent the trade. The methodology included a virtual ethnography. Traditionally, ethnographies were established as a means by which anthropologists and sociologists could explore cultural groups by using the technique of 'participant observation'. Observing and engaging with a specific group over an extended period of time allowed 'thick description' (Geertz, 1973), which both described and contextualised human behaviour and everyday experiences, actions and environments. In the present-day context, however, where everyday life for many includes a significant proportion of time spent in virtual communities, ethnography and social research more generally has been compelled to account for the multi-sited, mobile and transnational nature of modern social, cultural, political and economic life. Traditionally, local ethnographic research sites have therefore been expanded to analyse global, 'glocal', transnational and virtual sites (see Wittel, 2000). Whether in forums, blogs or social networking sites, social processes and patterns of communication take place in a new 'sphere' established by the Internet (Fielding *et al.*, 2008: 161). This requires from the ethnographer a methodology able to offer insights into the virtual worlds we regularly inhabit. What is typically labelled 'virtual ethnography' or 'netnography' has steadily increased in usage to offer researchers finely detailed insights into virtual communities (see for example Davey *et al.*, 2012; Fox *et al.*, 2005; Hine, 2000; Ward, 1999).

Primary data was collected via the virtual ethnography in both non-reactive and reactive ways (see Fielding *et al.*, 2008). Initially, research began with a period of non-participant observation (sometimes referred to as 'lurking'), whereby observations were made in public forums and social networking sites without direct interaction with users. This was an invaluable primary stage of data collection that gave us the opportunity to familiarise ourselves with such a mass of information and specific interactions. Screenshots of images and text from forums, online pharmacies, social networking sites and classified advertising were collected. Moreover, social media and forum profiles, and email accounts were established in order to interact with users and take part in discussions with online consumers and suppliers of medicines. Just as Webber and Yip found in their analysis of 'carding' and the online trade in fake credit cards, internet forums are a largely untapped

resource of empirical criminological research (Webber and Yip, 2013: 193).

In terms of selecting fora to enter, a literature review and online searches via Google were undertaken to identify those that related to specific topics with links (unintended or otherwise) to pharmaceutical consumption. Namely: health, bodybuilding, sleep, weight loss, pro-anorexia, mental health, sexual health, men's and women's health, general fora with keyword searches, drug fora and their prescription drug sections, and pregnancy and motherhood. Active participation followed and conversations were generated in these fora, as well as social networking sites – including Facebook and Twitter – and email discussions. It would be impossible to research the entirety of the web. Therefore, decisions were made to enter networks and online communities that appeared or claimed to primarily cover UK contexts over certain periods of time. This was decided after general searches, observations and discussions as to the most appropriate fora that individual users would utilise to discuss their experiences of buying and consuming specific prescription drugs. Thus such online networks and communities would be more likely to reveal information relating to the locations and identities of the pharmaceutical products' suppliers.

With regards to the supply side of the online trade in illicit medicines, this method was used to collect data from various online sellers and sites, which was then analysed, pooled and categorised in order to look for common patterns. This included posing as customers and interacting with sellers online in order to collect a number of specific details from a range of online sites. The virtual ethnography allowed us to collect rich data from online sites used for supply and to begin to analyse the networks that have proliferated throughout the various stages of the trade that caters for consumer demand in the UK.

However, there are limits to the utility of a virtual ethnography as an isolated method in this context. For instance, the researcher can only pool information that is openly available online. Moreover, illicit medicines are also physically traded, therefore, the distribution of the physical goods also requires investigation. For these reasons we also collected data from a range of other sources in order to triangulate the findings and offer richer and more comprehensive empirical evidence. Data from judicial and investigative cases, interviews with relevant stakeholders and enforcement officers, and secondary media and academic sources were gathered and analysed. Specifically, we collected data from the UK Medicines and Healthcare products Regulatory

Agency (MHRA), National Crime Agency (NCA), Interpol and LegitScript<sup>2</sup>. This involved semi-structured interviews and general discussions with experts in these organisations in the UK and Europe. For example, we interviewed analysts at Interpol's Medical Product Counterfeiting and Pharmaceutical Crime Sub-Directorate, a head analyst at the UK's National Cyber Crime Unit responsible for 'shutting down' illegal online pharmacies, and the head of enforcement for the MHRA. Experts also provided us with some quantitative data. The NCA provided data regarding known illegal online pharmacies, which included information on domain names, registrars and registrants. The MHRA provided us with statistics relating to seizures of counterfeit medicines during raids from 2009-2014. We also gained access to 10 investigative and judicial case files relating to online pharmaceutical crime at the MHRA. The above data have been used, alongside our ethnographic research, to build an accurate picture of the online trade in 'fake' medicines and, in the context of this chapter's objectives, to begin to analyse the tactics used by cyber-criminal entrepreneurs involved in the trade.

In addition, we attended the two-day workshop of the 'Pangea' Single Points of Contact (SPoCs) at INTERPOL's headquarters in Lyon in March 2014, where representatives of law enforcement agencies (police and customs), health regulatory agencies (including the MHRA) and representatives of the private sector (for example Mastercard, Microsoft and LegitScript) were present to discuss various aspects of the 'Pangea' operation. This is an annual international operation that began in 2008, which takes place for one week and is specifically aimed at tackling the online trade in illicit medicines. 'Pangea' is coordinated by INTERPOL, the World Customs Organisation, the Permanent Forum of International Pharmaceutical Crime (PFIPC), the Heads of Medicines Agencies Working Group of Enforcement Officers (HMA WGEO), the pharmaceutical industry and the electronic payments industry. During the two-day workshop we obtained data from presentations and informal interviews with individuals from the aforementioned agencies and organisations, as well as from unpublished manuals and reports used by the authorities in various countries.

Finally, we collected data via traditional ethnographic methods. The offline ethnography was conducted in a gym in the Northeast of England in which the use and trade of anabolic steroids is widespread. At this point it should be mentioned that this particular locale has one of the highest rates of steroid use in the UK (see Kean, 2012). Within the context of this ethnographic

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<sup>2</sup> LegitScript is a verification and monitoring service for online pharmacies.

research, we had the opportunity to acquire knowledge regarding a variety of illegal activities and, most importantly for this chapter, the use and (online) trade of anabolic steroids. To a considerably lesser extent, data were also collected in relation to other performance-enhancing substances. Interviews were conducted as free-flowing conversations with participants on a series of occasions between January 2014 and July 2014. Most of the interviews were quite informal and brief, in which a few questions were asked yet usable data were received (see Schwalbe and Wolkomir, 2003). These data were simply recorded in notebooks because the use of a tape-recorder was, on most occasions, impractical.

## **Findings**

### **a. Marketing tactics**

#### *Online Pharmacies*

The primary site for medicine supply online is *Online Pharmacies* (OPs). OPs are pharmacies that operate over the Internet and post their products to consumers via a shipping company or the postal service. There are various types of online pharmacies and, with the global and detached nature in which they operate, the distinction between legitimate and illegitimate operations can often become blurred.

Outside legitimate online pharmacies a range of illegitimate pharmacies are in operation. Legitimate online pharmacies include well-known pharmacy chains' online subsidiaries and independent pharmacies' online sites set up to simplify the ordering process and compete with larger companies. However, there are huge numbers of illegitimate OPs in operation. In order to identify illicit providers a number of common indicators can illustrate whether online sites are acting illegally. Most offer what should be 'prescription only' (PO) medicines without a prescription, whereas others offer forged online prescription services which simply ask the customer to 'virtually discuss' their supposed health concerns with someone posing as an online doctor. Other obvious ways to tell if an OP is acting illegitimately is the concealment of their physical address and the webpage's connection to a non-compliant registrar. To project the appropriate image and enhance credibility illegal entrepreneurs pay particular attention to the design of the website, providing scientific information on the issue, accompanied by photographs of health

professionals. In addition, these websites are embellished with extremely detailed *Frequently Asked Questions* (FQA) sections as another indication of reliability. In 2008 the UK introduced the green cross logo in order to offer legitimacy and to help UK consumers identify authentic online pharmacies. However, some rogue pharmacies have attempted to plagiarise the logo on their sites.

#### *Use of Social Media Sites*

The virtual ethnographic research revealed numerous examples of social media sites, particularly Facebook, acting as online sites for supply of illicit medicines. Connections between seller and buyer were forged via friends' lists and Facebook groups affiliated to prescription drugs, or linked to subcultures wherein prescription drug use is prevalent and normalised. 'Friends' tended to post stock available directly on their wall or on the page of a group, often with photographic evidence of the product alongside their personal or business name, their contact details and the date (see figure 1). Virtual 'word of mouth' plays an important role in terms of establishing, assuring and circulating the legitimacy of a seller and quality of the service on offer, especially as users are concerned about becoming victims of 'scams' and subsequently being defrauded. Some actors used a variety of social networking sites to advertise their products. For example, we also found evidence of opioids and erectile dysfunction drugs for sale via sellers posting on sites such as Instagram and Twitter.

**Figure 1.**

**Stock posted to the page of a Facebook group, March 2013.**



Source: authors' research

Participatory web cultures and social media sites allow for a process of ‘prosumption’ (Toffler, 1980) in ‘fake’ pharmaceutical trading, where often there is no clear demarcation between the producer, trader and consumer involved in marketing and advertising processes. This, we are quite convinced, is further evidence of a cultural shift in consumption—and business relations—more generally and suggests that the online market in ‘fake’ pharmaceuticals is an important example of this shift. Moreover, entrepreneurs use a variety of online sites/avenues (email, Facebook, OPs) interchangeably to market their products, usually bought in bulk from distributors. For example, initial links made between buyers and sellers on social media sites can direct buyers to OPs and/or lead to more detailed email conversations about the products. This also explains why particular sellers offer free samples or added extras in order to market specific products they have in stock and need to sell. Other actors using social media are small scale amateur sellers, sometimes also users/consumers of prescription drugs, a procedure that seems to mimic the ‘real’ street-level dealers involved in illicit drug distribution.

#### *Online Wholesalers and Classified Advertising*

We found two specific online marketplaces based in Asia selling large quantities of pharmaceutical chemicals, materials, equipment or finished medicinal products to distributors and consumers. These products are attempting to bypass IP laws and are therefore deemed as ‘fake’. These sites offer B2B and direct B2C platforms for trade in ‘fake’ medicines. *Alibaba* is one of the largest e-commerce markets in the world, so big that in 2012 the site processed the selling of more goods than Amazon and eBay combined (*The Economist*, 2013). However, it is also rife with counterfeit products. We found large quantities of powdered APIs (Active Pharmaceutical Ingredients) under their generic names. For example, Zopiclone, a non-benzodiazepine, a patented product with Sanofi Aventis for sale in the UK, being sold in powdered form in 25 kilo quantities direct from a chemical company based in mainland China. Moreover, the equipment needed to press pills at home was also for sale on the site.

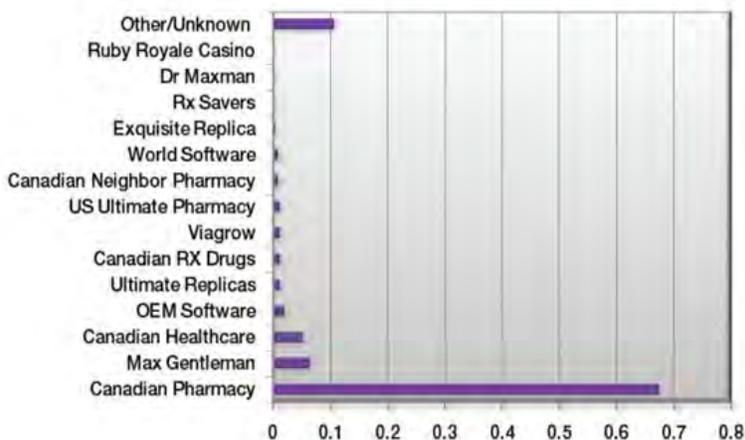
*TradeIndia*, an online Indian based B2B portal, was another large online marketplace illegitimately offering direct sales of pharmaceutical products under patent in the UK. We found direct evidence of a seller on Facebook who was supplied by a TradeIndia seller. In this case the ingredients/chemicals and pressing and packaging were being supplied to small clandestine operations based in the UK. Furthermore, we found classified advertising via such sites as *Craigslist* being used to sell smaller quantities of ‘fake’ medicines. We found

Oxycontin, Ritalin and Percocet among others for sale, mainly in the 'Health and Beauty' section. Further still, a variety of sites posing as UK-based online pharmaceutical wholesalers offered 'special products', which suggests that goods and services lying at the margins of legitimacy are being advertised. This may feed the 'new breed of retail drug dealer' sourcing their stock – in this case prescription drugs – online (see Aldridge and Décarry-Héту, 2014).

*'Pandora's (in)box': E-mail and spam*

Another way by which illegal pharmacies promote their business and merchandise online is through the use of spam e-mails. One of the most prolific counterfeit medicine traders online known to the authorities is the Russian-based GlavMed. They run their online pharmacy operation alongside their large spam company SpamIt. According to M86 Security Labs, the sites advertised in Glavmed/Spamit emails—best known by their "Canadian Pharmacy" brand name—were by far the most prevalent affiliate brands promoted by spam as of June 2010 (Krebs on Security, 2011) (see figure 2). In addition, after researching 218 drug related queries over nine months in 2010–2011, cybersecurity researchers at Carnegie Mellon University found that illegal pharmacies use spam e-mails to manipulate web search results and promote their business (Medical Daily, 2011).

**Figure 2.**  
**Affiliate brands promoted by spam, June 2010**



Source: Kerbs on Security (2011)

The practice is that of using spam e-mails in conjunction with another practice: web manipulation – primarily by illegal entrepreneurs with the highest IT ‘literacy’. Web manipulation has been viewed as much more efficient a method than spam e-mails. As the lead researcher of the project at Carnegie Mellon University noted

“. . . unauthorised online pharmacies have been using e-mail spam to tap the wallets of unwary online consumers but that method did not blanket enough customers so now [the illegal entrepreneurs] are infecting websites to redirect unwary consumers to hundreds of illegal online pharmacies” (Science Daily, 2011).

Specifically, they found that one-third of their collected search results during the study – 7000 infected websites – triggered an active redirect to a few hundred illegal online pharmacies sites. Affiliate and sub-affiliate networks often play a crucial role in this process, which we will return to below in our discussion of detection avoidance tactics.

#### *Fora*

There is an abundance of marketing research suggesting that consumers are heavily influenced by internet-based fora before they make purchasing decisions (Dellarocas, 2006). Therefore, entrepreneurs exploit discussions in these fora in the knowledge that potential customers tend to be more interested in a product if it is perceived as ‘authentically’ endorsed, rather than a product purposefully promoted by marketer-generated sources (Bickart and Schindler, 2001). In a similar vein, online fora have been identified as critical and strategic discussion platforms allowing for what Woerndl *et al.* (2008) call ‘viral marketing’: transmitting messages and information about products quickly to a much wider audience. This can be manipulated by criminals involved in the trade who pose as consumers, or more directly via the use of affiliates (see discussion below). It also confirms a point we made earlier that production and consumption are involved in a process of co-creation in the context of participatory web cultures and pharmaceutical trading. Virtual specialised fora are not only spaces in which illegal entrepreneurs identify (and persuade) potential customers to purchase medicines for medical conditions that concern them, but also in which customers often collectively discuss their pharmaceutical consumption online without such persuasion. Moreover, fora have also emerged in the form of what Soudijn and Zegers (2012) call ‘convergence setting’ for criminals; locations in which potential collaborators may meet one another. Hence, internet-based fora –

in an increasingly normalised process of time/space compression – provide large numbers of consumers in dispersed locations *and* offer the formation of transient relationships between (cyber)criminal entrepreneurs.

### *The Deep Web*

There has been a lot of discussion in the UK media regarding the SilkRoad, an unregulated US-based online marketplace recently seized by the FBI. This is only one example of operations on the so-called 'deep web', which enforcement agencies suspect might proliferate over time. Designed for online anonymity, Tor, or The Onion Router, offers layered encryption to buyers and sellers. It is a network designed to pass IP addresses and carry out web transactions through numerous relays, using random and anonymised URLs in order to conceal users' locations and internet activities. Once Tor is accessed a buyer and seller trade in digital currencies, such as Bitcoin, and use data encryption and decryption tools, for example PGP encryption (Pretty Good Privacy), to encrypt and decrypt messages. This has provided distributors of drugs a relatively anonymous and unregulated online marketplace. Our research has found numerous sellers of prescription-only medicines, steroids and other illicit drugs on the deep web across various sites. Clearly, a variety of online sites and avenues are implicated in the online trade in 'fake' medicines. However, along with the online sites of supply, a variety of other channels and networks have emerged and developed, through which the trade is put into practice, reiterating the importance of a discussion of both the virtual and physical elements of the trade and their interconnections, which we will turn to now.

### *Marketing of online business on physical locations*

Entrepreneurs also promote their online businesses offline, during pharmaceutical conventions and other relevant events and venues. For example, during our offline ethnography we came across an illegal entrepreneur, 'Pete', a nutritionist by training, who attended the gym in Northeast England. With his cousin, who is based in India, 'Pete' owns an illegal pharmacy that sells steroids and a variety of other pharmaceutical products to UK and European-based customers. 'Pete' also promotes the use and purchase of anabolic steroids in the gym, among individuals who are attempting to 'bulk up', and especially among those who have been having difficulty in doing so. He also promotes his illegal business during local and national bodybuilding, power-lifting and mixed martial arts events. His professional background as a nutritionist not only allows him to offer

detailed advice on nutritional matters, but also partly legitimises his illegal business in the gym. ‘Pete’ is regularly ‘taxed’ on his profit by the owner of the gym in return for the opportunity to market his business on the premises.

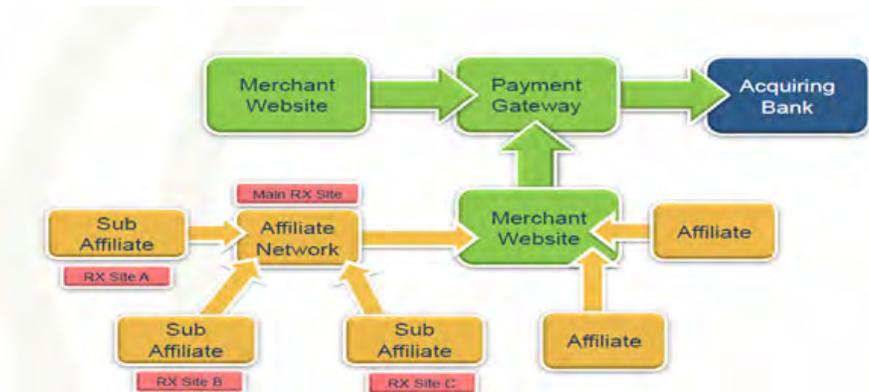
*Asking for personal details from customers*

Finally, entrepreneurs selling ‘fake’ medicines online market their merchandise by asking for a phone number when collecting billing information from customers making initial orders. The collected numbers are then used to contact customers for *repeat* business. In order to secure a customer’s number, the entrepreneurs make the provision of a telephone number compulsory if an online transaction is to be completed. Although an initial connection is made online, future sales can then be made over the telephone without any online interaction.

**b. Detection avoidance tactics**

As mentioned earlier, apart from tactics used to promote their business and merchandise, illegal entrepreneurs use a number of techniques to avoid law enforcement and health regulatory agencies’ efforts to close them down and bring them before the courts. Firstly, the tactics involve the use of affiliate and sub-affiliate networks to ‘muddy the waters’ (see Figure 3).

**Figure 3.**  
**Payment gateways in the online trade of counterfeit medicines**



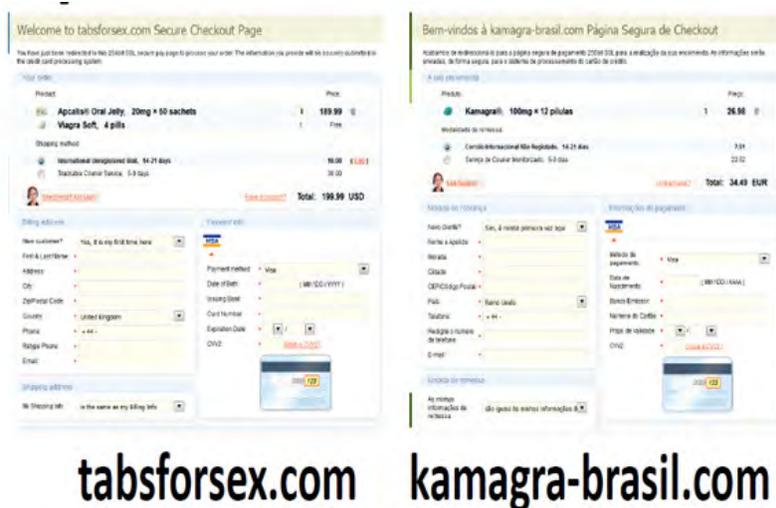
Source: Groves (2014)

An affiliate network is constructed in two ways:

1. By entrepreneurs who are responsible for a number of websites illegally trading in medicines; often the websites have a very similar if not identical template (see Figure 4);
2. By the use of 'affiliates', whereby larger 'organisations' operating OPs pay commercial entities commission to surf the web and 'set up clone pages mimicking the website of the "spider" and/or merely post a URL link' on their site to the pharmacy. In other words, individuals or affiliate programs run by individuals post links to OPs on various online sites and are paid for each 'customer who has 'clicked through' the affiliate's link' (DeKeiffer, 2005: p.9). Therefore, alongside muddying the waters, these networks provide a crucial marketing function.

Firstly, it is very interesting to note the case of 'Glavmed' mentioned earlier. This particular criminal enterprise owned and operated 2.026 domain names (although all of these names used similar website templates), provided by 36 different registrars, leading to only 12 payment gateways or pages. Similarly, the Pangea IV operation identified 1.412 illegal online pharmacies, 928 of which led to payment pages. Of those, 649 websites (or approximately 70%) were connected to only 4 payment pages (see Anaman, 2014). These examples emphasise the presence of large-scale, concentrated, schemes involved in the online trade of 'fake' medicines.

**Figure 4**  
**Illegal online pharmacies belonging to an affiliate network**



Source: figure provided by the UK Medicines and Healthcare products Regulatory Agency (MHRA)

Secondly, illegal entrepreneurs buy their domains from ‘rogue registrars’, such as *TodayNIC*; *BizCN*; *WebNIC.cc.*; *Joker.com*; *IPMirror*, etc. These non-compliant registrars tend to ignore law enforcement and regulatory agencies’ requests to block and shut down specific sites deemed to be associated with the illegal sale of medicines.

Thirdly, illegal entrepreneurs engage in something similar to counterintelligence. They attempt to identify unusual patterns of ‘behaviour’ on the part of law enforcement and health regulatory agents posing as customers. Specifically, they check the details of visitors to their affiliate sites, including the frequency of visits and the debit/credit card used for purchases. If a visitor is found to be making a number of visits to a number of their affiliate sites, as well as using the same card for payment, this is an indication of a law enforcement officer or health regulatory agent monitoring the website and/or conducting test purchases. If the illegal entrepreneurs identify such ‘unusual’ behaviour from the ‘fingerprint’ (IP address), the ‘potential client’ is blocked or re-directed to another website (for example, back to Google or to a site unrelated to the pharmaceutical industry).

Fourthly, illegal entrepreneurs actively attempt to avoid the WHOIS check that is performed by law enforcement authorities and regulatory agencies in order to identify illegal online pharmacies. WHOIS checks the following: 1. the company acting as the ‘registrar’; 2. the registrant of the domain name (basically the company or individual who has bought the domain name); 3. the registration date; 4. IP address; 5. the company address. Law enforcement and health regulatory agents use WHOIS services provided by websites such as *www.domain-tools.com*. According to the Permanent Forum on International Pharmaceutical Crime (PFIPC) (2014), it can be extremely difficult to track the ultimate source of a website, as many of the major illegal pharmacies use ‘fast flux’ in order to hide their physical location:

“The simplest type of ‘fast flux’, referred to as ‘single-flux’, is characterised by multiple individual nodes within the network registering and de-registering their addresses for a single DNS (Domain Name System) name. This creates a constantly changing list of destination addresses for that single DNS name – perhaps as often as every three minutes. The list can be hundreds or thousands of entries long” (PFIPC, 2014: p.14).

Fifthly, criminal entrepreneurs re-route payments through intermediaries and thus obfuscate the relationships existing between illegal activities and payments (see Burke, 2014). Law enforcement and health regulatory agencies consider ‘following the money’ as a reliable way of identifying illegal entrepreneurs involved in the illicit pharmaceutical trade. Indeed, ‘following

the money' is regarded as a way of counterbalancing the limitations of other aspects of the criminal investigation and a way of targeting the most important actors involved in a pharmaceutical crime network. However, illegal entrepreneurs largely avoid asking for bank payments because, on occasion, according to MHRA agents, the name of the beneficiary can be obtained from the transaction's paper trail. Instead, entrepreneurs prefer money transfer services (such as Western Union) because they are extremely easy to conduct, and – for smaller transactions – no identification is required. In addition, illegal entrepreneurs forge multiple banking relationships in numerous ways. They have been known to ask family members, friends and/or acquaintances to borrow their accounts for a number of transactions, or have rented the accounts of others for a short time.

Finally, illegal entrepreneurs generally avoid providing any personal information and details on delivery items accompanying the merchandise they send (such as delivery notes, invoices, leaflets etc.). Some unsuccessful or not so diligent illicit entrepreneurs use telephone numbers, which is quite a crucial piece of information for the investigative authorities. During our research, authorities showed us one delivery note sent with a batch of counterfeit Viagra that included the following message: *"Thank you for your purchase. For more information call XXXX 393348"*. As a result, the investigative team at the MHRA managed to trace a major, but not very intelligent, actor in an illegal online pharmacy operation distributing their merchandise in the UK.

## **Discussion and conclusion**

The 'fake' medicine trade is a growing and under-researched global phenomenon encompassing instances of counterfeit, substandard, unlicensed and illegally supplied pharmaceutical products. Based on data gathered as part of a broader ongoing study investigating the online trade in 'fake' medicines, this chapter has outlined a range of tactics adopted by illegal entrepreneurs involved in the trade. Specifically, the chapter focused on two distinct, although not entirely separate, aspects of our findings relating to the tactics and methods used. On the one hand, it offered an insight into how 'fake' medicines are marketed online. On the other hand, it highlighted how the entrepreneurs involved in the trade avoid detection by the authorities. As the chapter has shown, in terms of marketing techniques, online suppliers of 'fake' medicines use a range of sites – often simultaneously – to target

their market and circulate the value of their products to consumers. These include online pharmacies, social media sites, online wholesalers, classified advertising, email and spam, online fora and cryptomarkets found on the deep web, as well as on physical locations and via telephone marketing.

We have also found that affiliate and sub-affiliate networks can play a crucial role in marketing 'fake' medicines online (by providing greater market reach) *and* in attempts to avoid detection (by obscuring individual market operations). Furthermore, cyber-criminal entrepreneurs supplying 'fake' medicines use a range of other common detection avoidance practices. As discussed, they choose non-compliant and deceptive registrars to access domain names, monitor the behaviour of visitors to their sites, circumvent the WHOIS protocol, re-route payments, and avoid paper trails.

Although this chapter is empirical in its scope, our investigation into the online tactics illegal entrepreneurs employ in order to trade in 'fake' medicines online allows us to make a number of extrapolating observations. For the most part these observations relate to the ongoing debate surrounding whether modern ICTs have facilitated old or produced new forms of criminal activity. This specific illegal market can, therefore, be characterised by a tension between *logic consequence* (the view that professional or 'organised' criminals become involved in cyber-crime at any given opportunity) and *pragmatism* (the view that questions the need and/or ability of 'organised' criminals to exploit the virtual world) (McCusker, 2006; see also Levi, 2001; Savona and Mignone, 2004; Holt and Copes, 2010).

First of all, while computer crime has been identified as the 'new' threat or the 'new' frontier for law enforcement, policy makers, the media and an increasingly large number of academics, in reality the online trade in illicit medicines is largely based upon a set of established criminal acts: *intellectual property crime* (in the case of counterfeit medicines infringing IP laws) and *fraud*. McQuade (2011) would define these criminal activities as *adaptive* in the sense that they constitute technological variations of ordinary crimes. Similarly, as Naylor (2000: 3) very characteristically puts it:

"It is important to distinguish new crime from new methods. To take one common case, frequently "computer crime" is singled out as a prime new area of concern. But it really boils down to a series of traditional criminal acts . . . that happen today to be assisted by the use of computers. The crimes remain the same. The only difference is the technique used to commit them, and the ability to do them from much further away than was commonly the case" (see also Grabosky, 2001).

However, what our research on the illegal e-trade of medicines highlights is that although the Internet might enable the “distancing of offenders from their illegal goods and services” (Levi and Naylor, 2000: p.10; see also Filipkowski, 2004), it can also increase the authorities' ability to detect the offences and offenders (see, for example, Coscia and Rios, 2012; Moore, 2007).

Moreover, this particular market emphasises that the illicit traders involved in marketing and supplying medicines online “resemble many professional criminals in their ‘adaptive pragmatic organisation’” (Shover *et al.*, 2003: p.501). These professional criminals continue to evolve while responding to ‘shifting terrains’ (Hobbs, 2001), including new and frequently mutating technologies (see Levi, 2002; Bequai, 2001) and strategies in law enforcement and security (von Lampe, 2005). These “[e]conomic and social changes inevitably transform the worlds in which these professional criminals entertain options and organise for pursuit of criminal income” (Shover *et al.*, 2003; see also Hobbs, 1995; 1997; 2013; Hall, 2012). Indeed, the rise of the Internet is one factor working in conjunction with the non-digital dimension in a dynamic way, along with a variety of social, cultural, political and economic processes, to enable production and consumption of ‘fake’ medicines. The relationship existing between these economic and social changes, legal economies and illegal markets, online and offline ‘worlds’, is flexible and complex, and is manifested in the surrounding entrepreneurial landscapes and their elements (van Duyne, 2005; Antonopoulos and Papanicolaou, 2014). In Bauman’s (1992) words, “[the] entrepreneurial ethic that underpins both legal and illegal performances thrives upon new technical, social, psychological and existential skills” (Bauman, 1992), which in turn are bordered by new configurations of cultural and technological capital” (Shover *et al.*, 2003: p.502; see also Treadwell, 2011).

Our findings, however, highlight another key issue that merits attention, given the hype that accompanies internet-related crime. Ongoing legal and criminological research on cyber-crime is primarily concerned with *diffusion* and the ever increasing criminal opportunities offered by the Internet (Hayward, 2012: p.139). One would assume, therefore, that the Internet would allow many more criminal entrepreneurs to become involved in the process of illegally selling medicines online. Yet our study shows that the business is highly concentrated among a smaller number of individuals and groups operating on a wider scale, some of whom have a fair amount of IT knowledge and skill, or a team to which IT services can be contracted out. However, this finding may be problematic because it is the product of investigations by the authorities focusing on specific known illegal

pharmacies. Therefore, it may neglect *small-scale* actors who are involved in the illegal online trade of medicines (such as those we found during our ethnographic research). Overall, we have found that the actors involved in the online trade of ‘fake’ medicines and their operations exist on varied yet simultaneous scales; some are larger criminal organisations with pockets of concentrated power and reach (e.g. Glavmed), while others are small-scale nationally or locally based groups or individuals. This indicates that the market’s social composition does not change as a result of digitisation and similar subjective desires and demands emerge.

Finally, despite the ‘transnationality’ of this illegal market – in as much as it encompasses a multiplicity of interactions and linkages of individuals and institutions across the borders of nation states – it also has *national* and *local* manifestations. Our research has shown that the illegal online sale of medicines is illustrative of the “counter-geographies of globalisation” (Sassen, 1998): the dynamic and fluid networks that are – to a considerable extent – part of the informal economy, but also use sectors of the *legal* economy’s ‘infrastructure’ and support across various spatial scales. These networks are intertwined with the foremost dynamics constitutive of globalisation, such as the ‘formation of global markets’ and the establishment and intensification of ‘transnational and trans-local networks’, but these are coupled with a diversity of everyday grounded and localised economies (both legal and illicit) and occupational cultures in which the overall process of globalisation is embedded (Sassen, 1998; see also Hobbs, 1998).

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# **Codes of ethics in the Italian professional football**

## **Medicine, placebo or ‘snake oil’ in fostering integrity and tackling corruption?**

*Anita Lavorgna and Anna Di Ronco<sup>1</sup>*

### **Codes of ethics: a proper cure for Italian football corruption?**

The football sector has increasingly come under scrutiny following a number of corruption scandals. Italian football in particular has demonstrated to be very vulnerable to a number of corruptive practices carried out by dishonest sportsmen, white collar criminals, and organised crime syndicates. A widespread culture of illegality seems to affect the football environment, to the point that corruption-related illegal and unethical behaviours have become endemic along the years.

In a previous publication (Di Ronco and Lavorgna, 2014) we identified a number of deficiencies in the design and management of the Italian football sector which allows corruptive practices to take place. One major problem is a lack of adequate mechanisms of control and enforcement over the ethical conduct of football teams (*i.e.*, coaches, team members, and players themselves). The actors involved in this leaky system seem to be part of a “perfect storm”, where a combination of specific vulnerabilities in both the public and the private sectors (backed up by a relative climate of tolerance) create a fecund environment for corruption to prosper. Not only does the football business move huge sums of capital, 3 billion euros per year in Italy professional football alone (AREL and FIGC, 2013; Tramontano, 2012). It is also under constant pressure to deliver results on the playing field. Against this background the general lack of formal and informal control have led to unethical and even illegal conducts, with little prospect of football reforming from within (Whysall, 2014).

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In recent years, the relevance of codes of ethics has been emphasised by many national and regional organisations with a view to preventing corruptive practices in the football sector and to promoting more ethical behaviour in sports (Breitbarth *et al.*, 2011; Abbott and Dale, 2013; De Waegeneer and Willem, 2013). In Italy, the adoption of codes of ethics has been incentivised by the legislative decree N. 231 of 2001 on the criminal liability of legal entities. The Decree, which provides for a form of (administrative/criminal)<sup>2</sup> liability for corporations, companies, and associations in relation to certain types of white collar crimes, supplements the individual liability of natural persons who commit an unlawful act. For the aim of this chapter, the Decree is important because it excludes corporate liability if the corporation, among other things, adopted and implemented (prior to the commission of the unlawful act) appropriate organisational models aimed to prevent crime, including codes of ethics or similar guidelines.<sup>3</sup>

To our knowledge, no study has been carried out so far into the extent to which football teams have actually adopted a code of ethics. This chapter (1) provides a qualitative content analysis of a selection of such codes (those referring to Serie A, the top tier of the Italian football league system), and (2) identifies their strength and weaknesses against the backdrop of the situational crime prevention framework. It takes into consideration ethical codes in their entirety with a special focus on their capacity to tackle the corruptive practices and other wrongdoing currently affecting Italian football: private-to-public corruption; financial crimes (fraudulent bankruptcy, money laundering, and illegal betting); and sportive frauds (doping and match-fixing) (Di Ronco and Lavorgna, 2014).<sup>4</sup>

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<sup>2</sup> Although the responsibility is administrative on paper, it is criminal in its substantial character.

<sup>3</sup> Please consider that European professional clubs have traditionally societal roots—in contrast to football teams in other countries such as the United States (Breitbarth *et al.*, 2011)—and Italian professional clubs are therefore subject to the regulation of this Decree.

<sup>4</sup> Before moving on, it is important to underline that this chapter adopts a broad working definition of corruption, which transcends the legal crystallisation. In line with Van Duyne (2001) corruption is here defined as “an *improbability or decay in the decision-making process* in which a decision-maker (in a private corporation or in a public service) consents or demands to deviate from the criterion, which should rule his decision making, in exchange for a reward, the promise or expectation of it” (van Duyne, 2001: 2, italics in the original), and therefore the focus is on the behaviour of the decision maker. The adoption of a broad definition of corruption has the advantage of including in the analysis a wide variety of both illicit and unethical conducts (Di Ronco and Lavorgna, 2014) and to solve the conundrum of

## **On the importance of ethical codes and their content**

An ethical code is a written document containing a set of prescriptions developed by and for a company to guide present and future behaviours on multiple issues and to establish a socially responsible organisational culture (Stevens, 1994; Kaptein and Schwartz, 2008; Erwin, 2011). It is publicly available and addressed to anyone with an interest in the company's activities. In the last decades several studies have investigated the importance of adapting formalised codes of ethics, as they became increasingly widely used management instruments (Kaptein and Schwartz, 2008; Singh, 2011; Garegnani *et al.*, 2013). While the findings on the effectiveness of codes are mixed (Stevens 2008), studies are nevertheless generally consistent in underlining that ethical codes not only aim at enhancing corporate reputation and brand image, but also at developing a sense of belonging around some common corporate values. Furthermore, from a legal point of view, codes of ethic might help companies to reduce or avoid penalties (at least, in certain legal systems) (Singh, 2011; Garegnani *et al.*, 2013).

There is general agreement that the content of the codes has an impact on their effectiveness (Clarke, 1992; Farrell and Cobbin, 2000; Erwin, 2011; De Waegeneer and Willem, 2013).<sup>5</sup> Among the seminal and early studies conducted in the US starting in the late 1970s, the research of Cressey and Moore (1983) is pivotal for the aim of this study. Cressey and More analysed the codes of ethics of US corporations with the following criteria: (1) policy area (conduct on behalf of the firm, against the firm, and integrity of books and records); (2) authority or “precepts, trends, or principles that make a code’s policies seem ethical, morally necessary, or legitimate” (p. 59); and (3) compliance procedures, which are the “methods specified for monitoring, enforcing, sanctioning or otherwise ensuring compliance with the provisions of the code” (p. 64).

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applying legalistic definitions of corruption to the actual practice of a specific cultural environment (Heidenheimer, 1989; Kiellberg, 1994/95; Huisman and Vande Walle, 2010).

<sup>5</sup> A number of other factors, both internal and external to the organisation, might affect the effectiveness of ethical codes, *in primis* their implementation but also the way in which employees are made familiar of the codes and the structure and culture of the organisation (Kaptein and Schwartz, 2008). These aspects, however, are outside the scope of this study and will be addressed in the analysis only incidentally.

A few years later, Mathews (1988) re-worked these criteria and proposed a broader way to categorise the content of codes of conduct, based on three main areas:

1. categories of behaviour and actions covered by the code;
2. enforcement procedures; and
3. penalties for non-compliance.

Within these three main categories, 64 sub-categories were identified and assessed as not discussed (ND), discussed (D), discussed in detail (DD), and emphasised (E) in the code. The 64 categories were clustered in ten main areas: (1) Conduct on behalf of the organisation; (2) Conduct against the organisation; (3) Integrity of books and records; (4) Basis of the code; (5) Reference to specific laws; (6) Reference to governmental agencies; (7) Internal or external compliance or enforcement procedures/practices; (8) Codes mentioning enforcement or compliance procedures; (9) Penalties for noncompliance and illegal behaviour; and (10) References to the need to maintain the company's good reputation.

The method developed by Cressey and Moore and refined by Mathews has been used in the literature for the content analysis of business code of ethics (Lefebvre and Singh, 1992; Farrell and Cobbin, 2000; Singh *et al.*, 2005; O'Dwyer and Madden, 2006; Singh, 2006; Wood, 2000). To adjust the model to research needs, Carasco and Singh (2003) removed some categories (*e.g.*, the ones specific to the US corporate environment) and added some others instead (*e.g.*, acceptance of bribes/kickbacks/gifts/entertainment, and letter/introductory remarks from CO/ President/Chair of Board), ending up with 60 categories that were used for the content analysis of codes of ethics of transnational companies. This latter model served as the basis for our analysis in this chapter.

Despite the prominence of the issue of corruption (*lato sensu*) in football, especially in the light of the ongoing corruption scandals affecting the sector, codes of ethics in the sport sector have been generally overlooked by scholars. Only in recent years some studies have specifically addressed ethical codes in sports organisations (or, more generally, their corporate social responsibility) (Smith and Westerbeek, 2007; Breitbarth and Harris, 2008; Walters and Chadwick, 2009; Breitbarth *et al.*, 2011). Walters and Chadwick (2009), for instance, identified six strategic benefits that can be realised by adopting codes of ethics and more specifically by creating a community trust model of governance in football clubs. Such a community trust model would entail: (1) the removal of commercial and community tensions; (2) reputation management; (3) brand building; (4) local authority partnerships;

(5) commercial partnerships; and (6) player identification. De Waegeneer and Willem (2013) analysed the form and content of ethical codes from various Flemish sports clubs and found meaningful differences between and within different kinds of sports. These studies show that, in assessing ethical codes in the sport domain it is important to consider not only economic but also political and ethical/emotional dimensions. This is particularly important as regards the capacity to maintain and enhance the fan base, to establish substantial cooperation with external partners, and to demonstrate the social embeddedness of the club's professional activities within the wider sphere of amateur sports (Breitbarth *et al.*, 2011).

The present contribution is a further effort along this path of inquiry. It applies the methodology developed for analysing codes of ethics in corporations to the Italian professional football. The strength and weaknesses of these codes are then assessed in the light of the Situational Crime Prevention (SCP) framework, a practical approach based on opportunity theories which proposes a range of measures targeting the immediate situation enabling a criminal activity (Cornish and Clarke, 2003). Recent literature (see, among others, Graycar and Felson, 2010; Graycar and Sidebottom, 2012; Di Ronco, 2014; Di Ronco and Lavorgna, 2014) has emphasised that criminological approaches based on opportunity theories are promising in assisting research on corruption.

## **The (quasi-)legal framework**

There is no legal requirement to adopt codes of ethics (or germane instruments outlining standards of conduct) in the football sector. Most activity in the legislative field has been confined to soft law. It is worth mentioning the pioneering initiative of the Council of Europe launched in 1975 by the European Sports Ministers: the "European Sport for ALL Charter". This was adopted in 1992 and revised in 2001 (further revisions are currently under consideration). Building on the values promoted by the "European Sport for All Charter" the "European Sport Charter" was issued. This is a strategic document which provides the framework for sports policies in the member states. For instance, it encourages healthy sport practices and contrasts all forms of discrimination in sports, therefore trying to tackle corruptive malpractices and other unethical behaviours by focusing its intervention in the formation and education of young people (Comitato Nazionale per la Bioetica, 2010). At the EU level, the main contribution to this theme is

the Commission's *White Paper on Sport* of 2007 [COM(2009)391], which is aimed to set strategic guidelines, encourage debates, and help to improve sport governance in Europe.

Also many sport organisations at the national, regional, and international level have adopted guidelines and codes of ethics. Suffice it to recall those of the International Olympic Committee (first published in 1999 and last updated in 2013 to better respond to the issues of betting on Olympic Games competitions and the principles of good governance)<sup>6</sup> and of the Italian National Olympic Committee (Comitato Olimpico Nazionale Italiano, CONI).<sup>7</sup> If we look specifically at the football sector, the most important instruments are those adopted by the International Federation of Association Football (FIFA) and the Union of European Football Associations (UEFA, one of six continental confederations of the FIFA). The FIFA, in addition to its Disciplinary Code that describes infringements of the rules in FIFA regulations, determines the sanctions incurred and regulates the bodies responsible for taking decision,<sup>8</sup> approved a code of ethics in 2004. The code was amended in 2006 and in 2012 to reflect the creation of a new and independent Ethics Committee as competent judicial body.<sup>9</sup> The code applies “to conduct that damages the integrity and reputation of football and in particular to illegal, immoral and unethical behaviour”, focusing “on general conducts within the association that have little or no connection with action on the field of play”, and applies “to all officials and players as well as match and players’ agents” (artt.1 and 2). The UEFA does not have an ethical code but it has two disciplinary bodies (the Control, Ethics and Disciplinary Body and the Appeals Body) and an Ethics and Disciplinary Inspector representing UEFA in proceedings before the disciplinary bodies to deal with disciplinary cases, both on and off the field<sup>10</sup>.

In the Italian context we consider the actions taken by the Italian Football Federation (Federazione Italiana Giuoco Calcio, FIGC) and the Serie A League (Lega Nazionale Professionisti Serie A), which admittedly only covers part of Italian football. The Italian football league is a complex and pyramidal

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<sup>6</sup> <http://www.olympic.org/ethics-commission?tab=code-of-ethics>.

<sup>7</sup> <http://www.coni.it/it/documenti/category/17-garante-del-codice-di-comportamento-sportivo.html?download=28:codice-di-comportamento-sportivo>.

<sup>8</sup> <http://www.fifa.com/aboutfifa/organisation/footballgovernance/disciplinarycode.html>.

<sup>9</sup> <http://de.fifa.com/mm/document/affederation/administration/50/02/82/-codeofethics2012e.pdf>.

<sup>10</sup> *Ibid.*

system governed by the Italian Football Federation (Federazione Italiana Giuoco Calcio, FIGC) and composed by both professional (Serie A, Serie B, and Serie C) and non-professional (Serie D, Eccellenza, Promozione, Prima Categoria, Seconda Categoria, and Terza Categoria) leagues bound together by the principle of promotion and relegation. In particular, as regards the professional sector, Serie A comprises one national division for a total of 20 clubs, Serie B comprises one national division for a total of 22 clubs, and Serie C comprises three interregional divisions with 20 clubs each. In this analysis we focus on Serie A, which is at the top of the hierarchical system and is governed by the Serie A League (Lega Nazionale Professionisti Serie A).

The FIGC<sup>11</sup> first adopted a code of ethics in 2003 to unambiguously define the values recognised and accepted by the association and the behavioural standards to be followed both internally and in relationships with third parties. The 2003 FIGC code initiated a process of fair and transparent management in the football sector, which also paid deference to the Decree N. 231 of 2001. A new code was adopted in 2012 for the three professional leagues<sup>12</sup>; a Committee for the correct implementation of the code was established. As regards the Serie A league, although media news in April 2012 reported that guidelines were adopted in compliance with the 2001 Decree and that there was the intent to create an Ethics Committee, no evidence of their existence has been found on its official website.

As already mentioned in the introduction, the adoption of these ethical codes in Italy was boosted by the Italian legislator in 2001, when a legislative decree was enacted providing for a generic model of criminal liability that applies to companies and other organisational entities (except public or non-profit bodies), regardless of whether they have a legal personality or not. According to the Italian statute, a legal entity can be held responsible when an offence has been committed by an individual acting in a prominent position within the corporate body (art.5 let.a) or by a subject subordinate to him (art.5 let.b) in the interest of or to the advantage of the entity (art.5)

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<sup>11</sup> In 2014, the FIGC also adopted the *Codice di Giustizia Sportiva* (transl.: code on the sportive justice), which introduces disciplinary norms and procedures punishing some specific types of illicit and/or unethical behaviour of football teams and their members (e.g., sportive frauds, illicit betting, irregularities in the books, etc.). It is a sanctioning system that works in parallel with (and not as an alternative to) the eventual criminal proceeding that may be initiated after the commission of a criminal conduct. See <http://www.figc.it/>.

<sup>12</sup> [http://www.lega-pro.com/images/stories/pdf\\_comunicati/1112-1611.pdf](http://www.lega-pro.com/images/stories/pdf_comunicati/1112-1611.pdf).

when derived from “organisational failure” (artt.6 and 7). In both cases, when the offence is committed either by an agent in a leading position or by a subordinate of the corporation, due diligence in crime prevention can release the entity from responsibility.<sup>13</sup> Due diligence as a defence fending off criminal liability can be recognised by the competent judicial authority insofar as the elements in the organisational model prescribed by the legislator are included in the company’s compliance scheme (art.6 par.2). This has incentivised many companies (including football clubs, see Bof and Previtali, 2008) to comply with (and, thus, to adopt and implement) the legislative model. To operate as a defence, however, the corporate compliance scheme shall appropriately address and manage factors and areas of risk, and be supported by adequate financial resources. The management should be run by an independent unit responsible for ensuring its supervision and update, and be supplemented by a disciplinary system to detect and sanction corporate wrongdoing. Therefore, the underlying idea of the Decree is that of making the adoption of a code of ethics convenient for the organization, including football clubs (Bof and Previtali, 2008).

## **Methodology**

This study is based on the qualitative content analysis of all publicly available codes of ethic of professional football teams in the Italian Serie A league. Serie A has been chosen for a twofold reason: it is at the top of the football pyramid (see above), thus comprising the most influential football clubs, and it also has huge financial turnovers that might boost corruptive practices. Codes of ethics have been searched for the following twenty clubs that compete in Series *A* during the 2014–15 season: Atalanta, Cagliari, Cesena, Chievo, Verona, Empoli, Fiorentina, Genoa, Sampdoria, Inter Milan, Milan, Juventus, Torino, Lazio, Roma, Napoli, Palermo, Parma, Sassuolo, and Udinese. Codes of ethics are/should be generally accessible to the wider public. Therefore, our search started from the official websites of these clubs and/or on the Google search engine. In seven cases (Cagliari, Cesena, Chievo, Empoli, Genoa, Torino, and Lazio) the search did not lead to any results. We also

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<sup>13</sup> A vicarious form of liability is established in the first case, and thus when the offence is perpetrated by an agent in a leading position (art.5 lett. a). In this case, criminal liability is excluded when the corporation proves that, at the time the crime was committed, it had adopted and effectively implemented an organisational framework apt to prevent its occurrence (art.6).

directly contacted the clubs twice (via the email address provided by their websites) to check whether they had codes of ethics. Only one of the clubs (Chievo) answered explaining that the code was not available to the public as it was under revision. Therefore, our analysis was based on the thirteen codes available.

For the analysis of these documents we adapted the model developed by Carasco and Singh (2003) that we then applied to the football (corporate) environment (see Tables 1 to 9 below). More specifically, we adapted and adjusted to the football sector some pre-existing categories (*e.g.*, in the references to specific law and governmental agencies), and added or specified in the list (in *italic*) the specific corruptive malpractices that occur within or through football organisations (Di Ronco and Lavorgna, 2014): private-to-public corruption; financial crimes (fraudulent bankruptcy, money laundering, and illegal betting); and sportive frauds (doping and match-fixing). Ultimately, 64 categories have been used for the content analysis of Italian football organisations' codes of ethics, grouped around seven themes: (1) conduct on behalf of the organisation; (2) conduct against the organisation; (3) integrity of books and records; (4) basis of the code; (5) reference to specific laws or governmental agencies; (6) internal and external compliance or enforcement practices; (7) general information.

## **Analysis**

Information retrieved from the thirteen codes was included in the following table (Table 1). By following the example of Carasco and Singh (2003), each category was assessed as not discussed (ND), discussed (D), discussed in detail (DD), and emphasised (E) in the code depending on the extent of their presence in the code, and specifically: no discussion at all (ND), one or two sentences (D), more than two sentences up to one full or two short paragraphs (DD), and two or more full paragraphs on the subject.

### ***Conduct on behalf of the organisation***

Regarding the conducts on behalf of the organisation, the frequency of mention in the codes (ND, D, DD, E) varies very much according to the category taken into consideration. While almost all the codes of ethics include a mention of the relationships of the football team with customers, suppliers, and business partners (category n.1) (77% have it discussed in detail or otherwise emphasised), they rarely cover the relationships with

competitors (category n.5). Only in 8 codes of ethics (62%) the relationships with the competing teams are briefly mentioned (D). Relationships with investors (category n. 8) are not mentioned at all in 10 of the codes (77%). Only in the case of teams whose shares are traded in the stock market (as in the case of Fiorentina, Juventus, and Roma), investors have been referred to in the ethical codes.

**Table 1**  
**Relationships on behalf of the organisation**

CATEGORIES	Non-discussed ND	Dis-cussed D	Dis-cussed Detail DD	Emphasis E
<b>Conduct on behalf of the organisation</b>				
1) relationships with customers/suppliers/ business partners	2 (15%)	1 (8%)	2 (15%)	8 (62%)
2) relationships with external consultants	3 (23%)	5 (38%)	2 (15%)	3 (23%)
3) relationship with supporters/members (supporters holding a seasonal card)	3 (23%)	5 (38%)	4 (31%)	1 (8%)
4) relationships with employees (safety, health)	1 (8%)	1 (8%)	2 (15%)	9 (69%)
5) relationships with competitors	5 (38%)	8 (62%)		
6) relationships with relevant stakeholders (FIGC, UEFA, FIFA)		2 (15%)	7 (54%)	4 (31%)
7) relationships with (foreign) governments, political parties, unions and associations	1 (8%)		6 (46%)	6 (46%)
8) relationships with investors	10 (77%)	2 (15%)	1 (8%)	
9) relationships with civic and community affairs, consumers –community (non-profit and educational activities)	1 (8%)	3 (23%)	7 (54%)	2 (15%)

Despite being addressed (with a different emphasis) by 10 out of the 13 codes of ethics, the relationships with external consultants (category n.2) received generally less attention than those with business partners. While in 3 codes these relationships are not mentioned at all, in 5 codes they are merely mentioned once, and only in 5 codes they are addressed more profoundly. The same (rather ambivalent) results emerge with respect to the item dedicated to the relationships with supporters (category n.3): with the exception of three codes of ethics where such relationship is not pointed out, the other codes of football teams have relations to the fan base discussed (in 5 codes or 40%), discussed in detail (in 4 codes or 31%) or emphasised (1 codes or 8%). In 85% of the cases (11 codes), moreover, codes widely cover employees' safety and health, the relationships with relevant stakeholders (such as the FIGC, UEFA, FIFA, CONI, etc.) (category n.6), and with (foreign/domestic) governments,

political parties and unions (category n.7). Relationships with civic and community associations (category n.9) are also discussed in detail in 7 codes of ethics and emphasised in 2 codes – where the importance of the social and educational function of football is also underlined.

**Table 2**  
**Categories of external interaction**

<b>CATEGORIES</b>	<b>Not discussed ND</b>	<b>Dis-cussed D</b>	<b>Dis-cussed Detail DD</b>	<b>Emphasis E</b>
10) payments or political contributions to governments or their employees/officials	2 (15%)	2 (15%)	8 (62%)	1 (8%)
11) acceptance of (illicit) sponsorships or contributions	12 (92%)		1 (8%)	
12) giving of sponsorships or contributions (not to politics)	5 (38%)	3 (23%)	5 (38%)	
13) acceptance of bribes/kickbacks/gifts/entertainment	3 (23%)	3 (23%)		7 (54%)
14) giving of bribes/kickbacks/gifts/entertainment	1 (8%)	3 (23%)	3 (23%)	7 (54%)
15) other cases of money laundering	3 (23%)	1 (8%)	6 (46%)	3 (23%)
16) match fixing		12 (92%)	1 (8%)	
17) doping		9 (69%)	4 (31%)	

With respect to the categories n.10 to 17 (which are especially relevant for the purpose of this paper), the collected results show that not in all cases ethical codes are clear and complete, as they may neglect some very relevant rules that are prone to corruptive (mis)behaviours. The topic of offering payments or contributions to politics or public administrations (category n.10), for example, is dealt with in detail by the majority of the considered codes (8 codes or 62%), and in one case (Fiorentina) it is even emphasised. However, this issue is not mentioned in 2 codes of ethics (Atalanta and Milan) and is only briefly mentioned in other two (Inter Milan and Juventus).

In the same fashion, the giving and receiving of bribes and other undue advantages (such as gifts, entertainment, hospitality, etc.) (categories n.13-14) have been emphasised in 7 of the 13 codes under study. A good example is provided by the code of ethics of the Roma football team, which prohibits “*any form of gift that may be interpreted as exceeding the normal commercial and courtesy practices, or that is anyway aimed to obtain favouritisms in the pursuance of any of the activities of A.S. Roma S.p.A.*” (p.8). The code clarifies that employees are prohibited from offering gifts (exceeding the nominal value)

to both public officers and to their relatives, as well as from accepting or receiving them from business partners. This code (as well as the ones of Palermo, Verona, and Sampdoria) also provides a (very broad) definition of *gift*, which is considered as “*any sort of benefit or utility (e.g., the promise of a job offer etc.)*” (p.8). Also the code of ethics of Sassuolo prevents the team’s members from giving/receiving gifts when they are of any value and impels them to keep record of them in the team’s balance sheets (as to allow the relevant internal authorities to have a check on them). The exchange of gifts is tolerated only insofar as they are of nominal value or aimed to support initiatives to foster the team’s image and reputation.

The acceptance of bribes, by contrast, is neglected in 3 cases, and it is only given a limited coverage in the remaining 3 codes. The code of ethics of Atalanta, for example, does not provide any indication to its employees on both the offering/giving and the acceptance of bribes or kickbacks (both to business partners and to public officials).

While the giving of sponsorships to associations and non-profit organisations (category n.12) is discussed in some detail in 8 codes, the acceptance of illicit sponsorships (category n.11) is never addressed by codes of ethics (except in the case of Udinese).

Cases of *money laundering* (category n.15) are included in 10 codes of conduct, where they are discussed (1 code), discussed in detail (6 codes), and emphasised (3 codes). A set of detailed rules on money laundering is to be found in the codes of ethics of Fiorentina and Juventus. Here employees, suppliers, external consultants, and business partners are all prohibited from using money deriving from illicit activities, and are mandated to comply with the anti-money-laundering framework (besides living up to the team’s expectations with respect to integrity in business relationships). In these two cases, potential business partners are also thoroughly assessed (and scanned) prior to the entering into a business relationship with the two teams. Prior convictions or (verified) involvement in cases of money laundering, therefore, constitute a criterion for suppliers’ selection. In the codes of Napoli and Juventus, it is also stated that all the transactions should be made electronically (and not via cash) and be carefully accounted in the balance sheet. No slush funds can be created to store black money on behalf of the team.

*Match fixing* and, more generally, *sports frauds* (category n.16) committed on behalf of the organisation are addressed in more than two sentences only in one code (Napoli) and are only briefly mentioned in all the others. However, even when they are dealt with in more than one or two sentences, sportive frauds are only generally addressed. Illustrative in this respect is the

code of Napoli, which states that the team “*rejects any behaviour that clashes with the sport ethics or that conceals a fraudulent intent. Anyone who acts on behalf of the team [ . . . ] shall avoid taking steps in order to alter the course or the result of sportive competitions*” (p.11).

Only a few codes discuss in detail the conduct of *doping* (category n.17), that is, the conduct of providing the football players with prohibited substances aimed to enhance their physical condition and their professional performance. Such a phenomenon, however, is addressed only in general terms by the codes. Even in the 4 codes where the item is discussed more in detail, they do so by (only) evoking the (general) need of the team’s members to “*strictly comply with the relevant regulations on doping, whose adherence is a pre-condition to preserve players’ physical and mental health and the fair progress of sportive competitions*” (code of ethics of Palermo, p.9). Some clarification about the specific behaviour that is prohibited is provided by the code of ethics of Udinese, which identifies the conduct that is sanctioned by the team (and is not limited to the taking of a prohibited substance). These are the conduct of “*utilising, recommending, proposing, authorising, allowing or tolerating the use of any substance or method that would fall within the definition of doping, as well as the trading of such a substance*” (p.4). The remaining 9 codes only refer to the phenomenon of doping in one sentence—mainly by laying down a general prohibition on the use of drugs that applies both to managers and to football players. Despite the importance of having similar provisions in the codes of ethics, such norms do not incorporate relevant information regarding, for instance, the categories, types and amounts of prohibited drugs.

**Table 3**  
**Conduct against the organisation**

<b>Categories</b>	<b>Not discussed ND</b>	<b>Dis-cussed D</b>	<b>Dis-cussed Detail DD</b>	<b>Emphasis E</b>
<b>Conduct against the organisation</b>				
18) conflict of interests	2 (15%)	1 (8%)	6 (46%)	4 (31%)
19) personal character matters	2 (15%)	2 (15%)	4 (31%)	5 (38%)
20) divulging trade secrets/propriety information	1 (8%)	4 (31%)	5 (38%)	3 (23%)
21) insider trader information	10 (77%)	1 (8%)	1 (8%)	1 (8%)
22) match fixing	6 (46%)	6 (46%)	1 (8%)	
23) doping		6 (46%)	7 (54%)	
24) illegal betting	3 (23%)	8 (62%)	2 (15%)	
25) other conduct against the firm		2 (15%)	9 (69%)	2 (15%)

Conduct against the organisation is extensively addressed by the majority of the ethical codes, namely items such as conflict of interests (category n.18), personal character matters (category n.19), and the activity of divulging confidential information (category n.20) are. Only in the ethical codification of three football teams do such items not appear (not at all, in the case of Udinese, and only partly, in the cases of Atalanta and Parma). By contrast, the conduct of insider trading (*i.e.*, of trading a company's stock by benefitting of non-public information) (category n.21) is not addressed in 10 of the 13 considered codes. This can be easily explained because only three clubs are publicly traded.

While doping (when committed against the team) (category n.23) is generally addressed (in some detail) by all the 13 codes of conduct, match fixing (or sportive frauds) (category n.22) and illegal betting (category n.24) are relatively neglected. Sportive frauds, for example, are covered in more than two sentences only in one case (Sassuolo); in the remaining 12 codes they are either briefly mentioned in one sentence (6 codes) or completely absent (6 codes). Even in the code of ethics of Sassuolo, the relevant norms regarding sportive frauds are limited to (textually) reporting the content of the provisions of art. 1 par. 1 and art. 7 par. 5 of the *Codice di Giustizia Sportiva* (see footnote 11), which are no further clarified.

A prohibition of placing (illegal) bets on the results of football matches where the team is involved is not included in 3 codes of ethics (*i.e.*, Firenze, Milano, Napoli). Even in the other 10 cases where the item appears (to some extent), it is only generally referred to through vague statements. The code of Verona prohibits individuals to “*alter the course and/or the result of football matches, with any act or means, and to bet or to accept bets, directly or through mediators, or to facilitate the betting of others, on the results of the competition where the teams takes part*” (p.12), while in the case of Udinese such a prohibition is applicable to all official competitions organised by the FIFA, UEFA, and FIGC.

Other conducts against the team (category n.25) are covered in all codes of conduct and include economic transgressions and crimes to the detriment of public administrations, cybercrimes, organised crimes, corporate and commercial crimes, human trafficking and sexual exploitation of children, terrorism, environmental crimes, transnational crimes, copyright violations, female genital mutilations, culpable homicide, and serious bodily injuries (also deriving from the violation of the safety and hygienic norms at the workplace etc.) (see, for example, Atalanta and Sassuolo, whose ethical codes recall the list of crimes found in the 2001 Decree).

**Table 4**  
**Integrity of the books and records**

<b>Categories</b>	<b>Not discussed ND</b>	<b>Discussed D</b>	<b>Discussed detail DD</b>	<b>Emphasis E</b>
26) Integrity of the books and records	1 (8%)	2 (15%)	3 (23%)	7 (54%)

Except in one case (Milan), all codes thoroughly describe the conduct of the employees with respect to the activity of book keeping (category n.26). All individuals shall pay attention to the correct recording of incomes and expenses, which shall be traceable and fully documented (also with a view to eventually allowing the competent judicial authorities to fully reconstruct the transactions of the team). Most of the codes also indicate the presence of internal and external financial and accounting audits, and associate employees' misconducts to the application of internal disciplinary sanctions. Most of them underscore the importance of "*truthfulness and transparency in the books and records*" and of having a "*widespread culture of control which is present at every level of the team*" (code of ethics of Palermo, p.10)—meaning that every member is required to check over colleagues' accuracy in reporting expenses. This provision has been especially underlined in the code of ethics of Verona, where it is stated that "*anyone [ . . . ], is impelled to take part [ . . . ] in the activities of control and revision that are attributed to the shareholders, corporate bodies and auditing companies, or to the internal monitoring body envisaged by law and by the federal regulations in order to provide the latter with truthful, correct, complete and transparent information*" (p.13). A similar provision is found in the code of Sampdoria.

**Table 5**  
**Basis of the code**

<b>Categories</b>	<b>Not discussed ND</b>	<b>Discussed D</b>	<b>Discussed detail DD</b>	<b>Emphasis E</b>
<b>Basis of the code</b>				
27) legal responsibility	1 (8%)	4 (31%)	5 (38%)	3 (23%)
28) ethical responsibility		3 (23%)	5 (38%)	5 (38%)

In all the codes of conduct considered, the basis of the codification has been traced back to the wider ethical norms and values inspiring the sportive behaviour of the football team (category n.28), which in 10 cases is either discussed in detail or even emphasised. Except for one case (Milan), football teams have reconnected the adoption of the code also to the need to comply with specific legal standards (category n.27), that is, to the 2001

Decree (which in the codes of Juventus, Palermo and Sassuolo is explicitly emphasised).

Among the relevant laws referred to in the codes of ethics, all (except the case of Milan) make reference to the corporate responsibility envisaged by the 2001 Decree (category n.29) (in 8 of them it is either DD or E). By contrast, reference to laws disciplining competition (category n.30), securities (category n.31), and the environment (category n.32) are rarely addressed by the codes of conduct: on average, such regulations are not even mentioned in 85% of the cases. On the contrary, laws and regulations relating to workers' health and safety (category n. 33) are profoundly discussed by most of them (10 codes), and are neglected only in 3 cases (Fiorentina, Milan, and Udinese).

**Table 6**  
**Reference to specific laws or relevant agencies**

Categories	Not discussed ND	Discussed D	Discussed detail DD	Emphasis E
<b>Reference to Law</b>				
29) <i>D.lgs. 231/2001</i>	1 (8%)	4 (31%)	4 (31%)	4 (31%)
30) competition act/Anti-trust	10 (77%)	2 (15%)	1 (8%)	
31) securities	12 (92%)		1 (8%)	
32) environment	10 (77%)	2 (15%)	1 (8%)	
33) worker health and safety	3 (23%)		6 (46%)	4 (31%)
34) bribes or payments to governments or officials	2 (15%)	2 (15%)	5 (38%)	4 (31%)
35) other laws (e.g., privacy)	3 (23%)	1 (8%)	5 (38%)	4 (31%)
<b>Relevant agencies</b>				
36) competition tribunal	13 (100%)			
37) other agencies (FICG, CONI, FIFA, judicial authorities etc)		5 (38%)	2 (15%)	6 (46%)

The national anti-corruption legal framework (category n.34) is deeply addressed in 9 codes of conduct. It is only briefly mentioned in 2 codes, and ignored in the remaining 2 (Fiorentina and Milan). However, even when the prohibition to offer or give to governmental officials undue advantages is included in more than two or three sentences, it reads as a very general reference. The code of ethics of Sassuolo, for example, almost entirely reproduces the texts of the offences of active and passive bribery found in the Italian penal code (i.e., articles 317, 318, 319, 319-bis, 319-ter, 320 and 321)—a circumstance that better explains the reason of a lengthy description of such a topic.

Other regulations (category n.35) are also recalled in 10 of the ethical codifications, including, for example, privacy, frauds, and embezzlement.

Among the agencies referred to in the codes, there are the relevant (international and national) football authorities (category n.37). No mention to the competition tribunal is made (category n.36), nor to other external agencies and authorities.

***Internal or external compliance or enforcement procedures/practices***

***a. Internal***

**Table 7**  
**Compliance or enforcement procedure**

<b>CATEGORIES</b>	<b>Not discussed ND</b>	<b>Discussed D</b>	<b>Discussed detail DD</b>	<b>Emphasis E</b>
<b>Internal or external compliance or enforcement procedures/practices</b>				
<b>Internal oversight</b>				
38) supervisor surveillance	9 (69%)	3 (23%)	1 (8%)	
39) internal watchdog committee	1 (8%)	7 (54%)	3 (23%)	2 (15%)
40) internal audits	7 (54%)	6 (46%)		
41) read and understand affidavits	7 (54%)	4 (31%)	2 (15%)	
42) routine financial budgetary review	6 (46%)	5 (38%)	2 (15%)	
43) legal department review	13 (100%)			
44) other oversight procedures	10 (77%)	3 (23%)		
<b>Internal - Personal Integrity for questions related to policy or reporting misconducts of self or others to</b>				
45) supervisor	5 (38%)	7 (54%)	1 (8%)	
46) internal watchdog committee	2 (15%)	9 (69%)	2 (15%)	
47) corporation's legal counsel	9 (69%)	4 (31%)		
48) other (in firm)	8 (62%)	5 (38%)		
49) compliance affidavits	9 (69%)	3 (23%)	1 (8%)	
50) employee integrity		4 (31%)	4 (31%)	5 (38%)
51) senior management role models	11 (85%)	2 (15%)		

In almost all codes (except for the one of Milan), the employees' compliance with the ethical rules is guaranteed through the establishment of an internal watchdog committee (*Organismo di Vigilanza*, OdV) (category n.39). Only in a few codifications (4 codes), there are rules that refer to the oversight of the supervisor/ front-line manager (category n.38), whereas none of them refers to a more specific system of controls exercised by the department (category n.43).

The specific role and function of the internal monitoring body is addressed in detail by the code of the Palermo football team. According to this codification, the body is in charge of: 1) expressing independent

opinions regarding the ethical issues that may emerge from corporate decisions and the (alleged) ethical violations; 2) carefully monitor employees' compliance with the provisions incorporated in the code; and 3) coordinate the initiatives aimed to disseminate the ethical norms. According to the ethical codification of Sassuolo, such a body is also responsible for keeping the code up-to-date. This latter code is one of the few codifications (together with the one of Palermo) that dwells on the topic of rule dissemination and employees' ethical education: it encourages the team to disseminate the ethical rules to employees and to provide guidance on their interpretation through training (which is to be given differently according to the specific function and role played by the employees). The ethical code of Sassuolo, moreover, also mentions the rules that inform the selection of the members of the committee, their qualifications, the cases of their ineligibility to the position, the procedures that the authority has to follow in case a report of employee misconduct is filed with it, the guarantees of anonymity and confidentiality to be granted to the whistleblowers, etc. With respect to the topic of whistle-blowing, only in two cases it is addressed – mainly, codes of ethics do so by recalling the procedural guarantees that are awarded to employees reporting a misconduct. An example is provided by the code of ethics of Napoli (category n.15), which stipulates that “*anyone who reports a case of misconduct to the internal watchdog committee is protected against any form of retaliation, discrimination and penalisation. Also the highest level of confidentiality is guaranteed to the identity of the person*” (p.15).

In the majority of the codes, concerns regarding the correct interpretation of the ethical principles and rules, along with reports of employee misconduct, are to be submitted to the internal watchdog committee (category n.46) (11 codes) and to the supervisor (8 codes) (category n. 45) – who, on his/her part, has to refer back to the OdV for providing guidance and reporting misconduct. In four codes, internal bodies and organs of the (corporate) team (such as the board of directors) (category n.47) are regarded as competent to receive both types of enquiries. However, their role is only subsidiary, as they are required to forward any query immediately to the OdV. Five codes also refer to other internal controlling procedures (category n.48). For example, the codes of Palermo, Napoli, and Inter Milan recall the role of shareholders, of different corporate bodies, of auditing companies, as well as of different departments with the organisation of a team.

Only one code of ethics includes norms on the assessment of the specific risks associated with the specific (both business and sport-related) activities of the teams: the ethical codification of the Sassuolo. According to this code, the OdV is competent to map the risky areas within the team and to regularly

verify the effectiveness of the crime-prevention scheme, in order to “*adapt it to the changing of the activities and/or of the business structure*” (p.30). A prominent role is here played by the managers and the controlling bodies, who (also through the aid of external consultants) are in charge of monitoring the application of the code of ethics by employees’ and of periodically reporting to the OdV any newly emerging areas of risk, which can provide employees opportunities for the commission of crimes and the adoption of unethical conduct.

The existence of internal audits (category n.40) is only briefly mentioned in 6 codes, as well as routine financial controls (category n.42) (which appear in 7 codes and are only explained in detail in 2 of them). Only 3 codes (Inter Milan, Napoli, and Palermo) envisage other types of oversight procedures (category n.44).

Rarely (and notably only in 2 cases), do codes make a reference to the duty for senior managers and head of departments to behave with rectitude and honesty (category n.51) when representing the company, in order to also positively influence the conduct of their subordinates. The relevance of employees’ ethical behaviour (category n.50) is discussed in every code, and it is profusely addressed in 9 of them.

The requirement for recruited employees to *read and understand* the rules of ethical code (category n.41) is mentioned in 6 of the codes and is treated as a necessary condition attached to the labour contract. Only in 4 cases, it is stipulated that employees, consultants, and other external suppliers, shall sign compliance affidavits (category n.49) as a condition for their recruiting and/ or for entering into business relations with the team.

***b. External***

**Table 8**  
**External relevant actors to deal with**

<b>CATEGORIES</b>	<b>Not discussed ND</b>	<b>Discussed D</b>	<b>Discussed detail DD</b>	<b>Emphasis E</b>
<b>External</b>				
52) independent auditors	8 (62%)	5 (38%)		
53) law enforcement	9 (69%)	3 (23%)	1 (8%)	
54) other external	11 (85%)	2 (15%)		

In the majority of the cases, codes of ethics do not dwell on the description of external controls, which may be carried out by independent audit companies (category N. 52), as well as by law enforcement agents (category N. 53) and other (e.g., sport-related supervising) bodies (category N. 54). Even when

they refer to external controls, they mention them briefly in one sentence—as in the case of Sassuolo, where there is the general mention to the “*initiation of criminal proceedings*” (p.10).

**Table 9**  
**Codes mentioning enforcement or compliance procedures**

CATEGORIES	Not discussed ND	Discussed D	Discussed detail DD	Emphasis E
<b>Codes mentioning enforcement or compliance procedures</b>				
55) Code mentioning enforcement or compliance procedures ( <i>ref to 2001 Decree</i> )	1 (8%)	10 (77%)		2 (15%)

When talking about *other types of compliance procedures* (category n.55) applicable to employees breaching ethical norms, the codes make a general reference to the 2001 Decree. Only in 2 cases (Palermo and Sassuolo), is the Decree given significant treatment in the codes.

**Penalties for noncompliance and illegal behaviour**

**a. Internal**

**Table 10**  
**Penalties for noncompliance and illegal behaviour**

Categories	Not discussed ND	Discussed D	Discussed detail DD	Emphasis E
<b>Penalties</b>				
<b>Internal</b>				
56) Internal reprimand	11 (85%)	1 (8%)		1 (8%)
57) fine	10 (77%)	2 (15%)		1 (8%)
58) demotion	11 (85%)	1 (8%)		1 (8%)
59) dismissal/firing	3 (23%)	9 (69%)		1 (8%)
60) other internal penalty	7 (54%)	5 (38%)	1 (8%)	

Generally speaking, codes of ethics do not indicate the type of internal/disciplinary sanctions that are applied to employees when they are found in breach of a relevant ethical/legal norm. When codes do so, they normally envisage the sanction of dismissal/firing (category n.59) (in 9 cases), and only seldom do they indicate other types of sanctions, such as internal reprimand (category n.56) (1 code), fine (category n.57) (2 codes) or demotion (category n.58) (1 code). The only exceptions are represented by the two ethical codes of the Palermo and Sassuolo football teams, which thoroughly describe all

the sanctions that are applied to employees for their misdeeds. Sanctions in this case vary according to the gravity of employees' misconducts and to the role that employees, managers, consultants, or others played within the team. Also a general description of the conduct that leads to the imposition of an internal sanction is provided by the two codes.

Other types of internal penalties (category n. 60) appear in 6 of the analysed codes. For instance, the ethical code of Sassuolo envisages the posting of the penalty in the team's notice board and its communication to all other employees ("name and shame").

**b. External**

**Table 11**  
**External penalties discussed**

CATEGORIES	Not discussed ND	Discussed D	Discussed detail DD	Emphasis E
<b>External</b>				
61) legal prosecution <i>(including ref to 2011 Decree)</i>	9 (69%)	3 (23%)		1 (8%)
62) other external penalty	8 (62%)	5 (38%)		

External penalties are likewise only rarely referred to by the codes. While a legal prosecution (category n.61) following the commission of crimes as envisaged by the 2001 Decree is mentioned in only 3 codes and it is emphasised in 1 code, the existence of any other external penalty (category n.62) is included only in a short sentence in 5 codes. Such residual groups of external penalties may be issued by the FIGC and by other relevant agencies. In the code of ethics of Roma, a reference is made also to the provision disciplining the situation of conflict of interest (art. 2391 of the Italian civil code), whose breach is sanctioned by art. 2691 of the Italian civil code and by the 2001 Decree.

**General information**

Except for the case of Atalanta, codes of ethics are not introduced by a letter of the president of the football team (category n.64). Notwithstanding the absence of the CEO's opening remarks, they all include an introductory part where the general ethical principles and legal rules that inspire and guide the team's activities are spelled out. Among such statements of principles, there are the central role that ethics plays in sports and the need to maintain the team's good reputation (category n.64) – which should not be compromised by employee misconduct.

**Table 12**  
**General information discussed**

<b>Categories</b>	<b>Not discussed ND</b>	<b>Discussed D</b>	<b>Discussed detail DD</b>	<b>Emphasis E</b>
<b>General information</b>				
63) need to maintain corporation's "good reputation" and the fairness of the fair-play/ ethics in sports		6 (46%)	4 (31%)	3 (23%)
64) Letter/introductory remarks from the President/CEO/Chair of the Board	12 (92%)	1 (8%)		

From the data gathered through the content analysis, it emerges that in many cases the relevant information regarding corruptive practices is either missing or only briefly mentioned in the football teams' ethical codes. No in-depth information is provided to employees with respect to the conduct they are supposed (or not supposed) to adopt while fulfilling their tasks. They are also barely made aware of the (internal/external) consequences of any actions or omissions, and they are provided with little or no insights on the procedures they need to follow (and on the guarantees they are awarded) in case they wish to raise an issue on the correct interpretation of the code or to report a misconduct. Risk assessment procedures are also rarely dealt with in the codes, and educational initiatives such as trainings, awareness-raising campaigns, and specific plans for the code's dissemination are seldom covered. By contrast, other items have received a greater deal of attention in the 13 codes of ethics considered. Among the topics that were discussed in full detail, are the relationships with suppliers/business partners, employees' health and safety, and the integrity of the books.<sup>14</sup>

## **Assessing the codes of ethics from a situational crime prevention perspective**

This section aims at assessing the strength and weaknesses of the ethical codes analysed especially with respect to their capacity to tackle corruptive

<sup>14</sup> From Table 1, it emerges that also categories n.7 (relationships with (foreign) governments, political parties, unions and associations), n.13 (the acceptance of bribes/kickbacks/gifts/entertainment), and n.14 (the giving of bribes/kickbacks/gifts/ entertainment) have been given space in the majority of the codes. As the content analysis has shown, however, even when these issues are discussed in two or more full paragraphs, the related conducts are not well defined and clarified.

practices (private-to-public corruption, fraudulent bankruptcy, money laundering, illegal betting, doping, and match-fixing) against the backdrop of the Situational Crime Prevention (SCP) framework.

Situational crime prevention is a practical approach to the control of crime, originally developed out of the UK Home Office research programs in the 1960s, that focuses on crime events (rather than on the motivation) (Clarke and Felson, 2010). It is grounded on the idea that opportunity is a major driver for crime and seeks to alter its “near” causes by modifying the offender’s decisions that precede the commission of a criminal offence, as proximal causes closest to the criminal event (which are seen as those criminogenic factors that are the most easily changeable) (Clarke, 2008). According to the original approach developed and refined by Clarke and Cornish, the reduction of crime is achieved through twenty-five mechanisms that can be reduced to five main opportunity-reducing techniques: increasing the offender’s perceived effort, increase the risk, reduce the rewards, reduce provocations, and remove the excuses (Clarke, 1992; Cornish and Clarke, 2003). Recently Freilich and Newman (2014) have expanded the situational crime prevention approach by suggesting a sixth technique, i.e. to provide opportunities to manipulate behaviours. In this way, a total of 30 situational crime prevention mechanisms have been identified (as summarised in Table 2).

SCP has generally been applied to predatory crimes, but its scope has increasingly expanded. Applications of situational crime prevention in tackling corruptive behaviours have already been recognised by the literature, which has acknowledged its potential in developing a systematic and context-dependent understanding of corruption that would be useful to optimise the likelihood of its prevention (see, among others, Gorta, 1998; Graycar and Felson, 2010; Graycar and Prenzler, 2013).

It goes without saying that not all the mechanisms envisaged by situational crime prevention are suitable to the football environment. This notwithstanding, they all can help us to systematically think about the capacity of ethical codes to prevent corruptive malpractices in this sector. Among the 64 categories we relied on for the analysis, we recognised the presence (and applicability) of a few of the techniques of SCP—even though they were not originally thought as such. As already stressed in the analysis, in many cases the codes proved to be scarce in providing a proper framework to tackle the specific forms of corruptive behaviours infecting the football environment. Given these premises, SCP can provide us a framework to better understand what might be missing and hopefully to give guidance to enhance the capacity of codes to prevent and deter corruptive malpractices.

**Table 13**  
**Techniques and mechanisms of Situational Crime Prevention**

<b>Increase the effort</b>	<b>Increase the risk</b>	<b>Reduce the rewords</b>	<b>Reduce provocations</b>	<b>Remove excuses</b>	<b>Provide opportunities</b>
Target harden	Extend guardianship	Conceal targets	Reduce frustration and stress	Set rules	Facilitate
Control access to facilities	Assist natural surveillance	Remove targets	Avoid disputes	Post instructions	Forgive
Screen exits	Reduce anonymity	Identify properties	Reduce emotional arousal	Alert conscience	Offer alternatives
Deflect offenders	Utilise place managers	Disrupt markets	Neutralise peer-pressure	Assist compliance	Subsidise
Control tools	Strengthen formal surveillance	Deny benefits	Discourage imitation	Control drugs and alcohol	Legalise

Regarding the *increase the effort* technique, which relies on mechanisms aimed to render criminal activities more difficult to pursue, no specific reference was found in the codes analysed. In the codes, only some broad indications are provided on controlling access to the facilitating circumstances, with a view to avoid an improper use of the team's assets (category n.25). However, especially for cases of illegal betting and match-fixing, it would have been beneficial to have a few behavioural guidelines identified, which limit, for instance, the possibility for football players and other relevant actors to hang out at certain hot-spots (*e.g.*, frequenting betting shops) or with specific categories of people (*e.g.*, being at the same hotel of referees before a game). For doping, it would have been useful to introduce internal mechanisms of control (*e.g.*, doping control analysis).

The *increase the risk* technique refers to the mechanisms that increase the (perceived) likelihood of the potential offender to be caught, arrested, prosecuted, and sentenced. Only a few codes made reference to the external oversight of relevant agencies (categories n.36-37) or to mechanisms of external surveillance (categories n.52-54), which are consistent with the SCP technique of "extend guardianship". The categories of internal supervision, of internal enforcement procedures, and of other control mechanisms (categories n.38-51) can fall within the SCP mechanisms of "assisting natural surveillance" and of "utilising place managers". Also in these cases, however, codes generally do not discuss or discuss only superficially the relevant categories. Similarly, enforcement or compliance procedures (category n.55) ("strengthen formal surveillance") are mentioned by the codes only in very general terms.

As for the third technique of *reduce the reward*, which strives to decrease the perceived advantage gained through the criminal activity, only the mechanism of “deny benefits” seems to be compatible with the scope of this study. This should be guaranteed by the presence of penalties for non-compliance and illegal behaviour (categories n.56-62), which are not explicitly discussed (or only *en passant*) in the codes.

Also in the case of *reducing provocations*, which is a technique aimed to reduce the (personal and group) motivation conducive to the criminal act, codes of ethics fall behind their potential. The SCP mechanism of “avoid disputes” could be enhanced by defining and clarifying more thoroughly some of the concepts used (for instance “fair play” and “reciprocal respect”). As for “neutralising peer pressure”, provisions should be enacted to guarantee anonymity should someone report an unethical fact concerning a colleague, albeit these norms are in place in a minority of the codes. Finally, “discouraging imitation” fails because sanctions for breaking the code are not mentioned or clear – that is, discouraging – enough (only rarely codes describe the conduct whose adoption triggers a specific type of sanction).

The *remove excuses* technique refers to mechanisms centred on a clear rule setting, monitoring, and ethical training. The item of ethical responsibility (category n.28) and the need to maintain good reputation (categories n19 and 63), as well as the presence of introductory remarks from the President or the Chair of the Board (category n.64), are consistent with the technique of “alerting conscience”. “Rules” and “instructions” are set but they not always have clearly legal strength (categories n.1-18, 20-27, and 29-35), and there is no specific reference to mechanisms to “assist compliance” apart from the possibility (envisages in some codes) to turn to the OdV for clarification. While all codes mention the issue of doping and most of them those of match fixing and illegal betting, it is nonetheless surprising that such major issues were dealt with only superficially in many cases (e.g., technique of “control drugs”, categories n.17 and 23).

Finally, as regards the technique of *provide opportunities* (for compliance), codes make numerous references to the “mission” of football teams to disseminate among young generations of football players and other community members principles of healthy sport practices and values that could be connected to this SCP technique (through the “facilitate” mechanism). However, no specific mechanisms are envisaged in the codes to counter specific corruptive practices through providing opportunities for compliance, even if it would have been plausible to envisage them to better regulate, for example, the ways to provide sponsorship or otherwise financial support to the teams (which are now under-regulated and may constitute a specific corruption-opportunity for the teams).

## Conclusion

As emerges from the content analysis, the majority of the codes of ethics only briefly addresses (when they do so) the risky areas that are conducive to corruptive behaviour and malpractices in the football sector. Even when the codes refer to such areas, however, they do not clearly spell out the behaviours that are allowed, as opposed to the conducts that are not allowed or prohibited. A clear distinction may especially be useful for employees and players when it comes to taking decisions that have to do with the so-called “grey areas” (e.g., giving/receiving of gifts or gratuities). Codes of ethics, moreover, rarely mention the existence of risk assessments, which should be carried out to identify the areas that are most exposed to the risk of corruption (as well as to other relevant individual, corporate, and occupational crimes). Also guidance, training, reporting, and monitoring compliance with ethical and legal standards are usually only briefly referred to by the codes – all elements that the relevant literature on corporate deviance has recognised as crucial to the prevention and deterrence of the criminal activities committed both on behalf and against an organisation (Treviño *et al.* 1999; Parker 2002; Cleveland *et al.* 2009; Biegelman and Bartow 2012).

By contrast, codes deeply elaborate on *business-driven topics* (e.g., the relationships with suppliers/business partners, employees’ health and safety, and the integrity of the books), which characterise any business area and are, thus, not specific to the sport sector at issue. The fact that the focus of the codes of conduct of football teams is placed on these latter topics may be explained by the *Guidelines for the adoption and implementation of the organisational models of management and control envisaged by the Legislative Decree N. 231 of 2001*, a document of *Confindustria* (the Italian employers federation) released in June 2012. These guidelines indicate the minimum requirements that compliance systems of all companies (and codes of ethics as parts of these systems) need to meet in order to have due diligence recognised in judicial proceedings. Among others, the relationships with business partners, the conditions of health and safety of employees in the workplace, and the transparency of books and records, are here especially emphasised. This may explain why these requirements are included in all the codes of ethics of football teams as a kind of standard obligation.

Because of limits in the data gathering and analysis strategies, this study does not aspire to draw comprehensive conclusions on the capacity of ethical codes to defeat corruption in Italian football. Indeed, the content analysis carried out has considered only publicly available material and only for a limited selection of codes (of the teams in the Serie A League).

The content analysis of the codes, moreover, has only aimed to verify the presence of specific norms and to inspect their content. It has not assessed the effectiveness of their implementation (a research goal that would have required a rather different methodology). Apart from these limitations, the proposed analysis indicates that the codes of ethics adopted by football clubs have not sufficiently addressed the major issues related to corruptive behaviours in the football domain. The widespread culture of illegality affecting the football sector in Italy is, therefore, not deterred, and the system remains highly vulnerable to private-to-public corruption, financial crimes, and sportive frauds. One may question their internal motivation: usually, the football clubs merely acted as a consequence of the enactment by the national government of the 2001 Decree.

If on the one hand, codes of ethics are not a sufficient cure (and definitively not a panacea) in defying corruption in the football sector, on the other hand, they should be attributed some merits: overall, they all stress the presence of an ethical component in the activities of the teams and clarify once for all that certain behaviours are not in line with such a component. To answer the question we posed in the title, it can also be excluded that codes of ethics are a “snake oil” able to solve all the crime-related problems in the football sector. Rather, as they are now, codes of ethics resemble placebos – *i.e.*, substances or procedures that have no pharmacological effect but that are given merely to satisfy a patient who supposes it to be a medicine. As placebos, even if they may help to improve some of the symptoms, they do not cure the disease (by carefully addressing the risky areas) nor remove its causes.

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# Anti-money laundering policy: A response to the activity of criminals or of agencies?

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## Introduction

Compliance by financial institutions for the purposes of anti-money laundering was introduced by the 1993 Money Laundering Regulations.<sup>2</sup> This was only seven years after the first prescribed system of regulation had been brought to bear upon financial markets in the UK in the shape of the 1986 Financial Services Act. These markets had, prior to that point been largely left to their own devices, observing *Uberrimae Fidei*.<sup>3</sup> Indeed it can be argued that it was this 1986 Act that gave birth to the construct of compliance that is at the heart of the British model of regulation. It is fair to observe that the ensuing relationship between the financial markets and their regulators has proved to be somewhat complex and far from easy, described as “*a constant battle of wits between the surveyors and the surveyed – a battle where rituals of verification abound, where enormous energy goes into those rituals and into their subversion*” (Moran, 2000, p 11).

The 1986 Act created the mechanism for formal self-governance but it was two subsequent parliamentary Acts that provided the shift of power in favour of the regulators, the first of these was the Financial Service and Markets Act, 2000, an Act that saw the introduction of a model of statutory regulation.<sup>4</sup> The 2000 Act provided the regulator with an extensive range of disciplinary, criminal and civil powers to use against regulated firms and individuals.

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<sup>2</sup> The Money Laundering Regulations, 1993 (statutory Instrument No. 1933 effective 1<sup>st</sup> April, 1994)

<sup>3</sup> Literally translated as ‘my word is my bond’.

<sup>4</sup> This Act effectively combined the self regulatory bodies that previously governed each part of the financial market into a single regulator – the Financial Services Authority (FSA).

These powers were subsequently further tightened by the Financial Services Act, 2012. The various incarnations of the financial markets regulatory body has tended to be achieved simply by rearrangement much like deckchairs being moved on the beach to track the sun's rays. The 2012 Act dismantled the single regulator, the Financial Services Authority (FSA) which had come under increasing criticism that its span of oversight and control had grown too large to be effective. It was replaced with two regulators; the Financial Conduct Authority (FCA) and the Prudential Regulatory Authority (PRA). In addition, the 2012 Act broadened and strengthened the law in relation to market manipulation (arising from the LIBOR fixing 'scandal')<sup>5</sup> in order to improve accountability within the industry.

The relationship between regulatory bodies and the regulated sector was made more complex through the introduction of the anti-money laundering legislative framework (AML). The role of compliance as originally envisaged by the 1986 Act was very much one of internal focus, ensuring that the individual traders kept on the right side of the law and that their employing financial institutions did not step out of line and attract the opprobrium of the regulator. AML, however, introduced a new dimension to this compliance task. Not only did compliance officers have to ensure that the activities of their organisations did not themselves constitute aiding and abetting money laundering but they acquired the additional task of protecting their firms from becoming unintentionally embroiled in potentially illegal activity perpetrated by their clients. Thus, it placed upon them an additional external policing role in which they would have to monitor and report upon the activities of their customers. The regulatory relationship therefore acquired a new dimension which brought about interaction with law enforcement and the agencies of the police.<sup>6</sup>

The narrative within this chapter is built around the twin agencies of the FSA and the Serious Organised Crime Agency (SOCA) and their role in AML, recognising that both agencies now exist in a different form.<sup>7</sup> Thus

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<sup>5</sup> Forex scandal: What it that all about? BBC Business news, 12<sup>th</sup> June, 2014 available at: <http://www.bbc.co.uk/news/business-26526905> (accessed 20/7/14)

<sup>6</sup> A further change in anti-money laundering legislation is anticipated in response to the pending EU 4<sup>th</sup> Money Laundering Directive (the proposal for which was published in February, 2013). Following completion of the third round of mutual evaluation reports, the Financial Action Task Force (FATF) has modified their 40 Recommendations launching the 2012 version in February 2013. The EU's 4<sup>th</sup> Directive will reflect the updated Recommendations.

<sup>7</sup> As noted the 2012 Financial Services Act created the FCA and PRA; whilst SOCA was dismantled as a result of the Crime and Courts Act 2013 and was replaced by the National Crime Agency (NCA).

we consider the ‘matrimonial’ relationship between the regulators and the regulated entity that is *internal* to the financial markets. We further consider how both relate to the police enforcement agency, an agency that is *external* to the financial markets and in our metaphor is the silent jealous lover. It is the external enforcement agency that we suggest to be the ultimate beneficiary of the outcome of their joint compliance effort. This is played out through the regulatory ‘rituals’ that define the terms of engagement for the different sides, where each knows the rules, how they should be adhered to and both benefit from their continued existence; tending towards a mutual support for the *status quo*. Indeed, their relationship can be viewed as that of a married couple where the initial ardour has long since departed but they stay together in mutual tolerance because their history is jointly constructed and co-dependent such that one could no longer envisage life without the other.

It considers evidence from a range of material taken from public sources and uses for illustration, previously unpublished data that has been collected from three semi structured interviews that were conducted in June and July 2009 with Money Laundering Reporting Officers (MLROs) based respectively, in a financial institution, a firm of accountants and from within the gaming industry. These were selected as representative of the range of professions that fall within the AML regulatory framework.

## **Background: overview of the UK legal framework**

As can be seen from Table 1, the legal framework for money laundering within the UK is contained within a range of primary legislation, related regulations and guidance notes. However, the key pieces of legislation are the Proceeds of Crime Act 2002 (POCA), in particular Sections 327 to 329, as amended by the Serious Organised Crime and Police Act 2005 (SOPCA) and the Serious Crime Act, 2007. The 2002 Act simplified the pre-existing law by replacing the parallel drug (Drug Trafficking Act 1994) and non-drug money laundering offences (Criminal Justice Act 1988 as amended) with single offences. In addition to confiscation of assets it included provision for civil recovery. It also required (enforced by criminal liability) compliance by the regulated sector with the principal requirements to monitor customers (KYC) and to report suspicious activity (SARs). The legal framework has been translated into financial industry rules and codes (through the regulator) and subsequently into detailed (and lengthy) industry guidance and interpretational notes.

**Table 1**  
**The relationship between international, national law, regulation and guidance**

<b>Intergovernmental standards</b>	Financial Action Task Force, 40 Recommendations 1990, 1996, 2003 and 2012
<b>EU Money laundering Directives</b>	Money laundering Directives: 1 <sup>st</sup> Directive (1991) implemented in UK in 1993; 2 <sup>nd</sup> Directive (2001) implemented in the UK in 2001 3 <sup>rd</sup> Directive (2005) implemented in the UK in 2007
<b>UK Primary legislation</b>	1993 Criminal Justice Act as amended by the 1996 Criminal Justice Act 1994 Drug Trafficking Act 1995 Proceeds of Crime Act 2000 Terrorism Act as amended by the 2001 Anti-Terrorism Crime and Security Act 2002 Proceeds of Crime Act (combines and simplifies the 1996 Criminal Justice Act and the 1994 Drug Trafficking Act) as amended by the Serious Organised Crime and Police Act 2005 and the Serious Crime Act 2007
<b>UK Secondary legislation</b>	1993 Money Laundering Regulations 2001 Money Laundering Regulations 2007 Money Laundering Regulations
<b>International regulatory standards</b>	Basel Committee on Banking Supervision 1988 “Prevention of Criminal use of the banking System for the Purpose of Money Laundering” 2001 “Customer Due Diligence for Banks” 2014 “Sound Management of Risks Related to Money Laundering and Financing of Terrorism”
<b>UK Regulation</b>	2001 FSA Handbook 2011 FSA Financial Crime: a Guide for Firms (PS11/15) 2013 FCA Financial Crime: a Guide for Firms Part 2: Financial Crime Thematic Review 2014 FCA Financial Crime: a Guide for Firms Part 1: A Firm’s Guide to Preventing Financial Crime
<b>Industry guidance</b>	Joint Money Laundering Steering Group (JMLSG) guidance notes “Prevention of Money Laundering/Combating Terrorist Financing 2006 (parts 1 and 2) 2007 (parts 1 and 2) 2009 (parts 1 and 2) 2010 (part 3) 2011 (Part 1- Guidance for the UK Financial Sector; Part 2 Sectoral Guidance; Part 3 Specialist Guidance The Wolfsberg Anti-Money Laundering Principles for Private Banking 2000, revised in 2002 and the current version is 2012. BBA ‘money laundering Officer’s Practical Handbook; annual publication

Source: compiled by the authors

## **Initial ardour: rituals and relationships**

Vass (2006, pp. 191-192) discusses how “*the development of codification as institutionalisation*” is embedded within the regulatory framework. This takes place within two dimensions: Firstly, regulation becomes subject to judgement with academics drawing attention to the need for accountability and fairness (often referred to as transparency), proportionality to the problem; targeting to avoid unintended consequences; and consistency to avoid uncertainty (Baldwin and Cave, 1999, p.77; Kirkpatrick, 2006, p 236). Secondly, the regulators themselves are open to external scrutiny as retention of public interest as the dominant paradigm requires that they do not fall prey to regulatory capture.<sup>8</sup> Thus Vass (2006) further deconstructs accountability into three components: (a) being able to provide reasons for decisions, (b) to make them available for scrutiny and (c) to submit (if required) to independent review.

Beyond the legal structure, agencies of government will be created in order to enforce and ensure compliance with the legislation. Once created, such agencies will somewhat rationally seek to ensure their own survival and longevity. Thus reality and the behavioural interactions between policy making actors clashes headlong with this rational process, as Vass described above.

In this tension there is much organisational social-psychology, as can be deduced from the courtship between the regulator and the regulated sector: while each reveals its own desires, it carefully gauges the response of the other. If one accepts that the AML framework is here for the long term, both sides have to adhere to their respective roles and responsibilities such that the regulator can be seen to be proportional, objective and reasonable. For its part, the regulated entities have to balance their desire to be compliant against the interests of their shareholders.

This courtship dance can be illustrated by the move from a rules-based to a risk-based approach to AML promulgated by the FSA. Companies governed by the regulations are required to obtain information about the nature and purpose of the business relationship that they will be entering with the customer. This is to be carried out at the commencement of the business relationship, and at other appropriate times during the relationship on the basis of their risk estimation, something that is referred to as being on a ‘risk-

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<sup>8</sup> Capture theory is attributed to George Stigler (1971) and describes a state whereby regulators rather than acting in the public interest gain benefit from promoting the interests of those they profess to regulate.

sensitive basis'. In its consultation paper, DP22 "*Reducing money laundering risk: know your customer and AML monitoring*", the FSA discussed the practical application of the then proposed risk based approach to AML, noting that without its adoption "*firms' costs will be disproportionate*" (section 2.6, p 7). Thus suggesting that its implementation was in response to cost pressures within the institutions. This risk-based model requires regulation by exception – trusting that organisations self-police leaving the regulator to concentrate resource and effort in areas of high risk. The important point here and one that sometimes is a point of contention, is that the 'relevant person' must be able to demonstrate to his supervisory authority that the extent of the measures in place is appropriate in view of the risks of money laundering and terrorist financing. The purpose behind this risk-based approach was to enable banks in particular, to tailor their scrutiny and AML efforts in a more cost effective manner and help, therefore, reduce the costs of compliance. The problem that arose from implementing this approach is that the institutions felt that they still needed clarity and direction from the regulators which for their part were trying to divest some of the decision making falling to them under the previous 'rule-based' approach. But by being reasonable and proportionate did the regulators really intend to slacken the reins? The negative answer to this question is complicated by the coincidence with the recent pursuit of a policy of visible deterrence that has witnessed a gradual increase in the overall size of regulatory fines levied on transgressors. This visibility, far from slackening the reins, is probably also resulting from the financial crisis that has, inevitably, led to calls for what Moshella and Tsingou (2013, p. 409) referred to as "*re-regulation*" of these markets and "*to a more assertive and interventionist role for the public sector*", with perceived failings of the system resulting in further regulatory constraint (and power for the regulator). Moran's 'constant battle' in our regulatory courtship sets the scene whereby the regulated entity aims to demonstrate compliance (at minimum cost) and the regulatory agencies seek to maximise status, resources and enforcement tools. Thus we see a proliferation of interpretational guidance of what were originally quite simple principles. This guidance tends to expand with each iteration of the rules as illustrated by Table 2. It can be seen that the original 1988 guidance from the BIS was just four pages in length, this becomes 170 plus pages in the guidance notes from the Joint Money Laundering Steering Group.

**Table 2**  
**Size of documents by source and date order**

<b>Document</b>	<b>Author</b>	<b>Number of Pages</b>
Prevention of Criminal use of the Banking System for the Purpose of Money-Laundering (December 1988)	Bank for International Settlements	4 pages
Customer due diligence for banks (October 2001)	Bank for International Settlements	17 pages (21 including appendices)
Sound Management of Risk Related to Money Laundering and Financing of Terrorism (January 2014)	Bank for International Settlements	29 pages
Handbook (release 001) December 2001 section on Money Laundering	Financial Services Authority	29 pages
DP22 “Reducing money laundering risk: know your customer and AML monitoring” 2003	Financial Services Authority	26 pages (54 pages including appendices)
“Financial Crime: a Guide for Firms” PS11/15 December 2011 Chapter 3 Money Laundering	Financial Services Authority	15 pages
“Financial Crime: a guide for firms: part 1 - a firm’s guide to preventing financial crime” April 2014 Chapter 3 Money Laundering and Terrorist Financing	Financial Conduct Authority	15 pages
Guidance notes for the financial sector on the prevention of money laundering/ combating terrorist financing January 2006 Part 1	Joint Money Laundering Steering Group	153 pages
Guidance notes for the financial sector on the prevention of money laundering/ combating terrorist financing December 2007 Part 1	Joint Money Laundering Steering Group	159 pages
Guidance notes for the financial sector on the prevention of money laundering/ combating terrorist financing November 2009 Part 1	Joint Money Laundering Steering Group	175 pages
Guidance notes for the financial sector on the prevention of money laundering/ combating terrorist financing December 2011 Part 1	Joint Money Laundering Steering Group	174 pages
Forty Recommendations 1990	Financial Action Task Force	6 pages
Forty Recommendations 1996	Financial Action Task Force	13 pages
Forty Recommendations 2003	Financial Action Task Force	27 pages
Forty Recommendations 2012	Financial Action Task Force	124 pages

Source: compiled by the authors

It was earlier pointed out that one of the principles of regulation is to ensure that regulators are open to external scrutiny to avoid regulatory capture. The desire to operate in their own best interest rather than in the interest of those that they served led Stigler (1971) to conclude in terms of ‘capture theory’ that “*the regulated system comes to be operated in the interest of the regulated firms rather than the more general public interest*” (Ricketts, 2006, p. 38)<sup>9</sup>.

It may be constructed that ‘capture’ explains how once created, agencies seek to influence the state of affairs to perpetuate the need for their continued existence and this might reasonably explain this proliferation of guidance and explanation. Whilst we contemplate the content of Table 2 (and Figure 1 below) it is worth noting that the original 40 Recommendations from the FATF covered a mere six pages whilst the revised version runs to 124 pages with 20 pages for the Recommendations and 75 pages supplying ‘interpretive notes’.

**Figure 1: FATF Plenary in session February, 2012**



Source : <http://www.fatf-gafi.org/pages/aboutus/>

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<sup>9</sup> Capture theory can be seen as a component of bureaucracy theory (attributed to Max Weber) as it highlights one of the problems that arises within such as system.

## **Wooring: agency justification and the moral imperative**

In so far as we have agency creation there is a need for justification and in the context of AML the dominant discourse narrative is woven around the ‘problem’ of money laundering by ensuring that rather than decreasing as a result of and in response to increasing rounds of legislative intervention, the problem simply continues to grow. The imagery of fear around the threat of money laundering is reflected in the expansion of the global AML framework from its initial focus on drugs to a wide range of other areas of criminal activity (refer for example to the United Nations conventions: Vienna, 1988; Palermo, 2000; and Merida, 2003) making it far more difficult to reverse (Alldrige, 2008). Alldrige further notes the endorsement to the international imperative through the involvement of the IMF and IBRD to “*add both gravitas and the appearance of impartiality*” to the debate (p. 439). Sharman (2008) draws attention to the ‘rational fiction’ of the AML framework, spread not because of unassailable effectiveness, but to signal membership of ‘the group’. Add to this the observed broadening of the definition of what actually constitutes money laundering (van Duyne, 2003 and Alldrige, 2008) and the problem inevitably becomes bigger, attracting greater public attention (and presumably disquiet) and the apparently rational requirement for additional resources with which to counter this threat.<sup>10</sup>

The more we move from reality, the subject of objective assessment, towards a fiction that is interpreted by perception, we move into areas that cannot be rationally challenged. As such we witness a rather creative *ex post* rationalisation of actions through construction of validating behavioural ‘norms’ underpinned through what van Duyne and vander Beken (2009) describe as a restructuring of the facts that collectively achieve a ‘re-framing’ of reality. As eloquently argued by van Duyne and vander Beken (2009) objectivity in assessment becomes waylaid by emotion in any discussion of criminal activity and the tenor consistently evokes images of threat. This becomes an example of what Jolls *et al.* (1998, p. 1518) term “*pollutant of the month*” syndrome where regulation is driven by recent and memorable instances of harm. Thus “*when beliefs and presences are produced by a set of probability judgements, made inaccurate by the availability heuristic*”<sup>11</sup>, legislation

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<sup>10</sup> Made all the more urgent by the threat posed by terrorism and its financing.

<sup>11</sup> The availability heuristic explains ease of availability of information recall in the brain: negative events that are easy to remember are accorded a greater perceived frequency

will predictably become anecdote driven” (*ibid*). Sunstein (2002) argued that ‘emphasised’ stories related to a crime will trigger this availability heuristic, which in turn is responsible for skewing perceptions of what is considered normal and further when “*intense emotions*” are engaged, people tend to focus on the adverse outcome rather than its plausible likelihood.

Drawing on these ideas, the availability of such a threat will be determined by perceived frequency and resonance in addition to its recency. Thus if something has occurred recently, perception of it occurring again is attached a higher probability. In addition, perception is open to manipulation according to how information is presented. When a threat becomes ‘available’ (however unrealistic) there will be an associated demand for action on the part of policy makers. For as noted by Dorn (2009, p. 2) although “*righteous indignation may drive ‘quick fix’ policy activity, it does not facilitate a reasoned public debate of policy alternatives*”. Indeed, Combs and Slovic (1979) identified a high correlation between availability biases and the amount of media coverage an event received. Agencies are able to exploit ‘availability’; thus it is possible for them to influence government legislation through employment of the threat rhetoric, employing media coverage and heightening awareness such that a legislative response is automatic and ‘justified’. Harvey (2014, p. 187) points to “*the ability to create evidence of overwhelming importance of function*” leading to a system that is self-reinforcing. Agency justification from the perspective of law enforcement is premised upon the ‘threat’ to the integrity of the financial system posed by criminal contamination. Indeed, Woodiwiss and Hobbs (2009, p. 124) quoting Garland (2001, p. 179<sup>12</sup>) state that institutions: “*have a way of taking on a life of their own, and outliving the meanings and motivations that led to them being set up in the first place . . . continuing long after the original reasons for their creation have faded*”.

This relationship between the media and the Government was identified by Wilkins (1964) in what he terms the “deviancy amplification spiral” (see below). The manner of how such issues are presented to society has been noted as an important factor in how perceptions are manipulated, Stallings (1990), notes that written media publications play a crucial role in this process. Similarly, Cohen (2004, p. 66) explains how the media can engage these intense emotions and create moral panic (a term attributed to him arising from his work in the 1970s in relation to British teenage gangs) which involves:

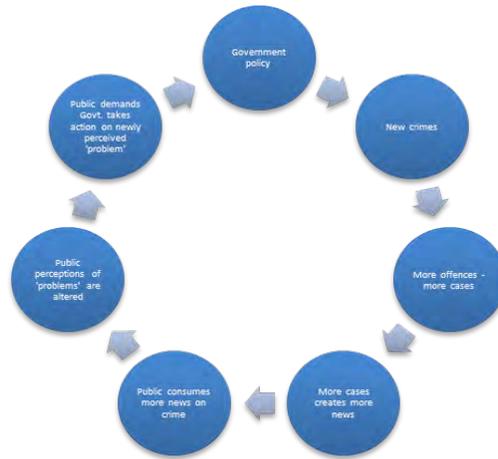
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and thus risk. This ease of recall can be influenced by heavy media coverage where such items are overstated as risk.

<sup>12</sup> Garland, D., (ed.) *Mass Imprisonment: Social Causes and Consequences*, London, Sage, 2001 .

“A condition, episode, person or group of persons emerging to become defined as a threat to societal values and interests; its nature is presented in a stylized and stereotypical fashion by the mass media; the moral barricades are manned by editors, politicians and other right-thinking people . . .”

**Figure 2**  
**Example Deviancy Amplification ‘Spiral’**



Source: Adapted from Wilkins 1964

Problem perception by the general public can be influenced by the activities of ‘claim-makers’ examples of whom are cited as government, law enforcement agencies and media, amongst others (Fishman, 1980). Similarly, Nichols (1997) argued that ‘landmark’ cases were used by ‘claim-makers’ to heighten perception of the crime of money laundering within the United States. Framing information in a negative way can also be achieved by context and structure of the words themselves (Jewkes, 2004). Take the following examples in relation to a discussion of information about asset recovery. The first extract is from a document published by the Home Office reporting on work undertaken by Dubourg and Prichard<sup>13</sup> in both 2005 and 2007:

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<sup>13</sup> Dubourg, R. and Prichard, S. (Eds) (2008) *Organised crime: revenues, economic and social costs, and criminal assets available for seizure*. Home Office available at: <http://www.homeoffice.gov.uk/about-us/freedom-of-information/released-information1/foi-archive-crime/9886.pdf?view=Binary>

Dubourg and Prichard (2008, p. 57) estimate “the value of additional criminal assets *theoretically* [emphasis added] available for seizure is about £2bn per year in the UK, with more than £3bn of revenue sent overseas annually”. The authors go on to note “Given the lack of reliable data, many of the underlying assumptions are speculative and some calculations are unfortunately reliant on judgements rather than hard evidence” . . . and . . . “provided these estimates are not treated as established facts,”

Sadly, too often the original *caveats* of the authors are disassociated from subsequent repetition of the ‘facts’. Is it coincidental that the derived values are curiously similar to those reported by HM Treasury (2007, p. 29<sup>14</sup>) which “*suggested that organised crime domestically generates over £2 billion of assets in seizable form annually, while a further £3 billion is likely to be sent overseas*”. Of greater concern is that this figure is derived from the following simple arithmetic (with no *caveats* attached: a sizeable sample of the 200.000 SARs indicated a median value of £10.000 and a mean of £35.000. Assumed 40% ‘suspicious’ thus revealing £2–3 billion of laundered funds (35.000\*200.000\*40%).<sup>15</sup> This is reminiscent of the FATF 1990 estimation (see van Duyne, 1994). Similarly, Harvey (2014, p. 201–202) notes:

“While there are clear gaps in the knowledge of the current academic literature by virtue of lack of access, it is suggested that the amounts available for recovery are less than accurate, skewing performance expectations placed upon those tasked with its recovery.”

Thus issues become matters of public concern with crimes such as money laundering being treated by the media as ‘*infotainment*’ (Levi, 2001). As illustrated in the web site of the former SOCA and the current NCA, use is made of imagery to exploit the righteous indignation of the hard working majority that criminals are able to achieve the trappings of the good life through crime, justifying their crusading ‘tough on crime’ mantra that goes back to the early years of the Blair government.<sup>16</sup>

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<sup>14</sup> HM Treasury, (2007) “The Financial Challenge to Crime and Terrorism” available at [www.hm-treasury.gov.uk](http://www.hm-treasury.gov.uk)

<sup>15</sup> Information extracted from p. 28 of the 2007 report.

<sup>16</sup> Refer to the Labour Party Manifesto 1997 that promised to be “*tough on crime and tough on the causes of crime*”.

**Figure 3**  
**Images and narrative from the Crime Agency**

SOCA Annual Report 2008/9\*



*'Some of the assets seized from Mark McKinney'*

Extract from the SOCA website from 2012 available from

<http://webarchive.nationalarchives.gov.uk/20120405020725/http://www.soca.gov.uk/about-soca/how-we-work/asset-recovery>

“SOCA is determined to ensure that criminals can't enjoy their profits. We also want to reduce the damage they cause by getting in between them and their working capital. The driving principle behind our approach is that criminals must not be allowed to hold onto their assets, profits and lifestyles. We will do everything we can to ensure they don't have it, can't use it, and can't flaunt it.

In 2009/10 SOCA denied criminals access to assets worth £317.5 million. This includes work that has been done as a result of SOCA referrals to our partners. Since April 2008, the assets subject to recovery and consent orders in our cases have included 205 properties or areas of land; 37 vehicles, including cars, a plane, a helicopter, two boats, and a petrol tanker; 190 bank accounts; 17 financial products including pensions, investments and shares; 56 cash payments; and numerous other assets including paintings, licence plates, cattle, and jewellery.”

Taken from the rolling banner on the NCA website

<http://www.nationalcrimeagency.gov.uk/> (accessed 12<sup>th</sup> October, 2014)



*'Yacht sailed from Caribbean carrying more than £100m worth of cocaine'*

\* Page 19 Serious Organised Crime Agency Annual Report 2008-9 available at <http://webarchive.nationalarchives.gov.uk/20100505093946/soca.gov.uk/about-soca/library> (accessed, 19th February, 2014)

## Compliance and the contribution of the regulated sector

Whilst compliance was always viewed as a necessary cost that would protect the institution from regulatory sanction arising from its own rule transgression, the further monitoring of the activities of its clientele for potential criminal conduct placed on them an additional burden of cost. Compliance will be accorded value within an organisation where it converges with the internal ethics, as “*the sense of moral obligation, it turns out, is very common throughout society and, it appears, may be a significant motivation explaining much of the evidence on compliance behaviour*” (Sultinen and Kuperan, 1999, p. 178). Bosworth-Davies (2009) has in the past argued that the general run of compliance officers share their employer’s free-market cultural beliefs in both the propriety and the priority of the commercial considerations of their industry over other interests; that their appointment does nothing more than simply provide the visible manifestation of a purely cosmetic response to legislation, and that they will actively resist developing attitudes or practices which would increase the likelihood of criminalisation of fellow industry practitioners.

Just the regulators face a conflict in executing their dual role: they are charged with reducing financial crime at the same time as maintaining confidence in the financial system. Prosecuting financial crime inevitably involves exposing wrong doing within the industry which may reduce confidence as it is exposed into the public domain. In the same fashion and undoudeably creating also tension in the marital home, the conflict for the compliance professional is that in undertaking the policing function with which they are charged, they have to remain mindful of the reputation (and profitability) of their employer. This implies treading a thin line between enforcing adherence to these extended rules whilst at the same time avoiding disclosure of any information that would potentially damage the public reputation of the business. Many compliance officials come from a police background and perceive their role as one of fighting money laundering with great emphasis on the security aspect (Favarel-Garrigues, Godefroy and Lascoumes, 2008, pp. 10-11), engaged in protecting the bank by undertaking defensive reporting as observed by Demetis and Angell (2007). The extent that such people are attracted into the profession was observed by an MLRO from the accounting profession interviewed by the lead author in July 2009: “*they might attract the sort of people who for some reason never managed to join the police – the detective wanabees*”.

Profit driven organisations are required to balance their underpinning commercial objectives against the resource cost requirements associated with this extended compliance function. More concerning from a cost perspective is the decision by some banks to further extend this responsibility by establishing their own internal police function. Take for example the following statement:

“One of the things we are looking at is to create a small intelligence unit that would make more effective use of the data we generate internally to try and understand whether our risk assessment methodology is helping us to identify the likelihood of suspicious activity. Feedback on SAR quality from the authorities, which is a typical industry gripe (and on which SOCA is working), is helpful in this process, but I have quite low expectations about the level of feedback we will ever see even in relatively well resourced places like the UK”.

It has also been suggested (Bosworth–Davies, 2009) that money laundering prevention does not rank highly in the ambitions of financial institutions or of others subject to the money laundering regulations. Willingness to comply for a profit driven firm and to bear the exogenous cost will be driven by fear of regulatory sanction associated with non-compliance (failure of systems) or of criminal proceedings in the event of breaking the law (failure to identify laundering activity) or some combination of the two aimed at protecting the institution. It is interesting to note that as part of some earlier research with compliance officers undertaken by the first author, an attempt was made to interview one of the banks that had been fined for non-compliance to understand the potential impact on reputation. Whilst the particular Money Laundering Reporting Officer within this bank was willing to explore the impact on the bank of having been the subject of a fine it was disclosed that “*one of the terms of the FSA enforcement notice was that we would not discuss the matter with any third party other than the FSA.*” Thus the matter could not be pursued.<sup>17</sup>

This perception is not limited to the broader financial sector. In this regard it is interesting to consider the comments made in an interview with an MLRO from the gaming sector that was conducted by the first author in June 2009:

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<sup>17</sup> E-mail exchange with deputy MLRO of a financial institution 16<sup>th</sup> June, 2004.

“Risk to [name of company] of non-compliance is what drives the company to be compliant – otherwise we will lose our licence to operate. The driver is not to identify proceeds of crime but to be showing to be seen as compliant and diligent.”

And:

“SARs is a small percentage of what we do – the focus is on processes and polices in place to prove against any challenge from the regulators”. . . .

“Drive is integrity of the industry and reputation and integrity of the sport.”

Is it possible then that, mindful of the threat of regulatory censure for non-compliance, the regulated sector will show their adherence to the rules and invest in appropriate systems in order to avoid the attention of either law enforcement or the regulatory agencies. Is there now a point of containment that has been reached where the regulated entities feel that they have shouldered a sufficient burden and the regulators recognise that they will be unable to extract anything further? An accepting and ‘comfortable’ symbiotic relationship in that each knows where they stand in relation to the other – much as our elderly married couple?

It is interesting to also note the content of a document produced by the FSA in August 2009: “*FSA Scale and Impact of Financial Crime Project*”. The first part of this paper (published as Occasional Paper 36<sup>18</sup>) provides a review of the academic work in the field that has considered scale and measurement of financial crime. The second part of the document<sup>19</sup> looked not only at the impact of financial crimes but significantly at their amenability to control by the regulator. The opening paragraph in the section 4.3: “*Amenability of money laundering to FSA control*” includes a quotation from Levi:

“[I]t remains uncertain and seldom asked, whether or not it is harder to practise as an ‘organised criminal’, a fraudster or a terrorist now compared with 1988, when the UN Vienna Convention and the Basle Committee on Banking Supervision ushered in the Brave New World of seeking on a global basis to control the criminal money trail”.<sup>20</sup>

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<sup>18</sup> A copy of the report can be found at: <http://hb.betterregulation.com/external/Occasional%20Paper%20OP%2036.pdf>

<sup>19</sup> A copy can be located at: [http://www.caerdydd.ac.uk/socsi/resources/scale\\_and\\_impact\\_paper.pdf](http://www.caerdydd.ac.uk/socsi/resources/scale_and_impact_paper.pdf)

<sup>20</sup> Levi, M., “Pecunia non olet? The control of money-laundering revisited”. In Bovenkerk, F and Levi, M. (eds) *The Organised Crime Community: Essays in Honour of Alan A Block* (studies in organised crime) vol. 6 (pp. 161-182), New York: Springer, 2007

Unfortunately the paper does not answer the question posed in the title but instead sets out the additional research that the authors argue should be undertaken with victims, launderers and risk professionals. It does note, however that “*there is much scepticism in market circles over whether anti-money laundering measures have any deterrent effect on the volume of laundering overall*” (p. 34).

## **Harmony: tension, dilemmas and cost avoidance**

The FSA and the current FCA have interpreted the money laundering laws and associated regulations and defined them in a series of rules and compliance actions required by the regulated sector. There emerged an uneasy truce whereby those that are regulated give the appearance of maximum support and the perception of compliance with the money laundering regulations. Compliance mechanisms will be highly organised and well-composed, systems will be well documented; staff will be identifiable, and apparent controls will be in place. The overwhelming impression will be one of compliance and orderly conduct, regardless of whether any meaningful results are being achieved. Hence investment in systems and procedures is viewed as providing concrete evidence of an institution’s commitment to fulfilling obligations. The effect is that those firms who manifest these signs will be able to deflect any too critical attention of the regulators (Bosworth-Davies, 2009). What they achieve, however, is the evidence of being compliant without necessarily being effective, the ‘tick-box culture’ identified by Harvey (2005).

The role of compliance is a cost overhead and frequently viewed as business inhibiting by the revenue generating parts of their business. It therefore serves their purpose if those employed in compliance are able to ensure that they justify their own position and contribution to their employers. It is interesting to consider the comments of the interviewee from the accounting sector from 2009:

“There is a problem with resources for a firm this size – we ignore stuff and keep our fingers crossed. Small companies will have a manual and it will all be kept up to date. If you are larger you can afford some overhead staff . . . A lot of analysis is done because we have to do it but it is totally meaningless . . .”

The MLRO from the financial institution interviewed in June 2009 noted:

“It is very hard to get costs. I used to do a lot with the BBA and they would always be moaning that nobody ever gives us these numbers apart from you can identify what you have brought and how much that costs, say £15 mill plus the staff support plus the team to run it – we’ve got 40 staff. Looking at it from the firm’s view, from the law enforcement, from the FSA, constantly at us all the time have we got money laundering here? The fact that we haven’t is probably nothing to do with the money laundering controls in place. So yes cost is reasonable in some areas, not in others, but at the bottom of it all who is going to decide what the risk is?”

Harvey and Lau (2009) suggested that given the investment undertaken by the regulated institutions over the past decade or so they would rather not consider alternative approaches, indicating support for the maintenance of the *status quo*. This takes us into a difficult area because banks rationalise their investment costs on the basis of the harm that money laundering can do to the institution. There is now (Levi, 2007) a massive industry that has been spawned – accreditation, training, new areas of government and restructured law enforcement agencies.<sup>21</sup> As a business cost it is in the interests of those within the compliance field to overstate importance and significance of the threat and justification for the expense incurred (Harvey, 2008; Alldridge, 2008). We see exploitation of ‘fear’ and the availability heuristic (footnote 10) to ensure greater resource allocation and status by the employees within the compliance function.

A further tension surrounds the quality of what is reported by the institutions to the police. Demetis and Angell (2007) draw attention to our innate desire to manage the unusual as, “*by finding a way to represent risk our hopelessness with uncertainty is swapped for the optimism in a structured plan of action that is meant to handle the risk*” (p. 413). Further, they go on to point out that the risk of the reporting regime is that reporting of the unusual generates a high degree of “false-positives” such that “*Under the fear of regulatory enforcement, institutions reported excessively, and thereby uncertainty and thus risk were passed onto the FIU, whose staff could not be certain whether it was real suspicion being reported or a self-defensive act by the reporters*” (p. 419).

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<sup>21</sup> Indeed, a simple Google search for the phrase “AML due diligence” returned 751,000 hits, primarily focused on how to ensure compliance (1st September 2014)

From a different perspective but adding weight to the debate over quality of reporting from institution to police, consider the following statement:

“One of my main concerns is that so much of the approach used across banks is based on such limited empirical evidence. The main risk assessment inputs we use – country, product type, and customer business – are hard to assess objectively and I really wonder whether there is a significant correlation between customer AML risk ratings and actual money laundering.”<sup>22</sup>

## **Conclusion: the interconnection and regulatory capture**

The narrative of complexity and threat can serve well the agencies and indeed those involved in compliance. Dorn discusses ‘*regulatory ineffectiveness*’ (2009, p. 12) pointing to evidence of regulatory capture whereby initially independent agencies become closely intertwined with those that they regulate, reflective of the tendency for collaboration and cooperation (and movement) between the two. The result was that rather than acting objectively in the public interest the regulators adopt the interests and objectives of those that they regulate seeing that they serve a joint purpose of mutual personal and institutional sustainability and support – back to our long suffering married couple! The regulator rather than being the objective arbiter of public interest, began to take decisions in the interests of the regulated sector. Van Duyne (2010, p 10) refers to this regulatory capture and to the evidence that “*the regulatory bodies adapted their view to the interests of those they had to supervise . . . [with the result that] the supervisors and supervised adopted a similar way of (rosy) thinking.*” Thus, the underlying legislation may not act as was originally intended (Cook, 2006), particularly if not properly applied by the regulators. Indeed any external criticism of the sector that might challenge or undermine this *status quo* could be dismissed simply because those from outside would lack tacit knowledge and understanding of the internal workings of the financial sector. The MLRO from the financial sector interviewed in June 2009 commented in this regard: “*There is a professionalisation of this as if you look at the obligations on the individual you all tend to huddle together*”. Thus industry shibboleths are

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<sup>22</sup> E-mail correspondence with the author from a compliance officer within a bank 30th July 2008

accepted as being truisms without underpinning evidence. It is inevitable that MLROs will repeat industry mantras without thought to their validity or having examined evidence to the contrary, being expected to know the proper response to questions or challenge. The power dynamics reinforce the *status quo* of the didactic rhetoric justifying the approach on grounds of complexity. It would appear that they are acting in an entirely rational way, exploiting any inherent advantage to justify their own existence. As such reality is re-framed such that, from their perspective, their activity and approach is entirely justified. Agency bias means that tensions will exist but having got to this point the rules of the relationship are accepted and as long as all play their allotted part, the *status quo* is maintained and the relationship continues in uneasy but tolerant harmony.

Before closing it is perhaps interesting to add the following note taken from the first Anti-money Laundering Annual Report of the FCA<sup>23</sup> that stated:

“However, our risk-based supervisory techniques (set out in Section 4) have led us to conclude that the level of anti-money laundering compliance in financial services firms is a serious concern”. (p. 11)

They go on to note:

“The root cause of these problems is often a failure in governance of money laundering risk, which leads, among other things, to inadequate anti-money laundering resources and a lack of (or poor quality) assurance work across the firm. This often focuses on whether processes have been followed rather than on the substance of whether good AML judgements are being made.” (p 12).

It is possible that the long standing relationship is finally at an end.

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# Criminal insolvency abuse in Slovenia

*Sabina Zgaga*<sup>1</sup>

## **Introduction: intent or bad luck in bankruptcy**

Insolvency brings about negative economic and social consequences for the workers of the insolvent company, its creditors, suppliers, etc. – basically all individuals, who are economically dependent on such company or its creditors (Jenull, 2010: p.29). Once a company becomes insolvent, it is unable to pay all its debts. Insolvency law therefore regulates a collective proceeding of payment of creditors of an insolvent debtor. Corporate insolvency law has three objectives namely, to maximise the return to creditors, to establish a fair and equitable system for the ranking of claims and the distribution of assets among creditors; and to provide a mechanism by which the causes of failure can be identified and those guilty of mismanagement processed and punished, if appropriate (Goode, 2001: p.58). Even though the majority of insolvency cases are not exclusively a result of criminal acts, but a result of bad luck or wrong business decisions, a lot of insolvency cases can be a consequence of criminal conduct. Criminal conduct can also be a side effect of attempts by the management to avoid insolvency of the company. The most obvious criminal acts are extending unlawful benefits to creditors while being insolvent, making unjustified business decisions, such as entering into speculative business ventures and wagering of the debtors assets.

Insolvency itself opens numerous legal and practical issues and has negative consequences for the society in general and especially for the dependent creditors. This applies even more to the cases of criminal insolvency abuse. It is namely not uncommon that an insolvent debtor ends up in insolvency proceedings with only its name and seat, but without any real property that could be cashed in for repayment of its creditors. This is often caused by previous mismanagement of company's property or by making assets

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disappear by bypassing them to third companies, from where the property is afterwards collected by the management.

Crimes connected to insolvency proceedings are traditionally not considered to be in any way connected to cross-border crimes. This is usually true when speaking about criminal conduct of the management of small and medium size firms (with assets only in one country), while trying to resolve the insolvency of their companies. But if we consider money laundering, tax frauds, especially when using missing traders or in cases of insolvency proceeding of multinational companies with assets in different countries, with an option of almost complete free forum shopping (Eidenmüller, 2005), the international elements of criminal conduct are evident.

Insolvency proceedings, as well as insolvency crimes therefore can have a cross-border dimension and can also be connected to crime against the financial interests of the European Union (EU). Consequently they have to be of interest to the EU. For this reason the chapter opens with short presentation of EU regulation, relevant also for Slovenia as EU Member State.

The main goal of this chapter is to show how Slovenian legislation on insolvency crimes is implemented in national legal practice from the viewpoint of official police and prosecutorial statistical data and typical *modi operandi*. These data represent the results of a David versus Goliath fight of criminal justice system against economic crime on the specific example of insolvency crimes. Appropriate implementation of legislation in practice is relevant, because general immunity for violations in insolvency proceedings influences the growth of general illegality of the actions of the members of management and supervisory bodies in companies (Jenull, 2010: p.32). The position of Slovenian law enforcement agencies and courts towards criminal insolvency abuse and also economic crime in general was portrayed as lenient (Jager and Šugman Stubbs, 2014) and could have had negative legal, social and economic consequences. But, due to increased attention given to insolvency crimes in (expert) public it is now expected that the criminal acts and other unlawful acts processed and their perpetrators has risen in that last few years.

For the purpose of this chapter insolvency crimes (in broader sense) will be understood as all unlawful acts, defined as such in Slovenian Criminal Code-1 (CC-1, 2012), which cause or abuse the company's inability to pay debts as the basic ground for compulsory liquidation of companies (Jenull, 2014: p.157). It should be again noted, however, that most bankruptcies are not criminal, or that every insolvency procedure is about disclosing criminal conduct. Most insolvency procedures are caused by non-criminal causes (Jenull, 2014: p.158) – despite opposite comprehension in public.

## **Insolvency crimes as an item on the European agenda?**

The EU has recognised that the transferring of assets or of judicial proceedings from one EU country to another in cases on insolvency can be problematic for the proper functioning of the internal market. Accordingly, measures have been adopted to avoid incentives for the transfer of assets or judicial proceedings from one Member State to another (Council of EU, 2000).

For example, Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings introduced common rules on international jurisdiction in insolvency proceedings, on the applicable law, and on the EU-wide recognition of court rulings (Council of EU, 2000).

The Treaty on the Functioning of the European Union (2012) after the adoption of the Lisbon Treaty includes a broad jurisdiction of the EU regarding judicial cooperation in criminal matters, including the principle of harmonisation of substantive criminal law. According to this principle, the EU may adopt minimum mutual standards regarding the definition of a criminal act and criminal sanctions in areas of particularly serious crime with a cross-border dimension, if such cross-border dimension results from the nature or impact of such offences or from a special need to combat them on a common basis. Insolvency crimes are not explicitly listed as such (contrary to terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime). However the Council of the EU may adopt a decision identifying other areas of particularly serious crime with a cross-border dimension after obtaining the consent of the European Parliament (Consolidated version of the Treaty on the Functioning of the European Union, 2012). Furthermore, insolvency crimes could be connected to other crimes explicitly listed as cross-border crime, for example money laundering (almost automatically included), corruption and organised crime.

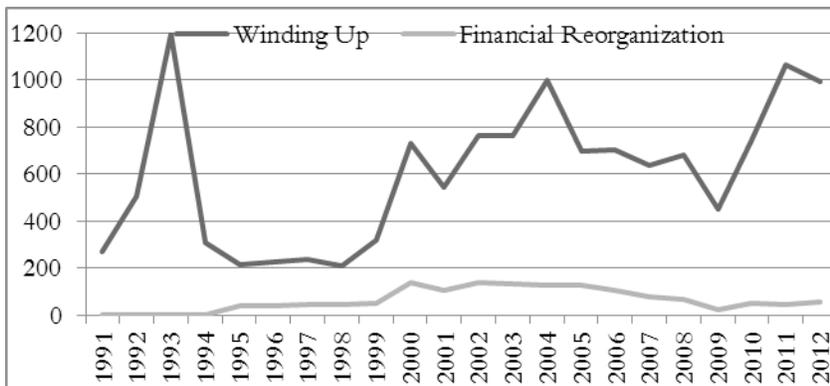
Insolvency crimes could also be subsumed under criminal acts against the financial interests of the EU. These criminal acts have recently been connected to the transformation of Eurojust into a European Public Prosecutor's Office (Council of the EU<sup>2013</sup>), and regulated by the Proposal for a Directive of the European Parliament and of the Council on the fight against fraud to the Union's financial interests by means of criminal law, 11 July 2012 COM (2012) 363 final (2012). However, criminal acts against the financial interests of the EU are currently very narrowly interpreted, mostly

as fraud against financial interests of the EU or as fraud related criminal acts affecting the EU financial interests (including money laundering and corruption) (European Parliament and Council, 2012). Insolvency crimes cannot be considered as such. Therefore, the EU currently does not have explicit jurisdiction for defining insolvency crimes, though there is, however, no explicit objection to it in EU law if the need for EU legislation in this field arises.

## Criminal and administrative responsibility of management in insolvency procedure in Slovenia

The first major wave of bankruptcies occurred after the independence of Slovenia in the 1990s. There has been a second wave of insolvency procedures at the beginning of 2000 (Figure 1). The interest in insolvency crimes has grown since 2008: the number of bankruptcies has increased, not only as a result of the economic and financial crisis, but also due to criminal conduct on the part of management and others (Jenuil, 2014).

Figure 1  
Number of insolvency cases in Slovenia



### De iure

In Slovenia, insolvency as such, not only insolvency crime, is perceived as an immoral act and definitely not as an aspect of normal business activity (Jenuil, 2010: p.30). This is reflected in the Slovenian legislation which includes all

sanctions and preventive measures that have been adopted in comparative legal systems: criminal offences, administrative offences<sup>2</sup> and tort liability as well as professional disqualification (Cepec *et al.*, 2011; Ilić, 2008).

Although the central act for administrative liability in Slovenia is the Minor Offences Act-1 (2013), it only regulates general conditions for administrative liability, sanctions and procedure. Administrative offences themselves are defined in *lex specialis* legislation. In case of violations in insolvency proceedings, the relevant legislation has always been the commercial legislation or more detailed; the insolvency legislation.

The Compulsory Composition, Bankruptcy and Liquidation Act from 1993 therefore defined as administrative offences certain violations of the insolvency trustee in insolvency procedures. The same attitude was continued by the Financial Operations, Insolvency Proceedings and Compulsory Dissolution Act in 2008. It added the administrative offences of the insolvent debtor itself, its management or partner for not transferring the insolvency trustee all the required information and property.<sup>3</sup> Actually, with almost every amendment of this act it became more and more repressive; the number of administrative offences defined increased, the fines increased, and most importantly, in 2010 the administrative offences of the members of the management and supervisory board for not proposing the insolvency proceedings promptly, were introduced.<sup>4</sup>

Slovenian criminal legislation deals with insolvency proceedings as well. There are especially two relevant criminal acts in Criminal Code-1 (2012, hereinafter CC-1), which was enacted on 1st November 2008; causing bankruptcy by fraud or careless operations (art. 226) and defrauding of creditors (art. 227). Their definitions originate in 1995, when the first Criminal Code (hereinafter CC) in independent Slovenia was enacted, and have varied slightly since. The current definitions from CC-1 correspond to the ones from 1995 and were lately also amended to correspond to the art of the state of commercial and especially insolvency law (Jenull, 2014: p.157).

Despite existing *lex specialis* insolvency crimes, however, most of

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<sup>2</sup> Despite the comparatively widely accepted terminology, used in this chapter (criminal and administrative liability), it should be noted that Slovenian law differentiates mainly between two forms of criminal conduct: criminal offences (Slovene *kazniva dejanja*), defined by CC-1 (2012), and misdemeanours (Slovene *prekrški*, here administrative offences), defined by Minor Offences Act-1 (2013) and various other legal acts (Bavcon *et al.*, 2013). The latter form of criminal conduct includes also the possibility of judicial protection.

<sup>3</sup> See articles 489-491 of this act.

<sup>4</sup> See 489a of this act.

insolvency criminality is prosecuted as *lex generalis* criminal acts, such as fraud, business fraud, abuse of position or trust in business activity, etc. (CC-1, 2012), because it is easier for the prosecution to prove the elements of a more general criminal act than of a more specific one. This approach applies generally to the chapter of criminal acts against the economy (also economic crime) – the majority of economic crimes are prosecuted as the criminal act of abuse of position or trust in business activity from article 240 of the CC-1 (Keršmanc, 2013). However, such practice is incorrect. The criminal act of abuse of position or trust in business activity (CC-1, 2012) is defined in a very general manner.<sup>5</sup> Consequently almost any criminal act from the chapter of economic crimes can be subsumed under it and any such criminal act represents a *lex specialis* rule to the criminal act of abuse of position or trust in business activity. According to the general legal interpretation rule *lex specialis derogat legi generali* the *lex specialis* rule (in present context two insolvency crimes) should be applied. Furthermore, the sentence, prescribed for the abuse of position or trust in business activity is low in comparison to the sentences of other economic crimes<sup>6</sup>—because (again!) it was intended only for cases of criminal conduct, not covered by any other *lex specialis* definition of economic crime. The criminal act of abuse of position or trust in business activity should only then be applied, when no other *lex specialis* criminal act from this chapter is relevant (Bavcon *et al.*, 2013).

The criminal act of causing bankruptcy by fraud or careless operations (art. 226) is composed of two criminal acts. First paragraph includes fraudulent bankruptcy, which is not often in case law and represent a *lex specialis* definition of fraud. It namely incriminates anyone, who causes any form of insolvency

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<sup>5</sup> Article 240 of the CC-1 (emphasised by the author):“(1) *Whoever in the performance of an economic activity and with a view to procuring an unlawful property benefit for himself or for a third person, or to causing damage to the property of another, abuses his position or the trust placed in him, acts beyond the limits of the rights or fails to perform his duties under the law, other regulation, act of a legal person or of legal transaction concerning the disposal of another’s property or benefits, their management or representation, shall be sentenced to up to five years in prison. (2) If the offence under the above paragraph has resulted in a large property benefit or a large loss of property and if the perpetrator intended to gain such property benefit for himself or a third person or to cause damage to the property of another, he shall be sentenced to imprisonment for not less than one and not more than eight years. (3) If the offence under paragraph 1 of this Article has been committed with the intention of procuring any non-property benefit for himself or another, the perpetrator shall be sentenced to imprisonment for not more than two years.*”

<sup>6</sup> Such low sentence causes also problems for the police, especially regarding the statute of limitation of criminal prosecution.

procedure with intent not to pay debts to the creditors. Such criminal act is therefore currently committed by whoever, who, with the intention of not paying what he is obliged to pay, apparently or actually worsens his own or a third person's financial circumstances, thus causing bankruptcy, or who, with the same intention, causes the fulfilment of conditions for the deletion of a company from the court register, *ex officio* without liquidation in any fraudulent way,<sup>7</sup> causes the initiation of the bankruptcy procedure or the procedure for the deletion of the company from the court register, *ex officio* without liquidation (CC-1, 2012).

The second paragraph of this article includes a more frequent form of criminal insolvency: causing bankruptcy by careless operations, which covers perpetrators, who after the established inability to pay the debts, mismanage their duties in the company and thereby in the long run cause also bankruptcy or liquidation of company and property damage.<sup>8</sup>

The criminal act of defrauding of creditors (art. 227)<sup>9</sup> incriminates the discrimination of creditors after the perpetrator's awareness of the debtor's insolvency. Namely, after the insolvency is established, all creditors should be

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<sup>7</sup> Including by the apparent sale, disposal without charge or at extremely low price, or destruction of the property or a part thereof which belongs to the bankrupt estate; the conclusion of a false agreement on debt or the concession of a false claim; or concealing, destroying or falsifying business books and documents or keeping them in such a manner which renders the identification of the actual financial position or solvency impossible.

<sup>8</sup> Article 226, paragraph 2 of the CC-1: "Whoever knows that himself or any other person as payer is unable to pay, but irrationally spends funds, becomes over-indebted, concludes detrimental contracts, performs the free, fictitious or discounted transfer of property to other persons, or reduces in some other way the value of his property, or the property or the company he manages, or omits the timely insurance or the enforcement of claims, or otherwise evidently violates his duties in the governing of an economic activity or financial operations, thus causing long-term financial insolvency or over-indebtedness, which results in a bankruptcy or the fulfilment of conditions for the deletion of the company from the court register, *ex officio* without liquidation, and a major damage (5.000 EUR or more) to property, shall be sentenced to up to five years in prison."

<sup>9</sup> Article 227 of the CC-1: "(1) Whoever, while engaging in economic activities, is aware of himself or a third person being insolvent and who, by payment of a debt or otherwise, intentionally puts a certain creditor in a preferential position, thereby causing a large property loss to other creditors, shall be sentenced to imprisonment for not more than five years. (2) Whoever, knowing that he or a third person is insolvent, and with the intention of defrauding or causing damage to creditors, concedes a false claim, drafts a false contract or otherwise causes a large property loss (50.000 EUR or more) to creditors, shall be punished to the same extent."

treated in equal manner. Any preferential treatment of a creditor thereby puts other creditors in discriminatory position and results in causing damage to them (CC-1, 2012; Bratina and Jovanovič, 2008).

Slovenia has also adopted legal basis for the liability of legal persons for criminal acts, as well as for their administrative liability. Criminal liability is regulated by Liability of Legal Persons for Criminal Offences Act of the Republic of Slovenia (2012), which has not been amended drastically through the years and enables also criminal liability of legal persons for insolvency crimes, if a criminal act was committed by the perpetrator in the name of, on behalf of or in favour of the legal person. Furthermore, the committed crime must represent carrying out of an unlawful resolution, order or endorsement of its management or supervisory bodies; management or supervisory bodies influenced the perpetrator or enabled him to commit the crime; legal persons has at its disposal unlawfully obtained property benefit or uses objects obtained through a crime or its management or supervisory bodies have omitted due supervision of the legality of the actions of employees subordinate to them (Liability of Legal Persons for Criminal Offences Act of the Republic of Slovenia, 2012). Legal persons could also be held responsible for administrative offences (Minor Offences Act-1, 2012).

The overall impression of the Slovenian legislation is that administrative liability is rapidly expanding and becoming more severe, whereas criminal liability has been adjusted to the existing commercial legislation – they should therefore both offer a sufficient legal basis for efficient prosecution and punishment of perpetrators of violations in insolvency proceedings (Jenull, 2014).

## **And de facto**

The true indicator for the state of art of insolvency crimes in Slovenia however is, how these legislative definitions of criminal acts are realised in practice. With this intention the official statistical data from annual Police reports and the annual State Prosecutor's Office reports, available online, were gathered. If the data were not directly accessible online, they were accessed from the Ministry of Justice<sup>10</sup> and the Supreme State Prosecutor's Office directly upon request according to the Public Information Access Act (2014).

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<sup>10</sup> Ministry of Justice is the misdemeanour authority with jurisdiction according to the Financial Operations, Insolvency Proceedings and Compulsory Dissolution Act (2014).

Table 1 shows the relationship between all reported criminal acts, reported economic crime and procedural outcomes of reported core insolvency crimes.

For the purposes of this paper, core insolvency crimes consist of the criminal act of causing bankruptcy by fraud or careless operations from the current CC-1 (2012: art. 226), as well as of the criminal acts of false bankruptcy and causing of bankruptcy by business mismanagement from the previous CC (1995).<sup>11</sup> Namely, the new criminal act from article 226 of CC-1 (causing bankruptcy by fraud or careless operations) represents a substantive continuum of criminal acts from CC (1995), because it combines articles 232 (false bankruptcy) and 233 (causing of bankruptcy by business mismanagement) from CC (1995) (Jenull, 2014: p.159; Jenull and Ambrož, 2012: p.164).

**Table 1**  
**Natural persons: core insolvency crimes (article 226 of CC-1, articles 232 and 233 of CC).**

<b>Year</b>	<b>all criminal acts<sup>12</sup></b>	<b>Eco-nomic crime<sup>13</sup></b>	<b>Insol-vency crimes<sup>14</sup></b>	<b>Of which dismissal</b>	<b>prose-cution</b>	<b>indict-ments</b>	<b>judg-ments</b>	<b>guilty verdict</b>
2007	88.197	6.748	31	13	17	3	3	1
2008	81.197	6.701	15	16	4	3	3	0
2009	87.463	6.787	16	11	1	2	0	0
2010	89.489	9.448	17	11	2	1	6	5
2011	88.722	8.539	14	10	0	1	3	1
2012	91.430	12.853	24	14	5	0	0	0
2013	93.833	16.333	72	15	3	4	3	1

<sup>11</sup> Valid from 1<sup>st</sup> January 1995 until 31<sup>st</sup> October 2008.

<sup>12</sup> Source: the Police.

<sup>13</sup> Source: the Police. For more data on crimes against economy see Keršmanc, 2014; Selinšek and Dvoršek, 2009; Selinšek, 2006.

<sup>14</sup> Source: State Prosecutor's Office (applies also to all other data in this table unless other provided so).

**Figure 2**  
**Number of all reported criminal act and criminal acts against economy.**

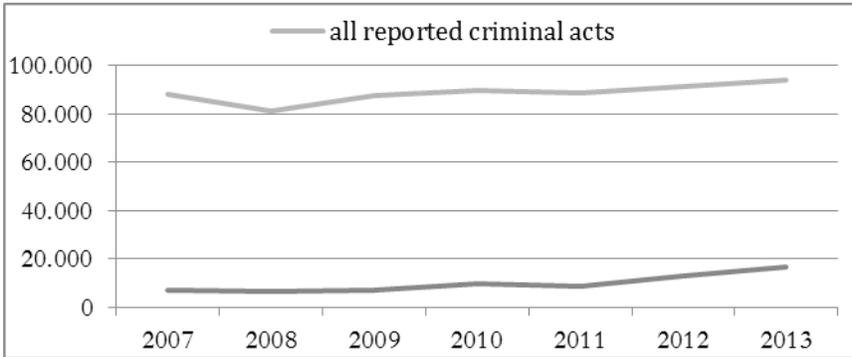


Table 1 and Figure 2 show that the number of all reported crimes has increased from 2007 to 2013, as well as the number of reported economic crimes. The same cannot be stated for the number of reported core insolvency crimes, which dropped significantly in 2008 (despite the beginning of the financial and economic crisis) and only slightly began to rise in the following years, however with another drop in 2011 followed by a steep increase in 2012 and 2013. The increase in 2013 cannot be explained by any amendment to criminal legislation, maybe by increased sensitivity of state authority and increased focus of the State Prosecutor's Office's prosecutorial policy on economic crime due to public and media pressure (State Prosecutor's Office, 2012).

The number of reported insolvency crimes is extremely low in all years and the subsequent prosecution numbers indicate that after detection the prosecution of insolvency connected crimes is completely ineffective. This inefficacy is a combination of the fact that very few insolvency trustees report their criminal suspicions to the police (despite his or her legal obligation to do so), the impractical criminal legislation and the general misunderstanding of the nature of crimes connected with insolvency.

The drop of prosecutions and guilty verdicts after 2008 could be explained also by amended definitions of relevant criminal acts. If the definition of a criminal act is narrower, it can cover fewer cases of insolvency crimes. This should also result in statistics. And *vice versa*; if the definition of a criminal act is broader, it could cover more cases of insolvency crimes, which should, again, also show in numbers.

Article 226 of CC-1 represents a substantive continuum of respective criminal acts from articles 232 and 233 from CC. However, the CC-1 in 2008 changed slightly the definition of this criminal act in comparison to the

previous definition from CC, which made the definition of this criminal act in 2008 narrower and more difficult to prove in practice. For a perpetrator such definition was of course more lenient than the previous definition from CC,<sup>15</sup> which could have also led to a drop in relevant statistics regarding this criminal act. Furthermore, this change often resulted in unsuccessful criminal prosecution. Immediately after 2008 the situation was not rare, when the supposed criminal act was committed before 2008, when the old CC was valid, and prosecuted after 2008, when the new CC-1 was already enacted. Due to a narrower definition of a criminal act in CC-1 and due to the constitutional principle of legality (Constitution of the Republic of Slovenia, 2013) the more lenient definition of a criminal act from CC-1 had to be applied. This meant that the criminal prosecution was mostly unsuccessful (Jenull, 2014: p.159; Jenull, 2010: p.42; Selinšek, 2011). The conduct, which was criminal according to the CC, was not criminal anymore according to the CC-1. Most changes, which made the definition of the criminal act of causing bankruptcy by fraud or careless operations in CC-1 in 2008 more difficult to prove, dealt with the perpetrator's guilt.<sup>16</sup>

The practice was aware of this. In 2011 the CC-1 was therefore amended significantly by the amendment Criminal Code-1B (2011), according to which the definition of article 226 is similar to the one from CC and again less lenient for the perpetrator. Consequently in the transition period<sup>17</sup> the definition of a criminal act, in force at the time of the commission of the

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<sup>15</sup> No reason for such change could be found in the *travaux préparatoires* for the CC-1.

<sup>16</sup> For example, the definition from 2008 demanded from the prosecution to prove that the perpetrator intended to defraud the creditors and to cause the bankruptcy, deletion of the company *ex officio* without liquidation (*dolus directus*). The old definition from CC was contrary satisfied with the proof that the perpetrator was aware that his conduct can originate a forbidden consequence (in our case large property loss for creditors) but he or she nevertheless let such consequence to occur. Furthermore, in the old CC bankruptcy and deletion of the company *ex officio* without liquidation were not objective conditions of punishability, which did not need to be covered by the perpetrator's intent (*dolus directus*), whereas according to the CC-1 they had to be covered by the perpetrator's intent, which was again very difficult to prove. And last, but not least. The CC only demanded the prosecution to prove that the perpetrator was aware of the inability to pay the creditors. The CC-1 from 2008 however set a more difficult task for the prosecution; it had to prove that the perpetrator intended not to pay the creditors (Jenull, 2014: 159; Jenull, 2010: 40). All these stricter conditions from 2008 contributed to the drop in the success of prosecution of insolvency crimes.

<sup>17</sup> That means that the criminal act was committed when CC-1 was enacted, whereas the case became *res iudicata* only then, after the new Criminal Code-1B was enacted.

criminal act – the definition from 2008 – should be applied (Jenull, 2014: p.191). After the transition period, however, such legislation should enable prosecution of a wider range of acts than the CC-1 from 2008, because the new definition is again broader.<sup>18</sup> And as the following table shows, the number of prosecutions has been rising slightly after 2011.

**Table 2:**  
**Natural persons: reported fraud against creditors**  
**(article 227 of CC-1 and article 234 of CC).**

<b>Year</b>	<b>All crimes<sup>19</sup></b>	<b>Econom. crime<sup>20</sup></b>	<b>Fraud creditors<sup>21</sup></b>	<b>Dismiss</b>	<b>Prosec.</b>	<b>Indict.</b>	<b>Judg-ment</b>	<b>Guilty</b>
2007	88.197	6.748	39	24	14	11	2	1
2008	81.197	6.701	51	42	14	4	11	6
2009	87.463	6.787	49	32	12	9	9	4
2010	89.489	9.448	71	40	16	9	8	3
2011	88.722	8.539	14	36	8	2	12	3
2012	91.430	12.853	96	35	21	3	4	3
2013	93.833	16.333	180	48	36	28	26	11

Table 2 shows the relationship between all reported criminal acts, reported criminal acts against economy and procedural outcome of reported defrauding of creditors (Jenull, 2014: p.190). Contrary to the previous table there is no significant drop of successful prosecutions in 2008, but a significant fall in the number of reported criminal acts of defrauding creditors can be observed in 2011, when CC-1 was, as already noticed, amended. Beside from that the

<sup>18</sup> Causing bankruptcy, or the fulfilment of conditions for the deletion of a company from the court register, *ex officio* without liquidation and causing major property damage to creditors is again only the objective condition of punishability. Contrary, the prosecution only needs to prove the existence of the property damage and liquidation of a company. Furthermore, the prosecution has to prove the perpetrator's intent regarding causing long-term financial insolvency or over-indebtedness of a company, but now the *dolus eventualis* suffices. This means that the prosecution needs to prove that the perpetrator was aware that he or she could cause long-term financial insolvency or is over-indebtedness by his or her conduct and consented to it. The list of executing acts has been supplemented by a general clause. The criminal act can therefore be committed not only by conduct, explicitly listed, but also in any other fraudulent way. These changes all broadened the definition of this criminal act (Jenull and Ambrož, 2012: 167).

<sup>19</sup> Source: the Police.

<sup>20</sup> Source: the Police.

<sup>21</sup> Source: State Prosecutor's Office (applies also to all data in this table, unless otherwise provided so).

number of reported criminal acts of defrauding of creditors has generally increased, even rapidly in year 2013, as well as the number of decisions to prosecute, indictments and guilty verdicts.

The results regarding the prosecution of legal persons for defrauding of creditors from Table 3 (relationship between all reported legal persons as suspected perpetrators and procedural outcome of criminal acts of defrauding of creditors, allegedly committed by legal persons) provide no reason to be optimistic.

**Table 3**  
**Reported legal persons: defrauding of creditors<sup>22</sup>**  
**(article 227 of CC-1 and article 234 of CC).**

<b>Year</b>	<b>legal entities<sup>23</sup></b>	<b>against creditors<sup>24</sup></b>	<b>dismiss</b>	<b>Prosecut.</b>	<b>indict-ment</b>	<b>judg-ment</b>	<b>guilty</b>
2007	241	7	4	0	1	1	0
2008	258	11	5	1	0	0	0
2009	388	7	7	1	0	1	0
2010	627	30	12	1	0	1	0
2011	814	12	12	2	0	1	0
2012	936	20	11	5	1	0	0
2013	1.012	72	19	10	1	0	0

The number of reported legal persons has increased, as well as the number of reported criminal acts of defrauding of creditors, decisions to prosecute and indict a legal person for such criminal act. However, since 2007 there has not been any conviction for legal persons for defrauding of creditors, which corresponds to the general attitude of Slovenian criminal justice system towards the prosecution of legal persons<sup>25</sup> despite the fact that criminal liability of a legal person or its legal successor is legally possible according to the Liability of Legal Persons for Criminal Offences Act of the Republic of Slovenia (2012) even in case of bankruptcy or winding up of a legal person (Deisinger, 2007). There is the issue of *raison d'être* of such prosecution,

<sup>22</sup> Not enough data core insolvency crimes for legal persons is available, therefore it is not included.

<sup>23</sup> Source: the Police.

<sup>24</sup> Source: State Prosecutor's Office (applies also to all data in this table, unless otherwise provided so).

<sup>25</sup> See data for example the annual reports of the State Prosecutor's Office, available online:

[http://www.dt-rs.si/sl/vrhovno\\_drzavno\\_tozilstvo/porocila\\_o\\_delu\\_drzavnih\\_tozilstev/](http://www.dt-rs.si/sl/vrhovno_drzavno_tozilstvo/porocila_o_delu_drzavnih_tozilstev/)

since in case of bankruptcy there are usually not enough assets left for the execution of criminal sanctions. Despite that the very fact of conviction of a legal person insolvency crimes proceedings could have a general preventive impact in sense of reduction of such violations as well as in connection to the legal consequences for insolvency, compensation, etc. proceedings.

**Table 4**  
**Natural persons: frequency of criminal sanctions for defrauding of creditors (article 227 of CC-1 and article 234 of CC) and core insolvency crimes (article 226 of CC-1, articles 232 and 233 of CC).**

Year	Core insolvency crimes				Defrauding of creditors			
	Nr guilty	Prison	Suspended	Fines	Nr guilty	Prison	Suspended	fines
2003	0	0	0	0	3	0	3	0
2004	0	0	0	0	8	2	6	0
2005	0	0	0	0	27	2	25	0
2006	1	0	1	0	11	1	10	0
2007	1	0	1	0	9	1	8	0
2008	4	2	2	0	6	1	5	0
2009	1	0	1	0	4	1	3	0
2010	4	1	3	0	3	0	3	0
2011	1	0	1	0	4	0	4	0
2012	1	1	0	0	8	2	6	0
2013	1	1	0	0	10	3	5	0
<b>Total</b>	14	5	9	0	93	13	78	0

Table 4 shows the relationship between different forms of sanctions for the criminal act of defrauding of creditors and for core insolvency crimes. In case of the criminal act of defrauding of creditors the suspended sentence is still more frequent than prison sentence, although slowly losing the strong superiority over prison sentence. For core insolvency crimes the table infers that in the last two years prison sentence is strongly prevalent, probably in the case of the worst commissions of insolvency crimes. However, in both cases, there is no fine, which would in mine opinion be an appropriate (at least additional) sanction considering the nature and consequences of these crimes.<sup>26</sup>

<sup>26</sup> Source: the State Prosecutor's Office.

**Table 5**  
**Administrative procedures for administrative offences in insolvency proceedings, defined by Financial Operations, Insolvency Proceedings and Compulsory Dissolution Act (2014).<sup>27</sup>**

<b>Year</b>	<b>Initiated procedures</b>	<b>Decisions on established misdemeanours<sup>28</sup></b>	<b>Official notes<sup>29</sup></b>
2011	11	1	1
2012	24	8	2
2013	48	16	3
2014 (until 15th April)	23	21	6

Table 5 shows the procedural outcome of the fast misdemeanour procedures according to the Minor Offences Act-1 (2013)<sup>30</sup> regarding the relevant administrative offences from the Financial Operations, Insolvency Proceedings and Compulsory Dissolution Act. The table includes the administrative offences from articles 489.a to 491 of the Financial Operations, Insolvency Proceedings and Compulsory Dissolution Act (2014). The administrative offences concern all relevant administrative offences from that act,<sup>31</sup> except the administrative offences, committed by insolvency trustees (Financial Operations, Insolvency Proceedings and Compulsory Dissolution Act, 2014).

The ministry has had the jurisdiction for conducting a misdemeanour procedure for insolvency misdemeanours since the enactment of insolvency legislation in 1994. However the year 2010 should be emphasised as

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<sup>27</sup> Source: the Ministry of Justice.

<sup>28</sup> In these cases the Ministry of Justice established that an administrative offence according to the Financial Operations, Insolvency Proceedings and Compulsory Dissolution Act (2014) had been committed and issued a sanction for it.

<sup>29</sup> In these cases the Ministry of Justice decided not to issue a decision on administrative offences or to lodge an accusatory instrument with the competent court (ordinary court proceeding). It is a negative decision, based on the lack of legal conditions for the prosecution or on inexpediency of the procedure.

<sup>30</sup> These are procedures, for which the misdemeanour authority has the jurisdiction (such as the police, inspection, etc.) and not the judiciary. It is a default rule according to the Minor Offences Act-1 (2013).

<sup>31</sup> That covers the administrative offences of the members of the supervisory board or management before the initiation of insolvency procedure; the insolvent debtor itself; its statutory representative or self-employed persons for certain violations in the insolvency procedure; administrative offences of a member of the management of the insolvent debtor; its partner; insolvent debtor; which is a natural person or such partner; a member of supervisory board or the insolvent debtor's employee.

important, because the amendment to the Financial Operations, Insolvency Proceedings and Compulsory Dissolution Act from that year introduced a completely new group of misdemeanours: the misdemeanours of the management and members of the supervisory board before and during the insolvency procedure.

The data for the last four years therefore shows a continuous rise of the initiated procedures for misdemeanours, as well as of the number of decisions on established misdemeanours.

In general, the statistical data show increased activity and effectiveness of the judiciary and the Ministry of Justice. The number of initiated criminal and misdemeanour procedures has risen, as well as the number of procedural decisions, establishing a violation and criminal or misdemeanour liability. The criminal sanctions have started to transform from suspended sentence to prison sentence. The problem remains the noteworthy absence of monetary fines and the unsuccessful prosecution of legal persons despite sufficient legal basis for it. The statistical data also indicate a need for stable legislation. In our opinion this signifies that legislation needs to be not only up-to-date, but also stable and thoughtfully amended.

## **Typical *modi operandi* of perpetrators of insolvency crimes in Slovenian case law**

The *de facto* state of art of prosecution of insolvency crimes could be assessed not only from official statistical data, but also from the selection of cases, prosecuted as insolvency crimes (Jenull, 2014; Jenull, 2010).

The overview of annual reports of the State Prosecutor's Office shows that the State Prosecutor's Office has formed a special group of economic crimes for the purposes of statistics, called criminal acts, committed against consumers and creditors. The crime of defrauding of creditors has always been the second most often emphasised criminal act among such crimes in the annual reports of the State Prosecutor's Office. The crime, which has had the highest number of reported and prosecuted cases has always been commercial fraud.<sup>32</sup> The annual reports of the State Prosecutor's Office therefore show that the prosecuted cases of defrauding of creditors usually involve an insolvent company, its manager, who is aware of the insolvency

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<sup>32</sup> See annual reports of the State Prosecutor's Office, available at [http://www.dt-rs.si/sl/vrhovno\\_drzavno\\_tozilstvo/porocila\\_o\\_delu\\_drzavnih\\_tozilstev/](http://www.dt-rs.si/sl/vrhovno_drzavno_tozilstvo/porocila_o_delu_drzavnih_tozilstev/)

or over-indebtedness and the consequence of unpaid creditors' claims due to certain 'creative' business techniques. Among such creative business techniques assignment contracts are very common: through a transfer order (assignment) the insolvent company usually authorises someone—the transferee (usually the insolvent company's debtor), to perform something for a specific third person—the recipient (the assignment beneficiary). At the same time the insolvent company authorises the third person to accept such performance (Obligations Code, 2007). With such contracts the funds of the insolvent company are slowly siphoned off to the account of the assignment beneficiary, usually a company, owned by the management of the insolvent company. Assignment contracts are therefore used to strip the company of its assets before the bankruptcy is final. The management usually signs a contract in the name of the insolvent company with the assignment beneficiary, according to which the assignment beneficiary receives payments from the insolvent company's debtors instead of the insolvent company itself. This asset is then used to repay certain creditors or even appropriated by the management of the insolvent company or legal persons, established by such management (Jenull, 2014).

Perpetrators of defrauding of creditors have usually been the management of insolvent company, who have been often also the partial owners of the insolvent company. They defraud creditors in various ways, among others via acknowledgments of sham claims made by third party, buying overpriced real-estate, selling real-estate under real price, simply transferring the money of the company to a bank account abroad, payment of a whole debt of a certain creditor, leaving others unpaid, sham selling of real-estate, without receiving the payment for it and lending money, when it could be used for the company itself (Jenull, 2014).

The causing of bankruptcy by fraud or careless operations is not found so often in the case law and in the annual reports of the State Prosecutor's Office. More often bankruptcy is caused by careless operations, which includes the state of over-indebtedness and engaging in long-term loans, postponing necessary financial reorganisation and restructuring, ordering services and goods while not paying for them for years and otherwise overstressing business costs. These acts must of course result in bankruptcy of the company. Prosecutions of fraudulent bankruptcy are much less frequent and included cases such as: taking out loans by the management and transferring the only profitable activity to another company after the company's accounts had been blocked; management's concealing of cashing debt and raising the rent that the company is paying for the offices in order to financially benefit the owner of the offices which of course resulted in bankruptcy (Jenull, 2010).

## Conclusion

Since commercial and punitive legislation regarding insolvency proceedings influence management and criminal decisions of individuals it is important that (Slovenian) law on insolvency crimes is efficient not only on paper, but also in action.

Comparatively speaking Slovenia is certainly one of those states, which consider insolvency manipulation in general and especially intentional bankruptcy as immoral and therefore adopted a broad range of legislation, which should prevent such a socially undesirable phenomenon and punish the perpetrators, including by administrative and criminal liability.

As for the Slovenian legal system, a conclusion must be drawn that the criminal legislation regarding insolvency crimes has been unfortunately amended in 2008 in such a way that the definition of the relevant criminal act has been narrowed, although no explanation for the reason of such amendment could be found in the *travaux préparatoires* to the CC-1. This resulted in less successful prosecutions of insolvency crimes. In 2011 the definitions of the relevant criminal acts have been adapted to the commercial and insolvency law and widened again. Administrative legislation has been constantly encompassing more forms of transgressions with higher fines, which has made it more repressive.

This has influenced also the practice. The official statistical data therefore shows increased activity and effectiveness of the prosecution service, the courts and Ministry of Justice regarding implementation of criminal and administrative liability. The number of initiated criminal and administrative procedures has risen, as well as the number of procedural decisions, imposing criminal or administrative liability. The frequency of prison sentence has increased as well.

Two problems however remain unanswered: (a) the reluctance to impose fines (at least as the additional sanction) in criminal procedures, despite its appropriateness due to the nature and consequences of crime, and (b) the absence of convictions of legal persons. In both cases the issue is not insufficient legislation, but its execution.

The statistics also shows the growing need for stable legislation, because any significant amendment causes a backlog of cases and congestions in the prosecution offices and the courts, which is reflected in annual statistics of the relevant authorities. The criminal and administrative legislation therefore must be up-to-date and adapted to the commercial and insolvency laws, but its amendments should not be a product of rash and populist decisions.

The included *modi operandi* of these crimes shows pretty straightforward

and clear cases of reducing the company's value in order to defraud certain creditor(s) or to cause bankruptcy.

Based on the short analysis of Slovenian legislation and practice, the conclusion can be drawn that the public outcry due to the growth of criminal insolvency abuse and accompanying social circumstances (economic and financial crisis) have indeed led to the amendments of the punitive legislation. It also stimulated the increase of investigation and prosecution of insolvency crimes and administrative offences and consequently imposing more repressive sanctions – with few exceptions.

The foundation of the legal and especially practical regulation of insolvency crimes and economic crime in general in my opinion lies in a very basic issue: the comprehension of such actions by politics and society. This stands also for Slovenia. Managers that were considered almost national commercial heroes, loved by politicians and media, turned overnight into enemies of state due to the financial crisis and sudden lack of financial means in the state banks due to unsecured loans granted to the commercial sector. Similarly; activities, previously considered as inventive, but legal commercial practices, were later labelled as criminal (Mekina, 2011). This, in my opinion, also influenced the prosecutorial strategy (2012) of the State Prosecutor's Office and subsequent more effective practice of judiciary. Now the real issue for me is, why only the managers are put into spotlight. Why is there still no focus is given to the responsibility of the members of supervisory boards, who have not rarely represented the state due to at least partial state-ownership of companies. They were often required to give consent to managerial decisions on the basis of commercial legislation and they represented the wide-opened door for political influence on commercial sector.

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# Criminal responsibility of political parties for economic crime: Democracy on test

Sunčana Roksandić Vidlička and Aleksandar Maršavelski<sup>1</sup>

*“Where two orders of men, such as the nobles and people, have a distinct authority in a government, not very accurately balanced and modelled, they naturally follow a distinct interest; nor can we reasonably expect a different conduct, considering that degree of selfishness implanted in human nature. It requires great skill in a legislator to prevent such parties; and many philosophers are of opinion, that this secret, like the grand elixir, or perpetual motion, may amuse men in theory, but can never possibly be reduced to practice.”*

David Hume (1742)

## Introduction

On 11 March 2014, a Croatian court made a historic step in subjecting political parties to the rule of criminal law. In a major corruption case, the County Court of Zagreb convicted the largest political party in Croatia – the Croatian Democratic Union (CDU) – and sentenced the Party to pay the maximum fine prescribed by law in addition to a confiscation order to pay back 24 million kuna (€3,2 million) of proceeds of crime. This was the outcome of a 2-year trial, already depicted in some Croatian media as the Croatian “trial of the century”. The same goes for the separate trial of the former party leader, Ivo Sanader, who finally got 8,5 years imprisonment for bribery and abuse of position (Roksandić Vidlička, 2014).

It is important to understand the circumstances under which the criminal prosecutions in this case have been initiated. The period in which the crimes of the CDU have been committed was between 2003 and 2009. Croatia was still in the transitional period from a former Yugoslav republic (1945–1991) to becoming a member of the European Union (2013) (more in Novoselec *et al.*, forthcoming 2015).

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At the same time, in 2007–2008, the global financial crisis began, which brought the feeling of social and economic insecurity. In 2009, the Prime Minister of Croatia Ivo Sanader, the president of CDU, resigned his post, leaving scarce explanation for his actions and temporarily disappeared from public life. This raised serious doubts about the real reasons of his resignation, and the people left in a situation of a declining economy wanted an explanation of Sanader's and his party actions.

Naturally, in periods of recession, there is an intensified public demand for responsibility of politicians and their parties. Dubious political decisions, especially the costly transactions from state's budget, are being watched and investigated in case of suspicions that crimes have been committed. Politicians connected to economic crimes are targeted first and this demand and need goes beyond the responsibility of individuals. We are facing a new era of political accountability as more and more countries are adopting criminal liability of political parties (Maršavelski, 2014).

One of the central questions is how to attribute criminal accountability to political parties. This is still difficult to imagine in most legal systems of the world. One way to do so is to treat political parties as legal entities and determine their liability the same way as for corporations. This model was introduced in Croatia in 2003, when the Law on the Responsibility of Legal Entities for Criminal Offences was enacted, but until the CDU case it has never been applied to political parties. In this chapter we shall evaluate the most important features of addressing criminal responsibility of political parties for economic crimes.

Bringing political parties within the reach of criminal justice is not an easy task. It is necessary to be aware of possible obstacles in investigating, prosecuting, convicting and punishing political parties for criminal offences: immunity, abolition, amnesty, pardon, law amendments, political preferences of prosecutors and judges etc. The purpose of aforementioned obstacles is mainly related to preventing the so-called 'vicious' prosecutions, which intend to discredit certain political parties (Maršavelski, 2014).

A further question is which sanctions courts should be imposed on political parties for (economic) crimes. Apart from fines, which are widely used against legal entities, the most controversial issue is whether there should be a possibility to dissolve a political party in cases of the most severe economic crimes.

Therefore, this chapter will address the following related issues:

1. First it will address the notion and effects of economic crimes in contemporary political systems;

2. Second, we shall discuss the causes of economic crimes committed by political parties;
3. Third, criminal proceedings involving political parties face various obstacles regarding the initiation and undertaking of such proceedings, which must be taken into account when searching for an adequate model of responsibility for criminal offences;
4. Fourth, one of the crucial points is to evaluate available criminal sanctions for political parties, as well as their (desired and undesired) consequences;
5. Finally, we shall evaluate the effects of criminal prosecutions of political parties on democracy.

## **The notion and effects of economic crimes and political corruption**

Various political financial scandals we can daily read in the media convey the impression that economic crimes are the most common types of law breaking committed by political parties. But what is exactly meant when we discuss economic, financial or (taken together under the label of) ‘white-collar’ crimes? Like a virus, economic crime adapts itself to the trends that affect all organisations, and political parties are allegedly involved in this type of crime at the highest level. However, despite this adaptability, there must be some ‘common stem’ for a useable definition. The elements of the usual definitions of economic crimes in the literature are characteristic, not only for corporations, but also for political parties. For example, Alvesalo and Tombs (2001) provide two definitions of economic crime: a criminalised act or omission which is committed in the framework of, or using a corporation or other organisation with the aim of attaining unlawful direct or indirect (material) benefit; and a criminalised, systematic act or omission that is similar to entrepreneurship and has the aim of considerable benefit (pp. 239–240). In a more abstract way, according to Appelgren and Sjögren (2001), these crimes can also be interpreted as crimes against the economic order, distorting or even destroying the regular mechanisms of the economy and the market (p. 11; Bhusal, 2009: p.13).

The initial definition of white collar crime was given by Edwin Sutherland (1949): “*a crime committed by a person of respectability and high social status in the course of his occupation*” (p. 9). However, Sutherland was not the first social scientist to write about crimes by those in the upper class. In his 1934 *Criminology* text, Sutherland used the term “*white-collar criminaloid*”

in reference to the “*criminaloid concept*” initially used by E. A. Ross (1907). Unlike ordinary criminals, ‘criminaloids’ enjoy the respect of society and they often tend to establish good connections with the government. They accomplish that either by establishing connections from the outside or they become members of the regime themselves by joining the ruling political party. Ross (1907: p.48) particularly addresses the notion of ‘criminaloids’ as follows:

“By this we designate such as prosper by flagitious practices which have not yet come under the effective ban of public opinion. Often, indeed, they are guilty in the eyes of the law; but since they are not culpable in the eyes of the public and in their own eyes, their spiritual attitude is not that of the criminal. The lawmaker may make their misdeeds crimes, but, so long as morality stands stock-still in the old tracks, they escape both punishment and ignominy.”

Political parties are social organisations, which mean that their economic crimes can be depicted as a form of organisational deviance and organisational crime. Organisational deviance is defined as “*actions contrary to norms maintained by others outside the organisation . . . [but] supported by the internal operating norms of the organisation*” (Ermann and Lundman, 1978: p.7). Organisational crime can be referred to as

“illegal acts of omission or commission of an individual or a group of individuals in a formal organisation in accordance with the operative goals of the organisation, which have serious physical or economic impact on employees, consumers, or the general public” (Schrager and Short, 1978: p.408).

Finally, members of leading political parties, who are the ones that are in position to engage in economic crimes, are members of social elites. Thus, we can say that economic crimes of political parties also belongs to the category ‘elite deviance’ i.e. “*acts committed by persons from the highest strata of society*” (Simon, 2006: p.12).

Economic crimes of political parties pose a serious danger to the society and democracy. Some effects of economic crimes are well explained by Bhusal (2009: p.12):

“[A] financial criminal not only attempts to accumulate money from illegal sources but its activity is also threatening the economic order and creates a hurdle for national development. Economic crimes are also contributing to the degradation of social norms. This crime causes

further chaos and disorder in society by creating wider gaps between the hard money earners and easy money earners”

The most important type of economic crime is corruption. Political corruption needs to be penalised for the sake of “*protecting democratic structures and basic values of democratic societies such as equality, non-discrimination and transparency*” (Albrecht, 2009: p.3). According to Gottschalk (2014), corruption generally encompasses bribery, kickbacks, organisational corruption and public corruption, as the abuse of power of entrusted power by political leaders. He defines it as the giving, requesting, receiving or accepting of an improper advantage related to position, office or assignment. It is just as much an economic problem as it is political and social one, because “*it is a cancer that burdens the poor in developing countries*” (Gottschalk, 2014: p.29, cited in Roksandić Vidlička, forthcoming 2015).

Due to its organisational and elite nature, grand corruption occurs at the highest level of government and involves major government projects and programs (Moody-Stuart, 1997). In addition, the offences of such gravity even have the potential to be recognized as crimes under international law, what would correspond to new global world order: see the UN Convention on Corruption of 2003 and the Council of Europe Criminal Law Convention on Corruption of 1999. (Roksandić-Vidlička, 2014; forthcoming 2015). How serious the problem of corruption is for a society is well explained by Rose-Ackerman (1999, p.38):

“Corruption that involves top-level officials can produce serious distortions in the way government and society operate. The state pays too much for large-scale procurements and receives too little from privatizations and the award for concessions. Corrupt officials distort public sector choices to generate large rents for themselves and to produce inefficient and inequitable public policies. Government produces too many of the wrong kind of projects and overspends even on projects that are fundamentally sound”.

Moreover, as Rose-Ackerman argues, corruption can not only produce inefficiency and unfairness, but it can undermine the political legitimacy of the state: “*The most severe costs are not bribes themselves but the underlying distortions they reveal – distortions that may have been created by officials to generate profits*” (Rose-Ackerman, 1997: p.42, cited in Roksandić-Vidlička, forthcoming 2015)

In the past 15 years numerous international conventions have been adopted that provide important but unfortunately “incomplete” remedies to combat corruption (Starr, 2007: 1292). The most important one is the

above mentioned *UN Convention against Corruption* (2003), because of its far-reaching approach and because the mandatory character of many of its provisions make it a unique tool for developing a comprehensive response to this global problem. The Convention addresses the issue of the funding of political parties in paragraph 7(3):

“Each State Party shall also consider taking appropriate legislative and administrative measures, consistent with the objectives of this Convention and in accordance with the fundamental principles of its domestic law, to enhance transparency in the funding of candidates for elected public office and, where applicable the funding of political parties”.

The drafters of the Convention left the state parties to decide what would be the nature of the legislative measures to enhance the transparency of funding of political parties in accordance with the principles of its domestic legal system. The nature of these measures can range from criminal to administrative law provisions, while one of the fundamental principles that needs to be taken into account are the principles of proportionality and/or the *ultima ratio*.

Another example of an international instrument, or better to say, one of the regional anti-corruption instruments is the *African Union Convention on Preventing and Combating Corruption* (2003). This document, of particular importance for Africa where corruption has its most severe consequences, contains an important provision in Art. 10:

“Each State Party shall adopt legislative and other measures to: (a) proscribe the use of funds acquired through illegal and corrupt practices to finance political parties; and (b) incorporate the principle of transparency into funding of political parties”.

Unfortunately, the drafters of other regional conventions on corruption failed to recognize the importance of specific regulations on financing political parties for combating corruption (*e.g.* 1996 Inter-American Convention Against Corruption, 1999 Council of Europe Criminal Law Convention on Corruption *etc.*).

## **The causes of economic crimes of political parties': will to power, innovation and transition**

According to *Locke* (1689 [2003]: p.172), once a political party is employed to participate in the legislative or executive branch of the state power, it has a duty to act for “*the good of the people, and not manifestly against it*”. However, political parties often fail to obey this duty. The main reason for this is one of the main driving forces in humans that *Nietzsche* (1884 [2006]: 88) calls “the will to power” (*der Wille zur Macht*). In other words, political parties' main goal is often not the welfare of the people, but to obtain and keep the power. One of criminal manifestations of the will to power is the possibility to abuse the given financial authority (abuse of office, bribery *etc.*) in order to expand or maintain political power or to achieve financial power (Maršavelski, 2014).

Political parties are capable for what Merton (1938) calls “innovation”. They tend to be innovative when driven by their will to achieve or maintain political or financial power, which are considered to be the main “*culturally induced success-goals*” in capitalist societies (see more as applied to societies in transition in Novoselec *et al.*, forthcoming 2015). Merton (1938: p.678) uses U.S. society as an example:

“The extreme emphasis upon the accumulation of wealth as a symbol of success in our own society militates against the completely effective control of institutionally regulated modes of acquiring a fortune. Fraud, corruption, vice, crime, in short, the entire catalogue of proscribed behaviour, becomes increasingly common when the emphasis on the culturally induced success-goal becomes divorced from a coordinated institutional emphasis”.

Since the institutionalised legitimate means for achieving those goals are often limited (*e.g.* the national budget cannot be used for financing political campaigns apart from amounts regulated by law; the election rules require transparency and free elections *etc.*), political parties seek ‘innovative’ means to achieve their goals by engaging in corruption, tax evasion *etc.* (Maršavelski, 2014).

Although the perpetration of economic crimes by politicians may take place in any country, transitional settings have proven to be particularly fruitful for the rise of economic crimes of politicians and their political parties. The countries in transition share some common characteristics: increase in volume of crime, growing *anomie*, growing weakness of control mechanisms, emergence of new types of crimes, decrease in the efficiency

of law enforcement, limited economic sources, perception of an erosion of the state monopoly of legitimate violence, omnipresent fear of crime and preoccupation with safety concerns etc. (Albrecht, 1990: 448–450). Among these, one of the most important side-effects of transition is the ‘state of de-regulation’ or anomie, *i. e.* a “*condition in which society provides little moral guidance to individuals*” (Macionis and Gerber, 2010: p.97) because of the breakdown of social bonds between the individual and the society. Durkheim’s anomie theory demonstrates the repercussion of such a situation to crime: “*Every abnormal relaxation of the system of repression results in stimulating criminality*” (Durkheim, 2005[1897]: p.330).

Therefore, addressing the transitional justice mechanisms must be taken into account when dealing with economic crimes of political parties. Transitional justice itself refers to the set of judicial and non-judicial measures that have been implemented by different countries in order to redress the legacies of massive human rights abuses. This is part of a broader systematic shift from totalitarianism to democracy. What is also important to bear in mind is that transitional justice at the end

“is not an ideology-free concept [. . .] but a logical outgrowth from post war, and particularly Western, political and legal theory. Its genesis took place against the backdrop of an idea that grew from the Cold War and which had by the mid-nineties gained huge momentum, namely that international law should be deployed to spread liberal democracy worldwide” (Kemp, 2012: p.253 cited in Rokсандić Vidlička, 2014).

By addressing the economic crimes of political parties, it is important not to undermine the road to democracy, which may take place if criminal proceedings are used for confrontations with the opposition, which was particularly visible in the *Tymoshenko case*.<sup>2</sup> Because of the transitional political context of the trial and conviction of former Prime Minister of Ukraine, *Yulia Tymoshenko*, this case raised serious doubts with the public about Tymoshenko’s criminal responsibility.

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<sup>2</sup> In 2011, former Prime Minister of Ukraine, *Yulia Tymoshenko*, was charged for abuse of power by exceeding her authority and abusing her office in ordering the head of a state-owned enterprise Naftogaz to sign an agreement with the Russian company Gazprom providing for the importation of natural gas at a price of \$450 per 1,000 cubic meters, which had caused the State to suffer considerable financial losses. She was sentenced in 2011 to seven years in prison for ‘misuse of powers’ concerning the gas deal and got a three-year prohibition on exercising public functions. The judgment became final in November 2012 (See also Rokсандić Vidlička, 2014).

Hence, the transitional justice can be described as a legal-policy debate that seeks to resolve certain dilemmas, arising at moments of national crisis, about how to deal with serious crime (Kemp, 2012: p.254; See also Teitel, 2003: p.69). Neglecting the prosecution of transitional economic crimes only enhances an impunity gap and social conflict by focusing almost exclusively on civil and political human rights violations while leaving out accountability for economic crimes. Therefore, the strengthening of the protection of the economic and social rights in transitional states, including adequately regulating economic crimes, could be considered a *condicio sine qua non*, especially in states that shifted from the socialist economic system to free market economy or are in one of phases of transitional period (Roksandić Vidlička, 2014).

In the following sections we shall see that in the Croatian CDU Case, the post-war transitional vulnerability of the Croatian political and social environment was abused by the ruling political party under the leadership of the former Prime Minister of Croatia Ivo Sanader.

## **The Croatian CDU corruption case**

The CDU is a centre-right and largest political party in Croatia (with more than 200.000 members), and it is the longest ruling party since Croatia's independence. The founder and the first president of the Party was Franjo Tuđman, the first democratically elected president of Croatia, who ruled Croatia in the 1990s during the Yugoslav wars. After Tuđman's death, the Party lost the elections in 2000, and an opposition coalition took over the government headed by the Social Democratic Party (SDP). In the meantime, Ivo Sanader, a former Minister for Science and Technology (1992–1993) and a two-term Deputy Minister for Foreign Affairs (1993–1995, 1996–2000),<sup>3</sup> became the president of CDU. Sanader, a person with charismatic appearance and variety of professional interests, brought his Party back to power by

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<sup>3</sup> Later it has been proven that he was one of the Croatian war profiteers in this period. In 1995, during the negotiations of the terms of the loan to be granted by the Austrian bank Hypo-Alpe-Adria International AG to the Government of the Republic of Croatia, he made a deal on the basis of which the bank paid him, in return for that bank's entry into the Croatian market, a commission of 7 million Austrian Schillings. In 2012, he was convicted for abuse of office and authority pursuant to the new *Law on Exemption from Statute of Limitations for War Profiteering and Crimes Committed in the Process of Ownership Transformation and Privatization*. Novoselec et al. (forthcoming 2015)

winning the parliamentary elections in in December 2003. This is where the story of the *CDU corruption case* begins.

The judicial epilogue of one of the greatest corruption affairs in the history of Croatian politics took place in March 2014, when the County Court of Zagreb convicted the CDU and its former president Ivo Sanader. However, this case opened a broader discussion about whether it represents a great shame for the Croatian political system or that it will turn Croatia into a role-model for other countries for bringing to justice not only highest political officials, but also their political party because of the responsibility for economic crimes. There is no doubt that the Croatian CDU case is a precedent not only in Croatian, but also in the worldwide practice of addressing political corruption.

In December 2011, Ivo Sanader, his associates, CDU and certain private corporations, among which Fimi Media played a main role, were indicted for conspiracy and abuse of authority. According to the indictment and the judgment of the County Court in Zagreb, Sanader abused his authority in the period between 2003 and 2009 as Croatian Prime Minister and as president of the ruling political party, to obtain material benefit for himself, CDU and other persons. The scheme started with Sanader who personally, or by giving orders to the CDU's treasurer, asked the heads of certain state departments, directors and managers of certain state-owned corporations (including the national power company, highway company, postal bank, oil company etc.) to make business transactions with a private corporation called Fimi Media. The illegally obtained proceeds by the Fimi Media were divided in three parts: (1) one part was kept by the Fimi Media's director, (2) another part was given to CDU's treasurer who then gave it to Sanader, and (3) the last part was used by Fimi Media's director to finance certain services for the CDU.

Besides the illicit proceedings obtained from Fimi Media, the CDU benefited additionally from unreported donations, which had been collected by Sanader and associates for his party, again abusing their and party's power and authority. Some of these donations were illegal because they exceeded the amount prescribed by law,<sup>4</sup> while a part of them was paid through the Fimi Media's account. Sanader had ordered that amounts of these donations must not be reported in the financial records, which resulted in CDU's black fund. CDU used this black fund to finance different party needs,

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<sup>4</sup> According to the Croatian law, donations to a political party may not exceed the amount of 90.000 kuna (approximately € 12.000) per year while it is forbidden to accept funds from anonymous donators.

also pursuant to orders given by Sanader. According to witness statements, all illegally obtained assets had been mainly used for election campaigns, payments to singers, payments to the media (newspapers, TV), luxury (BMW cars, travels, catering, *etc.*). The total amount that CDU obtained from these criminal activities was 24,3 million kuna (approximately €3,1 million).

The Croatian law adopted the model of criminal liability of legal entities, including political parties, based on the criminal conduct of individually responsible persons. In this case, the criminal liability of the CDU was based on the criminal offences committed by its president Ivo Sanader and his party associates. In addition to this, the CDU illegally obtained assets from these crimes, which fulfilled all the requirements to convict the CDU. The only punishment that the Court could impose on the CDU was a fine, because the Croatian law excludes the possibility to dissolve a political party in criminal proceedings. The purpose of this provision is to prevent abuses which could endanger one of the fundamental constitutional values: the multi-party democratic system.<sup>5</sup>

The fine that the County Court imposed on CDU was the maximum fine prescribed by law: 5 million kuna (approximately € 700.000), and additionally the Court ordered CDU to pay 24,3 million kuna (approximately €3,1 million).

During the proceedings, the CDU filed a claim of 50 million kuna (approximately € 7 million) against Sanader and his associates, arguing that CDU suffered both material and non-material damage because the defendants acted contrary to the Statute of the CDU, while their criminal acts were attributed to the CDU. However, the Court rejected this claim. Most of the Croatian media reported that the main damage that the CDU suffered during the proceedings was the defeat on parliamentary elections in 2011. However, the 2014 European Parliamentary Elections have shown that the convicting and sentencing judgment issued by the County Court of Zagreb did not have any long lasting impact on the voters and obviously does not endanger the political future of the CDU, whose coalition won the highest number of votes (41,42%) on these elections. The case is now on appeal and it still remains to be seen whether the Supreme Court of Croatia will uphold the conviction judgment.

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<sup>5</sup> Apart from this, the Croatian Constitution empowers the Constitutional Court to control the conformity of programs and activities of political parties with the provisions of the Constitution. In case the political party's programs or activities are found to be unconstitutional, the Court will impose a sanction of dissolution of the party.

## **Preserving the interests of democracy through obstacles in the application of criminal law against political parties**

In most countries, where a transgression committed by a (natural or legal) person is considered a crime, the state does not qualify the same deed as a crime if committed by a political party – either due to absence of provisions on criminal liability of political parties or because of unwillingness to prosecute political parties. There is some paradox in such state of affairs, because the political parties have the highest responsibilities when ruling the state. However, they bear very little criminal responsibility when they abuse the given powers – the main sanction is to be overthrown by another political party (either through elections or by means of force). Even for politicians, who bear the primary criminal responsibility, there are many obstacles for prosecution such as immunity, amnesty, abolition and pardon. The reasons of this “discrimination” are well explained by critical criminologists such as Richard Quinney. In his book *Class, State, and Crime*, Quinney (1977) argued that crime is a function of society’s structure, that the law is created by those in power to protect and serve their interests (as opposed to the interests of the broader public), and that the criminal justice system is an agent of oppression designed to perpetuate the status quo. Furthermore, he argues that corporate and state violation of the law is ‘natural’ and ‘necessary’ to secure the capitalist system. Political elites, as the creators of the legal framework that governs their activities, are in position to minimise the possibility of sanctions for the wrongdoings they commit throughout their mandates. This ‘vicious circle’ creates a state of ‘responsibility without accountability’ *i.e.* it provides power and functions to political elites, but the risks of sanctioning their own misbehaviour are minimal (Maršavelski, 2014).

The obstacles in prosecuting political parties are difficult to overcome due to the two opposing interests at stake: interests of justice versus interests of democracy. On the one hand, there is a need of punishing the wrongdoer. On the other hand, there is a need of ensuring the effective functioning of the democratically elected bodies, which are an expression of people’s political freedom. In several cases concerning political parties, the ECtHR has clearly pointed out the view of political parties as vital participants in the process of debate and dialogue that constitutes the heart of the concept of democracy (Maršavelski, 2014).

Investigations or prosecutions of politicians can *per se* have negative effects (especially in cases of so-called ‘vicious prosecutions’) that ought

to be avoided by ensuring the immunity of high-ranking public officials. Most states do recognise such immunity as well as the possibility to lift the immunity upon the authorization of the body whose office holder is under investigation. However, leaving aside the fact that in totalitarian systems the ruling parties enjoy absolute immunities, the states normally do not formally recognise the immunity of political parties or the possibility to lift such immunity. The laws regulating criminal responsibility of legal entities sometimes just exempt the political parties from liability, which is *de facto* an absolute immunity (Maršavelski, 2014).

Another problem in investigating, prosecuting and convicting political parties for crimes is that many countries recognise abolition, amnesty and pardon. These decisions are usually the competence of the head of state or the parliament. The controversy lies in the fact that the ruling party usually has a majority in the parliament and it is also possible that the head of state is also a member of the same party. In such circumstances conflicts of interest are obvious. Radbruch observed well that amnesties mark the bad conscience of criminal law (Radbruch, 1964: p.136, see as applied to transitional justice mechanism in Roksandić Vidlička 2014).

Self-amnesties are not driven by conscience, but by interest of avoiding criminal prosecution. The essence of amnesties is an act of mercy for another *i.e.* an altruistic correction of law, while self-amnesties by-pass the law in the interest of their authors (Pestalozza, 1984: p.561). The situation with self-pardoning, including pardoning own party members, is similar. The most notable example of such 'self-pardoning' occurred in 1974 when the U.S. president Gerald Ford pardoned his Republican colleague Richard Nixon for his role in the Watergate scandal.

Furthermore, a ruling political party may amend the laws in order to avoid criminal responsibility. For example, this was done by *Forza Italia*, which passed several amendments in the Italian Parliament in order to save its leader *Silvio Berlusconi* from prosecution. However, once he lost power, first convictions appeared.

Moreover, in most countries public prosecutors are considered to be a body of the executive branch or at least highly influenced by the executive (especially through the cooperation with police authorities). This means that, if public prosecutors work for the government, they are obviously in conflict of interest while investigating crimes of the ruling party, which makes independent and impartial investigations virtually impossible. The same conflict is even more evident with respect to the police, which is usually a body of the Ministry of Interior, whose minister is a member of the ruling political party (Maršavelski, 2014). The complications are even more present

when the country itself is in the transitional period (Rokšandić Vidlička, 2014).

Finally, when all these hurdles have been taken, the political preferences of judges may also influence the outcome of trials against politicians and political parties. In order to prevent that, some countries prohibit judges from being members of political parties (e.g. Turkey, Croatia, Macedonia etc.). How influential political preferences of judges are has been demonstrated in studies that revealed how predictable the rulings of the U.S. Supreme Court can be (see Epstein *et al.*, 1989).

## **Appropriate sanctions that could be imposed on political parties for economic crimes**

One of the most problematic issues of criminal responsibility of political parties is which criminal sanctions should be prescribed, and in particular which sanctions should be applicable when they commit economic crimes.

In countries that have criminal liability of legal entities, a fine is considered to be the main punishment and it is also the most frequently applied sanction. As we have seen in the *CDU case*, the court imposed the maximum fine as prescribed by law: 5 million kuna (€ 700.000).<sup>6</sup> A fine also seems to be the most appropriate for cases of economic crimes committed by political party, namely, because if money was the reason to break the law, loss of money will ‘hurt’ them the most and deter them from such activities in the future.

On the other hand, the sentence of dissolution is considered to be the most controversial, because it may undermine the functioning of the country’s political life (especially in two-party systems). The same problem exists in countries that do not have a sanction of dissolution of a political party, but the fines that can be imposed may so high that they can immediately lead to bankruptcy of the political party. Furthermore, dissolution of political parties may lead to illegitimate limitations of certain political freedoms, especially election rights. This is especially the problem in transitional societies, where the criminal justice system is often subject to political influences (Maršavelski, 2014). However, if a country can ensure adequate procedural safeguards to uphold political plurality, in cases of the most severe economic crimes committed in the course of natural disasters (floods, earthquakes etc.), war

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<sup>6</sup> The law was later amended and increased the maximum fine to 15 million kuna (approximately € 2 million).

(war profiteering), or the ones that bring the country to the edge of poverty, it may be justified to allow in such cases even a dissolution of a political party responsible for these crimes.

Following a survey of the practice among countries, the Venice Commission (1999) adopted the *Guidelines on the Prohibition and Dissolution of Political Parties and Analogous Measures*, which recognized that:

“Prohibition or dissolution of political parties can be envisaged only if it is necessary in a democratic society and if there is concrete evidence that a party is engaged in activities threatening democracy and fundamental freedoms. This could include any party that advocates violence in all forms as part of its political programme or any party aiming to overthrow the existing constitutional order through armed struggle, terrorism or the organisation of any subversive activity” (Venice Commission, 1999).

There are also other criminal sanctions that states adopt in sentencing political parties as legal entities. The most important among them is confiscation, either as a measure designed to seize the means of perpetration, to seize the illegal benefits from the crime or as a separate punishment. As we have seen in the CDU case, the confiscation of assets and compensation was more than four times higher than the fine itself. Apart from confiscation and compensation, other criminal sanctions mainly include security measures that have the purpose to prevent the danger of repeating the crime (ban on performance of certain activities or transactions; ban on obtaining of licences, authorizations, concessions or subventions; publication of the judgment in the media, placement under supervision, disqualification from public tenders etc.). States that exempt political parties from the punishment of dissolution as a legal entity, also exempt the political party from sanctions having a similar effect such as the ban on performance of certain activities (e.g. France, Croatia, Macedonia etc.), because banning a political party to perform certain (political) activities would make it impossible to function (Maršavelski, 2014).

With respect to certain consequences of conviction that are sometimes referred to as ‘ancillary measures’, it is worth of observing that in most countries many official positions (e.g. president, governor, mayor etc.) require office holders not to have a criminal record. However, there are no such provisions for political parties. Such measures could be used to prevent corrupt political parties to come back to power, however, the effects of such measures are the same as temporary dissolution.

## **Conclusion**

Economic crimes are the most common type of crimes committed by political parties and among these the most important is political corruption. There is hardly any country in the world that has been immune to corruption scandals involving ruling political parties. Their collective will to power and lack of fear of possible consequences of their acts, makes it difficult to discipline them. Until now countries did not find a way to adequately address the criminal liability of political parties. The presented judgment in the Croatian *CDU case* is a precedent that can be used as a new model to address liability of political parties for economic crimes. Challenges that political corruption poses for society and democracy are large-scale, however, this new model also brings more challenges for democracy. This does not mean we should give up or substantially limit the criminal liability of political parties. Certain safeguards are already provided by obstacles in investigating, prosecuting, convicting and punishing political parties for criminal offences, such as *e.g.* immunity, abolition, amnesty, pardon, law amendments etc. However, it is necessary to determinate the correct balance in the spectrum of their application in order not to be led to a condition of irresponsible political structures.

After evaluating certain sanctions that can be imposed on political parties, it seems that a fine is the most acceptable punishment for political parties in cases of economic crimes. Sanction of dissolution is generally considered to be inappropriate for political parties and especially too harsh for economic crimes. Some national legal systems tend to generally exempt political parties from this sanction, as it is the case in Croatia. The reason for this is to avoid possible threats of criminal proceedings to democracy, in which a ruling political party could use criminal prosecutions to exert pressure on or even eliminate opposition parties. Confiscation and compensation are sanctions of crucial importance in order to satisfy the principle that *crime doesn't pay*. Criminal procedure is an appropriate forum to resolve the issues arising from the illegally obtained assets from crimes committed by political parties, because civil proceedings completely depend on the initiatives of the damaged persons.

In any case, this new puzzling topic for lawyers and criminologists requires further research. First, we should wait for the final outcome of the first case of holding a political party criminally responsible for corruption, which is now pending on appeal before the Croatian Supreme Court.

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# **OLAF: The watchdog that sometimes barks. But does it always bite?**

*Brendan Quirke*<sup>1</sup>

## **Introduction**<sup>2</sup>

EU Fraud, as Xanthaki (2010) observes, is a phenomenon which arouses passion and controversy and is often used as a symbol with respect to mismanagement and inefficiency within the EU. Despite the attention and controversy, EU fraud remains a grey area. How big is the problem? It is very difficult and indeed naive to try and put a figure on the level of EU fraud. Fraudsters, for obvious reasons, endeavour to keep their activities secret: “they are meant to remain in the shadows” (Xanthaki, 2010, p.133). There have been guestimates produced which suggest that fraud is in the region of 1 billion euros, but no one is really sure how big the problem is.

The institution tasked with attempting to co-ordinate the fight against this ‘known unknown’ phenomenon is OLAF: the European Fraud Prevention Office. It was established on April 28<sup>th</sup>, 1999. The creation of this office was a response to the criticisms of its predecessor UCLAF (Unite Co-ordination de la lutte anti-fraude) which was the anti-fraud unit of the European Commission. UCLAF was severely criticised by the European Court of Auditors (The EU’s financial watchdog) for the quality of its operational and intelligence work. The European Parliament responded to these criticisms by issuing the Bosch Report which called for the creation of an independent anti-fraud office.

OLAF was granted operational independence and given its own budget, yet it still remains part of the European Commission. This arrangement was judged to be useful by the Committee of Experts (1999) which was established by Parliament to investigate wrongdoing within the Santer

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<sup>2</sup> Research methodology comprised a review of secondary materials such as EU reports and series of semi-structured interviews with OLAF officials and member state officials between 2010 and 2012. There were ten interviews conducted in total

Commission and to consider issues of management, scrutiny and evaluation of the use of EU funds and the investigation of fraud and irregularity. The Committee took the view that both for the purpose of enquiries as well as for the contribution it could make to the shaping of legislation where there is a fraud interest or aspect, OLAF could play a valuable part by being based within the Commission.

There is a major problem with respect to this arrangement. If there are suspicions of fraud and irregularity within the Commission, which OLAF would investigate by virtue of it being the lead agency with responsibility for investigating these matters, then surely this would be an instance of the Commission investigating itself. This fact alone could well raise serious questions with respect to the independent status of the anti-fraud office. Also, appearances are important particularly in these times when there appears to be a distinct lack of trust in public bodies of all kinds. As well as a democratic deficit in Europe there does appear to be a trust deficit also. It might have been more sensible to have based OLAF entirely outside the Commission in order to prevent there being any allegations of 'whitewash' or 'cover up' being made.

## **OLAF's Responsibilities**

OLAF has two major responsibilities. First, it is responsible for conducting internal investigations within the institutions and other bodies of the EU and these institutions and bodies have an obligation to fully cooperate in OLAF enquiries and to communicate to OLAF any information concerning suspected fraud and irregularity. Second, OLAF also has the responsibility to assist member state agencies in their fraud and irregularity investigations with respect to investigations, intelligence and liaison between different national agencies.

OLAF's activities are supervised and monitored by a Supervisory Committee which is composed of five independent members nominated jointly by the Commission, the Council of Ministers and the European Parliament. The Supervisory Committee does not have the power to interfere in operational matters but does issue an annual report through which it gives an opinion on the activities of the anti-fraud office to the institutions of the EU. The Committee can draw attention to what it sees as shortcomings in

OLAF's investigative activity.<sup>3</sup> In order to be able to do this the Committee is given access to OLAF case files<sup>4</sup>

## **Problems and issues for OLAF**

The early years of its life have not been easy for OLAF because it has had to endure a long period of uncertainty regarding its role and powers: has this particular watchdog got sharp teeth and a strong bite, is it vicious enough? This uncertainty is illustrated by the attempts to draft amendments to Regulation 1073/99 which is one of the regulations governing OLAF, have gone through a number of iterations since first proposed in 2003. Such a period of uncertainty is not conducive to good morale and also it can potentially impact upon the perceived status of the organisation. OLAF too has also had to cope with the legacy of its predecessor, UCLAF, which has tied up significant resources in terms of closing inherited cases. There have also been problems with the relationships between sister transnational organisations, such as Eurojust and Europol, which have exacerbated existing problems of fragmentation.

## **Amendments to Regulation 1073/99 and its limitations**

The proposals put forward by the Commission in all their different guises have been designed to strengthen the operational role of OLAF and to improve communications between OLAF, EU bodies and member state agencies as well as strengthening the role of the Supervisory Committee (OLAF Supervisory Committee, 2007). The regulation was finally adopted formally in 2013, a full ten years after it was first proposed.

In terms of the provisions designed to improve the flow of information, OLAF is required to inform Community institutions if officials or staff members are suspected of involvement in wrongdoing, in order that the institution can decide whether to take precautionary or administrative measures. The wording appears to be vague, perhaps deliberately so. This could well be designed to give OLAF officials some latitude in terms of when they inform the institution. Academic commentators such as Professor Michael Levi and Professor Nicholas Dorn in evidence to the UK House of Lords European Scrutiny Committee with respect to an earlier version of

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<sup>3</sup> Interview with OLAF officials, 2011

<sup>4</sup> Interview with OLAF officials, 2011

Regulation 1073/99, were concerned that if the institution was informed at too early a stage in the investigation, suspects could be forewarned and could cover up or even destroy evidence. A counter argument is that if institutions know as early as possible that the integrity of an individual is open to question, they could take steps and measures to try to remedy the situation. Yet these measures in the opinion of Levi & Dorn (House of Lords, 2004) are precisely what would undermine the secrecy needed to mount an investigation and to gain evidence of any criminal activity.

There have also been concerns raised about OLAF's contribution to external investigations as Quirke (2010) has observed. OLAF's role is to support the efforts and activities of member state agencies, but it cannot enter the territory of a member state and start investigating suspects on its own, taking witness statements and gathering evidence without close cooperation with the relevant member state agencies. Liaison between agencies is essential and it is vital that both OLAF and national agencies work closely together and do not impede the efforts of each other (House of Lords, 2004). Unless there is a close liaison, evidence gathering could be compromised, if national rules and regulations are not adhered to and there could also be duplication of effort and resources. If different representatives from different agencies visit the same locations and ask the same questions of the same people, this then damages the credibility of the organisations concerned and could be indicative of the amount of fragmentation that might exist when one considers that the EU has so many members and a multiplicity of agencies (Quirke 2007).

To be frank, OLAF has not been given the powers it needs in order to be more effective. The responsibility for this must lie with the member state themselves. Furthermore, once OLAF has made a referral to a member state, its powers are somewhat limited. When it concludes an investigation it cannot compel the national authorities to act and it does not enjoy the same coercive powers as a criminal investigative body. It can only send the information it obtains in its investigation to the relevant prosecuting authorities in the individual member states. As Professor Spencer acknowledges in evidence to the European Scrutiny Committee of the UK House of Lords: "*The basic flaw with OLAF is that it does not have any powers to do any more than investigate and then send a file to a member state*" (House of Lords, 2012, p.156) He argued that in this sense: "*OLAF is toothless, but it is toothless because the member states have chosen not to give it any teeth*" (House of Lords, 2012, p.156).

The UK government view in evidence to the same House of Lords Committee, is that imposing an obligation on member states to act following a referral from OLAF is a power that goes too far. It would cut across the

member states legal systems. It could be interpreted as an infringement of national sovereignty. As things stand, member states have national judiciaries and criminal frameworks and certainly the UK view was that they were not attracted to permitting OLAF to direct UK institutions to perform in a particular way. Ultimately, according to this view, any decision to prosecute must remain “a domestic matter”. This appears to confirm Professor Spencer’s view and is indicative of the problems that OLAF faces. It is criticised for not being effective enough, yet the same critics (*i.e.* national governments) are not prepared to give it the powers that it needs to make it more effective!

Xanthaki (2010) confirms the above view of OLAF when she observes that apart from a preparatory investigatory role, OLAF has a supervisory role after the file has been passed to national authorities, as they report on progress in the case to OLAF. As follows from the section above, there is however, a major weakness here: OLAF is not the lead agency, it acts as support to national agencies which take the lead. However, for some countries, EU fraud may not be at the top of the list of their priorities which affects the status of the role of OLAF. This view appears to be confirmed by Rosalind Wright who has previously been the Chairperson of OLAF’s Supervisory Board and Director of the UK’s Serious Fraud Office (not at the same time of course). Again in evidence to the UK House of Lords European Scrutiny Committee, she observed:

“OLAF send a case over to national judicial authorities saying ‘Investigate Mr So-and-so, who is a national of your country, who is alleged to have committed a large fraud on the European budget’. It is impossible to say if this true, but your instinct tells you that in some cases they are reluctant to investigate their own nationals for a fraud on a subsidy that is being paid centrally from Brussels. No matter what their treaty obligations might be!!” (House of Lords, 2012, p.199).

### **OLAF’s on the spot checks: “neutralised”**

There have also been issues with the exercise of OLAF’s powers which are telling of the ambiguous attitude to a potentially strong OLAF. If a dog has no teeth, how can it bite? For example, Regulation 2185/96 granting the Commission the right to carry out on the spot checks – which is now the exclusive responsibility of OLAF – lays down rules for the conduct of these checks. On the spot checks are carried out with the cooperation of national authorities. OLAF has no power of compulsion and whenever an economic operator refuses access to premises or to information/data, OLAF

must rely on member state authorities to use its powers of coercion. The same situation applies in relation to measures to preserve evidence. White (2010) observes that the quality of cooperation during on the spot checks has a direct impact on the admissibility of evidence. OLAF must ensure that the reports it draws and sends to prosecuting agencies constitute admissible evidence in administrative or judicial proceedings in the member state in which their use proves necessary, in the same way and under the same conditions as administrative reports drawn up by the national administrative inspectors. However, White (2010) concludes that this cooperation is not always forthcoming. She quotes Vervaele (2008) who also commented that some member states have tried to neutralise the autonomous character of these investigative powers and their reach.

### **Fragmentation at the centre**

Inevitably, in an organisation of 28 member states, there is a problem of fragmentation. There are twenty-eight different legal systems with differing procedures and traditions. There is a multiplicity of agencies some of which are in conflict with each other; all this makes for a huge problem of co-ordination. These problems do not just exist amongst member state agencies, they also exist at the centre too. As White (2010) explains, bodies like Europol and Eurojust have an important role to play in creating a climate of cooperation, making cross-border investigation and prosecution possible. Europol based in The Hague, has been processing Member States' data on crimes which include crimes against the EU budget, such as fraud and corruption. Eurojust, also based in The Hague, has been coordinating member states' judicial authorities in the investigation and prosecution of similar crimes. Eurojust has a particular role in supporting criminal investigations in cases of serious cross-border crime.

At first sight, it might appear that there is ample opportunity for OLAF and Eurojust to cooperate: OLAF on the investigative side, where it conducts administrative investigations and Eurojust providing the link with national prosecutors. However, in the early years of their relationship, there were difficulties. There were instances of OLAF liaising directly with national judicial authorities and not informing Eurojust and also setting up a magistrates unit within OLAF in competition with Eurojust (House of Lords, 2004). In defence of OLAF, it can be said that its magistrates unit was totally dedicated to fighting EU fraud, whereas for Eurojust, fraud was just another issue which perhaps did not rank as highly as terrorism and organised crime.

There did appear to be feelings of resentment: OLAF considered Eurojust “responsible for there not being a European Prosecutor responsible for fraud” (House of Lords, 2004a, 2004b, p.27). Eurojust took the view that OLAF believed it had no role to play in fraud investigations unless other serious crimes were linked to EU fraud, such as using money fraudulently obtained from the European budget to help fund drug trafficking or arms dealing. (House of Lords, 2004a)

Such ‘territoriality’ is not conducive to fighting fraud effectively and could inevitably lead to duplication and waste of resources. With two sister agencies having problems of cooperation and coordination, this does not bode well for the task of coordinating the work of a multiplicity of agencies across many member states.

In order to improve cooperation between OLAF and Eurojust, a cooperation agreement was signed in 2008. The President of Eurojust in evidence to the UK House of Lords’ European Union Committee in 2013, cited many years of cooperation between the two organisations, but stated that between 2004 and 2009, Eurojust had worked with OLAF on just five cases, however, in 2011 this had risen to eight. On the face of it, the cooperation appears somewhat limited. Europol gave evidence that its various working groups enjoyed differing relations with OLAF which in some instances could be called “strained”. In evidence from MEP’s to the same committee, MEP’s felt that the system between the three agencies, Europol, Eurojust and OLAF was cumbersome and overly bureaucratic and that coordination was inadequate.

The House of Lords European Committee (2012) took the view that the difficult relationship between the three EU crime agencies contributes to the lack of coordinated response to fraud on the EU’s budget which is a further limitation on OLAF’s effectiveness. There is a reference to the relationship being something of a “tangled web”. This does not bode well for multilateral coordination and cooperation.

It does appear, as White (2010) comments, not as much attention seems to have been paid as to how these agencies would fit with one another or how they would work together in order to achieve common goals.

## **Insufficient legal action to fight criminal activity**

OLAF has also faced difficulties in terms of its effectiveness owing to lacunae in the various legal codes of member states, because after all it does depend upon member states to prosecute frauds and to recover monies owing. Given

the extent of the financial issues at stake, the protection of the EU budget merits more frequent and more thorough investigation and prosecution by the criminal justice authorities. This is obviously not an easy task, as crimes against the Budget often involve cross-border investigation and proceedings in several member states.

Under the current framework, such criminal investigations are handled by individual member states' prosecution services acting under their respective criminal law codes. However, the competent authorities of member states do not always appear to have sufficient legal means at their disposal and appropriate structures in place to adequately prosecute cases affecting the EU. This applies equally to accession countries.

Differences in the legal framework of the member states and the resulting operational and organisational barriers to cross-border investigations within the EU mean that the financial interests of the EU are not equivalently protected across the EU as regards criminal law.

“The rate of conviction in cases involving offences against the EU budget is positively influenced by the seriousness and solidity of the cases sent to the judicial authorities and on the quality and adequacy of the evidence provided, but it is nevertheless worth mentioning that it can vary from 14% to 80% in member states (the average being 41%)” (House of Lords 2012, p.199).

National judicial authorities do not open criminal investigations systematically upon OLAF recommendations. Sometimes it is difficult to identify the specific motive for such lack of action. According to the Commission, cases involving fraud against the EU budget are sometimes subject to only a summary examination and not acted upon further. This leads to a lack of equivalence of criminal law protection throughout the Union.

In evidence to the House of Lords European Committee, the OLAF Director General, Mr Kessler, did not believe that the divergent referral to conviction rates were a reflection of poor work by OLAF. He argued that if the figure was low in all member states that would suggest that there was something wrong with the quality of OLAF's work. But instead, he believed that the protection of the EU's financial interests is left to the ability and willingness of national authorities and that varies very much. Again this is another example of the fragmentation which exists at all levels in the fight against fraud.

## **The shadow of UCLAF**

It can be argued that any evaluation of OLAF should also take into the account the negative impact caused by the legacy bequeathed to it by its predecessor, UCLAF. The 'shadow of UCLAF' and its perceived shortcomings has loomed large over the early years of its successor. OLAF has had to plough through to a series of cases originally opened by its predecessor. These have taken in some instances, over five years to conclude. The European Court of Auditors in its review of OLAF's performance commented that OLAF had to take on 1,400 old cases from UCLAF and this "*was a very burdensome legacy owing to the disorganised way in which many of these investigations had been managed*" (Court of Auditors, 2005). As Quirke (2010) observes, a special taskforce had to be set up to deal with these old cases. It is difficult to identify and quantify exactly how much work was performed on these old cases as they were taken over by OLAF at different times and stages.<sup>5</sup> The fact is that OLAF's early years were affected in terms of demand upon limited resources and time to be spent in dealing with unfinished business from the past and of course the opportunity cost of all this which must have been considerable. Perhaps this was not the best start to the new organisation's life and has taken some time to put to rest.

## **Impact of the EU's expansion on the fight against fraud**

The fight against fraud has been complicated and indeed made more difficult by the rapid expansion of the European Union. If fragmentation existed when there were only fifteen member states, now that the EU has expanded to twenty eight members, this problem can only be exacerbated. For example, OLAF has had to cope with thirteen relatively new legal systems – this was hardly likely to improve the existing situation. Efforts have been made to prepare various candidate countries for their responsibilities in the fight against fraud as detailed by Quirke (2008, 2009). Newly acceded countries had received billions of euros in financial aid and before accession, the candidate countries were required to "*create an efficient anti-fraud protection system with respect to funds provided in the framework of the Accession Partnership*" (Murawska, 2004).

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<sup>5</sup> Interview with OLAF officials, 2005

In order to prepare for the responsibilities of membership with respect to fighting fraud and to ensure effective co-operation between OLAF and the national administrations in the candidate countries as well as seeking to have in place organisational arrangements which would be capable of preventing and detecting frauds and irregularities, OLAF supported the creation of independent anti-fraud structures at a national level in the then candidate countries (see Murawska, 2004). The rationale behind the decision to create such structures was to ensure effective co-ordination between legislative and administrative measures dealing with EU fraud policy (Murawska, 2004). It is interesting to note that established member states in Western Europe have had no such AFCOS (see below) structures – “*where are the British, French and German AFCOS?*”<sup>6</sup> It does appear, to new countries, that the EU is asking new members to meet requirements that existing members do not have to meet, an appearance that suggest to them dual, if not double, standards<sup>7</sup> This omission has now been addressed and all member states will be required to have an AFCOS network in place. The City of London Police force is bidding to be the lead AFCOS body for the UK.

OLAF has provided training and support to anti-fraud bodies and officials in candidate states and although some national officials regarded such support as not being sufficient<sup>8</sup> and some as fairly minimal<sup>9</sup>. A country like Bulgaria which has significant problems of fraud and corruption as well as powerful and influential criminal networks and is one of the poorest in the EU, was clearly a country in need of support and nurturing as it had a nascent anti-fraud service with officials who did not have the experience of dealing with the complexities of EU policy regimes. It also had a bureaucracy which did not have the capacity to absorb billions of euros of EU funds (Centre for the Study of Democracy, 2007) as well as perhaps not having the experience of investigating transnational frauds. It is therefore a useful example to focus on. The Bulgarians do seem to be fairly satisfied with the support and training they have received<sup>10</sup>,

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<sup>6</sup> Interview with Bulgarian officials, 2010

<sup>7</sup> Interview with Bulgarian officials, 2010

<sup>8</sup> Interview with Czech officials, 2006

<sup>9</sup> Interview with Maltese officials, 2007

<sup>10</sup> Interview with Bulgarian officials, 2010

## **The AFCOS Structure**

All countries involved in the enlargements of 2004, 2007 and 2013 were required to construct an AFCOS network. This was to ensure smoother co-operation and communication between sister national agencies and with the authorities in Brussels.

The basic functions of AFCOS are: co-ordination, co-operation and communication (the 3 C's) which signify the ability:

- to co-ordinate, within a member state/candidate country, all legislative, administrative and operational obligations and activities related to the protection of the Community's financial interests;
- to co-operate with OLAF and its partner institutions whenever OLAF requires investigative assistance or, on the other hand, whenever OLAF assistance is required;
- to communicate with OLAF and its partner institutions with regard to mandatory reporting and information exchange (Sigma, 2004).

The EU and OLAF had serious concerns about the security of EU funds in the new member states, particularly those that had experienced a rapid transition from being former communist states. These countries had experienced a swashbuckling period of capitalism where state assets were privatised at far less than their apparent market valuation and favoured individuals had gained control of such assets. These 'favoured' individuals were former Communist party officials or members of the security services. Countries like Romania and Bulgaria were subjected to many scare stories in the media regarding the level of corruption and whether this would lead to a widespread misuse of EU funds. Countries like Romania, Bulgaria and the Czech Republic had relatively low rankings in Transparency International Perception of Corruption Index, indicating an apparent problem with corruption. Problems in Bulgaria and Romania have been well documented by authors such as Gawthorpe (2010), Gheorge (2008), Scheinost (2006), Van Duyne and Stocco (2012) and Giatzidis (2004).

Given the concerns about corruption, it might be reasonable to assume that special support would have been given to the authorities of these countries by both OLAF and the European Commission in order that they could build up robust and effective anti-fraud structures. Assessment reports by Sigma, the consulting arm of the OECD in Paris which was commissioned by the European Commission to undertake an assessment of anti-fraud structures in then candidate states sheds some interesting light in this respect. The Sigma Report on Czech anti-fraud structures[ (Sigma, 2004) which was published

just as the Czech Republic joined the EU is typical of their findings for many of the candidate states:

- AFCOS had not carried out a risk assessment of pre-accession funds and a National anti-fraud strategy had still not been developed;
- The relevant ministries had not been given the OLAF reporting guidelines and the reporting format on suspected cases of irregularity;
- No training had been given on the use of these guidelines;
- The OLAF anti-fraud information system (AFIS) which enabled constituent parts of AFCOS to securely communicate with each other and with OLAF had yet to be installed in the Directorate-General of Customs and linked by terminal to the relevant ministries;
- No irregularities had been filed by AFCOS with OLAF;
- Knowledge of European regulations and rules was insufficient and partner institutions had asked, without exception, for additional training;
- The training function and help-desk function was underdeveloped or even non-existent;
- The Anti-Fraud Information System (AFIS) was not yet operational and no terminals were linked to the National Customs Agency, which had a gateway link to OLAF (Sigma, 2004, p.2).

It could well be argued that OLAF and the Commission needed to have done far more to support these countries when such glaring omissions were found by the Sigma inspectors shortly before accession. To be fair to OLAF and the Commission, they have relatively limited resources and the level of support that was apparently required could have been provided by existing and experienced member states. Existing member states needed to do more. Perhaps a ‘buddy’ system whereby candidate states were ‘paired’ with existing member states might have been helpful and more supportive.

### ***The management of EU funds in Bulgaria***

Why Bulgaria? It provides a damning example of “chickens coming home to roost”. Bulgaria was clearly not ready to assume membership responsibilities. The decision to allow Bulgaria into the EU was driven by politics. At a meeting in London in 2005 a UP academic was told by UK government officials that despite all the difficulties both Romania and Bulgaria would join the EU in 2007 – “*This is a question of politics, not anti-fraud capabilities.*”<sup>11</sup> The concerns expressed above appear to have been justified when in 2008, the European

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<sup>11</sup> Interview with UK Academic, 2012

Commission published a damning report on the management of EU funds in Bulgaria. The Commission was very concerned that administrative capacity was weak and that there had been serious allegations of irregularities as well as suspicions of fraud and conflicts of interest in the award of contracts. This led to a temporary suspension of pre-accession funds and the freezing of payments under various other financial instruments. There were many areas of concern but those relating to the PHARE and Transition Facility programmes which supported Bulgaria to complete institutional reforms and to prepare for the absorption of much larger amounts of assistance under the Structural Funds are worth noting.

The total amount allocated under PHARE and Transition Facility programmes was around 650 million euros (European Commission, 2008). Monitoring and audit work had shown that there were serious weaknesses in the management and control systems and there were a number of irregularities, suspected fraud cases and conflicts of interest between the programme administration and contractors. Two of the implementing agencies, the Central Financing and Contracting Unit (CFCU) and the Implementing Agency at the Ministry of Regional Development and Public Work (MRDPW), had their right withdrawn because of the serious weaknesses outlined above. Also, at the SAPARD (Special Accession Programme for Agriculture and Rural Development) agency which would oversee the implementation of 445 million euros of funding to modernise agriculture and the countryside, there were a number of serious problems. Firstly, there were OLAF investigations relating to projects worth 26 million euros regarding fraud and corruption. Secondly, the former executive director of the SAPARD Agency was accused of the wrongful approval of projects and criminal proceedings had been initiated against him. Thirdly, 105 million euros had still to be paid to beneficiaries and there were serious control weaknesses in the investment aid system. OLAF commented about there being a lack of haste in the investigation of the SAPARD irregularities (European Commission, 2008). There were also concerns expressed by OLAF about breaches in confidentiality, improper transmission and leaks of sensitive information, possibly involving organised crime (this has been strongly disputed by Bulgarian officials who argue that one such major leak involved journalists and not organised criminals.<sup>12</sup>

The report caused immense damage to Bulgaria's reputation and as Gawthorpe (2010) observes, it severely damaged confidence in Bulgaria's

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<sup>12</sup> Interview with Bulgarian Officials, 2010.

capacity to function as a full member of the EU. Owing to the pressure she was under, Bulgaria did attempt to respond quickly to these concerns to try to strengthen administrative capacity, control systems and to guard against potential conflicts of interest. The Commission recognised in its 2010 Report on Progress in Bulgaria under the Co-operation and Verification Mechanism, which is a report that the Commission issues every six months concerning judicial reform, the fight against corruption as well as the fight against organised crime. The 2010 report commented that progress had been made but Bulgaria still needed to substantially strengthen its capacity to correctly manage EU funding and that OLAF was concerned about leaks of confidential information as well as the slow progress of cases through the Bulgarian legal system (European Commission, 2010).

### ***Cooperation between OLAF and the Bulgarian AFCOS***

Despite the difficulties discussed above and the concerns expressed by OLAF, the Bulgarian AFCOS officials believe that there is a very good and co-operative relationship.<sup>13</sup> They cite the investigations into the SAPARD frauds and irregularities, which although damaging to Bulgaria's reputation did illustrate the close co-operation that exists between AFCOS and OLAF. One of the frauds investigated concerned a scam involving fifty Bulgarian enterprises defrauding SAPARD of five million Euros involving grants to replace old meat processing equipment. Old East German built meat processors were shipped from Germany and bought as "new" for 24 times the original price. From a distance the machines which had been painted white looked very new, up close and investigators having scraped some of the paint away, the unmistakable mark of quality – "Made in the GDR" – was revealed (Interview with Bulgarian Officials 2010). The investigations and co-operation were greatly facilitated by OLAF in the opinion of Bulgarian officials: "*They put us in touch with the right people in Germany*".<sup>14</sup> OLAF agents were able to ascertain that invoices had been overpriced for purchases by SAPARD for meat processing plants in Bulgaria (European Commission, 2010). The former head of the State Agriculture Fund, Assen Droumov, and a political associate and a businessman and fundraiser of the Socialist Party with ties to then Prime Minister Stanishev were indicted for fraud and received substantial prison sentences in 2010<sup>15</sup>.

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<sup>13</sup> Interview with Bulgarian officials, 2010

<sup>14</sup> Interview with Bulgarian Officials, 2010

<sup>15</sup> Interview with Bulgarian officials, 2010

In the area of cigarette smuggling and counterfeiting and the avoidance of duty, there has also been good level of co-operation between AFCOS and OLAF. In 2008, OLAF requested assistance from the Bulgarian authorities with respect to contraband Chinese cigarettes – Jin Ling – which had been found in several EU member states. There was suspected involvement of Bulgarian companies in the counterfeiting and smuggling of these contraband cigarettes. To handle this case there was co-operation between OLAF officials, the AFCOS Directorate, Customs Agency and the Border Police. Customs offences and illegal production of cigarettes were discovered and the Bulgarian authorities received a commendation from OLAF for their co-operation in this case (Interview with Bulgarian Officials 2010). Despite the difficulties and problems that have been discovered and pointed out above, on the ground, there are instances of effective and valuable co-operation. AFCOS officials do stress that when they require assistance from other member state agencies, they always approach them through OLAF as they know that they will be put in touch with the most appropriate people and they greatly value this.<sup>16</sup> This may appear to be a weakness. Is it a case that the Bulgarians do not feel able to directly contact sister agencies in other member states? Or is it more a case that OLAF, with its Europe-wide view and newnetwork of contacts in each member state, is a more efficient and effective channel for contact with sister agencies in other EU states?

In Romania also, it appears on the surface at least that there has been a good level of cooperation between its EU anti-fraud agency DLAF (De Lupta Anti-Frauda Department – the Romanian EU Anti-Fraud Department) and OLAF itself. There have been a number of joint on the spot investigations. One example from 2007 involved investigating two projects financed from the pre-accession PHARE funds, a project financed by the Instrument for Structural Policy for Pre-Accession (ISPA) funds and one financed by a loan from the European Investment Bank: the total value of these projects amounted to more than 58 million euros (DLAF Annual Report 2007). DLAF also carried out a joint investigation with OLAF of a case which constituted an example of defrauding funds from the Leonardo da Vinci programme. It involved training in professional activities in Germany for 120 young people. The training partners were found to be fictitious, Romanian citizens had not travelled to Germany and false documents had been submitted in order to obtain the financing. This type of fraud involves a high degree of organisation. Reports were sent to prosecutors in Romania and attempts were made to

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<sup>16</sup> Interview with Bulgarian officials 2010

recover the funds fraudulently obtained and spent. And this was successful.

Also, the role of DLAF at the apex of the AFCOS structure has been recognised by OLAF in a way that has not always been the case in the Czech Republic or Malta for example (Quirke 2008), with all communication of irregularities to Brussels being handled by DLAF and there being no separate reporting by individual agencies.<sup>17</sup> In countries like Malta and the Czech Republic there have been examples of organisations in the AFCOS network directly reporting irregularities to and communicating with OLAF, when the clear rationale underpinning AFCOS is that the lead AFCOS body should be the sole point of communication with OLAF. One ‘fly in the ointment’ amidst all this positivity was the fact that an OLAF official who had been based in Bucharest during this formative period was withdrawn a year after accession and not replaced.<sup>18</sup> This was unfortunate, as DLAF officials found the advice offered to have been very useful and it was very helpful to have such easy access to an experienced OLAF official.<sup>19</sup> It is somewhat surprising that this should have happened, given the concerns expressed by the EU about the general situation in Romania and the worries concerning the security of EU funds.

Yet, despite these examples of good practice, the communication structure through AFCOS does not appear to be compelling. For example, in Customs cases, Customs Agencies can be contacted directly by OLAF without going through the AFCOS Directorate at the apex of the AFCOS structure. To bypass the directorate does undermine the whole rationale of AFCOS. If this does happen, what is the point of AFCOS? This situation of ignoring the communication protocols has been observed before in other member states.<sup>20</sup> This has happened in Bulgaria and the Czech Republic too.

## **General lessons from the Enlargement Experience**

There are a number of general lessons and recommendations that can be drawn and made and which do give some credence to the notion that the watchdog does not have enough as well as sufficiently strong teeth. These lessons and recommendations are:

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<sup>17</sup> Interview with Romanian officials, 2008

<sup>18</sup> Interview with Romanian officials, 2008

<sup>19</sup> Interview with Romanian officials 2008

<sup>20</sup> Interview with Maltese officials, 2007

- The speed of accession and the preparedness of countries like Bulgaria, Romania and the Czech Republic, their uneven post-communist development and the potential for fraud and corruption from a number of groups, and the absence of a functioning control environment, should have been addressed by the EU in advance of accession. This should be taken into account for future enlargements, particularly for countries from the former Yugoslavia.
- The issue of fragmentation needs to be addressed. There is a multiplicity of agencies involved in the investigative process, some of which investigate on a criminal investigative basis and some which investigate on an administrative basis. There is the potential for misunderstandings and duplication of effort and a lack of efficiency in the investigative process. A more streamlined anti-fraud structure may well prove easier to manage and lead to a more productive and cohesive investigatory regime.
- The AFCOS structure needs to be pro-active in analysing its skill gaps and deficiencies and seeking help in tackling them. 'Brussels' too should take a more active part in terms of offering additional training in the period leading up to accession.
- The issue of bureaucratic and administrative capacity needs to be addressed. It is neither fair nor sensible to expect poor countries like Bulgaria and Romania and other countries in the Balkans to be able to absorb billions of euros of aid without a major programme to strengthen administrative capacity and expertise before such aid is disbursed. Being critical after the event is not good enough. This situation should have been foreseen in the case of Bulgaria and should be addressed in future enlargements.
- The reporting requirements to all partner institutions should be clearly disseminated and explained. The co-operation of OLAF would be very useful in this respect.
- AFCOS is meant to be the sole contact point with OLAF. This should not be circumvented by separate communication to the Customs Agency with the AFCOS Directorate informed after the fact. This undermines one of the main reasons for setting up the AFCOS system.
- AFCOS should not be the subject of political in-fighting regarding its position and placement. This happened in Bulgaria when it was transferred from the Interior Ministry to the Council of Ministers and back again within a twelve month period. Such instability is not conducive to successfully embedding such a nascent anti-fraud service, is disruptive and bad for staff morale and should be avoided in future cases.
- OLAF officials should be based in candidate states and should stay there for some time after accession, in order to be a ready source of advice

and support and to give national officials experience of working with a transnational organisation. To withdraw such officials a year or so after accession is far too soon.

Without heeding these lessons OLAF will not develop the proper capacity to bite when required as a few teeth remain missing.

## **Conclusion**

OLAF is a relatively small organisation which has only 400 members of staff and of this number only about 160 are classed as agents. It has a mammoth task to perform in seeking to co-ordinate the activities of a multiplicity of agencies across twenty eight member states with twenty eight different legal systems. It has suffered problems of fragmentation with its sister transnational agencies such as Eurojust and Europol which does not bode well for its efforts to coordinate so many different national agencies. It cannot act as the EU's fraud busting organisation because it has not been given 'the teeth' by member states which would enable it to be more effective in this regard. Enlargement of the EU has created far more work for OLAF in terms of training and development but in some respects particularly with regard to countries like the Czech Republic and Bulgaria, it has been found wanting and these countries did not receive sufficient support to enable them to fully assume their responsibilities with respect to fighting fraud effectively. The blame for this however, cannot be laid solely at OLAF's door. The Commission and indeed existing member states have to take their share of responsibility for this state of affairs. OLAF does add value to member states with respect to their anti-fraud efforts and it does "bark" in terms of raising awareness. How powerful its "bite" is in terms of helping to bring criminals to justice and recovering misused and misallocated funds is still open to question.

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## **List of acronyms**

- AFCOS – Anti-Fraud Coordination Service
- DLAF – De Lupta Anti-Frauda Department (Romanian EU Anti-Fraud office)
- OLAF – Office de la Lutte Anti-Fraud (European Anti-Fraud Office)
- PHARE – Poland & Hungary: Assistance for Restructuring their Economies (expanded beyond these countries to include all former communist states joining the EU)
- SAPARD – Special Accession Programme for Agriculture & Rural Development
- UCLAF – Unit de coordination de la Lutte Anti-Fraud (Predecessor of OLAF)



**The Sarajevo Colloquium**

When we look back at the past decades of crime and criminal policy development, a substantial part of which – 15 years – is covered by the Cross-border Crime Colloquium Volumes, one cannot avoid a feeling of relativity: within a lifetime some moral and criminal issues have changed from ‘threat’ to ‘acceptable’ or the other way round, or are only nominally maintained but their urgency has become diluted or ‘bleached’. One may call this relativity the ‘wink of history’. Naturally much depends on the subject at stake: moral relativity does not always express itself unambiguously as there are so many shades between black and white. The criminological issues of this volume which covers a range of criminal manifestations, from corruption, organised crime in post conflict regions, cigarette smuggling, money laundering, fraud and their supervisory bodies, can be represented as a kind of ‘relativity parade’, analogous to the Gay Pride Parade. In this volume it is called the ‘Moral Relativity Pride Parade’ and it is this lens through which we address this diversity of subjects.

Depicting the elaborated themes as a parade of Moral Relativity Floats with a challenging crew of participants, does not hide the fact that there is also much policy making moral duplicity presented with no tinge of ‘relativity’ but dressed in the cloths of moral rectitude. For example: tough-on-(organised) crime legislation neglecting basic principles of criminal law safeguards; crying wolf against certain forms of organised crime when the real issue is poverty; supervisory structures which look more like a bad marriage relationship between supervisors and the supervised actors than addressing the (money laundering) problem in the real life; or prioritising a concern like EU fraud while installing an European agency as a toothless watchdog.

This fourteenth volume of the Cross-border Crime Colloquium, an institution which stimulates a critical discourse on crime and crime-control in Europe and beyond, contains the peer-reviewed critical and innovative contributions of 23 international experts. The chapters are based on empirical data or critical theorising and highlight new aspects of these fields.

