

Can the COVID-19 crisis facilitate money laundering for organised crime?

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KEYWORDS	COVID-19 – money laundering – organised crime – mafia – banks – due diligence
ABSTRACT	The number of small businesses suffering from financial difficulties is quickly rising because of the COVID-19 pandemic. This enables organised crime groups to take advantage of this unprecedented situation by acquiring more figurehead entities in order to launder their money. Banks should therefore adapt their due diligence processes to identify these new money laundering threats. This paper aims to discuss the issue from an Italian and Swiss comparative law perspective.
ZUSAMMENFASSUNG	Die Zahl der kleinen Unternehmen, die aufgrund der COVID-19-Pandemie in finanzielle Schwierigkeiten geraten, steigt schnell an. Dies ermöglicht es der organisierten Kriminalität, diese schwierige finanzielle Situation auszunutzen, indem sie diese Unternehmen erwerben, um ihr Geld zu waschen. Banken sollten daher ihre <i>Due-Diligence</i> -Prozesse anpassen, um diese neuen Bedrohungen der Geldwäsche zu erkennen. Dieser Beitrag diskutiert das Thema aus einer rechtsvergleichenden Perspektive Italiens und der Schweiz.
RÉSUMÉ	Le nombre de petites entreprises souffrant de difficultés financières augmente rapidement en raison de la pandémie de COVID-19. Le crime organisé peut ainsi tirer parti de cette situation sans précédent en acquérant davantage d'entités fictives pour blanchir de l'argent. En conséquence, les banques devraient adapter leurs processus de <i>due diligence</i> afin d'identifier ces nouvelles menaces de blanchiment. Cet article souhaite aborder la présente problématique sous une perspective de droit italien et suisse.

Introduction

The COVID-19 crisis is currently disrupting the world that we live in and it therefore raises a number of issues, mainly regarding public health and the economy. Global restrictions on travel and other measures have a significant impact on legitimate businesses and on criminal activities¹. For instance, these restrictions make drug trafficking more complicated for organised crime groups (hereinafter: OCGs)². As such, it forces them to adapt

their *modus operandi* in order to maintain the drug supply despite the restrictions³. However, as mentioned by ROBERTS and BARIGAZZI, «*Mafia has a specific playbook for profiting from moments of crisis*»⁴ which enables OCGs to take advantage from this current instability.

Therefore, this short paper presents an overview of the COVID-19 consequences, in Italy and Switzerland, focusing on a specific money-laundering scheme used by OCGs. It should be emphasised that the addressed issue here is not specific to criminal organisations, but also concerns ordinary people with assets of illegal origin. As a result, people who do not belong to criminal groups may

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¹ See for instance «*key findings*» in: FATF, COVID-19 Risks and Policy responses, p. 4; EMCDDA/EUROPOL, Impact of COVID-19 on EU Drug Markets, p. 7; EUROPOL, How COVID-19 will shape organised crime in the EU, p. 4; EUROPOL, Viral Marketing: Counterfeits in the time of pandemic, p. 4.

² The present paper does not aim to define what OCGs are. For further details on this notion, see CHAMPEYRACHE, *L'infiltration mafieuse dans l'économie légale*, pp. 9–14; LUPPI, pp. 15–17; CASSANI, N 6.176 ff; Judgment of the Swiss Federal Supreme Court 6B_107/2010 of 22 February 2011; CORTE SUPREMA DI CASSAZIONE, Rel. n° 83/2020, § 2.3., p. 11 & § 3,

p. 15; Judgment of the Italian Supreme Court Sez. 1, n. 14134 of 30 September 1986, Rv. 174636-01, (*Amerato*).

³ See for instance: INTERPOL, Dealers using food delivery services during COVID-19 lockdowns, <<https://www.interpol.int/News-and-Events/News/2020/Dealers-using-food-delivery-services-to-transport-drugs-during-COVID-19-lockdowns>>, (*lastly checked: 01.11.2021*); EUROPOL, Viral Marketing: Counterfeits in the time of pandemic, pp. 5–10; EUROPOL, How COVID-19 will shape organised crime landscape in the EU, pp. 5–13.

⁴ ROBERTS/BARIGAZZI, 2020.

see the pandemic as an opportunity to invest their assets of illegal origin⁵. Moreover, organised crime remains a marginal phenomenon in Switzerland, with a maximum of 15 convictions accounted for in 2015 and only 5 in 2019⁶. Conversely, organised crime is a more common offence in Italy⁷.

The paper is divided into three main points: COVID-19's effects on the legal economy (I.); how OCGs can profit from this crisis in order to launder money (II.); and what consequences should be borne in mind for banks (III.).

I. COVID-19's effects on the legal economy

The current pandemic has created an unprecedented re-organisation of daily life and restrictive measures have been adopted worldwide, amongst which lockdowns for several months in many States⁸. These measures have led to severe consequences on the economy and in order to limit the negative effects recovery plans have been adopted⁹. For instance, a total of EUR 1'800 Trillion stimulus

package has recently been confirmed in December 2020 by the European Union¹⁰.

These massive investments will undoubtedly tempt OCGs to search for new opportunities to launder their money, especially since authorities do not have the means to trace all the funds transferred¹¹. They could be fraudulently transferred to offenders who have made false claims¹² or provided to «*traditional mobster front businesses such as construction, cement manufacturing and haulage*», which would potentially be solicited by public tenders¹³.

Additionally, the public health crisis related to the pandemic also creates a new range of activities for OCGs, such as, counterfeits or substandard production of medical equipment (e.g. masks, gloves, corona test kits, etc.¹⁴). In that regard, the vaccine for COVID-19 is described as

⁵ Indeed, money laundering as per Art. 305bis of the Swiss Criminal Code of the 21 December 1937 (SR 311.0; thereafter: SCC) and Art. 648bis ff. of the Italian Criminal Code (G.U., 26 ottobre 1930, n. 251) is not an infraction in which the author must have a particular quality [CASSANI, § 6.89; LOMBARDINI, § 278; CESONI *et al.*, pp. 426–427].

⁶ See «Art. 260^{ter}» in the Table on convictions of adults for a delict or crime under the Swiss Criminal Code of the Swiss Federal Statistical Office (FSO), available at: <<https://www.bfs.admin.ch/bfs/fr/home/statistiques/criminalite-droit-penal/justice-penale/jugements-mineurs-adultes.assetdetail.13407151.html>> (lastly checked: 02.17.2021).

⁷ See CORTE SUPREMA DI CASSAZIONE, Rel. n° 83/2020 and references.

⁸ The period and the intensity of lockdowns are varying from State to State, see for example: *Coronavirus: quels pays sont confinés ?*, in: Le Monde, 30 March 2020, available at: <https://www.lemonde.fr/planete/article/2020/03/30/coronavirus-quels-pays-sont-confinés_6034936_3244.html> (lastly checked: 01.11.2021).

⁹ FATF, COVID-19 Risks and Policy responses, pp. 5–6. For instance, the United Nations Secretary-General's COVID-19 Response and Recovery Trust Fund have permitted through 75 programmes to counter the pandemic's effects on the economy in 61 countries with a budget of USD 64 Mios (UNMPTF, Global Interim Report, p. 3). In Switzerland, a programme worth CHF 20 billion was adopted to permit companies affected by the crisis able to apply for bridging credits guaranteed by the federal government to ensure their liquidity (SWISS FEDERAL COUNCIL, Emergency ordinance on granting of credits); in that regard, see: *Ordonnance fédérale du 25 mars 2020 sur l'octroi de crédits et de cautionnements solidaires à la suite du coronavirus (OCaS-COVID-19, SR 951.261)*. Additionally, in Switzerland, a budget of CHF 2.5 billion has been adopted to provide financial help to businesses endangered by the

pandemic (SWISS FEDERAL COUNCIL, Emergency ordinance on cases of hardship; WUTHRICH, 2021); in that regard, see: *Ordonnance fédérale du 25 novembre 2020 concernant les mesures pour les cas de rigueur destinées aux entreprises en lien avec l'épidémie de COVID-19 (Ordonnance COVID-19 cas de rigueur, SR 951.262)*.

¹⁰ This stimulus package is enshrined in the EU's long-term budget and is coupled with the NextGenerationEU plan, a temporary recovery instrument of EUR 750 billion designed to repair the immediate economic and social damage of the pandemic. For more information, see: EUROPEAN COMMISSION, Recovery plan for Europe, <https://ec.europa.eu/info/strategy/recovery-plan-europe_en> (lastly checked: 01.11.2021).

¹¹ BARRICELLI, 2021; ROBERTS/BARIGAZZI, 2020; FATF, COVID-19 Risks and Policy responses, p. 9. See the case in Switzerland, where COVID credits were given to an entrepreneur who used it to buy a luxury car (RUCHE, 2021).

¹² Swiss newspapers have reported a 4-year-old sentence in Geneva for this kind of offence, (RUCHE, 2021); FATF, COVID-19 Risks and Policy responses, p. 9.

¹³ ROBERTS/BARIGAZZI, 2020, also mentioning that although the public tender legal framework is designed to exclude the risk of criminal enterprises, «*the large scale of planned investments in the wake of the coronavirus epidemic could mean that these processes are rushed and less likely to detect illegitimate businesses*». EMCDDA/EUROPOL, Impact of COVID-19 on EU Drug Markets, p. 8; CHAMPEYRACHE, *La face cachée de l'économie*, p. 182.

¹⁴ EUROPOL, Viral Marketing: Counterfeits in the time of pandemic, p. 5; EUROPOL, How COVID-19 related crime infected Europe in 2020, p. 6; FATF, COVID-19 Risks and Policy responses, p. 6. In March 2020, a transnational operation led to the seizure of EUR 13 Mio in potentially dangerous pharmaceuticals and 34'000 counterfeit surgical masks, ROBERTS/BARIGAZZI, 2020.

the «*liquid gold of 2021*»¹⁵ by STOCK¹⁶ and is already in the line of sight of OCGs¹⁷.

Moreover, since the economical consequences have spread to multiple industries – notably to small businesses like food services (bars, restaurants, etc.) or recreational activities (tourism, theatres, museums, casinos, etc.) – it is therefore difficult to measure the precise impact of the pandemic¹⁸. Certain travel restrictions continue to prevent a full recovery in some regions of the world where a significant part of the economy is based on tourism like Italy¹⁹.

The common factor within these industries can be found in the fact that they are known to be cash-intensive industries frequently used by OCGs to launder money. Those industries could be, in the current context, a «*target of choice*»²⁰ for these organisations²¹. If the aforementioned stimulus aids cannot help in a timely and appropriate manner²² all of the establishments hit by the crisis, it is likely that some business owners will be more inclined to accept OCGs' propositions in order to avoid bankruptcy

or simply to ensure a living wage²³. Indeed, as raised by GOVERNALE²⁴, «[t]he State must stand with those in difficulty or someone else will [...]. The mafia becomes powerful when the state is absent. It is like the principle of communicating vessels — if the state is not present the space will be filled by someone else»²⁵.

Inevitably, the question that arises is to see *if* and «*how*» this «*space*» will be filled by OCGs and the benefits these organisations can draw from the COVID-19 crisis.

II. An OCGs' money laundering scheme in the context of the COVID-19 crisis: loan sharking and extortion

The following part will focus on one specific scheme that OCGs are likely to exploit during the COVID-19 pandemic in order to launder money. However, the present paper purpose is not to define the notion of money laundering²⁶. Yet, to recall purposes, money laundering can be abstractly defined as: «*the attempt to conceal or disguise the ownership or source of the proceeds of criminal activity and to integrate them into the legitimate financial systems in such a way that they cannot be distinguished from assets acquired by legitimate means. Typically this involves the conversion of cash-based proceeds into account-based forms of money*»²⁷.

Only one major scheme used by OCGs will be presented hereafter, which regroups loan sharking and extortion, but there are other potential offences prone to be committed during the pandemic²⁸. For instance, counterfeiting

¹⁵ ROBERTS, 2021.

¹⁶ Interpol Secretary General, <<https://www.interpol.int/en/Who-we-are/General-Secretariat/Secretary-General/Juergen-Stock-biography>> (lastly checked: 01.11.2021).

¹⁷ ROBERTS, 2021; BARRICELLI, 2021.

¹⁸ *Infra*, n. 21.

¹⁹ The UN World Tourism Organization (UNWTO) have announced a loss of USD 935 billion in export revenues from international tourism and region from Asia continued to record declines of nearly 100% in September and October 2020 (UNWTO, Tourism during COVID pandemic). In Southern Europe, including countries such as Italy or Spain, the annual tourist arrivals have decreased of 70% over the last year according to the UNWTO Tourism Recovery Tracker, <<https://www.unwto.org/unwto-tourism-recovery-tracker>> (lastly checked: 01.11.2021).

²⁰ In fact, small businesses are the most common form of legal mafia companies according to a study made in Italy between 1983 and 2012: 46,6% of the companies were limited liability company (*sociétés à responsabilité limitée*) and 25,8% were sole proprietorships (*entreprises individuelles*) (TRANSCRIME, *Gli Investimenti delle mafie*, p. 101); CHAMPEYRACHE, *La face cachée de l'économie*, p. 180 & pp. 186–187; REUTER/TRUMAN, Box 3.5, pp. 30–31 & Table 3.1, p. 33.

²¹ *Infra*, II.; CHAMPEYRACHE, *L'infiltration mafieuse dans l'économie légale*, pp. 50–52; EMCDDA/EUROPOL, Impact of COVID-19 on EU Drug Markets, pp. 8–9.

²² SAVIANO 2021. The financial support is not quickly delivered which endangered companies as for example pointed out by *GastroSuisse* (Swiss association of hotel and restaurants industry) regarding the Swiss financial aid from the Ordinance of cases of hardship (WUTHRICH, 2021; WUTHRICH, 2020). To see in detail how this aid will be used, see: VDK CDEP, 2021.

²³ EMCDDA/EUROPOL, Impact of COVID-19 on EU Drug Markets, p. 8; ROBERTS/BARIGAZZI, 2020; SAVIANO, 2021; POZZANA, 2020.

²⁴ Head of Italy's Anti-Mafia Investigative Directorate until October 2020 (*Direzione Investigativa Antimafia*) replaced since by Maurizio VALLONE, <<https://direzioneinvestigativaanti-mafia.interno.gov.it/page/direttore.html>> (lastly checked: 01.11.2021).

²⁵ ROBERTS/BARIGAZZI, 2020. Such a statement is also confirmed by the mafia's expert Roberto SAVIANO: «*Ciò che State e banche non danno, le mafie possono concederlo*» (What States and banks do not give, mafias can provide [SAVIANO, 2021]).

²⁶ This notion has already been intensively analysed by scholars, for a comparative overview of Belgian, Swiss, French, Italian and International law, see for instance: CESONI *et al.*. Under swiss law, for further developments see: ACKERMANN, § 15; CESONI *et al.*, pp. 283–344; LOMBARDINI, Chapter IV, pp. 69–119.

²⁷ CPSS, Glossary, p. 32.

²⁸ See for example: RTS, Le marché noir de faux tests négatifs Covid-19 inquiète les autorités suisses, <<https://www.rts.ch/info/economie/11967566-le-marche-noir-de-faux-tests-negatifs-au-covid19-inquiete-les-autorites-suisses.html>> (lastly checked: 02.16.2021).

of medical equipment is one of them²⁹ as well as cyber-crime (e.g. phishing emails through spam campaigns with specific reference to COVID-19 or ransomware in video conferencing software exploiting thereby the increased teleworking practices)³⁰ or even migrant smuggling (e.g. by using social media to spread misinformation around the pandemic to increase demands for their services or by increasing their price)³¹.

Loan sharking is a technic of usury where a person or an entity lends money at high interest rates, well above legal rates and the person usually use violence to collect the unpaid debts³². This technique is often implemented by OCGs who target companies experiencing financial difficulties. It should be underlined that a loan shark's purpose is not to recover the debt, but, on the contrary, to implement the loan guarantee, which is often to take control over the company itself³³.

Another method is also employed which is considered to be a new form of «*extortion*», where OCGs lend money (at normal rates) instead of directly taking control over the company³⁴. This situation is similar to the previous one, except for the fact that instead of directly contacting directors, offenders would present themselves as a legitimate company or an entrepreneur looking for investments (i.e. participating in the capital of the company)³⁵. If the director accepts the money, he/she would gradually lose control of its business to the said company/entrepreneur and therefore become a figurehead for the OCG³⁶. The transition is often swift. Traditionally, the mechanism would be carried out as follows: first, the company director would be obligated to hire someone on account of the loan, and, second, the said person starts «*to give orders, changing products or arranging a renovation*» despite the owner's protestations. The director is then confronted to a

«take it or leave it» situation³⁷. If the director protests, the loan sharks will frequently resort to the use of violence³⁸.

Since there are currently more and more businesses experiencing financial difficulties, OCGs have more opportunities to act on, thus enabling them to acquire legitimate businesses. The purpose here is not to develop how the company will be transferred into the hands of the OCG³⁹. Nevertheless, it is important to remember that this transfer is not necessarily achieved through a legal acquisition of the company⁴⁰. It can be done tacitly by a *de facto* change of the director, which means the legal director remains on the official documents, thus playing the role of a figurehead⁴¹. If the transfer of property is carried out by a sales agreement, it can be at a price well below the market price or at a normal price but with no actual transfer of funds (often after sustained pressure or even the use of violence)⁴².

In Italy, PORZIO⁴³ has stated that COVID-19 increased the risk of extortion and usury since more businesses are on the verge of bankruptcy⁴⁴. In fact, according to the *Banca d'Italia*, 142'000 businesses are endangered by the pandemic representing a need for EUR 48 billion in liquidity⁴⁵. When comparing this information to the 6.5 % rise of usury in Italy for the period from the 1st of January to the 30th of June 2020⁴⁶, it can be assumed that OCGs are finding ways to exploit the pandemic issues⁴⁷.

The newly acquired legal infrastructure (usually recreational establishments such as restaurants, bars, casinos, etc.⁴⁸) is often used as a figurehead for money launder-

²⁹ EUROPOL, How COVID-19 related crime infected Europe in 2020, pp. 6–7 & 15; EUROPOL, How COVID-19 will shape organised crime in the EU, pp. 6, 11 & 15–16.

³⁰ EUROPOL, How COVID-19 related crime infected Europe in 2020, pp. 7–8; EUROPOL, How COVID-19 will shape organised crime in the EU, pp. 6 & 10.

³¹ EUROPOL, How COVID-19 related crime infected Europe in 2020, pp. 12 & 17–18; EUROPOL, How COVID-19 will shape organised crime in the EU, pp. 8 & 10.

³² LISLE, pp. 167–171; KAGAN.

³³ CHAMPEYRACHE, *L'infiltration mafieuse dans l'économie légale*, pp. 48 & 50; ROBERTS/BARIGAZZI, 2020.

³⁴ SAVIANO, 2021; CHAMPEYRACHE, *L'infiltration mafieuse dans l'économie légale*, p. 48.

³⁵ This can be considered as an acquisition of a stake in the company. SAVIANO, 2021.

³⁶ ROBERTS/BARIGAZZI, 2020; SAVIANO, 2021.

³⁷ According to Maurizio DE LUCIA, the Chief prosecutor in the Sicilian city of Messina in Italy, in: ROBERTS/BARIGAZZI, 2020; SAVIANO, 2021.

³⁸ SAVIANO, 2021.

³⁹ To see how OCGs are proceeding to acquire legal businesses, see: CHAMPEYRACHE, *L'infiltration mafieuse dans l'économie légale*, pp. 44–45.

⁴⁰ CHAMPEYRACHE, *La face cachée de l'économie*, pp. 185–186.

⁴¹ ROBERTS/BARIGAZZI, 2020; CHAMPEYRACHE, *L'infiltration mafieuse dans l'économie légale*, p. 48.

⁴² CHAMPEYRACHE, *L'infiltration mafieuse dans l'économie légale*, pp. 48–49.

⁴³ Ex Extraordinary Commissioner of the Government for the coordination of anti-racket and anti-usury initiatives (February 2019–October 2020).

⁴⁴ SAVIANO, 2021.

⁴⁵ *Banca d'Italia*, Note COVID-19, November 2020, p. 2; SAVIANO, 2021.

⁴⁶ See Figures in: SAVIANO, 2021.

⁴⁷ *Banca d'Italia/UIF*, Annual Report 2020, pp. 45–46; SAVIANO, 2021.

⁴⁸ Usually, this sector is targeted by OCGs to launder money since they do not need to provide a substantial initial investment, nor do they need qualified people to manage the business. Thus, it reduces the loss in case of seizure from the authori-

ing⁴⁹. This type of mechanism has already proven to be effective during a stable economy, but its effects are multiplied due to the pandemic⁵⁰.

At the moment, there is insufficient data in Switzerland to confirm a similar phenomenon, but the economic impact of the pandemic mostly affects small businesses in Switzerland and may lead to a similar situation, although it would probably be to a lesser extent since OCGs are less widespread⁵¹.

Therefore, it seems that COVID-19 could facilitate in an indirect manner, money laundering for OCGs (at least in Italy).

III. Consequences for banks in regard to the anti-money laundering regulation

Prior to raising the implications related to the financial sector, it should be noted that extortion, usury and money laundering remain offences that are to be prosecuted by criminal authorities. Under Swiss law, extortion, usury and money laundering are respectively enshrined in Art. 156, Art. 157 and Art. 305bis/305ter of the SCC⁵². Whilst Italian law provides that these offences are respectively sanctioned by Art. 629, Art. 644 and Art. 648bis ff. of the Italian Criminal Code⁵³. In addition, there are specific provisions regarding confiscation that need to be taken into account when dealing with criminal groups⁵⁴.

This paper is not aiming to present the anti-money laundering system (thereinafter: AML) nor its implications in Italy or Switzerland. Yet, the fact that the pandem-

ic increases the number of legal businesses taken over by OCGs, the phenomenon is likely to have a crucial impact on the banks in regard to their duty of due diligence.

In Italy, the AML EU's Directives' transpositions (AMLD IV and V) are applicable⁵⁵. Switzerland has enforced the Anti-Money Laundering Act (AMLA)⁵⁶, the Anti-Money Laundering Ordinance (AMLO)⁵⁷ and the FINMA⁵⁸ Anti-Money Laundering Ordinance (AMLO-FINMA)⁵⁹.

Because of the United Nations Convention against transnational organised crime⁶⁰, signatory countries are moreover required to adopt a legal framework preventing the risk of OCGs' money laundering.

According to the Legislative Decree 231/2007 (Art. 15 ff.) and the AMLA (Art. 3 ff.), financial intermediaries such as banking establishments have to apply

ties (CHAMPEYRACHE, *L'infiltration mafieuse dans l'économie légale*, pp. 50–51); REUTER/TRUMAN, Box 3.5, pp. 30–31 & Table 3.1, p. 33.

⁴⁹ Banca d'Italia/UIF, Annual Report 2020, pp. 45–46; CHAMPEYRACHE, *La face cachée de l'économie*, p. 180; REUTER/TRUMAN, Box 3.5, pp. 30–31 & Table 3.1, p. 33.

⁵⁰ EUROPOL, Impact of COVID-19 on EU Drug Markets, p. 9; POZZANA, 2020; ROBERTS/BARIGAZZI, 2020; SAVIANO, 2021; CHAMPEYRACHE, *L'infiltration mafieuse dans l'économie légale*, p. 49.

⁵¹ *Supra*, I., n. 5, 9 & 22. The Money Laundering Reporting Office Switzerland (MROS) 2020 annual report, once it is published, will eventually have some data to confirm or infirm the said statement. Same applies for the FSO Criminal convictions Table, mentioned *Supra*, I., n. 5.

⁵² ACKERMANN, § 15; LOMBARDINI, Chapter IV, pp. 69–119.

⁵³ CESONI *et al.*, pp. 426–427.

⁵⁴ Under Swiss law see in particular: Art. 72 SCC; LOMBARDINI, § 526–532; ACKERMANN, § 15, N 98–99. Under Italian law see in particular: Art. 240bis Italian Criminal Code; CORTE SUPREMA DI CASSAZIONE, Rel. n° 83/2020, §§ 8.2. & 8.3., pp. 25–26.

⁵⁵ For the AMLD IV: Decreto legislativo dal 25 maggio 2017, n. 90, Attuazione della direttiva (UE) 2015/849 relativa alla prevenzione dell'uso del sistema finanziario a scopo di riciclaggio dei proventi di attività criminose e di finanziamento del terrorismo e recante modifica delle direttive 2005/60/CE e 2006/70/CE e attuazione del regolamento (UE) n. 2015/847 riguardante i dati informativi che accompagnano i trasferimenti di fondi e che abroga il regolamento (CE) n. 1781/2006. For the AMLD V: Decreto legislativo dal 4 ottobre 2019, n. 125, Modifiche ed integrazioni decreti legislativi 25 maggio 2017, n. 90 e n. 92, recanti attuazione della direttiva (UE) 2015/849, nonché attuazione della direttiva (UE) 2018/843 che modifica la direttiva (UE) 2015/849 relativa alla prevenzione dell'uso del sistema finanziario ai fini di riciclaggio e di finanziamento del terrorismo e che modifica le direttive 2009/138/CE e 2013/36/CE (G.U., 26 ottobre 2019, n. 252). Is also applicable: Decreto legislative dal 21 novembre 2007, n. 231, Attuazione della direttiva 2005/60/CE concernente la prevenzione dell'utilizzo del Sistema finanziario a scopo di riciclaggio dei proventi di attività criminose e di finanziamento del terrorismo nonché della direttiva 2006/70/CE che ne reca misure di esecuzione (G.U., 14 dicembre 2007, n. 290) (thereinafter: Legislative Decree 231/2007).

⁵⁶ Federal Act of 10 October 1997 on Combating Money Laundering and Terrorist Financing, SR 955.0. Not to forget that for banking establishments, the AMLA only enshrines the obligations arising from the Swiss banks' code of conduct with regard to the exercise of due diligence (CDB 20), available at: < <https://www.swissbanking.org/fr/medias/news/cdb-20-de-nouvelles-regles-en-matiere-de-blanchiment-d-argent> > (lastly checked: 01.18.2021) (CASSANI, N 6.9).

⁵⁷ Ordonnance du 11 novembre 2015 sur la lutte contre le blanchiment d'argent et le financement du terrorisme (AMLO; SR 955.01).

⁵⁸ Swiss Financial Market Authority.

⁵⁹ Ordonnance du 3 juin 2015 de l'Autorité fédérale de surveillance des marchés financiers sur la lutte contre le blanchiment d'argent et le financement du terrorisme dans le secteur financier (AMLO-FINMA; SR 955.033.0).

⁶⁰ Also known as Palermo Convention, the said Convention is in force in Italy since 04.11.2006 (G.U., 11 aprile 2006, n. 85) and since 11.26.2006 in Switzerland (SR. 0.311.54).

due diligence measures in order to have a clear comprehension of the business relationship⁶¹. They are required to identify both the customer «Know Your Customer/KYC» (Art. 18 (1) (a) Legislative Decree 231/2007/Art. 3 AMLA) and the beneficial owner (Art. 18 (1) (b) Legislative Decree 231/2007/Art. 4 AMLA)⁶². If during these processes the financial institutions have any doubts regarding the identity of the customer, the beneficial owner or the source of the funds, they have a duty to verify the information before drafting reports to the state authorities (Art. 18 (1) (d) & 41 Legislative Decree 231/2007/Art. 5 & 6 AMLA)⁶³.

If there are any doubts as to the legal nature of the transaction or the issue with the identity of the aforementioned persons persist, the banks have thus, an obligation to report (Art. 41 Legislative Decree 231/2007/Art. 9 AMLA)⁶⁴. The threshold of these doubts is variable and often debated but it can be considered that mere doubts may be sufficient enough to trigger the obligation to report⁶⁵.

Bearing in mind the rise of potential legal businesses taken over by OCGs due to the COVID-19 and the banks' due diligence obligations, it emerges that banks should strengthen their verification system in order to prevent all risks of money laundering⁶⁶. Especially because in the event of a failure to report, the bank exposes itself to a risk of criminal prosecution and sanctions provided under Art. 55 ff. Legislative Decree 231/2007 and Art. 37 AMLA⁶⁷.

In that regard, state authorities should also be prepared to deal with a potential increase of money laundering alerts. Even more so if alert thresholds are recalibrated as suggested by certain institutions. For instance, the European Banking Authority (EBA) is urging to «pay particular

attention to any unusual or suspicious patterns in customer's behaviour and financial flows [...] includ[ing] cash-intensive businesses [...] in sectors facing the economic downturn which will keep a similar volume of financial flows in the absence of real economic activity»⁶⁸ (e.g., bars, restaurants, etc.). Whereas the *Banca d'Italia* is asking for deeper and more adequate verifications⁶⁹. Additionally, FINMA implemented a simplified regime of customers' identifications which only applies for customers domiciled abroad and until 30 June 2021⁷⁰. Nevertheless, FINMA still insists that a case-by-case analysis must be carried out⁷¹.

Consequently, the banks' money laundering detection system must be adapted, by reducing thresholds required to trigger alerts and by increasing vigilance in transactions. If, for example, a company's activity is affected by the pandemic but it continues to make the scheduled payments to reimburse a bank loan, there may be doubts as to the source of the money. The bank's anti-money laundering system must be able to detect this type of situations. Additionally, cases of smurfing are also to be expected in this kind of context and may therefore not be detected by the current thresholds set by the bank⁷².

Furthermore, regulated entities should remain vigilant to detect suspicious transactions, especially for operations involving emergency COVID-19-related funding⁷³. Indeed, it is expected that illegitimate businesses may file false claims in order to obtain access to stimulus funds by posing as legitimate business seeking assistance⁷⁴.

Thus, the banks' IT systems need to be updated in order to adapt to the current circumstances in accordance with Art. 20 (2) AMLO-FINMA⁷⁵. In addition, specific training courses for bank employees as per Art. 8 AMLA may also be necessary⁷⁶. Although this will undoubtedly generate additional costs for the bank, such an adjustment is necessary to avoid any sanctions. Such obligations are also provided in Italian law as outlined in the

⁶¹ CASSANI, N 7.66; CESONI *et al.*, p. 467.

⁶² SHK-DOBRAUZ-SALDAPENNA/DERUNGS, Art. 3 GwG, N 3; ABEGG, Sec. 21.2 p. 460 ff. & Sec. 21.3, p. 437 ff.; LOMBARDINI, N 65–140; CASSANI, N 7.67 & 7.77; CESONI *et al.*, pp. 468–469.

⁶³ ABEGG, Sec. 21.1.4, B, p. 457; LOMBARDINI, N 590; CESONI *et al.*, pp. 468–469.

⁶⁴ SHK-LUCHSINGER, Art. 9 GwG, N 4; ABEGG, Sec. 21.4.5, p. 479; LOMBARDINI, N 590; CESONI *et al.*, pp. 472–473. To see what should be included in such a report, see: SHK-LUCHSINGER, Art. 9 GwG, N 91.

⁶⁵ CASSANI, N 7.134 & 7.136; Judgment of the Swiss Federal Supreme Court 1B_433/2017 of 21 March 2018; Judgment of the Swiss Federal Supreme Court 4A_313/2008 of 27 November 2008. To see objective indicators under Italian law: CESONI *et al.*, pp. 475–476.

⁶⁶ See *Infra*, III., p. 10; FATF, COVID-19 Risks and Policy responses, p. 15.

⁶⁷ CASSANI, N 7.168; LOMBARDINI, N 639; CESONI *et al.*, p. 491 and references.

⁶⁸ EBA, Statement COVID-19, p. 2.

⁶⁹ *Banca d'Italia, Raccomandazione COVID-19*, p. 2.

⁷⁰ FINMA, Guidance 07/2020, p. 2.

⁷¹ FINMA, Guidance 07/2020, pp. 2–3.

⁷² «Smurfing» is the situation in which a transaction involving a large amount is divided into several transactions involving smaller amounts in order to avoid attracting attention [LOMBARDINI, n. 196 and references].

⁷³ *Supra*, I.; FATF, COVID-19 Risks and Policy responses, p. 15.

⁷⁴ FATF, COVID-19 Risks and Policy responses, p. 9; BARRICELLI, 2021; SAVIANO, 2021; RUCHE, 2021.

⁷⁵ LOMBARDINI, N 209 & 210.

⁷⁶ CASSANI, § 7.121; LOMBARDINI, N 204 & 206.

*Banca d'Italia's Directives pursuant to Art. 7 (2) Legislative Decree 231/2007*⁷⁷.

Therefore, anticipation is once again an effective manner to prevent the risk attached to the AML regulation in particular in the context of the COVID-19 pandemic.

Conclusion

The COVID-19 crisis's effects have not yet been entirely revealed and will presumably continue to unfold until the health situation improves significantly. However, as previously stated, some businesses are already in a complicated financial situation and are less inclined to wait for government aids. In that respect, OCGs will continue to take advantage of the situation, by adapting their *modus operandi*. This will have important consequences for the legal economy and its actors. Both banks and the authorities will have to be more vigilant in their due diligence operations because the risk of money laundering is increased by the pandemic. In that regard, international cooperation will once again be a key issue to fight against money laundering and organised crime. Indeed, since «[t]he virus has demonstrated that it doesn't respect frontiers, and the mafia has demonstrated that it doesn't neither»⁷⁸ why should the authorities?

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⁷⁷ *Banca d'Italia*, AML Directives, Capitolo Secondo, Sezione I, pp. 16–19 & Sezione V, pp. 22; CESONI et al., pp. 486–487.

⁷⁸ Giuseppe GOVERNALE in: ROBERTS/BARIGAZZI, 2020.

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