

THE EMERSION OF CORRUPTION AND ORGANIZED CRIME IN ITALY

Author

Aurelian Olimpiu SABĂU POP*

ABSTRACT: *The Italian legal system is facing an unprecedented "professionalization" of organized criminal groups committing corruption offenses as we have identified in the extensive scientific researches conducted, which will be referred to, and based on which the State implemented penal policy.*

KEYWORDS: *corruption, organized crime, Italy, legal system.*

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I chose this analysis precisely to depict the objective reality of organized crime in another system of law where crime fighting has concerned the State over a long period of time.

The Italian legal system is facing an unprecedented "professionalization" of organized criminal groups committing corruption offenses as we have identified in the extensive scientific researches conducted, which will be referred to, and based on which the State implemented penal policy.

Italy is the country which first established specialized institutions in combating the phenomenon (prosecutors and specialized courts), a comprehensive witness protection project, collaborators of judicial authorities, thus establishing a model for other legal systems including the Romanian one.

The mafia groups¹, already existing and traditionally connected to the existence of the Italian society, pursue political power and the members of the political parties sometimes fail to refrain from the temptation to buy "packages" of electoral benefits; powerful interests are present in the public contracting area, resulting in a close blending between poor administrative management and the relationships with delinquent characters, violence, threats.

The proliferation of such phenomena leads to the ability of organized crime to manage the territory not only through old mafia practices by way of traditional crimes such as

* Lector universitar doctor, Universitatea „Petru Maior”, ROMANIA

¹ See R. Șpan, P. Pitcovici, *The role of information in the fight against corruption*, Sitech Publishing House, Craiova, 2009;

extortion, threats, illegal restraint, but also through a new type of relationships with the local administration and public authorities involvement². The local society is today a leading provider of expenditure, especially in services; in this circumstances cannot be avoided this crime which, directly or through other means, tries to guide the activity of the local administration towards gaining power and ample economic spaces³.

For criminal policy on combating corruption to be rational and effective in Italy, the incrimination of certain offenses sometimes in close connection with acts of corruption was needed to ensure uniform application of the legal provisions on corruption: for example, by using the "vector" of incriminating association offenses provided by *Articles no. 416 and 416²* of the Italian Criminal Code. (According to *Article no. 416* of the Italian Criminal Code, "when three or more persons are associated for the purpose of committing crimes, the persons who promote, establish or organize the association are punished with imprisonment from three to seven years", and according to *Article 416²*, "any person who is part of a mafia-type association of three or more persons, is punished with imprisonment from three to six years."). Thus began a control through the data of the Central Criminal Record, creating a strong link between corruption and organized crime⁴. The Criminal Record is correlated with the Tax Record, thus is provided information on the circle of perpetrators, while public authorities (for example, the Financial Guard) are organized by military status with broad competences and opportunities to preserve the results of factual findings.

Regarding the structure of the conduct incriminated by the Criminal Code legal provisions, it is important to note that the legislature incriminates even the mere participation in any form of a mafia-type association. It is not necessarily the activity of performance, preparatory in nature, of such crimes indictment reimplemented into the program: thus, conceptually, participation should be addressed in distinction to the activity of performing in the association's operations, which consists in performing instrumental activities under the association's program (i.e., providing subsistence means to the association's members or purchasing means of financing, etc.). Precisely the conceptual autonomy of mere participation is explained by the fact that the activity does not necessarily mean the crime of competition at this kind of misdemeanors (specific to activities of performing in the criminal association).

Under the "instrumental" profile, mafia association is characterized by the fact that its members make use the association's force to intimidate, of obedience to its rules, and of the "law of silence" (*omerta*) derived therefrom. The use of force to intimidate is undoubtedly one of the most common mafia behaviors, traditionally emphasized by the historical and sociological research. In the Italian case law was shown that "the intimidation does not necessarily consist in making threats, the warning of the presence and supervision by association is sufficient."

The results expected from intimidation must be enforcement of obedience and "silence"; obedience is the state of psychological succumbing that manifests in the potential intimidation victims, while "silence" is expressed by the generalized refusal of

² See G. Antoniu, Reflections on organized crime, *Criminal Law Magazine*, no. 3, 1997, p44;

³ See P. Davigo, G. Mannorozzi, *La corrutione in Italia. Perceptio sociale e controllo penale*, Latenza Publishing House, 2007, p 79;

⁴ See P. Davigo, G. Mannorozzi, *La corrutione in Italia. Perceptio sociale e controllo penale*, Latenza Publishing House, 2007, p 80;

cooperation with justice, usually manifested by complicity, perjury, etc.⁵. Thus, according to a second interpretation found in the Italian case law, obedience would not only have an external valence, but also an internal one, which manifests as the "fear" and obedience of any member to the "heads" of the mafia association.

Mafia association is characterized by a greater magnitude of the objective pursued, which is not only limited to committing crimes specific to the criminal organizations (as provided for in Article 416 of the Italian Criminal Code), but further including: direct or indirect acquisition of management and control over certain economic activities, concession, permits (certification), contracting and services, aiming to achieve undue advantages for itself or for others⁶.

The foresight of the Italian legislature concerning this form of the criminal illicit was due to the link between the new "image" of contractors and the growing power of mafia organizations, whose target of enrichment was not only achieved through crimes against property, seizures, drug trafficking, but also through involvement in "money laundering" activities in the economic and production sectors, influenced by the intervention of the political system, with the consequence of limiting the citizens' freedom to vote.

The final goal is "gaining the management and control of economic activities". The term "management" means the exercise of activities with economic relevance, and the term "control" actually expresses a particular situation with the effect of conditioning activities relative to a particular economic sector.

As regards "the finality of foreclosure activity and obstruction of freedom to vote in order to achieve votes for itself or for another person" is not necessary to actually perform coercive activities influencing the freedom to vote: the association's constituents, who promised to electorally support the candidate, must exercise pressure on the citizens with right to vote in order to get them to vote for a particular candidate, and they achieve this by resorting to any form of intimidation⁷.

But instead, the studies conducted in Italy through the "Clean Hands" project showed that "there is no need of a mafia presence for an extensive and branched corruption market to develop". Part of the Italian corruption, the Milanese corruption, was largely independent of organized crime, its homogenization being possible due to the more developed economic peculiarities of the northern province. The importance is carried by economic traditions, interests and opportunities which provincialize stances without neglecting the national system.

The deficiency in finding the association crimes depends on the difficulty of proving the incrimination of large associations, such as political parties, final recipients of the bribe, almost impossible to be incriminated due to the "legality garment" that is provided to them by law.

Regarding the evolution of the crimes of association over time it is very important to remember the decisions of the Courts of Appeal in some Italian districts, where the civil

⁵ See G. Fiandaca, E. Musco, *Diritto penale. Parte Speciale*, volI, Zanicheli Publishing House, Bologna, 2007, p 482;

⁶ See G. Fiandaca, E. Musco, *Diritto penale. Parte Speciale*, volI, Zanicheli Publishing House, Bologna, 2007, p 483;

⁷ See G. Fiandaca, E. Musco, *Diritto penale. Parte Speciale*, volI, Zanicheli Publishing House, Bologna, 2007, p 484;

servants' episodes of corruption of "free payment" type were qualified as crimes of association.

Yet, it is important to note that where organized crime is massively present, it ends by managing the corruption market as well.

An interesting study, led by Ronald Goldstock⁸, indicates that the "modern" corruption system is that of bribery, of schemes and cartels. These "cartels" are met in almost all sectors belonging to the countless activities closely related to construction, lacking any control and with a completely suppressed competition. This result was achieved through the most diversified mechanisms, from illegal agreements between employers and associations of employees to unauthorized intermediations, covered by the fact that production was regulated and distributed in the territory at prices agreed upon between competitors⁹.

The construction sector in Italy was always a privileged investment area covered by the presence of organized crime. Since it does not require advanced technology or receiving a large number of expert reports, it can be used for money laundering activities, allowing territory control through work force supply and political consensus.

There is actually a connection between criminal organizations, political power, government and various sectors of the economy, resulting in a convergence of interests between subjects operating in the field of public contracting: the politicians provide work to contractors in exchange for bribes, the contractors give various advantages to the politicians and provide money and works contracts to mafia; mafia receives money from contractors in exchange ensuring social harmony and work force control, guaranteeing political and electoral support. In campaigns, the statistics are favorable for the own electoral group, which provides investments, jobs, a relative prosperity, while behind the scenes undue therefore illegal benefits are accumulated, amounting to impressively big numbers.

In the Italian case law was ascertained that "the secretary of the party to whom are known the criminal mechanisms by which such party is economically sustained shall not be criminally liable for competition pertaining to the crime committed by the party individuals for having failed to prevent subsequent misdemeanors, because you cannot determine a guarantee that would cause the party secretary to become the holder of a legal power aiming to prevent execution of certain misdemeanors and such duty is not part of the powers of a party secretary"¹⁰.

Likewise, the Italian practice includes the famous case of Tanassi, Minister of Defence, who in April 1970, due to having personal contacts with the representatives of the American company Lockheed, accepted the promise of granting money in favor of certain political parties for facilitating the conclusion of a contract to purchase 14 military

⁸ See R. Goldstock, *Control of Corruption and Racketeering in the construction Industry. The use of the Independent private sector*, New York University Publishing House, 1990, p 148; The author reaches this conclusion after the assessment of a report drafted in 1992 by New York State Joint Legislative Committee on Housing (the so-called Lockwood Committee), who described the sector of New York construction;

⁹ See P. Davigo, G. Mannorozzi, *La corrutzione in Italia. Perceptio sociale e controllo penale*, Latenza Publishing House, p 81;

¹⁰ See G. Vinciguera, *Corrutione*, Cedam Publishing House, Padova, 2004, p29;

aircrafts with the above mentioned company, in this regard exercising pressure on the public institutions competent in awarding such a contract¹¹.

In another case, to obtain a sum of money to the benefit of a certain political party, a member of the Licensing Committee consented to granting an operating license to a company¹².

Article 416³ of the Italian Criminal Code incriminates new acts (according to *Article 416³* of the Italian Criminal Code, "the penalty under *the first paragraph of Article 416²* also applies to the person who obtained the promise to be voted provided by the third paragraph of the same *Article 416²* in exchange for money "); the main problem is that the above-mentioned legal provision does not clearly indicate the incriminating conduct.

The political counter performance consisting only of offering money prevent the attribution of criminal relevance to other forms of exchange that are actually much more commonly found: if the elections are won, the promise of awarding public works and services, authorizations, licenses, employment or other types of benefits provided through the misuse and abuse of public power¹³.

With the introduction of *Article 416³* in the Italian Criminal Code, which introduces the new offense of electoral-mafia political exchange, the legislature of 1992 was concerned to extend criminal control to the link between the mafia and politics. Then, in particular, the reasoning that justified the introduction of *Article³ 416* in the Italian Criminal Code was the exigence to prevent agreements between mafia organizations and the candidates of political parties to elections: agreements that may include the promise of electoral support by mafia methods in exchange for provision, performance, facilitation by the candidates of various services. The act, therefore, assumes the existence of a mafia organization to which a candidate, usually the representative of a party, must address in order to obtain electoral support. The conduct incriminated consists of obtaining electoral support from the criminal association in exchange for future financial benefits after the election.

The symbiosis between the mafia and corruption in view of the Italian doctrine¹⁴ forms a genuine "industry" with common concerns and interests, but with different as well: first, private protection, and second, the ownership right over public revenues. On the other hand, in general, the services provided are useful for the activity of the other, or end up by being consumed by contractors, businessmen, mobsters, politicians. The arrangements made for the purpose of corruption and the political and electoral exchanges are reinforced by mafia safeguard which at the same time guarantees "silence" and protection before the law.

Corruption comes to the attention of judicial authorities in a very limited extent when it is "managed" by organized crime with their own methods of intimidation and dissimulation. The involvement of the political class makes it even more difficult to be discovered.

The "legal visible" economy around which organized crime develops needs political and administrative benevolence and in turn will provide and stabilize, not only through the

¹¹ See G. Fiandaca, E. Musco, op.cit., p223;

¹² See G. Vinciguera, op.cit., p32;

¹³ See G. Fiandaca, E. Musco, op.cit., p486;

¹⁴ See P. Davigo, G. Mannozi, op.cit., p82;

known "spiral" effect, typical to corruption in the legal economy, but also mainly through its climate of "intimidation and silence", specific to areas with increased presence of organized crime.

The political and administrative corruption is in fact precisely a part of the embodiment of performing infringements that are supported by organized crime: contracts and schemes, licenses for construction, support, staffing, financing of companies¹⁵. Thus, by "paying politicians, clerks, magistrates or police officers to turn their eyes away from illegal trafficking, the criminal group acts as an instigator of corruption." (The corruption offense in judicial acts is punished according to *Article 319*³ - "The Corruption in Judicial Acts" - according to which, "If the acts provided by *Article 318* and *319* are committed to promote or injure a party to a civil, criminal or administrative, process, shall be punished with imprisonment for 3-8 years.", and the crime of incitement to corruption is punishable according to *Article 322* - "Incitement to corruption" - according to which, "Any person who offers or promises money or other undue benefits to a public official or a provider of public services with the purpose of performing any act according to his duties, if the offer or promise was not accepted the penalty shall be reduced by one third. If the offer or promise is made to cause a civil servant or representative of a public service to omit or delay the performance of an act according to his duties, or perform an act contrary to his duties, whether the offer or promise was accepted or not, the penalty established in *Article 319* shall be reduced by one third ")¹⁶.

According to the Italian case law, for the offense of incitement to corruption the offer and the promise must be "serious and appropriate", confirmed by examination of all the circumstances of the specific case. Although "the diction is instigation", the term is understood in the peculiar sense of *Article 322* of the Italian Criminal Code, namely the subject who instigates, promises or gives undue amounts of money to a civil servant to perform an act in relation to his duties¹⁷.

The Italian Court of Cassation ruled legal classification of the promise of money for obtaining advantages in favor of a political party as a crime of incitement to corruption, *Article 322* of the Italian Criminal Code explicitly mentions only the promise made to the benefit of a civil servant or official¹⁸.

The offense of incitement to corruption defines as a misdemeanor, an offense whose consumption does not require that the promise made by the private person or the request of the civil servant to be accepted by the other party¹⁹.

The phrase "corrupted" is kept "in silence" and most "incentives" are designed to keeping the "faith" which derives precisely from the position of "guarantor" of organized crime. The "Dark Figure of Corruption" is reinforced precisely by this "silence", which is the "fruit" of a climate of intimidation. It was concluded that the "anti-State" mafia structures were stronger than the State structures, and sustained a degree of protection for corrupt exchanges, thus increasing the extent of the "Dark Figure of Corruption"

¹⁵ See MB Depuis, *Corruption*, Cedam Publishing House, Padova, 2002, p114;

¹⁶ See G. Fiandaca, E. Musco, *op.cit.*, p.217-220;

¹⁷ See MB Depuis, *op.cit.*, p115;

¹⁸ See G. Fiandaca, E. Musco, *op.cit.*, p239;

¹⁹ See G. Vinciguera, *op.cit.*, p132;

phenomenon²⁰. We believe that where crime reached its peak a double state is formed, the one constitutionally organized competed by the second, "governed" by its own organization and economic power.

Corruption has been the tool for changing the internal structure of organized crime and which today is the main tool to maintain power based on legal economy synergy with the criminal economy and the political power with the institutional one. The empirical research²¹ made on the mafia phenomenon "revealed" the homogeneity of mafia associations and companies lawful in terms of domestic social relations within enterprises, and the relationship between business and society.

Many companies resorted to practicing "corruption" especially where there were relations with the public administration. They justified their behavior by the fact that they were obliged, therefore forced to resort to this conduct for maintaining their services on the market.

The secondary legal object of corruption offenses injured by the legal entity's act is protection of equal opportunity in economy in terms of access to the market of goods and services²², undifferentiated treatment of the private entities by the authorities, protection of fair competition.

The corruption offense committed for the benefit of the legal person in order to obtain momentary advantages for its activity surpasses the scope of the activity object. This advantage should not be analyzed solely in terms of the patrimonial element which should instantly give benefits to the legal person.

The benefit must be understood either by acquiring a market segment, or by keeping a share of participation in a specific market of services. We can identify many crimes including corruption crimes that would be committed in the interest of the legal person.

These advantages must be individualized in each case and the criminal conduct that directly relates to patrimony will be much easier to identify, but we believe it will be more difficult to prove in case of a public image of power and strength.

Most times bribery is systematically connected to forgery. Many contractors have developed a habit of carrying their businesses under "protective garment", sheltered from competition, with a market for goods and services which actually is public contracts market. In this situation, the amount of the bribe was represented at first glance by the share of amounts divided after signing the contracts²³.

Regarding the link between corruption and organized crime, it is important to remember that corruption market is an illegal market in an environment where it is impossible to achieve compliance by means of a form of "legal guardianship".

Therefore, the "guardianship" is entrusted to the pressure of the illegal market, excluding an undertaking that has not committed corruption offenses to obtain a contract

²⁰ See P.Davigo, G. Mannorozzi, *op.cit.*, p116;

²¹ See W. Geary, *The legislative recreation of RICO: Reinforcing the "myth" of Organized Crime; Crime, Law and Social Changes*, no. 38, 2002, p55;

²² See J. Cartier-Bresson, *Corruption et pratiques anticoncurrentielles: une premiere reflexion a partir d'une etude de cas*, *Lamy droit Penal des Affaires*, 1989, No. 78, p4; B. Ramas-Muhlback, *Corruption dans les marches publics les aspects patrimoniaux*, *Droit. adm.*, 1999, *Chronic* no.6;

²³ See P. Davigo, *Interview about corruption*, Laterza Publishing House, Rome, 2004, p118;

to supply goods and services to the state, excluding the civil servant who does not accept undue economic advantages.

However, when an illegal market is managed by organized crime, the respect for rules is ensured by means of intimidation specific to criminal organizations.

Corruption reveals itself in its pure form - provided by *Article 318-319* of the Italian Criminal Code (according to *Article 318* of the Italian Criminal Code, "The civil servant, which to perform an act concerning his work related duties receives for himself or for another person a sum of money or other material advantage, undue remuneration, or accepts a promise of such benefits, is punished with imprisonment from 6 months to 3 years). If the civil servant receives remuneration for an act that was already accomplished, the penalty is imprisonment for up to one year.", And according to *Article 319* of the same law, "The civil servant who, in order to omit or delay, or for having omitted or delayed an act concerning his work related duties, or to perform or for having performed an act contrary to his work related duties receives for himself or for another person, a sum of money or other material benefit, or accepts a promise of such benefits, is punished with imprisonment for 2-5 years." *Article 319*², "Aggravating circumstances", provides that, "The penalty is higher if the object of the offense provided for in *Article 319* is to confer a public office, a salary, pensions or provisions of a contract that would interest the administrative authority of which the civil servant is part of.", "with a physiognomy contaminated" by organized crime²⁴.

CONCLUSION

The research on corruption and illegal financing political parties revealed links to corruption offenses and abuse of office²⁵.

The primary distinction between abuse of power (incriminated by *Article 317*, "Abuse of Power", of the Italian Criminal Code, according to which, "The civil servant or the representative of a public service who, by abusing his position and powers, coerces or claims from a person to give or promise to give him or to another person an amount of money or other undue material benefits, is punished with imprisonment for 4-12 years.") and individual corruption is the relationship between the will of the subjects. For the corruption offense the initiative belongs to an individual, while for the offense of abuse of power the initiative belongs to the civil servant²⁶.

In particular, for individual corruption the common unlawful goal is to the detriment of public administration, while in the case of abuse of power, the civil servant expresses the will of coercion which conditions the free conduct of private individuals who, in order to avoid greater harm, must promise or offer undue benefits to the civil servant and thus may continue his previous illegal endeavors. The possible common element is the anti-legal exercise of the official duties by the civil servant (Italian Court of Cassation, Berlusconi case, October 19, 2001)²⁷.

²⁴ See P. Davigo, G. Mannorozzi, *La corruzione in Italia. Perceptio sociale e controllo penale*, Latenza Publishing House, p 85;

²⁵ *ibid*, p19;

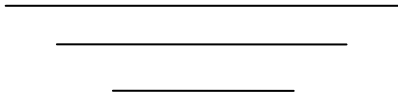
²⁶ See M. B. Dupuis, *op.cit.*, p129;

²⁷ See G. Vinciguera, *op.cit.*, p96;

The perception of corruption as "organized" or "associative" is prior to starting the "Clean Hands" study. In 1988, Franco Cazzola already observed the transformation of corruption in the south of the country, from "Pathology" to "System".

As a proof of this, two years after the start of the "Clean Hands" study, Bettini was noticing an accelerating in predisposition to certain forms of corruption, "Political corruption in Italy is owned by organized crime...".

Crime is the means of expression of "the weaker social subjects", being "unsuitable to understand the major crimes such as economic crime, organized crime, corruption"²⁸.



²⁸ See P. Davigo, G. Mannorozzi, op.cit., p263;