Aspects of Italian Civil Law in the Recent Developments Regarding Money Laundering Regulations

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Abstract

Original results have been achieved on the issue of money laundering through Italian regulations,[1] *mostly following the request of the European Community. In particular, the Decree dated 21 November 2007 n. 231, implementing two European directives (n. 2005/60/EC and n. 2006/70/EC), is the main framework, which coordinates the laws that have been passed in recent years.*[2] *My research is focused on the impact of the new regulations on the field of civil law, especially on contracts and obligations. The core of the paper is the involvement of the legal professionals and, in particular, of the lawyers, to the fight against money laundering. The topic also involves some problems about the protection of individual rights, such as right of transparency in the market, right to know economic and financial information, right to defense and to a fair trial, right to secrecy.*

Keywords: money laundering, preventive approach, traceability of payments.

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1 G.M. Flick, 'Riciclaggio', *in Enc. giur. Treccani*, XXVII, Roma, 1991, p. 1; L. Magistro, *Riciclaggio di capitali illeciti*, Milano, 1991, p. 3; G. Amato, *Il riciclaggio del denaro 'sporco'*, Roma, 1993, p. 17; L. Ferrajoli, *La normativa antiriciclaggio*, Milano, 1994, p. 3; E. Cassese, *Il controllo pubblico del riciclaggio finanziario*, Milano, 1999, p. 44; A. Di Amato, 'Contratto e reato, Profili civilistici', *in* P. Perlingieri (ed.), *Tratt. dir. civ. Cons. Naz. Notariato*, Napoli, 2003, p. 228; S. Faiella, *Riciclaggio e crimine organizzato transnazionale*, Milano, 2009, p. 11; R. Razzante, *Il riciclaggio nella giurisprudenza*, Milano, 2011, p. 43.

2 It also has been amended by the so called "Save Italy Decree" (Decree dated 6 December 2011 n. 201, inside the Monti's manoeuvre), which lays down urgent measures for growth and consolidation of public finances.

A. Compliance with International Standards

The Decree dated 21 November 2007 n. 231, which is the main regulatory framework in the recent developments regarding money laundering, was introduced in Italy at the urging of international law, in line with the international standards.[3]

Money laundering is frequently carried out in an international context, so the effort to combat it must be global. It has been necessary to concentrate on the Recommendations of the Financial Action Task Force, because they represent the most important international provisions, which help shape domestic legislation in the prevention of money laundering. Some of these Recommendations changed their flexible nature, when they found their way to the European directives, which made them into binding law for European member States.

The general concept of money laundering indicates exchanging money or assets that have been obtained illegally for money that is 'clean'; it also includes using lawful or unlawful money to fund terrorism however it is obtained. Accordingly, the measures of the 2007 Decree cover not only the manipulation of money derived from crime, but also the collection of 'clean' money for terrorist purposes. Terrorism and organized crime have one interest in common: to destroy or to weaken the rule of law or the principle of legality,[4] which is the basis of national legal system and the core objective of the European integration process.

B. The Prejudicial Influence of Money Laundering on the Market

In order to facilitate harmonization in this area, European Union Directives have established a much wider definition of money laundering: although initially limit-

3 Financial Action Task Force Recommendations are what we call "soft law" (a term referring to the lack of justifiability of legal instruments); they are not binding rules, but their contribution to the regulation we are discussing is impressive, as they provide a framework of rules in an area where, at the beginning, formal legislation was lacking. The forty recommendations on money laundering, adopted in 1990 and revised in 1996 and in 2003, are available on the website: <www.uif.bancaditalia.it>. The Financial Action Task Force (FATF, in Italy called GAFI, Gruppo d'Azione Finanziaria) is an independent international body, composed of the European Commission and the representatives of many countries of the world and the Council of the Gulf Cooperation. The updated list of the Member States of this organism is on <www.fatf-gafi.org>. About the incidence of the Financial Action Task Force in the fight against money laundering, *see* L. Ferola, *Il riciclaggio dei proventi illeciti nel diritto internazionale*, Milano, 2005, p. 165; P.L. Vigna, 'Relazione introduttiva', *in I decreti legislativi di attuazione della III direttiva in materia di antiriciclaggio e antiterrorismo nell'attività notarile*, Atti del Convegno, Firenze 26 January 2008, Roma, 2008, pp. 8-13; M. Krogh, 'La nuova filiera normativa (dalle raccomandazioni Gafi al D.lgs. 231/2007). I principi generali che regolano il nuovo sistema. Le definizioni di riciclaggio e di finalità di terrorismo. Gli obblighi previsti dal D.lgs. 22 giugno 2007 n. 109', in *I decreti legislativi di attuazione della III direttiva in materia di antiriciclaggio e antiterrorismo nell'attività notarile*, Atti del Convegno, Firenze 26 January 2008, Roma, 2008, p. 51.

4 P. Perlingieri, *Il diritto civile nella legalità costituzionale secondo il sistema italo-comunitario delle fonti*, Napoli, 2006, I, p. 32; P. Perlingieri, 'Il principio di legalità nel diritto civile', *in Rass. dir. civ.*, 2010, p. 164, who gives clear indications of what the principle of legality is; H. Christ, 'Does the rule of law have meaning within the European Union – a corpus linguistic approach?', *Diritto e processo*, n. 6/2010, p. 92.

ed to drugs crimes, it is now based on a broader range of offences.[5] The most innovative aspect of European law is that there is money laundering even if the activities that generated the money to be laundered were carried out in another member State or in a third Country.

Money laundering is the lifeblood for the Mafia and terrorist organizations, both because its objective is to lose track of the money coming from crime and because it allows organizations to finance themselves and to survive. In fact, money launderers accumulate massive flows of 'dirty' money initially and, later, they try to take advantage of the movements of capitals to help criminal activities and to give a licit semblance to something whose origin is, really, illegal. The funds derived from criminal activities are brought into the channels of legitimate economy, invested and mixed with 'clean' enterprises, thus putting the integrity and the stability of the entire economy at risk. For all these reasons, fighting against money laundering is an essential goal in order to ensure the confidence in the market and to protect our society.

The issue of money recycling has traditionally been considered the prerogative of the criminal law scholars. It is, however, a problem that has affected, even the scholars of civil law for some time now, because they have been studying the responses to organized crime both in relation to the rules about restricting the use of cash in the payments system, both in relation to the various tasks given to the professionals to combat money laundering.

C. The Original Response to Money Laundering: The Preventive Approach

Over the last two decades, legislation has expanded its range by identifying innovative tools in the battle against money laundering. In this direction, a preventive effort has been required in addition to the criminal law perspective.

It is generally assumed that organized crime must be fought not only by the penalties of criminal justice, such as confiscation and seizure of assets, that are put into effect when the offence has already been established, but also using civil tools, which do not consider the conviction of a criminal, but, more specifically focused on the future, aim more at preventing than repressing money recycling.

The first Italian legislation on money laundering – the 1991 law – was based on limiting the use of cash,[6] because money was – and also is – normally laundered through cash movements. In order to guarantee a minimum of traceability

5 Di Amato, 2003, p. 228; M. Angelini, *Il reato di riciclaggio (Art. 648 bis c.p.), Aspetti dogmatici e problemi applicativi*, Torino, 2008; Razzante, 2011, p. 59.

6 Regarding the problems about contractual obligations of paying in cash, *see* generally B. Inzitari, G. Visintini & A. Di Amato, 'Moneta e valuta', *in* F. Galgano (ed.), *Tratt. dir. comm. e dir. pubbl. econom.*, VI, Padova, 1983; E. Quadri, 'Le obbligazioni pecuniarie', *in* P. Rescigno (ed.), *Tratt. dir. priv.* 9, I, Torino, 1984, p. 431; G. Olivieri, 'Sistemi di pagamento', *in Enc. giur. Treccani*, XXXIII, Roma, 1995, p. 1; . G. Olivieri, 'La rilevanza del tempo nei sistemi di pagamento', *in Banca, borsa e tit. cred.* 2000, I, p. 161; A. Di Majo, *Le obbligazioni pecuniarie*, Torino, 1996, p. 276; B. Inzitari, *Profili del diritto delle obbligazioni*, Padova, 2000, p. 19 and p. 398; A. Riccio, 'Le obbligazioni pecuniarie', *in* M. Franzoni (ed.), *Le obbligazioni, I. L'obbligazione in generale*, Torino, 2004, pp. 1011-1025; G. Carriero & V. Santoro (eds.), *Il diritto del sistema dei pagamenti*, Milano, 2005.

of movements of capital, payments in cash were allowed up to the threshold of 20 million Lire (then become 12.000 Euros). But this law left some problems unsolved, especially those requiring the transparency of the market. The circulation of the information on transactions appeared unsatisfactory, because it did not allow cross checks between the supervisory authorities of the economic sector. It concerned essentially banks,[7] credit and financial institutions, in particular in order to prevent crime; instead, it was also necessary to extend control to the legal profession, potentially vulnerable to money laundering.

The provisions of 2007 Decree ring the changes regarding the way of transferring funds, carrying out the process that is called the 'dematerialization' of money. Several amendments of the legislation have later improved the rule on the traceability of payments, providing a further progressive reduction of the limit of the use of cash.

Recently, Monti's manoeuvre in 2011 has forbidden cash payments of 1,000 Euros or more, that must be made through banks, electronic money institutions or the Italian Post Office.[8] It means that cash movements have been minimized, have become marginal, referred only to the operations of minimum economic value, thus implementing the principle of transparency.

I wonder if it would be better to ban the use of cash completely, not just limit it, also in order to reduce tax evasion and to prevent the payments of employees' cash in hand. Monti's manoeuvre, in fact, tends to connect the fight against money laundering and that against tax evasion, considering that facts that involve the application of the money laundering regulations may emerge from fiscal controls.

D. The Transparency of the Market in Terms of Prevention of Money Laundering

In order to make progress in the prevention of money laundering, the application of the general principle of transparency shows its great importance.[9]

The principle of transparency means traceability of payments and collection of data on movements of money and it implies control of those persons involved in business transactions (that could disguise the origin of criminal proceeds). Using transfer tools to circulate the money available presupposes signing contracts with banks and financial intermediaries, which are under the control of the public authorities.

7 M. Comporti, 'Identificazione della clientela, segnalazione di operazioni sospette di riciclaggio e tutela della riservatezza', *in* C.G. Corvese & V. Santoro (eds.), *Il riciclaggio del danaro nella legislazione civile e penale*, Milano, 1996, p. 393.

8 The prohibition also refers to bearer securities (bonds, open checks), which do not specify the name of the holder and move with the simple delivery of the title. The circulation of bank checks is also strictly regulated; they must have the non-transferability clause at the moment of issue.

9 About the great importance of the general principles in the application of law, *see* P. Perlingieri, 'Applicazione e controllo nell'interpretazione giuridica', *in Riv. dir. civ.*, 2010, p. 323; L. Mezzasoma, V. Rizzo & L. Ruggeri (eds.), *Il controllo di legittimità costituzionale e comunitaria come tecnica di difesa. Corte costituzionale italiana e spagnola a confronto*, Napoli, 2010.

This intermediation of the banks pursues the primary objective of identifying the real beneficiaries of the operations. In fact, banks have to verify the identity of the customers, to keep appropriate paper trail of records and also to report any indications of money laundering to the competent authorities: using electronic systems, they are able to respond rapidly to requests for information on the business relationships they have with named persons.

The principle of transparency, through the annotations on the current accounts of individuals involved, ensures useful traces for the purposes of any investigation and could give evidence of eventual implication in criminal activities.

E. The Consequences of the Violation of the Rule on the Traceability of Payments

If someone violates the rule on traceability of movements, different penalties are fixed as a percentage of the amount transferred (from 1% to 40%), imposed by the Ministry of Economy and Finance. In this case, the contract by which money has passed from one person to another is not null, but it continues to be valid.[10]

The law prohibits the money from being transferred, but keeps the contract – which is, normally, the source of the monetary obligation – in being and this is demonstrated by an important rule that, even if the payment is made in cash, without complying with the traceability of capital movements, the effect of payment is immediate.

In Italian legal system, we have to take into account that, as a general rule of Civil Code (Art. 1418, c. 1, c.c.), a contract can be declared null and void if it breaches a mandatory norm. The problem is if the nullity established by Italian Civil Code can sometimes be declared when the contract is made in violation of criminal law.

According to some academics, the behaviour judged by criminal law would have never effect on the validity of the contract, but this thesis is disputable, because based on the idea of incommunicability between civil law and criminal law and it is contrary to the principle of the unity of the Italian legal system. In my opinion, the money laundering norms are all criminal 'behaviour rules', which could, in particular cases, become the 'rule of validity' of a contract.

The right way to solve the problem is to emphasize the practical objectives pursued by the parties: if the result to which they aspire is not licit, the contract

10 Comporti, 1996, p. 397.

should be considered null.[11] We can say that, if the transfer of cash made without observing the traceability of capitals, constitutes a means of committing money-laundering offences, such activity would affect the validity of the contract. For example, if you buy a house for 100,000 Euros and you pay this amount in cash, thus laundering 'dirty' money, and the seller knows this and takes advantage of the operation, the sale contract should be considered null and void.[12] In this case, in fact, the practical objective pursued by both parties is clearly illicit.

In Italy, a special anti-Mafia legislation envisages the nullity of the contract in similar cases.[13]

F. The Involvement of the Legal Profession to the Fight Against Money Laundering

As innovative result, the 2007 Decree introduced a wide array of stringent obligations not only referred to financial institutions, but also to legally recognized and controlled professionals, such as auditors, labour consultants, external account-

11 M. Mantovani, *Divieti legislativi e nullità del contratto, in Nuova giur. civ. comm.*, 1987, p. 68; G. Villa, *Contratto e violazione di norme imperative,* Milano, 1993, p. 133; M. Rabitti, 'Controllo di validità degli atti strumentali ai reati fallimentari e disciplina della revocatoria', *in Riv. dir. civ.*, II, 1997, p. 341;. M. Rabitti, *Contratto illecito e norma penale. Contributo allo studio della nullità,* Milano, 2000; U. Breccia, 'Contrarietà alle norme imperative', *in* M. Bessone (ed.), *Tratt. dir. priv., Il contratto in generale*, v. XIII, t. III, Torino, 1999, p. 234; A. Grasso, *Illiceità penale e invalidità del contratto*, Milano, 2002, pp. 98-99; Di Amato, 2003, pp. 227-228; P. Perlingieri, 'La contrattazione tra imprese', *in Riv. dir. impr.*, 2006, p. 323, p. 335 and p. 338; P. Perlingieri, 'La dottrina del diritto civile nella legalità costituzionale', *in Rass. dir. civ*, 2007, p. 498. Regarding the nullity of the contract , in general, *see* C.M. Bianca, 'Il contratto', in *Diritto civile,* III, Milano, 2000, p. 617; M. Nuzzo, 'Negozio giuridico, IV) Negozio illecito', in *Enc. giur. Treccani,* XXIII, Roma, 1990, p. 1; C.M. Bianca, 'Introduzione alle scienze giuridiche', in *Le istituzioni del diritto privato* (a cura di M. Nuzzo), 1, Torino, 2005, p. 222.

12 Another example: To assume the invalidity of a bank deposit contract, money laundering should involve both parties, in the sense that both the bank and the customer should have decided to sign the contract for the same unlawful purpose. Nullity of the contract could be declared even when one of the contracting parties signed the contract to facilitate the offence committed by the other, taking advantage of the situation.

13 *See* the Italian law dated 13 August 2010 n. 136. More exactly, when the violation of the anti-money laundering regulation concerns a public service contract, the contract is null and void if it does not include the clause in which the contracting authority is obliged to provide traceability of payment. The contracting authority is the public administration or government contracting agencies that assigns the contract to the company that makes the best offer. Regarding this topic, *see* M. Mazzeo, 'Non si sfugge alla tracciabilità', *in Resp. civ.*, 2010, p. 11; F. Michelangelo, 'La tracciabilità finanziaria nei contratti pubblici', *in Corr. merito*, 2011, n. 3, p. 237.

ants, tax advisors, notaries and lawyers, when they participate in financial or corporate transactions.[14]

A special active role in the fight against money laundering is played by the legal professionals, as they represent channels of communication between the private and the public sector. In Italy, they are called 'gatekeepers', because they can put their clients in contact with the financial and economic world.

Their cooperation increases the possibility of tracking down and punishing illegal activities, because they have to verify the identity of their clients,[15] to check their legal history, to assess the risk of the business being used to launder 'dirty' money and to report anything suspicious to the competent authority.

When a lawyer assists a client in establishing a new business or in a financial or corporate transaction, he needs to obtain information on the intended nature of the transaction, on the origin of funds that will be using and on the scope of activity that will be undertaken.

Another aspect of the professional's involvement in the fight against organized crime regards the recording of cases, which must be observed 'promptly and in any case within thirty days of acceptance of the professional assignment'. It means keeping all documents that relate to financial transactions, including the identity of clients, risk assessment and management procedures.

The risk of money laundering is not the same in every case, so the principle introduced by legislation is that obligations must be adapted using a risk-based approach. This is based on general legal parameters, such as the type of client, the type of professional service, the kind of product or transaction. In line with this principle, simplified customer due diligence is allowed in appropriate cases, for example, when the customer is a bank.[16]

14 The application field of Italian money laundering regulation covers professionals who assist their clients (whether by acting on behalf of and for their client) in any financial or real estate transaction, or assist in the planning or execution of transactions for their client concerning the: buying and selling of real property or business entities; managing of client money, securities or other assets; opening or management of bank, savings or securities accounts; organization of contributions necessary for the creation, operation or management of companies; creation, operation or management of trusts, companies or similar structures), real estate agents, casinos.

15 The customer due diligence of lawyer means taking steps to identify the customers by obtaining their name, their photograph on an official document which confirms their identity, their residential address and date of birth. The best way to do this is to ask for a government issued document like a passport, identity card. Sometimes, he also needs to identify the 'beneficial owner'. This may be because someone else is acting on behalf of another person in a particular transaction. Or it may be because it is necessary to establish the ownership structure of a company, partnership or trust. The "beneficial owner" is the person who is behind the customer and who represents or controls the customer (think of corporate bodies) or it is the person on whose behalf an activity is carried out. Verifying the identity of the beneficial owner means taking elements similar to those required for the customer. During their activity of control, professionals may decide to use public sources, such as public registers, lists or documents available to anyone.

16 Less rigorous identification procedures are required, when the customer is a bank or an other financial intermediary or a credit institution subject to the EU directive on money laundering or financial institution located in a non-EU country that imposes an anti-money laundering regime equivalent to that provided by the relevant framework (Art. 25).

According to this principle of gradual measures, in situations that, by their nature, can present a higher risk of money laundering, the obligations must be proportionate to it and more stringent than those ordinarily required.[17]

If the client refuses to give all the information requested, the professional must suspend the services in progress and assess the transaction to decide what to do. In any case, before informing the Financial Intelligence Unit, the professionals are obliged to refrain from carrying out transactions that they suspect to be connected to money laundering. This conclusion derives also from some provisions of the professional ethics of the lawyers, that have marked effect, by their binding nature,[18] on the fight against money laundering.

G. The Obligations of Reporting Suspicious Transaction

The professional must submit a report not only when he knows, but even when he suspects or has reasonable grounds to suspect that money laundering or terrorist financing is being or has been committed or attempted. In order to help the professionals in this delicate task, there are some indexes of suspect based on strange or abnormal behaviours of the clients in their economic or financial operations.

The obligation of reporting does not mean that professionals take responsibility for criminal investigation, because they are not police officers. The report seems to be an act of disclosure duty; this facilitates the investigation, since the communication is not sent directly to the Court, but to the Financial Intelligent Unit, which must analyse the received data accurately as a starting point for investigations and, if necessary, report a crime.

Consequently, the report does not constitute an allegation of crime, but an act of pre-investigation, which communicates the facts constituting a possible indication of money laundering. This is confirmed by the fact that a monetary penalty, rather than a criminal penalty, is imposed for any person who fails to

17 Stricter customer due diligence for high-risk operations is envisaged, for example, when the customer is not physically present for identification purposes. In this case, the professional must ascertain the identity of the client through additional data, adopt specific and adequate measures to compensate for the higher risk, such asking for a confirmatory certificate from a financial institution, making sure that the first payment of operations is carried out through a bank account.

18 Regarding the binding nature of the professional codes of conduct, *see* A. Bellelli, 'Codice deontologico medico e tutela del paziente', *in* P. Zatti (ed.), *Le fonti di autodisciplina*, Padova, 1996, p. 116; P. Zatti, 'Tutela della privacy, Comm. alla l. 31 dicembre 1996, n. 675. Capo IV, sub art. 25, Il codice deontologico dei giornalisti relativo al trattamento dei dati personali', *in Nuove leggi civ. comm.*, 1999, p. 598, p. 600 and 'Legge sulla privacy e codice deontologico dei giornalisti', *in Rass. dir. civ.*, 1999, p. 3; A. D'Angelo, 'La deontologia dell'avvocato', in *Le fonti di autodisciplina*, *o.u.c.*, p. 125; G. Piepoli, 'Autodisciplina professionale e codici deontologici, una prospettiva europea', *in Quad. dir. priv. eur.*, 1997, I, p. 85; G. Alpa, 'La prassi e i codici deontologici', *in* R. Sacco (ed.), *Le fonti del diritto italiano, I, Le fonti scritte, in Tratt.*, Torino, 1999, p. 106; G. Alpa, 'I principi generali', in G. Iudica & P. Zatti, *Tratt. dir. priv.*, Milano, 2006, p. 547; N. Lipari, 'Fonti del diritto e autonomia dei privati (Spunti di riflessione)', *in Riv. dir. civ.*, 2007, I, p. 727; G. De Minico, *Regole, comando e consenso*, Torino, 2004, p. 139.

report suspicious transactions. A criminal penalty might obviously be applied in case of conspiracy of the professional in the offence.

If the suspects are unfounded, the Financial Intelligent Unit and declares the case closed. On the other hand, if the suspects are founded, the Financial Intelligent Unit continues the procedure and may proceed to report the crime to the Court or transfer to the Anti-Mafia Investigation Dipartment or to the Financial Police, who will inform the Anti-Mafia Prosecutor Office.

As feedback information, the Financial Intelligent Unit is responsible for informing the professional that the case has been closed, so that the person who made the report knows that the investigation is concluded, thus confirming the reliability of the client.

H. Limits to the Confidentiality on the Part of Lawyers

It must be highlighted that there is a contrast between the obligation to report suspicious transactions and the principle of professional secrecy, with particular regard to the lawyers.

The lawyers should respect the secrecy of all information received in the course of professional activity. On the one hand, confidentiality is a primary duty of the lawyers, because they should be told by the client things that the client would not tell to others. On the other hand, they are obliged to report suspicious transactions to the authority.

The solution to the problem of balancing the two different obligations seems to be given by the norm that envisages that the reporting 'does not produce liability of any kind' (Art. 41, para. 6 of the 2007 Decree). This means that the obligation of reporting prevails over the duty of confidentiality, because the prevention and the repression of crime are considered supreme values. Consequently, the individual right to secrecy is limited by law in order to satisfy the interest of criminal justice.

But the reporting of suspicious transactions does not exclude the right of the client to ask for compensation when the professional who made the report was wrong.[19] Therefore, the lawyers are not always obliged by law to report suspicious transactions. For these reasons, it is an essential point for the lawyers to know with certainty when they are obliged to report and when they are not.

In order to find the right answer to this problem, an important rule has been established by the Decree. The rule introduces a wide exemption from any obligation to report suspicious transactions when the lawyers represent a client during legal proceedings or when they are ascertaining the legal position of a client before, during or after judicial proceedings. This is a fundamental directive that

19 Regarding the malpractice of lawyers in general, *see* A. Sherr, *Client Care for Lawyers: An Analysis and Guide*, London, 1999; A. Sherr, *Compensation for Inadequate Professional Services*, IALS, London, 2000.

protects the individual right to a fair trial[20] and helps lawyers to decide on their behaviour during professional activity.

According to this directive, lawyers are obliged to report anomalies to the competent authorities when they assist clients in the sphere of business and commerce or in the sphere of finance or real estate, always in a context definitely unrelated to judicial proceedings.[21] On the contrary, they are not obliged to report suspicious transactions if they are defending their client in a trial or if they are simply giving advice or getting information about the legal position of the client, possibly connecting him to judicial procedures.

It is not always easy to distinguish this kind of professional activity and sometimes the situation of uncertainty makes it difficult for lawyers to decide about the necessity of reporting. The possibility to be liable for their mistakes might produce litigations and debates in the future.

I. The Secrecy of the Report to the Financial Intelligent Unit

When a report has been made to the Financial Intelligent Unit, the professional is obliged to keep it secret: he cannot tell the client or anyone else, anything about the report made. The professional is obliged also to keep the outcome of the report and the result of the investigation secret: nothing can be communicated to the client to to third parties. By this way, the legislator aims to protect the professionals who made the report from being exposed to threats or hostile actions.[22]

The reports must be kept by the professional for ten years to allow consultation by investigative agencies.

The Italian Law requires that the identity of the person making the report should not be revealed even when this has become a criminal prosecution. The investigative agencies are obliged to omit the personal data of professionals who have reported suspicious transactions in judicial prosecution proceedings or in any other communications.

20 On the individual right of defence, *see* G. Giacobbe, *Diritto di agire in giudizio*, in *I rapporti civilistici nell'interpretazione della Corte costituzionale, Rapporti civili, Rapporti etico-sociali.*, Acts of the 2 National Congress, Capri, 18-19-20 April 2006, Napoli, 2007, p. 98; P. Perlingieri, *Funzione giurisdizionale e Costituzione italiana*, Napoli, 2010, p. 10, p. 26.

21 You can find a clear indication in this sense in Court of Justice, 26 June 2007, C-305/2005-2798, *in Corr. giur.*, 2007, 8, p. 1169, with the comment of R. Conti & R. Foglia, *Riciclaggio, obblighi di informazione a carico degli avvocati ed equo processo.*

22 The 2007 Decree prohibits not only the professional, but also anyone else involved from disclosing the report to third parties and to the client himself (Art. 46, para. 1). The 2007 Decree requires coordination with the Italian Privacy Code (the 2003 Decree n. 196), because the professionals cannot tell the client anything about the report made or the result of the investigation. It is clear that there is a restriction on the personal data protection of the customer, because he cannot have access to how his personal data is used. On the other hand, the personal data must be treated "lawfully and correctly, collected and recorded for specific, explicit and legitimate purposes." It means that a professional is obliged to explain to the client that his personal data will also be used to execute the obligations imposed by money laundering regulations and to proceed, if necessary, to a suspicious transaction report.

Despite the secrecy of the reports in private relationships, the Decree guarantees the availability of an information database,[23] which should allow any public supervision required by law in the fight against money laundering. Therefore, it must be taken into account that the information recorded by professionals can be used for purposes of taxation and, in fact, the Financial Intelligence Unit must pass on the information to the tax authorities for the investigation of related crimes.

Other exceptions to the secrecy of reports facilitate both the collaboration between professionals, even if situated in different Countries,[24] and the cross communication between the supervisory authorities.[25]

By this way, the 2007 Decree seems to have found the right compromise between the protection of human rights and the need to combat organized crime.

J. The Proposal Regarding a System of Global Cooperation between Public Authorities

In my opinion, the Italian anti-money laundering regulation has partly filled the gaps in the previous regulatory framework.

Nevertheless, in the global society, national authorities should cooperate more closely: they should exchange information relating to suspicious transactions with similar authorities from other States, not only on European level, but also on International level.

The problem is that some Extra-European Countries have a stricter protection of national secrecy than the others, and they do not have equivalent requirements to those laid down in European Union.

According to Italian regulations, the information received from the foreign authorities can be transmitted to the competent Italian authorities, unless the authority of the State that provided the information forbids this explicitly. In order to avoid this, the same level of regulation and supervision should be achieved in every State, also outside the European Union.

23 About the problems that exist in the current system of exchange of information among member States regarding criminal convictions, *see* C. Stefanou & H. Xanthaki, *Towards a European Criminal Record*, Cambridge University Press, Cambridge, 2008, p. 1, which notes the necessity of a European Criminal Record, given the gaps in national registers.

24 The regulations envisage that the professionals who work in a partnership, as employees or associates, even if situated in third Countries, can exchange information relating to reports made with each other, provided that they apply measures equivalent to those laid down by European Directives (Art. 46, para. 5, of 2007 Decree). According to the limits fixed by the money laundering regulations, the secret information can be circulated among the competent authorities, but the exchanged information must be used exclusively for the purposes of prevention or repression of money laundering.

25 This legal monitory system is founded on a network of public supervisors, who have to cooperate each other and their powers can be delegated between national authorities and between those authorities and European Community. In this direction, *see* the European Union directive 24 November 2010, n. 78.

This would require a partial revision of some foreign legislation, which should give additional powers to the Financial Intelligent Units in a perspective of global harmonization.[26]

This urgency emerges, for example, comparing the Italian regulation with the Swiss money laundering regulation. In fact, in Switzerland, under the current law on official secrecy and bank confidentiality, the Swiss Financial Intelligent Unit is not permitted to exchange financial information – such as bank account numbers – with foreign Countries. Consequently, the authorities of European member States, on the bases of a reciprocal behaviour, are also reluctant to share financial information with Swiss authorities. This situation is not satisfactory. It does not help to prevent money laundering and prosecute the people involved.

It would be appropriate to make all the national laws on data exchange between authorities comply with the Recommendations of the Financial Action Task Force.[27] According to these Recommendations, the Financial Intelligent Units from all over the world should exchange all available information and nothing should be concealed on the bases of national secrecy.

A system like this would not be against human rights standards as long as the general principle of legality is satisfied; if this principle is respected, the transfer of information and personal data collected would improve the quality of life of European Union citizens, because it is directed to reduce organized crime.[28]

26 A. Cornelli, 'Di fronte alle sfide della società globalizzata un modello unitario per i servizi di intelligence', *in Guida dir., Il Sole-24Ore,* 2012, n. 14, pp. 10-11, who presents a unitary model of the Intelligence Services in order to face to the challenges of globalization.

27 All the national laws should comply, in particular, with the principles f the Egmont Group. Since 1998, the Financial Intelligent Units have been consolidated at an international level in the Egmont Group, whose aim is to improve the efficient and secure exchange of information and to set fundamental standards and general clauses for international cooperation. Every single State that is member of the Council of Europe should sign the Convention of Varsavia, that has been passed in 3 May 2005, but not signed by all the contracting parties yet. About this problem, *see* A. Baldassarre & A. Pavesi, 'La Convenzione di Varsavia sul riciclaggio, la ricerca, il sequestro e la confisca dei proventi di reato e sul finanziamento del terrorismo', *in* M. Condemi & F. De Pasquale (eds.), *Quaderni di ricerca giuridica*, 2008, n. 60, p. 262.

28 For an excellent study in international and comparative criminal law about the use of database and criminal records as means of preventing organized crime, *see* C. Stefanou & H. Xanthaki, *Financial Crime in the EU: Criminal Records as Effective Tools or Missed Opportunities?*, Kluwer Law International, The Hague, 2005, p. 13, p. 42, where it is highlighted the importance of a "central archive accessible to all banking institutions, tendering authorities and professional associations".