Il reato di riciclaggio: un banco di prova per i principii del manifesto del diritto penale liberale e del giusto processo

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Gli attuali sviluppi del diritto penale sostanziale e processuale espongono i principii fondamentali del diritto penale liberale – ben lontani dal costituire un acquis delle legislazioni penali nazionali – a un rischio costante di violazione. Per questa ragione, tali principii sono stati riaffermati nel Manifesto del diritto penale liberale e del giusto processo, edito dall'Unione delle Camere Penali Italiane nel 2019 e oggetto di un dibattito a Bologna, nel novembre 2022. Prendendo le mosse da tale incontro, il presente articolo intende, da un lato, mostrare la continuità tematica tra tali principii e la c.d. Frankfurter Schule für Strafrecht, dall'altro lato, si propone di comparare i principii numero 2, 3, 5, 11 e 15 del Manifesto con la legislazione italiana e tedesca in materia di riciclaggio, evidenziando la natura strumentale di tale reato e la sua paradigmatica attitudine a violare i principii di un diritto penale liberale.

1. Introduction. The *Manifesto* on the trail of the *Frankfurter Schule des Strafrechts*.

The *Manifesto del diritto penale e del giusto processo*, issued by the *Unione delle Camere Penali Italiane* (UCPI) in 2019 and discussed in Bologna, 18-19 November 2022, during the International Congress "*I principii del Manifesto: un dibattito per i penalisti europei*", is clearly an expression of liberal criminal law. The reader of the *Manifesto* will easily find a deep connection with the thoughts developed by the so-called Frankfurt School of Criminal Law (*Frankfurter Schule des Strafrechts*)[1].

[1] This article is based on the speech delivered at the conference of the *Unione delle Camere Penali Italiane* titled "*I principii del manifesto: un dibattito per i penalisti europei*" which took place on 18-19 November 2022 in Bologna. Sections 1 to 2.1. were written by Matthias Jahn; Sections 2.2. to 3 were written by Federica Helferich.

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1.1. Then…

Indeed, many criminal law scholars interpreted the joint papers issued by the "founders" of the *Schule*[2] – namely Professors Winfred Hassemer, Klaus Lüderssen and Wolfgang Naucke – as a sort of "Manifesto" of the Frankfurt School, thus implying that their shared view on criminal law prevailed over their standpoints and works. Hassemer, Lüderssen and Naucke, however, repeatedly maintained that such a School ultimately did not exist[3] or, "if it ever existed […] it never was founded, but rather grew up spontaneously"[4] – let alone the existence of a Manifesto!

Indeed, what others labelled as "*Schule*" actually happened to be, from the viewpoint of the founders, a sort of academic affiliation, which shared the same *forma mentis* and critical approach towards criminal law[5]. Naucke, Hassemer and Lüderssen "naturally" agreed on considering criminal law as a source of "irresolvable problems"[6]. And, even if the answers they provided to these problems could diverge widely[7], what mattered and proved to be the true bond was the way the answers were looked for: that is, through the peculiar style of arguing and debating ("*Debattenstil*")[8] that the three Professors specifically developed at Goethe University in the early '70s.

With the help of a post-1968 dialogue-friendly environment, intellectual inventiveness and readiness to constant confrontation, debates rose everywhere – in classes, in elevators, during lunch and, of course, at the legendary *Dienstagsseminar*[9], an academic arena which still takes place after fifty (!) years, every Tuesday since the Winter Term 1973/74. This *esprit* and the critical attitude towards criminal law ended up being inherited by the "scholars" (Peter-Alexis Albrecht; Klaus Günther; Ulfrid Neumann; Cornelius Prittwitz; Felix Herzog…) and still bond legal doctrine nowadays.

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[2] See for instance HASSEMER *et al.* (1979a); HASSEMER *et al.* (1983b), as well as the publications issued in the book series "*Frankfurter Kriminalwissenschaftliche Studien*" (Peter Lang Verlag) and those edited by the INSTITUT FÜR KRIMINALWISSENSCHAFTEN FRANKFURT (1995a); INSTITUT FÜR KRIMINALWISSENSCHAFTEN FRANKFURT (1999b); INSTITUT FÜR KRIMINALWISSENSCHAFTEN FRANKFURT (2007c).

[3] NAUCKE (2010), p. 434.

[4] HASSEMER (2005b), p. 10.

[5] On this topic, see for details JAHN M. and ZIEMANN S. (2014), p. 943.

[6] LÜDERSSEN (2010), p. 373.

[7] Indeed, KUHLEN (2023), p. 143 ff., argues that the Frankfurt School did not exist, both because of the heterogeneity and the aporia of the personal dogmatic solutions to the abovementioned problems.

[8] NAUCKE (2010), p. 434.

[9] NAUCKE (2010), pp. 432-433.

1.2. …And now.

Debate is exactly what the principles of the *Manifesto* and the related Congress pursue. Indeed, Frankfurt in the early '70s, with its all-peculiar social and political climate[10], was the right time and the right place for the development of ground-breaking ideas on criminal law. Likewise, *now* is the right time and the right place for discussing the *Manifesto* and sharing ideas (and concerns, too!) on the actual state of criminal law among European legal scholars, in the light of the "School's" idea of an "*allgemeines Strafrecht*"[11].

The core similarities between the *Manifesto* and the critical approach of the *Schule*, however, are content-related.

– First off, they share the novel idea of criminal law and criminal punishment as a *power*, as such prone to abuse and in constant need of boundaries[12]. These boundaries, moreover, need to operate on a double level[13]. On the one hand, they serve to legitimise (*i.e.*, democratize) the *allocation* of the punitive power: from this point of view, the *Manifesto* rightly warns against shifts of authority between the Legislative and the Government, as well as between the Legislative and the Judiciary[14]. On the other hand, boundaries guarantee the legitimacy of the *exercise* of said power. This is a key aspect of the so-called *Strafverfassungsrecht*[15], which in Italy was paradigmatically developed by Franco Bricola[16]: namely, the idea that a national Constitution is both a limit and a binding content provider for national criminal law[17]. It is not by chance that Winfried Hassemer, the first criminal lawyer from *Academia* appointed as a judge of the *Bundesverfassungsgericht* (BVerfG), in his dissenting opinion to the decision *Geschwisterinzest* of 2002[18], stated that material criminal law, too, had to comply with the *Grundgesetz*[19].

– Secondly, the *Frankfurter Schule des Strafrechts* and the *Manifesto* share a critical view on the use of criminal law as a panacea, a sort of cure-all-means offered by a good prince for dealing with any worrisome phenomenon affecting society. Highlighting the

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[10] JAHN M. and ZIEMANN S. (2014), pp. 944-945.
[11] HASSEMER (2005b), p. 11.
[12] UNIONE DELLE CAMERE PENALI ITALIANE (2019), pp. 8 and 10.
[13] On this topic see the insights by BARTOLI (2022), pp. 56-58.
[14] UNIONE DELLE CAMERE PENALI ITALIANE (2019), p. 3.
[15] See the various contributions to BÄCKER M. and BURCHARD C. (2022).
[16] See DONINI (2012), p. 63.
[17] BURCHARD (2016), p. 28, claims that the Constitution "organizes" and "limits" criminal law, and therefore "ends up legitimizing it".
[18] BVerfG, Beschl. v. 26. Februar 2008 – 2 BvR 392/07 = BVerfGE 120, 224 (255).
[19] See JAHN (2016a), p. 77.

social and political costs of this dysfunctional use of penal law, the *Manifesto* resonates with the *Schule's* thoughts on the use of criminal law both as a tool and as a symbol for societal problems[20].

– And, thirdly, the *Manifesto* stresses the risk of criminal procedural law being an arena of social regulation and score-settling, instead of a time and space solely aimed at determining the facts and the possible criminal responsibility of the person charged[21]. In this respect, the recent promise of the German Government to make criminal trials "more effective, quicker, more modern and more workable" cannot but raise concern among legal scholars. The criminal procedural law forged by the German Code for criminal procedures (*Strafprozeßordnung* – StPO) actually calls for the opposite approach. It is about time that a *Magna Charta Libertatum* of the accused person is introduced in the StPO, in order to affirm and enshrine the core principles in this matter: the presumption of innocence, the full dignity of the person charged and the right to a fair trial, to begin with[22]. These principles, indeed, are constantly at risk of fading too far into the background.

This is why the *Manifesto* is particularly needed in the European landscape right now, as much as the penal law needed our predecessors' groundwork back in the early days of the *Frankfurter Schule* fifty years ago. Pressure raises counterpressure, one may say.

2. The crime of money laundering: a touchstone for the principles of the *Manifesto*.

Unfortunately, the importance of the *Manifesto* can also be confirmed by contrast, *i.e.*, by highlighting the provisions, interpretations and practices that actually *deny* its core statements. In this regard, a comparable key role is played by the crime of money laundering, in Italy as well as in Germany.

As a matter of fact, both article 648-*bis* of the *Codice penale* (art. 648-*bis* c.p.) and § 261 of the German *Strafgesetzbuch* (§ 261 StGB) seem to have undergone a process of expansion and instrumentalization in gross disregard of the principles of liberal penal law. Indeed, the offence of *riciclaggio*/*Geldwäsche* has become a paradigmatic example precisely of the form of criminal law that the *Manifesto* aims to make aware of.

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[20] UNIONE DELLE CAMERE PENALI ITALIANE (2019), pp. 4-5.
[21] UNIONE DELLE CAMERE PENALI ITALIANE (2019), p. 4.
[22] JAHN (2022d) and JAHN (2022e).

This is particularly true when observing the recent reforms that have occurred in both legal systems in order to comply with EU Directive 2018/1673[23]. Legislative Decree 195/2021 has broadened the scope of art. 648-*bis* c.p. by including in the range of predicate offences all crimes of negligence and certain types of contraventions. In Germany, the Law of 9 March 2021 has gone even further. It has given § 261 StGB the shape of an *all-crimes-Tatbestand* encompassing *every* unlawful fact (*rechtswidrige Tat*) – whereas until that moment the *Geldwäsche* provision was based on a closed list of (mostly serious) predicate crimes. If the broadening of art. 648-*bis* c.p. raises more than a dogmatic perplexity[24], the new shape of § 261 StGB is a veritable change of paradigm[25] – even though this provision seems doomed once again to remain more effective on paper than in reality[26].

For this reason, this paper intends to run a condensed "test" of some of the core statements of the *Manifesto*[27] against both article 648-*bis* c.p. and § 261 StGB.

2.1. Principle no. 2.

"*Criminal law is an instrument of social control strongly affecting one's fundamental rights and interests* […]".

The offence of money laundering indeed affects personal liberties and freedoms at more than one level.

Firstly, on a strictly punitive one. As it will be seen in connection with Principle no. 5, the range of behaviours that are criminalised as "money laundering", both in Italy and in Germany, is wide and poorly determined.

But the crime of money laundering represents "*an instrument of social control strongly affecting one's fundamental rights and interests*" also on an administrative-preventive level. The system of anti-money laundering (AML) is a system of integrated control based on crime-prevention[28] via detention and use of financial information; in this context, the repressive moment is conceived as a last resort.

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[23] Directive (EU) 2018/1673 of the European Parliament and of the Council of 23 October 2018 on combating money laundering by criminal law.
[24] Overview by MELCHIONDA (2022), p. 1 ff.
[25] GERCKE *et al*. (2021), p. 330.
[26] Based on an empirical study, BUSSMANN, K.-D. and VELJOVIC, M. (2020), p. 420, already observed that, even under the previous version of § 261 StGB, Public Prosecutors very often suspended trials for money laundering (§ 153a StPO) because of the predicate crime being petty.
[27] To this end, we will provide an English translation of the relevant principles of the *Manifesto*.
[28] STESSENS (2001), p. 108, qualifies it as "a twin-track fight".

Indeed, the offence of money laundering is *genetically* connected to the information-based AML system: the very decision to criminalise money laundering roots in global economic concerns[29] shaped by the growing interconnectedness of markets and financial systems. As a result, the crime of money laundering – just as the preventive apparatus! – is a means of *control* of illegally obtained assets and financial risks[30]. To the criminal lawyer, this situation recalls the BVerfG's constitutionally grounded *caveat* on the instrumentalization and weaponization of criminal law[31].

But the crime of money laundering also displays an *operative* connection to the AML system. This raises concerns with respect to *Manifesto's* Principle no. 2 under two different viewpoints, both strictly connected to "*social control*": the obtainment and the exchange of financial information.

Suspicion transaction reports (STR) are the main tool for *obtaining* such information[32]. The trigger for an STR is the (merely factual) suspicion of an ongoing, attempted or achieved operation of "money laundering". Now, whilst in Italy the notion of *riciclaggio* serving to this end is autonomously defined by art. 2, par. 4, of Legislative Decree 231/2007[33], the German legislation (§ 43 *Geldwäschegesetz* – GwG)[34] refers to the *criminal* notion of money laundering, *i.e.*, to § 261 StGB[35]. This reference creates a functional liaison between the repressive and the preventive system[36]: the wider the criminal notion of *Geldwäsche*, the higher the number of STR and the flow of fiscal information[37].

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[29] ALLDRIDGE (2001), p. 280.

[30] PIETH (1999), p. 543.

[31] BVerfG, Urt. v. 30. Juni 2009 – 2 BvE 2/08, 2 BvE 5/08, 2 BvR 1010/08, 2 BvR 1022/08, 2 BvR 1259/08, 2 BvR 182/09 = BVerfGE 123, 267 (410), *Lissabon* ("The core content of criminal law does not serve as a technical instrument for carrying out international cooperation but represents the particularly sensitive democratic decision on a legal ethical minimum standard").

[32] Article 35 of D. Lgs. 231/2007 and § 43 GwG.

[33] Legislative decree of 21 November 2007, *Implementing Directive 2005/60/CE on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing and Directive 2006/70/CE laying down implementing measures for Directive 2005/60/EC*, in G.U. Serie generale n. 290 of 14 December 2007.

[34] *Law on the Identification of Profits from Serious Crimes* of 23 October 1993, in BGBl. 1993, I, 1770.

[35] Obliged entities shall file a suspicious transaction report if elements are indicating that a good connected to an economic transaction originates from a criminal behaviour that could be a predicate crime of *Geldwäsche* under § 261 StGB (§ 43, par. 1, GwG).

[36] FINDEISEN (1997), p. 121.

[37] In 2010, the FATF regretted that "for an economy the size of Germany's […] the level of suspicious transaction reports appears to be unusually low" (although of "very high quality"), because it "denies the FIU and the state law enforcement Authorities important access to a wider intelligence base": FATF/GAFI (19 February 2010), pp. 170-171, parr. 714 and 719. In 2021, the German FIU observed that one of the causes for the notable increase in STR was the adoption of

In addition, FIUs are also legitimised to acquire information *motu proprio*, both by consulting obliged entities (even regardless of a previous STR)[38] and by accessing a wide range of public registers and databanks[39].

Also, criminal law becomes an instrument of social control because of the *exchange* of such information among public entities involved in the fight against money laundering. Indeed, according to the relevance of the financial information in their possession, national FIUs have to share said information with the judicial, law enforcement, fiscal, custom or intelligence authorities[40] as well as with FIUs of other Member States[41].

Such a network of information exchange is likely to threaten (among other things) the constitutional right to informational self-determination (*informationelle Selbstbestimmung*), as stated by the BVerfG in the *Antiterrordateigesetz I* decision[42], in that it may determine a *de facto* loss of the pivotal distinction between intelligence activities (aiming at a preventive security-oriented data collection and analysis) and investigation activities (meant to react to suspected committed crime and aiming at acquiring incriminating and also exculpatory evidence). This distinction is indeed the precondition of the principle of separation of police and intelligence data (*informationneller Trennungsprinzip*)[43], whose circumvention may forge intelligence-based rather than suspicion-led police investigations.

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an all-crimes approach in § 261 StGB: FIU (12 September 2022), pp. 15-16.

[38] Art. 6, par. 6, letter c) of D. Lgs. 231/2007; § 30, subsection 3, GwG. On this subject see the critical remarks by VOGEL, B. and MAILLART, J.-B. (2020), p. 207.

[39] Art. 6, par. 6, letter e) and art. 9 of D. Lgs. 231/2007; §§ 31 and 23 GwG.

[40] Art. 47 D. Lgs. 231/2007; § 32 GwG.

[41] Art. 53 of Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing. On this topic, see the highlighted issues by GIANFELICI, F. and SIENA, F. A. (2021), p. 21 ff.

[42] BVerfG – 1 BvR 1215/07, Urt. v. 24. April 2013 = BVerfGE 133, 277 (316), Rn. 93 ff. The *Antiterrordateigesetz I* decision concerned a joint counter-terrorism database allowing data sharing among a large number of security authorities with very different mandates, especially police authorities and intelligence services, in disregard of the principle of proportionality. The right to informational self-determination originates from Art. 2, par. 1, in conjunction with Art. 1, par. 1, of the German Constitution (*Grundgesetz*, GG); it has recently been reaffirmed in two decisions concerning information exchange between police and intelligence: BVerfG – 1 BvR 1619/17, Urt. v. 26 April 2022, upcoming in BVerfGE 162; BVerfG – 1 BvR 2354/13, Beschl. v. 28. September 2022, upcoming in BVerfGE 163.

[43] Also applying to "extended use" (data mining) of databases set up for police authorities and intelligence services: see BVerfG – 1 BvR 3214/15, Urt. v. 10. November 2020 = BVerfGE 156, 11 (40), Rn. 74 – *Antiterrordateigesetz II*.

2.2. Principle no. 3.

"*A penal system is only liberal when the punitive reaction is legitimated. The legitimisation derives from the respect of a strict necessity-rule; from the proportion in respect to the underlying legal interests, and the respect of the person affected*".

The legitimisation of the crime of money laundering in this respect appears to be doubtful because the "underlying legal interest" that the criminal provision is supposed to provide for – the *Rechtsgut* – is difficult to grasp. It has been said by Gunter Arzt that § 261 StGB came into the world "without a brain and without a heart, which means without a *Rechtsgut*"[44]: which is also true for art. 648-*bis* c.p. Or, if ever they have had a *Rechtsgut*, because of their initial connection to organized crime and, since 2001, to the financing of terrorism[45], they now have completely lost it on their way to being the fit-all-crimes for every investigative purpose.

The judicial approach to this topic is rather disappointing: some judges seem to have given up on recovering the legal interest underlying the national offence of money laundering[46]; some others resort to the concept of multi-harmfulness[47] or else talk of a "peculiar *Rechtsgut* not to be further concretised"[48]. For its part, the scholarly debate still revolves around two poles equally unsatisfactory because equally unable to grasp the complexity of the phenomenon of money laundering.

On the one hand, the claim that the offence of money laundering is dangerous for the integrity of the economic and financial legal system – *i.e.*, for competition rules[49] as well as for the collective interest for an equal and correct allocation of monetary resources[50] – does not find an echo in the structure of the criminal provisions, especially after the all-crimes approach[51] has been enlarged (Italy) or newly adopted (Germany).

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[44] ARZT (1999), p. 758.

[45] Art. 648-*bis* c.p. has been forged by Decree Law no. 59 of 21 March 1978, bearing *Substantial and Procedural Rules for Prevention and Repression of Serious Crimes* (then converted into Law no. 191 of 18 Mai 1978, in G.U. no. 137 of 19 Mai 1978); § 261 StGB has been introduced by the *Law Against Illegal Drug Trafficking and Other Forms of Organized Crime* (1. OrgKG), of 22 July 1992, in BGBl. I, 1992, p. 1032.

[46] As far as concerns the *Isolierungstatbestand* (former § 261 Abs. 2 StGB), see *ex multis* BGH, Urt. v. 4. October 2010 – 1 StR 95/09, *NStZ* 2010, 517 = *NJW* 2010, 370, merely referring to the intention of the legislator when interpreting; BGH, Beschl. v. 23. April 2013 – 2 ARs 91/13; 2 AR 56/13, *NStZ-RR* 2013, 253 = *MMR* 2013, 674; BGH, Beschl. v 6. Juni 2018 – 1 ARs 163/18; 2 AR 106/18, Rn. 5.

[47] C. cost., sent. n. 302/2000.

[48] BVerfG, Urt. v. 30 März 2004 – 2 BvR 1520, 1521 = BVerfGE 110, 226 (251), *Geldwäsche durch Strafverteidiger*.

[49] MANES, Vittorio (2016c), p. 856; LAMPE (1994), pp. 125 – 126.

[50] BRICOLA (1993), p. 38; PEDRAZZI (1993), p. 654.

[51] In support of a different view, see CAEIRO (2018), p. 282 ff.

Indeed, the economic quality and/or quantity of the predicate offence has no influence whatsoever on the criminal relevance of the laundering fact, nor does the behaviour criminalised under art. 648-*bis* c.p. and § 261 StGB contain any reference to an economic context[52]. Also, German legal scholars are keen on pointing out that the integrity of the economic and financial legal system is not an appropriate *Rechtsgut* at all, because it has a collective and abstract nature – thus resonating with the *Frankfurter Schule* – and appears to be far too fragile and too fungible at the same time[53]: all the more reason to deny this economic legal interest has an actual hermeneutic and critical function[54].

On the other hand, the claim that the money laundering offence is a crime against the administration of justice (*Rechtspflege*) reverberates in the structure of both art. 648-*bis* c.p.[55] and § 261 StGB[56]. The modal clause "*in a manner that hampers the identification*" of the illicit provenance and the newly shaped behaviours of § 261 Abs. 1 Nr. 1 and 2 and Abs. 2 (see *infra*) indeed (may) harm the investigation and confiscation activities.

Nevertheless, even if this legal interest is less evanescent than the economic one, a substantial respect for Principle no. 3 of the *Manifesto* does not automatically follow, especially when considering the actual all-crimes pattern. First of all, the punishment established by art. 648-*bis* c.p. (detention from four up to twelve years and fine from 5.000 up to 25.000 Euros) is undeniably not proportionate, considering that money laundering facts can result in a petty offence or even a mere bagatelle. Secondly, the so-called *Isolierungstatbestand* under § 261 Abs. 1 Nr. 3 and 4 n.F. does not seem to "*respect* […] *a strict necessity-rule*", given that it explicitly criminalises neutral behaviours (obtention, custody and use of a tainted good)[57] in order to overcome evidentiary problems[58].

Lastly, as it will be shortly demonstrated, since the legal interest "administration of justice" may be filled up with several contents, it can foster and nurture the instrumental nature of the crime of money laundering.

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[52] Except for the aggravating circumstance under art. 648-*bis*, par. 3, c.p. and for the autonomous provision of § 261 Abs. 4 StGB (*Qualifikationstatbestand*).
[53] JAHN (2020c), p. 663, Rn. 96.
[54] On this function HASSEMER (1989a), p. 88).
[55] DELL'OSSO (2017), p. 81 ff.
[56] ALTENHAIN (2017), pp. 526 ff. (Rn 8 ff.).
[57] SALDITT (1992), p. 125; MANES (2004a), p. 55.
[58] BUNDESRAT, *Draft of a Law Against Illegal Drug Trafficking and Other Forms of Organized Crime*, BT-Drs. 12/989 of 25 July 1991, p. 27.

2.3. Principle no. 5.

"*Every excessive usage of the punitive power goes beyond the principle of the 'bare minimum necessary' and therefore represents an arbitrary act of the State and, in the most serious cases, a crime. Institutions have the precise duty to assure the respect of the criminal offender, who can never be instrumentalized in the name of crime prevention*".

Not only do the criminal provision of *riciclaggio* and *Geldwäsche* allow the obtaining and exchange of financial information, but they also pave the way for the application of far-reaching and intrusive investigative measures, such as undercover investigations (art. 9, co. 1, lett. a Law no. 146 of 16 March 2006; § 110a StPO) telephone wiretapping (art. 266, par. 1, letter a) c.p.p.; § 100a, par. 2, no. 1, letter m StPO) and online searches (100b, par. 2, no. 1, letter l) StPO).

For this reason, as it has been pointed out by scholars in both legal systems, the criminalisation of money laundering displays a procedural instrumental nature[59] that may result in a violation of Principle 5 of the *Manifesto*.

Indeed, the suspect and/or the official charge of money laundering, on the one hand, allows law enforcement authorities to carry out investigations both on (alleged) predicate crimes[60] and on (alleged) laundering activities[61]. On the other hand, it may give rise to investigations that go *beyond* money laundering and its (alleged) predicate crimes, aiming at discovering and dismantling the criminal network possibly having organised the crimes[62].

This instrumentality of the suspect/official charge of money laundering clearly is useful and legit when law enforcement authorities are confronted with serious cases of money laundering, such as the (alleged) laundering of large amounts of money; the laundering of money (allegedly) deriving from serious crimes (both scenarios requiring a solid criminal network); the injection of copious quantities of laundered money in the financial system.

But one should always bear in mind that, nowadays, *any* crime can be a predicate crime of money laundering, not to mention the fact that § 261 subsection 6 StGB punishes negligent money laundering – *i.e.*, the fact of not realizing that a good has an illegal origin due to superficiality or carelessness[63] (a vivid example of an "*excessive usage of the*

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[59] JAHN, Matthias (2019b), p. 1710, Rn. 5; MANES (2006b), p. 5230.
[60] BERNSMANN (2009), p. 328.
[61] BARTON (1993), p. 160.
[62] BT-Drs. 12/989 p. 21; SEMINARA (2000), p. 703.
[63] See for instance BGH, Beschl. v. 11. September 2014 – 4 StR 312/14, *NStZ-RR* 2015, 13. However, ever since BGH, Urt. v. 7. July 1997 – 1 StR 791/96, *JR* 1999, 76, 78 (=BGHSt 43, 158 (168)), when it comes to *Geldwäsche*, case law gives a "willfulness-close" interpretation of negligence.

punitive power", in the words of the *Manifesto*). Therefore, the broadness of the investigative measures that it allows, combined with the system of information exchange, reveals the instrumentality of the money laundering criminal provision as a disproportionate tool for the control and repression of predicate crimes[64].

Indeed, German case law has faced this issue multiple times, due to the previously closed range of predicate crimes in § 261 StGB. In 2003, the *Bundesgerichtshof* (BGH) was confronted with defendants accused of money laundering and criminal conspiracy for smuggling, and thus wiretapped. At that time, however, on the one hand, smuggling was not included in the catalogue of crimes allowing wiretapping pursuant to § 100a StPO a.F. and, on the other hand, the evidentiary framework made it clear that the suspects had participated in the predicate offence and therefore (at that time) could not be charged for (self)money laundering as well[65]. In 2020, the BVerfG affirmed that a domestic search[66] and a search at a lawyer's place[67] can only be justified by a so-called double suspect, which means a suspect concerning the money laundering *and* additionally a suspect concerning its possible predicate offence.

Lastly, the German legislator has acknowledged this problem and the underlying proportionality issues[68]. While transforming § 261 StGB in an all-crimes *Tatbestand*, the 2021 reform has established that law enforcement authorities can only proceed to wiretap in relation to cases of money if its predicate offence belongs to one of the "serious crimes" listed in § 100a Abs. 2 Nr. 1-11 StPO.

2.4. Principle no. 11.

"*The legal system has a main duty to clearly define any criminally relevant fact*. […]".

The principle of determinateness of criminal provisions is in danger to be denied when it comes to the crime of money laundering. The "war-against" attitude that led to the introduction and the further implementation of the offence of money laundering, as well as the adaptivity of the underlying criminal phenomenon (see *infra*, 2.5.) seem to

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[64] BRODOWSKI (2021), p. 423.

[65] BGH, Beschl. v. 26. Februar 2003 – 5 StR – 423/02, *NJW* 2003, 1880 (= BGHSt 48, 240). A similar case has been faced by OLG Hamburg, Beschl. v. 19 Juni 2002 – 3 Ws 70/02, *StV* 2002, 590.

[66] BVerfG, Beschl. v. 3. März 2021 – 2 BvR 1746/18, *NZWiSt* 2020, 276.

[67] BVerfG, Beschl. v. 31. Januar 2020 – 2 BvR 2992/14, *NStZ* 2020, 559 = *NJW* 2020, 1351.

[68] MINISTRY FOR JUSTICE AND CONSUMERS' PROTECTION (BMJV), *Draft of a Law for the Improvement of the Fight against Money Laundering via Criminal Law* of 11 August 2020 (BR-Drs. 620/20), p. 16 (Ref-E); GOVERNMENT OF THE GERMAN FEDERAL REPUBLIC, *Draft of a Law for the Improvement of the Fight against Money Laundering via Criminal Law* of 9 November 2020 (BT-Drs. 19/24180), p. 17 (Reg-E).

legitimise a deliberate denial or an attenuation of the constitutionally relevant principle of determinateness, allowing case law to elastically interpret the constitutive elements of the crime.

As for Italy, the two alternative criminal conducts of "substitution" and "transfer" respect to a certain extent the principle of determinateness. "Substitution", the most ancient form of laundering, consists of the physical replacement of a tainted good with a "clean" one[69]; "transferring" means resorting to legal tools that translate property or possession of a good[70].

However, the third conduct, "perform other operations", somehow nullifies the (already scarce) level of determinateness of "substitution" and "transfer". Because of its broadness, it has been assimilated into a sort of residual general conduct[71] aiming at catching all the behaviours that are not to be subsumed under "substitution" or "transfer": for instance, a material, rather than legal, transfer[72], or even the mere hiding[73] of stolen goods.

Most importantly, all of these behaviours have to be committed "*in a manner that hampers the identification*" of the illicit provenance of the good. The majority of scholars interpret this requirement as an attribute of all three forms of conducts[74] that has to be judicially assessed *in concreto* on an individual base[75]. Nevertheless, case-law is not keen on ascertaining the actual fitness of the conduct to hamper the identification. In particular, *any* cash deposit in a bank is considered a "substitution" *ex se*, given the fungible nature of money[76]; and *any* banking operation aiming at interrupting the paper trail "hampers the identification", even if the operation was actually traceable[77].

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[69] GALLI (2019), p. 4727; CASTALDO, R. and NADDEO, M. (2010), p. 120.
[70] MANTOVANI (2021), p. 293; ZANCHETTI (1997), p. 208.
[71] CINGARI (2023), p. 399.
[72] Cass. pen., Sez. II, sent. n. 18577 del 24 gennaio 2003, in *Cass. pen*., 2004, p. 3642; Cass. pen., Sez. II, sent. n. 11895 del 17 febbraio 2009 (dep. 18 marzo), *Verroggio*.
[73] Cass. pen., Sez. II, sent. n. 46754 del 26 settembre 2018 (dep. 15 ottobre), in *Cass. pen*., 2018.
[74] ACQUAROLI (2015), p. 813; DELLA RAGIONE (2018), p. 101; Cass. pen., Sez. II, sent. n. 13448 del 13 febbraio 2005, *De Luca*, in *Cass. pen*., 2006, p. 1822. According to PLANTAMURA (2009), p. 182, however, the modal clause "*in a manner that hampers the identification*" only refers to the conduct of performing "*other operations*".
[75] MANES (2004a), pp. 54-55; SEMINARA (2000), p. 267.
[76] Cass. pen., sent. del 5 aprile 1986, *Ghezzi*, in *Giur. it*., 1988; Cass. pen., Sez. II, sent. n. 52549 del 17 novembre 2017; Cass. pen., Sez. VI, sent. n. 13085 del 3 ottobre 2013; Cass. pen., Sez. II, sent. n. 5972 del 22 gennaio 2013 (dep. 7 febbraio), in *St. iuris*, 2013, p. 1047. For recent developments on bitcoins in the Italian case law see VADALÀ (2021), p. 2224 ff.
[77] *Ex multis*, Cass. pen., Sez. II, sent. n. 32936 del 13 luglio 2012, *Papale*; Cass. pen., Sez. II, sent. n. 46319 del 21 settembre 2016.

As for Germany, one of the ambitions of the 2021 reform was to perform a "rationalisation and restructuring"[78] of the criminal conducts enshrined in § 261 StGB. Indeed, in 2008 the BGH sharply criticised such conducts, accusing them to be "barely understandable", constantly overlapping and so broad that "almost every interaction with an ill-gotten good" had become criminally relevant[79].

Nevertheless, even after 2021, not only does the *Gesetzessystematik* of § 261 StGB remains unaltered, but also the changes that occurred to the conducts are so mild that it can still be said that § 261 StGB is an "open-crime *Tatbestand*"[80] aiming at catching all forms of contact with tainted goods, irrespective precisely of the principle of determinateness of criminal provisions. Indeed, the newly shaped behaviour of *hiding* the ill-gotten good ("*verbergen*", § 261 Abs. 1 Nr. 1), which consists in concealing or displacing the good, subtracting it to the law enforcement radars, may overlap with the newest behaviour of "*substituting, transferring, moving*" ("*umtauschen*, *übertragen*, *verbringen*", § 261 Abs. 1 Nr. 2) of the proceeds in order to avoid their recovery or confiscation. However, these new conducts themselves may overlap with the new Abs. 2 (see *infra*) and/or may result in one of the conducts of the so-called *Isolierungstatbestand*[81].

A further problem in respect of the principle of determinateness under Art. 103 Abs. 2 GG is also the all-new behaviour of § 261 Abs. 2 StGB. Although it criminalises a core-behaviour of laundering, namely concealment and disguise ("*verheimlichen*; *verschleiern*"), this conduct is no longer referred to criminal proceeds and/or their provenance, but to "*elements*" ("*Tatsachen*"), that "*may be useful for the discovery, the confiscation, or the investigations on the paper tail*" of the proceeds themselves[82].

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[78] Reg-E, p. 31.

[79] BGH, Urt. v. 24 Juni 2008 – 5 StR 89/08, *JR* 2008, 478 = *NJW* 2008, 2156 (2157).

[80] See JAHN (2019b), p. 1721 Rn. 42.

[81] ALTENHAIN, K. and FLECKENSTEIN, L. (2020), p. 1050. Because of these risks of overlapping, it is preferrable to interpret the new § 261 Abs. 1 Nr. 2 StGB as a crime of concrete, rather than abstract, danger: GERCKE *et al*. (2021), p. 337.

[82] In order to counterbalance the vagueness and broadness of this *Tatbestand*, some scholars propose to interpret it as a crime of concrete danger requiring the additional element of the risk for the deviation of investigations, on the model of the crime of false allegations under § 164 StGB: GERCKE *et al*. (2021), p. 337.

2.5. Principle no. 15.

"*Criminal legislation has to be based on criminological data that are reliable and accepted by the scientific community. The worthiness of a more severe punishment has to be grounded in proportionated and criminologically corroborated interests*".

When it comes to money laundering, criminological studies on its empirical dimension appear to be particularly necessary. Indeed, the multi-faceted, adaptive and chameleon-like nature of the criminal phenomenon of money laundering challenges both the ability of the criminal provision to crystallise its actual harmfulness (*Unrecht*) and the aptitude of the preventive regulation to effectively intercept laundering activities.

If the conceptual *description* of money laundering as a three-stage process made of "placement, layering and integration" seems to have achieved a certain level of solidity in the scientific community, the same cannot be said as far as regards its *quantification*.

The constant asymmetry between the annual number of STRs and the number of convictions for money laundering[83] sheds a light on the seriousness of the dark figure of crime rate. Also, despite the importance of criminological data, as stated by *Manifesto*'s Principle no. 15, the scientific community still lacks a common yardstick and a fully endorsed method for measuring the *quantum* of laundered money on a national and/or international scale[84]. In 1994, the IMF estimated that the global sum of laundered money amounted to between 2 and 5 percentage points of global GDP[85]. Further evaluations do not sensibly differ from this esteem: according to the UNODC, in 2009 the global amount of laundered money was "probably" up to 1,6 trillion US dollars[86]; in 2011, it is said to be between 800 billion and 3 trillion, although "it is difficult to estimate the total amount of money that goes through the laundering cycle"[87].

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[83] In its 2022 *Annual Report*, the German FIUs states that, in 2021, the number of STRs concerning money laundering was 295.324 (99% of 298.507 STRs in total), whereas the overall number of convictions amounted to 103. As for Italy, in 2019 the FIU had to deal with 104.933 money laundering-related STR (out of 105.798 STRs) and the number of convictions was 475 (this data is taken from the document "Analysis of Legislative Impact" annexed to the Draft of Legislative Decree no. 159/2021, p. 7-9). In 2021, the FIUs Annual Report states that the number of STRs concerning *riciclaggio* amounted to 138.936 (99, 6% of 139.524); we do not dispose of judiciary statistics concerning 2021.

[84] VAN DUYNE *et al*. (2018), p. 121 and p. 132.

[85] IMF (1994), as critically reported by QUIRK (1996), p. 26.

[86] UNODC (25 October 2011).

[87] UNODC (2011).

In this situation, policymakers and stakeholders only seem to be able to conduct *ex-post* identifications of vulnerable businesses, social activities and/or geographical areas[88], with a view to deciphering "typologies" or rather "methods and trends" of money laundering[89].

National legislators, for their part, chase a questionable idea of "effectiveness" and react by increasing the possibilities of crime detection: meaning both the tightening of the business requirements and the broadening of criminal provisions' scope. Whether this also justifies the forging of all-crimes offences, however, is not straightforward: the main consequence of such a normative implementation is that, by sheer mathematics, everybody becomes a money launderer, sooner or later – which means, nobody really is[90].

3. Conclusions.

The crime of money laundering is a perfect example of the modern shift of penal law from a liberal to a security paradigm[91].

Indeed, both *riciclaggio* and *Geldwäsche* were introduced in times of emergency due to the need to counter the newest worrisome criminal phenomenon, *i.e.*, organized crime. This justified the structure of art. 648-*bis* c.p. and § 261 StGB as serious crimes, based on the previous commission of a determined and serious offence.

Despite the official rationale of a campaign (in fact, a war) against economic organized crime and terrorism financing, with the passing of time, the shape of the provisions began to expand and their harmfulness became less and less specific. Simultaneously, the intersections with the administrative-preventive system gained greater importance and the flow of financial information developed into a valuable asset in the fight against all sorts of crimes. To the extent that, bearing in mind the crime of self-laundering too, one may paraphrase what has been said about embezzlement[92] and declare: "*Geldwäsche geht immer*"! Therefore, the crime of money laundering offers a

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[88] See the study of the GERMAN MINSTER FOR FINANCE, *First National Risk Analysis – Fight against Money Laundering and Terrorism Financing*, 10 October 2019, based on the analysis of BUSSMANN, K.-D. and VOCKRODT, M. (2016), p. 138.

[89] Following the creation, in 2016, of a *Working Group on Risks, Trends and Methods* within the FATF, its empirical reports and case studies that used to be called "*Typology Reports*" now go under the name of "*Methods and Trends*".

[90] FISCHER (2021), p. 114.

[91] On the topic of security in criminal law from a global perspective see the recent work of NIETO MARTÍN (2022), p. 49.

[92] RANSIEK (2004), p. 634.

privileged viewpoint to continue watching over and advocating for the precarious relationship between the punitive system, freedom and guarantees.

Look out, closely, for what comes next.

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