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Italy

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A. GENERAL ASPECT OF PRE-TRIAL INVESTIGATION

IN ITALY, A country belonging to the civil law tradition, a statutory basis is necessary for procedural rules. In 1999 Article 111, para 1 of the Italian Constitution was amended and now states that jurisdiction is carried out through the fair trial rule of law (*la giurisdizione si attua mediante il giusto processo regolato dalla legge*). However, even before that innovation, there was no doubt about the necessity of governing criminal (and even civil) procedure by statutory law.

The Code of Criminal Procedure (CCP) belongs to the area of public law; the current Code[2] entered into force on 24 October 1989, and has been heavily amended by a variety of statutes during the more than 20 years of its operation.

The first stage of Italian criminal process (as in many other states) is the phase of investigation, ie the 'pre-trial' phase. Investigation begins when there is a *notitia criminis* ('notification of a crime': CCP, Article 330f). This phase ends with the decision of the Public Prosecutor to prosecute (*esercitare l'azione penale*: CCP, Article 405) or to drop the proceeding (CCP, Article 408).

In order to arrive at the decision to prosecute or not, the Public Prosecutor has to investigate all the issues both for and against the defendant. With a decision to prosecute there begins the phase in which the principle of publicity of the hearings and the principle of 'orality' (which means that evidence against the defendant must be presented by live witnesses in court, subject to cross-examination) are recognised at the highest level, and at the end of which the judge must decide whether the defendant is guilty or not.[3]

[1] This chapter is the result of a mutual exchange of ideas between the two authors; nevertheless, Francesca Ruggieri is the principal author of sections A1 to B8, Stefano Marcolini of sections B9 to E4. The work represents the law as at October 2011.

[2] The code incudes also rules as to putting into effect (*norme di attuazione, di coordinamento e transitorie*, eCCP).

[3] There may also be an intermediate stage between the investigation and the public trial: after the indictment by the Public Prosecutor, but before the public trial, a different judge (the 'judge of the preliminary hearing') must verify in a preliminary hearing (*udienza preliminare*, CCP, Art 416 ff) that the request has a real factual basis, ie that the indictment is well grounded on the results of the investigations and, consequently, that there is a likelihood that the defendant will be convicted at the end of the public trial. If so, the judge appoints a day for the trial (CCP, Art 429); if not, he/she must acquit the defendant of the charge (CCP, Art 425). See below, section C3.

1. Body Carrying out Investigation, Prosecution and Judicial Review

The 1989 Code of Criminal Procedure rejected the idea of the 'investigative judge' (*giudice istruttore*), hitherto a part of the Italian criminal justice system and a legacy of the French *juge d'instruction*. Today only the Public Prosecutor, the Police and the 'judge of freedom' (*giudice per le indagini preliminari*) are involved in the pre-trial stage: the last of whom has no investigative powers but the role of guaranteeing fundamental rights of freedom, privacy, property, etc during the pre-trial phase.

Theoretically, the division of roles requires the Public Prosecutor to prosecute[4] and the police to investigate. However, often the Public Prosecutor investigates as well.

The Public Prosecutor belongs to the judicial system (*magistratura*): ie to the unitary body of judges and Public Prosecutors whose independence is guaranteed by a constitutional body, the *Consiglio Superiore della Magistratura*. This structure is recognised and regulated by the Constitution (Articles 104–106).

Police officers who carry out criminal investigations come usually from one of the three specialist and general police agencies in Italy: the *Carabinieri*, *Guardia di Finanza* and *Polizia di Stato*.[5]

2. Absence of a Specialised Procedure for Financial Criminal Investigation

There are no special rules for financial *criminal* investigations, but there are specific rules for financial *non*-criminal investigations.

Financial violations are normally established under administrative law and repressed by the Ministry of Finance through its central and peripheral organs, the so-called *Agenzia delle entrate* (the Revenue Agency).[6]

The financial authorities do not need judicial authorisation to carry out their investigation activities. These authorities can obtain information about bank transfers of a person over the last five years.

In the event that the suspected tax evasion exceeds certain thresholds, the administrative violation becomes a criminal violation. These threshold amounts are set out, in detail, for every kind of tax, in Legislative Decree (*Decreto Legislativo*) number 74 of 10 March 2000.

Some law enforcement agencies, such as *Guardia di Finanza*—the body of police skilled in the investigation of tax evasion[7]—are experts in financial investigation. For this reason, the Public Prosecutor very often uses these agencies in his/her criminal investigations: for example, to analyse accounts in a criminal bankruptcy or in a crime of bribery or money-laundering. In addition, the *Guardia di Finanza* can cooperate with banks and swiftly obtain information about transactions and operations, by cash or otherwise.[8]

[4] Generally, you can assume that in Italy the Public Prosecutor is the only person entrusted of the prosecution: ie the charge or indictment (*azione penale*). The Italian Constitutional Court has ruled, however, that this monopoly is not absolute, with respect to a peculiar 'popular action' in force in the electoral legislation.

[5] There are also some yet more specialist units within the *Polizia di Stato*, *Carabinieri* and *Guardia di Finanza*, such as: *GIS*, or *Gruppo di Intervento Speciale*¸ Special Intervention Group; *RIS*, or *Reparti Investigazioni scientifiche*, Scientific Investigation Division; *NOCS*, or *Nucleo Operativo Centrale di Sicurezza*, Central Operation Security Squad; *GICO*, or *Gruppo di Investigazione sulla Criminalità Organizzata*, Group on Organised Crime. The *DIA*, or *Direzione Investigativa Antimafia*, Antimafia Investigative Direction, must also be mentioned.

[6] See, eg, Decree No 633 of 26 October 1972, on VAT.

[7] On *Guardia di Finanza*, see also above, section A1.

[8] See again Decree No 633 of 1972.

Undercover operations may also be carried out for financial crimes, such as money laundering. And when financial crimes are ascribed to a criminal association, wiretapping is easier than in a normal criminal proceeding, because a milder ground is allowed by a special law,[9] and the operations can last 40 days (extendable by a judge).

As noted above, a fiscal violation is normally not a criminal violation, but it turns into a criminal offence only if the evasion exceeds certain amounts prescribed by law. This requires a coordination rule. Whenever the administrative authorities, during their financial non-criminal investigations, are alerted to a crime, due to the amount of the suspected tax evasion, the administrative proceeding turns into a criminal proceeding. From that moment on, evidence must be collected according to the CCP and the person of interest becomes a person being investigated and he/she must be granted of all the rights belonging to this new status.[10]

This means that, for example, the *Guardia di Finanza* normally acts in the field of financial investigations as a Law enforcement agency; but when, during these financial investigations, a crime is discovered, a criminal proceeding must immediately start, with all the guarantees of due process.

Thus, every time an administrative proceeding for a financial violation turns into a criminal proceeding, all the following rules concerning the rights of the accused, due process, the law of evidence, etc (practically, the whole CCP), will be applicable.

3. Legal Entities

The process against legal persons, for their liability related to criminal offences, is contained in the *Decreto Legislativo* of 8 June 2001, No 231, which basically shaped the process to legal entities much like that in the Code of Criminal Procedure, plus some special issues (the Decree has 85 articles).

Actually, during the proceeding the legal entity is considered like a person being investigated, or a defendant: Article 35 of the mentioned Legislative Decree says so.

Thus, the following rules, concerning the rights of the person accused, the law of evidence and, generally, the criminal investigations, are valid, with some logical adjustments, for the legal entities also.

B. INVESTIGATION MEASURES

1. Interrogation of Witness at the Investigation Stage (Including Complainants/Injured Party)

It is possible to interrogate witnesses in the investigation stage from the moment the notification of a crime is recorded (CCP, Article 335). This measure can be applied for every criminal offence, whether petty or serious.

[9] Art 13 of Law Decree No 152 of 13 of May 1991, converted into Law No 203 of 12 July 1991, requires only sufficient evidence (*sufficienti indizi*), while in a normal criminal proceeding Art. 266 CCP requires a more severe ground (see below, Section 4.b).

[10] Art 220 eCCP.

Anybody can be a witness. He/she has a duty:

(i) to appear to the Public Prosecutor (or to the police);
(ii) to tell the truth.

Concerning (i), the duty to appear is excepted only for persons who hold very high offices of state (for example, the President of the Republic). Normally, should a witness fail to appear, without justification, the Public Prosecutor can issue a summons (executed by the police).

Concerning (ii), a witness may refuse to give evidence only if to do so would be to incriminate him/herself (privilege against self-incrimination; CCP, Article 63).

There are some other exceptions to the duty to answer, in order to guarantee other fundamental rights, equal to or more important than the jurisdiction.

To guarantee the right to defence, lawyers can abstain from providing evidence gained as a result of their confidential relationship with a client. The same dispensation is given to doctors and to the health experts, to ministers of religion (for the seal of the confessional) and to other professions (for example psychologists or pharmacists) due to the client confidentiality they must respect: CCP, Article 200f.

To respect the deepest—and frequently problematic—feelings and relationships within a family, relatives of a person being investigated cannot be forced to bear witness (unless they have made the complaint against their relatives). Obviously, if they nevertheless decide to provide evidence, they must say the truth (CCP, Article 199).

To guarantee press freedom, on the other hand, journalists cannot be forced to disclose the name of their source; if this name is vital for the jurisdiction, however, the judge can order the journalist to testify (CCP, Article 200, para 3).

Finally, to guarantee the supreme national interests, no one can give evidence about something which is a state secret. The state secret has to be confirmed by the Government.

No one can be arrested if he/she refuses to testify: in this case, however, there may be a preliminary investigation for the crime of false witness (CCP, Article 476, para 2). The same happens if someone lies or deny the truth.

The police or Public Prosecutor question witnesses; even the defence lawyer can question witnesses, during his/her investigation.[11]

The defence lawyer is given notice of the interrogation of a witness only if it is necessary that the examination of the witness be conducted exceptionally by the *giudice per le indagini preliminari* during a closed hearing, because the witness is in peril of life, or is under threat (*incidente probatorio*: CCP, Article 392f).

2. Search and Seizure

Search and seizure are often the first measures adopted in a criminal investigation. They are acts of enforcement that involve fundamental rights (for example, to property). For this reason, they can only be carried out in the full respect of some determinate rules.

[11] The interpreter or the translator are designated every time a person being investigated or prosecuted, or other party to the proceedings, or a witness needs to declare something or needs to understand something and they don't speak Italian (CCP, Art 143).

These measures can be applied for any criminal investigation, both for petty and serious offences.

For body searches and searches of premises, it is necessary for there to be a reasonable ground to find, respectively hidden on a person or stored in a place, a body of evidence or other things relating to the crime. A place can also be searched, if there is a grounded base that there you may find the person, being investigated, to arrest.[12] Similarly, it is permissible to search a computer system or part of it and computer data stored therein when it is reasonable to assume that the computer contains data relevant to an investigation.[13]

A search can be initiated either by a judge or the Public Prosecutor (*autorità giudiziaria*).[14] For the police, it is more correct to speak of an emergency procedure: when there is urgency (CCP, Article 352 in cases of urgency), the police can search, but the *post factum* validation of the Public Prosecutor is required within 96 hours.

There are two types of seizure.[15]

A judge or the Public Prosecutor can order seizure of a body of evidence but, normally, it is the police who are present first at a crime scene and seizure what is relevant (CCP, Articles 354 and 355). When there is urgency (Article 354 in the case of urgency), the police can seize the body of evidence, but the *post factum* validation of the Public Prosecutor is required within 96 hours (CCP, Article 253). According to the law, 'body of evidence' is anything that has been used to commit a crime or is the result (proceeds or profit) of a crime (CCP, Article 253).

To avoid the commission of a new crime or to avoid consequences of the first crime, the *giudice per le indagini preliminari* during the pre-trial investigation can order a preventive seizure (CCP, Article 321); the Public Prosecutor (and police) can exceptionally order this, when it is urgent, but they must immediately (within 48 hours) ask for validation by the judge. There is a second kind of preventive seizure, which can be ordered to ensure future confiscation (CCP, Article 321, para 2).

Some restrictions must be taken into account.

It is possible to search a law firm only if the lawyer or 'other persons regularly working in the same firm' (*altre persone che svolgono stabilmente attività nello stesso ufficio*) are being investigated, or to uncover a specific body of evidence. Only a judge (or, during pre-trial investigation, the Public Prosecutor with the authorisation of a judge) can personally search and order seizure in a law firm (CCP, Article 103).

A body search must respect the dignity and decency of the involved person (CCP, Article 249); searches of premises cannot be carried out in the night (between 8 pm and 7 am), save with the authorisation of the Public Prosecutor or of a judge (CCP, Article 251).

It is forbidden to order seizure of a law firm's records of defence, excepting those which are a body of evidence.

[12] CCP, Art 247.

[13] CCP, Art 247, para 1-bis, according to Art 19 of Convention on Cybercrime, Budapest, 23 November 2001.

[14] *Autorità giudiziaria* is an old term contained in the Italian Constitution: it means both Public Prosecutor and judge. But today the Constitution too is read as if it mentioned only the 'judge'.

[15] Provisions on freezing orders (a measure similar to seizure) don't belong to the penal system. *Decreto Legislativo* No 109 of 2007 sets out the measures of freezing, within the powers of government (Department of Treasury and Foreign Office), implementing the international Convention against international terrorism. The above-mentioned Legislative Decree rules the measures, according to the international Convention, only in the area of international terrorism. The 'Agency of State Property' (*Agenzia del Demanio*) is entitled to execute the measure.

For Members of Parliament it is necessary to first obtain a 'leave to prosecute' (*autorizzazione a procedere*): ie to obtain the authorisation of the Parliament to investigate.

Since every single procedural act of the police, of the Public Prosecutor or even of judges has to be recorded or documented, the orders disposing a search or a seizure, of the Public Prosecutor or of the judge, will be written, and there will be always a 'report' (*verbale*) containing a description of the activity of the police.

As 'surprise' measures (*atti a sorpresa*), neither search nor seizure can be notified before their execution. But the defence lawyer has the right to be noticed as soon as the execution of the measure begins, and to be present. A night-time search of premises (between 8 pm and 7 am) is possible in a case of urgency, in execution of a written order of the Public Prosecutor during the pre-trial investigations, or of the judge after the *azione penale* (CCP, Article 251, para 2). It is forbidden to carry out the measure in a clandestine way.

The criminal code punishes arbitrary search and inspection (*perquisizione e ispezione arbitraria*, CC, Article 609).

The defence lawyer must be informed as soon as the execution of the measure begins. He/she can be present, but the operating authority has no obligation to wait for him.[16]

The legal system provides for judicial review, ie a *riesame* (CCP, Article 322) or, in some other cases, *appello* (CCP, Article 322-bis), which is addressed to and decided by the Court of Freedom. The decision of the Court of Freedom can in turn be reviewed by the Italian Supreme Court. Every person who has a specific interest, even if he/she is not being investigated (for example: the owner of a seized firm) can appeal to the Court of Freedom and then, if he/she is not satisfied, to the Supreme Court.

(a) Production Orders (in Particular for Banks, Service Providers, Public Authorities and Administrators of other Data Collections)

There are some institutions and entities, against which search and seizure are not immediately disposed. The code prefers a 'soft approach', which consists, first, in a production order and only if this order remains unrealised, in a subsequent measure of search.

The rules applicable on production orders are contained in the CCP, Article 256, concerning the duty of professionals—who have the privilege seen above[17]—and the public authorities and administrators to deliver to the Public Prosecutor (or judge, after the *azione penale*) what he/she is looking for, because it is relevant for the investigation.

There is no need for a degree of suspicion in order to apply the measure. A *notitia criminis* is enough.

The measure is applicable for all type of offences.

CCP, Article 256 provides a possible restriction if the documentation or data required concerns an office, a professional or a state secret (as seen above for interrogation of witnesses).[18]

[16] As already mentioned, the interpreter or the translator are designated every time the person being investigated or prosecuted, or another party of the proceeding, or a witness, needs to declare something or needs to understand something and they don't speak Italian (CCP, Art 143). In case of search and seizure, as unaware measures, no interpreter must be provided, but after the execution of the measure, if the person concerned doesn't speak Italian, he/she can apply for an interpreter/translator.

[17] CCP, Art 200.

[18] See section B.1.

In this case, the addressee of the production order must send a written declaration, setting out the reasons for the secret: CCP, Article 256, para 1.

Whenever the addressee of the production order declares he/she cannot produce the documentation or the data, due to the existence of a secret, the Public Prosecutor before the indictment or *azione penale*, or the judge after the indictment, can order an investigation to confirm the existence or otherwise of the secret: CCP, Article 256, para 2.

If there is no office or professional secret, the investigative authorities may seize the data or documents. This measure imposes a duty to cooperate with investigative authorities. People mentioned above have to collaborate with justice and to deliver the documents or data requested for investigative reasons.

It has to be remembered that CCP, Article 391-quater disposes the possibility for the defence to obtain documents from public administration and offices. Persons, addressees of the order or of the request, execute this measure spontaneously. If there is no spontaneous execution, the Public Prosecutor or judge verifies the existence of the secret and, if transpires not to exist, disposes the seizure of the documents or of the data: see again CCP, Article 256, para 2.

In Italy, every single procedural act of the Public Prosecutor or of the judge must be recorded or documented. The order of the Public Prosecutor or of the judge is written and briefly reasoned, and must be notified to the addressee: without notification, he/she cannot know what the authority needs and cannot answer, giving the documents or the data requested, or declare the existence of a secret.

Defence is not involved, and no judicial review is possible.

(b) On-line Search of Computers

It is necessary to define on-line search of computers, since on-line search or on-line surveillance of a computer is a complex procedure and it is necessary for there to be precision in the definition. Unfortunately, since in Italy there is no legislation concerning these two measures, the definition is unofficial and comes only from academic reflexion.

With this warning, we can define on-line search (or one-time copy) as the copy, full or partial, of the memory of a computer system; on-line surveillance as the detection and recording of which websites are visited by a system or by an account relating to that system. Both of them are carried out through a 'Trojan' or a 'Sniffer', without the person concerned being aware: if person is aware, the measure becomes in fact a sort of search.

Whenever this measure allows interception of the contents of telecommunications (content data) between two or more persons, pertinent rules are applicable. But there is space for on-line search and on-line surveillance with no interception of communications.

Today's technology allows such measures, which, incidentally, have been under observation by the German Constitutional Court.[19] Since in Italy, as said before, there is a lack of legislation on the topic, only academic authors considered this new technological measure, concluding that, in the Italian system, due to the total absence of a complete legislative structure, such a measure infringes the principle of the supremacy of the rule of law and

[19] See decision of 27 February 2008.

cannot be disposed.[20] As long as this gap of legislation persists, such a measure should not be admitted as evidence.

But, as noted, this is only a doctrinal opinion. It seems that jurisprudence is inclined to admit the on-line search of computers as evidence. This can be deduced, for example, from some newspaper sources, concerning a resounding proceeding against Mr Luigi Bisignani and other persons, who were accused of being members of an illegal association called 'P-4'. It seems, in fact, that in the context of this investigation, the Public Prosecutor and Police applied such a measure to the computer of one or more of the persons being investigated.

3. Access to Relevant Premises ('Crime Scene')

Another measure of 'first aid' is the so-called 'access to relevant premises', about which there are no specific rules. More exactly, many measures can be considered, depending on what you want to do.

The proper measure to describe the scene is called 'inspecting' or 'viewing' (*ispezione,* CCP, Articles 244–46): ie a measure to observe and to 'photograph' the crime scene. This measure can be applied to any criminal offence.

The purpose of inspecting a body (*ispezione personale*) or premises (*ispezione di luoghi o cose*) is to verify the signs and the marks left by a crime.[21] Additionally, if it is necessary for the investigation, the Public Prosecutor or the Police can obviously search and seize the place.

The Public Prosecutor or judge (*autorità giudiziaria*, CCP, Article 244, para 2) can order the inspecting. The police, who normally arrive first at crime scenes, are responsible for all the necessary urgent fact-finding operations, to avoid contamination of the crime-scene (CCP, Article 354).

Concerning information to the defence, normally, if the Public Prosecutor decides to order an inspection of the person being investigated, he/she summons the person (CCP, Article 364, para 1). The person can come with a lawyer in attendance. If the Public Prosecutor needs to order an inspection but the presence of person being investigated is not necessary, he/she must inform the person's lawyer at least 24 hours in advance of the inspection (CCP, Article 364, para 3).[22]

Concerning presence of the defence at the execution of the measure (CCP, Article 364, para 4), a lawyer always has the right to be present, even when he/she has not been informed. The right to be present doesn't mean, however, a duty to be present: it is only a possibility. If he/she is not present, the police or Public Prosecutor can carry on the operation.[23]

[20] See Marcolini, 'Le cosiddette perquisizioni on line (o perquisizioni elettroniche)' in Cass pen, 2010, 2855f.

[21] At the beginning of a physical inspection (*ispezione personale*), the concerned person (who can possibly differ from the person being investigated) must be advised he/she can ask for someone to be present during the inspection (CCP, Art 245, para 1). At the beginning of a premises inspection (*ispezione di luoghi o cose*) the concerned person is given a copy of the decree disposing the inspecting: CCP, Art 246, para 1.

[22] There is an exception: if the Public Prosecutor has reasonable grounds to believe that provision of such information to the person being investigated, or to the lawyer, could eventually represent a threat to the investigation, he/she can skip information and proceed with the act (CCP, Art 364, paras 5 and 6).

[23] An interpreter can be opportune, whenever the concerned person doesn't understand Italian language.

The legal system doesn't provide for a judicial review, save in the event that the measure involves a search or a seizure.

4. The Measures of Interception

Interception is probably the most significant activity which enforcement agencies can carry out in order to investigate and fight crimes, especially if these crimes are transnational.

The traditional definition of the interception as 'preventing something from leaving or from coming' must be updated: for example, if we consider interception of communication between person on air, by phone or by internet or other forms of visual and acoustic surveillance, the measure doesn't consist in preventing the communication or the activity, but in observing and recording it.

As one of the most serious restrictions of fundamental rights (to privacy, to free communication, etc), this activity is possible only under specific conditions.

(a) Interception of Postal Communications (Letters)

The Public Prosecutor[24] can seize letters in the postal system and open them (CCP, Article 254, which uses, once again, the expression *autorità giudiziaria*).

The police cannot intercept letters at their own initiative: the authorisation of the Public Prosecutor—or his/her *post factum* validation within a few hours—is always needed (CCP, Article 353).[25]

The Public Prosecutor or judge (after the *azione penale*) can order seizure of letters when there is a reasonable ground that they come from or are directed to the defendant or, in any case, that they are relevant to investigation of the issue.[26]

This measure is viable for every criminal offence, both petty and serious.

It is explicitly forbidden to seize letters between the person being investigated/defendant and his/her lawyer (CCP, Article 103). This postal communication can be seized only if there is a ground that it is body of evidence.

CCP, Article 256 requires public employees to hand over to the Public Prosecutor or judge (after the prosecution) any kind of documentation they are asked for. The only exception concerns state or public secrets.[27] Public Prosecutor (or judge) can check if the public secret is grounded. State secret must be validated by the Government.

[24] Or judge after the prosecution (*azione penale*).

[25] There is however an emergency procedure involving the police regarding letters. When police officers are dealing with such communications, they can: hold the letters and send them immediately to the Public Prosecutor, who can seize and open them (CCP, Art 353, para 1); if there is some urgency, they can ask for the authorisation of the Public Prosecutor and directly open the letters (CCP, Art 353, para 2); once again, if there is some urgency, they can order the mail forwarding service to suspend the sending for 48 hours, so that the Public Prosecutor can seize the letters (CCP, Art 353, para 3).

[26] If the letters are not relevant for the investigation, they must be immediately returned to the person they belong to (CCP, Art 254, para 3).

[27] CCP, Arts 201 and 202. The definition of state secret is provided by Law No 124 of 3 August 2007 (see, especially, Article 39). The public secret (*segreto d'ufficio*), instead, is the secret that public administration must observe while carrying out its duties, and is protected by a criminal sanction (see Criminal Code, Art 326).

The police are usually charged with the execution of the measure, which is disposed by the Public Prosecutor or by a judge.[28]

(b) Interception of the Contents of Telecommunications (Content Data)

CCP, Articles 266-71 concern the interception of telephonic communication (wiretapping) or of on-line communications.

Such a measure is possible also in 'John Doe investigations' (ie investigations against unknown persons), as long as there is a serious base of a crime and this measure represents the only way to carry out the investigations (CCP, Articles 266–67).

Interception can be applied only to more serious offences, for example intentional crimes punishable by imprisonment for life or for more than five years at the maximum,[29] crimes against public administration, murder, etc (CCP, Article 266), and for some special misdemeanours, for example threatening telephone calls (see again CCP, Article 266).

Generally, anyone can be intercepted at any time, but the communications cannot be used as evidence in the same cases mentioned above for the witnesses when a professional privilege or a state or public secret is involved.

Another important principle: interceptions made without complying with the relevant conditions are invalid and cannot be used at trial. This is one of the oldest 'exclusionary rules' in the Italian system (for more details, CCP, Article 271).

Finally, there are some special rules concerning the Prime Minister, members of the Government and Members of Parliament (Article 68 Constitution and Article 10 Constitutional Law No 1 of 16 of January 1989).

Interception operations must be carried out by the office of the Public Prosecutor, save the possibility for the Public Prosecutor to authorise the use of equipment by the police (CCP, Article 268).

All the interceptions must be recorded. In order to use the interceptions at the trial, they must be transcribed onto paper by an expert.

The interception of the contents of telecommunications can last for only 15 days, but the operation can be extended for further periods of 15 days by the judge at the request of the Public Prosecutor, under the same initial conditions.

By law, the contents of telecommunications involving third parties must be destroyed before the trial begins (CCP, Article 269).

According to law, there should be a closed hearing (*incidente probatorio*) at which the judge of freedom, Public Prosecutor and lawyer for the person being investigated indicate the conversations relevant for the process. The judge of freedom instructs an expert to transcribe all the relevant conversations. The other material must be conserved on record, but it must be kept in secret and none can hear it.

[28] According to the law, there will be always a 'report' (*verbale*) containing the description of the activity of interception of the communication. Notification requirements, information to the defence lawyer on place and time of the execution and judicial review are the same as for search and seizure.

[29] In Italy every crime is punished with a sanction which Criminal Code (CC) predetermines in its minimum and maximum extension, according to the importance of the protected interest, to the seriousness of the misbehaviour and to the entity of the consequences. CCP, Art 266, says that in order to establish if wiretapping is possible for a certain crime, you should consider only the maximum extension of the sanction: if it is life imprisonment or if, at least, it exceeds five years, wiretapping is viable.

Transcription is normally ordered after the *azione penale*, and this often results in newspapers (and the media in general) reporting the contents of the interceptions, even those irrelevant to the proceeding, but 'spicy' for the public opinion. It is very difficult for the persons involved in the interceptions, but not investigated, to be aware about the content of the interceptions before they appear on newspapers, to ask for their destruction on the ground of aforementioned CCP, Article 269.

In recent years Parliament has been discussing a reform to avoid such a violation of privacy, but no new law has yet been enacted.

Generally speaking, no duty to cooperate from persons intercepted is requested, understandably if we consider that interception requires those persons not to be aware, at least during the operations.

But, in some special cases, persons—other than the person intercepted—can have a duty of cooperation. For example, CCP, Article 254-*bis* (as amended according to the Budapest Convention on Cybercrime of, 23 November 2001), says that server providers must save a copy of the seized data (and this applies also to data and traffic retention).

Wiretapping is easier against organised crime, because a milder ground for an offence is required, and the operations can last 40 days (extendible by the judge): Article 13 of *decreto legge* No 152 of 13 May 1991, converted into Law No 203 of 12 July 1991.

Police executes the measure under the supervision of the Public Prosecutor. The measure requires authorisation, which is requested by the Public Prosecutor; a judge, during pre-trial investigation the *giudice per le indagini preliminary,* decides with a grounded and briefly reasoned order authorising the interception if there are the necessary conditions. If there are, the authorisation is written, setting out a brief reasoning.

There is no judicial review; note however that an authorisation without grounds would invalidate all the results of interception. As already said, interceptions made without the respect of these rule are subject to the exclusionary rule.

There is also an emergency procedure.

The Public Prosecutor can exceptionally authorise interceptions, when there is some urgency, but he/she must immediately (within 48 hours) ask for validation by the judge: CCP, Article 267, para 2.

The results of the measure are, at first, recorded on tape (CCP, Article 268, para 1), then transcribed onto paper by an expert (CCP, Article 268, paras 6–8).

Concerning notification requirements, there is no notification of wiretapping. Wiretapping or intercepting telecommunications 'in a clandestine way', without legal authorisation, is a crime: CC, Articles 615, 617, 617-*bis*, 623-*bis*.

The defence lawyer (and the person being investigated) will be informed about the interception only at the end of the operations: CCP, Article 268, paras 4 and 6).

(i) Monitoring of Telecommunication Traffic Data

Monitoring of telecommunication traffic data is not an interception, but it concerns telecommunication freedom.

In Italy, such monitoring activity is regulated, in particular, by the so-called 'Privacy Code' (Legislative Decree No 196 of 30 June 2003), by the interpretation of these dispositions made by National Privacy Authority and also by the decisions of the same Authority (although the interpretation and the decisions of the Authority are not statutory dispositions).

Monitoring of telecommunication traffic data is different from interception. This activity is considered a lesser incursion on the right of privacy than interception, and so the dispositions provide fewer limitations. Traffic data cannot reveal the content of communications but only external data.

As under the Privacy Code, telecommunication companies have to collect traffic data (concerning telephonic and computer traffic data) for a specified period (limited, but not so short, as reveals the Italian Privacy Authority): 24 months for telephonic data and 12 months for internet data, if necessary for the prevention and repression of crimes: Article 132 of Privacy Code.

Article 18 of the Privacy Code underlines the powers of public authorities concerning monitoring and treatment of telecommunication data: every form of this activity is possible only for institutional functions, in the framework of general principles of Privacy Code.

This measure is applicable for all kind of offences, without exclusions.

There are no limitations concerning the people involved. The Privacy Authority has power to control the activity of monitoring and collection of traffic data, in order to ensure respect for the general principles of the Privacy Code and fundamental rights (in particular, to privacy and dignity of person). The Authority also controls the elimination of traffic data and the way people collect data and control the computer terminals containing data.

The Privacy Code specifies forms of control by companies involved in the field of telecommunication. These companies must introduce real and effective control in the phase of exchange of data and in their circulation, in particular by protocols avoiding the intrusion of other people or the loss of data.

The phase of elimination of data is also under control and it is necessary to ensure a permanent deletion of traffic data.

The legal system doesn't specify particular measures of protection of third parties, other than the cautious conservation and the elimination of data.

Under the Privacy Code, Article 132, para 3, traffic data must be sent by companies to the Public Prosecutor when he/she asks for them. Cooperation with the investigative authorities is highly regulated: telecommunication companies have a duty to provide the authorities all the information they have. The activity of monitoring and collection of traffic data is carried out by the telecommunication companies themselves (telephonic ones or internet service providers).

The person being investigated or prosecuted, the victim, the other parties and their lawyers should have no direct contact with telecommunication companies, but, if they need the traffic data, must submit an application to the Public Prosecutor. Only the lawyer of the person being investigated or prosecuted can, in limited cases, present a direct request to the companies. There are no emergency procedures.[30]

The defence lawyer is normally informed of the execution of the measure only with the discovery at the end of the investigations (as provided in the CCP), save when he/she is submitting to the Public Prosecutor an application asking for the data from the companies.

[30] As all the acts of the Police or of the Public Prosecutor or of the judge must be recorded or documented, the request of the Public Prosecutor to the telecommunication companies is written and documented; and the answer of the companies could either be written or contained in a technological device (email, USB key, and so on).

The legal system provides a general control over the telecommunication companies, devolved to the Privacy Authority, which is a sort of 'watchdog' against violation of the fundamental rights and general principles of the Privacy Code, for example to guard against illegal collection of data after the period of time allowed.

Finally, concerning the execution of the measure, while the Public Prosecutor will ensure that telecommunication companies send all the data requested, the Privacy Authority always controls the execution of the measures concerning monitoring, collection and destruction of traffic data.

(c) Tracking and Tracing of Objects and Persons

The phenomenon of tracking and tracing of objects and persons has no statutory rules.

According to the Supreme Court, tracking and tracing of objects and persons in the 'open air', with GPS, is a measure that the police can individually set up. It is like a 'tailing' or, better, a 'satellite tailing', and needs no authorisation by a Public Prosecutor or by a judge.[31]

Since the rule has emerged from recent case law, there are still no indications as to possible restrictions or guarantees. It should be held, however, that if the measure affects a specific right recognised by the Constitution or by the ECHR (for example, the right to privacy), the measure is unlawful and it cannot be used.

The measure can be applied for any criminal offence, both petty and serious offences, and must be clandestine, in the sense that the concerned person must be unaware of the tracking or of the tracing. So, the defence is not informed about or involved in the execution. No emergency procedure is possible.[32]

(d) Surveillance in Public and Private Spheres (Acoustic and Visual)

Surveillance in the public and private spheres (acoustic and visual) can turn into interception, even of images (in the case, not frequent but still possible, of gestural communication).

The applicable law concerning surveillance in the public and private spheres (acoustic and visual), is the CCP and the Privacy Code; the Privacy Authority has also provided various guidelines.

First of all, every 'acoustic surveillance' is nothing but an interception of conversations: consequently, Code rules on wiretapping (CCP, Article 266f) must be applied. This kind of 'acoustic surveillance', *intercettazione ambientale*, is characterised by the physical presence of the persons (communication, not telecommunication), and is totally subject to Code rules on wiretapping. Moreover, if it takes place within a home, acoustic surveillance requires the probable cause that a crime is being committed there (CCP, Article 266, para 2).

Visual surveillance is more problematic, since there is no specific rule, in criminal proceedings, about this phenomenon.

[31] See Supreme Court, judgment no 9667, 10 March 2010.

[32] Also in this case, there will be a 'report' (*verbale*) containing the description of the activity of tracking and tracing.

It is important to make two clear distinctions:

(i) the first concerns whether visual surveillance is made in the private sphere, in the public sphere, or in 'places with privacy expectation' (the latter category will be defined below);
(ii) the second concerns the object of the visual surveillance: communicative or non-communicative behaviour.

Visual surveillance in the private sphere, if (and only if) concerning communicative behaviour is, once again, nothing but wiretapping, an interception of conversations: consequently, Code rules on wiretapping (CCP, Article 266f) should be applied.

Visual surveillance in the private sphere, concerning non-communicative behaviour, is forbidden: the Supreme Court has said so.[33] The reason is that Article 14 of the Constitution grants the right to privacy, and a law is required to limit it. Because such a law doesn't exist (yet), this kind of visual surveillance is unlawful.

Visual surveillance in the public sphere, concerning communicative behaviours (for example, gestural communication), is, once again, nothing but a wiretapping, an interception of conversations: consequently, Code rules on wiretapping (CCP, Article 266f) should be applied. Vice versa, visual surveillance in the public sphere, concerning non-communicative behaviour, is, in principle, free and doesn't even have a criminal procedural nature: there is no regulation in the CCP and the Privacy Code only imposes, in some cases, a duty of information (for example, a poster with the wording: 'place under surveillance').

Finally, the so-called 'places with privacy expectation'. The creation of this category arises from the above-cited judgment of the Supreme Court.[34] Reference is made to places which belong neither to private nor public sphere, but where people have an expectation of privacy: for example, public toilets or changing rooms. In these cases, visual surveillance of communicative behaviours would be, once again, nothing but wiretapping. More interestingly, the conclusions of the Supreme Court with reference to visual surveillance of non-communicative behaviours, in the above-mentioned case, is that this kind of surveillance doesn't require a legal framework, but only the authorisation of the *autorità giudiziaria*, the authorisation of the Public Prosecutor or judge.[35]

Since acoustic surveillance is nothing more than a wiretapping, the degree of 'suspicion' required is obviously the same as for wiretapping measures, and the restrictions are those of wiretapping measures. Plus, if acoustic surveillance, as said, is disposed at home, it requires the probable cause that the crime is being committed there (CCP, Article 266, para 2). Acoustic surveillance requires the presence of a 'bug' close to the speakers. This means it would not be possible to operate from the office of the Public Prosecutor: it is an exception to what was formerly said about wiretapping.

The same conclusion also applies every time visual surveillance concerns communicative behaviours and, consequently, is nothing more than a wiretapping: the degree of 'suspicion' required is obviously the same as for wiretapping measures.

Coming to visual surveillance in the public sphere, concerning non-communicative behaviours, as formerly said it is not even a criminal procedural measure, and there is no need of suspicion or even of a *notitia criminis*.

[33] See judgment no 26795 of 28 March 2006.
[34] See, again, judgment no 26795 of 28 March 2006.
[35] On this point see also Caprioli, 'Nuovamente al vaglio della Corte costituzionale l'uso investigativo degli strumenti di ripresa visiva', *Giurisprudenza costituzionale* (2008) 1832. On the meaning of the expression *autorità giudiziaria*, see above, n 14.

Finally, visual surveillance in 'places with privacy expectation', concerning non-communicative behaviours, is subject to the mere authorisation of the Public Prosecutor or judge. It means that only a *notitia criminis* is needed, nothing more. Visual surveillance in 'places with privacy expectation', concerning non-communicative behaviours, can be disposed for any offence.

It should be repeated for the last time that, if visual surveillance concerns communicative behaviours, being nothing more than a wiretapping, the limits are those of the wiretapping measures, seen above.

On the execution side, acoustic or visual surveillance, concerning communicative behaviours and being therefore nothing more than a wiretapping, are subject to the rules concerning wiretapping measures (see above).

Visual surveillance in 'places with privacy expectation', concerning non-communicative behaviours, will be normally disposed by the Public Prosecutor (it's hard to conjecture by a judge): this means that the Public Prosecutor will normally entrust the police with execution of the measure. There is no emergency procedure; it is normally recorded as an investigative measure (there will be a written order of the Prosecutor, disposing the visual surveillance, and a *verbale* of the Police, describing the activity of visual surveillance carried out), and there are no notification requirements, nor is information given to the defence, nor can there be judicial review.

Acoustic or visual surveillance, concerning communicative behaviours and being therefore nothing more than a wiretapping, is subject to the rules concerning wiretapping measures, in respect of the authorisation procedure, the emergency procedure, the recording, the notification requirements, the information to the defence, and the judicial review.

(e) DNA Mining and Profiling. DNA Database

Implementing the Treaty of Prüm, there is legislation regarding DNA profiles and databases.[36] Analysis of DNA without the agreement of the person involved is possible only for certain serious offences (CCP, Article 224-bis), and it must be done by an expert. It is possible only if there is a criminal investigation: that is to say, only if there is a *notitia criminis*. In addition, this measure must be the only way to carry out the investigations: CCP, Article 224-bis, para 1.

DNA analysis without the agreement of person involved is possible only when the investigation is referred to crimes punishable by life imprisonment or imprisonment of more than three years at the maximum.[37]

The operations to take the sample (of hair, saliva etc) necessary for profiling must respect the dignity and decency of the person, without causing any danger to his/her life. In the operation to take the sample it is mandatory to respect health not only of the involved person but even of eventual future children: CCP, Article 224-bis, para 4. The law says that the operation can be executed without the consent of the involved person: CCP, Article 133 and 224-*bis*, para 6. The measure is ordered by the judge but it is executed by an expert.

The Public Prosecutor has to ask for the authorisation of the *giudice per le indagini preliminari*. Authorisation is written and reasoned. There is no judicial review. Please

[36] See Law of 30 June of 2009, No 85, and new CCP, Arts 133, 224-bis, 359-bis, and 392.
[37] See above, n 29 on the meaning of this legal expression.

note, however, that any profile made without due authorisation is invalid, since there is an exclusionary rule as in wiretapping (CCP, Article 224-*bis*, paras 2 and 7).

The emergency procedure is described by CCP, Article 359-*bis*. If delay might be dangerous for the investigation, the Public Prosecutor can order a forced and immediate execution. But he/she needs an immediate validation (within 48 hours) from the judge.[38]

The presence of a lawyer is mandatory, otherwise the operation is invalid: CCP, Article 224-bis, para 7.

5. Monitoring of Bank Transactions

The CCP contains no rules applicable to monitoring of bank transactions, since there is no need of a *notitia criminis*. The relevant rules belong to a different branch of law, concerning the fight against money laundering: see, at least, Law Decree of 3 May 1991, No 143, and Law of 5 July 1991, No 197, concerning in general all the rules to prevent money laundering in bank transactions, and *Decreto Legislativo* of 21 November 2007, No 231, which implements Directives 2005/60/CE and 2006/70/CE, but without containing criminal measures.

Monitoring bank transactions is possible both in case of criminal proceedings (seizure) and in case of ordinary control activities, especially if made by taxation authorities. By starting an inspection or control in financial and taxation fields, the involved authorities can obtain information about bank transfers of a person, concerning the last five years. The request concerns a defined person.

The law on money laundering sets out a duty of the members of finance companies to report so-called 'suspect' transactions to the Italian Unit of Financial Information (*Unità di informazione finanziaria, UIF*), which is set up within the Bank of Italy and will, in turn, inform the Public Prosecutor of the *notitia criminis*.

Bank and financial intermediaries execute measures as requested. The request contains the name of the person, a reason for the investigation, requested data and the number of days given for the answer to the authority. In case of emergency it is possible to obtain quite immediately the information requested. The request and the answer and the circulation of data are normally made through the internet.

No notification, even to the defence lawyer, is required. Concerning judicial review, there are some rules provided for the protection of privacy and secret in bank activities.

6. Undercover Operations

The rules applicable to 'infiltration', or undercover operations, are principally contained in Law 146 of 2006, which ratified the United Nations Convention against Transnational Organized Crime and its Protocols, and governs undercover operations (Article 9 of Law 146 of 2006).

[38] The application of the Public Prosecutor will be documented, as well as the authorisation of the judge and the 'report' (*verbale*) containing the description of the activity of mining and profiling. The order of the judge, disposing the measure has to be notified to the involved person, to the defence lawyer and to the person being investigated: CCP, Art 224-*bis*, para 3.

There are also some others dispositions in special legislation, for example concerning the prevention and supression of child pornography: Article 14 of Law 269 of 1998, and those concerning the fight against drug trafficking: Article 97 of the Decree of President of Republic 309 of 1990, on undercover activity, and Article 98 of the same Decree on controlled deliveries.

To complete the picture, the rules concerning the activity of investigative authorities must be remembered too.

Undercover operations are possible, according to Article 9 of Law 146 of 2006, only to collect evidence for serious offences. Regarding Law 146 of 2006 and the other special rules, there are many kinds of offences which may be investigated by infiltration: money-laundering, organised crime, trafficking of drugs and people, smuggling of migrants, terrorism, child porn, and so on.

Undercover operations must be ordered by the chief of each police force or agency, under the supervision of the Public Prosecutor. Police executes the measures.

There are many special forms of this undercover operation: one example is the creation of an unmarked police website to attract authors of child porn related crimes: see again Article 14 of Law 269 of 1998.

These kinds of measures don't require authorisation: it's better to talk about supervision of the Public Prosecutor. These measures are carefully documented on paper or on electronic devices.

On the ground of Article 9, para 5 of Law 146 of 2006, as amended in 2010, the Ministry of the Interior can define more precisely the formalities of the infiltration rules.

According to Article 9, para 1, letters (a) and (b) and para 1-*bis* of Law 146 of 2006, if an undercover Agent commits a crime, that is to say he/she cooperates in one of the crimes he/she has been investigating, he/she cannot be punished. More or less the same is said by Article 97 of the Decree of the President of Republic on undercover activity in the framework of the fight against drug trafficking.

7. Controlled Deliveries

Controlled deliveries are defined by Article 1-(g) of the 1988 UN Convention against illicit Traffic in Narcotic Drugs and Psychotropic Substances as the 'technique of allowing illicit or suspect consignments of narcotic drugs, psychotropic substances … or substances substituted for them, to pass out of, through or into the territory of one or more countries, with the knowledge and under the supervision of their competent authorities, with a view to identifying persons involved in the commission of offences established in accordance with article 3, paragraph 1 of the Convention'. The same definition is repeated in Article 2-(i) of the 2000 UN Convention against Transnational Organised Crime, and Article 2-(i) of the 2003 UN Convention against Corruption.

Such activity is possible under the conditions and within the limits mentioned above.[39] Please remember also that a particular undercover activity is set by Article 98 of the Decree of the President of Republic 309 of 1990, in the field of the fight against drug trafficking.

These measures are carefully documented on paper or on electronic devices.

[39] Section B.6.

8. Invoking the Assistance of Experts to Examine Clues etc. During the Pre-Trial Phase

The Public Prosecutor, police and the defence lawyer can, during the pre-trial phase, appoint an expert (for the police, CCP, Article 348, para 4; for the Public Prosecutor CCP, Article 359; for the defence lawyer CCP, Articles 391-*bis* and 233).

This is a choice of the parties and doesn't need any particular 'suspect'. The measure can be applied for every criminal offence, both petty and serious offences.

If one of the parties—ie Public Prosecutor or defence—wants to assign to an expert an activity which cannot be repeated at the trial (*attività irripetibile*: for example, an autopsy), before the expert begins this party must notify the other one, in order to allow him/her to take part in or observe the operations with his/her own expert: CCP, Articles 360 and 391-*decies*, para 3. The expert puts on record the result of his/her activity.

9. Pre-Trial Arrest and Detention

Rules on arresting or detaining a person 'suspected' of a crime are provided by CCP, Article 379f.

Unlike pre-trial custody, arrest and detention are a shorter restriction of freedom: within the 48 hours the concerned person must be presented to a judge, who verifies in a hearing the regularity of the arrest or of the detention in the next 48 hours. After the hearing, the person arrested or detained can remain in custody only if the Public Prosecutor requests, and the judge authorises, a pre-trial custody (see below).

There are two possibilities of restriction: the arrest *in flagrante delicto* (*arresto in flagranza*), which finds legal framework in CCP, Articles 380 and 381; the detention of a suspect of a crime (*fermo di indiziato di delitto*), which finds legal framework in CCP, Article 384.

The degree of suspicion necessary to execute the measure of the arrest *in flagrante delicto* is very high. Italian law provides a definition of *flagranza di reato* that occurs when the person is caught in the act of committing the crime or immediately after (CCP, Article 382). An arrest *in flagrante delicto* can only be applied to the most serious offences.

There are two types of arrest: mandatory and voluntary (optional). Mandatory arrest is, as the word implies, compulsory, and it applies for the most serious crimes.[40] Voluntary (optional) arrest is not compulsory, and it can be disposed, similarly to the mandatory arrest, only for the crimes indicated by law.[41] Voluntary arrest doesn't mean, however, arbitrary arrest. A person may be arrested only if the measure is justified considering the gravity of the offence and his/her dangerous personality.

[40] It is, in detail, provided for two groups of crimes: first, intentional crimes punished by imprisonment for life, or by imprisonment for not less than five years at the minimum and than twenty years at the maximum, according to the CC (CCP, Art 380, para 1); secondly, a closed, but long list of crimes which the legislator considers very serious (CCP, Art 380, para 2).

[41] It is, in detail, provided: for intentional crimes punishable by imprisonment for more than three years at the maximum, or for non-intentional crimes punishable by imprisonment for more than five years at the maximum, according to the CC (CCP, Art 381, para 1); and for a closed, but long list of crimes which legislator considers serious (CCP, Art 381, para 2).

Both mandatory and optional arrests are executed by the police. When an arrest is executed by a private person, this person must immediately call the police (CCP, Article 383).

No one can be arrested because of their refusal to testify: in this event, however, a preliminary investigation may be initiated for the crime of false witness (CCP, Article 476, para 2). The same offence occurs if someone lies or denies the truth.

The degree of suspicion necessary to execute the measure of the *fermo di indiziato di delitto* is not as high as that of the previous measure but is, nevertheless, considerable. CCP, Article 384 says that there must be serious evidence of crime against that person (*persona gravemente indiziata di un delitto*).[42] This kind of detention can be executed both by the police and by the Public Prosecutor. Specifically, the police act when the Prosecutor has not yet taken over the investigation, or when there is no time to inform him, in order to prevent the person fleeing after the crime (CCP, Article 384, paras 2 and 3).

Article 13 of the Constitution says that no one shall be deprived of their liberty, save in accordance with law and when the Public Prosecutor or judge[43] says so in a reasoned statement. The CCP in force says only a judge can issue this statement.

The police can surely arrest or detain someone with *interim* measures, but must inform him/her about his/her rights, including the right to a lawyer (CCP, Article 104), and must inform the Public Prosecutor, who is entitled to decide whether to present him/her to the judge of freedom (*giudice per le indagini preliminari*) or to release him within 48 hours after the arrest or detention. The *giudice per le indagini preliminari* must pronounce a *post factum* validation in a hearing to be made within the next 48 hours (overall, 96 hours after the arrest or the detention). During this hearing it is mandatory to explain the reasons of the arrest, with the presence of the lawyer (CCP, Article 391). If there is no validation, the person must be released immediately,[44] in accordance with the ECHR, under Article 5, para 1, letter c).

This *post factum* judicial control concerns the work of the police, that is to say, the events which have already happened. If validation is granted, it means that the police 'did a good job'; if validation is not granted, it means that the arrest or the detention were unlawful and wrong. But this problem is different from the other one: what if we think that the arrested or detained person should be kept in pre-trial custody? As said, judicial *post factum* control concerns only the past; in order to execute a pre-trial custody, with effect on the future, a specific further request is needed. In this case, the Public Prosecutor, as well as requesting the *post factum* validation, must ask the same judge of freedom to order the pre-trial custody of the person arrested or detained. Judicial *post factum* validation on arrest or on detention,

[42] The detention of a suspect of a crime can be applied only in case of wilful crimes punishable by imprisonment for life or by imprisonment for not less than two years at the minimum and more than six years at the maximum, according to the CC, or in case of crimes related to arms, terrorism and subversion of democracy (CCP, Art 384, para 1).

[43] In Italian Constitution, *autorità giudiziaria*: see above, n 14.

[44] When the police arrest or detain a person, they must immediately inform the Public Prosecutor, who can question the detainee. A first important decision is entrusted to the Public Prosecutor, who must decide, within 48 hours of the arrest or detention, whether to release the person or to present that person before the *giudice per le indagini preliminari* in a hearing for the *post factum* validation (CCP, Arts 386, 389 and 390). If a person is presented to the judge for the *post factum* validation, the hearing must take place within the next 48 hours (CCP, Art 391). During the hearing the judge must question the person and control the circumstances of the arrest or of the detention.

from one side, and pre-trial custody, from the other side, are different and independent tasks of the judge, although he/she must decide on them in the same hearing (CCP, Article 391).

Post factum validation of the judge of freedom on arrest or on detention is, in turn, subject to judicial review: it can be appealed to the Italian Supreme Court (*Corte di Cassazione*, CCP, Article 391, para 4).[45]

Every single procedural act of the police or of the Public Prosecutor or of the judge has to be recorded or documented. Hence, the arrest or the detention will be recorded or documented; the presentation to the judge for the *post factum* validation will be; the hearing will be; and the decision of the judge will be.

In these cases information to the lawyer is necessary as well: if the Public Prosecutor wants to question the person, before presenting him or her to the hearing for the *post factum* validation, it is necessary to inform his or her lawyer, who must be present during the questioning (CCP, Article 388); in case of hearing for the *post factum* validation, the date of the hearing must be notified to the Public Prosecutor, to the person and to his or her lawyer (CCP, Article 390, para 2); the decision after the hearing is notified to all the parties, including the lawyer, to allow all of them the exercise of the right of appeal (CCP, Article 391, paras 4 and 7).

The presence of lawyer is necessary when the person under arrest or detention is questioned by the Public Prosecutor (CCP, Article 388) and during the hearing for the *post factum* validation (CCP, Article 391, para 1).[46]

10. Pre-Trial Custody

Rules on pre-trial custody are provided by CCP, Article 272f.

Degree of 'suspicion' is described in CCP, Article 273, which says that reasonable circumstantial evidence is needed (*gravi indizi di colpevolezza*) for a similar (temporary and before a definitive conviction) restriction of freedom.

To understand this standard you must remember that conviction after trial requires that the person being prosecuted is found guilty beyond any reasonable doubt (CCP, Article 533). For pre-trial custody, something less is needed: a probable cause the person committed a crime. Nevertheless, it is worth mentioning that in recent years the difference between evidence sustaining a verdict of guilt after the trial judgment, on one hand, and circumstantial evidence sustaining a measure of pre-trial custody, on the other hand, has decreased. This is due to the legislator, who has explicitly applied to the pre-trial measures rules which formerly were applicable only to the trial judgment (CCP, Article 273, para 1-*bis*); and to the jurisprudence, whence has arisen the principle called 'need for

[45] In the event of arrest or detention, some activity of notification is required: when they arrest or detain a person, the police must inform his or her parents without any delay (CCP, Art 387); if the Public Prosecutor wants to question the person, before presenting him or her to the hearing for the *post factum* validation, it is necessary to inform his or her lawyer, who must be present during the questioning (CCP, Art 388); the date of the hearing for the *post factum* validation must be notified to the Public Prosecutor, to the person and to his or her lawyer (CCP, Art 390, para 2). Finally, the decision after the hearing is notified to all the parties, to allow them the exercise of the right of appeal (CCP, Art 391, para 4 and 7).

[46] It must be remembered that an interpreter or translator are designated every time the person being investigated or prosecuted, or another party to the proceedings, or a witness needs to declare something or needs to understand something and they don't speak Italian (CCP, Art 143).

completeness of the phase of the investigation' (*principio di necessaria completezza delle indagini preliminari*).[47] If the investigation has to be complete, this is clearly going to enrich also the basis of circumstantial evidence of the measures of pre-trial custody.

The *gravi indizi di colpevolezza* are not enough for the pre-trial custody to be applied to a person. At least one (or more) of the precautionary needs (*esigenze cautelari*, CCP, Article 274) is required as well: the danger that the defendant, if free, will flee; the danger that he/she, if free, will destroy or contaminate evidence; finally, the danger that he/she, if free, will commit other similar crimes.

Pre-trial custody may be applied only for more serious offences, which are defined by CCP, Article 280, para 2: those crimes punishable by imprisonment for not less than four years at the maximum.

There are, moreover, some notable restrictions:

— no custody can be applied when the results would be that the author of the fact cannot be convicted (CCP, Article 273, para 2) or if probation can be awarded (CCP, Article 275, para 2-*bis*);
— custody is the far more severe of all the pre-trial measures. This is why the legislator wants custody to be the *extrema ratio*: this means it can only be applied when the other measures appear inadequate (and the judge must reason on this in his/her decision, CCP, Article 275, para 3);
— custody cannot be applied to some categories of persons being investigated or defendants: pregnant women, mothers of children under the age of three years (or fathers, when the mother is unavailable for some reason), persons aged over 70, patients with serious diseases (CCP, Article 275, para 4 and CCP, Article 286-*bis*).

There are also special forms.

Usually, pre-trial custody is disposed in jail (CCP, Article 285). Alternatively, if a person needs health care, pre-trial custody can be disposed in hospitals (CCP, Article 286).

Another pre-trial measure is 'house arrest' (CCP, Article 284) which basically is a restriction of liberty of the defendant not in a public jail, but in his or her own house. This clearly allows a saving of money and other material means for the judiciary system.

The two measures—custody and house arrest—have an important intersection: when the judge disposes custody, he can replace that measure with house arrest with electronic surveillance (CCP, Article 275-*bis*). Unfortunately, this is still 'law in the books': electronic devices are not freely available in daily practice.

The measure is decided by the judge (at the pre-trial stage, the *giudice per le indagini preliminari*) at the request of the Public Prosecutor, according to Article 13 of the Constitution.

The Public Prosecutor addresses the application to the judge, enclosing not all the investigations, but only those investigations he/she considers relevant, plus all exculpatory evidence (CCP, Article 291).

The judge decides whether there are all the conditions for a pre-trial custody: ie the *gravi indizi di colpevolezza,* and one of the necessary precautionary needs mentioned above (danger of fleeing, danger of alteration of evidence, danger of re-offending).

[47] See Italian Constitutional Court, judgments nos 184 of 2009, 115 of 2001 and 88 of 1991.

If all the prerequisites exist, the judge issues the order, which also contains the reasoning (CCP, Article 292). Reasoning must explain inter alia why the exculpatory evidence, if any, did not convince the judge not to issue the order.

The concrete execution of the measure is up to the police (CCP, Article 293) which, when enforcing the measure, must inform the person concerned about his/her rights, including the right to a lawyer (CCP, Article 104). More exactly, the police must consign to the concerned person a copy of the order issued by the judge and must inform him/her about the right to counsel (CCP, Article 293). This way, the person is informed in detail of the reasons for his/her detention, and can organise a defence.

The judge's measure is subject to review (CCP, Article 309). The review (*riesame*) is set within 10 days from the execution of the measure; it is addressed to and decided by the Court of Freedom (*Tribunale della Libertà*), which is composed of three judges.

The Court of Freedom has a penetrating power of control of the measure (CCP, Article 309, para 9). Moreover, there are terms for the decision which are imperative: if the *riesame* is not decided within 15 days, pre-trial custody is nullified.

A decision of the *Tribunale della Libertà*, whatever it is, can be appealed to the *Corte di Cassazione* (CCP, Article 311).

11. Questioning the Person Being Investigated, Free or Under Detention

The person being investigated, ie the person whose name is on the record ex Article 335 CCP, can always stand for questioning (*interrogatorio*); in their turn, the Public Prosecutor and police can (not must) at every time question the person being investigated (the police only if the *indagato* is free).

The questioned person has the rights to have a lawyer and to know the summary charge, ie the initial hypothesis of crime; he/she must be warned about his/her other rights, ie, similarly to 'Miranda warnings', that anything he/she does or says, may be used against him/her in the future trial; he/she has the right to remain silent and to refuse to answer questions, but the investigation will go on; if he/she tells something against other people (for example, against an accomplice) he/she'll must testify, becoming a sort of 'crown witness' at the trial (CCP, Article 64).

The person being investigated must only and always answer at least those questions, which the Public Prosecutor and police ask first, regarding his/her identity (CCP, Article 66).

If the person being investigated doesn't understand Italian, an interpreter or a translator is appointed (CCP, Article 143).[48]

To guarantee the right to silence in advance, when a 'witness' (*testimone*, or better *persona informata sui fatti*)[49] is questioned in the investigation stage, the police or Public Prosecutor must interrupt the questioning, whenever it appears the mere suspect that he/she has in fact committed a crime. Hence, the witness becomes a person being investigated (CCP, Article 63) and he/she is warned about all the rights above and, consequently, can remain silent and anything he/she said before cannot be used against him/her at the trial.

[48] This article applies every time interpretation or translation is needed by the person concerned and he/she doesn't understand Italian. See section E.3.

[49] A terminological clarification: in the Italian legal system, a 'witness' is a person who testifies under a duty to tell the truth in the trial. When the same person is summoned to declare something, but at the investigation stage, he/she is not called a witness, but a 'person aware of the facts' (*persona informata sui fatti*).

When a person, who is free, is summoned for questioning, he/she is obliged to present. If the person doesn't present, the Public Prosecutor can ask to the *giudice per le indagini preliminari* for a forced retinue of the person (CCP, Articles 132, 376): this means that the person is coercively taken and brought before the Public Prosecutor and there he/she must remain for the time necessary for the questioning. This measure doesn't imply a finding of guilt: it is merely a consequence of the previous non-appearance of the person.

Summarily, the questioning of the person being investigated or prosecuted is never mandatory for the Public Prosecutor or the police and doesn't require the person to be under arrest or detention; but if the questioning is disposed, the person must present.

The person can be questioned by the police, but in this case person must be free (CCP, Article 350), or by the Public Prosecutor (CCP, Article 375), both in the case he/she is free and in the case he/she is under arrest.

The *giudice per le indagini preliminari* questions only the person under arrest or detention in order to control and ensure observance of the correct conditions of arrest or of detention, as seen before.[50]

The Code of Criminal Procedure expressly provides that at the trial the witness during his or her examination, can be authorised by the judge to refer to written material, in order to 'help his or her memory' (*in aiuto della memoria*): CCP, Article 499, para 5. The same principle applies to the police,[51] to the expert (*perito*)[52] and, finally, to the defendant.[53] Nevertheless, all these provisions regard only the trial phase. What about the investigations? When a person is questioned (or interviewed) as a witness or as an expert or as a person being investigated during the pre-trial phase, although there is no express provision, the conclusion of jurisprudence and doctrine is that it is possible to apply by analogy the above provisions. Thus, the person questioned (or interviewed) can always be authorised to refer to documents during his/her questioning (or interview).

It is however important to underline that the person can be authorised but does not have a right to be. It means the authorisation given by the judge (at the trial) or by the Public Prosecutor or by the police (during the investigations) is quite a discretionary measure.

Actually, with the only exception of the expert, whose position is quite peculiar, the examination or the interview should normally be conducted orally and the possibility to use documents or other written texts could seriously interfere. This is the reason this possibility is subject to an authorisation by the authority and it is not a right.

12. The Right to Silence During the Pre-Trial Procedure and to be Informed that Statements may be Used as Evidence

As mentioned, the right to silence and to be informed that statements may be used as evidence during the pre-trial phase are both guaranteed.

[50] See sections B.9 and B.10.

[51] The police, if heard as witnesses, can be authorised to such a consultation, with regard to the reports made during the investigation: CCP, Art 514, para 2.

[52] The expert (*perito*) has the possibility, during his or her examination at the trial, to refer to 'documents, written notes and publications' (*documenti, note scritte e pubblicazioni*: CCP, Art 501, para 2), and his or her written expertise can be put into the record only after the oral examination (CCP, Art 511, para 3).

[53] The defendant, during his or her examination, can be authorised by the judge to refer to written material, just like a witness: this is because CCP, Art 503, para 2 makes reference to CCP, Art 499, para 5.

As soon as the *interrogatorio* begins, the Public Prosecutor informs the defendant that he/she has the right to be silent and that, if he/she decides to declare, his/her statements may be used as evidence against him/her: CCP, Article 64, para 3, lit a) and b).

But what about statements against other persons? At the beginning of the questioning the suspect is informed also that if he/she declares something about facts regarding other persons, he/she will become a witness with respect to these facts: CCP, Article 64, para 3, lit c).[54] He is informed orally, but everything is then written on the report (*verbale*).[55]

The consequences of non-information are clearly established by CCP, Article 64, para 3-*bis*: if the person being investigated is not informed of his/her right to silence and of the consequences of his/her declarations (possibility to use his or her statements as evidence against him/her or against other persons), such declarations cannot be used. This is a clear example of an exclusionary rule aimed to guarantee the freedom of the person being investigated.

It is important to underline that the person being investigated has no duty or obligation to cooperate: he can decide not to cooperate. The presumption of innocence means that the burden of proof is on the Public Prosecutor. There is only one thing the person being investigated can never refuse to declare: CCP, Article 66 says that he/she must always reveal his/her personal identity; otherwise he/she commits a crime.

C. PROSECUTION MEASURES

1. The Start of the Proceeding: the *Notitia Criminis*

Criminal investigation begins with a *notitia criminis*. The typical *notitiae criminis* are the denunciation (*denuncia*) and the report (*referto*).

The *denuncia* comes from a member of a public agency or power (CCP, Article 331) or even from a private person (CCP, Article 333). The content is always the same: facts, if possible evidence and, if possible as well, the name of the author (CCP, Article 332). A *denuncia* is mandatory for police officers and for members of a public authority, and optional for private persons, excepting a limited list of very serious criminal offences (CCP, Article 333).

The *referto* comes from a doctor or from another person operating in the health field (CCP, Article 334). It is always mandatory, except in very few cases (Article 365 CP).

Atypical *notitiae criminis* have other names (*esposto*, ie exposition of facts; *rapporto*, ie account), etc; the content, however, is practically the same.

[54] This provision is very recent (2001). Previously, the role of the person being investigated or of the defendant was incompatible with that of a witness: that is, the person being investigated or the defendant who decided to accuse another person (for example, an accomplice), was not obliged to swear and to say the truth. Accordingly, the judge couldn't use such declarations as witnesses ones, but only to 'corroborate' declarations made by other persons or other kind of evidence (this rule still exists: CCP, Art 192, paras 3 and 4).

[55] During the pre-trial phase, every statement coming from the person being investigated must be recorded and put in a written report (*verbale*), which is the only way to demonstrate that a statement has been made from him or her. For this reason, the code forbids everybody, and especially the police, to testify on the statements the person being investigated made (CCP, Art 62): the only way to prove them is to put them in the written report. There is only one exception: if a crime has just been committed and the police find the person being investigated at the crime scene, they can question him or her, even without the presence of the lawyer: but the statements of the defendant cannot be put on the report, they can only be used in order to ensure the immediate continuation of the investigation (CCP, Art 350, para 5).

A special mention must be made of the complaint (*querela*): a *notitia criminis* which applies only in the special cases provided for by the law. The *querela* comes from the victim of a crime (Articles 120f CC, 336f CCP) and, unlike all the other *notitiae*, has to be presented within three months from the notice of the crime, has to respect some formal requirements and is the necessary condition to prosecute (ie without a *querela*, the trial cannot begin).

The natural addressee of every *notitia criminis,* typical or atypical, and of every complaint is the Public Prosecutor, who has the duty of entering it into the record of the notifications of crimes (*registro delle notizie di reato*: Article 335 CCP). Only a *notitia criminis* that is clearly improbable (for example: the murder of a cartoon character; the theft of a mythological item; and so on) may not be recorded.

The Public Prosecutor and the police too can seek, on their own initiative, *notitiae criminis*, which must then be entered into the above mentioned record (Article 330 CCP).

Following registration in the Record, there starts to elapse the time for the phase of investigation, that has a maximum permissible duration, depending upon the seriousness of the crime (Articles 405–407 CCP).

2. The End of the Pre-Trial Stage

(a) The Legality or Mandatory Principle to Prosecute

According to the principle directly stated by Article 112 of the Constitution, the Italian justice system is based on the legality principle.

Since the prosecution (*azione penale*) is mandatory, the Public Prosecutor 'must' prosecute whenever there is a probable cause that the person being investigated will be convicted at the end of the trial (CCP, Articles 405, 408 and eCCP, Article 125).

In other words, the case must be dropped whenever there is insufficient evidence to attest that someone is involved in the crime, or that a crime was committed. The Public Prosecutor has to drop the case even when it is impossible to identify the person who committed the crime or there is no complaint (*querela)* from the victim, which is necessary to prosecute some offences.

The duty to prosecute is subject to judicial review.

A Public Prosecutor who wants to drop a case has to ask the judge of freedom for a measure to dismiss. If the judge holds that the motion of the Public Prosecutor is not grounded, after a hearing with the person being investigated and the victim (and their lawyers) and the Public Prosecutor, he/she can order the Public Prosecutor to make new additional investigations or directly to prosecute. Otherwise he/she dismiss (*archivia*) the case, in accordance with the motion of the Public Prosecutor.

When the Public Prosecutor asks the judge of freedom to dismiss the case, he/she has to notify his/her motion to the victim, who asked for this notification. The victim, or better his/her lawyer, has the right to see and to copy the dossier,[56] in order to decide whether or not to oppose the Public Prosecutor's request of dismissal (*opposizione all'archiviazione*). If

[56] There is another situation where the victim can have access to the dossier of the pre-trial investigations: if and when the Public Prosecutor prosecutes someone with the indictment (*azione penale*). Normally, during the pre-trial phase, the 'confidentiality of investigations' forbids any disclosure. On this principle, see below, section E.2(a).

so, the victim must, with the opposition, give to the judge of freedom the elements to verify whether or not the Public Prosecutor has correctly asked for the dismissal.[57] This solution of Italian criminal procedure was modelled on the German *Klageerzwingungsverfahren*.

It is also possible to reopen a closed case: to do so requires an authorisation of the judge of freedom, at the request of the Public Prosecutor, on the grounds that new investigations are possible (CCP, Article 414). Against the decision to reopen or not to reopen there is no remedy in law. The victim can always try to persuade the Public Prosecutor to change his/her opinion about a case he/she dropped.

However, the legality principle operates only in books. In reality it is impossible to investigate and/or to prosecute all the crimes. A great number of *notitiae criminis* cannot be prosecuted and when they are, it can be a long time after the date of the crime.

Due to the *prescrizione del reato* (an elapsed time, which inhibits trial after a certain number of years[58]), a lot of processes end with a pronouncement that the prosecution of the crime is time-barred.

(b) Multilateral Disposal of the Case (Negotiated Justice and Diversion)

The principle of mandatory prosecution, according to Article 112 of the Italian Constitution, is theoretically incompatible with 'alternative' forms of jurisdiction. An indictment must be presented whenever there is a probable cause that the defendant will be convicted; and after the indictment (*azione penale*), the trial must end with a judicial decision, so there is no possibility to create forms of diversion such as those that are so frequent in common law systems.

However, the subject has been studied[59] and the Italian legislature has 'created' something similar to common law solutions in two cases: for petty offences and for young offenders.

First there is the possibility, before a magistrate, called justice of the peace (*giudice di pace*), of acquittal in cases of especially 'small' offences (Article 34 of *Decreto Legislativo* of 28 August 2000, No 274) and in cases of compensation or restitution of damages (Article 35 of *Decreto Legislativo* of 28 August 2000, No 274).

The second is the possibility, before the Juvenile Court, of acquittal for the special 'irrelevance' of the offence (Article 27 of the Decree of President of Republic of 22 September 1988, No 448) or the possibility to be put on probation (*messa alla prova*) for young offenders (Article 28 of the Decree of President of Republic of 22 September 1988, No 448).

The justice of the peace can decide only petty offences (ie certain misdemeanours, such as insults or threats); instead, the Juvenile Court can issue an acquittal for the special 'irrelevance' of the offence, or can order the probation (*messa alla prova*) for every crime committed by the minor.

[57] See, on all these aspects, CCP, Arts 408, 409, 410.

[58] The law fixes that period of time, depending on the seriousness of the crime; for a misdemeanour, the time is shorter than for an offence. There are also crimes (such as those against humanity) for which there is no expiration date: in these cases, prosecution will never be time-barred.

[59] See Mannozzi, *La giustizia senza spada:uno studio comparato su giustizia riparativa e mediazione penale* (Milan, Giuffrè, 2003).

The process in the Juvenile Court is suspended during the probation for one or three years (depending on the gravity of the offence); the court ordering the probation can set some rules for the young defendant, including a conciliation between him/her and the victim.

In some cases, these ways of diversion require a consent.

The justice of the peace can dismiss a case (ie before the prosecution, *archiviare*) for special 'smallness' only if the victim expresses no interest in a prosecution; the justice of the peace can order acquittal (ie after the prosecution, *azione penale*) only if neither the defendant nor the victim oppose (Article 34 of *Decreto Legislativo* of 28 August 2000, No 274). Compensation or restitution of damages implies an agreement (Article 35 of *Decreto Legislativo* of 28 August 2000, No 274).

An acquittal for the special 'irrelevance' of the offence (Article 27 of the Decree of President of Republic of 22 September 1988, No 448) is issued after a hearing in the presence of the young defendant and his/her parents; probation obviously requires the participation of the young defendant.

All decisions in this field are written and reasoned, and the involvement of the defence is necessary.

3. Committing to Trial and Presenting the Case in Court

At the request of the Public Prosecutor, but before the public trial, a different judge (*giudice dell'udienza preliminare*) has to verify in a preliminary hearing (*udienza preliminare*) that the request has a real factual basis, ie that the indictment is well grounded on the results of the investigations and, consequently, that there is a probable cause that the defendant will be convicted at the end of the public trial.

At the end of the preliminary hearing, the *giudice dell'udienza preliminare* decides either to commit the case to trial or to acquit.

A preliminary hearing is always necessary for more serious crimes. However, the defendant can waive this hearing and decide to appear directly in court for the trial: CCP, Article 419, para 5.

A preliminary hearing is not provided for minor offences, punishable with imprisonment not higher than four years (CCP, Article 550): in these cases, there is no preliminary hearing and the Public Prosecutor summons directly the defendant to the court.

The decision of the judge of a preliminary hearing looks very like a decision of a 'pre-trial chamber', even if he/she is only one person, while the chamber is a court composed by several judges. Actually, the origin of the preliminary hearing is the same as that of the pre-trial chamber: ie the *giurisdizione istruttoria* (investigating jurisdiction) of French legal tradition.

The Public Prosecutor represents the case in court. Since the office of the Public Prosecutor is burdened with much work and many cases, in practice it is unusual that the person of the office, who carried out investigations, is also the same person at the trial. At the trial, it is more usual to find another person of the office or also a 'Lay Prosecutor', that is to say a Public Prosecutor who doesn't belong to the professional judiciary system but is appointed, between lawyers, only for a given time (*magistrato onorario*).

D. LAW OF EVIDENCE

1. The 'Double Dossier': Oral Evidence and Written Report

After the entry into force of the new accusatorial code of 1989, the Italian legal system has a new law of evidence too.

Previously, according to the 'Rocco' Code (1930-89) and to the French tradition, there was no such law of evidence: you could speak about the evidence only referring to the investigation powers of the 'judge of instruction' (*giudice istruttore*).

Today a large part of the CCP is dedicated to the law of evidence. At the public trial, evidence mainly consists of declarations coming from witnesses and experts. Only a very few of the investigative measures carried out during the pre-trial stage can be used by the judge of the trial to decide.

In fact, the entire system is based on the so-called 'double dossier' principle.

This means that there is a first dossier, the dossier of the investigation, which collects all the acts and measures carried out during the preliminary phase (CCP, Article 416, para 2) including, therefore, the police 'written reports'. Then, there is the trial dossier (CCP, Article 431), ie a dossier which contains all and only the evidence which can be used by the judge at the end of the trial to decide if the defendant is guilty or not.

The relationship between these two dossiers is, theoretically, simple. Ordinarily, according to Article 111, paras 3 and 4 of the Constitution, evidence is to be presented orally, in a public hearing, before the judge who has to decide, and nothing which has been done or acted during the investigation can enter or be inserted in the trial dossier.[60]

However, there are at least two very important exceptions. The first is that activity which cannot be repeated at the trial must be inserted in the dossier—for example, the record of a search or of a seizure, the record of a wiretapping, the record of the declaration of a witness who unexpectedly died, and so on.[61] The second is the consent of the defendant: if the defendant says so, written reports can be inserted in the trial dossier and can be used by the judge (CCP, Article 493, para 3). Normally, investigative measures which were carried out in pre-trial and became unrepeatable at the public trial are 'guaranteed' by the presence of the lawyer.

The term 'report' (*rapporto*) evokes what in the former criminal procedural code (Rocco Code) was the 'account' that police used to send to the Public Prosecutor about the acts and measures of the investigation carried out. Normally, such written reports are not admissible as evidence in the trial, because only oral evidence is admissible.[62]

The new code determines the evidence and, inter alia, the 'document' (CCP, Article 238), ie all the sensible supports (on paper, on hard disk, etc) with communicative content, that

[60] It could be useful to remember that a completely different point of view arises whenever the proceeding ends with a plea bargaining (CCP, Art 444). When the defendant enters a guilty plea, the judge must decide on the 'written reports' of pre-trial investigation, without any oral evidence. In this case the use of written reports is the ordinary way to decide upon the culpability and/or punishment of the defendant. Something very similar happens in the 'summary trial' (*giudizio abbreviato*), which is a special proceeding the defendant has the right to ask: here the judge decides on the 'written reports' of pre-trial investigation too (CCP, Art 438).

[61] To the examples already made above can be added the record of a shadowing made by the police during the investigation.

[62] The written report of the police cannot be used by the trial judge: he or she can decide only considering what the Policeman says at the trial, during the cross-examination by the public prosecutor or the lawyer (at the end of the examination, the judge too can question the witness: CCP, Art 506, para 2).

are normally formed out of the criminal proceeding. For example, according to the law, a 'document' can be a letter found on the crime scene. This kind of evidence can directly enter the trial dossier and be used by the judge.

Finally, there is a specific regulation (CCP, Article 238) on the topic of the possibility to use, in a trial, evidence gathered in another proceeding (pre-trial phase or trial: for example, a witness declaration put on the record in a different trial).

2. Status of Illegally or Improperly Obtained Evidence

In principle, judges cannot use illegally obtained evidence, ie evidence gathered without observance of the criminal rules. This principle is clearly set, for example, in the field of illegal wiretapping.[63]

Obviously not all the criminal rules are relevant: according to CCP, Article 191, the judge must exclude any evidence obtained against an express prohibition imposed by the law (once again, the example can come from rules on wiretapping: a wiretapping, gathered without the necessary order of the judge, must be excluded).

Italian law doesn't clearly adhere to the theory of the fruit of the poisonous tree; according to case law, this theory could be applied in the Italian system, but the decisions of the Italian judges on this matter are neither frequent nor clear.

For example, in a case regarding an illegal house search, the Supreme Court clarified that the consequent seizure was possible in so far as the police have an obligation to seize anything which can be regarded as a 'body of evidence', even if illegally obtained.[64] That is to say: the Supreme Court admitted the house search was illegal but, on the other hand, emphasised that, despite the illegality of that search, the police still had a duty to seize the evidence.

E. STATUS AND RIGHTS OF THE 'ACCUSED'

The CCP distinguishes between the *persona sottoposta alle indagini* or the *indagato*, from the *imputato* (CCP, Article 60 and 61).

The first two expressions signify the person being investigated by the Public Prosecutor during the pre-trial stage; the person, whose name is registered in the record according to Article 335 CCP is an *indagato* until the end of the investigation phase. The latter expression means the defendant, ie the person being prosecuted by the Public Prosecutor and committed to the trial.

Therefore, Italian legal terminology has no equivalents of the terms 'suspect' and 'suspicion'.

Indagato and *imputato* have, in principle, the same rights. These rights are to be especially protected in the preparatory stage, when the Public Prosecutor or the police are secretly conducting their investigations and using all the measures and the powers of the state against the private citizen.

[63] See above, section B4(b).
[64] Cass pen, sez un, 27 March 1996, no 5021, Sala.

1. Presumption of Innocence

According to Article 27 of Constitution, the defendant is not considered guilty until the definitive conviction (guilty verdict). Despite the different expression of the Italian language from Article 6, para 2 of the ECHR ('2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law'), the result is the same.

The presumption of innocence imbues the whole proceeding. See the pre-trial custody: before conviction, the freedom of the defendant can be limited only in exceptional cases (for example when there is a founded basis about the crime committed by the defendant, CCP, Article 273, plus the danger that he or she may escape, CCP, Article 274).

See, also, the standard of evidence: as in the United States, according to CCP, Article 533 the culpability of the defendant must be proved 'beyond any reasonable doubt' (CCP, Article 533 was so modified in 2006) and to this end Public Prosecutor has to collect charge and discharge evidence.

See, as well, the right to silence and the privilege against self-incrimination, that leave the defendant free to cooperate or to not cooperate in any way with the Public Prosecutor's investigation.

During the proceedings the defendant must be considered innocent until the conviction; he/she should be free, unless serious and urgent reasons suggest the opposite.

The burden of proof lies on the Public Prosecutor. The defendant need only refute the evidence against him/her. He/she is not obliged to provide exculpatory evidence, nor to tell anything about the charge. The judge must acquit unless the Public Prosecutor proves beyond any reasonable doubt the defendant's guilt.

This is the law. In action, unfortunately, Italian proceedings still follows the old and opposite mentality of the French Napoleonic tradition: pre-trial custody is very frequent for serious cases (the phenomenon of the *detenuti in attesa di giudizio*,) and a defendant who doesn't answer the Public Prosecutor's questions is often suspected to be guilty.

2. The Right to Legal Assistance

According to Article 24, para 2 of the Constitution, the right to defence is inviolable at every stage of the proceeding (*la difesa è diritto inviolabile in ogni stato e grado del procedimento*). The defendant must always have a lawyer: also a lawyer, accused of a crime, must have a defence lawyer. The presence of a lawyer is mandatory.

That being so, it is important to distinguish two different situations.

If the defendant doesn't have sufficient money to pay a lawyer, he/she can ask for legal aid (*patrocinio a spese dello Stato*: see Decree of President of the Republic of 30 May 2002, No 115, Article 74 ff): this means the lawyer, who can be appointed from a list prepared by the Bar Council, will be paid by the state. To be admitted to legal aid a defendant must demonstrate a very low income (not more than 9,296.22 EUR in a year[65]).

Different is the case of the *difensore d'ufficio*, which can be translated as 'public defender', but only if the underlying reality is clear: when the defendant doesn't appoint a lawyer (for example simply because he/she doesn't know one) the *autorità giudiziaria* (Public

[65] Art 76 Decree of President of Republic No 633 of 1972 (n 9).

Prosecutor or judge[66]) must appoint one, chosen from a list of lawyers, prepared by the Bar Council (CCP, Article 97). The defendant must regularly pay his/her public defender (CCP, Article 97). The person being investigated, as well as the defendant, can at any time appoint a 'trust' lawyer, who immediately replaces the public defender: CCP, Article 97, para 6.

It is possible for a defendant to be admitted to legal aid and to be appointed a public defender, but it is important to keep clear we are discussing of two different aspects.

As soon as the Public Prosecutor or the police perform any act which implies the presence of the defence (for example, a search), they must inform the person being investigated of the right to legal assistance, with a so-called 'letter of rights' (*informazione di garanzia*: CCP, Articles 369 and 369-*bis*).

Normally, non-compliance with this right, that is to say the absence of a lawyer when his or her presence is mandatory, forbids the Public Prosecutor or police from carrying out their activity. Nevertheless, if it is carried out, such activity is nullified (*nullità*, CCP, Article 178, lit c)) and normally the activity must be repeat.

(a) Confidentiality of Investigation and Defendant's Right to be Informed About the Charges

To exercise his or her right of defence, the accused person must clearly know the charge against him or her.

This is not always possible from the start of the pre-trial phase. In fact, normally the police and Public Prosecutor carry on all the acts of the investigation in secret: the so-called 'confidentiality of investigations' (*segreto istruttorio*), CCP, Article 329.

However, there are many ways a person can be informed of the charges during the procedure against him or her.

The first way to be informed of the charges is when the Public Prosecutor or police carry out an act from which it is inferred a process is pending. For example: if the person is searched, or if his/her house is searched (and he/she is present), the Public Prosecutor or the police give him or her a copy of the order or warrant on the basis of which they are proceeding, together with the 'letter of rights' (*informazione di garanzia*). The order or the warrant usually contain a very brief reference to the relevant Articles of the Criminal Code (CC) and, often, a reference to time and place of the facts.

A second and wider way is when the person is questioned: he or she must be informed, clearly and precisely, about the charges, and even the evidence must be partially revealed (CCP, Article 65).

These two cases belong to the category of acts, to carry on which, Police or Public Prosecutor must inform the lawyer of the defendant: they are called 'guaranteed acts' (*atti garantiti*). After their realisation, the secretariat of the Public Prosecutor must make those acts (and only those acts) available to the lawyer (CCP, Article 366), and he or she can consult them.

The rule which requires 'guaranteed acts' to be available to the lawyer has only one possible exception: the Public Prosecutor can, 'on serious grounds' (*per gravi motivi*) delay for no more than 30 days that availability: CCP, Article 366, para 2.

If the acts are not made available to the lawyer, the consequence is that every faculty, deriving from the knowledge of the acts, will rise at the time of the subsequent and actual knowledge.

[66] On the meaning of the expression *autorità giudiziaria* see above, n 14.

The third way to be informed of the charges is when the investigation phase finishes: at the end of the preliminary phase (but still before the indictment) the Public Prosecutor must make all the acts of the investigation available to the lawyer (discovery), who can consult them, and notify the person being investigated of an act with the preliminary and provisional charge: CCP, Articles 415-*bis* and 416, para 2. This is the generalised discovery at the end of the pre-trial phase.

The discovery at the end of the pre-trial investigations is always compulsory.

What happens if the Public Prosecutor, at the end of the pre-trial phase, makes available to the lawyer only a part of the acts of the investigation? Jurisprudence says there is no invalidity: only those acts cannot be used by the judge in order to decide whether there are enough reasons to celebrate the trial or not.[67]

Recently the Constitutional Court said there is no invalidity if the dossier of the pre-trial phase is too messy.[68]

In conclusion, during the investigations general rule is for the confidentiality; during the trial general rule is for the public nature and for the knowability of all the relevant legal acts.

It is possible, however, that no revealing act is made and, nevertheless, the person perceived a 'rumor' that something—in the criminal justice system—is moving against him/her.

In this case, a person who thinks he or she may be subject to investigations, can make a query to the 'Record of the notifications of crimes' (*registro delle notizie di reato*: Article 335 CCP) in order to know if there has been a notification of a crime against him or her.

There is a restriction to the query to the 'Record of the notifications of crimes': the Public Prosecutor must normally answer such a query, but with two exceptions. The first concerns a number of serious offences, related to organised crime. The second exception works as follows: if the Public Prosecutor has to make some investigations, which an answer to the query could eventually compromise, he can withhold the answer, but for no longer than three months. This decision is reasoned, but there is no judicial review (Article 335, para 3 and 3-*bis* CCP).

There is no more room for secrecy when the Public Prosecutor prosecutes the person with the indictment, which is always and unfailingly brought to the attention of the defendant. At the trial the charge is public and every modification must alike be disclosed and announced.

During the trial, discovery is automatic and parties are not allowed to bring to the judge evidence not brought to the attention of the other parties (*prove a sorpresa*). For example, the party who wants a witness to be heard during the trial, must submit the name of the witness to the judge, including the circumstances on which the witness must be heard, seven days before the hearing, in order to let the other parties know the request and make their rebuttals.

What if during the trial one party presents 'surprise evidence' and the other party is not admitted to rebuttal by the judge? The right to provide evidence to the contrary is very important and is protected by the possibility to present a specific reason of appeal to the Supreme Court: CCP, Article 606, lit d).

[67] In this sense, see, for example, Cass, sez I, 15 January 2010, no 19511.
[68] Sent no 142 of 2009.

Until now, we've been talking about the so-called internal secret, which is addressed to the parties of the proceeding, that is to say, mainly the person being investigated (or the defendant) and the victim, as well as their lawyers (CCP, Article 329).

There is also an external secret: even when the internal secret has been lifted, for example because investigations ended with the indictment, and parties have made copies of the file, this doesn't mean the external secret has been lifted as well. The external secret is addressed to everybody who neither took part to the proceeding nor had the right to: that is to say, the collectivity. For the collectivity, the external secret, regarding the investigations, is going to be lifted much later: at the end of the trial, CCP, Article 114, para 2 and 3.

We must admit, however, this provision is one of the most often violated. Daily we can read in newspaper and hear on the television about investigations, acts and measures, even during the pre-trial phase. The distinction between law in the books and law in action couldn't be, unluckily, more strident.

The problem regarding the consequences of not respecting the right of the accused to know the charge against him/her is complex.

If orders or warrants, which must contain a brief description of the charge, don't contain such a description, the consequence should be the nullity (*nullità*) of the act.[69]

If the person is questioned with no previous disclosure of the charge (in violation, therefore, of Article 65 CCP), there is a clear violation of his/her right to defence and the interrogation is affected by nullity (CCP, Article 178, lit c)).

Finally, if the charge in the indictment is not described in a clear and precise way, the consequence is, once again, nullity: see, for example, CCP, Article 429, para 2 and Article 552, para 2.

(b) Access to the File During Pre-Trial Proceedings: the Pre-Trial Discovery

The investigation, as just said, is secret.

The person being investigated and his/her lawyer have a right of access to the whole dossier of the investigation, but only at the end of the investigation, before the indictment; during the pre-trial investigations, only partial discovery is possible.

During the investigation, the person being investigated and his/her lawyer, who can be notified about the proceeding with the letter of rights (*informazione di garanzia*), can also obtain partial access to the dossier, particularly:

— in case of search and seizure they obtain a copy, but only of the act ordering the search and the seizure and of the report (*verbale*) of the operations carried out;
— in case of pre-trial custody, when the judge of freedom orders a measure that limits the freedom of the defendant. In such an eventuality, the lawyer has access to the dossier that the Public Prosecutor gave the judge to justify his/her request for the pre-trial custody.

Note that if the Public Prosecutor, at the end of the investigation phase, asks for the dismissal of the case, the person being investigated normally knows nothing about it (he/she

[69] See the acceptable point of view of Cass pen, sez VI, 22 of September of 2005, No 998, in a case regarding a seizure.

is aware of the proceeding only, for example, if there has been a pre-trial custody, a search or a seizure, a questioning, etc).

Only if the victim opposes a request of dismissal (*opposizione all'archiviazione*), or the judge of freedom believes it necessary in every case to hold a hearing with the presence of the victim and the person being investigated, can the latter, as well as the victim, have access to the dossier.[70]

After the investigation is closed:

— access to the dossier of pre-trial investigation is fully granted, if the Public Prosecutor prosecutes with the indictment (*esercizio dell'azione penale*);
— the access is complete too, if the Public Prosecutor asks for the dismissal and the victim opposes this.

If the Public Prosecutor doesn't allow access to the complete dossier when he decides to prosecute, the indictment—and all the successive proceedings too—should be considered invalid. Nevertheless, jurisprudence tries often to offer alternative interpretations, oriented to the preservation of what has been done. For example, according to recent jurisprudence, if the Public Prosecutor, at the end of the pre-trial phase, makes available to the lawyer only a part of the acts of the investigation, there would be no invalidity: only, those acts shouldn't be used by the judge in order to decide whether there are enough reasons to celebrate the trial or not.

Other ways a person can become aware of a proceeding are through the query to the 'Record of the notifications of crimes', or if during the preliminary investigations a measure is carried out, which require the presence of the lawyer (CCP, Article 366, para 2).[71]

Copies can be made which the lawyer can send to the client (person being investigated or victim), but only to him/her.

(c) The Right of the Defence to Undertake Investigative Measures/Acts in their Own Right

It is only since 2000 (Law No 397 of 7 December) that defence lawyers can carry out own investigation, according to CCP, Article 391-*bis* 391-*decies*. Even with the new Code of Criminal Procedure of 1989, defence lawyers were substantially forbidden to investigate and to contact or to speak with a future witness, since it could be a disciplinary violation.

Since 2000 a lawyer (of the defendant as well of the victim) can question witnesses and co-defendants; if he/she decides to record the examination, he/she has to record every question and answer completely (CCP, Article 391-*bis* and -*ter*).

The lawyer can request public administrations to send documents at their disposal (and in the case of no answer, the lawyer can request the Public Prosecutor to compel an answer: CCP, Article 391-*quater*); he/she can access to places relevant for the crime (with the authorisation of the judge of freedom, if the place isn't public: CCP, Article 391-*sexies* and -*septies*): he/she can question expert witnesses, and so on.

The lawyer can also investigate 'in advance', that is to say, when a proceeding is not yet open, but there is such a possibility; in these cases, he/she needs a special written power, ie

[70] On the role of the victim, see section C2(a).
[71] For both, see above, section E2(a).

not the simple appointment, which is normally sufficient, but the indication of the issue for the future criminal proceeding.

To conclude, the investigation of the defence is potentially very powerful in the books. In the action, however, the old tradition that saw 'passive' lawyers is still prevalent and, especially in the south of Italy, where organised crime is still strong, only a few of them dare to carry out their own investigations.

(d) The Right to Ask for a Special Act of Investigation

In principle, since 2001 neither the defendant nor the victim need to ask the Public Prosecutor for a special act of investigation, since they can carry out investigations by themselves, through their lawyers.

However, there are some acts of investigation which cannot be carried out by the defendant or by the victim, being reserved only to a public power: for example, wiretapping or a search and seizure.

Moreover, even when the defendant or victim could carry out by themselves an act of investigation, they are logically not compelled to, and they can always ask the Public Prosecutor to do so.Except in two cases, however, the Public Prosecutor has no obligation to proceed to the act of investigation requested.

This first case is provided by CCP, Article 391-*bis*, para 10: when the lawyer has tried to question a person being informed of facts, but this person decided not to answer (as is his or her right), the lawyer can ask the Public Prosecutor to summons that person.[72] The Public Prosecutor, if the request of the lawyer is reasoned and detailed, must then do so.[73] In the presence of the Public Prosecutor, that person shall answer to the questions of the lawyer.

The second instance is provided by CCP, Article 415-*bis*: before the indictment, the Public Prosecutor is compelled to discover all his/her pre-trial investigations and ask the defendant and his/her lawyer if they consider some more investigation act is needed.[74] The defendant can ask for seizure, for a search or for something else; if he/she asks to be questioned, the Public Prosecutor, unlike in the other cases, must question him/her. If he/she doesn't carry out the questioning (*interrogatorio*),[75] the charge can be invalidated: CCP, Article 416, para 1.

In other cases (CCP, Article 391-*quater*, para 3, Article 415-*bis*, para 4, Article 368), the Public Prosecutor can—not must—proceed to the act requested.

The fact that the Public Prosecutor has no obligation to proceed to the act of investigation asked by the party, together with the other fact that the Public Prosecutor is supposed to be the natural opponent of the defendant, lead to the conclusion that the possibility to ask for an investigation act is quite rare.

[72] On investigation of the lawyer, see above, section E2(c).

[73] See Cass, sez II, 23 November 2010, no 40232.

[74] On CCP, Art 415-*bis*, which set the discovery at the end of the pre-trial investigations; see above, section E2(a).

[75] On questioning, see above, section B11.

3. The Right to an Interpreter

The Italian legal system provides for the right to an interpreter.

Reference is to CCP, Article 143 ff: a defendant who doesn't understand the Italian language can apply for an interpreter, in order to be able to understand the charges against him/her and to participate knowingly to the procedure. CCP, Article 143, para 1 says expressly that the right to apply for an interpreter is free for the defendant.

The defendant also has the right to a written translation: in these cases, says CCP, Article 147, the interpreter can ask for and obtain a time for the translation of the acts he is requested to translate.

An important ruling of the Constitutional Court must be mentioned: in judgment No 254 of 6 July 2007, the Constitutional Court said that foreigners, who don't speak Italian and are admitted for legal aid, can apply for an interpreter: Article 102 of the Decree of the President of the Republic No 115 of 2002.

CCP, Article 144 specifies who cannot be an interpreter: for example, minors or mentally ill persons, persons banned from public offices, etc.

See, however, mentioned CCP, Article 144 for the complete list.

4. The Right to Submit Written Statements and to Require a Precise Wording of One's Statements

A person accused of a crime can directly contribute to the investigations or to the trial, by submitting written statements.

During the pre-trial investigations, the lawyer (whose presence is, anyway, compulsory) can at any time submit written statements (*memorie*) and requests (*richieste*) to the Public Prosecutor (CCP, Article 367).[76]

Similarly, whenever they wish, parties (not only the defendant) can submit to the judge (during the pre-trial phase or even at the trial) written statements (*memorie*) and requests (*richieste*). The judge has an obligation to answer within 15 days, if a shorter time is not provided (CCP, Article 121).

According to CCP, Article 482, during the trial parties also have the right to put into the record every statement they make.

Finally, CCP, Article 494 allows the defendant to make 'spontaneous statements' (*dichiarazioni spontanee*) during the trial, whenever he or she wants so. These oral statements will be put into the record (CCP, Article 494, para 2).[77]

[76] The possibility for the lawyers to submit written statements to the Public Prosecutor is expressly admitted during the pre-trial phase (see CCP, Art 367), but it must be said that the Public Prosecutor accepts always with no problem written statements, even in the trial or during the appeal. No restrictions are set regarding the content or the aim of the written statements; on the other hand, the Public Prosecutor is not compelled to answer to the statement.

[77] The right of the parties to put into the trial record their statements has two limits: 'within the limits strictly necessary' (*entro i limiti strettamente necessari*), and 'unless the statement is against the law' (*purché non contraria alla legge*): CCP, Art 482. When the defendant is making his or her oral and spontaneous statements, on the ground of CCP, Art 494, he or she cannot be interrupted or silenced, unless his or her statements are not relevant or too long.

Persons being investigated are not informed of the possibility of submitting written statements, granted by Article 367 and 121 CCP, nor of the possibility to put into the trial record a statement, granted by CCP, Article 482: this is because such rights will be well known by their lawyers (whose presence is compulsory). The defendant is informed of his/her right to make spontaneous statements by the judge at the beginning of the trial (CCP, Article 494).

If a party ask to enter a statement into the trial record (CCP, Article 482) and the judge denies this right, the judge him or herself commits a crime. This is a purely theoretical hypothesis.

If the defendant wishes to make spontaneous statements (CCP, Article 494) and the judge denies this right (once again, it is unlikely to happen), it could produce a 'nullity' (*nullità*) of the proceeding, on the ground of CCP, Article 178, lit c). Vice versa, if the judge does not inform the defendant of this right, nothing really happens, because the defendant has a lawyer who can at every time remind him or her of this right.[78]

[78] See Cass, sez V, 28 September 2004, no 45416.