



## PRIV-WAR Report - Italy

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### Italian Legislation on Private Military and Security Companies

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#### **PRIV-WAR**

Regulating privatisation of “war”: the role of the EU in assuring the compliance with international humanitarian law and human rights

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## Italian Legislation on Private Military and Security Companies

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## INTRODUCTION

In Italy there is no specific regulation on PMC and so far no PMC has been incorporated under Italian Law or in the Italian territory. Instead, a regulation on PSC and its affiliates is provided by:

- 1) **T.U. of Laws on Public Security - R.D. June 18 1931, n. 773**  
Title 4 - Arts. 133-141 (hereinafter, « *LPS* »);
- 2) **R.D. May 6 1940, n. 635**  
Title 4 - Arts. 249-260, as modified by the D.P.R. August 4, 2008, n.153 (hereinafter, « *Regulation* »);
- 3) **R.D.L. September 26 1935, n. 1952;**
- 4) **R.D.L. November 12 1936, n. 2144.**

*Also some criminal norms of the ITALIAN CRIMINAL CODE may be considered relevant for PMC/PSC*

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### **1. *The Italian criminal dimension of PMC/PSC***

The Italian Criminal Code was enacted when the phenomenon of PMC did not exist, and while some PSC were incorporated in Italy, they were essentially operating within the Italian boundaries. Therefore, no criminal norms provide a specific regulation for PMC/PSC, their involvement in military or peace keeping operations and the use of force by their affiliates in wartime. Notwithstanding, it is important to understand if it is possible to apply some criminal norms to such phenomenon and actually the answer is not as simple as it may appear at first sight. The general principles of the Italian criminal legislation must be taken into account and, among the others, the principle that prohibits interpreting the criminal norms in an extensive way. Since no criminal norms expressly regard PMC/PSC, it is evident that such a prohibition of extensive interpretations complicates the application of some penal norms to PMC/PSC.

The norms provided by the Italian Criminal Code that can come into consideration for the regulation of PMC/PSC are the ones provided by Title 1 - Second Book of the Code. This Title regards Crimes against the personality of the State and is subdivided into four Chapters:

- 1) Chapter 1 - *Crimes against the international personality of the State;*
- 2) Chapter 2 - *Crimes against the domestic personality of the State;*
- 3) Chapter 3 - *Crimes against the political rights of citizens;*
- 4) Chapter 4 - *Crimes against the foreign States, its heads and representatives*

As we said above, none of the norms provided by the aforementioned parts of the Code expressly takes into account PMC/PSC. However, some Italian courts interpreted Article 288, regarding mercenarism, as applicable to PMC/PSC, if a qualified link exists between them and a foreign State. This was done notwithstanding the prohibition of extensive interpretations of the criminal provisions.

Before facing the question of the *qualified link*, it is important to mention that as a general principle, the sanctions provided by the norms related to crimes against the personality of the

State are reduced if the facts committed are not of a grave nature. On the other hand, they are increased in cases of terrorist intent.

Article 1 of Law Number 15, enacted on February 6<sup>th</sup> 1980, provides for an increase of the criminal sanction, for all crimes against personality of State, if the crimes are committed with terrorist intentions or for the purpose of subversion of the democratic order. Such increase will be for half of the sanction and, of course, will not be applied if the crime is punished with life in prison. In any case, if a person that takes part in a terrorist act or plan works in order to avoid further consequences of such activity and support the public authorities for the individuation of the authors of the crime, such increase of sanction will not be applied. Moreover, if a person impedes the realization of the terrorist activity and furnishes elements of proof necessary in order to provide a real reconstruction of the facts and for the identification of other eventual authors of the crime, then such person is not punishable according to Art. 5 of the same Law.

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## ***2. The prohibition of mercenarism and its application to PMC/PSC according to the Italian Courts***

According to Article 288 of the Italian Criminal Code, any person that, within the Italian territory, and without the authorization of the Government, recruits or furnishes arms to Italian citizens so that they fight on behalf of, or at the service of the foreigner, is punished with imprisonment from four to five years. Of course, the sanction is increased if there are soldiers on duty or people obliged to perform military service amongst the recruited persons. The material element of the crime is *giving arms to* and *recruiting Italian citizens* on behalf of the *foreigner*, with no authorization of the Government. This means that the norm regards only the recruitment of Italian citizens and according to Article 242, III paragraph, of the Italian Criminal Code, also the persons who have lost, for any reason, their Italian citizenship, must be considered Italian as well. It does not matter if they became citizens of foreign States or displaced persons: the norm will be applied if, once during their lifetime, they had Italian citizenship. On the contrary, Article 288 does not apply in case of recruitment of foreigners and displaced persons within the Italian territory. In such case, the norm of article 653 will be applied (with a substantial reduction of the sanction), unless such behaviour results in a danger of war for Italy. In this situation, Article 244 will be applicable.

It is important to underline that Article 288 punishes only the person who recruits or furnishes arms and not the recruited persons. Furthermore, it punishes the recruitment on behalf of the foreigner, *i.e.* foreign States or, as specified by the Italian Courts, foreign insurrectional groups.

Last but not least, to be applicable, acknowledgement by the recruiter of operating without the Government's authorization and for military purposes is required. On procedural grounds, the authorization of the Ministry of Justice must be obtained to prosecute the crime.

Applying Article 288, the Prosecutor of Bari, after having obtained the authorization of the Ministry of Justice, asked the Judge of preliminary investigations of Bari (*i.e.* GIP – Giudice delle indagini preliminari), for the application of a security measure (*prohibition of expatriation*) against the Italian representative of the *Presidium Corporation*. Presidium Corporation is a PMC incorporated in Seychelles and with two secondary seats in Italy, the first in Sammichele di Bari, and the second in Olbia.

In the opinion of the G.I.P., Giuseppe De Benedectis, Presidium Corporation is actually a training centre for mercenaries. Three Italian citizens have been recruited in Sammichele di Bari with the aim of working in Iraq on behalf of another PMC incorporated in Nevada, *DTS*

*Security Llc.*, as support for Anglo-American military forces. Such persons were also entitled to use military arms, the license of which was given to them by the Anglo-American Military Provisional Government of Iraq. For all of these reasons, as a security measure, the judge ordered the « *prohibition of expatriation* » for the author of the recruitment (Decision of October 1<sup>st</sup> 2004). This decision was appealed before the «Tribunale del Riesame» of Bari (a kind of judge of second instance). The Tribunale del Riesame explained that Article 288 may be considered applicable only to persons recruited in the Italian territory with the purpose of carrying out a real military activity on behalf of the foreigner. It is not required that the recruited person to be integrated in the foreign army, but it is necessary to carry out « military activities » in an organized way. Therefore it is not a crime to recruit persons with the aim of letting them work, even in a State such as Iraq, as bodyguards or other similar professionals, since this is not a military activity. Furthermore, it is not a crime to give a person an arms license, if such person does not work in an organized way on behalf of the foreigner.

Regarding the term *foreigner*, according to the Tribunal such term must be interpreted as referring first of all to Foreign States and/or insurrectional groups. Thus, the recruited person must work on behalf of a foreign State or insurrectional group. PMC would be excluded, but the Tribunal specifies that in some situations, a foreigner may also be a private entity. In such a case, a « qualified link » must exist between the private entity and the foreign State or the insurrectional group.

Referring to the case in discussion, the Tribunale del Riesame stated that it was not demonstrated that a « qualified link » really exists between DTS, or Presidium, and the Anglo-American forces; nor was the military nature of the activities carried out in Iraq by the recruited persons demonstrated. For these reasons, the appealed security measure has been annulled (Tribunale del Riesame, October 18<sup>th</sup> 2004).

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### **3. The theory of the qualified link: characteristics and consequences for the PMC and PSC.**

Once ascertained that Article 288 can also be applied to PMC/PSC when a qualified link exists between such entities and the foreigner, i.e. a foreign State or an insurrectional group, it is necessary to stress the characteristics of such link. In particular, as the Tribunale del Riesame stated, private entities may be considered *foreigners* for the purpose of Article 288, only if they show a public and institutional dimension. This means that the private entity must be:

- 1) financed by a public entity, with public or hidden financing;
- 2) owned either in whole or in part by public entities, also as hidden partners;
- 3) used as a *longa manus* of a foreign State or an insurrectional group.

As specified by the Tribunal, when a private entity is involved, the court must be very careful and must have evidence sufficient to establish such an existing link between the private entity and the Foreign State. If the proof of such link does not exist, the recruiter of a PMC cannot be considered to have committed the crime provided by Article 288 of the Italian Criminal Code.

It is too early to say if the theory of the « qualified link » will be followed by the Italian Courts in the near future. As we have seen above, the theory was elaborated and applied by the Italian courts in relation to the application of a security measure. The proceeding on the merit of the case is still pending before the Tribunal, and since the decision regarding the security measure does not bind the Judge of the proceeding on the merits, the theory of the qualified link could be set aside. On the basis of the restrictive interpretation of the criminal

provisions, the Tribunal may state that Article 288 does not regard PMC/PSC although the vagueness of the term « foreigner » used by the norm could permit to include such entities. We will see what happens in the near future but, in any case, what is important to highlight now is the scenario that the theory of the qualified link could open to PMC/PSC. In fact, on the basis of this theory, many other criminal norms of the Italian legislation could be considered relevant for PMC/PSC.

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#### **4. The Italian Criminal norms applicable in time of war.**

Taking into consideration the qualified link required between a PMC/PSC and a public entity, other norms of the Italian criminal legislation may be applied to PMC/PSC and its affiliates. Among the others, the penal provisions regulating the time of war could be applied.

Before analyzing the individual relevant norms, it is important to stress that according to Article 310 of the Italian Criminal Code, the time of imminent danger of war, if the war follows, must also be considered as a time of war. Thus, to be in time of war, a declaration of war is not required. Verifying if a time of war occurs is above all an analysis of fact that the judge must carefully carry out.

Apart from this, many of the norms regulating the time of war punish behaviours of persons acting against Italy or in favour of States at war against Italy. As the Italian Courts specified, States at war against Italy are also to be considered political groups that, although not recognized as States, are treated as belligerent. On the other hand, according to Article 268 of the Italian Criminal Code, the norms contained in Articles 247-267 must be applied even if the facts are committed against foreign States, allied or associated with the Italian State for purposes of war. This means that if an act or activity is punished when carried out against Italy, and in time of war, that criminal norm also applies if that act or activity has been carried out against a State which is allied or associated with Italy.

In light of the above, we now analyze the relevant criminal norms regulating the time of war, which are:

- 1) Article 242 - *Cittadino che porta le armi contro lo Stato italiano* (Italian citizen who brings arms against the Italian State);
- 2) Article 247 - *Favoreggiamento bellico* (War aiding);
- 3) Article 248 - *Somministrazione al nemico di provvigioni*;
- 4) Article 249 - *Partecipazione a prestiti a favore del nemico* (Participation in financing the enemy).

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##### **a) Article 242 - Cittadino che porta le armi contro lo Stato italiano (*Italian Citizen who Brings Arms against the Italian State*)**

According to Article 242, the Italian citizen who brings arms against the Italian State or is recruited, even when not for the purpose of carrying out military activities, among the military forces of a foreign State at war against Italy is punished with life in prison. The sanction is not applied if the Italian citizen is in the territory of the enemy State during the conflict and is obliged to work on its behalf.

Such a crime may be committed only by Italian citizens and, as we said above, also the persons who lost, for any reason, their Italian citizenship, must be considered Italian citizens as well. However, members of the Italian military forces cannot be guilty of such crime since,

if they bring arms against Italy, the Italian military code will be applied, excluding the application of the penal code.

This crime is also committed if the Italian citizen is recruited by insurrectional groups and, as we said above, also if the foreigner is at war against a State allied or associated with Italy for war purposes.

Taking into account the aforementioned judgement of the Tribunal of Bari, if an Italian citizen is recruited by a PMC which has a qualified link with the foreigner at war against Italy, the norm should be applied. Thus, the Italian citizen recruited by a PMC commits the crime provided by Article 242, if the recruiting PMC:

- is financed by a foreign State or an insurrectional group at war against Italy;
- owned either in whole or in part by a State or an insurrectional group at war against Italy;
- is used as a *longa manus* by a foreign State or an insurrectional group at war against Italy.

Of course, the recruitment must be done during a time of war and when the qualified link between the recruiting PMC and the foreigner at war against Italy already exists. The norm punishes the recruitment of Italian citizens among the military forces *of a foreign State at war against Italy*. Thus, if a person is recruited in peacetime or by a PMC which is not linked to a State at war against Italy at the time of the recruitment, Article 242 will not apply. In any case, if the Italian citizen is recruited in peacetime by a PMC and such PMC is later involved by a foreign State at war against Italy, the Italian citizen can no longer work on behalf of the PMC. Apart from the recruitment, Article 242 punishes the person who brings arms against the Italian State, unless he is within the territory of the enemy and is obliged to do so. Thus, it is possible to argue that if the Italian citizen bringing arms against Italy and on behalf of a PMC demonstrates that he acted against Italy in force of a contractual obligation toward the PMC, he cannot be condemned on the basis of Article 242. Of course only if he were already in the territory of the enemy and it is clear that such condition is particularly difficult to meet.

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#### **b) Article 247 - Favoreggiamento bellico (*War Aiding*)**

According to Article 247, any person who shares intelligence with the foreigner in a time of war in order to favour the military operations of the enemy against the Italian State, or in order to disrupt the military operations of the Italian State, or in any case commits other acts for the same purposes, is punished with prison of not less than 10 years. If the author of the crime realizes his intent, the sanction will be life in prison.

The norm has a wide application since it punishes the sharing of intelligence with the foreigner either in order to facilitate the enemy or in order to disrupt the Italian military operation. Then, it also punishes any other kind of acts or activities carried out in order to obtain one of the two aforementioned purposes.

Taking into account the aforementioned judgement of the Tribunal of Bari, if a person is recruited by a PMC, which has a « qualified link » with the foreigner at war against Italy, the norm should be applied. According to a general principle of the Italian Criminal legislation, to be guilty of such crime, the recruited person must be informed of the « qualified link » existing between the PMC and the foreigner. Considering that the crime is committed only if the criminal behaviour is performed with the intent of helping the foreign military operations, or disrupting the Italian military operations, such acknowledgment is also implied by the content of the norm.

**c) Article 248 - Somministrazione al nemico di provvigioni (*Supply of Provisions to the Enemy*)**

According to Article 248, any person that, in a time of war, provides, even indirectly, food or other things that may be used against Italy by the enemy State, is punished with imprisonment of no less than 5 years.

This norm cannot be applied if the facts are committed abroad.

Taking into account the aforementioned judgement of the Tribunal of Bari, if a person commits such acts on behalf of a PMC, which has a qualified link with the foreigner at war against Italy, the norm should be applied. What we said in relation with Article 247 is also valid for Article 248. As a general principle of the Italian Criminal legislation, to be guilty of the crime provided by Article 248, the recruited person must be informed of the qualified link between the PMC and the foreigner. However, since in this case the norm does not require action with the specific purpose of helping the foreigner, it is not possible to say that such acknowledgment is implied by the content of the norm. This means that the analysis of the Judge must regard the qualified link between the PMC and the foreigner on the one hand, and on the other, the acknowledgment of such link by the person accused on the basis of Article 248.

In any case, the acts must be committed in Italy. Otherwise, Article 248 cannot be applied. As a consequence, it seems that the PMC must have at least a secondary seat in Italy.

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**d) Article 249 - Partecipazione a prestiti a favore del nemico (*Participation in Financing the Enemy*)**

According to Article 249, any person that in a time of war takes part in financing the enemy State, or in any case takes part in operations with the aim of obtaining such financing, is punished with imprisonment for no less than 5 years. This norm is not applied if the facts are committed abroad.

Taking into account the aforementioned judgement of the Tribunal of Bari, if a person commits such facts in favour of a PMC, which has a qualified link with the foreigner at war against Italy, the norm should be applied. In any case the acts must be committed in Italy. However, despite what we said regarding Article 248, it is not necessary that the PMC/PSC have a seat in Italy. In fact, it is important that the acts be committed in the Italian territory. Thus, transferring money to a foreign PMC from Italy, through a bank account, is enough to apply the norm.

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**5. The relevance of Article 244 of the Italian Criminal Code for PMC/PSC**

According to Article 244, any person who recruits or commits hostile acts against a foreign State, without Government authorization, causing a danger of war to Italy, is punished with imprisonment for between 6 and 18 years. If a war follows such behaviour, the sanction will be life in prison.

Moreover, if such behaviour does not cause a danger of war, but is capable of troubling the international relations of Italy with a foreign State or causing danger of countermeasures against Italy or its citizens, the sanction will be imprisonment for between 3 and 12 years.

And if a break of diplomatic relations follows, or if countermeasures are taken against Italy or its citizens, the sanction will be imprisonment for between 5 and 15 years.

The lack of Government authorization is a necessary condition for the application of the norm. The crime implies that Italy and the foreign State are not at war. That is why we did not take into account the provision among the others analyzed before.

If a person (it does not matter if he is an Italian or a foreign citizen) recruits people on behalf of a PMC/PSC against a foreign State, and causes the aforementioned consequences, the norm should be applied. In such cases, the qualified link between PMC/PSC and the foreigner should not be relevant, since the norm punishes any person who recruits people, for military purposes, against a foreign State. In this regard, it is difficult to imagine a PMC/PSC working against a foreign State, lacking such qualified link with another State entity. Therefore, the question of the qualified link becomes an issue of fact for the application of the norm.

According to the Italian Supreme Court (Cass. pen. Sez. VI, 01/07/2003, n. 36776), such norm is different from the one analyzed previously, i.e. Article 288, since:

- Article 244, to be applied, requires that the recruited person is integrated into the foreign military forces, following the execution of a contract, while Article 288 regards any activity of recruitment for military purposes and it does not matter if the recruited person is integrated into the military forces or not;
- Article 244 applies only if qualified consequences stem from the recruitment activity, i.e. danger of war or of countermeasure or break of diplomatic relations, while Article 288 does not require the occurrence of such consequences (for a different trend see Ass. Mantova, 23 June 1955);
- Article 244 also applies to the recruited person, while Article 288 regards only the recruiter.

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## ***6. The Italian Criminal legislation on Terrorism and its relevance for PMC and PSC***

Before facing the relevance of the norms regarding terrorism for PMC/PSC, and provided by Article 270bis-270quinquies of the Italian Criminal Code, it is important to analyze the definition of terrorism introduced into Italian legislation. According to Article 270sexies, conduct which, because of its nature or context, can cause serious damages to a State or to an international organisation and which is carried out with the purpose of intimidating the population or compelling either public powers or international organisations to either perform or abstain from the performance of any act or destabilising or destroying the fundamental political, constitutional, economic, and social structures of a State or of an international organisation, as well as any other conduct defined as terrorist or committed for terrorist purposes by conventions or other norms of international law which are binding upon Italy, is considered terrorist conduct.

Article 270 sexies does not introduce a specific crime, but rather it provides a definition of terrorist conduct, making reference to international law as well, which is relevant for the application of the norms provided by Articles 270 bis – 270quinquies. Thus if a group does not have all the characteristics indicated under Article 270sexies, Articles 270bis – 270quinquies will not be applicable, either to PMC/PSC working on its behalf. On the contrary, if a group falls under the definition provided by Article 270bis, the aforementioned norms will also apply to PMC/PSC working on its behalf, of course if the qualified link exists between them.

What it is important to underline is that Article 270sexies has a wide application, since it provides a first wide definition of terrorist acts, also including acts against international organisation and since the definition provided may be extended by binding [for Italy] international norms. The Italian Supreme Court confirmed this principle, stating also that terrorist acts may be committed in time of war as well (Cass. 1072/2006, already mentioned). That means that insurrectional groups may fall under Art. 270sexies and that PMC/PSC may be sanctioned according to Articles 270bis / 270quinquies if they work on behalf of an insurrectional group. Of course, only in cases where the conditions previously indicated are met. The wide application of Article 270sexies may also complicate the possibility for anyone to work on behalf of national liberation movements, but for the time being it is impossible to say what future the application of such norm will have in this respect.

It is now the time to examine the norms regarding terrorism that may be relevant for PMC/PSC and in this respect we start from Article 270bis.

According to Article 270bis of the Italian Criminal Code, any person who promotes, constitutes, organizes, directs or finances associations that have the aim of committing acts of violence with terrorist purposes or with the purpose of *subversion* of the democratic order is punished with imprisonment for between 7 and 15 years. Any person who takes part in such associations is punished with imprisonment for between 5 and 10 years. Furthermore, confiscation of the things used or finalized to commit the crime, and/or of all things which are the price, the product, or profit of the same crime is always applied against the condemned person.

Since such crime may be committed only in cases of promotion, constitution, organization, financing, or participation in terrorist groups, and since it is difficult to imagine a PMC/PSC directly organized for terrorist purposes, the norm does not seem applicable to such corporations. In this regard, the Court of Appeal of Milan specified that the norm is also applicable if the participation of a person is represented by instrumental conduct or logistic support to the association, thus – it seems – even where the terrorist intentions of the group are not shared (see App. Milano, November 5<sup>th</sup> 2007). This principle has also been specified by the Italian Supreme Court according to which, even if there is not an integration of the person into the terrorist organization, the norm may be applied: the condition required in such a case is that through the external contribution, the organization is supported in realizing its aims (Cass. pen. Sez. I, November 10<sup>th</sup>, 2006, nr. 1072). That means that if a PMC is involved by a terrorist association in order to carry out some activities on its behalf, the norm should be applied, even though the PMC is not moved by terrorist aims. It could be sufficient, therefore, to work on behalf of the association. However, since PMC does not work for free, the question of the qualified link becomes a matter of facts in this case as well.

The Italian Supreme Court (Cass. pen. Sez. I, November 10<sup>th</sup>, 2006, nr. 1072) stated that terrorist acts may also be committed in a time of war, when such acts of violence, even if committed during an armed conflict and against a military « objective », cause a danger to civilians (this judgment annulled the previous judgement of App. Milano, November 28<sup>th</sup>, 2005). Thus, in case of support for a terrorist association from a PMC/PSC, even in a time of war, the norm could be applied. It is not necessary that the aforementioned acts be committed: the existence of the terrorist group and the existence of a qualified link between the terrorist group and the PMC is sufficient.

Also Article 270ter may be relevant for PMC/PSC. According to that article, any person who furnishes food, hospitality, means of transportation or communication, to any person who takes part in a terrorist group, is punished with imprisonment for a maximum of 4 years. The sanction is increased if the assistance is furnished continuously.

Taking into account the aforementioned judgement of the Tribunal of Bari, if a person furnishes means of transportation or communication to a PMC which has a qualified link with

the terrorist organization, the norm should be applied. Certainly, the accused person must be informed of this qualified link and the Judge must be very careful in verifying the existence of such link between the PMC and the terrorist association on one hand, and the acknowledgment of the link by the accused person on the other one.

The same can be said in relation with Article 270quater and 270quinquies.

According to Article 270quater, any person who recruits people to carry out acts of violence with terrorist purposes is punished with imprisonment for between 7 and 15 years. According to the Article 270quinquies, any person that educates or gives instructions regarding the use of explosive material, arms, chemical or bacteriological weapons, or of techniques and methods for the committing of acts of violence for terrorist purposes (even if against a foreign State or an International institution or entity) is punished with imprisonment for between 5 and 10 years. The same sanction is applied to the person instructed. If a PMC/PMS is involved in the aforementioned activities, the norm will be applied to the persons recruited to be instructed for this purpose as well. The PMC/PSC must have a qualified link with the terrorist organization and the instructed person must be informed of the purposes of its instruction.

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## **7. The Italian regulation on PSC**

As we said above, a specific regulation on PSC and its affiliates is provided by: a) T.U. of Laws on Public Security - R.D. June 18 1931, n. 773 - Title 4 - Articles 133-141 (here in after, « *LPS* »); b) R.D. May 6 1940, n. 635 - Title 4 - Arts. 249-260 (here in after, « *Regulation* »); c) R.D.L. September 26 1935, n. 1952; d) R.D.L. November 12 1936, n. 2144. No PSC may work without the previous authorization of the public authority, which represents a fundamental condition for private institutes to operate in the field of security. The rationale of this norm is to extend the state overall control on the activities of these private entities, considering the public interest for security. That's way the Italian legislation provides, a part from the need of a previous authorization, many and specific obligations for such private institutes to work. Most of these obligations are provided by the *LPS* and specified, for the more technical aspects, by the *Regulation*.

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According to Article 133 *LPS* public and private entities may avail themselves of special guards for the surveillance of their properties. They may also do it in association, for the surveillance of common properties, but in such case, they need a previous authorization from the public authority, i.e. Prefetto. Thus, if a public or private entity may directly engage special guards, an association of such entities needs to make an application to the Prefetto for the surveillance of the common properties of its members. The content of the application is specified by Article 249 of the *Regulation*, according to which in order to obtain the authorization required for the surveillance of common properties, the associated entities must provide the Prefetto with two copies of a written act containing the personal data and the signature of all the associated parties, the duration of the association, and all forms of aggregation, substitution and withdrawal of the associates.

In any case, on the basis of the same Article 249, public and private entities that intend to avail themselves of special guards are obliged to make a declaration to the Public authority, i.e. Prefetto, indicating the personal data of the designated special guards. Such declaration must be signed by the legal representative of the entity or by its owner and by the designated special guards. All the documents necessary in order to demonstrate the possession of the require requisites (see art. 138 LPS) must be attached to the declaration.

Whereas public and private entities may designate special guards for the surveillance of their property without the authorization of the public authority (required only in the aforementioned case – see art. 133), private entities may not perform surveillance activities without the authorization of such authority, i.e. Prefetto (hereinafter such entities are indicated as « *Private Institutes* »), as provided by Article 134. Such authorization is also required in order to perform investigations and/or searches or in order to collect information on behalf of private entities.

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### **8. Conditions provided by the law for the concession of the license to PSC**

The law provides for the conditions which the Private Institutes and also their affiliates must respect in order to get the license. In particular, such conditions are specified by the LPS and, for the more technical aspects, by the Regulation. They must be respected throughout the duration of the activities carried out by the Institutes, and if they cease after the concession of the license, the license must be revoked.

First of all, it is important to underline that according to Article 134 LPS, the Prefetto's license may only be given to Italian persons, individuals or corporations. Thus, if the authorized person loses their Italian citizenship, the license will be revoked. Then, regarding juridical persons, one may question if a secondary seat in Italy entitles the Corporation to the right to apply for the license.

The license cannot be given to people who have been condemned for the commission of wilful crimes. Nor can it be given for operations which imply the exercise of public functions or limitations of individual freedom. Furthermore, on the basis of Article 11 LPS, the license cannot be given to persons subject to security measures and according to Article 136 LPS it may be denied in consideration of the number and the importance of the PSC already in existence.

Moreover, according to Article 137 LPS the concession of the license requires the payment of a sum, to be established by the Prefetto, in favour of the State (Cassa depositi e prestiti). Such sum is a guarantee for all the obligations assumed by the Private Institutes with the concession of the license. Thus, if the Institute violates one of the conditions imposed by the obtained license, the Prefetto orders the devolution of the sum in favour of the State. The Private Institute is entitled to have the money back only when, once three months have passed following the end of its activities, the Institute has proven that it has no outstanding obligations. In fact once the authorization has been obtained the Private Institute must respect specific obligations finalized to extend the State's overall control over its activities. Thus, for instance, the directors of Private Institutes are obliged to keep a register of the activities they carry on daily (Art. 135 LPS). Such register shall indicate all persons with whom they

perform their social activities. State agents of public security may ask for the exhibition of such register at any moment, and directors of PSC are obliged to show it. The data that the Register must contain are always indicated by the law, and in particular by Article 260 of the Regulation. According to this norm, the Register must indicate:

- The personal data of the persons with whom business or operations are carried out;
- Date and type of the operation carried out;
- The established price and the results of the operation carried out;
- The documents used by the client in order to obtain performance of the required activity.

It must be kept for five years.

Apart from the Register, always according to Article 135 LPS, the directors of the Private Institutes must keep a kind of table on the premises of the corporation indicating the operations they are able to carry out with the relevant prices. Such table must be authorized by the public authority, i.e. Prefetto, and is binding for the PSC. This means that the corporation cannot carry on activities different from the ones indicated, or at a different price.

Furthermore, PSC cannot perform their activities on behalf of persons which are not in possession of the IDI card or any other document (with picture) issued by the administration of the State.

According to Article 136 LPS the license may be revoked:

- if the authorized person does not demonstrate having the technical capacities required in order to perform the authorized activities;
- for reasons of public security or public policy.

Article 257quater of the Regulation provides for other causes of revocation of the license. Particularly, it is revoked when the Private Entity has performed an activity for which it was not authorized; if a penal proceeding has been started against persons having directive functions in relation with crimes indicated under art. 51, para. 3bis, of the criminal code (most of all crimes for « mafia »); for reasons of public security. Finally, the license may be revoked or suspended if the Private Entity do not respect its social security and insurance duties towards its affiliates.

With the revocation of the license, the guards recruited by the Private Entities automatically end their duties.

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### ***9. The application form required in order to obtain the license***

The Regulation also specifies the content of the application form that must be applied in order to obtain a license. Actually, before the enactment of the DPR August 4, 2008, the legislation was quite vague on the point, thus the Prefetto used to have wide discretionary power. To be more restrictive on the control of the public authority, the Parliament introduced specific norms provided by Articles 257bis-257sexies of the Regulation.

According to Article 257 of the Regulation<sup>1</sup>, the application form required by Article 134 LPS for security and surveillance activities, must indicate:

- a) the name of the applying entity, of its chief and/or of the directors appointed for eventual second seats and the name of all the persons having administrative or directive functions;
- b) the structure of the applying entity, the name of the owners of the corporation and the eventual shareholding, in « control position », in other corporations;
- c) the territory in which the applying entity intends to operate, specifying the legal seat of the corporation and the other eventual secondary seats;
- d) the activities for which the entity applies for authorization.

To the application form, the Private Institute must attach its technical project and the documentation attesting to the technical capacities of its affiliates and the possession of the all technical and financial means necessary in order to perform the security and surveillance activities for which the authorization is required. A decree of the « Ministro dell'Interno » will specify the minimal characteristics of the technical project (Article 257quinquies specifies the general criteria that must be followed in this respect).

According to Article 257ter, once the possession of all the requisites required has been verified, the applying entity is informed of the time, which cannot exceed 30 days, within which the license will be issued. Before such issuance, the private entity must pay the guarantee and must conform to all the obligations provided by the law and regarding the insurance and social security duties towards its affiliates.

The license of the Prefetto has a field of application. Any variation of the activities performed by the private entities or of the territory in which they operate must be communicated to the Prefetto. Once 90 days have passed from this communication, the license is considered extended unless the Prefetto provides otherwise.

Article 257sexies provides the chance for the already authorized Private Entities to create a temporary association, if in their technical project the possibility of sharing the financial and technical means with other corporations is indicated. Of course, the temporary association can only work in the limits of the licenses obtained by the associated corporations. In any case, the creation of the association must be previously communicated to the Prefetto.

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## **10. Conditions provided by the law for the affiliates of PSC**

The law also provides some conditions to be respected by each single affiliate of PSC (hereinafter « *Special Guards* »). Private Institutes are obliged to communicate the lists of their personnel and any subsequent modification to the Prefetto, and to give back the decrees of guards which have terminated their service.

In particular, according to Article 137 LPS, Special Guards must be in possession of the following requisites:

- 1) to be an Italian citizen;

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<sup>1</sup> Article 257 is applicable also to « investigating private entities », but only if is not derogated by the following Article 257 bis.

- 2) to be more than 18 years old and to have performed military service
- 3) to be able to read and write ;
- 4) not to have been condemned for crimes;
- 5) to have an ID card;
- 6) to be enrolled at the INAIL.

The norm provided that Special Guards must have excellent political and moral behaviour but in 1996, the Constitutional Italian Court declared this part of Article 138 unconstitutional (judgement of July 25 1996, n. 311).

The public authority that controls the respect of such requisites by the Special Guards is the Prefetto who must approve their designation, through a decree of approval indicated by Article 250 of the Regulation. After the issuance of this decree, the special guards must take an oath in front of the Prefetto. Thus they cannot perform their duties prior to the oath. The Prefetto attaches a copy of such oath to its decree. According to Article 250, para. 7, of the Regulation, as modified by the D.P.R. August 2008, nr. 153, the performance of security activities without the previous authorization is an abuse of title, punished by law.

According to the following Article 251, the decree of approval may be issued for the surveillance of more than one property and on the behalf of more than one entity but it cannot be issued for the surveillance of its own properties or for the surveillance of properties of relatives.

Regarding the territorial competence of the public authority, Article 252 provides that the decree of approval must be issued by the Prefetto of the administrative district (i.e. Provincia) where the properties to be supervised are located. If the properties to be supervised are located in more than one administrative circuit, the decree of surveillance may be issued by one of the Prefettos of the involved circuits, but only after consultations with the other Prefettos. Such norm was introduced by Article 1 of the D.P.R. enacted on August 4, 2008 (nr. 153) since, before its introduction, the decree of approval was to be issued by all the Prefettos of all the administrative circuits involved, unless a special norm provided otherwise. D.P.R. August 2008, nr. 153 has also introduced the norm of Article 252bis of the Regulation, according to which, special guards are registered in a special register kept by the public authority of the competent administrative circuit (i.e. Pretore). Such register indicates the Private Institutes on behalf of which they perform or they have performed their activities. All the registers of each single circuit are linked between each other through the offices of the « Ministero dell'Interno ».

According to Article 141 LPS, all the aforementioned decisions taken by the Prefetto are definitive. Moreover, in case of violation by Private Institutes or Special Guard of the norms above, the sanction is prison for no more than two years and the payment of a fine of between 400.000 and 1.200.000 Italian Lire (*in accordance with Article 113, 1st par., of the Law of November 24th 1981, n. 689*).

Special Guards are entitled to sign statements only in relation to the activities they are entitled to perform. Such statements may be used in legal proceedings and are prima facie valid, except where contrary evidence has been provided (see Article 259 of the Regulation). They are also under the control of the public authority, i.e. Questore, as provided by the R.D.L. of September 26 1935, n. 1952. Thus, the Private Entities that use Special Guards are also required to obtain an approval from the Questore of the competent administrative circuit, describing the activities that they have to perform and the functions and tasks assigned to each

individual guard. The Questore is entitled to modify the rules of the proposed service and to add all obligations he may consider proper in the public interest. In case of violation of such obligations, the special guard may be immediately suspended by the Questore and its license may be revoked (by the Prefetto). It is forbidden for private institutes to use the special guards in violation of the rules established by the Questore.

According to the R.D.L. November 12 1936, n. 2144, the private investigation agencies with more than 20 employees are also under the surveillance of the Questore. If considered proper, the Questore may also extend its authority over private institutes with less than 20 employees. Such authority may be delegated by the Questore to its functionary. The Questore may immediately suspend a special guard from his duty and withdraw the arm in his possession.

Special Guards must be in uniform or wear a badge. Uniform and badge must be approved by the Prefetto. They are governed by Articles 230 et seq. of the Regulation and are not required for private investigators. According to Article 256 of the Regulation, Special Guards must apply for a special license according to Article 42 of LSP and Article 71 of the Regulation, in order to bear arms.

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## **11. *The involvement abroad of the Italian Private Entities***

Taking into account all the requisites required for a private entity to obtain the license of the Prefetto, and considering above that all the authorization is given by the authority of the administrative circuit in which they operate, it may be doubtful to involve such entities in military operations above. According to Article 139 LPS, Private Institutes are obliged to perform their activities in favour of the State if and when requested by the public security authority. Their agents are also obliged to respond to all requests of the agents of public security or of the « polizia giudiziaria ». This norm could open the way to the involvement of Private Entities in the international scenario, but it seems that, in this respect, other conditions must be previously met.

The law enacted by the Italian Parliament on March 29, 2007 (nr. 38), and related to the international missions in Afghanistan, Sudan and Lebanon, authorizes the Ministry of Foreign Affairs to assign temporary duties of consultancy or specific activities to Private Entities. Thus, it seems that in order to be involved abroad, Private Entities need to have an authorization by the Ministry of Foreign Affairs and that the Ministry must be previously authorized by the law. This means that, regarding the involvement of the Italian Private Institutes in Afghanistan, Sudan and Lebanon, the Ministry of Foreign Affairs may only give them some temporary functions of consultancy and/or some specific activities that must be previously indicated.

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## 12. Conclusions

Regarding the criminal dimension of PMC/PSC, although the Italian Criminal Code has been enacted when the phenomenon of the « privatization of war » did not exist, it seems possible to interpret some penal norms as applicable to such entities. Of course the general principles of the Italian Criminal legislation must be taken into account and the principle that prohibits interpreting in an extensive way the penal norms may complicate the application of such norms to PMC/PSC. Despite this, according to the G.I.P. and the Tribunale del Riesame of Bari, the crime of mercenarism, provided by Art. 288 of the Italian Criminal Code, may also be committed by a PMC, if a qualified link exists between the PMC and the foreign State, or the insurrectional group, on the behalf of which it performs its activities. Thus, in order to consider a PMC guilty of mercenarism, it must be proven that the PMC is financed by a public entity, with public or hidden financing; or that it is owned either in whole or in part by public entities, also as hidden partners; or that it is used as a *longa manus* of foreign States or insurrectional groups.

As we said above, the theory of the qualified link has been so far applied only by two Judges and in relation with the application of a security measure. Therefore, this judicial trend cannot be considered consolidated. Above all, if we take into account that, pending the proceeding on the merits, such theory may be totally set aside. By the way, in case of its confirmation, the theory of the qualified link could open a new criminal dimension for PMC/PSC. In fact, applying this rule, other criminal norms of the Italian legislation could be considered applicable to PMC/PSC.

It is evident that the theory of the qualified link becomes the corner stone of the criminal dimension of PMC/PSC because, only if such theory is confirmed some behaviours of PMC/PSC or their affiliates could be sanctioned according to the existing Italian Criminal norms. If it is not, special norms must be enacted in order to insure a penal dimension for PMC/PSC.

It is also important to underline that, apart from the penal norms regarding the regulation of the time of war, the theory of the qualified link may grant the application of the Italian norms on terrorism to PMC/PSC. In this way, terrorist associations or activities could also be defeated fighting against the Private Entities that operate on their behalf.

In relation to other norms concerning Private Institutes, it is important to stress that while there is no specific regulation on PMC, PSC are ruled by specific norms. Such norms regard above all the constitution and the life of such entities and their affiliates and are finalized to grant a State overall control of their activities. In fact, considering that they operate in the field of security, the Italian State feels the need to extend its public control on them, not only at the moment of their constitution, but during their entire life.

Thus, PSC cannot operate without the previous authorization of the public authority and must first obtain the license of the Prefetto. For the concession of the license, some conditions must be respected and if they cease after the concession of the license, then the license must be revoked. Furthermore, affiliates and directors of PSC are under some specific obligations, thus the Italian State grants itself another instrument of control of PSC's activities.

The norms regarding PSC were enacted even before the second world war and they did not take into account the possibilities for the Private Entities to be engaged abroad. Although the Italian Government now in charge felt the need to modify the Regulation, this question is not expressly faced by the D.P.R. August 4, 2008, nr. 153. Notwithstanding, the Italian

Parliament has authorized the Ministry of Foreign Affairs to involve Private Entities in the international missions in Afghanistan, Sudan and Lebanon. Thus, lacking a general norm, it seems that such involvement is possible only if PSC obtain an authorization of the Ministry of Foreign Affairs and if the Ministry of Foreign Affairs has been previously authorized by law. It also seems that, regardless of the intervention of the Government (with the enactment of the aforementioned D.P.R.), the Italian legislation is not able to fully cover the involvement of PSC abroad and in the international scenario and that in this respect, the lack of legislation must be filled in by the authorization of the Ministry of Foreign Affairs and/or by the legislation authorizing him to involve PSC abroad. Consequently, the regulation of PSC's activities abroad could be different mission by mission and in order to avoid this, a new law on their international involvement is certainly preferable. The same may be said in relation to PMC, but since no PMC have yet been incorporated under Italian law or in the Italian territory, the question is not manifestly urgent.