

# OCTOPUS Interface 2008

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## A BRIEF OUTLINE OF THE ITALIAN RATIFICATION LAW OF THE BUDAPEST CONVENTION

### FOREWORD

Italy has been the first European country, after France, to set up an organic law for fighting against computer crimes which amended both its criminal code and code of criminal procedure. This law is Law no 547 of 23 December 1993. After it, other laws followed in specific fields aimed at repressing unlawful behaviours related to what is known as computer piracy (Legislative Decree no 518 of 29 December 1992, as amended by Law no 248 of 18 August 2000 and, more recently, Law no 128 of 22 May 2004), to the protection of personal data (Law no 675 of 31 December 1996 as subsequently amended, and also, in particular, the so-called “privacy code”, i.e. Legislative Decree no 196 of 30 June 2003), to the so-called cyber-pedophilia (Law no 269 of 3 August 1998, as amended by Law no 228 of 11 August 2003 and, more recently, Law no 38 of 6 February 2006, although the latter one only provides for virtual child pornography and not also for the so-called putative one (article 600-*quater*-1).

Therefore, when Italy deposits its instrument of ratification, it will have to make the reservation provided in article 42 of the Convention in relation to Article 9(4).

As regards child protection, a Government Bill is at present under discussion in Parliament (no 3241 – Chamber of Deputies) which provides for the introduction in the Criminal Code of Article 609 *undecies*: “*Solicitation of minors*”:

*“Anyone who, in order to sexually abuse or exploit a minor under sixteen years of age, enters, even through the use of the internet network or other networks or communication means, into such a relationship with him as to seduce him or deceive him or in any case such as to stealthily gain his trust, shall be sentenced to imprisonment of from one to three years*

On 27 February 2008, the Senate definitively approved Bill no. 2012 on the ratification and execution of the Convention and this is now ready to be published in the Official Gazette.

This law introduces some modifications both in our criminal code and in our code of criminal procedure: here we are going to dwell on those relevant to the criminal code.

In this respect it is important to recall that Decree Law no 144 of 27 July 2005, converted into Law no 155 of 31 July 2005 on urgent measures against international terrorism, introduces a new article in Law no 895 of 2 October 1967, Article 2-*bis*, which reads as follows:

*“Anyone who, other than in the cases permitted by provisions contained in laws or regulations, instructs someone or gives instructions in any form, even anonymously or through telematic systems, on the*

*preparation or use of explosive materials, war arms, chemical weapons or noxious or dangerous bacteriologic substances and other deathly devices shall be sentenced, provided the act does not constitute a more serious offence, to imprisonment of from one to six years.*

## **1. Misuse of devices**

(Modification to Book 2, Title 12, of the Criminal Code)

1. *Article 615-quinquies of the Criminal Code is substituted by the following:  
“Article 615-quinquies. – (Distribution of computer equipment, devices or programmes aimed at damaging or interrupting a computer or telematic system).- Anyone who, in order to unlawfully damage a computer or telematic system, the computer data or programmes contained therein or pertaining thereto, or to contribute to the total or partial interruption or alteration of its functioning, manages to obtain, produces, reproduces, imports, diffuses, communicates or in anyway puts at the disposal of others computer equipment, devices or programmes shall be sentenced to imprisonment of up to two years and to a fine of up to 10,329 euros”*

## **2. Interference with computer or telematic data and systems**

(Modifications to Book 2, Title 13, of the Criminal Code)

1. *Article 635-bis of the Criminal Code is replaced by the following:  
“Article 635-bis. – (Damaging of computer information, data and programmes).  
Provided that the act does not constitute a more serious offence, anyone who destroys, deteriorates, cancels, alters or suppresses any computer information, data or programmes of others shall be sentenced, upon complaint of the victim, to imprisonment of from six months to three years.  
If the case provided in Article 635, paragraph 2, number 1) occurs, or if the act is committed by abusing of the quality of system operator, the sentence shall be to imprisonment of from one to four years and the proceedings shall be started ex officio”.*

2. *After Article 635-bis of the Criminal Code the following are inserted:  
Article 635-ter - (Damaging computer information, data and programmes used by the State or any other public body or a body anyway having a public utility)  
Provided that the act does not constitute a more serious offence, anyone who destroys, deteriorates, cancels, alters or suppresses any computer information, data or programmes used by the State or any other public body, or body anyway having a public utility, shall be sentenced to imprisonment of from one to four years.  
If from that act derives the destruction, deterioration, cancellation, alteration or suppression of the computer information, data or programmes the sentence shall be to imprisonment of from three to eight years.  
If the case provided in Article 635, paragraph 2, number 1, occurs, or if the act is committed by abusing of the quality of system operator, the sentence shall be increased.*

*Art. 635-quater – (Damaging computer or telematic systems) – Provided that the act does not constitute a more serious offence, anyone who, through any of the conducts under Article 635-bis, or through the introduction or transmission of data, information or programmes, destroys, damages or makes in whole or in part unusable the computer or telematic systems of others or seriously hampers their functioning shall be sentenced to imprisonment of from one to five years.*

*If the case provided in Article 635, paragraph 2, number 1, occurs, or if the act is committed by abusing of the quality of system operator, the sentence shall be increased.*

*Article 635-quinquies – (Damaging computer systems or telematic systems of public utility) – If the act in Article 635quater is aimed at destroying, damaging, making in whole or in part unusable any*

*computer or telematic system of public utility or at seriously hampering their functioning, shall be sentenced to imprisonment of one to four years.*

*If from that act derives the destruction or damaging of the computer or telematic system of public utility or if this is made, in whole or in part, unusable the sentence shall be imprisonment of from three to eight years.*

*If the case provided in Article 635, paragraph 2, number 1, occurs or if the act is committed by abusing of the quality of system operator, the sentence shall be increased”.*

## **2. Computer forgery**

The Italian criminal law provides for this offence in Article 491*bis* of the Criminal Code, which was introduced by Law no 547 of 1993 on “Computer documents”.

This Article added a new offence in Chapter 2 of Title 2, Book2, of the Criminal Code, relevant to the forgery of documents, whereby the provisions on forgery of a public deed or a private document (Articles from 476 to 491 of the Criminal Code) were extended to the case of forgery of a computer document.

The second part of this Article contains the definition of computer document for the purposes of criminal law: i.e. “*any computer medium containing data or information having an evidentiary value, or programmes aimed at processing them*”.

The Government Bill on the ratification of the Convention provides some integrations and modifications on the subject of computer forgery. Indeed, in Article 491*bis*(1) of the criminal code the second sentence is deleted from “to this end” to “destined to process them” and after article 495 of the criminal code the following is added:

*“Article 495bis (False declaration or attestation to the electronic signature certifier as to one’s own identity or personal quality or to those of others). - Anyone who declares or attests falsely to the certifier of electronic signatures the identity or state or other qualities of oneself or of others, shall be sentenced to imprisonment of up to one year”*

The explanatory report to the Government Bill explains these innovations stating that Article 491*bis* has been modified in consideration of the fact that the definition of computer document as meaning “computer medium containing data or information with an evidentiary value or programmes aimed at processing them” had become inadequate. It was therefore decided to accept, even for the purposes of criminal law, the broader and more correct notion of computer document, which was already contained in the Decree of the President of the Republic no 513 of 10 November 1997, as meaning “computer representation of legally relevant instruments, facts and data” and to delete the second sentence of Article 491*bis*.

## **3. Computer fraud**

The criminal code in force provides for the offence of computer fraud in Article 640*ter*. This is a special case of fraud which concerns the alteration of the functioning of a computer or telematic system or of a system relating thereto. More precisely this Article concerns the act of who, by altering in whatever way the functioning of a computer or telematic system or intervening without right, by whatever means, on data, information or programmes contained in a computer or telematic system or a system relating thereto, procures for himself or others an unlawful profit to the detriment of others. This provision too is a specific one compared to the general offence of fraud (Article 640).

The ratification law provides also for a further case of computer fraud, i.e. the one committed by the certifying subject. Thus, after Article 640<sup>quater</sup> the following is inserted:

*“Article 640 quinquies. - (Computer fraud of the subject certifying electronic signatures). – The subject providing electronic signature certifying services who, in order to procure for himself or for others an undue profit, or to cause a damage to others, infringes the obligations provided by law for the issuance of a qualified certificate, shall be sentenced to imprisonment of up to three years and a fine of from 51 to 1,032 euros”*

#### **4. Corporate liability**

In Italy, the administrative liability of legal persons is provided in Legislative Decree no 231 of 8 June 2001 which, under Article 24, establishes the liability of entities for any computer fraud committed to the detriment of the State or of a public entity . This Article, “Undue perception of allocations, fraud to the detriment of the State or of a public entity or for obtaining public allocations” reads as follows:

*“With reference to the commission of the offences in Articles 316bis, 316ter, 640, paragraph 2, no 1, 640bis and 640ter when committed to the detriment of the State or other public entity, of the Criminal Code, the pecuniary sanction of up to 500 units shall apply”.*

*“If, subsequent to the commission of the offences under paragraph 1, the entity obtained a considerable profit or suffered a particularly serious harm the pecuniary sanction of from two hundred to six hundred units shall apply”.*

*“In the cases provided by the above paragraphs the prohibitive sanctions provided in Article 9, paragraph 2, letters c), d) and e) shall apply.”*

The Government Bill on the ratification of the Convention integrates Legislative Decree no 231 inserting Article 24-*bis*, which provides as follows:

1. *With reference to the commission of the crimes provided in Articles 615-ter, 617-quarter, 617-quinquies, 635-bis, 635-ter, 635-quarter and 635-quinquies of the criminal code, the entity shall be inflicted the pecuniary sanction of from one hundred to five hundred units.*

2. *With reference to the commission of the crimes provided in Articles 615-quarter and 615-quinquies of the criminal code, the entity shall be inflicted the pecuniary sanction of up to three hundred units.*

3. *With reference to the commission of the crimes provided in Articles 491-bis and 640-quinquies of the criminal code, save as otherwise provided in Article 24 of this Decree for the cases of computer fraud to the detriment of the State or of another public entity, the entity shall be inflicted the pecuniary sanction of up to four hundred units.*

4. *In the case of conviction for one of the crimes under paragraph 1, the prohibitive sanctions provided in Article 9, paragraph 2, letters b) and e) shall apply. In the case of conviction for one of the crimes under paragraph 3 the prohibitive sanctions provided in Article 9, paragraph 2, letters c), d) and e) shall apply”.*

#### **5. Procedural modifications**

Considering the limited time at my disposal, I won't be able to describe in detail the modifications introduced in the code of criminal procedure in order to adapt the existing legislation to the Convention provisions, although they are important modifications.

First of all, some modifications concern the search for evidence in connection with computer and telematic systems.

Other modifications have been introduced in Article 244 concerning the cases and the ways of carrying out inspections of places and persons; in Article 248 concerning the request to surrender specific items during searches; in Article 254 concerning the seizure of correspondence; in Article 256 concerning the duty to produce documents and records and concerning official, professional or state secrets.

As regards seizures a new Article has been introduced, Article 254-bis, denominated: “Seizure of computer data from providers of computer or telematic or telecommunications services.

Other modifications concern Article 259, on the custody of seized items; Article 260, on the placing of seals on seized items. Further modifications have been introduced as to the activity carried out on the initiative of the judicial police, amending Article 352 on searches, Article 353 on the acquisition of packets and correspondence, Article 354 on urgent verifications in places, on items and persons, and on seizures.

An important modification comes from the introduction of paragraph *4bis* in Article 132 of the code on the protection of personal data contained in Legislative Decree no 196 of 30 June 2003. Pursuant to it the Minister for the Interior or, by his delegation, the judicial police officers in charge of the central offices specialised in computer and telematic matters are entitled, even in relation to requests made by foreign investigation authorities, to order the providers and the operators of computer or telematic services to preserve and protect the data relevant to telematic traffic for the purpose of carrying out the preventive investigations provided in Article 226 of the provision under Legislative Decree no 271 of 1989, or for the purpose of ascertaining or repressing specific offences. The relevant order may, on grounded reasons, be extended to up to a total period of six months.

Of particular importance is also the derogation to the Public Prosecutors’ normal competence provided by the new paragraph *3-quinquies* added to Article 51 of the code of criminal procedure which reads as follows:

*“3-quinquies. When the proceedings concern crimes, whether completed or attempted, provided by Articles 600-bis, 600-ter, 600-quarter.1, 600-quinquies, 615-ter, 615-quarter, 615-quinquies, 617-bis, 617-ter, 617-quarter, 617-quinquies, 617-sexies, 635-bis, 635-ter, 635-quarter, 640-ter and 640-quinquies of the criminal code, the functions indicated in paragraph 1, letter a) of this Article are assigned to the office of the public prosecutor attached to the court of the chief town of the area within which the competent judge has his seat”.*

Finally, Article 13 of the Ratification law provides that:

1. *The central authority pursuant to Articles 24, paragraph 7, and 27, paragraph 2, of the Convention is the Ministry of Justice.*
2. *The Ministry of Interiors, in concertation with the Ministry of Justice, shall designate the point of contact provide by Article 35 of the Convention.*