

Vat-Fraud Prevention Tools: Challenges And Policy Issues In Italy

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Abstract: The European Member States lose billions of euros in VAT revenues on account of fraud. The paper analyses the Italian legislation concerning the VAT fraud, highlighting the critical issues in view of the Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law.

Keywords: Carousel fraud. Invoices. fraudulent declaration. Threshold. Legal person. Attempt. Criminal liability.



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1 INTRODUCTION

Every year, the EU Member States lose billions of euros in VAT revenues on account of fraud. This loss is commonly referred to as the “VAT gap”, which can be defined as the difference between VAT actually collected and expected VAT revenues.

According to the Report on the VAT gap, released on 11 September 2018, the VAT gap for the year 2016 fell below EUR 150 billion and amounted to EUR 147.1 billion¹.

The Italian legal system does not have an explicit definition of VAT frauds. In fact, it is not governed by the Penal Code, but by Legislative Decree 74 of 10 March 2000, concerning tax offences, as thoroughly revised by Legislative Decree 158 of 24 September 2015, in force since 22 October of the same year.

The Decree of 2000 introduces a radical change of direction with respect to the structure of the tax penal system under Law No. 516 of 1982, based on the identification of cases purely prodromal to evasion. Such law, in fact, entrusted the repressive intervention to criminal cases aimed at striking behaviours considered abstractly suitable to realize a future evasion, independently of an effective injury to the interests of the State (FLORA, 1991, p. 443).

¹ See the “*Study and Reports on the VAT Gap in the EU-28 Member States: 2018 Final Report*”, TAXUD/2015/CC/131.

The present decree, on the other hand, identifies in the tax declaration the pivot around which the criminal relevance of the various evasive phenomena is modulated.

Chapter I, Title II of the normative text of 2000, as modified subsequently, incriminates in four distinct criminal hypotheses, three of a commissive nature (Art. 2, 3 and 4) and one of an omissive nature (Art. 5), the violation of the obligation to complete and verify the exposure of the quantitative and qualitative components which determine the taxable base (MEREU, 2011, p. 22).

It follows that the legislature has thus punished, in an excursus of decreasing gravity, in Article 2 hypotheses of reduction of the tax base exclusively through the increase of the taxable elements, through the use of invoices for non-existent transactions; in Article 3 it has introduced the first elements of specificity requiring the alteration, in decrease of assets or increase of liabilities, takes place on the basis of false representation of the accounting records and by fraudulent means; has provided, finally, in Article 4 the conduct of those who limit themselves to reducing the taxable base, altering the assets and/or liabilities; punishing, on the other hand, autonomously in Article 8, the conduct of those who make such conduct possible through the issue or release of false tax documentation (ANTOLISEI, 2001, p. 345).

2 FRAUDULENT DECLARATION THROUGH THE USE OF INVOICES OR OTHER DOCUMENTS FOR NON-EXISTENT OPERATIONS

Art. 2 regulates the offence of fraudulent declaration through the use of invoices or other documents for non-existent operations. It represents the most serious ontological case since it occurs when the

declaration is not only untrue, but is altered by a documentary system, capable of distorting the reality represented.

The active subjects of the crime are all those who are required to submit tax and VAT returns (IORIO-MECCA, 2011, p. 2998). Since this is a crime of a commissive nature, its essential constituent element is represented by the indication, in one of the declarations, of fictitious passive elements, using invoices or other documents for non-existent transactions.

The Italian Supreme Court also confirmed in sentence 51027/2015 that the offence in question exists both in the hypothesis of objective non-existence of the transaction, i.e. when the transaction was never carried out in reality²; and in the hypothesis of relative non-existence, i.e. when the transaction was carried out but for a lower amount; and, finally, in the hypothesis of qualitative over-invoicing, i.e. when the invoice certifies the transfer of goods or services with higher prices than the real ones. The object of criminal repression, therefore, is any type of divergence between commercial reality and its documentary expression.

The crime, therefore, is committed with the presentation of the declaration. Any corrective declaration of the fraudulent one, even if it has taken place within the terms provided by law for the presentation of the annual declaration, does not constitute a cause of non-punishability³.

The intent required by the case is a specific intent. The legislator, therefore, punishes those who intend to evade taxes or obtain an undue refund or recognition of a non-existent tax credit. The incriminating case, therefore, does not exist when the subject has been moved by other purposes. The Italian judge is obliged to verify the existence of the psychological element. In other words, the offence in question is committed not by the mere use of documents, but by a subsequent and distinct behaviour, such as the presentation of the declaration.

² Court of Cassation, sent. no.22930/2006; no. 23897/2006; no. 32544/2006.

³ Court of Cassation, sent. no.7289/2001.

The Italian system aims to limit the criminal repression only to facts directly related to the injury of tax interests. It, therefore, renounces the prosecution of purely preparatory and formal violations, considered prodromal to the actual damage of the protected legal asset.

In this regard, it should be pointed out that, at the express wish of the legislator, the use of invoices for non-existent operations are no longer punishable as an attempt, if the latter are not included in the tax declaration.

The Italian provision does not provide for a threshold of non-punishability. In 2011, moreover, the legislator eliminated the third paragraph of Articles 2 and 8 of Legislative Decree 74/2000, which provided for a substantial reduction in the punishment for the offences referred to in the aforementioned articles, carried out by means of fictitious passive elements of less than € 154,937.07.

This criminal conduct referred to in Article 2 is punishable by imprisonment from one year and six months to six years.

With regard to carousel fraud, characterised by the issue of invoices for non-existent transactions, carried out by international criminal organisations in order to obtain a fictitious right to VAT deduction or reimbursement of VAT credit (ANTONACCHIO, 2005, p. 2723; PERINI, 2003, p. 6759), the Italian legislator introduced into Legislative Decree 74/2000 a new type of offence listed under Article 10-ter, as "*Failure to pay VAT*" (SOANA, 2007, p. 111). According to the above mentioned article, anyone who does not pay, within the term for the payment of the advance relating to the following tax period, the value added tax due on the basis of the annual declaration, for an amount exceeding two hundred and fifty thousand euros for each tax period, is punished with imprisonment from six months to two years. For this type of offence, the Supreme Court, with sentence 18924/2917, held responsible for issuing subjectively false invoices both the legal director, who did not comply with the duty of supervision and control, and the de facto director, who actually carries out the prohibited conduct.

3 FRAUDULENT DECLARATION BY OTHER MEANS

Art. 3 of the legislative decree in question outlines the case of fraudulent declaration by means of devices other than the use of invoices or other documents for non-existent operations. Therefore, this provision includes all the devices capable of hindering the investigation and misleading the financial administration. With regard to the notion of fraudulent means, the Circular of the Minister of Finance No. 154/E of August 4, 2000, specifies that "the simple violation of the obligations of invoicing and registration, although aimed at evading taxes, is not sufficient, in itself to constitute the crime in question, having to verify, in the specific case, whether, for the methods of implementation, has a degree of insidiousness such as to hinder the activity of assessment of the financial administration. In this regard, the presence of systematic and continuous violations or the keeping of black accounts or the use of bank current accounts for operations destined not to be accounted for can be decisive" (BRICCHETTI, 2001, p. 7069; LANZI, 2001, p. 207).

Even in this case, the active subjects are all those who are required to declare income and VAT, even if not bound to keep accounting records. Obviously, as mentioned above, the intent of the offender will be fundamental. Also in this case, in fact, they detect the conduct aimed at evading value added tax or income tax or to obtain an undue refund or non-existent tax credit.

The offence in question is committed only when the false declaration of assets or liabilities leads to the combined exceeding of two thresholds. Firstly, the evaded tax, considered as the quantitative difference between the tax actually due and that indicated in the tax

return, must exceed 30,000 euros. Furthermore, it is necessary that the total amount of the active elements subtracted from the tax, also by indicating fictitious passive elements, is higher than five per cent of the total amount of the active elements indicated in the declaration, or in any case, is higher than one million five hundred thousand euros, or if the total amount of fictitious credits and withholdings deducted from the tax is greater than five per cent of the amount of the tax or, in any case, thirty thousand euros.

The relationship between the offence in question and that referred to in Article 2 is governed by the subsidiarity clause of Article 3, which excludes the application of fraud with other devices when Article 2 is applicable (IORIO, 2017, p. 21).

4 UNFAITHFUL DECLARATION

Article 4 regulates the crime of unfaithful declaration. The structure of this offence coincides with that of the crime of unqualified fraudulent declaration referred to in the preceding article. The only differentiating element is the absence of fraudulent means (SANTORIELLO, 2017, p. 3075).

The offence under review is undoubtedly of a residual nature, therefore the relevant case can be said to be integrated outside the cases provided for in the previous articles. In essence, the offence is committed when there is a divergence between the declared economic result and the real economic result, without the support of fraudulent means.

Also in this case, as for the previous crimes, the active subject is whoever indicates in one of the annual declarations active elements for a lower amount than the actual one or non-existent passive

elements. Obviously, the intent with which such conduct is carried out is relevant, aimed, as before, at evading tax.

The peculiarity of this crime, characterized by a lower damaging charge, has induced the legislator to provide for a less severe penalty. The offender will be sentenced to between one and three years' imprisonment.

The punishability, moreover, occurs when two quantitative thresholds are exceeded, which must be used together. For the purposes of criminal relevance, it is therefore necessary that the evaded tax exceeds 150,000 euros and that the total amount of the assets subtracted from the tax, also by indicating non-existent taxable items, is greater than ten per cent of the total amount of the assets indicated in the declaration, or, in any case, greater than three million euros (GENNAI-TRAVERSI, 2011, p. 79).

The 2015 reform also introduced a non-punishability clause for accounting errors. The legislator, in essence, with paragraph 1-*bis* wanted to maintain a favourable view in relation to values corresponding to incorrect valuations of assets or liabilities, provided they objectively exist.

Still on the subject of valuations, it is worth mentioning paragraph 1b, also introduced in 2015, according to which, with the exception of the cases provided for in the previous paragraph, valuations that differ by less than ten per cent from actual valuations are not punishable.

It must be said that the assessment carried out by the Italian tax authorities for the identification of assets that are lower than their actual value is carried out by means of presumptions made by the inspectorate during the tax audit. This VAT assessment activity is governed by Articles 54 and 55 of Presidential Decree 633/1072.

5 ATTEMPT

Pursuant to Article 6 of Legislative Decree 74/2000, the offences referred to in Articles 2, 3 and 4 are not punishable as attempts. As already mentioned above, the aforementioned offences are instantaneous offences and are committed upon presentation of the declaration.

Breaking with the past, the legislator, therefore, wanted to punish the fact relevant and harmful to the Treasury and not the related prodromal acts. Their realization, therefore, is not punished as an attempt to commit crimes of fraudulent and unfaithful declaration. This thesis was also reiterated by the Constitutional Court in its ruling 49/2002.

The punishability of the attempt in the criminal tax law, represents, therefore, an exceptional hypothesis.

6 ISSUANCE OF INVOICES OR OTHER DOCUMENTS FOR NON-EXISTENT OPERATIONS

A last relevant case to complete the analysis of the Italian regulations concerning VAT fraud is that governed by Article 8 of Legislative Decree 74/2000. It punishes with imprisonment from one year and six months to six years anyone who, in order to allow third parties to evade income tax or value added tax, issues or issues invoices or other documents for non-existent transactions.

The autonomy conferred on this conduct stems from the need to repress this action taken by illegal companies set up with the aim of placing false documentation on the market. Whoever carries out

such conduct does not directly subtract income from the Treasury, but carries out a simulated operation, by virtue of which the user of the false invoice, will carry out the direct injury. Article 8, in other words, indirectly protects the tax assets (SPAGNOLO, 2003, p. 1792).

To this end, the Italian Supreme Court, with sentence 24307/2017, reiterated that the crime of issuing false invoices or other documents for non-existent transactions is configurable even in the case of only subjectively false invoicing, that is, when the transaction subject to tax has been carried out but there is no correspondence between the service provider indicated in the invoice and the one that provided the service. Even in this case, in fact, it is possible to configure illegal allowing third parties to evade taxes on income and value added⁴.

The active party in this case is anyone who issues invoices or documentation for non-existent transactions. It is therefore a common offence (PERINI, 1999, p. 172).

The legislator has split the offence into two different and specular moments: the one of issuing the invoice or documentation for non-existent operations and the one of use, by a third party, of the aforesaid documentation.

Also in this crime the psychological element is required. According to the legislator, therefore, it is important that the offender carries out the action with the intention of having an evasion carried out by a third party. It should be pointed out, however, that the psychological element capable of configuring the crime under review is given by intent and not by damage. The offence, therefore, is committed with the mere issue of an invoice and not with the subsequent execution of the evasion.

The peculiarity mentioned above makes it impossible to punish as an attempt to commit the crime referred to in Article 8. A hypothetical attempt, in fact, should refer to a moment prior to the actual issue of fictitious invoices, excluding the possibility of verifying

⁴ Court of Cassation, sent. no. 20357/2010.

the use of the same. Therefore, two parties are inevitably involved in the commission of the offence: the issuer and the user. For this reason, part of the doctrine maintains that the issue, pursuant to Article 8, and the use, pursuant to Article 2, are nothing more than the hypothesis of complicity in a single crime (PERINI, 2002, p. 738). This hypothesis, however, is expressly excluded by the legislator who, in art. 9, states that the issuer of invoices or other documents for non-existent operations and whoever contributes to the same is not punishable by way of aiding and abetting the crime provided for in article 2. Likewise, whoever uses invoices or other documents for non-existent transactions and whoever contributes to the same is not punishable by way of aiding and abetting the offence referred to in Article 8 (CARACCIOLI, 2017, p. 29).

As mentioned above, the 2011 reform eliminated the previous threshold of punishment of € 154,937.07.

7 PIF DIRECTIVE AND ITALIAN LEGISLATION

As is well known, the Directive (EU) 2017/1371 regulates the VAT fraud (UDVARHELYI, 2017, p 4). According to the fourth recital of the preamble to the cited Directive, the European discipline applies to the most serious forms of VAT fraud (so called serious offences), in particular VAT fraud through missing traders, VAT fraud committed within a criminal organization and carousel fraud, which create serious threats to the common VAT system⁵ and thus to the Union budget. Offences against the common VAT system are considered to be serious where result from a fraudulent scheme whereby those

⁵ Established by Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax.

offences are committed in a structured way with the aim of taking undue advantage of the common VAT system, they are connected with the territory of two or more Member States, and the total damage caused by the offences is at least 10,000,000 euros. The notion of total damage refers to the estimated damage that results from the entire fraud scheme, both to the financial interests of the Member States concerned and to the Union, excluding interest and penalties.

In other words, the Directive applies only in cases of serious offences against the common VAT system, where the concept of seriousness is defined having regard to the high amount of damage and the cross-border nature of the illegal conduct.

In the opinion of the writer, it seems that the above threshold is too high and neglects all those frauds which do not reach that level, but which are still characterized by an intrinsic relevance for the protection of EU interests. Indeed, the Italian legislation, with the cited Legislative Decree No 74 of 10 March 2000, currently punish violations even for amounts significantly lower than those indicated in the EU source.

Particular attention should be paid to Article 5 of the Directive, entitled "Incitement, aiding and abetting, and attempt". In the first paragraph, it requires Member States to "take the necessary measures to ensure that inciting, and aiding and abetting the commission of any of the criminal offences referred to in Articles 3 and 4 are punishable as criminal offences". In the following paragraph, it also prescribes the same measures "to ensure that an attempt to commit any of the criminal offences referred to in Article 3 and Article 4(3) is punishable as a criminal offence".

With regard to the complicity in person in the crime it should be borne in mind that in the field of VAT violations, Article 9 of Legislative Decree No 74/2000 excludes the criminal relevance of the complicity of the user of false invoices for transactions that do not exist in the conduct of the other issuer, or the person who issues them. This exclusion is in conflict with European law. For this reason,

it is desirable to abolish this exception for a peaceful and proper implementation of the Directive.

Finally, with regard to the attempt, it should be pointed out that Article 6 of the abovementioned Decree of 2000 excludes the possibility of an attempt limited to the cases of fraudulent declarations by using invoices or other documents for non-existent transactions, fraudulent declarations by other means and unfaithful declarations, which are governed by Articles 2, 3 and 4 of the abovementioned Decree respectively. Again, it is desirable to remove this exception.

7.1 CRIMINAL LIABILITY OF LEGAL ENTITIES

The concept of a legal person, covered by Article 2(1)(b), is extremely broad and general. According to the European rules, "legal person" means an entity having legal personality under the applicable law, except for States or public bodies in the exercise of State authority and for public international organizations.

Article 6 states that legal persons shall be held liable if they have benefited from the commission of the offences referred to in the previous paragraph⁶, if they have been committed by their senior members, or as a result of the failure to carry out checks by the company's top management.

This form of liability of the entity does not exclude the possibility of criminal proceedings against the natural persons who committed the alleged crime.

Moreover, from the point of view of sanctions, Article 9 of the Directive states the need to ensure that the legal persons held criminally liable are subject to effective, proportionate and dissuasive

⁶ See the articles 3, 4 and 5 of the PIF Directive.

sanctions, which include criminal or non-criminal fines, such as disqualification fines.

In this regard, part of the doctrine maintains that, from the combined provisions of Articles 6 and 9 of the Directive, one can see the consolidated indifference of the legislature to the attribution of a genuine criminal-label to the punitive sub-system of collective bodies, in accordance with the traditions of the Member States according to which *societas delinquere non potest* (VERMEULEN-DE BONDY-RYCKMAN, 2012, p. 22; DE SIMONE 2012, p. 117; BAYSINGER, 1991, p. 341; CONTI, 2001, p. 861).

In Italy, the liability of entities is governed by Legislative Decree no. 231 of 8 June 2001, which governs the administrative liability of legal persons, companies and associations, including those without legal personality (PISTORELLI, 2017, p. 610; PIERGALLINI, 2002, p. 571; DE SIMONE, 2011, p. 1895).

This decree, after a long genesis, was introduced in accordance with Article 11 of Law No. 300 of 2000 (GENNAI-TRAVERSI 2001, p. 380), which was aimed at ratifying the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, which, in Article 2, expressly provided for the obligation, for each party, "to take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the bribery of a foreign public official"⁷.

The Legislative Decree 231 of 2001, therefore, in its current and current version, has a wide scope and covers largely the scope of the crimes covered by the Directive⁸. However, offences in tax matters and, therefore, also those relating to VAT are excluded.

⁷ See the *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, adopted by the Negotiating Conference on 21 November 1997.

⁸ See in particular Article 24 of Legislative Decree 231/2001 which refers, among others, to Articles 316-ter and 640-bis of the Italian Criminal Code; Article 24-ter which refers, among others, to Articles 416 and 416-bis of the Italian Criminal Code; Article 25 on the subject of extortion, undue induction to give or promise benefits and corruption; Article 25-octies on the subject of receiving stolen goods, money laundering and use of money, goods or benefits of unlawful origin, as well as self-money laundering.

As correctly observed by the doctrine, in order to implement the new legislation, it will be necessary, or at least appropriate, to include in the punitive subsystem provided for by Decree 231 not only VAT fraud, but the entire criminal-tax sector referred to in Legislative Decree no. 74/2000 (BASILE, 2017, p. 63).

It is therefore necessary to enrich the list of offences alleged to be the responsibility of collective bodies, including VAT fraud.

8 CONCLUDING REMARKS

The Italian legislation seems to be largely in line with European suggestions. The introduction of tax offences within the rules on the criminal liability of entities, as set out in Legislative Decree no. 231/2001, represents, therefore, the next challenge of Italian criminal-tax law.

The current absence of tax offences in the catalogue of predicate offences, highlights the limits of a system that fails to guarantee at the same time an effective prevention and repression of tax offences. Such a maneuver, therefore, in addition to satisfying the demands of the European Union, would have a positive impact on the fight against tax evasion, combating even more radically the crime of profit.

It is important to underline that the threshold set by the Directive for the VAT Fraud is too high and neglects all those frauds which do not reach that level, but which are still characterized by an intrinsic relevance for the protection of EU interests.

In the opinion of the writer, it would be desirable to reduce the threshold and to extend the cooperation with third party countries in fighting VAT-fraud, improving the exchange of information.

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Ferramentas De Prevenção À Fraude De Iva: Desafios E Questões Políticas Na Itália

Vincenzo Carbone

Resumo: Os Estados-Membros europeus perdem bilhões de euros em receitas de IVA por causa de fraude. O documento analisa a legislação italiana em matéria de fraude ao IVA, destacando as questões críticas à luz da Diretiva (UE) 2017/1371 do Parlamento Europeu e do Conselho, de 5 de julho de 2017, relativa à luta contra a fraude nos interesses financeiros da União através de de direito penal.

Palavras-chave: Fraude carrossel. Faturas. Declaração fraudulenta. Limite. Pessoa coletiva. Tentative. Responsabilidade criminal.