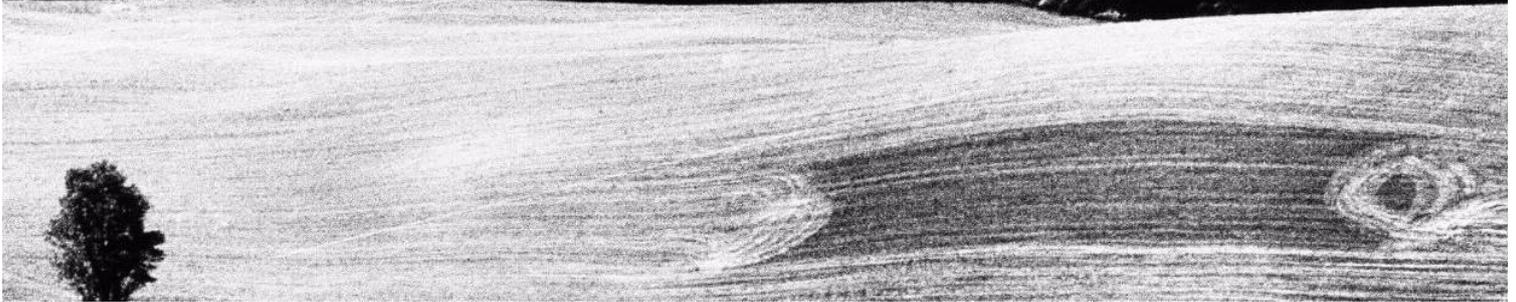


Newsletter

White Collar Crimes and Business Integrity Unit
Tax offences: the new field for corporate criminal liability in Italy



Abstract

2020 is going to be a decisive year for the inclusion of tax offences among the predicate offenses capable of triggering corporate liability, a matter which has been the subject of a controversial debate in Italy spanning the past decade. This move will increase the pressure on Italian and foreign companies acting in Italy, both in terms of sanctions risk and in terms of the need for preventive compliance programs. In particular, on 1 October 2019, the Italian Chamber of Deputies definitively approved the European Delegation Law of 2018, instructing the government to introduce corporate criminal liability for a certain number of VAT offences following the Directive on the protection of the financial interests of the EU.

Most importantly, Law N. 157/2019, adopted on 19 December and entered into force on 25 December, introduces a wide range of tax crimes in the list of predicate offences capable of triggering the liability of entities under Italian law. Further significant amendments stem from the Legislative Decree, the draft version of which has been approved on 23 January 2020, implementing the Directive on the protection of the financial interests of the EU into the Italian legal system.

These legislative amendments deeply alter the Italian landscape in relation to corporate criminal liability and tax offences. Companies will be exposed to the risk of new, severe punishments and will need to adopt their compliances programs accordingly.

I **New predicate offences for corporate liability: the emerging role for tax crimes.**

2019 was a moving year for the Italian legal framework governing corporate criminal liability, which is embodied mainly in Legislative Decree N. 231/2001 ("Decree 231"). As a brief background, Decree 231 provides for the liability of entities, to be adjudicated in front of a criminal court, where a person with representative, administrative or directive capacity (also *de facto*) or a person subject to their direction or surveillance, commits - or attempts to commit - one of the predicate offences listed in the Decree in the

interest or to the benefit of such entity. The list of predicate offences is quite broad, including, among others: corruption; money-laundering; manslaughter and injuries as a consequence of health and safety violations; environmental crimes; cybercrimes; corporate crimes; market abuse; and insider trading. Sanctions under Decree 231 can consist of fines reaching Euro 1.5 million, disqualification measures, confiscation, and publication of the conviction. Disqualifications and confiscation are particularly worrisome) for companies. The former can, for instance, lead to the suspension of any business activity or to the prohibition to negotiate with the public administration, a risk that many companies cannot easily afford. Confiscation refers to the price or profit of the offense, or to any sum of money, goods or other benefits equal to the value of the price or profit of the offence, and this can have a significant economic impact on the convicted company.

Over the last months, alongside more than 20 categories of criminal offenses capable of triggering corporate liability under Decree 231, which were progressively included in the list of the so-called predicate offences since 2001, there has been an unprecedented expansion to new sets of crimes, mostly under the impetus of EU law. This extension includes, among others: (i) trading in illicit influence (with an envisioned pecuniary sanction of up to Euro 300.000); (ii) fraud in sports competitions and abusive exercise of games and betting and gambling through prohibited devices (with possible pecuniary sanctions reaching up to Euro 700.000 and disqualification measures of at least one year); as well as (iii) certain new offences against national cybersecurity (with a pecuniary sanction of up to Euro 600.000). The sanctions system for individuals in relation to certain offences envisioned by Decree 231 was also strengthened, particularly by virtue of a new, sweeping anti-corruption law (Law N. 3/2019). Just to give an example, the penalty for corruption pursuant to Article 318 of the Criminal Code ranges from three to eight years of imprisonment, while under the previous version of the provision it ranged from one to six years.

More significantly, very recent legislative developments have targeted tax offences, an important and sensitive new addition for companies, responding both to a protracted debate taking place at a domestic level and to laws issued at EU level.

Law N. 157/2019, definitively approved on 19 December and entered into force on 25 December, envisages important amendments in relation to the criminal liability of both individuals and legal persons for tax offences. Before analyzing its content, we will briefly mention the different attempts in the past to have tax crimes included in the list of predicate offences capable of triggering the liability of entities under Italian law.

II The previous attempts to introduce tax offences within the corporate criminal liability system.

Before the introduction of Law N. 157/2019, tax crimes established by Decree 74/2000 were not expressly included in the list of Decree 231 predicate offenses capable of triggering corporate liability. Consequently, companies could only be subject to sanctions issued by the tax administration for fiscal violations or have to deal with the consequences of seizures and confiscations arising out of offences committed by their legal representatives. Nevertheless, since certain tax offences were widely considered to be relevant when it comes to corporations, as well as compatible with the requirements contained in Decree 231, their total exclusion from Italy's corporate liability system has long been the topic of contentious debate in academia, in the legislature, and in the courts.

The first legislative proposal to include tax offences in Decree 231 already came in 2007 upon the initiative of a Ministry of Justice commission. Later in 2014, a similar proposal was presented to the Chamber of Deputies concerning the introduction of tax offences as a Decree 231 predicate offence, with a view to filling *"an unjustifiable gap not only at the political-criminal level (...) but also at the systematic level"*.

At the same time, certain Italian judges have made creative attempts to hold companies liable – albeit indirectly – for tax offences. On the one hand, they have based corporate liability on existing Decree 231 predicate offences (such as money-laundering and criminal association) when these are linked to or stem from tax offences. For instance, in 2013 the Italian Supreme Court held that Decree 231 seizures that target profits of a criminal conspiracy also concern profits of tax crimes committed as the aim of the conspiracy,, as such seizures relate to all benefits obtained as a result of the offences committed within the conspiracy (Supreme Court, Criminal Sec. III, N. 24841/2013). This decision was highly criticised and remains an isolated precedent. Courts also relied on an extensive application of confiscation measures to seize profits deriving from tax offences committed by companies' legal representatives or other individuals when the sums were within the possession of companies, irrespective of the fact that the tax offence was not a predicate offence for corporate liability (Supreme Court, United Sections, N. 10561/2014 and 31617/2015).

III The European Delegation Law 2018 and the upcoming European Public Prosecutor's Office: the VAT offences.

Directive 2017/1371 on the fight against fraud to the Union's financial interests by means of criminal law, also known as the "PIF Directive", adopted on 5 July 2017, was grounded on the knowledge that *"fraud affecting Union revenue and expenditure in many cases was not confined to a single country"*.

The Directive imposes a duty on Member States to criminalise four offences: fraud; money-laundering; bribery; and misappropriation. The definition of fraud distinguishes between: (i) non-procurement related fraud; (ii) procurement related fraud; (iii) non-VAT revenue fraud (i.e. customs revenue fraud); and (iv) VAT revenue fraud. The latter offence of VAT revenue fraud applies only in case of *"serious offences"* against the common VAT system, namely where the intentional acts or omissions underlying this offence are connected with the territory of two or more EU Member States and involve a total damage of at least Euro 10 million.

When it comes to legal persons, the Directive requires Member States to ensure that they can be held liable for any of the PIF offences *"committed for their benefit by any person, acting either individually or as part of an organ of the legal person, and having a leading position within the legal person (...)"*, as well as for PIF offences, made possible by the lack of supervision or control by such a leading person over a person under their authority. The European text goes on to require that Member States take the necessary measures to ensure the application against legal persons of *"effective, proportionate and dissuasive sanctions, which shall include criminal or non-criminal fines and may include other sanctions"*, such as exclusion from public benefits or from public tender procedures, disqualification from the practice of commercial activities, judicial winding-up, and others.

As a consequence, within the Italian legal system, the issues surrounding the inclusion of tax offences as a predicate offence for corporate liability have once again come to the fore.

The European Delegation Law 2018 (Law N. 117 of 4 October 2019), which entered into force on 2 November 2019, implements and transposes 26 EU Directives into Italian law, including the PIF Directive. Specific guidelines are given concerning corporate liability: the Government is asked to extend, by 28 February 2020, Decree 231 to the *"offenses which harm the financial interests of the European Union and which are not already included in the Decree"* and envisage that *"all sanctions be effective, proportionate and dissuasive"*.

The real novelty is the inclusion within the regime of corporate criminal liability of VAT frauds.

The latter are defined by the Directive as any act or omission committed in cross-border fraudulent schemes in relation to: (i) the use or presentation of false, incorrect or incomplete VAT-related statements or documents, which has as an effect the diminution of the resources of the Union budget; (ii) non-disclosure of VAT-related information in violation of a specific obligation, with the same effect; or (iii) the presentation of correct VAT-related statements for the purposes of fraudulently disguising the non-payment or wrongful creation of rights to VAT refunds.

To make it clear, the European Delegation Law for 2018 did not produce any practical result for individuals and companies: Government has to fulfil its tasks by adopting a more detailed piece of binding legislation in the upcoming weeks.

The Italian Government has made a step forward in this direction by approving, on 23 January 2020, the draft Legislative Decree implementing the PIF Directive into the domestic legal order. The Legislative Decree modifies, among others, the tax offences provided by Decree 74/2000 that are included in the list of Decree 231 predicate offenses. In fact, this list will also encompass false or omitted statement of income (Articles 4 and 5 of Decree 74) and illicit clearance (Article 10 quarter of Decree 74). The following changes are also worthy of note: (i) the attempt to commit a tax offence will be also punished, where the crime is transnational and if the tax evaded goes beyond 10 million; (ii) the list of 231 predicate offenses will also include fraud in the public supply, fraud in agriculture and smuggling; (iii) two more crimes against the public administration will be included in the list of 231 predicate offences: embezzlement and abuse of office. It should be noted that this is not a definitive text and that the Decree is likely to undergo further amendments before its adoption.

The PIF Directive is furthermore strictly intertwined with the Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ("EPPO"),

The EPPO – expected to start its activities in November 2020 - is the new European Union body responsible for investigation and prosecution in relation to criminal offences affecting the EU's financial interests.

The structure of the EPPO includes European Delegated Prosecutors ("EDPs") across participating Member States, which are 22 at this stage. EDPs will investigate and prosecute cases in their respective Member States and bring them before the domestic criminal judges.

Its material competence covers the so called "PIF offences" (fraud, corruption, misappropriation, money laundering) and ancillary offences, inextricably linked to them. Within this framework, the EPPO will be competent also for serious frauds against VAT where the misconduct is connected with at least two

participating Member States and has caused a total loss of at least EUR 10 million, as stated in the PIF Directive.

IV **Law N. 157/2019 and the new corporate criminal liability system for a wide range of tax offences.**

The abovementioned debate has been widely overcome by the adoption of the last piece of legislation, the most important one in relation to corporate criminal liability for tax offences. The first step was made on 26 October 2019, when the Italian President issued the Law Decree N. 124 (also referred to as the “Fiscal Decree”), containing “*urgent measures for undeferrable tax and financial needs, also through the fight against tax evasion and related criminal law*”. Law N. 157/2019, which was definitively approved on 19 December 2019 and entered into force on 25 December, made some amendments to Decree 124/2019 and converted it to Law.

Pursuant to Law N. 157, the following provision is to be added to Decree 231:

“Article 25-quinquiesdecies (Tax offences). — 1. In relation to the commission of the offences under Decree 74, the following pecuniary sanctions shall apply: a) for the offence of fraudulent declaration through the use of invoices or other documents for inexistent transactions envisioned in Article 2(1) of Legislative Decree N. 74/2000, a pecuniary sanction of up to 500 quotas; b) for the offence of fraudulent declaration through the use of invoices or other documents for inexistent transactions envisioned in Article 2(2-bis), a pecuniary sanction of up to 400 quotas; c) for the offence of fraudulent declaration through the use of other artifices envisioned in Article 3, a pecuniary sanction of up to 500 quotas; d) for the offence of issuing of invoices or other documents for inexistent operations envisioned in Article 8(1), a pecuniary sanction of up to 500 quotas; e) for the offence of issuing of invoices for inexistent operations envisioned in Article 8(2-bis), a pecuniary sanction of up to 400 quotas; f) for the offence of destruction and concealment of accounting documents envisioned in Article 10, a pecuniary sanction of up to 400 quotas; g) for the offence of fraudulent subtraction to pay taxes envisioned in Article 11, a pecuniary sanction of up to 400 quotas. If following the commission of the above offences the entity has obtained a profit of substantial amount the pecuniary sanction is increased of a third. In all cases can be applied also disqualification measures envisioned in Article 9(2 c, d and e) Decree 231”.

The following points are worth highlighting:

- Following Law N. 157/2019, a wide range of tax offences are now included in the list of predicate offences, while the Fiscal Decree included only one category of tax crimes. In fact, in addition to fraudulent tax declarations through the use of invoices or other documents for inexistent transactions (the so-called “false invoicing” offence), punished under Article 2 of Decree 74, the following offences are now encompassed in the list: (i) fraudulent declaration through the use of invoices or other documents for inexistent transactions if the amount of the evaded tax is lower than Euro 100.000, punished under Article 2(2-bis) of Decree 74; (ii) fraudulent declaration through the use of other artifices, punished under Article 3; (iii) issuing of invoices or other documents for inexistent transactions, punished under Article 8 (1 and 2-bis); (iv) destruction and concealment of accounting documents punished under Article 10; (v) fraudulent tax avoidance, punished under Article 11.
- Law N. 157/2019 also includes certain disqualification measures as penalties applicable to companies in addition to pecuniary sanctions. The following disqualifications measures apply: bans from contracting with the public administration; exclusion from benefits, loans, grants or subsidies, including revocation of those already granted; ban on advertising goods or services. These measures can range from 3 months to 2 years and are imposed if: (i) the organization has made a substantial profit and the crime was committed by persons in senior position or individuals with directorial functions when the crime was determined or facilitated by serious organizational shortcomings; (ii) in case of reiteration of the offences.
- Law N. 157/2019 also made substantial amendments to the criminal regime for tax offences committed by individuals encompassed in Decree 74. The main amendments regard: (i) the increase of penalties for certain crimes; (ii) the lowering of the thresholds required to trigger the criminal offence; (iii) the applicability of the “extended confiscation” under Article 240-bis of the Italian Criminal Code to tax offences as well. Now confiscation under Article 240-bis of the Criminal Code is also applicable to tax offences in case of conviction or plea bargaining (provided by Article 444 of the Criminal Procedure Code) for each crime encompassed in Legislative Decree N. 74/2000 (except for failure to pay withholding taxes or failure to pay VAT), when the omitted payment exceeds Euro 100.000.

V The impact of the new legislation on companies in terms of compliance programs.

These legislative developments, combined with the difficulty to detect problematic tax practices and the potential pervasiveness of these crimes, should put companies on guard. The focus should now home in on which actions and measures companies can put into place to prevent the commission of such offences,

first and foremost through the adoption and implementation of effective systems and controls pursuant to Decree 231.

Indeed, it should be borne in mind that under Decree 231, when a predicate crime is committed, a company can avoid or reduce liability if it proves, *inter alia*, that it has adopted and effectively implemented adequate systems and controls in accordance with the Decree, including an organization and management model (a so-called “231 Model”) suited to prevent the type of crime that was committed. Notably, since Decree 231 can, in certain instances, also apply to foreign companies – as discussed in a previous newsletter – foreign companies are also advised to monitor these developments and ensure Decree 231 compliance when its operations fall within Italian jurisdiction.

In light of these significant new legislative developments, it is important that companies update their own organization and management model in order to render it “tailored” to the recent new provisions and thereby avoid the risk of being exposed to the abovementioned new, severe punishments.

Chiomenti and its White Collar Crimes & Business Integrity Unit is available to provide any clarifications and support you in any situation which may be of interest to you.

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