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Technical Paper

Sanctions and ne bis in idem in the Italian anti-tax evasion legal framework: “Extended confiscation” to counter fiscal corruption

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Sanctions and *ne bis in idem* in the Italian anti-tax evasion legal framework: "Extended confiscation" to counter fiscal corruption

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This technical paper analyzes some of the most problematic aspects of the Italian anti-tax crime criminal legal framework. In particular, it focuses on the existing tax gaps, the reasons leading to the lack of voluntary tax compliance, and the most recent tax policies adopted to combat the phenomenon of tax evasion. It explores how the sanction model, characterized by a double track system (i.e., at the same time criminal and administrative), can still be considered somehow infringing the principle of *ne bis in idem* (i.e., double jeopardy) and how it does not facilitate general tax compliance among taxpayers. Finally, it highlights how confiscation, in particular, "preventive confiscation" can be used to counter fiscal corruption aiming at confiscating illicit, disproportionate, and unjustifiable economic advantages obtained through the perpetration of economic crimes.

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1. The "double track" sanctioning system: Problematic issues of the Italian tax sanctioning model.

In the Italian legal system, the legal framework designed to counter tax offenses is characterized by a "double-track sanctioning system." This means that unlawful conduct committed in tax matters, representing an administrative offense and a crime, can be punished through the imposition of both administrative and criminal sanctions.[1] Such a feature raises several issues that are intertwined with the general complexity of the taxation system. From the Expert Survey conducted during the VIRTEU[2] project, it emerged that, although the experts from 10 countries considered their taxation system as "rather complex", all the experts from Italy rated the Italian tax systems as "very complex."[3]

Just to outline the general profiles of the Italian discipline, on the one hand, and for illicit facts committed by individuals, the Legislative Decrees no. 471/472 and 473 of Dec. 18, 1997, provide administrative penalties for violations of tax regulations, while Legislative Decree no. 74/2000, as amended by Legislative Decree no. 158/2015 (on the amendment of the sanctioning system), regulates tax offenses constituting crimes and identifies the corresponding criminal sanctions.

On the other, Law no. 326 of 24th November 2003 regulates the administrative penalties for tax administrative violations committed by legal entities, while art. 25-*quinquiesdecies* of Legislative Decree n. 231/2001 (that provides the discipline about criminal

[1] See, *inter alia*, Maiello, V. (2017). Doppio binario sanzionatorio, "ne bis in idem" e reati tributari. *Giurisprudenza commerciale*, (2/2), 348-357;

[2] VIRTEU (Vat fraud: Interdisciplinary Research on Tax crimes in the European Union) was a two-year international research project funded by the European Anti-Fraud Office (OLAF) of the European Commission (Grant Agreement no: 878619), which aimed at exploring the interconnections between tax crimes and corruption. All documents produced, as well as all the video recordings of the events organized over the course of the project, are available online at on the Corporate Crime Observatory which serves as the long-term repository of the project outcomes: https://www.corporatecrime.co.uk/virteu.

[3] See, Costantino Grasso & Stephen Holden, *VIRTEU Expert Survey Report: The Interconnections between Tax Crime and Corruption*, Corporate Crime Observatory (Sept. 2022), at page 11, available at www.corporatecrime.co.uk/virteu-expert-survey.

liability of legal entities),[4] as introduced by Law n. 157 of 19th December 2019,[5] disciplines tax crimes and penalties as well as for legal entities.

According to this option of criminal policy, also adopted in the sector of market abuse[6], tax administrative offenses should be punished with administrative sanctions, whereas fiscal misconducts that constitute a criminal offense, as in the case of false invoices (art. 4, Legislative Decree n. 74/2000) and tax declaration failure (art. 5, Legislative Decree n. 74/2000), should be punished with criminal sanctions.

However, as will be pointed out, the same offense may be committed at the same time both in breach of a tax and a criminal rule and by the same person (that means both individuals and legal entity). In this case, it is not excluded that duplication of sanctions may occur, since the taxpayer can be subjected both to the tax and the criminal proceeding and to the consequent sanctions deriving.

This phenomenon may give rise to the violation of the principle of *ne bis in idem*,[7] currently expected at a national level by the art. 649 of the penal procedural code, at a supranational level by the art. 4, Protocol n. 7 of ECHR and at a European level by art. 50 of the European Union Charter of Fundamental Rights.[8]

The topic of *ne bis in idem* in fighting tax offenses[9] is particularly relevant to highlight some of the major issues and, from a certain perspective, the criticalities of the Italian legal

[4] On the argument, see Severino P. – Lattanzi G. (2020). Responsabilità da reato degli enti, Giappichelli.
[5] Piva D. (2020). Reati tributari e responsabilità dell'ente: una riforma nel (ancorchè non di) sistema. *Sistema penale*, 2-21 (www.sistemapenale.it).
[6] About that, see Tripodi, A. F. (2016). Il doppio binario sanzionatorio all'esame del giudice delle leggi: una decisione in materia di abusi di mercato tra corsi e ricorsi storici. *Giurisprudenza costituzionale*, (4), 1498-1509; Viganò F. (2016). Ne bis in idem e doppio binario sanzionatorio in materia di abusi di mercato: dalla sentenza della Consulta un assist ai giudici comuni, *www.penalecontemporaneo.it*, 5 ff
[7] For a general reconstruction, see Amati E. – Mazzacuva N. (2018). Diritto penale dell'economia, Cedam, 351-384.
[8] Vinciguerra C. (2015). Il principio del ne bis in idem nella giurisprudenza della Corte EDU. *Diritto e Pratica Tributaria*, 337; Flick, G. M. (2014). Reati fiscali, principio di legalità e "ne bis in idem": variazioni italiane su un tema europeo. *Rassegna tributaria*, (5), 939-960.

[9] Basile, E. (2021). Recenti riforme penal-tributarie e responsabilità degli enti. Controverse ricadute di una svolta politico-criminale. *Rivista di diritto tributario*, (1/3), 1-22; Severino P. (2020). L'inserimento dei reati tributari nel d.lgs. n. 231/2001 tra osservazioni de iure condito e prospettive de iure condendo. Atti del webinar "Tax

framework in countering tax crimes and, in general, all the economic crimes, inspired by the logic of realizing illicit profits.

This issue became even more central in the domestic doctrinal debate after the introduction of Law no. 157/2019 (adopted to adopt urgent tax provisions), just called up above, by which the criminal liability of legal persons (regulated by Legislative Decree n. 231/2001) was also enshrined for certain serious tax crimes. This recent reform has raised several concerns precisely concerning the potential duplication of the penalties[10] for the same act committed by the individual and by the legal person for whose benefit tax crime has been committed. It is the typical case of a CEO who, in order to achieve more savings, fraudulently omits to declare the income of the company he represents.

The set of sanctions now provided by the Italian Legislator may thus affect both the CEO, as an individual and material perpetrator of the offense, and the legal person since the CEO is its representative.

Indeed, the CEO, as an individual, can suffer both the administrative sanction in the form of a fine and the criminal sanction in its possible dual form of imprisonment and confiscation of the profit of the crime.

Similarly, the legal person may suffer both the administrative sanction, which is a pecuniary sanction, and the criminal sanction in the form of a pecuniary penalty and the confiscation of the profit.

That is why, the overburdening sanctioning load here described could be in contrast to some fundamental principles of the criminal justice system, such as reasonableness

compliance, responsabilità degli enti e reati tributari. Una riflessione alla luce della legge n. 157/2019. *Sistema Penale*, 126-130.

[10] Bellacosa M. (2020). L'inserimento dei reati tributari nel "sistema 231": dal rischio di ne bis in idem alla implementazione del modello organizzativo. Webinar acts "Tax compliance, responsabilità degli enti e reati tributari. *Sistema penale*, 137-144.

(“*ragionevolezza*”), proportionality (“proporzionalità”)[11] and appropriateness (“*adeguatezza*”) of the sanction.[12]

In this context, the sanctioning framework as reformed with Law no. 157/2019, also provides for a new and peculiar instrument, the so-called 'extended confiscation' (art. 12-*ter* of Legislative Decree n. 74/2000)[13] that can be applied to the individuals when it appears, even if on the basis of presumptions, that there is a disproportion between declared income and actual wealth that cannot be justified in front of the judge.

In applying “extended confiscation,” judges aim at verifying the “criminal habit” of the taxpayer and his ability to build criminal schemes, which thus intersect the crimes of tax evasion with other connected, such as money laundering or corruption. Tax savings, obtained through crimes such as fraudulent misinterpretation or tax declaration failure, generate illicit sums of money, subsequently used in corrupt conduct to obtain further benefits.

In light of what has been shortly outlined so far, the paper, after a brief reconstruction of the criminal policies adopted to combat tax offenses and about the current problematics, also from a cultural perspective connected to the dissemination of effective tax compliance, will first of all attempt to ascertain what the most effective interpretative solutions might be to ensure the overall consistency of the tax penalties with the constitutional principles of the criminal justice system and of the ECHR and of the European Charter of Fundamental Rights in order to avoid the violation of *bis in idem* and the consequent ineffectiveness of the penalty system.

Secondly, a focus will be made on the new instrument of “extended confiscation”, which could represent an effective - albeit critical - tool to fight economic crimes, showing

[11] Tripodi A.F. (2017). Cumuli punitivi, ne bis in idem e proporzionalità. *Rivista italiana di diritto e procedura penale*, 1047-186.
[12] Flick, G. M. (2014). Reati fiscali, principio di legalità e "ne bis in idem, cit. 958-960.
[13] Ardito, F. (2020). La riforma dei reati tributari (art. 39 del D.L. 26 ottobre 2019, n. 124). *Bollettino tributario d'informazioni*, (9), 667-672; Bartoli R. (2020). Ancora sulle incongruenze della recente riforma in tema di reati tributari e responsaiblità dell’ente. Webinar acts “Tax compliance, responsabilità degli enti e reati tributari. *Sistema penale*, 137-144-152; Todini, C. (2020). La confisca per sproporzione nei reati tributari: criticità applicative e garanzie a rischio. *Corriere tributario*, (8-9), 799-807.

how certain types of offenses, such as corruption, tax crimes, and money laundering[14] are often interconnected and practiced on the basis of a single criminal scheme.

Finally, an in-depth look at the application dynamics of "extended confiscation" could be useful to understand the phenomenon of fiscal corruption, also in view of its possible future regulation.

2. Tax gap and tax policies against tax evasion in Italy.

The Italian legal system currently provides an articulated regulatory and sanctioning framework which has developed in a manner that has not always been linear over the years.

Also, the criminal policies that have taken turns over time to counter tax evasion phenomena have not always been effective in the repression of criminal conduct in tax matters and in guaranteeing the correct payment of taxes and duties by taxpayers, mainly for two reasons.

The first reason has a socio-cultural nature. Tax evasion, to be considered here in general as the unlawful contribution of citizens and companies to the needs of the State by the payment of taxes is a widespread phenomenon in Italy.

Although economic and legislative policies in recent years have been able to slightly decrease the tax gap from 2018,[15] the currently evaded taxes amount to approximately EUR 80 billion.[16] In considering the state's loss of revenue from taxes and fees such as VAT, should also be taken in account the effects of tax avoidance.

At the same time, it is really difficult to identify the global cost of tax avoidance which, although it is not regulated as a crime in Italy, can have a very negative effect on overall tax

[14] Castaldi G. (2011) Lotta all'evasione fiscale e alla corruzione. Contributo dell'Unità di informazione finanziaria (UIF),Bank of Italy, Milano, 1-14 https://uif.bancaditalia.it/pubblicazioni/interventi/documenti/milano_281111.pdf

[15] Camera dei Deputati (2020). Report about *Lotta all'evasione fiscale* *https://www.camera.it/temiap/documentazione/temi/pdf/1104478.pdf*.

[16] MEF (2021). Nota di aggiornamento del documento di Economia e Finanza, 29th september 2021, https://www.dt.mef.gov.it/export/sites/sitodt/modules/documenti_it/analisi_progammazione/documenti_programmatici/nadef_2021/Rapporto_evasione_fiscale_e_contributiva.pdf

revenues taken by the State. Tax avoidance differs from tax evasion, nevertheless, both can produce a loss for the State.

If we try to give a definition of tax avoidance,[17] we could derive it in both negative and positive terms.

In a negative key, tax avoidance differs from tax evasion since it does not formally consist in the violation of a tax rule and in the non-payment of a tax debt that has already arisen for the taxpayer. In a positive way, the definition can be derived from article 10-bis of Law no. 212/2000 (as reformed by Legislative Decree no. 128/2015),[18] which affirms that it consists in carrying out one or more transactions devoid of economic substance that, while formally complying with tax rules, achieve undue tax advantages. Tax avoidance transactions do not give rise to criminal prosecution of the taxpayer but – as well article 10-bis states - to the only disallowance of undue advantages by the tax authorities.

The complex of tax evasion practices and - to some extent – even of tax avoidance ones, which - we repeat - are not criminalized by Italian law, generate - as anticipated - a significant tax gap that is reflected in the lack of essential services for citizens.

Moreover, the main effects generated by tax evasion consist precisely of the inability of the public administrations to adequately and extensively provide essential services for the benefit of the citizens: schools, security, transport, health care, and justice. This inevitably leads to an increase in social inequality among the various social classes.

Overall, the tax gap phenomenon, which can be defined as "the difference between tax collected and the tax that should be collected"[19] is probably caused in Italy by three main factors.

The first concerns the non-spontaneous payment of taxes by citizens and companies, which represents the so-called "voluntary tax non-compliance."

[17] For a definition, see Tesauro F. (2013). Istituzioni di diritto tributario. Parte Generale. Utet, 241.
[18] Mignosi, U. (2019). Considerazioni sulla nuova disciplina dell'elusione fiscale ex art. 1 d.l.vo 5 agosto 2015, n. 128. *Rivista penale*, (5), 453-455.
[19] HMRC (2012). Measuring Tax Gaps 2012, p. 3.

Here, particularly, a reference is made to IRPEF tax (income tax on individuals), which currently remains the most circumvented and evaded tax by Italian taxpayers, to VAT (Value Added Tax) and IRES (Income Tax Applied to Legal Entities).[20]

The highest tax gap rates are registered in the Italian economic private sector, especially in certain such as the construction industry, wholesale and retail, food and entertainment, and professional consulting.[21]

These are mostly areas where probably the monitoring activity is not particularly efficient.

Another reference has to be made to non-payment of the social security contributions that are mainly due to the exploitation of irregular workers (undeclared work, mainly linked to the sectors with the greatest exploitation of labor and irregular immigration[22] - construction, wholesale and retail trading, agriculture) and the fragmentation of social and labor policies.[23]

The second issue relates to the erosion of public and economic resources carried out by organized crime, that, in addition to depleting the economy and distorting competition hides resources and produces income and money leakage from the legal economic circuit.[24]

It is here enough to think that the economic and financial market produced and fed by organized crime has a value of approximately EUR 140 billion per year[25]. Sectors, in which

[20] See, MEF (2021). Nota di aggiornamento del documento di Economia e Finanza, 29th september 2021, https://www.dt.mef.gov.it/export/sites/sitodt/modules/documenti_it/analisi_progammazione/documenti_programmatici/nadef_2021/Rapporto_evasione_fiscale_e_contributiva.pdf, 3-10

[21]MEF (2021). Nota di aggiornamento del documento di Economia e Finanza, 29th september 2021, https://www.dt.mef.gov.it/export/sites/sitodt/modules/documenti_it/analisi_progammazione/documenti_programmatici/nadef_2021/Rapporto_evasione_fiscale_e_contributiva.pdf 10-12.

[22] Cocco, M. (2018). Intermediazione illecita e sfruttamento del lavoro: il "caporalato etnico" nella comunità cinese a Prato. *Rivista penale*, (10), 873-880.

[23] Barletta, R. (2017). L'evasione contributiva mediante la simulazione contrattuale come ipotesi speciale di evasione fiscale. *Rivista giuridica del lavoro e della previdenza sociale*, (4/2), 663-667.

[24] See, Centorrino, M. & Signorini, G. (1996). Debito pubblico, mafia ed evasione fiscale. Rivista internazionale di scienze sociali, (4), 539-554.

[25] Unioncamere (2013).La misurazione dell'economia illegale, 1-39.

the economy exploited by organized crime obtain the greatest illicit profit, exactly coincide with those characterized by the highest rate of tax evasion.

Moreover, the economic sectors in which criminal associations are able to penetrate more easily and more efficiently are certainly those in which the required tax compliance is not based on particularly high standards and in which the identification of the author of a transaction is not so immediate.[26]

On the other hand, criminal associations aim at penetrating all the fundamental strategic sectors for a territory's economic control, in particular the public contracts sector,[27] where public expenditure[28] is particularly high and the regulating system is excessively complex and articulated (see, for instance, the most recent Legislative Decree no. 56/2017 adopted).

The third factor causing such an important tax gap is to be found in the model of tax policies that have been characterizing the action of legislators in recent years. Certainly, it is not possible here to examine in detail the more particular and critical aspects pertaining to the tax policies adopted in recent years.

Nevertheless, it is possible to underline that tax evasion and tax avoidance, unlike what happened with corruption and organized crime, have rarely been the focus of public debate and described as a threat to the economy or as an endemic limit to the democratic development of the country.[29]

Trying to summarize, in recent years, tax policies have not been particularly effective due to a number of factors that must be considered as a whole, such as:

[26] La Rosa F., Paternostro S., Picciotto L. (2015), The effects of the anti-mafia entre-preneurial behavior on firm performance: an empirical study on southern Italian small-medium enterprises, il Mulino.
[27] Consiglio S. – Canonico P. – De Nito E. – Mangia G. (2019). Organizzazioni criminali. Strategie di business nell'economia legale, Roma 1-248.
[28] Caruso R. (2009). Spesa pubblica e criminalità organizzata in Italia: evidenza empirica sui dati dei Panel 1997-2003. Economia&Lavoro, 1, 73-90.
[29] Recently, the President of the Republic spoke directly on the issue, saying that tax evasion is presented as "a serious and indecent phenomenon https://www.ilsole24ore.com/art/mattarella-l-evasione-fiscale-e-grave-e-indecente-ACAMPL4?refresh_ce=1;

- the particularly high level of the tax levy on the incomes of both autonomous and employed workers (up to 43[30] percent for incomes above 75,000 euros);

- provision of tax shields or periodic tax amnesty for tax international and national evaders, both individuals and legal entities (think of one of the most recent measures, the so-called "voluntary disclosure");[31]

- the complexity of the tax regulatory system, which is not always clear and easy for taxpayers to understand;

- the high bureaucracy in assessment and collection procedures;

- the lack of a clear and long-term economic and social policy that communicates to citizens exactly how public expenditures will be made and for whose benefit;

- the lack of a spread tax compliance culture among taxpayers.

However, in the coming years, the goal of reducing the tax gap will also be an important challenge for Italy for the implementation of the Next Generation EU (NGEU) program, the European Union's response to the pandemic crisis.

For Italy, the implementation of the NGEU represents a unique opportunity to revive the country's growth potential and start its transformation.[32] Italy is the first beneficiary, in absolute value, of the two main instruments of the NGEU: the Recovery and Resilience Facility (RRF) and the Recovery Assistance Package for Cohesion and Territories of Europe (REACT-EU). The RRF Facility requires Member States to present a package of investments and reforms, the National Recovery and Resilience Plan (NRRP), on the basis of the RRF Regulation. article 18 of the Regulation requires an explanation of how the Recovery and Resilience Plan contributes to effectively addressing all or a significant subset of the

[30] See, https://www.ansa.it/sito/notizie/economia/2021/04/17/aumenta-la-pressione-fiscale-e-al-431_1d98db9b-e676-47a5-9798-4d5f54877d4f.html.

[31] Ingrassia A. (2015). Le caleidoscopiche ricadute penalistiche della procedura di voluntary disclosure: causa sopravvenuta di non punibilità, autodenuncia e condotta penalmente rilevante, *Diritto penale contemporaneo*, 127-142.

[32] See, https://www.finanze.gov.it/export/sites/finanze/.galleries/Documenti/Varie/Relazione-evasione-fiscale-e-contributiva_25_09_finale.pdf, 112-114.

challenges identified in the relevant Country Specific Recommendations (CSRs). The CSRs relevant for the NRP are those of 2019 and 2020.

In the 2019 Recommendations, CSR 1, referring to tax policy, indicates as a priority the reduction of the tax burden on labor, and its compensation also by combating tax evasion, particularly in the form of omitted declaration. The country is also called upon to strengthen compulsory electronic payments, including by lowering the legal limits for cash payments.

Among the objectives set out in the NRRP, the "reduction of the tax gap" was thus included. In this regard, the NRRP points out that "tax evasion increases the burden on honest taxpayers, diverts resources from the public budget, and introduces distortions among economic operators, altering the conditions of competition, with negative repercussions on the efficiency of the economic system as a whole."

2.1. Regulatory measures and recent reforms on tax offenses.

The second reason has a regulatory nature but depends mostly on tax policy choices. Indeed, for a long time and till the beginning of the new millennium, the relationship between the State and the taxpayer,[33] (individual and legal person), has not been characterized by the immanence of principles of collaboration and cooperation, based on transparency and aimed at obtaining an effective and proportionate collection of the tax due in respect of the taxpayer's guarantees and prerogatives, but rather on mutual prejudice and evident distrust.

Above all, the criminal policy options made by the Italian legislator have suffered from the absence of a climate of transparency and loyal cooperation between taxpayers and the state, which has also contributed to the manner in which tax crimes have been selected.

It is sufficient here to think that Law no. 516/1982, moreover rebaptized with the appellation "handcuffs to tax evaders"[34] by which the Italian Legislator, in order to ensure

[33]Moschetti F. (2011). Il principio democratico sotteso allo Statuto dei diritti del contribuente e la sua forza espansiva. *Rivista di Diritto Tributario*, 731-755.

[34] Musco E. (2007). voce Reati tributari. *Enciclopedia del Diritto*, 1053.

more protection of fiscal transparency[35] and the exercise of the assessment function by the financial administration, than a correct collection of income taxes, had introduced crimes aimed at sanctioning prodromal conducts to tax evasion and a series of formal violations. In practice, criminal law intervened providing crimes of danger that freed the judge from ascertaining the actual and real damage produced against the state in terms of unpaid taxes.

By way of example, it can be useful to mention tax crimes such as the omission or partial recording of remuneration, the omission or irregular storage of accounting records, the failure to purchase, hold, and record the compilation of accompanying documents and tax receipts, all of which are cases not capable of revealing an actual damaging of State's prerogatives (see art. 1, par. 1 e 3; art. 2 l. law n. 516/1982).[36]

These regulatory options were adopted for the sole purpose of simplifying and accelerating the detection and prosecution of violations. Nevertheless, this simplification turned out to be practically mortified by the introduction of inadequate punishability thresholds. This identifies a minimum quantitative limit of unpaid tax, triggering the application of criminal law.

In the criminal sanctions system, thresholds of punishability can be used to make the configuration of crimes compliant with the principle of offensiveness ("offensività," ex art. 25(2) of the Italian Constitution), the principle that requires the legislator to punish only those behaviors truly harmful to the legal interest protected by the norm.[37]

Nonetheless, in 1982, the Legislator selected misconduct with a limited offensive capacity, creating a variety of contraventions ("*contravvenzioni*"), punished with mild penalties, many of which could be extinguished by oblation (the reference is done to

[35] Tripodi A.F. (2003). L'impossibilità di ricostruzione dei redditi o del volume di affari nell'art. 10 del d.lgs. 74/2000 ed il principio di necessaria offensività., *Rivista Trimestrale Diritto Penale dell'Economia*, 331-347.

[36] Padovani T. (1982). Problemi generali e analisi delle fattispecie previste dai nn. 1,2,3,4,5,6 dell'art. 4, legge n. 516/1982. *Responsabilità e processo penale nei reati tributari*, 199.

[37] On that argument, see Longari C. (2020). Soglie di punibilità e diritto penale tributario. Cedam.

"*oblazione*", regulated by art. 162 the Italian criminal code) that did not ensure effective recovery of taxes and the effective suppression of illegal behavior.

In short, the legislative discipline of '82, moreover, adopted in a particularly hot and unstable socio-political climate, was highly penalizing for citizens and, in its effects, ineffective in solving one of our country's main and atavistic problems, which is tax evasion.

Furthermore, it can be said that only the crime of tax fraud introduced by the legislation at that time was affected by the intervention of the Constitutional Court (Judgment no. 35/1991[38]), which stated partial unconstitutionality with respect to many of the basic principles of the penal system.

In a certain way, that political-legislative experience of 1982 should have already represented a warning for posterity indicating how the criminal-tax system should instead permeate itself with innovative tools capable of facilitating the achievement of a balance in the controversial relationship between state and taxpayer, orienting itself in a consistent manner with the principle of "fiscal capacity" ("*principio di capacità contributiva*," art. 53 of the Italian Constitution)[39] and the principle of "culpability" ("*principio di colpevolezza*," art. 27 of the Italian Constitution).

Anyway, it took many years before a decisive change of course in the regulation of criminal law in combating tax evasion was achieved. The turnaround was preceded by the adoption of extra-criminal and tax-related legislation with which the State intended to regulate the relationship with taxpayers in an innovative way, imposing a mutual trust.

The reference is made to the so-called "Statuto del Contribuente,"[40] the Taxpayer's Statute (Law no. 212 of 27 July 2000) by which, firstly, it was imposed that tax regulations

[38] Balzarini, C. (1992). Dichiarazione di incostituzionalità della frode fiscale: l'intervento della Corte Costituzionale battuto sul tempo dal legislatore. *Diritto e pratica tributaria*, (2/02), 374-385.

[39] Melis G. (2017). Capacità contributiva (Principio di). *Digesto delle discipline pubblicistiche*. 106-132.

[40] Moschetti F. (2011). Il principio democratico sotteso allo Statuto dei diritti del contribuente e la sua forza espansiva, in Consenso, equità e imparzialità nello Statuto del contribuente, Rivista di Diritto Tributario, 732-755.

should be inspired by principles of clarity, simplicity, and adequacy (articles 2, 4 ,5, 6 and 7 of Law no. 212/2000).

Secondly, the Statute required that the relationship between State and taxpayer henceforth be based on the principle of loyal cooperation and good faith. This meant, for example, that administrative penalties could not be imposed on the taxpayer when the violation of the rule was due to an objective condition of uncertainty about the scope and the application of the tax rule or when the violation of the tax rule did not entail any real damage.

This new system of rules underpinning the relationship between the state and the taxpayer certainly helped to inspire the reform of the criminal-tax system in 2000.

With Legislative Decree no. 74/2000,[41] (about "new regulations on income tax and value-added tax crimes") the Italian legislator intervened, radically changing the regulatory framework for combating tax crimes.

Basically, the new criminal tax system bases the exercise of criminal sanctions around conducts concretely fraudulent and harmful in terms of tax evaded and always above a certain threshold[42] of unpaid tax that is strictly identified. The use of punishability thresholds done by the Legislator in 2000 was more appropriate than in the past since the perimeter of unlawfulness was more clearly defined.

The new legal system has revolved around a limited number of serious offenses ("delitti"), no longer aimed at sanctioning preparatory acts to evasion, but focused on guaranteeing the tax return. In detail, the main crimes regulated by Legislative Decree no. 74/2000 are:

1) fraudulent misrepresentation by use of invoices or other documents for not existing economic transactions (art. 2);

[41] Napoleoni V. (2000). I fondamenti del nuovo diritto penale tributario nel d.lg.s n. 74/2000, Giuffrè.

[42] About thresholds in tax crimes, see Vozza, D. (2016). Soglie di punibilità e doppia incriminazione: i reati tributari al vaglio della cooperazione giudiziaria internazionale in materia penale. *L'Indice penale*, (3), 937-961.

2) fraudulent misrepresentation by use of other artificial schemes (art. 3);

3) unfaithful tax declaration (art. 4);

4) failure in submitting tax declaration (art. 5);

5) issuance of invoices or other documents for non-existing operations (art. 8);

6) destruction or concealment of accounting statements (art. 10);

7) undue compensation (art. 10-quarter);

8) fraudulent subtraction to tax payment (art. 11);

Apart from the case of the issuance of invoices or other documents for not-existing operations (art. 8), facts preliminary to evasion – including the criminal attempt ("*tentativo*"), do not have criminal relevance.

In order to select facts that may damage the State's financial interests, the punishability thresholds – with the exception of offenses that are considered particularly harmful: e.g. arts. 2 and 8 of the Legislative Decree no. 74/2000 – as well as the fraudulent intention ("*dolo*") were required as structural elements.

Even today, Legislative Decree no. 74/2000 is the criminal law legislative discipline in use for combating tax evasion.

However, the reform has left open some issues that affect the persistence of certain tax gaps and reflects the need for a cultural rather than regulatory step-change in the management of tax policies.

The first problematic aspect, also relevant with reference to the issue of the prohibition of *ne bis in idem*, concerns the potential overlapping between the criminal discipline set forth in Legislative Decree no. 74/2000 and the discipline adopted to combat tax offenses punished with the administrative penalty, provided by Legislative Decrees Nos. 471/472 and 473 of 1997, recently reformed by Law no. 269/2003 for legal entities' liability, in punishing the same fact. This is, precisely, an example of the so-called "double track sanctioning system" that governs tax regulations and imposes deep systemic reflections.

In order to avoid an excessive accumulation of sanctions on the same person and for the same fact punished by both disciplines, it would have been necessary to set up a rule capable of regulating the relations between the two normative frameworks.

To remedy this problem, the Legislator who introduced Legislative Decree no. 74/2000 included article 19, by which the so-called "principle of specialty" ("*principio di specialità*")[43] is introduced.

This rule provides that when the same fact is regulated and punished both by criminal law (crimes incorporated in Legislative Decree n. 74/2000) and by a provision ensuring an administrative penalty (tax violations included in Legislative Decrees no. 471/472 and 473/1997), only the special provision should apply.

Thus, the selection between the criminal law rule and the administrative penalty should be made by selecting the rule that has characteristics of specialty or specificity and that is "best" suited to regulate the concrete case.

However, as has also been pointed out by the Italian Supreme Court (see Corte Suprema di Cassazione, Section II, decision of 8th February 2012, no. 18757) the problem with the full effectiveness of article 19, which – as we said - is potentially capable of avoiding overlapping, lies in the fact that the misconducts selected by the Legislator within both Legislative Decree no. 74/2000 and Legislative Decrees no. 471/472 and 473/ 1997 are practically the same and not always have any specializing or specifying elements that would facilitate selection between one or the other.

This implies that a significant difficulty remains in selecting which provision and consequent penalty should be applied.

The second one is related to the issue of the criminal relevance of tax avoidance and abuse of rights.[44]

[43] Vallini A (2016). Il principio di specialità, in *Trattato di diritto sanzionatorio tributario*, Giuffrè, 27.

[44] Ex multis, Flick G.M. (2011). Abuso del diritto ed elusione fiscale: quali sanzioni tributarie?, *Giurisprudenza Commerciale*, 465-485; Gallo F. (2001). Rilevanza penale dell'elusione. *Rassegna Tributaria*, (2), 321-329.

On that, it should be pointed out that the Italian Legislator had always ruled out the criminal relevance of tax avoidance and of the so-called "abuse of the law," which occurs when the taxpayer uses certain legal transactions or tax schemes for a purpose other than that for which they were adopted. Thus, it is a use of contracts, legal transactions, and fiscal schemes theologically oriented only to obtain undue tax savings. This is, as anticipated, a different phenomenon from tax evasion, in which the taxpayer violates, even fraudulently, a rule of law in tax matters by not paying a tax already due to the state.

Yet, over the past few years, we have assisted judicial interpretations that have recognized a criminal relevance to tax avoidance. These orientations had as normative basis article 37-bis of Presidential Decree no. 600/1973 (regulating “common rules about income tax assessment”), which basically lists some typical types of conduct that constitute tax avoidance hypotheses. The rules in question, however, did not have any criminal nature. This did not limit the Italian Supreme Court in ascribing a criminal validity to this rule violating the principle of rule of law operating in the criminal law system (art. 25(2) of the Italian Constitution).

In particular, a reference has to be made to the mediatic *Dolce&Gabbana* Case (Corte Suprema di Cassazione, Criminal Section II, decision of 28th February 2012, n. 7739),[45] in which the Supreme Court adopted improperly a recent verdict about “abuse of rights” given by the ECJ (Halifax, ECJ 21 February 2006, Case C-255/02),[46] ruled that the so-called tax avoidance - in the species of the “resident tax inversion” ("*esterovestizione*") of a company - can in abstract assume criminal relevance pursuant to articles 4 and 5 of Legislative Decree 74/2000, if the conduct put in place by the authors of the fact “is capable of determining a reduction or an exclusion of the taxable base”.

[45] Troyer L (2012). La rilevanza penale dell’elusione tra Suprema Corte e Legislatore dopo la sentenza D&G. Le Società, (1), 692-703; Mereu A. (2012). Abuso del diritto ed elusione fiscale: rilevanza penale o mera mancanza di un explicatio terminorum? Alcune riflessioni a margine del caso «Dolce & Gabbana», *Rivista di Diritto Tributario*, 1001.

[46] See for a comment about case law given by ECJ on abuse of rights, Pistone, P. (2012). L'abuso del diritto nella giurisprudenza tributaria della Corte di Giustizia dell'Unione Europea. *Diritto e pratica tributaria internazionale*, (2), 431-461;

In the case at hand, the Supreme Court had traced the evasive behavior back to the crime of "unfaithful tax declaration" under article 4 of Legislative Decree no. 74/2000, due to the fact that the two authors involved allegedly set up a company in Luxembourg only to obtain a tax saving and not have the royalties from the *Dolce&Gabbana* brand taxed so highly in Italy.

From a criminal policy perspective, this ruling, although has been adopted in contrast to some fundamental principles of the criminal justice system (as anticipated, the principle of legality ex art. 25, II par., Const.) had a way of highlighting how even avoidance behaviors, theoretically lawful, can determine significant damage to the state in terms of unpaid and unrecovered taxes.

This distortion of the system was formally eliminated in 2015, when the Italian Legislator, with Legislative Decree no. 128/2015, in Art. 1, provided for the inclusion of Art. 10-bis within the Taxpayer's Statute (Statuto del Contribuente), explicitly providing in par. 13 that abuse of rights and tax avoidance do not give rise to the application of the criminal tax law.

However, even this legislative intervention would not seem to have definitively clarified the boundaries between abuse of rights/tax avoidance, which is not criminally relevant, and tax evasion, which is criminally relevant.

Through a process of interpretation consistent with the new criminal-tax system, anyway, it could be considered that tax avoidance is that which does not have a fraudulent and deceptive component. Despite this, even after the 2015 reform, Italian Courts, in some rulings (such as in Cass. Pen., sec. III, 01.10.2015, no. 40272[47]) have stated that some tax avoidance behaviors may still present the connotations of tax evasion, if they fall under the hypothesis of unfaithful tax declaration (art. 4, Legislative Decree n. 74/2000).

The third issue concerned the absence of a direct corporate criminal liability for tax crimes, introduced only by Law no. 157/2019, by which EU Directive no. 1371/2017 on

[47] See Bosi M. (2016), La rilevanza penale dell'abuso del diritto. *Diritto Penale Contemporaneo*, 54-65.

combating fraud affecting the financial interests of the European Union was implemented in the Italian legislative framework.[48]

Until that moment, companies had only an administrative liability, as provided by Law n. 326/2003 for administrative offenses such as VAT declaration failure. Only individuals were affected by the criminal penalty and, as anticipated, in some cases also by the administrative penalty because of the double-track sanctioning model.

The absence of tax crimes within the catalog of predicative crimes for which the legal person is liable under Legislative Decree no. 231/2001 had raised various concerns and manifested the absence of an effective tax policy in preventing and suppressing tax crimes committed within companies. Primarily, this regulatory loophole did not allow to sanction of legal entities directly and legally, that actually benefited exclusively from the commission of tax crimes by their top executives, manager, or employees. Basically, this meant that it was not possible to recover the illicit profit, often quite large, obtained by the companies mainly through crimes such as unfaithful tax declaration and failure in submitting tax declaration.

However, this regulatory gap has not prevented the adoption of decisions by the Italian Courts and by the Supreme Court as well, aimed at recovering the illegal tax savings obtained, "circumnavigating"[49] - if not actually violating -, firstly, the principle of legality ("*principio di legalità*," art. 25(2) of the Italian Constitution) and the prohibition of analogy *in malam partem* (also provided in art. 25(2) of the Italian Constitution, in art. 1 of the Italian Criminal Code, and in art. 14 of the preliminary provisions of the Italian Civil Code, which in the Italian legal system not allows punishing a fact or an act that has not been expressly and previously provided by the law as a crime).

Here, it is enough to think about some of the Supreme Court's pronouncements, given before 2019, aimed at countering and striking down the accumulation of illicit wealth by legal entities, also obtained through the commission of tax crimes. In some cases, the offense of

[48] In general, see Atti del webinar "Tax compliance, responsabilità degli enti e reati tributari. Una riflessione alla luce della legge n. 157/2019, 126-130, https://www.sistemapenale.it/pdf_contenuti/1595283307_atti-webinar-tax-compliance-responsabilita-enti-reati-tributari.pdf

[49] Severino P. (2020). L'inserimento dei reati tributari nel d.lgs. n. 231/2001 tra osservazioni de iure condito e prospettive de iure condendo, cit. 127.

organized crime (art. 416 of the Italian Criminal Code) has been used as a so-called "container crime" in order to confiscate illicit tax savings obtained through the commission of all types of crimes usually perpetrated by the criminal organization.

In other cases, then, the Italian Supreme Court used art. 648-*ter*(1)[50] regulating the crime of self-laundering. In such a hypothesis, the Supreme Court has put in place an expansive interpretation (at the margins with the prohibition of analogy *in malam partem*) of the notion of "illicit profit" to also include tax savings obtained through the commission of tax offenses. Finally, it is not possible to forget the Supreme Court's ruling in the *Gubert case*[51] about "direct confiscation" ("*confisca diretta*") of the profit of legal entities. In this ruling, the Supreme Court held that it was possible to proceed with the seizure and with the confiscation of money or other properties attributable to the commission of a tax offense, committed by the organs of the legal person when such profit was found to be in the material and legal possession of the legal person itself.

Overall, therefore, the absence of tax crimes among those included in the list of predicate offenses from which liability of legal entities could derive as provided by Decree 231 of 2001 (hereinafter the "231 catalog") had mainly created some interpretative distortions (as above seen) aimed at countering this type of offense even in violation of fundamental principles of the criminal system.

Secondly, the lack of this kind of crime in the "231 catalog" has influenced it in the sense of not facilitating the spread of tax compliance within the corporate culture.

In the Italian system, in fact, pursuant to article 6 of Legislative Decree 231/2001, private legal entities, such companies, are required to adopt a *compliance program* through which they structure a set of procedures and measures aimed at preventing the crimes provided for in the 231 system and, in particular, those that in the specific - for the type of activity conducted - the company may commit. The impossibility, before 2019, to implement

[50] See Gullo A (2018). Reati tributari e autoriciclaggio, *Diritto Penale Contemporaneo*, 1-16.
[51] See Romano M. (2016). Confisca, responsabilità degli enti, reati tributari. *Rivista Italiana di Diritto e Procedura Penale*, 1674-1696.

compliance programs even with respect to tax crimes effectively limited real tax compliance[52].

On the one hand, there is no doubt that the introduction of tax offenses, thanks to Law no. 157/2019, into the "231 catalog," has fostered the spread of a tax compliance culture among legal entities. In particular, here it can be mentioned how large companies could benefit from the adoption of certain extra-criminal tools to implement their tax compliance and avoid incurring the commission of administrative and, in some cases, even criminal offenses. The specific reference is made to the <<cooperative compliance>> system, introduced in Italy by Legislative Decree no. 128/2015. Without going too further, here, it is possible to recall how – thanks to some international institutions, such as the OECD[53] -, with the aforementioned legislative decree, Italy adopted the "Tax Control Framework" model for big enterprises (thus mainly multinationals) that represent a typical instrument of cooperative compliance.

Through this, companies can be accepted by the tax administration to participate in a collaborative compliance process. Thanks to the cooperation of the tax administration in evaluating tax schemes adopted, companies are able to verify whether their tax regime is compliant with the national regulatory system. In this way, companies ascertain in advance whether their regime is adequate.

In this sense, the effective adoption of the *Tax Control Framework* by the company can influence, even if not directly, since it is a different system, the adequacy of a compliance program, requested by the system provided by Decree 231 of 2001 (hereinafter the "231 system"), for proper prevention of tax offenses that also constitute a criminal offense.[54]

[52] See on this topic and in general about legal entities criminal liability, Mongillo V. (2018). La responsabilità penale tra individuo ed ente collettivo. Giappichelli; sepcifically about tax crimes and compliance programs, see Salvini L. (2020). I reati tributati nel decreto 231/2001: una sfida per le imprese di ogni dimensione. Webinar acts "Tax compliance, responsabilità degli enti e reati tributari. *Sistema penale*, 131-137.
[53] OECD (2013). The importance of the Tax Control Framework, Cooperative Compliance: a framework: from Enhanced Relationship to Co-operation Compliance, Paris, www.oecd.org; OECD (2013). Co-operative Compliance: A Framework. From enhanced relationship to co-operative compliance," cfr. www.oecd.org.
[54] Ielo P. (2020). Reati tributari e responsabilità dell'ente. *Rivista 231*, (1) 1 ff.

On the other hand, as will be illustrated below, the introduction of tax crimes into the "231 catalog" has raised several concerns as regards compliance with the *bis in idem* principle.

3. The double track sanctioning system and *ne bis in idem* principle.

As has been already mentioned, the tax sanctioning system is characterized by the existence of a double track. The introduction of tax offenses in the Italian "231 system" by Law n. 157/2019 may represent a new opportunity to verify the overall consistency of the tax penalty system and the profiles of possible violations of the *ne bis in idem* principle.

The extension of the criminal liability of legal entities pursuant to Legislative Decree no. 231/2001 to tax offenses is part of a sector that already provides, pursuant to article 7 of Legislative Decree no. 269 of 30 September 2003 (converted into Law no. 326 of 24 November 2003), an administrative sanctioning system against the legal entity/taxpayer, which is required to pay the administrative sanction in addition to the tax evaded plus interest.

Now, this "double track" system provided for the legal persons for tax offenses runs the risk of colliding with the prohibition of *bis in idem*, in the event that the same fact is punished twice.

Moreover, the issue of the prohibition of *bis in idem* has long characterized the tax field. In fact, one of the considerations developed in the past concerning the need to keep tax offenses out of the "231 system" was precisely related to the risk of multiplying the penalties, both against the individual and against the legal entities, resulting in an excessively afflictive system[55].

In order to fully explore this issue, it is necessary to examine, albeit briefly, the nature and content of the *ne bis idem* principle to understand its scope also with respect to the most recent case law, which can offer a valid interpretative tool to define whether the tax penalty

[55] Caraccioli I. (2007). Reati tributari e responsabilità degli enti, in *Responsabilità amministrativa della società e degli enti*. (1), 155-160.

system can be said to be adequate and compliant with the fundamental principles of the Italian legal system or whether instead, the legislator should intervene rapidly to ensure adequate effectiveness to the system.

As is well known, the *ne bis in idem* is a fundamental principle with a European matrix, since it is stated both in the supranational conventional system, by article 4 of Protocol no. 7[56] of the ECHR, and in the European Union system, by article 50[57] of the Charter of Fundamental Rights of the European Union. Basically, these norms establish the right for a person to not be tried in criminal proceedings or punished twice.[58]

Also at a national level, as anticipated, the *ne bis in idem* principle is expressed in art. 649 of the Criminal Procedure Code, which states that a person may not be under a penal proceeding twice for the commission of the same act.

In this sense, according to a first reading of the rules just above mentioned, the principle of *ne bis in idem* would involve only the criminal system, understood as the sum of all the criminal relevant elements, the sanction, and the criminal procedural aspects, and not also the extra-criminal sanction system, such as the administrative sanctioning system. So, the principle would be violated only if the same person is subjected twice to criminal proceedings or if he/she suffers two criminal penalties for the commission of the same facts,[59] whereas such a principle would both be violated if the same person is subjected to both a criminal and an administrative sanction for the same facts.

In principle, therefore, the tax penalty system would appear not to be at odds with the *ne bis in idem* principle. However, some conflict profiles with the principle of *ne bis in*

[56] Article 4 of Prot. No. 7, "No one shall be liable to be tried or punished again in criminal proceeding under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of the State."
[57] Article 50 states that "No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law"
[58] Bellacosa M. (2020). L'inserimento dei reati tributari nel "sistema 231": dal rischio di ne bis in idem alla implementazione del modello organizzativo. Webinar acts "Tax compliance, responsabilità degli enti e reati tributari. *Sistema penale*, cit. 138.
[59] About the relationship between proceedings and investigative instruments, see Bolis, S. (2021, April 29). VIRTEU National Workshop - Italy, Session 1. Video recording at 40:19. Retrieved from https://www.corporatecrime.co.uk/virteu-nationalworkshop-italy

idem may begin to arise if the punitive regime, taken as a whole, as a system of administrative and criminal sanctions designed for individual and the legal person, is analyzed in the light of the so-called "Engel criteria,"[60] developed in the recent past by the European Court of Human Rights.

The Engel criteria were developed and elaborated in order to verify, in concrete terms and beyond the formal labels affixed by the Italian legislature, whether a given sanctioning regime expresses the typical features of a criminal sanction and whether, therefore, a particular sanctioning regime can be defined as a "criminal matter."

The European Court of Human Rights specified therein that the following three elements must be considered in order to establish the criminal nature of a sanction:

- the formal qualification of the offense given by the national legal system;

- the actual nature of the offense;

- the level of severity of the penalty.

Hence, the punitive regime of the "231 system" and Legislative Decree no. 74/2000 and the sanction regime expressed by Law no. 326/2003 and by Legislative Decree n. 471,472 and 473/1997, read in the light of the aforementioned "Engel Criteria" are referable to the notion of "criminal sanction" as elaborated at the European level by the European Court of Human Rights, precisely in view of their level of severity and afflictive and repressive nature.

From a substantive point of view, therefore, both penalty regimes would have an afflictive nature and, in this sense, could not be cumulated against the taxpayer.

It must also be examined whether both penalty regimes punish the "idem factum" (i.e., the "same fact"). As already mentioned, the conflict with the *ne bis in idem* principle

[60] European Court of Human Rights, Engel v. The Netherlands, 8th June. For a comment, see Flick G. (2014). Reati fiscali, principio di legalità e ne bis in idem: variazioni italiane su un tema europeo. *Diritto Penale Contemporaneo*, 1-19.

develops when several criminal sanctions are imposed against the same person and for the "same fact."

If, for example, we examine both the rules of the administrative penalty regime for legal persons (article 7 of Legislative Decree no. 269/2003, later converted into Law no. 326/2003) and the criminal tax offense provided for legal persons in article 25-*quinquiesdecies*, it is possible to verify how both offenses appear substantially identical both in their connotations and in their historical factual elements.

Moreover, the problem of the identity of the offense has already been encountered with regard to the sanctions for natural persons. The lack of applicability of article 19 of Legislative Decree no. 74/2000 is due precisely to the identity of the fact governed by both the administrative and criminal norms.

Therefore, it is possible to say that it may emerge a formal incompatibility of the double track sanctioning tax system with the *ne bis in idem* principle, especially after the entry into force of Law no. 157/2019. What now needs to be verified is whether that system is substantially consistent overall or whether, on the contrary, it is effectively in contrast with the *ne bis in idem* principle.

In this regard, it can always be useful to take into account the discipline in the light of the case law developed by the European Court of Human Rights and the European Court of Justice.

A first argument that can be put forward to hold the double-track sanctioning system compliant in any case is the one derived from a recent ruling of the European Court of Human Rights.

This is the case law A. and B. v. Norway, of 15 November 2016, given precisely in tax matters, for proceedings concerning natural persons.[61] On that occasion, the Court held the regulatory system to be compatible with article 4 of Protocol 7 if the two proceedings

[61] ECHR, Grand Chamber, 15th november 2016, A and B. V. Norway. For a comment, see Viganò F. (2016). La Grande Camera della Corte di Strasburgo su ne bis in idem e doppio binario sanzionatorio, *Diritto Penale Contemporaneo*, 1 ff.

(criminal and administrative), even if they run in parallel, are sufficiently closely connected in substance and in time, so that they are integrated almost as if they were a unitary system.

In particular, in the case law this "close connection" must imply, on a substantive level, that:

- the two proceedings pursue different purposes and relate to different aspects of the same unlawful conduct;

- the duplicity of the proceedings is a foreseeable consequence of the conduct;

- the two proceedings are conducted in such a way as to avoid duplication in the collection and in using evidence, thus through interaction between the different prosecuting judicial authorities;

- the sanction imposed in the proceedings first concluded is taken into account in the subsequent proceedings so as to ensure that the overall sanctioning treatment is proportionate.

In terms of time, it is also provided:

- there must be chronological continuity between the two proceedings in order to protect the individual from uncertainty and from the delay of the proceedings.

These interpretative principles developed by the ECHR follow the admissibility of double-track sanctioning for an "idem factum" (i.e., the same fact), in the presence of the above-mentioned conditions and if the overall sanctioning treatment is proportionate to the gravity of the fact.

Also, the Court of Justice of the European Union has developed some criteria to be considered in order to verify the compatibility of a double-track sanctioning system with article 50 of the Charter of Fundamental Rights.

The Court of Luxembourg[62] stated that "an accumulation of proceedings and sanctions of an essentially criminal nature may be justified where those proceedings and sanctions pursue, with a view to achieving the objective of combating VAT offenses," "complementary aims," specifying that, by virtue of the principle of proportionality under article 49 of the Charter, it is required that the combination of proceedings and penalties provided for national legislation does not exceed the limits of what is appropriate and necessary to achieve the legitimate aims pursued by the legislation in question, that implying "the existence of rules ensuring coordination aimed at reducing to what is strictly necessary the additional accumulation of sanctions."

On this basis, the EU Court of Justice ruled that the prohibition of bis in idem, within the meaning of article 50 of the Charter does not preclude national legislation to provide two different proceedings (administrative and criminal) against the same person for the *idem factum*, if such double track is justified by the objective pursued (the fight against tax offenses) and if the proceedings and the penalties imposed have "complementary" purposes and contain rules which ensure that the severity of the penalties is limited to what is "strictly necessary", just to ensure the respect with the principles of reasonableness ("*ragionevolezza*") and proportionality ("proporzionalità").

Also at the domestic level, the Italian Constitutional Court[63] has assimilated the principles developed by the European Courts on the *ne bis in idem* principle. In particular, in recent case law, the Constitutional Court specified how there is no violation of the *ne bis in idem* principle when due to the close material and temporal link between the criminal and tax proceedings:

-the criminal and tax sanctions pursue different and complementary purposes, connected to different aspects of the same conduct;

[62] ECJ, 20th march 2018 (C-524/15). For a comment, see Consulich F. (2018*).* Il prisma del ne bis in idem nelle mani del Giudice eurounitario*. Diritto Penale e Processo*, 949.

[63] Here a reference is made to Constitutional Court., 24th January 2018 n. 43 and Constitutional Court., 24th october 2019 n. 222.

- the duplication of proceedings is foreseeable for the person concerned;

- there is coordination in the use of proofs between the two proceedings;

- the overall sanctioning level is not excessively afflictive in relation to the seriousness of the offense.

In practice, there should be no breach of the *ne bis in idem* principle whenever: a) the sanctions pursue different and complementary purposes; b) the system ensures coordination between the two proceedings; c) the penalties given are not excessive and disproportionate.

On the basis of these principles, the Constitutional Court has recently, in its judgment no. 149/2022,[64] declared the unconstitutionality of article 649 Criminal Procedural Code insofar as it does not prohibit the commencement or continuation of criminal proceedings against those who have already been subjected to administrative proceedings when the penalty imposed is already particularly afflictive.

Definitively, therefore, in the light of the parameters outlined by the European Courts and the Constitutional Court, it would appear that the tax penalty system could also be considered consistent with the *ne bis in idem* principle if:

- the two proceedings are coordinated, both in terms of evidence and time;

- the overall penalty result is proportionate, in the sense that the judicial authority intervening as second must avoid a double infliction of punishment that is not proportionate and reasonable.

However, what seems to be lacking in the tax penalty system is a rule, such as the one provided for in the context of market abuse offenses (article 187-*terdecies* TUF),[65] that regulates the relationship between criminal and administrative proceedings and identifies the criteria that the criminal or administrative judge must consider in order to avoid accumulating

[64] Constitutional Court, 10th may 2022, n. 149

[65] See, Fusco, E. - Baggio, G. (2019). Recenti pronunce in materia di "market abuse." Qualche punto fermo in una materia ancora in attesa di un moderno assetto normativo. *Diritto penale contemporaneo*, (1), Retrieved from: http://archiviodpc.dirittopenaleuomo.org.

penalties that are excessive overall. In the tax system, this task - so far - is left to the judicial authority. This means that the criminal judge, who usually intervenes after the administrative one, will have to be very careful in imposing the penalty, considering the sanction already imposed during the administrative proceeding. The fact that there is no general rule leaves open, how it is possible to see, many criticalities. What is in fact hoped for, however, is an intervention by the legislator to ensure consistency in the system so ensuring the penalty system is sufficiently adequate and proportionate.

Until that moment, therefore, it is to be hoped that the judges, in applying the sanctions, will ensure compliance with the principles expressed by the supranational courts and the Constitutional Court.

4. The specific features of the "extended" confiscation: A conclusion.

This research aims at verifying if there are any instruments in the penal tax system used in fighting tax evasion in its interconnections with corruption or other economic crimes.

Even though the Italian legal system does not regulate the phenomenon of *fiscal corruption* as an autonomous offense or crime[66], there are nonetheless specific instruments for combating tax evasion that express the awareness of the existence of forms of the interconnection of tax evasion with other crimes, such as corruption or money laundering.

The reference here is made to confiscation ("*confisca*"),[67] which is a patrimonial measure widely used in Italy to combat economic offenses, which, in recent years, has undergone enormous development even if, at times, not always in line with the principles of the criminal justice system. It is the confiscation ("*confisca*").

[66] See, Gullo A. (2022). Exploring the interconnections between Tax Crime and Corruption: National Report for Italy. VIRTEU. Vat Fraud: interdisciplinary Research on Tax Crimes in the Europea Union. 2 ff.
[67] See, ex multis, Pagliaro A. (2020). Principi di Diritto Penale. Parte Generale. Giuffrè, 815-820.

Basically, three different types of confiscation can be identified in the Italian criminal law system:

- confiscation as a "security measure" (that is not a criminal sanction but a "security measure");

- confiscation as a criminal sanction (to apply to the illicit profit obtained and also to equivalent goods or utilities in original profit cannot be found and in case of a verdict of condemnation);

- confiscation as a patrimonial prevention measure (to be applied against persons who have wealth disproportionate to their declared income and cannot justify it).

Even if describing all the specific profiles of this measure, its origins, its criticalities, and the evolutions it has had over the years[68] would be beyond the scope of this technical paper, it can be useful to highlight some profiles of these three kinds of patrimonial measure.

Confiscation was firstly adopted and used in the Italian criminal system as a "security measure" (art. 240 of the criminal code[69]), fundamentally for depriving the author of the crime or the "socially dangerous person"[70] of the instrument used in trying or in committing the crime and/or of the direct profit obtained or the material product got in committing the offense.

However, after the sixties of the last century[71], this measure started to spread[72] and to be used against the most serious kind of crimes, such as organized crime. Then, it was demonstrated to be very effective as much as to be used not only in the fight against mafia-type criminal organizations (here we recall Art. 416-*bis* of the Italian Criminal Code, introduced in 1982, which provided for confiscation as a "criminal sanction" against members

[68] *Ex multis*, Fondaroli D.(2007). Le ipotesi speciali di confisca nel sistema penale. Bologna; Maugeri A.M. (2007). Le sanzioni patrimoniali come moderno strumento di lotta contro il crimine organizzato. 'Pecunia olet', Prevenzione e repressione del riciclaggio e del reimpiego dei capitali illeciti, Giuffrè, 55-166.
[69] See Maugeri A.M. (2017). Art. 240 c.p. Commentario breve al codice penale. Cedam.
[70] Fiandaca G- Musco E. (2010). Diritto Penale. Parte Generale. Zanichelli, 824-829.
[71] The reference is done to a kind of preventive confiscation regulated by art. 2-ter, Law No. 575/1965, for a comment, Fondaroli D (2007). Le ipotesi speciali di confisca. 160-200.
[72] See Fondaroli D. (2007). Le ipotesi speciali di confisca. 227-233.

of mafia-type criminal organizations) but also in the fighting of economic crimes (for instance, for money laundering see art. 648-quarter Italian criminal code, for corruption see art. 322-*ter* of the Italian criminal code) to which, indeed, it was gradually extended and implemented.[73] In a nutshell, confiscation from a "simple" patrimonial "security measure" has also turned into a full-fledged criminal sanction, applied against several categories of crimes. It became a "real" criminal sanction, on a par with imprisonment, to apply to both natural and legal persons.[74]

Confiscation as a criminal sanction is fundamentally applied to deprive the author of the crime of the illicit profit gained with the crime. But when it is not possible to recover the specific and direct profit obtained, confiscation can be applied taking money or other utilities in the equivalent quantity of the original profit that had to be confiscated ("*per equivalente*").[75] So, it means that it is applied to goods that have the same value as the illicit profit originally obtained.

In addition, being a criminal sanction, confiscation has also started to be regulated in some specific sectors (as well as the fighting against mafia-type criminal organizations) as a "preventive patrimonial measure."[76]

The typical example of preventive patrimonial measure is the one provided by Legislative Decree no. 159/2011[77] as well in the fight against mafia-type criminal organizations.

This kind of confiscation is characterized by some specific elements. As well as the confiscation as a criminal sanction *tout court*, it is used to counter the illicit enrichment obtained by individuals.

[73] For a general and critical reconstruction, see Manes V. (2015). L'ultimo imperativo della politica criminale: nullum crimen sine confiscatione. *Rivista Italiana Diritto e Procedura Penale*. 1259-1282.
[74] Confiscation for legal entities is provided by art. 19 of the Legislative Decree n. 231/2001.
[75] See, Fondaroli D (2007). Le ipotesi speciali di confisca, cit., 15-22.
[76] On this topic, see Maugeri A.M. (2017). La legittimità della confisca di prevenzione come modello di "processo" al patrimonio tra tendenze espansive e sollecitazioni sovranazionali. *Rivista Italiana di Diritto e Procedura Penale*. 559-599.
[77] See, De Vita, A. (2018). Profili sostanziali della confisca di prevenzione. *Processo penale e Giustizia*, (2), Retrieved from: http://www.processopenaleegiustizia.it

The difference is in the fact that it is not applied in case of a verdict of condemnation but just when an individual is suspected to be part of a criminal association, such as mafia-type criminal organizations, and is unable to prove the provenance of his money, that overall, results disproportioned to the declared income, or goods deriving from unlawful activities.

This kind of confiscation has always raised several problems in terms of compatibility with the Italian Constitution,[78] including the critical issue of the reversal of the burden of proof. First of all, because it is applied *ante delictum*, it means before the final verdict of condemnation and on the grounds of "probable cause" but not of full evidence.

Despite this, preventive confiscation understood as the measure applied against a person who is unable to prove the lawful origin of his assets and goods that are disproportionate to the declared income has become widely applied, also with respect to any kind of offense.

And it is precisely such kind confiscation as a "preventive measure" that became the instrument through which striking all forms of illicit richness obtained by the commission of various crimes (corruption, money laundering, drug trafficking, and others) fundamentally not declared to the tax authorities and that represent also the result of a form of tax evasion.

In a nutshell, confiscation as a preventive measure shows to be able to bring to light criminally relevant conduct interconnected and realized for the logic of profit. Offenses such as bribery, money laundering, and tax evasion (in the various forms of unfaithful tax declaration or failure in submitting tax declaration[79]) are committed by the author for basic economic reasons.

In the field of tax crimes, the application of confiscation has recently been extended.

[78] For a comment on a recent case law before the Constitutional Court, see Maugeri A.M. – Pinto de Albuquerque P. (2019). La confisca di prevenzione nella tutela costituzionale multilivello tra istanze di tassatività e ragionevolezza se ne afferma la natura ripristinatoria (C. Cost. 24/2019). *Diritto Penale Contemporaneo*. 1-95; Viganò, F. (2018). Riflessioni sullo statuto costituzionale e convenzionale della confisca "di prevenzione" nell'ordinamento italiano. *Rivista italiana di diritto e procedura penale*, (2), 610-643.

[79] To go in depth, see Marcheselli, A. & Ronco, S.M. (2018). L'evasore fiscalmente pericoloso: prevenzione patrimoniale e contrasto agli illeciti fiscali. *Corriere tributario*, (13), 1000-1007; Menditto, F. (2015). Le misure di prevenzione patrimoniali: profili generali. *Giurisprudenza italiana*, (6), 1528-1534.

The criminal tax system already had the form of confiscation as a criminal sanction *tout court*, provided in article 12-bis of Legislative Decree no. 74/2000.[80]

The recent reform of Law no. 157/2019, - the same that introduced tax crimes into the catalog of the so-called "231 system" -, has included in the tax criminal system another kind of confiscation, which we can call "extended confiscation." It applies to individuals and not also to legal persons.

Extended confiscation for tax crimes is now provided by article 12-*ter* of Legislative Decree no. 74/2000. The provision in question recalls the confiscation of article 240-*bis* of the Italian Penal Code ("confiscation in particular cases") and provides that the confiscation of money, assets or other utilities whose provenance cannot be justified by the tax evader and which, also through a third party, are owned for any reason and whose value is disproportionate to income declared or the economic activity carried on.

In any case, the offender may not justify the legitimate provenance of the assets on the assumption that the money is the reuse of tax evasion unless the tax obligation has been discharged by fulfillment in accordance with the law.

When it is not possible to confiscate the money, goods and other utilities obtained committing the crime for which the author is condemned, the judge shall order the confiscation of other sums of money, goods, and other utilities of lawful provenance for an equivalent value, of which the offender has the availability, also through a third party.

Confiscation is applied for specific tax offenses and when thresholds of evaded tax are exceeded, as set out in article 12-*ter*.

[80] Art. 12-bis of Legislative Decree n. 74/2000 states that: "In the event "of condemnation or application of the penalty upon request of the parties pursuant to Article 444 of the Code of Criminal Procedure for one of the offences provided by this Decree, the confiscation of the goods constituting the profit or price thereof shall always be ordered, unless they belong to a person extraneous to the offence, or, when this is not possible, the confiscation of goods, of which the offender has the availability, for a value corresponding to such price or profit. Confiscation shall not operate for the part that the taxpayer undertakes to say to the Treasury even in the presence of a seizure. In case of non-payment, confiscation shall always be ordered."

This new type of confiscation, like preventive confiscation, is aimed at hitting assets unlawfully obtained by the offender through the commission of tax crimes and of which the author did not provide information in his tax declaration. Unlike preventive confiscation, however, it is applied in case of condemnation.[81]

In practice, adopting "extended confiscation", the Italian legislator deprives the offender of the unlawful wealth obtained through the commission of tax offenses or that the offender has obtained unlawfully in another way (e.g., bribery) and whose origin he cannot justify.

At the same time, this patrimonial measure deprives the offender of those illicit assets that can be placed on the market or that can be used for the commission of other economic crimes.

This patrimonial measure, on the one hand, presents several critical issues[82]. First of all, it proposes a duplication of sanctions against the individual tax offender. In fact, the measure in question can be applied in addition to confiscation as a "criminal sanction," provided by article 12-bis of Legislative Decree 74/2000; therefore, it shows profiles of potential conflict with the principle of *ne bis in idem* but, in any case, configures an excessively severe sanctioning model.

Secondly, it exposes the offender to deprivation of part of the assets not necessarily directly resulting from a tax offense just because merely undeclared or unjustifiable.

On the other hand, "extended confiscation" shows how offenses committed for the purpose of profit can be interconnected and thus carried out for a common purpose and in a single criminal logic. That is why, just to set out a general conclusion, <<extended confiscation>> helps to identify the phenomenological interconnections between tax evasion

[81] For views on the extended confiscation in the tax crime sector, see Di Siena, M. (2021, April 29). VIRTEU National Workshop - Italy, Session 2. Video recording at 51:27. Retrieved from https://www.corporatecrime.co.uk/virteu-national-workshop-italy.

[82] D'Avirro, A. (2020). Confisca diretta, per equivalente e "allargata" nei reati tributari. *Rassegna tributaria*, (2), 487-499.

and corruption; interconnections that – in a first analysis – appear to exist when illicit tax conducts are carried out on a large scale and with the aim of obtaining illicit profits.

It remains to be seen how "extended confiscation2 will be applied in the foreseeable future and what types of crimes will emerge as the basis for the perpetrator's criminal conduct.

Beyond that, it is possible to say that in the Italian legal system the interconnection profiles between the illicit conducts of tax fraud and corruption (to be intended in a broader sense) could be found by looking at the patrimonial sanctioning measure of the "confiscation."

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