VIRTEU National Workshop focused on Italy

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The video recordings of the research event are available at:

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Costantino Grasso:

Welcome back. We are now in the second part of this workshop. In this part, we will try to unveil the mechanics of interaction between corruption and tax crimes. I'll start with the question that Dr. Sabia has already asked, Rossella if you want, you can also repeat your question. Basically, we are talking about the extent to which and whether tax crime disputes are carried out in conjunction with corruption disputes in cases where there is a crossover phenomenon. That is, how much does it happen and how does this reach the Italian Supreme Court?

Marco Di Siena:

If I may, I will explain something very briefly. The interaction between the phenomenon of tax evasion, or rather between the phenomenon of tax offenses and corruption, actually peaked in the early 1990s during the so-called *Mani Pulite* investigation [a nationwide judicial investigation into political corruption in Italy, *tn*]. And that happened for a very simple reason: in order to guarantee the financial resources that would be used to pay off the corrupt public official, the simplest way to do that was to commit a tax crime that would allow for the accumulation of slush funds.

Once this phase was more or less effectively closed, these two phenomena - that is the pathology of the crime against the public administration and the pathology of the tax crime - in my opinion, experienced a fundamental decoupling phase. In other words, we no longer have major situations of joint dispute. If there are any, it is because tax offenses are often a means of guaranteeing visibility, but I have no evidence of major investigations that are actually leading to the verification of facts that may be relevant to both types of crimes. I am being very brief here, perhaps even too simple, but this is my experience.

Costantino Grasso:

Thank you very much. Are there any further additions?

Pietro Molino:

I would just like to mention the possible collateral profile of judicial corruption in the field of taxation. This issue of corruption in tax courts in the whole strand of the tax jurisdiction should not be underestimated. We've already seen it in the press as well.

Costantino Grasso:

Perfect, that's very important. Colonel, you may speak.

Samuel Bolis:

I can express my point of view, though it differs a bit from Di Siena's depiction. In the last two years, we have witnessed a disarming, systematic, and widespread picture of correction in the suburbs, and I am quoting the words of the investigating judge. This situation led to the arrest of the provincial director of the Italian Revenue Agency, two other provincial directors and about 15 professionals, including lawyers and accountants. Basically, there was a flaw in tax verification activity, which was systematic and encouraged both by public officials and by the professionals themselves, and which had, in fact, undermined any competition among professionals in the area. Only those who accessed these forms of systematic corruption were able to obtain benefit from their new clients.

In some cases, the corruption reached the point where they would actually cause tax problems for their clients without their knowledge in order to generate a tax investigation that would lead to the corruptive activity. Then again, we have witnessed mini-tax frauds aimed exclusively at creating liquidity for the payment of bribes. I must point out that the context in which this use of false invoices was possible is that of tax relief, with explicit reference to the taxation of amateur sports associations under the flat-rate scheme, which has always favored this phenomenon. Therefore, the picture is there, it is well present and systematic, it did not reach the Italian Supreme Court because all the parties have settled, all of them.

Costantino Grasso:

Colonel, thank you very much. It is a fundamental emergency from a phenomenological point of view. You were very clear; these are very important phenomena. You have already started to answer the first question of this evening, which was precisely about the mechanisms by which tax offenders interact with intermediaries and other enablers to manipulate and exploit tax administration systems. And we have already answered that question. So, at this point I will do a quick round of the panel to clarify, according to your professional experience, which categories of professional enablers (e.g., bankers, brokers, accountants, internal auditors, external auditors, tax lawyers and so on) are most involved in facilitating these crimes. Let's go around quickly. Colonel, shall we start with you?

Samuel Bolis:

Tax lawyers and accountants is certainly a category, or rather all the subjects who, according to Italian law, can bring a case before the Provincial and Regional Tax Courts. Therefore, all those subjects who have the opportunity to develop a cross-examination with the tax

administration or represent it in court before the special jurisdiction, and who are able to reach an agreement in theory and also in practice.

Costantino Grasso:

Councilor Molino, were you saying something?

Pietro Molino:

Yes. I confirm exactly what the colonel has just said, perhaps even with an emphasis on the internal bodies of the companies, i.e., the auditors. This should not be underestimated; I believe there is also a great interconnection between the efficiency of the system of fraud and tax evasion repression and the current company law, with the system of control within the companies. The current system easily allows a company to take on the form of company, or a single-member form of company or even one with very little share capital. Therefore, there is less rigidity than in the previous system combined with the presence of in-house operators in a control function, who can facilitate the whole process if they are motivated by a purpose of tax evasion, other tax fraud or corruption.

Costantino Grasso:

Do you see any difference between the internal and external auditors? With regard to the Big Four.

Samuel Bolis:

If I may, there's an incompatibility between the audit function and the continuous provision of professional services by the consultant in national Italian legislation. In the most relevant situation, it is a cause of *de facto* disqualification from acting as a standing auditor of the Board of Auditors, for example. But what do we often find in practice? In associated firms the positions are exchanged, so what used to be the role of the professional is now changed to that of a member of the Board of Auditors, while the colleague next door continues to provide professional advice. In my opinion, there are no dissuasive sanctions for this type of situation, and there are probably no sanctions other than the *de facto* termination of office.

Costantino Grasso:

Thank you very much. We are already preparing the ground for a question that Dr. Sabella would like to ask. To this end, we have also talked about sanctions. I would like to ask you: how often tax-related professionals, who belong to categories subject to the self-regulatory regime (e.g., by association councils), are subject to disciplinary sanctions or disqualification measures for illicit or unethical conducts related to their work in the area of taxation?

Marco Di Siena:

I would say it is an absolutely small percentage.

Costantino Grasso:

Attorney Di Siena, what do you think are the causes of this situation? Is it the structure of the Association Council? Are there any solutions to this problem? Because it is a rather widespread problem, not just in Italy.

Marco Di Siena:

I think this is a widespread problem and it's an objective problem that affects all organizations. That is to say, when a member of a particular council or organization has to judge one of his peers in some way, there is a tendency to be reluctant to take heavy sanctions. I am talking about the members of the BAR association, as well as of any other professional body, obviously without any form of individualization. I hope Dr. Molino will forgive me, but the controversy that sometimes arises over the sanctions imposed on members of the judiciary by the judiciary governing body (Consiglio Superiore della Magistratura) itself is reported in the press. So perhaps it is a reluctance that is in the nature of human beings.

Costantino Grasso:

Thank you. I would say that the other sub-questions have already been answered by several statements. If there are no further cases [to be evaluated] of these interconnections between professionals, administrations and tax offenders, we can go on with the [other] questions. Colonel, please.

Samuel Bolis:

May I make an observation?

Costantino Grasso:

Yes, of course.

Samuel Bolis:

There is probably also a lack of a constant flow of communication from the Public Prosecutor's office to the Association Councils when conducting criminal prosecutions. I am not aware that there are any rules similar to rule 129 on implementing measures imposing, for example, an obligation to notify the Court of Auditors when there are phenomena related to fiscal losses or similar cases. So, there’s a problem if the Association Councils are not promptly informed, in addition to other issues which concern the use of that data at that stage, the right to a double-track system and so on.

Pietro Molino:

Perhaps the only moment of effectiveness occurs during the precautionary phase, or precautionary penalty phase, in which the suspension of the activity is clear; in that moment we have a connection with the respective Association. But then, once the trial has begun and the phase of cognition has started, I believe a very small percentage actually results in a disciplinary sanction, as the previous speakers have pointed out. There is certainly a moment in the precautionary phase that normally leads, for all these professionals, to trial outcomes that often result in plea bargains or early termination. Because, obviously, that is a moment that affects the life of the professional or the subject in a very significant way. Therefore, it nearly always, or rather often, leads to an early exit of this subject from the judicial moment as opposed to the other parties involved who continue.

Costantino Grasso:

Thank you. I should now give the project experts the floor. I am going to ask Dr. Sabella's question because unfortunately he's busy at the moment. He sent it to me, it is very interesting. We've already discussed it a bit. We're talking about the aspects of the famous revolving doors, which are one of the most controversial aspects of undue interaction. Here you are Pietro. Can you ask this question about revolving doors?

Pietro Maria Sabella:

Yes, of course. I'm sorry, but I had to take that call. So, the topic is precisely about revolving doors. In what way? Lately, some articles published in a number of newspapers, such as *L'Espresso*, have begun to raise the issue of the conflict of interest linked to this mechanism. In other words, we have external consulting firms that in some way collaborate with public administration. They provide consulting services and at the same time manage the commercial and economic plans of private competitors or, in any case, private players who interact with the public administration through tenders.

As Dr. Bolis was saying earlier, the point is that there are individuals who initially operate within the public administration, for example, and then move to these major consulting firms or vice versa. And this somehow encourages exchanges that are not entirely lawful, maybe in the gray area, which create problems of incompatibility and also potential conflict of interest. Because when a private party intervenes in the public sector and manages to steer certain tenders and certain commissions towards a particular party, it could obviously be detrimental to competition and could create a conflict of interest.

This issue has been taken into consideration by the anti-corruption authority, to the extent that even some ministries, such as the Italian Ministry of Economy and Finance for example, have started to react. By adopting three-year plans, they have started at least to assess this issue and to take it into consideration by setting incompatibility criteria. For example, a

person that comes from the public administration is not allowed to work for a company and vice versa for at least three years. So, what is the future of this problem? What kind of practical application can this problem implement? Can it also reveal corrupt profiles? What can be the further mechanisms to prevent these phenomena that are in a grey area, but do not necessarily stay in the gray area?

Costantino Grasso:

Thank you, Pietro. Before leaving the floor to the experts, I want to point out a certain vulnerability concerning the incompatibility mechanisms that we have already talked about, because sometimes, as we know, the passage is unilateral. In other words, there is no reverse passage, and, above all, it is a passage made of connections, contacts and so on. The incompatibility measures are not necessarily helpful. Therefore, if you have any recommendations on how to improve the measures to avoid these conflicts of interest, you are welcome to take the floor.

Marco Di Siena:

If I may, I would like to make a bold remark. It's probably not a conventional thought, maybe it's even unconventional. These guidelines are very clear, and they are perhaps even advisable and desirable compared to the past. However, one of the countries that is considered to have the most efficient public administration, that is France, is characterized by a phenomenon that is expressed in French and that we have also introduced into our administrative law, which is *pantouflage*. *Pantouflage*, or revolving doors, is the repeated passage from the private sphere to the public sphere and vice versa. This happens quite frequently, and it led to corruption in some situations in France as well. But in the French Republic it is not necessarily seen as a strongly pathological phenomenon.

So, in my opinion, this is where the legal culture of each country comes into play. The idea of separation and formal conflict of interests is very typical of northern Europe, of Anglo-Saxon countries. It has not always been integrated into our legal culture, and I do not mean to say that it is not a positive phenomenon, indeed there is much room for improvement. However, certain attempts at imitation, such as the so-called "ban on *pantouflage"* which is sometimes applied in the regulation of public law bodies, could prove to be an inefficient measure. This is just my impression. If I may, these are initiatives that should be adopted in a less unilateral manner, with a grain of salt. At least, this is my point of view.

Costantino Grasso

Perfect. Would anyone else like to make additional remarks on this issue?

Samuel Bolis

Yes. I wanted to quickly say that…

Costantino Grasso:

Colonel, your mic is muted.

Samuel Bolis:

Can you hear me? Ok. I wanted to follow the lead of Mr. Di Siena, whose latest opinions I fully share, as a matter of fact I agree with all of them. Rather than an imitation, I notice that the Italian attitude is more like that of Penelope [in Homer's Odyssey], who each day weaves and each night unravels her day's work. Let's not forget that at the end of the 1990s in Italy, with the *Bassanini Laws* 2 and 3 and above all with Law 165/2001, we wanted to encourage the transition from public to private and vice versa in certain forms of management. This is a fact.

As an expert in criminal law, one has to ask oneself what is the criminally relevant conduct of *pantouflage*. Because, either we have a corruptive agreement when the subject still acts as a public employee or as a public service representative and accepts the promise of an assignment - or future assignment - with that subject who will hire him/her in the future, in function of a hypothetical act contrary to his/her official duties. Otherwise, I find it hard to imagine a criminal conduct and a sanction other than the one introduced a short time ago in the Italian legal system to protect the conduct of *pantouflage*, which basically consists in the repayment of the amount due and the termination of the employment and of the contract signed.

Costantino Grasso:

Thank you. We have to move on. We have run a bit over time, though this is an extremely interesting topic. All of them will be just as interesting, so I would ask you to kindly keep your answer within two minutes or even one minute if possible. But we have covered some very interesting topics. The following issue is very relevant for us, it is central to our project, and it is the one that has caught the attention of the European Anti-Fraud Office. This second issue is how corrupt practices - in this case meant in the broad sense of criminalization, namely any form of abuse of power or public functions based on private interests - can, by affecting the political decision-making processes within the Italian jurisdiction, end up encouraging - even if indirectly - tax evasion or negatively influence the assessment of the repression of tax crimes.

In particular, recent multidisciplinary studies have shown that business interest groups and other pressure groups may unduly influence the political decision-making process. For instance, such a pressure may lead to the implementation of self-regulatory regimes rather than mandatory ones; the adoption of an unnecessary level of complexity in regulation; the practice of limiting the scope of the criminalization of illicit conducts to evident fraudulent tax evasion practices keeping out unethical and aggressive tax avoidance ones; the continued reluctance to adopt effective transparency regimes; the adoption of legal instruments

favorable to tax evaders such as the tax amnesties and negotiated resolutions we have already discussed. Taking this into consideration, how do you assess the level of such an undue influence in the Italian jurisdiction? Can you identify any institutional vulnerabilities that can facilitate such influences?

Pietro Molino:

Maybe I didn't understand correctly. It seems to me that the context you are describing is characterized by corrupt practices that act on levels that ultimately shape the decision-making process at a policy level. In other words, on a regulatory level. Am I correct?

Costantino Grasso:

Exactly. We are moving from the operational-administrative level to the political decision-making process, which not only influences legislation but also resources and competences, for example. But on a political decision-making level.

Pietro Molino:

So, how much the possibility of corrupt practices affects overall policies, am I right?

Costantino Grasso:

Exactly. In a broad sense, we are also considering undue pressure, lobbying, and so on.

Samuel Bolis:

If I may make an observation, I am not aware of any legislation in Italy, such as that in force in the European legal system in other Member States, which regulates the lobbying activities in the decision-making and legislative process. Therefore, in Italy, I find it hard to see the possibility, for example, of an investigation such as the one that led to the arrest in 2012 of the Maltese member of the European Commission, John Dalli. Dalli was accused of taking bribes to change a regulation on tobacco taxation to the detriment of some Member States and in favor of a multinational company that I won't mention. In that case, OLAF was able to fully trace the lobbying process that was quite legitimately implemented until the unlawful conduct took place.

Costantino Grasso:

Perfect. So, from a certain point of view this answer clarifies the deficiencies in terms of repression. From a phenomenological point of view, however, being experts in this field for years, what do you think this pressure comes from? I'll give you this input. The fact that tax offenses are not included among the offenses presupposed by the Legislative Decree 231/2001 was quite evident for many years. In the end, they were only partially included thanks to the intervention of the European Union. So, which are the processes that

determined this absence? Is it because of pressure from interest groups? This is the crucial point. I am asking you to answer from a phenomenological point of view.

Fabrizio Reggiani:

I cannot answer this question directly, but I will make an observation on its assumption. From my point of view, the absence of tax offences in the Legislative Decree 231/2001, until the recent modifications, marked a distortion and then gave origin to corrective jurisprudential interventions. I cite one case among all, on the issues of confiscation after many fluctuations of case law, the well-known sentences. But then, in fact, I believe that this implementation has been even more severe than what was requested, and it leads to imposing too many sanctions on the subjects concerned.

Therefore, the fact that there were no sanctions before certainly represented a moment of irrationality in some aspects, but in my opinion, it was also consistent with many other disciplines that end up intervening on the same matter with all the problems of *bis in idem* that are discussed with reference to this matter. So, I do not associate it with anything pathological. There was a legal vacuum, but it has now been filled and has created other problems.

Costantino Grasso:

Thank you.

Antonio Gullo:

Excuse me. May I? My name is Antonio Gullo

Costantino Grasso:

Welcome, professor.

Antonio Gullo:

Sorry, I had class. If I may intervene, I would like to add one further comment. In our legal system, lobbying activity is not regulated, but it is now regulated under the criminal law, because influence peddling has been a crime since 2012. Today, in 2019, it also covers supposed influences, and it is a predicate offense for the liability legal entities since 2019. So, from this point of view, under a pathological profile there is now an applicable law that also concerns the liability of legal entities.

And in terms of application, before the implementation of tax crimes, the case law used to apply either confiscation or criminal association for the purpose of tax crimes. Then, the Court of Cassation affirmed that profits could be actually confiscated even though tax crimes were not included in the list of predicate offenses [that allow the attribution of liability to legal

entities]. That is, because it didn't refer to tax crimes, but rather directly to the criminal association [which is a crime included in list of predicate offenses], emphasizing the Supreme Court's decision regarding the aggravating circumstance and reuse of the mafia-type associations.

Costantino Grasso:

[To Antonio Gullo] Thank you, Professor. [To the audience] Let's always try to keep our answers short, because we are running out of time. [To Marco Di Siena] Attorney Di Siena, did you want to intervene? We are analyzing the remote, let's say systemic, phenomenological causes, even if they are not criminalized.

Marco Di Siena:

I would just like to make one observation that is perhaps more sociological rather than legal. Certainly, the legislative process in Italy is porous and, using yet another French term, *délabré* [meaning run-down]. And therefore, since the normative activity is objectively intense because we tend to have a normative hypertrophy, it is obvious that the more or less articulated pressure on the legislator can be useful or not useful to achieve results that are not praiseworthy. At the same time however, I would like to say that, as the professor reminded us towards the end, the system of repressive sanctions already exists and is also particularly severe. To continue with what we were observing earlier, an example is the lack of tax crimes within the scope of the crimes presupposed in Legislative Decree 231 of 2001.

I reasonably do not think that it was the object of choices determined by the lobby in one sense rather than another; in my opinion, it was also a choice of balancing the sanctions. It is important to remember that in Italy, in addition to the particularly severe criminal penalties in the tax field, there are also administrative penalties, which, unlike in all or the majority of other EU countries, sometimes exceed 100% of the tax evaded. This means that we currently have an administrative penalty that is in fact a criminal penalty, according to the jurisprudence of the ECHR; we have criminal penalties that are particularly punitive for the perpetrator of tax crimes; and then [as concerns legal entities] we have the liability under Legislative Decree 231. In short, we have a particularly challenging panoply of sanctions for those who may be involved in this type of conduct.

Costantino Grasso:

Thank you very much. We have to move onto our research objective, which is identifying the specific vulnerabilities of tax authorities and other relevant law enforcement agencies, including public prosecutors and judges - as already anticipated by Councilor Marino, which are involved in the fight against tax crimes. I'll start by asking you if the law in Italian jurisdiction grants sufficient powers to agencies involved in the prevention and response to tax crimes and corruption.

Pietro Molino:

Yes. Regarding corruption in general, as Attorney Di Siena just said, I would tend to exclude that the problem is the lack of an adequate repressive or investigative arsenal of sanctions. I believe that also with regard to Legislative Decree 231, perhaps we have given too much importance to the possibility that this instrument was somewhat the only solution to all the problems concerning the repression of certain phenomena. Therefore, I do not believe that it is a problem of instruments that can be implemented, but rather a problem that concerns the overall criminal justice system, which cannot cope with a number of criminal proceedings that in some ways is unparalleled.

This number does not correspond proportionally to countries that are comparable to Italy in terms of size, importance, volume of business and so on. And this has a ripple effect on all the other structural problems that we are familiar with. Then, if we want to talk specifically about tax jurisdiction there is a lot to say, I don't know if we will get to it later. But in general, I don't consider the problem of corruption to be a problem of lack of punitive instruments.

Costantino Grasso:

Thank you. I would like to move on to the second question, which is a bit more specific. Certain investigation methods, and I am referring to wiretapping and bugging, are particularly effective in the fight against corruption. But when it comes to tax offenses, I would ask you to clarify whether the use of these tools is granted in terms of law, if it is used in practice and therefore granted in terms of resources, and to what extent it is currently used.

Samuel Bolis:

The use of wiretapping is decided by the Public Prosecutor according to a principle of proportionality in relation to the situation under investigation. Clearly, it is also essential to reconstruct, above all, the psychological element of the *mens rea* where we are dealing with more extensive phenomena characterized by a criminal conspiracy. It is unimaginable to extend it to all situations of use - e.g., invoices for non-existent transactions - even if in abstract terms the legislation would allow it.

Considering the phenomenon and the example of carousel fraud, without wiretapping it is difficult to prove the subjective element of the offense and therefore to challenge Article 2. Without wiretapping, the non-deductibility of the non-existent transaction would - for example - be subject to an administrative penalty imposed by the tax authorities or the Court of Justice on the broker of a large company who was not very diligent, because he should have known that he was the final link in a carousel fraud. Without interceptions, we cannot go far, and the rule would be totally ineffective.

Costantino Grasso:

Thank you. [To Fabrizio Reggiani] Attorney Reggiani.

Fabrizio Reggiani:

Yes, I just wanted to add something. Today, the legislation allows a wider use of this instrument of investigation, but perhaps a consideration can be made also in distinguishing the typology of the phenomena. Because, with respect to phenomena considered, from the perspective of the investigation, to be marked by a greater disvalue - as the Colonel said before - the interceptions can help us also in reconstructing certain components of the operation on the subjective side as well. Unlike the fight against other forms of alleged evasion, other investigative instruments are equally efficient in reconstruction. For instance, think of all the activities of seizing all the electronic correspondence from the company servers, especially when referring to day-by-day activities. And therefore, e-mails are sometimes more significant than wiretapping for reconstructing concrete operations.

Costantino Grasso:

Great, thank you Attorney Reggiani for raising the second question. When are companies involved? What are the technical, legal or practical limiting factors in assessing liability? I am referring to the difficulties in determining who is the beneficial owner of the company or, as Mr. Reggiani was saying, in accessing and analyzing documents - such as e-mails, documents and their chronology, which are often incredibly high in number especially when it comes to multinational or transnational companies- and also the difficulties in determining potential transnational offenses.

Pietro Molino:

I can say a quick word on the problem regarding data seizure. What is happening in the last case law of the Court of Cassation is the expression of an extremely restrictive direction regarding the possibility of seizing the entire computer file. There are precise limits with respect to the time required to operate the selection of the data considered to be relevant to the hypothesis of crime on which an investigation is being carried out. Other limits have been placed regarding the necessity that - given the potential comprehensive nature of the data contained in any device, computer file and so on - the evidentiary restriction to the seizure of the asset - which normally happens through the execution of a forensic copy - is conducted through methods that guarantee, in the most absolute way, the impossibility for the criminal investigation department to examine all the data that are not pertinent. And therefore, investigative authorities need to indicate precise keys to the reading of the device - through key words and codes - that in some way establish the relationship of pertinence of the data to recover for the hypothesis of crime against which they are proceeding in order to ensure

the principle of proportionality in the freezing of evidence, which derives directly from our Constitution.

This type of case law is particularly present in the rulings of the last few years. In the Court of Cassation, there are many sentences that have also referred to known cases of seizure of databases belonging to foundations or companies that were close to a certain party or political exponent, or to a certain company. And it is a fact to be taken into consideration because, in some way, it constitutes something with which the local investigative authorities must necessarily deal, otherwise the investigative efforts will be substantially nullified.

Costantino Grasso:

Thank you very much. We're running behind so, I'd like to ask you quickly about the topic of beneficial owners of a company - What are the issues concerning that? Maybe the Colonel can follow up on this at this point.

Samuel Bolis:

I believe that Colonel Sorbello is the anti-money laundering authority here. We are defining the implementing decrees to establish a register of beneficial owners in Italy. It was supposed to be ready by March 15, but there was a request for postponement - if I remember correctly - by the Bank of Italy, so it will be discussed in June. Certainly, this data will mark a breakthrough. There are plans to set up a register in every Chamber of Commerce in Italy, and we are wondering how far it will extend besides the police forces and those responsible for investigations.

Costantino Grasso:

Thank you, Colonel. So, we are still unable to evaluate the efficacy. Colonel Sorbello, any additional comments?

Pietro Sorbello:

One aspect that struck me about the register of beneficial owners is that there is a particular sanction that concerns the possibility of paralyzing the exercise of voting rights for a shareholder who does not reveal who the beneficial owner is. And this is a different sanction from the ones we are used to - the criminal sanction, the administrative sanction. I will now post the exact regulatory reference in the chat room. As soon as I read this development, I understood the importance of a 360-degree strategy.

Costantino Grasso:

Thank you very much. You made a very good point about this regulation; the chat is not recorded so we have to save it somehow. We will now move on to the analysis of some specific issues of the project. I would like to start by analyzing the issues on the liability of

entities and ask you what are the limits for attributing liability for tax crimes to legal persons in Italy? What is your assessment in relation to the legal nature of this administrative or civil criminal liability? And how can the interconnections between tax crimes and corruption, where they emerge, affect this liability regime?

Samuel Bolis:

Certainly, the inclusion of tax offenses in the list of predicate offenses for the application of Legislative Decree No. 231/2001 will allow a more effective counteraction, because it will concretely lead to value-based confiscation from legal persons of the amounts actually evaded. This was not possible at the time and outside the context of the crime of association for the purpose of committing tax offenses. We were basically stuck at the jurisprudential stop by the Court of Cassation with the Gubert case, which simply allowed the seizure of the sums held in the current accounts of legal persons intended as a seizure for the direct confiscation of the proceeds of the crime. We expect greater effectiveness due to the increase in the number of seizures related to tax evasion.

Costantino Grasso:

Any further comments on the national aspects? Attorney Di Siena, please.

Marco Di Siena:

Going back to a remark I made earlier, I find that the inclusion of Legislative Decree 231 as a prerequisite for tax offenses in the end has an inherent risk of becoming excessively punitive, I must be honest. In general, I don't find it to be the key to ensuring more widespread compliance. So, if this is the turning point for punitive tax policy, personally I find it quite questionable. I have to be honest and swim against the current once again.

Costantino Grasso:

Thank you. So, now I would pass the floor directly to the project experts, because we should deal with *ne bis in idem*. There's a question from Dr. Sabella - make sure it's within a minute, and then we have Dr. Sabia.

Pietro Maria Sabella:

I will be really brief, because the subject has already been partly addressed. It concerns extended confiscation, this new type of confiscation that we know has been introduced in 2019, but with an obvious asymmetry. Meaning it is applied to individuals, but the entity - which is the subject that receives the illegal appropriation - is not directly affected. So, on the one hand, there is a problem of overload of sanctions on the natural person - because the natural person can be subjected to the extended confiscation, the value-based confiscation, in addition to other penalties - but, on the other hand, the entity already suffers from this

overload of sanctions - consisting in the confiscation and the pecuniary penalty - provided for in Article 19.

In this context, I wanted to know, on the basis of your professional experience, have you already had any experience in the application of the extended confiscation? In other words, if there is already a significant experience in this field. And above all, what can be the mechanisms to prevent the application of extended confiscation? Since it gives rise to disproportionate wealth. And what could be the limits within which the application of this type of confiscation is possible? I have summarized as much as possible, thank you.

Marco Di Siena:

I will try to answer, also in this case, from my own perspective. Personally, I have not yet had any experience in the application of the so-called extended confiscation. Resuming certain considerations which I have already made on more than one occasion, I find that the tax sector, today, is overly punitive from this point of view. We come from a situation in which, with regard to tax crimes, it was possible to operate and carry out only direct confiscation. Then we moved to value-based confiscation, which is certainly a very effective instrument, and today we are faced with the extended confiscation, if we want to define it in this way. The latter arises according to logical dynamics which are objectively different, and I do not know how much sense it makes in a sector which already provides that the person liable for the tax obligation must pay the evaded tax and interest.

Furthermore, the liable person is also sanctioned with administrative sanctions - which, as I said before, are particularly punitive - and, when there is a difference between the person liable for the tax obligation and the offender, it is not even possible to invoke the rule of speciality. Therefore, I find that it is a criminal tax law of the enemy, quoting Carl Schmitt and the reference made earlier by Mr. Bolis. Unfortunately, sometimes the Italian legislator - who is a somewhat *délabré* legislator - swings between being overly punitive and overly lax. The pendulum is currently swinging towards being overly punitive, perhaps.

Costantino Grasso:

Thank you. Does anyone want to weigh in on this? No? Ok. I shall give the floor to Dr. Sabia.

Rossella Sabia:

Yes, thank you. I am going to be very quick on a prevention profile in the field of corporate liability. I wanted to ask, in your opinion, what are - if there are any - the actual prospects of integration and interoperability between the various compliance instruments? I am clearly referring to the 231 organizational models that have already been mentioned to some extent, but also to other preventive mechanisms - especially after the inclusion of tax offenses in the 231 catalog - such as the tax control framework. In your professional experience, do you see

any opportunity for interoperability and integration between compliance mechanisms? What could be the concrete consequences for those involved? Thank you.

Pietro Molino:

I would like to speak. I apologize, but I have already told Costantino Grasso that I need to leave, so I will end my participation here. On the subject of 231 in general, I basically agree with Attorney Di Siena, with a few specifications. In my opinion, the case of tax offenses is a classic demonstration that the risk of a hypertrophy of the sanctioning response exists, but it exists to the extent that we have decided to apply this discipline also to a corporate dimension or, in any case, to a body with a very restricted membership base. The risk that a subject - which in the end may also be a company of one or two persons or in any case a family company - is affected repeatedly exists. The more we move away from the initial theme of a regulation on the liability of the entity designed precisely to depersonalize the individual members of this entity - which was detached from the subjects who were part of it and lived an independent life - to return to corporate models - or, in any case, smaller entities -, the more this type of situation exists.

Therefore, it is clear that it is very difficult to achieve compliance in cases where the proceedings relate to small companies. Because obviously the theme of an entity that - against the will of the natural person who has committed the predicate offense - becomes virtuous or adopts the model of conduct, is a theme that is difficult to imagine when the entity tends to coincide substantially with the single individuals. For it is precisely the natural persons who have committed the offense and it is those persons who embody the entity. So, if I may, I would differentiate the functioning of the instruments of compliance starting from a certain quantitative scale of the legal person, which could in some way give sense to the hypothesis that the entity adopts a virtuous model of compliance - through the interlocution with the judge on one side and the tax agency on the other side. I apologize but I must say goodbye, it has been a pleasure.

Costantino Grasso:

Thank you.

Pietro Molino:

I have to leave you, everyone. It has been a pleasure collaborating.

Costantino Grasso:

Thank you. [To Pietro Molino] It has been a pleasure, Dr. Molino. [To the audience] Same goes for everyone who will be staying with us a few more minutes. We only have two more topics to discuss.

Samuel Bolis:

I wanted to make a very quick comment on this subject, which I think is very interesting. Usually, we link tax offenses to receiving a specific amount of money that is not paid to the tax authorities but is retained by the entrepreneur. In the big carousel frauds, we see sometimes, or most of the time - in some sales contexts of certain product categories - a system that is greatly compromised. I am thinking, for example, of the sale of computers, electronic accessories, beef - all the categories where Article 50-bis is applied, basically the reverse charge. In these cases, the result is simply a tax saving whose actual beneficiary is the customer. The company, however, benefits in return with an increase in volume and survival in the market. What does this mean in reality? That it is in the interests of the company as such to pursue these corporate policies in order to fuel large-scale VAT fraud. This is why the legislator must make an effort to introduce law enforcement models such as those of 231 to monitor this situation.

Costantino Grasso:

Thank you very much. I will therefore move on to the next topic and then there will be an open debate at the end of the session. The last specific topic concerns assessing the role played by whistleblowers. From a terminological point of view, I am referring to the definition of whistleblowers as included in Directive (EU) 2019/1937, as 'persons who work for a public or private organization or are in contact with such an organization in the context of their work-related activities, that know about threats or harm to the public interest which arise in that context' and reports them. So, we'll limit the discussion to this type of definition. I would start by encouraging you to make an assessment, based on your professional experience, of the role that whistleblowers play in Italy in unveiling tax crimes and corruption in the tax sector, looking in particular at how such reports benefit investigations.

Samuel Bolis:

Again, in my personal experience, whistleblowers are certainly essential to initiate major investigations in the field of corruption. The investigation I mentioned in the past - the one between the Italian Revenue Agency and professionals - arose from similar incidents of whistleblowing by Revenue Agency officials. But the rate of protection of these whistleblowers is still to be explored.

Costantino Grasso:

Perfect. If no one else wants to speak on this point, I will move on. To your knowledge, are there any periodical reports on rates of whistleblowing or analyses of investigations arising from such reports in Italy? Or maybe not? You have to speak into the microphone.

Marco Di Siena:

As far as I am concerned, I am not aware of any structured form of analyzing the investigative outcomes of such reports.

Costantino Grasso:

What about the amount of reports? Not any?

Marco Di Siena:

Personally, I have no evidence whatsoever on the collected data. It is a very significant and very important tool, in my opinion, that's for sure. But I am not able to give a concrete dimension of the phenomenon.

Costantino Grasso:

Perfect, thank you. Based on… [To Antonio Gullo] Yes.

Antonio Gullo:

Sorry to interrupt. Regarding the public administration, ANAC publishes for each year a report on corruption - not on the outcomes, but on the number of reports, classifications, source entities and so on. While in the private sector, as far as I know, it remains the knowledge of the different entities.

Costantino Grasso:

Thank you for specifying that, Professor. To your knowledge, are acts of retaliation against whistleblowers who uncover tax crimes or corruption frequent within Italian jurisdiction? E.g., dismissal, demotion, harassment, bullying, lack of promotion opportunities, or accusation of defamation.

Fabrizio Reggiani:

Personally, I don't have any evidence on that data.

Costantino Grasso:

Colonel?

Samuel Bolis:

Yes, perhaps in the few cases where they occurred, they then led to concrete actions based on the reports submitted. There were confrontations, which led people to consider the possibility of resigning from public office to do something else.

Costantino Grasso:

Perfect. So, to close the discussion on whistleblowing, what is your assessment of the quality of the legislation and the practice related to the protection of these individuals who expose themselves in order to unveil tax crimes and corruption? What are the most relative deficiencies of whistleblowers protection both in relation to the legal framework and practical aspects? In which ways do you believe that whistleblowers' protection should be enhanced? Attorney Di Siena.

Marco Di Siena:

I think that unfortunately we do not have an adequate analysis of the phenomenon. Perhaps it's because the institute is young - if we want to use this term – so we don't really have an adequate database to be able to imagine both the pervasiveness of the phenomenon and its effects in a positive or negative way, except for what traditionally emerges in the media. But I find it difficult to give a precise answer.

Costantino Grasso:

Actually, this is a very precise answer, because it is an emergency that we will raise in the Committee. Having said that, let's move on to the last question. This is an open question, so I would invite everyone, including our project experts, to answer it. An essential point and an objective of the research is to develop innovative solutions to fight tax crime and corruption in the context of fighting tax crimes. So, the first thing I would like to ask you is: what are the best practices in the fight against tax crime and corruption developed and implemented in Italy that could be usefully exported in other EU countries? This is an open debate, anyone can contribute.

Fabrizio Reggiani:

I am not aware of what instruments are available in other EU countries and, therefore, whether they have already been implemented. However, based on the experience gained in the field of application, the evolution of the fight against these phenomena has had a clear turnaround with the introduction in 2008 of confiscation and preventive seizure, and the possibility of preventive seizure for this purpose. Therefore, asset ablation instruments are certainly something that has given an extra boost to the repression of the phenomenon.

Costantino Grasso:

Thank you, Attorney Reggiani. Does anyone else have further comments on this point?

Marco Di Siena:

If I may, I would like to make two considerations, two positive experiences that I believe the Italian Republic has to offer. The first is the existence of a dedicated police force, although I

realize that, especially in Anglo-Saxon countries, this is perceived as a somewhat Latin peculiarity. In my opinion, this is something that positively characterizes us. The second aspect is undoubtedly the forms of asset ablation mentioned by my colleague. That is to say, the possibility of being able to draw certain sums of money even during the trial - therefore during the precautionary phase - is what often makes the difference in terms of effectiveness. It is often quite useless to have a final sentence later in time if the damage to property is not stopped immediately.

Costantino Grasso:

Thank you very much. I can only agree. In a mission in Montenegro, as an international expert of the Council of Europe within the framework of anti-corruption and tax crimes, I proposed the adoption of a specialized police force like the *Guardia di Finanza*. So, I agree, it is definitely a good asset that can be exported. Having said that, what best practices from other EU and/non-EU countries may be imported in Italy to enhance the fight against tax crimes and corruption?

Rossella Sabia:

If I may, as part of my research within the project, the mechanisms of procedural diversion which are widespread in other legal systems - not only in common law, but recently we have also had evidence from the French experience - are a topic for discussion regarding a possible implementation in our system as well.

Costantino Grasso:

Thank you. I have a final question, and I will ask it personally to all the experts present. If you had a magic wand, based on your professional experience, what are your final recommendations to improve the fight against tax crimes and corruption in the area of taxation to be implemented in Italy? I would like to start with Colonel Bolis.

Samuel Bolis:

Thank you for letting me start, although I think it is simply a matter of alphabetical order. So, there is certainly an effort to segment the processes of tax proceedings - ranging from the initial contestation to the final discussion - by defining checks and balances and criteria. In my experience, for example, I have noticed that a corrupt agreement is unlikely to take place during the phase of contestation of the tax assessment by the Revenue Agency if the *Guardia di Finanza* has previously issued a report of contestation. In other words, the procedure has been segmented and must then be completed as it was initiated. Moreover, a corruptive agreement aimed at invalidating the tax compensation is unlikely to take place if - and this is a flaw of our legal system in Italy - the legal office of the agency interested in the financial administration is the same public entity that defined the assessment.

If the corrupt agreement got in there, it is very likely to reach that level as well. In the operational experience that I have mentioned today, in addition to the director of the provincial agency, the head of the legal office was also arrested for collusive agreements before the Provincial Tax Court. Therefore, the effort is to proceed in the activity of business mapping that has already been done since 2001, that is, the mapping that the Italian corruption discipline has done on the decision-making processes liable to major corruption. The effort is to follow an in-depth analysis also among the different actors in the tax administrative process.

Costantino Grasso:

Thank you very much, proceeding in alphabetical order, [To Marco Di Siena] Attorney Di Siena

Marco Di Siena:

I will be very blunt: in order to improve, I think we need very high standards. First of all, we have to abandon the myth that any problem can be resolved by resorting to a law. We are a country characterized by a very heavy production of legislation, and this production of legislation gives rise to the phenomena of porous lobbying, previously mentioned, and gives rise to implementation difficulties. Unfortunately, in our common perception, when there's a problem, there is a law that needs to be enforced. And if there is a problem, it must be sanctioned with a particularly heavy punishment, at least from a legal point of view. All these measures are lost in the implementation phase. So, this is a fundamental problem because it does not help the functioning of the tax system.

It is also a breeding ground for misunderstandings of pathological phenomena. Secondly, we definitely have an implementation problem from a bureaucratic point of view. This is traditionally - we must tell ourselves without pretense - a problem of our national structure. Our procedures are quite baroque, so to speak, and these too - like the regulatory hypertrophy - are the main opportunity for corruption agreements or for encouraging pathological phenomena, whatever they may be, including fiscal ones. These are perhaps the two mantras, I realize that they are sociological and not strictly legal, but I feel I should express them.

Costantino Grasso:

Thank you, these are extremely interesting observations. [To Fabrizio Reggiani] Attorney Reggiani.

Fabrizio Reggiani:

Going back to one of the issues we mentioned in the introduction, there is certainly a need to simplify the underlying regulation. Given that the tax offense has an accentuated regulatory component, the simplification of the underlying regulation is certainly an

element that would benefit the clearer demarcation between what is criminally relevant and what is not. In order to avoid areas of ambiguity, a simplification also in the procedure, as Attorney Di Siena mentioned before, would certainly help in this direction. And I can say, among other things, with regard to the fight against the pathological phenomenon, probably - at least according to the experience that I draw from the territory - there is also a lack of homogeneity of competences.

Earlier, we mentioned a specific competence of a body dedicated to fight these types of crimes, both at the administrative and criminal level. We do not always find as much specialization in the Public Prosecutor's Offices, also for a question of organization, resources, and numbers. Therefore, some Public Prosecutor's Offices are very well equipped and, at times, have been pioneers in interpretations that were broader and inspired by a collecting logic and also with normative interventions, think of all the themes on the abuse of rights and the criminalization of those phenomena. There is not always the same degree of sectorization. But this is probably dictated more by the lack of resources to create specialized pools in each judicial office.

Costantino Grasso:

Thank you. This subject of symmetry in the geographic distribution of resources and competence is extremely important. Do our project experts have anything to add?

Rossella Sabia:

Just a very quick remark. I think that a prevention is an aspect we could still work on, because it seems to me that the direction already taken by ANAC with reference to the anti-corruption aspects in the public sector - and we have already mentioned the subject of the cooperative compliance in the field of taxation - is an aspect to be valued. I believe it has emerged unequivocally that the repressive sector instead - the criminal law aspects - does not suffer from particular vulnerability in our system. Perhaps another theme that emerged from the discussion is that awareness-raising and education on certain issues is also something that can be further invested in. When we tried to mention structured awareness-raising initiatives in these areas in the first session, we didn't come up with many examples. So, this might also be an aspect that could be further developed.

Costantino Grasso:

Thank you very much. Let’s conclude in alphabetical order, even though we skipped Pietro. [To Pietro Maria Sabella] Pietro Maria Sabella.

Pietro Maria Sabella:

No, mine is simply a final thought. Before the pandemic hit, I spent five days in Denmark. From the moment I set foot in Copenhagen until the day I left, I never had to withdraw cash

- I always used my card. So, the topic of digitalization and elimination of physical currency could be one of the instruments aimed at simplifying the origin of tax evasion.

Costantino Grasso:

Thank you. I had an argument in Positano about paying 18 euros for breakfast with my debit card and failed miserably. Let's move on to Colonel Sorbello.

Pietro Sorbello:

A final comment just to shake the conversation up right before the end. In 2011, I wrote that the idea of liability of entities for tax offenses was important to me, and the superfetation of the sanctioning reaction could be overcome with a realignment clause. Because compared to the sanctions provided by the administrative sanctions discipline, the Legislative Decree 231 has the advantage of co-liability and requires - also in the perspective of compliance - to be well organized. The approaches foreseen by the administrative sanctions discipline are only repressive, but Decree 231 is not only a matter of repression.

So, the idea of implementing it is also a way to encourage entities with a prospect of reward with organizational models adopted even *post factum* to obtain reductions and to organize themselves well. The alignment clause has been known for a long time, for example, Article 187-terdecies of the Consolidated Law on Finance provides that in the event of double-track system or market abuse, the criminal penalty or the administrative fine shall be proportional according to the difference with the amount already imposed. I rest my case. Now I shall go.

Costantino Grasso:

Thank you. [To Donato Vozza] Dr. Vozza.

Donato Vozza:

Thank you, Costantino. I have actually enjoyed listening to all the participants so far. Among other things, I have been working on these issues for three years - in particular on the fight against tax offenses - and I must say that this is simply a personal observation of mine, and I can agree with all the remarks that have been made so far, particularly in relation to hypertrophy. In recent times, as you said, I have organized and attended 14 workshops. Soon I will participate in four other workshops in Croatia, Holland, Poland and Germany. And it seems to me, having seen the various systems of course, that there are generally two main approaches.

The first one is mainly based on the management of the recovery of the evaded debt, and it is a form of enforcement that is very widespread in Europe. So there, the work is mainly done through the instruments of tax administration. On the other hand, we have another group of countries - paradoxically, those that have the main problems on this front - which, as Attorney

di Siena and Attorney Reggiani and others said, focus mainly on sanctions. And to make you understand, at least from my point of view, how often Italy is hyperactive, I happened to observe that often in the processes of implementation - even of European regulations - Italy is constantly implementing a reform, while there are many states that have internal regulations and limit themselves to communicating what they already have.

In fact, the minimum thresholds of European legislation often try to take into account what is already in place. From this point of view, if we take these two models into consideration - on the one hand, a management of evaded debt and, on the other, a more sanctioning model - I believe that Italy will eventually realign. But let me say one thing about the European Union that we are obviously talking about today. Recently the EU, in my opinion, is putting a lot of effort into the use and application of sanctioning instruments and, among other things, in recent times we have also witnessed a "retreat" of fundamental safeguards. For example, the European Court of Human Rights, as mentioned, had opened up important prospects on the subject of protecting the right of *bis in idem*, but the Court of Justice has somewhat slowed the process by taking into account a series of principles and - in my opinion - debasing that principle of proportionality.

At the same time, the Court of Justice has introduced forms of third-party liability - for example in the case of carousel frauds - and the same statute of limitations that the Taricco ruling called for to be disapplied in that specific case, which are rules on statutes of limitations that in any case protect and guarantee the individual. From this point of view, in general, I would also like to imagine a greater attention to prevention and cultural profiles. In this respect, I hope that both Italy and Europe will realign in a slightly different direction, [with] a slightly different design from the current one, thank you.

Costantino Grasso:

[To Donato Vozza] Thank you, Donato. Before we go ahead and close the session [To Lorenzo Pasculli] Lorenzo, do you have any final remarks?

Lorenzo Pasculli:

Let me unmute myself - I am particularly interested in prevention, so I agree with what Donato said just now about the idea of cultural aspects. The lack of initiatives in this respect over the last ten or twenty years, depending on which of the two advertisements we are targeting, is a matter of some concern. For us, the suggestions that arose from many people concerning a hyper reaction from the Italian system are very interesting.

The only consideration I would make on this issue is: are we talking about hyper-reactivity that only exists on paper or are we talking about hyper-reactivity in fact? Because if the excessive punitive measure is not certain - and there's no guarantee of an actual punishment - perhaps this whole situation is a house of cards. So, I don't know, these are considerations

that would be interesting to submit to the experts from other nations as well. But I don't have anything else to add. It has been very interesting, and I really thank everyone for their participation.

Costantino Grasso:

So, I thank you sincerely, thank you for being with us after the scheduled time, it has been a pleasure, I will now end the recording.