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VAT fraud: Interdisciplinary Research on Tax crimes in the European Union

Research Associate Report

Prevention, punishment and punitive damages: Strengths and weaknesses of the Italian anti-corruption strategy in the area of taxation

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July, 2021

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Prevention, punishment and punitive damages: Strengths and weaknesses of the Italian anti-corruption strategy in area of taxation.

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Suggested citation (OSCOLA): Pietro Sorbello, 'Prevention, punishment and punitive damages. Strengths and weaknesses of the Italian anticorruption strategy in area of taxation' (VIRTEU, July 2021) <www.virteu.com/reports>

In the fight against corruption and tax evasion, the State has various tools that must combine, synergistically, prevention and repression. However, these instruments cannot be based only on legal measures because it is also necessary to intervene on the cultural level, generating a virtuous relationship between the State and citizens. For this purpose, on the one hand, public action must be transparent and efficient; on the other hand, the more the citizen is satisfied with the public services he receives, the greater will be the spontaneous fulfillment. In this perspective, if the importance of the common good must prevail over the self-interest pursuit by any means, even illicit ones, an effective criminal policy must make the choice to violate the rules not convenient.

VIRTEU Project Alignment Statement

This technical paper has focused mainly on two of the VIRTEU research questions: The development of a phenomenological and legal notion of fiscal corruption; and the creation of a catalogue of responses and other solutions aimed at countering the practices of fiscal corruption. Concerning the former, the paper has set out definitions of tax evasion, tax avoidance and corruption according to international legal instruments (hard law and soft law). As regards the latter, the report focused on several criminal policy tools oriented to the economic analysis of law, highlighting the importance of those based on prevention and extra-criminal measures as well as restorative justice. In assessing the rules' effectiveness, a criminal policy must consider that prevention will be more achievable the less the chances of impunity are. To get closer to this ideal condition, it will be more useful combining repression with a prevention system focused on collaboration with institutions as well as on tools that favour resipiscence and reparation. From this point of view, the report intends to highlight how the regulatory approach not only pursues deterrence, but also makes the violation of the rule not convenient. These ideas should directly contribute to the development of a wide range of measures against the criminal phenomena on which the Core Research Team at VIRTEU is focusing.

1. Introduction.

Tax evasion and corruption are strongly connected phenomena because the non-payment of taxes represents, together with false accounting, one of the main tools to create the black funds to pay the price of corruption. Even before the legal level, both phenomena need to be scrutinised on the economic, social and political level.

Firstly, tax evasion and corruption slow down growth as they steal public resources in favour of a few so-called "free riders" and distort competition because the tax evader exploits illegal advantageous positions. Secondly, they are particularly serious when there is no strong social disapproval and are even socially accepted. Finally, corruption can alter electoral processes, government stability and the democratic order itself.

The two phenomena meet when the tax evader/corruptor and the corrupt public official pursue an illicit enrichment. In general, through the threat of sanction, the legal system pursues compliance with the law. From the tax compliance perspective, the sanction is even more important because it intends to guarantee the tax revenue and public expenditure. This diversion of resources may also depend on the unlawful conduct of a public official who receives an undue utility or violates her or his office's duties to ensure the achievement of an illicit profit. The intertwining of these two phenomena better sheds light on relevant constitutional interests at stake, worthy of protection also by means of criminal law.

On the one hand, the contribution to public spending is based on one's possibilities (Article 53 of the Italian Constitution); on the other hand, for those citizens who perform public functions, the duty to fulfil them with discipline and honour[1] (Article 54 of the Constitution). The violation of this latter duty introduces the (meta)legal meaning of corruption, which describes that degeneration contrary to the interest of public administration's good performance[2] (Article 97 of the Constitution).

Faced with this pathology, the fight against the illegal economic interest pursued by the tax evader/corruptor and the corrupt public official requires not only a deterrent approach but a disincentive one where the recipient of the rule also evaluates whether it is convenient to violate it.

[1] Article 8 of the United Nations Convention against Corruption, signed in Merida on 2003, provides that "in order to fight corruption, each State Party shall promote, *inter alia*, integrity, honesty and responsibility among its public officials, in accordancewith the fundamental principles of its legal system. 2. In particular, each State Party shall endeavour to apply, within its owninstitutional and legal systems, codes or standards of conduct for the correct, honourable and proper performance of public functions […]".

[2] According to the Article 1, the purposes of the United Nations Convention against Corruption is "c. to promote integrity, accountability and proper management of public affairs and public property". For these purposes, the following article (i.e., Article 5) requires that "each State Party shall, in accordance with the fundamental principlesof its legal system, develop and implement or maintain effective, coordinatedanti-corruption policies that promote the participation of society and reflect theprinciples of the rule of law, proper management of public affairs and publicproperty, integrity, transparency and accountability".

The repression of criminal law is here linked to the prevention, according to an integrated criminal policy. Therefore, it is a different approach from the traditional punishment-based approach. From this point of view, every regulating behaviour mechanism (including law) falls within the notion of social policy. The criminal policy is placed as in a system of concentric circles.

While social policy aims to avoid the development of criminogenic factors, criminal policy, through preventive and sanctioning measures, criminal or administrative, aims at reducing the offences against the penal system. At the last stage, this policy is based only on criminal penalties.
A reflection on these areas of intervention allows us to record the evolution of the legal approach to corruption.

In fact, in the last twenty years, corruption has come to prominence on the international scene. Initially, the adverse effects of this phenomenon on society, the economic system competitiveness and the legitimacy of democratic institutions were not felt with the same current awareness. High levels of corruption distort the efficient allocation of resources, affect the gross domestic product and, consequently, the public debt. Similarly, on the other side of the coin, tax evasion also deprives the State of the resources necessary for its functioning. These effects have made corruption a "universal crime"[3], considering that the most important international conventions[4] have required its indictment together with money laundering. Furthermore, as a serious crime, corruption is one of the underlying predicate crimes of money laundering. It is considered so by enacting the second AML Directive (2001/97/EC) on the EU basis. In the same sense, the following fourth AML Directive (2015/849/EU) also included tax crimes in the notion of criminal activity relevant to money laundering.

The simple consideration that both the corrupt public official and the corrupting evader need to launder illicit proceeds allows us to anticipate some reflections on contrast strategies. In 1991, on the basis of the Financial Action Task Force (FATF) recommendations, Directive 91/308/EEC (the First AMLD) recognised that "criminal instruments should not, however, be the only way to combat money laundering, given that the financial system can play an extremely effective role" and that "the task of defending the financial system from money laundering cannot be carried out by the authorities responsible for combating this phenomenon without the cooperation of credit and financial institutions"[5]. The progressive extension of the subjects under the AML obligations had the

[3] In these terms CANTONE R.- CARLONI E. (2018), *Corruzione e anticorruzione. Dieci lezioni*, Feltrinelli, p. 18.
[4] In chronological order, the Inter-American Convention against Corruption of 29.03.1996, the European Union Convention on the fight against corruption, adopted on 26.05.1997, the OECD Convention on combating bribery of foreign public officials in international business adopted on 21.11. 1997, the Criminal Convention on corruption of the Council of Europe on 27.01.1999 and the civil convention, adopted on 04.11.1999, the African Union Convention on the prevention and fight against corruption, adopted on 12.07.2003 and the United Nations Convention against corruption, opened for signature in Merida on 09.12.2003.
[5] It is essential that gatekeepers (banks and other obliged entities) apply measures to prevent money laundering and terrorist financing. Traceability of financial information has an important deterrent effect. The European Union adopted the first AML Directive in 1991 in order to prevent the misuse of the financial system for the purpose of money laundering. It provides that obliged entities

effect of creating a control network, based on the risk assessment and the active collaboration of all those involved in the presence of suspicions of money laundering operations.
Apart from the need to not exclude some sectors from anti-money laundering legislation, in order to avoid regulatory gaps and with them money laundering "facilitated" channels, it is also necessary not to limit the prevention system through a limited notion of money laundering based on few predicate crimes[6]. To avoid this risk, Article 3 of Directive (EU) 2015/849[7] (the Fourth AMLD) included in the relevant notion of criminal activity "any type of criminal involvement in the perpetration of the following serious crimes: [...] d) fraud to the detriment of the financial interests of the Union, if it is at least serious […]; e) corruption; f) all crimes, including tax crimes relating to direct and indirect taxes, as specified in national law, punishable by a deprivation of liberty […]"[8].
The same preventive approach was later borrowed in the anti-corruption strategy, starting with the United Nations Convention of Merida, which combined the traditional repressive approach with the preventive one focused on risk assessment and transparency of administrative action. To this aim, the right of access has been strengthened and the regulation of conflicts of interest and incompatibilities have been regulated.

For an all-out contrast strategy, a criminal policy integrated by the Economic Analysis of Law (EAL) can provide useful insights into the prevention and repression of both corruption and crimes those related to evasion.

2. Definitions and critical aspects.

2.1. Tax fraud, tax evasion and tax avoidance. Distinctions, consequences and measures

When a rule assigns a legal position of advantage, allowing one to realise his own interest, the legal system recognises a subjective right. By virtue of this right, the owner has a series of powers and faculties. The protection accorded to this situation is potentially unlimited, as long as the concrete exercise of this right complies with the objective function for which the power itself is attributed. Compliance with the rules a necessary, but not sufficient, condition for the exercise of the right to

shall apply customer due diligence requirements when entering into a business relationship (i.e. identify and verify the identity of clients, monitor transactions and report suspicious transactions). This legislation has been constantly revised in order to mitigate risks relating to money laundering and terrorist financing: https://ec.europa.eu.

[6] A limited money-laundering notion would affect both judicial cooperation in cases where double criminality is requested and the suspicious transaction report obligation.

[7] The 11st considerandum of the IV anti-money laundering directive emphasizes how important is highlighting that "tax crimes relating to direct and indirect taxes are included in the broad definition of 'criminal activity' in this Directive, in line with the revised FATF Recommendations [2012]. Given that different tax offences may be designated in each Member State as constituting criminal activity punishable by means of the sanctions as referred to in point (4)(f) of Article 3 of this Directive, national law definitions of tax crimes may diverge. While no harmonisation of the definitions of tax crimes in Member States' national law is sought, Member States should allow, to the greatest extent possible under their national law, the exchange of information or the provision of assistance between EU Financial Intelligence Units (FIUs)".

[8] The link between EU financial interests, money laundering and corruption is also explained in Article 4 of Directive (EU) 2017/1371 of 5 July 2017, relating to the fight against fraud affecting the financial interests of the Union through criminal law.

be worthy of protection. If the law attributes a subjective right, its exercise is legally inadmissible if it exceeds not an external limit (with respect to other rights or prohibitions), but the internal one (with respect to its purpose). This limit concerns the purpose of exercising the right and compliance of this exercise with the rule's objective function. Any discrepancy integrates an abuse of law and, in the tax field, the equivalent is the tax avoidance concept.

Tax avoidance traditionally occupies an intermediate space between legitimate tax savings and tax evasion. The taxpayer evades taxes when he conceals his income, not declaring it (or partially declaring it) to the tax administration. In the case of tax avoidance, on the contrary, there is no violation of the rule because the taxpayer does not hide the ability to pay, but circumvents the tax rules[9]. Tax avoidance is, therefore, the circumvention of tax precepts. This behaviour is formally compliant with the rules, but not with their ratio. By exercising his right to contractual autonomy, the tax avoider uses legal instruments for purposes unrelated to their function with the sole or overriding objective of achieving a tax advantage. In tax evasion and tax avoidance, the taxpayer pays a lower tax than the one due. Based on this analogy and the erroneous conceptual mix[10] that whereby tax-evading also includes the notion of tax avoided, Italian courts have affirmed tax avoidance's criminal relevance.[11] This is a fundamental step.

Without an express legal basis, in a civil law system, there can be no criminal liability. Briefly, those who avoid taxes do not violate any specific provision, but his conduct is contrary to the purpose of the tax law and exclusively pursues an undue tax advantage. Tax avoidance is the result of conduct carried out "under the sunlight", without concealment of the taxable matter or simulated acts; there is no tax avoidance if the taxpayer achieves a legitimate tax saving because taxpayers are free to follow, among several alternatives, the one that is less taxable.

The affirmation of tax avoidance's criminal relevance has generated strong uncertainty, often undermining the relationship of trust between entrepreneurs and the tax administration. In 2015, also for reasons of legal certainty, the criminal irrelevance of tax avoidance was asserted. With the

[9] In these terms TESAURO F. (2005), *Istituzioni di diritto tributario. Parte generale*, Torino, 2011, p. 241. According to LUPI R., *Diritto tributario. Parte generale*, Milano, p. 103, there is a legitimate tax saving when the taxpayer, being able to achieve a certain result using "a plurality of mutually interchangeable legal regimes", makes his choice only "according to the tax treatment" (so called "tax shelter").

[10] See FALSITTA G. (2010), *Spunti critici e ricostruttivi sull'errata commistione di simulazione ed elusione nell'onnivoro contenitore detto "abuso del diritto"*, in *Riv. dir. trib.*, 6, p. 349.

[11] According to the Supreme Court, not any tax evasive conduct can assume criminal relevance in terms of unfaithful or omitted declaration, but only that which corresponds to a specific circumvention hypothesis expressly provided for by law. In this case, in fact, the taxpayer is required to take into account, when preparing the tax return, the overall tax regulatory system, which assumes a mandatory nature in the specific anti-avoidance provisions. In other words, in the criminal field the existence of a general anti-avoidance rule cannot be affirmed, which is independent of specific anti-avoidance regulations (i.e. Article 37-*bis* of Decree of the President of the Republic 600/1973), while the criminal relevance of conducts that fall within a specific anti-avoidance tax provision can be affirmed. See Court of Cassation, Criminal Section II, 28.02.2012, n. 7739, and FLORA G. (2011), *Perché l'"elusione fiscale" non può costituire reato (a proposito del "caso Dolce & Gabbana")*, in *Riv. trim. dir. pen. econ.*, 4, p. 865.

introduction of Article 10-*bis* of Law No 212 of 2000, the Italian legislator established a general anti-avoidance clause, applicable to all taxes, imposing an administrative sanction on tax avoidance.
The importance of the general anti-avoidance clause is confirmed by Article 6 (General anti-abuse rule)[12] of Directive 2016/1164/EU of 12 July 2016[13], containing rules against tax avoidance practices that directly affect the functioning of the internal market.
For the purposes of the tax liability calculating, the first tax avoidance consequence is the financial administrations shall "ignore an arrangement or a series of arrangements which, having been put into place for the main purpose or one of the main purposes of obtaining a tax advantage that defeats the object or purpose of the applicable tax law". In this case, the tax liability shall be calculated in accordance with national law, as if the acts had never been put in place.
There are relevant distinctions between tax evasion and tax avoidance on the one hand and tax evasion and tax fraud on the other. As for the first, a useful contribution comes from the OECD Glossary of Tax Terms[14] according to which:

- tax evasion is "a term that is difficult to define but which is generally used to mean illegal arrangements where liability to tax is hidden or ignored, i.e. the taxpayer pays less tax than he is legally obligated to pay by hiding income or information from the tax authorities"[15];
- tax avoidance is "a term that is difficult to define but which is generally used to describe the arrangement of a 'taxpayer's affairs that is intended to reduce his tax liability and that although the arrangement could be strictly legal it is usually in contradiction with the intent of the law it purports to follow"[16].

A notion of tax fraud is provided in Article 3 of Directive (EU) 2017/1371 on the fight against fraud to the Union's financial interests by means of criminal law of 5 July 2017[17].

[12] Article 6: "1. For the purposes of calculating the corporate tax liability, a Member State shall ignore an arrangement or a series of arrangements which, having been put into place for the main purpose or one of the main purposes of obtaining a tax advantage that defeats the object or purpose of the applicable tax law, are not genuine having regard to all relevant facts and circumstances. An arrangement may comprise more than one step or part".

[13] In order to ensure the tax is paid in the place where the profits and value are generated, Directive (EU) 2016/1164 implemented the recommendations of the 15 actions against base erosion and profit shifting (BEPS) of the Organization for Economic Cooperation and Development published on 5 October 2015: www.oecd.org/tax/beps/beps-actions/.

[14] www.oecd.org/ctp/glossaryoftaxterms.htm#T.

[15] As a criminally relevant evasion hypothesis, Article 4 of Legislative Decree 74 of 2000 sanctions the unfaithful declaration: "anyone who, in order to evade income tax or value added tax, indicates in one of the annual declarations relating to these active elements taxes for an amount less than the effective or non-existent liabilities". The offense is integrated on the double condition that: a) the tax evaded is higher, with reference to some of the individual taxes, than one hundred thousand euros; b) the total amount of the active elements subtracted from taxation, also by indicating non-existent passive elements, exceeds ten per cent of the total amount of the active elements indicated in the return, or, in any case, exceeds two million euros".

[16] This is a different situation from the legitimate tax savings, defined by the same glossary as "tax shelter" that is "1. an opportunity to use, quite legitimately, a relief or exemption from tax to pay less tax than one might otherwise have to pay in respect of similar activities, or the deferment of tax. 2 The polite term usually given to a contrived scheme to avoid or reduce a liability to taxation".

[17] Previously, see Article 1 of the Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on the protection of the European Communities financial interests Act of the Council of the European Union of 26 July 1995.

"1. For the purposes of this Directive, the following shall be regarded as fraud affecting the 'Union's financial interests: […]

(c) in respect of revenue other than revenue arising from VAT own resources referred to in point (d), any act or omission relating to:

(i) the use or presentation of false, incorrect or incomplete statements or documents, which has as its effect the illegal diminution of the resources of the Union budget or budgets managed by the Union, or on its behalf;
(ii) non-disclosure of information in violation of a specific obligation, with the same effect; or
(iii) misapplication of a legally obtained benefit, with the same effect;

(d) in respect of revenue arising from VAT own resources, any act or omission committed in cross-border fraudulent schemes in relation to:

(i) the use or presentation of false, incorrect or incomplete VAT-related statements or documents, which has as an effect the diminution of the resources of the Union budget;
(ii) non-disclosure of VAT-related information in violation of a specific obligation, with the same effect; or
(iii) the presentation of correct VAT-related statements for the purposes of fraudulently disguising the non-payment or wrongful creation of rights to VAT refunds."

In the Italian legal system, a contribution to distinguish tax fraud, tax evasion and tax avoidance, comes from Article 1 of Legislative Decree 74/2000, under which:

- g-*bis* "objectively or subjectively simulated transactions" means apparent transactions, other than those falling within the notion of abuse of the right, as governed by article 10-bis of the law of 27 July 2000, no. 212, put in place with the intention not to carry out them in whole or in part or the transactions referring to fictitiously interposed subjects";
- g-*ter*, according to which by "fraudulent means" we mean "active artificial behaviors as well as omissions carried out in violation of a specific legal obligation, which determine a false representation of reality".

With respect to the notion of "fraudulent means", the third paragraph of Article 3 of Legislative Decree 74/2000 adds a negative requirement to the positive one provided by letter g-*ter*: "the mere violation of the obligations of invoicing and noting the active elements in the records do not constitute fraudulent means accounting or the sole indication in invoices or annotations of active elements lower than the real ones".

The joint reading of the above definitions confirms that if tax fraud involves tax evasion, the converse, however, is not valid in general. Unlike tax evasion, tax fraud is committed when the taxpayer not only does not pay taxes or pays less than he should (omissive behaviour), but he also implements tricks and deceptions (commissioning behaviour[18]) to conceal his income[19]. In these cases (the example is the fraudulent declaration through invoices for non-existent transactions) the punishment is independent of the evaded tax thresholds. The thresholds need to be provided because they express the limit beyond which the tax offence is sanctioned with the most serious sanction: without exceeding the thresholds provided for by law, tax evasion will not be criminally relevant and will lead, similarly to tax avoidance, to administrative sanction. The distinction between tax fraud, tax evasion and tax avoidance entails significant consequences on the procedures and the consequent applicable penalties.

The cases of tax fraud are the most serious tax crimes provided for by Legislative Decree 74/2000. They expose the offender to the severest punishment, including legal entities liability, and the particular form of confiscation revised to art. 12-*ter* of the same Legislative Decree. Tax evasion cases do not necessarily constitute a criminal offence because: regarding the tax return, if the evaded tax thresholds are not exceeded[20], the fact will constitute a mere administrative offence. Finally, tax avoidance does not constitute a crime, but only an administrative offence.

2.2. The notion of corruption (bribery). Corruption for the act or for the function

The acknowledgement of the worrying dimensions assumed by the corruption phenomenon has prompted the adoption of multiple regulatory instruments at the supranational level, all converging in need to prepare more effective rules to curb the spread of corruption. The main reference is to the 1999 Council of Europe Strasbourg Convention and the 2003 UN Convention against Corruption

[18] In reality, following the changes made by Legislative Decree 24 September 2015, no. 158, according to the article 1 letter g-*ter*) of Legislative Decree 74/2000, in the definition of "fraudulent means" that determine a false representation of reality have been included not only active artificial conduct, but also omissive conduct carried out in violation of a specific legal obligation.

[19] The criminal tax system introduced by Legislative Decree 74/2000 provides for criminal cases focused on the violation of the complete and faithful exposure of the tax base obligation. The cases connected to the declaration can be divided into three groups: the fraudulent, the unfaithful and the omitted tax declaration. With reference to the fraudulent one, the unfaithful tax declaration has a residual character because it punishes all hypotheses of false declaration, not supported by fraudulence: these are the declarations in which the indication of the active elements lower than the real ones, or the exposure of fictitious passive elements is not supported by a (further) fraudulent behavior, aimed at validating the data presented in the declaration. See LANZI A.-ALDROVANDI P (2020)., *Diritto penale tributario*, Milano, p. 396. In the matter of tax crimes, the residual nature of the unfaithful declaration crime, pursuant to Article 4 of the Legislative Decree n. 74 of 2000, excludes concurrence with the crime of tax fraud declaration, provided for by the previous 2, when the material conduct has as its object the same declaration, while it does not operate in the event that different conduct is contested, one for the omissions of active elements of the income and the other for non-existent passive elements. In these terms Court of Cassation, Criminal Section III, 17.01.2018, n. 41260. The aforementioned article 4 sanctions the criminal evasion constituted by the unfaithful tax return. In the absence of the specific hypotheses provided for by the previous Articles 2 and 3, the unfaithful declaration would in any case be suitable to cover the most serious hypothesis of tax fraud.

[20] Without a criminally relevant evasion, the liability of legal persons and confiscation of value will not be applied, without prejudice to the applicability of the mortgage and the attachment also for the administrative offense under the conditions of *periculum in mora* and *fumus boni iuris* provided for the article 22 of Legislative Decree 18 of December 1997, no. 472.

which have required the signatory States to criminalise, in their respective legal systems, corruption, embezzlement by public officials, trafficking of illicit influences and even corruption between private individuals.
The awareness of the limited effectiveness of criminal control and the priority role of prevention in the overall strategy to combat corruption was reflected in the UN Convention against Corruption, which, in 2012, led the Italian legislator to rethink the strategy to combat corruption and guarantee transparency through the establishment or strengthening of existing instruments such as the right of access to documents, codes of conduct and anti-corruption plans.

On a strictly criminal level, Law 190/2012 intervened on corruption crimes, abandoning the traditional Italian distinction between "proper and improper corruption"[21] (bribery). To better understand this step , it is necessary to compare the notions of corruption provided by the various international conventions, listed below in chronological order.

Inter-American Convention against corruption adopted on March 29, 1996:

- Article VI (Acts of Corruption): 1. This Convention is applicable to the following acts of corruption: a. The solicitation or acceptance, directly or indirectly, by a government official or a person who performs public functions, of any article of monetary value, or other benefit, such as a gift, favor, promise or advantage for himself or for another person or entity, in exchange for any act or omission in the performance of his public functions; b. The offering or granting, directly or indirectly, to a government official or a person who performs public functions, of any article of monetary value, or other benefit, such as a gift, favor, promise or advantage for himself or for another person or entity, in exchange for any act or omission in the performance of his public functions".

Convention drawn up on the basis of article K.3 (2) (c) of the Treaty on European Union on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union, adopted on May 26, 1997.

- Article 2 (Passive corruption): "1. For the purposes of this Convention, the deliberate action of an official, who, directly or through an intermediary, requests or receives advantages of any kind whatesoever, for himself or for a third party, or accepts a promise of such an advantage, to act or refrain from acting in accordance with his duty or in the exercise of his functions in breach of his official duties shall constitute passive corruption […]".

[21] The etymological meaning of the word "corruption" goes back to the Latin "corruptio", which is composed of "con-" and "rumpere" (to break). It indicates a spiritual and moral degeneration, depravity, total abandonment of dignity and honesty. The Italian criminal code uses this term to describe cases in which the public official waives his duties in exchange for money or other personal advantages. The traditional distinction between "proper" and "improper" corruption concerns cases in which the public official receives a utility to perform an act of his official duty (proper corruption, i.e. to issue a permit that would have been issued anyway, but in a shorter time) or a act contrary to its official duties (improper corruption, i.e. to omit a tax assessment).

- Article 3 (Active corruption): “1. For the purposes of this Convention, the deliberate action of whosoever promises or gives, directly or through an intermediary, an advantage of any kind whatsoever to an official for himself or for a third party for him to act or refrain from acting in accordance with his duty or in the exercise of his functions in breach of his official duties shall constitute active corruption […]”.

OECD Convention on Combating Bribery of Foreign Public Officials adopted on November 21, 1997.

- Article 1 (The Offence of Bribery of Foreign Public Officials): “1.Each Party shall take such measures as may be necessary to establish that it is a criminal offence under its law for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for thatofficial or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business […]”.

Criminal Convention on Corruption of the Council of Europe adopted on January 27, 1999.

- Article 2 (Active bribery of domestic public officials): “Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally, the promising, offering or giving by any person, directly or indirectly, of any undue advantage to any of its public officials, for himself or herself or for anyone else, for him or her to act or refrain from acting in the exercise of his or her functions”;

- Article 3 (Passive bribery of domestic public officials): “Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally, the request or receipt by any of its public officials, directly or indirectly, of any undue advantage, for himself or herself or for anyone else, or the acceptance of an offer or a promise of such an advantage, to act or refrain from acting in the exercise of his or her functions”.

United Nations Convention against Corruption, opened for signature on December 09, 2003.

- Article 15 (Bribery of national public officials): Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally: a The promise, offering or giving, to a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official

act or refrain from acting in the exercise of his or her official duties; b The solicitation or acceptance by a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties.

Although these notions of corruption appear to coincide, there is a distinction when not the individual act (as in the Inter-American Convention), but the function's exercise is indicted. An indictment anchored to the function and not to the single act has a wider application, anticipating the criminal protection from the completed act to the pact to make the public function available[22]. This step occurred with law 190/2012, which modified the crime of improper corruption for an act of the duty.

The reasons for this change lie in acknowledging the changes in the corrupt practices widespread in Italy in the previous twenty years. It has been recorded that the public administrator is no longer limited to trading a single official act, but grants the private individual its general availability in view of achieving an indeterminate series of advantages. The corruptive relationship no longer ends in "trading" one or more acts of one's duty. It does not end with their fulfilment because it is projected over time: the change no longer concerns the single act, but the public function's trade (so-called public official on the "pay book"[23] for a "*quid pro quo*" deal).

Since the previous version of the offence of improper bribery focused only on a single act's performance, a broad interpretation was needed to include cases in which the public official was paid to make his functions available, regardless of whether the act was adopted. The amendment introduced in 2012 legitimised this interpretation, replacing the crime of improper corruption with the new figure of corruption for the function's exercise (even potential). The notion of improper corruption provided for the Italian Penal Code[24], as linked to a single act and not to the function, was more limited than conventional notions[25]. A further consequence was the simplification of the evidence because the failure of an official act frees the public prosecutor from the onerous burden of identifying and proving the act - the public agent's behaviour about the corruptive agreement.

[22] Unlike the crime of proper corruption, provided for in Article 319 of the criminal code, where the public official performs an act contrary to the official duties.

[23] In these terms, FIANDACA G.-MUSCO E. (2013), *Diritto penale. Parte speciale* (*addenda La recente riforma dei reati contro la pubblica amministrazione*), Bologna, p. 18.

[24] According to the Article 319 of the Italian penal code: "the public official who, for omitting or delaying or for having omitted or delayed an act of his office, or to perform or for having performed an act contrary to his duties of office, receives, for himself or for a third, money or other benefits, or accepts the promise, is punished with imprisonment from six to ten years".

[25] It is more convenient to adopt a broad definition of corruption (anchored to the function and not necessarily to the single act) because the more restricted ones could lead to regulatory gaps.

2.3. The fiscal corruption. An existing model: the collusion of the military of the Guardia di Finanza

On the possibility of developing a legal notion of fiscal corruption, which includes schemes relying on a combination of elements of both fraudulent and corrupt practices, it appears useful to report the Italian experience relating to the collusion of the military personnel of the Guardia di Finanza[26]. Article 3 of the Law No 1383 1941 provides for three crimes that can be committed only by the personnel of the Guardia di Finanza and that fall within the jurisdiction of military courts: "the military of the Guardia di Finanza who commits a violation of the financial laws […], constituting a crime, or colluding with strangers to defraud the finance, or appropriates or otherwise distracts, for his own profit or for others, values or genres which he, for reasons of his office or service, has the administration or custody of or over which he exercises supervision is subject to the established penalties from Articles 215 [27] […] of the Military Penal Code of Peace […]".
Even if these crimes are different, they share the public interest in the faithful performance of the task institutionally assigned to the Guardia di Finanza. Unlike those belonging to other police forces, both civil and military, the military of the Guardia di Finanza has a special distinguishing qualification: the tax police qualification, which allows exercising penetrating administrative powers.

The need to introduce and maintain special crimes with respect to the other crimes against the public administration in the criminal code has traditionally been justified by the loyalty relationship that binds the member of the Guardia di Finanza to the State's financial interest.
The crime of most significant interest for this research concerns the collusion to defraud the finance. It is a necessarily multi-subjective crime, which requires the participation of subjects unrelated to the financial administration that is potentially damaged by the fraud.

This potential is explained by the type of offence regulated in Article 3 of Law 1383/1941, which is realised with the sole agreement to defraud the State's fiscal interest without necessarily achieving

[26] The Guardia di Finanza is a military police force reporting directly to the Minister of Economy and Finance, with general economic and financial crime-fighting competences. Its primary mission is to protect the legal economy and the businesses operating in compliance with the law, while ensuring that the Republic, the European Union, the regions, and the local governments can rely on a regular inflow and appropriate use of the resources meant for the community, and for supporting policies for economic and social development. Its activities are connected with financial, economic, judiciary and public safety: tax evasion, financial crimes, smuggling, money laundering, international illegal drug trafficking, illegal immigration, customs and borders checks, copyright violations, anti-Mafia operations, credit card fraud, cybercrime, counterfeiting currency, terrorist financing, maintaining public order, and safety, political and military defense of the Italian borders.
[27] For the existence of this crime, the military of the Guardia di Finanza must commit an act established by the law as a tax crime. If the tax crimes is committed together with other people, the title of the offense will change only for the Guardia di Finanza military, who will not be punished according to the criminal tax law (for example the offenses governed by Legislative Decree 74/2000), but by article 3 of law 1383/1941.

this result[28]. For this reason, this crime introduces a derogation from the general principle of *nemo patitur cogitationis poenam* established in Article 115 of the criminal code, according to which the agreement or incitement to commit a crime is not in itself punishable unless followed by the actual commission of the same[29]. According to the Italian Supreme Court's interpretation of Article 3, the tax interest is violated when such a fraudulent agreement:

- is aimed at concealing previously committed violations of financial laws[30];
- consists of the communication to a private individual of confidential information about an imminent office activity concerning him[31].

It is very interesting to consider the relationship between the collusion to defraud the finance and the crime of corruption for an act contrary to official duties, which results in fiscal corruption.
On this topic, the Court of Cassation affirmed the concurrence between the two crimes because they harm different legal interests. While Article 3 of Law 1383/1941 protects the regularity of tax revenues and the discipline of the Guardia di Finanza, the criminalisation of corruption protects the proper functioning of the public administration and the interest that the acts of public officials are not subject of merchandise[32].

Unlike bribery crimes, no acceptance of the promise or receipt of benefits is required by Article 3 of Law 1383/1941. The criminal intervention's anticipation is therefore evident, as well as the different treatment of the military of the Guardia di Finanza compared to the civilian civil servant of the Financial Administration, which the Constitutional Court has deemed legitimate[33]. It is necessary to consider whether this type of collusion is a useful criminal policy tool in tax matters. Its application is limited to the officers of the Guardia di Finanza in the Italian system. If extended to all financial administration members, it would undoubtedly strengthen the fight against relevant financial

[28] According to the Supreme Court, this crime requires the indication or adoption of any expedient or other fraudulent means, capable of damaging the fiscal interest of the State. This interest is endangered, both by collusive conduct aimed at tax evasion, and by those aimed at preventing its assessment. See Court of Cassation, Criminal Section I, 16.03.2017, n. 18545.
[29] See Court of Cassation, Criminal Section I, 15.10.2014, n. 45864.
[30] In these terms Court of Cassation, Criminal Section VI, 29.09.1988, n. 9556. This circumstance also integrates the crime of omission of official acts pursuant to article 328 of the criminal code or, in particular, the crime of failure to report according to the following article 361.
[31] This circumstance also integrates the crime of disclosure of official secrecy pursuant to article 328 of the criminal code. See Court of Cassation, Criminal Section I, 06.06.2019, n. 37820.
[32] See Court of Cassation, Criminal Section VI, 28.11.1997, n. 1319.
[33] In the judgment of 08.04.1976, n. 70, the Constitutional Court ruled on the legitimacy of Article 3 of Law 1383/1941, having regard, among other things, to the deemed unjustified difference in treatment for the military of Guardia di Finanza with respect to civilian employees of the Financial Administration and other military personnel. For Court the question of constitutional legitimacy was unfounded because the greater gravity of the legislation concerning members of the Guardia di Finanza is not enough to make Article 3 unreasonable and therefore harmful to the equality principle. Despite being functionally framed in the financial administration, the Guardia di Finanza has a strong military character, which in itself can already justify the application of a more rigorous discipline. In addition, the specific, though not exclusive, task of the members of the Guardia di Finanza is to prevent, search for and report violations of financial laws. The aforementioned military personnel, cumulating the faculties of the tax police and the judicial police, have a complex of powers that have no parallel in the other police bodies: www.cortecostituzionale.it.

crimes, because it involves an anticipation of the criminal intervention with respect to corruption, since the promise or bestowal of the bribe is not necessary.

3. Criminal policy and the Economic Analysis of Law: a perspective for addressing regulatory problems

Whether or not to criminalise certain conduct is conditioned by the constitutional relevance of the interest at stake and the outcome of multiple checks in different directions. One relevant check concerns the rationality of the sanction's purpose, which also considers the utilitarian evaluation of the subject. If the legal rule regulates the behaviour, the Economic Analysis of Law (EAL) evaluates which behaviour the rules encourage or discourage. By applying the theory of prices to the law, predicting how people will react to changes in prices, the penalties for violating the rules are analysed as incentives to behave because "the reasonable man referred to in the law behaves in an analogous way to the rational man of the economy"[34].

As is known, the EAL studies legal phenomena through the method of economic sciences and the use of mathematical logic, which is why it is understandably foreign to non-mathematicians[35]. Many law areas are explored with this method, such as property rights[36] and civil liability for road accidents[37]. EAL is also adopted to develop the economic analysis of the family, couple relationships[38] and jurisdiction[39]. To the end of this chapter, the economic analysis of the sanction is relevant[40].

The rational choice theory (RCT), together with other economic theories on behaviour, has over time known several variants, each of which has strengths and weaknesses, additions and corrections[41].

The modern view on our decision-making process, based on countless research in the field of applied psychology starting in the 1970s and now widely accepted in the scientific community

[34] See COOTER R.D. (1993), *Diritto ed economia*, in *Enciclopedia delle scienze sociali*, p. 100: https://www.treccani.it/enciclopedia/diritto-ed-economia_%28Enciclopedia-delle-scienze-sociali%29/

[35] In these terms KOROBKIN R.B.- ULEN T.S. (2000), *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, in *California Law Rev.*, 88, p. 1054, who invite to avoid that "mathematical elegance becomes the main objective" in the Economic Analysis of Law.

[36] See COASE R.H. (1960), *The problem of social cost*, in *The Journal of Law and Economics*, vol. 3, Oct., p. 1

[37] See CALABRESI G. (1961), *Some thoughts on risk distribution and the law of torts*, in *The Yale Law Journal,* Mar. 1961, p. 499; CALABRESI G. (1970), *The Cost of Accidents. A Legal and Economic Analysis*, *Yale University Press*.

[38] In these terms CALABRESI G. (2007), *Cosa è l'analisi economica del diritto*, in *Rivista diritto e scienza delle finanze,* 3, p. 344.

[39] See VISCO DOMANDINO V.- GORINI S. (1998), *Profili di analisi economica della crisi della giurisdizione civile in Italia*, in *Riv. politica economica*, 7, p. 61 ss.

[40] On the Economic Analysis of Law applied to the sanction, BECKER G. (1968), *Crime and Punishment: An Economic Approach*, in *Journal of Political Economy*, vol. 76, no. 2, p. 169.

[41] See ANDERSON E. (2000), *Beyond* Homo Economicus. *New developments in theories of social norms, Philosophy and Public Affairs*, Vol. 29, 2, p. 170.

demystifiying the idea of full rationality. The research[42] has shown that our reasoning is limited and that our decisions are strongly influenced by our (often distorted) perception of reality. As a result, our choices are, to a large extent, predictable but not rational.

The above-considered rational choice theory type is anyway able to provide useful regulatory information: it does not operate as a categorical imperative, at least as a hypothetical imperative "if you want this, then do"[43]. It does not postulate (since it cannot) economic rationality as universally necessary in every individual's choice. The individual is essentially utilitarian, although capable of making mistakes and subject to many constraints[44].
In any case, the cultural stimulation of the EAL's contribution to criminal law "is still useful to strongly recall that the rational paradigm, even regardless of its heuristic capacity of conduct, in the economic sector presents itself with a character of absolute normality, so much so that the irrational corporate crime appears quite exceptional and scholastic"[45].

To support the permanent usefulness of this contribution, particularly in the fight against corruption, it is necessary to consider that one of the pillars of the fight against corruption is the cultural one, as highlighted in the UN Convention against Corruption preamble. In this way, it is possible to establish a virtuous circulate relationship between law and customs. In this perspective, the code of conduct for civil servants adopted with the Decree of the President of the Republic of 16 April 2013, n. 62, which defines the minimum duties of diligence, loyalty, impartiality and good conduct that public employees must observe. In particular, on the subject of gifts, remuneration

[42] Recent research shows that most of the wrong things are committed by individuals who, instead of being guided by deliberative reasoning, have simply been carried away by circumstances without proper consideration of the consequences of their actions. For exemple, white-collar criminals are not merely driven by excessive greed or hubris, nor do they usually carefully calculate costs and benefits before breaking the law. Instead, Soltes shows that most of the executives who committed crimes made decisions on the basis of their intuitions and gut feelings. The trouble is that these gut feelings are often poorly suited for the modern business world where leaders are increasingly distanced from the consequences of their decisions and the individuals they impact. The extraordinary costs of corporate misconduct are clear to its victims. See SOLTES E. (2016), *Why they do it: inside the mind of the white-collar criminal*, *PublicAffairs*.

[43] In these terms CARUSO S. (2000), Homo œconomicus: *paradigma, critiche, revisioni: saggio sui (discutibili) presupposti antropologici della razionalità utilitaria e sulle implicazioni ideologiche della loro entificazione*, Firenze, p. 3, which identifies *homo oeconomicus* as an instruction manual to commensurate the means to the purpose and guidelines to optimize the cost / benefit ratio. This is what Max Weber called "rationality with respect to purpose", Horkheimer "instrumental reason" and Habermas "strategic action".

[44] According to BECKER G. (1978), *The Economic Approach to Human Behavior*, *University of Chicago Press*, Chicago, p. 14, "any kind of behavior can be conceived as a game between actors who maximize their utilities starting from a stable set of preferences and who do this, on a plurality of markets, accumulating an optimal amount of information and other resources". As noted by CARUSO S. (2000), Homo œconomicus: *paradigma, critiche, revisioni: saggio sui (discutibili) presupposti antropologici della razionalità utilitaria e sulle implicazioni ideologiche della loro entificazione*, Firenze, p. 6, this approach is also close to the realistic version of rational choice theory, but not identical. Indeed, Becker considers rational choice a prevalent form of individual behavior, but he does not exclude the possibility of irrational behavior with respect to the purpose of resources (all kinds of resources, including knowledge) and the existence of certain constraints (not only economic, but legal, moral or otherwise). Therefore, the economic approach recommended by Becker does not assume as its principle the utilitarian rationality of every single decision (or of the majority of them) but rather the universal traceability of every social sphere to a sort of market, characterized by supply and demand. of certain goods, where both rational and irrational behaviors can occur. See BECKER G., *Irrational behavior and economic theory*, The *Journal of Political Economy*, LXX, 1, Feb. 1962, p. 1.

[45] In these terms ALESSANDRI A. (2005), *Attività d'impresa e responsabilità penali*, in *Rivista italiana diritto penale e processo*, 2, p. 538.

and other benefits, Article 4 provides that "the public employee does not ask for, or solicit, for herself/himself or others, gifts or other benefits. The employee does not accept, for herself/himself or others, gifts or other benefits, except those of modest value [46] occasionally made in the context of normal courtesy relations and in the context of international customs. In any case, regardless of the circumstance that the fact constitutes a crime, the employee does not ask, for herself/himself or for others, gifts or other benefits, not even of modest value by way of consideration to perform or to have performed an act of her/his office by subjects who may derive benefits from decisions or activities inherent to the office, nor from subjects towards whom he is or is about to be called to perform or carry out activities or powers of the office held".

Within this framework, it is hard to believe that corrupt public officials are not simply driven by excessive greed or arrogance or that they do not carefully calculate costs and benefits before breaking the law.

In this perspective, in assessing the rules' effectiveness, a criminal policy must then consider that prevention will be more achievable the less the chances of impunity are. To get closer to this ideal condition, the exclusive use of the penalty is ineffective because a criminal policy is more useful if it combines repression with a prevention system focused on collaboration with institutions as well as on tools that favour resipiscence and reparation.
In addition, to counter the corruption phenomena related to the violation of the State or the European Union's financial interests, the goal is to intervene on the most relevant regulatory problems such as the probability of being discovered, convicted, and to cancel any utility gained from the violation.

3.1. Prevention and increasing the probability of discovering the violations

First of these regulatory problems (increasing the probability of discovering the violation), since it is not possible to unlimitedly strengthen[47] the public supervisory authorities, it is necessary to privilege the public-private partnership in order to prevent offences and provide for special investigative techniques in fighting against specific crimes. A consolidated example of the public-private partnership, very useful for bringing out corruptive facts, is the suspicious transaction report obligation[48]. Pursuant to Article 35 of Legislative Decree 21 November 2007, no. 231, "the obliged

[46] "By gifts or other utilities of modest value we mean those of a value not exceeding, as an indication, 150 euros, also in the form of a discount. The codes of conduct adopted by the individual administrations may provide for lower limits, even up to the exclusion of the possibility of receiving them, in relation to the characteristics of the body and the type of duties".
[47] For this purpose, those provisions that allow the entrusting of assets to the police forces that carried out the seizures and confiscates them are useful. For example, the Article 18-*bis* of Legislative Decree 10.03.2000, n. 74 provides that assets seized in the criminal proceedings relating to any tax offense, other than money and financial resources, can be entrusted by the judicial authority in judicial custody, to the financial administration bodies that request it for their own operational needs.
[48] The same fulfillment is referred to in Article 52 of the UN Merida Convention with reference to the "prevention and detection of transfers of proceeds of crime": "each State Party shall take such measures as may be necessary, in accordance with its domestic law, to require financial institutions within its jurisdiction to verify the identity of customers, to take reasonable steps

entities, before carrying out the transaction, send without delay to the FIU, a report of suspicious transaction when they know, suspect or have reasonable reasons to suspect that money laundering operations are in progress or have been carried out or attempted financing of terrorism or that the funds, regardless of their size, come from criminal activity".

Since this obligation arises in case of mere suspicion, the suspicious transaction report best expresses the active collaboration principle. It allows anticipating the competent authorities' intervention according to the preventive purpose of the AML discipline[49]. The same preventive purpose can be seen, in the tax field, with the collaboration between the taxpayer and the financial administration[50], and in the compliance models whose adoption and effective implementation exempts the legal person from liability with respect to specific predicate crimes internally committed by individuals in top positions or subordinates to them[51].
Although the inclusion of tax crimes among those involving the entities liability has been contested[52] and, in any case, it has occurred almost twenty years[53] after the introduction into the Italian legal system, this form of liability is a significant criminal policy tool[54].

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to determine the identity of beneficial owners of funds deposited into high-value accounts and to conduct enhanced scrutiny of accounts sought or maintained by or on behalf of individuals whoare, or have been, entrusted with prominent public functions and their family members and close associates. Such enhanced scrutiny shall be reasonably de-signed to detect suspicious transactions for the purpose of reporting to competent authorities and should not be so construed as to discourage or prohibit financial institutions from doing business with any legitimate customer".

[49] The whistleblowing institution pursues the same purpose. In this regard, Article 33 of the Merida Convention invites States to incorporate "into its domestic legal system appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent Authorities any facts concerning offences established in accordance with this Convention".

[50] As expressly provided for by the article 10 of the Statute of Taxpayers' Rights (Law no. 212 of 27 July 2000). It finds its maximum expression in the "cooperative compliance" regime established by Legislative Decree 5 August 2015, no. 128, wich introduced provisions on legal certainty in relations between tax authorities and taxpayers.

[51] In this regard, even beyond what Directive 1371/2017 required, Italian legislator extended the liability of entities including the most serious crimes in the field of direct and value added taxes provided for by Legislative Decree 10 March 2000, n. 74. See Law Decree 26 October 2019, n. 124 and Legislative Decree 14 July 2020, n. 75, which implemented Directive (EU) 2017/1371 and has expanded the catalog of offenses from which the liability of legal persons derives by including embezzlement offenses by public officials (Article 314 of the Criminal Code), abuse of office (Article 323 of the Criminal Code), fraud in public supplies (Article 356 of the Criminal Code), undue receipt of contributions from the European Agricultural Guarantee Fund (Article 2 of Law No. 898 of 23 December 1986), smuggling as well as other unforeseen tax crimes from DL 124/2019. In the aforementioned art. 25-*quinquiesdecies,* a paragraph 1-*bis* has been inserted which extended the legal person's responsibility for the crimes of unfaithful declaration (art. 4 of Legislative Decree 74/2000), omitted declaration (art. 5) and undue compensation (art. 10-*quater*), provided that they are "committed in the context of cross-border fraudulent systems and in order to evade value added tax for a total amount of not less than ten million euros".

[52] The reason is in the excess punishment that would result from adding to the criminal sanction provided for the natural person and the tax sanction provided for the legal person, a *tertium genus* of the administrative sanction pursuant to legislative Decree 231/2001 for the legal person.

[53] While tax crimes were included in the liability system of legal entities only in 2019 (Article 25-*quinquiesdecies* of the legislative decree 231 of 2001), corruption is one of the offences (Article 25 of the same decree) involving the liability of legal persons since 2001, from the introduction of the liability of entities in the Italian legal system. The consequences of the liability of legal entities are: pecuniary sanctions, disqualification sanctions (for example the interdiction of the activity, the suspension or revocation of authorizations, the ban on contracting with the public administration and advertising goods or services, the exclusion from public funding or revocation of those granted), confiscation and publication of the sentence.

[54] The ability of the law to guide behavior is subordinated to the message that illegal tax savings are not only never convenient, but also rather expensive. An effective anti-tax evasion policy is based on the administration's deterrent capacity rather than on an

It is complementary to voluntary tax compliance, which is the tax system's essential element.
In this perspective, an effective strategy to combat tax evasion must begin from an accurate analysis of the (dis)incentives to evade taxes. From a theoretical point of view, citizens evade taxes to obtain an economic advantage. Theoretical models on tax evasion suggest that taxpayers consider the benefits of tax evasion and the expected costs in deciding whether to evade taxes. In particular, those who evade taxes pay less, but face the risk of being caught and paying both the taxes due and the related penalties. In this context, if the benefit exceeds the expected cost, the taxpayer is likely to choose to evade tax obligations. The choice to evade taxes depends on the perceived likelihood of being discovered, which acts as a disincentive because of the negative consequences.

In general, the exemption from liability for legal persons is under the condition of adoption and effective implementation of compliance models to prevent corruption and tax crimes from which the corruption price is often obtained. It is clear that in addition to the natural preventive purpose, these organisational models also make it possible to increase the probability of uncovering the offences. On the public side, the same purposes are pursued at two levels: upstream, with the national anti-corruption plan adopted by the competent national authority; downstream, by each individual public administration on the basis of the indications in the national plan, of prevention planning with the analysis and assessment of specific corruption risks as well as organisational interventions to prevent them[55].

Still, regarding the regulatory problem of increasing the chances of discovering the violation, a useful contribution for law enforcement authorities comes from the interoperability of databases and predictive analysis. In summary, if this regulatory problem affects the acquisition of the crime report, the new technologies[56] offer a solution, in particular, the automated processing of personal data "for the purposes of prevention, investigation, detection and prosecution of crimes" as required by the Directive 2016/680 of 27 April 2016[57].

Since the choice to evade taxes depends on the perceived probability of being discovered, an epochal turning point in the financial administration's control capacity took place with the

impractical and costly control of the mass of taxpayers. In this perspective, a fundamental contribution comes from the crossing of databases and the use of metadata to develop risk analyzes.

[55] Due to the preventive purpose, the "administrative" concept of corruption has a broader meaning than the criminal one because it includes all situations of abuse of power to obtain private advantages. This expansion responds to the different logic of prevention, in which situations of merely potential risk become significant and must be assessed according to a risk-based approach. This is the so-called "maladministration", which the law 6 November 2012, no. 190 through the adoption of a code of conduct, the violation of which entails disciplinary, civil, administrative and accounting liability.

[56] On the subject, please refer to SORBELLO P. (2019), *Banche dati, attività informativa e predittività. La garanzia di un diritto penale del fatto*, in *Dir. pen. cont. – Riv. trim.*, n. 2, p. 374 ss.

[57] Directive on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA

establishment of the register of accounts and deposits (which later became the financial archive[58]). It has allowed the automatic identification of intermediaries in the relationship with the taxpayer. Until 2011, financial investigations were instrumental because it was first necessary to select the taxpayer to be checked and only then the financial reports archive could be consulted. For greater effectiveness in combating tax evasion, since 2012, financial operators have also been obliged to periodically communicate movements and extra-account transactions, all information that the financial administration can use to prepare specific selective lists of taxpayers at greater risk of conducting evasion[59]. The integrated use of this information allows selecting the companies for which, despite being financial assets, the declaration for tax purposes has been omitted or presented for lower amounts. The automatic matching of the information contained in the archive of financial reports with the declared amounts allows, in some cases, to acquire the crime report almost immediately, avoiding the tax offense extinction by prescription.

The latest intervention that further enhanced the use of the financial reports archive is represented by Law Decree 23.10.2018, no. 119, which expanded the possibility of carrying out risk analysis, thus allowing even more targeted economic and financial investigations. In the fight against tax evasion, the automatic exchange of information governed by article 16-*sexies* of the same Law Decree is very important, according to which "the Revenue Agency provides, upon request, to the Guardia di Finanza, for the execution of tax control activities or for the purpose of analysing the risk of tax evasion, elements and specific processing based on the information received [...] in the context of the automatic exchange of information for tax purposes provided for by Directive 2011/16/EU [60] of 15.02.2011, and by agreements between Italy and foreign countries".

The Directive 2011/16/EU (DAC) provisions, implemented with Legislative Decree 04.03.2014, n. 29, allows the financial administration to have the additional information from the European Union's

[58] Article 20 of the law of 30 December 1991, no. 413 introduced an obligation of communication by financial intermediaries of the identification data, including the tax code, of any person who has account or deposit relationships with them or who in any case may have access to the same. The further strengthening of the discipline took place with Article 11 of Legislative Decree 16 December 2011, no. 201.

[59] Unlike in the past, the Italian financial administration (including the Guardia di Finanza) no longer controls taxpayers only afterwards. It constantly examines the economic and financial operations carried out: bank withdrawals and payments, real estate transactions, capital and goods movements as well as all normal commercial operations, thanks to the electronic invoice database. For the same purposes, it is possible to use the information received through the automatic exchange of information for tax purposes provided for by Directive 2011/16 / EU of 15.02.2011 (relating to administrative collaboration in the tax sector) and also those information relevant for the purposes of the anti-money laundering regulations. All this information is automatically and constantly cross referenced to identify the most relevant situations for tax purposes, also taking into account the different category of taxpayers. Taxpayers are in fact divided into macro-categories: large taxpayers, medium-sized enterprises, minor enterprises and self-employed workers, non-commercial entities and finally individuals. For each category there are different methods of intervention. With reference to large taxpayers, in particular, the financial administration focuses its investigative capacity on symptomatic cases of tax evasion or avoidance such as, for example, the delocalization of income to more favorable taxation countries; transfer pricing; large refunds or aggressive tax planning.

[60] Directive on administrative cooperation in the field of taxation (DAC).

corresponding administrations in other member states, through the exchange of specified information in three forms[61].

Finally, it is necessary to highlight the importance of databases' interoperability and the greater effectiveness of the system for preventing and combating tax evasion and the laundering of illicit proceeds based on the interaction between the AML regulations and tax investigations.

3.2. The probability of a "prompt and certain" application of sanctions

The second regulatory problem concerns the application of the sanctions envisaged.
The evaluation of the rule's effectiveness is more complex. Criminal policy choices primarily concern the type of sanction imposed, whether administrative, criminal or any other consequence with an afflictive function. It is necessary to consider the consequences of the type chosen, including the impact of constitutional principles, the possible presence of subjective qualifications, thresholds or the subjective element required, considerations on the evidence, and the timing required by a fair trial. In order to convict and apply a penalty against an offender, it is necessary to gather evidence. For this purpose, the Italian criminal law provides more stringent investigative tools about the most serious crimes, such as corruption.

About the collection of evidence for corruption crimes, special investigative techniques and wiretapping are desirable also from the EAL perspective. Special investigative techniques include undercover operations and controlled deliveries, which provide the judicial police with suitable tools to fight crimes in respect of which the need for repression derives from a growing social alarm. Moreover, these techniques allow investigating modern criminal organisations, which have proved impervious to ordinary investigative means. Although a general classification is not easy, special investigative techniques are distinguished in:

[61] The Directive provides for the exchange of specified information in three forms: "spontaneous, automatic and on request.

- Spontaneous exchange of information takes place if a country discovers information on possible tax evasion relevant to another country, which is either the country of the income source or the country of residence.
- Exchange of information on request is used when additional information for tax purposes is needed from another country.
- Automatic exchange of information is activated in a cross-border situation, where a taxpayer is active in another country than the country of residence. In such cases tax administrations provide automatically tax information to the residence country of the taxpayer, in electronic form on a periodic basis. The Directive provides for mandatory exchange of five categories of income and assets: employment income, pension income, directors fees, income and ownership of immovable property and life insurance products. The scope has later been extended to financial account information, cross-border tax rulings and advance pricing arrangements, country by country reporting and tax planning schemes. These amendments which extend the application of the original Directive are loosely based on the common global standards agreed by tax administrations at international level, notably at the OECD".

See: https://ec.europa.eu/taxation_customs/business/tax-cooperation-control/administrative-cooperation.

- "active": these are aimed at acquiring evidence immediately after the offence or while the criminal activity is in progress, such as in undercover operations[62];
- "passive": these consist in the mere supervision of the criminal activity in progress, such as in the case of controlled deliveries or the deferral of seizure or arrest orders.

Article 9 of the law of March 16, 2006, no. 146, which ratified the United Nations Convention against Transnational Organized Crime (Palermo Convention) 2000, rationalised the special investigative techniques discipline[63], a fundamental tool in cross-border investigations relating to criminal organisations[64].

The same article (i.e., Article 9) allows using these investigative tools also in other sectors: with the Law 9 January 2019, no. 3, for example, circumstances in which undercover operations can be applied has also been extended for crimes against the public administration, including corruption.
Among the traditional means of searching for evidence, wiretapping is particularly important. By referring to the provisions on organised crime, article 6 of Legislative Decree 29 December 2017, no. 216 simplified the conditions[65] of wiretapping in proceedings for the most serious crimes against the public administration (i.e. corruption). It was also foreseen the intercepting communications between presents by inserting a remote administration tool (so-called "trojan horse") on an electronic device even in places of a private residence, in case of serious crimes of public officials or persons in charge of public service against the public administration.

For the acquisition of evidence, especially in the case of transnational investigations, it is also important the possibility of investigating through a joint investigative team (JIT) among authorities

[62] The European Court of Human Rights has drawn a clear distinction between undercover agent and agent provocateur, with significant repercussions in relation to the acquisition of evidence. In recognizing that special investigative techniques are not contrary to the fair trial right referred to in Article 6 of the ECHR, the European Court stressed the risk that the police incite the commission of a crime (judgment 05.02.2008, Ramanauskas V. Lithuania). The Court also deemed compatible the use of the undercover agent who, belonging to the police forces or formally collaborating with them, acts in the context of an official preliminary investigation. However, he must not go so far as to provoke criminal conduct that otherwise would not have occurred (judgment, 21.03.2002, Calabrò vs. Italy and Germany).

[63] Article 20 (Special investigative techniques of the United Nations Convention against transnational organized crime): "1. If permitted by the basic principles of its domestic legal system, each State Party shall, within its possibilities and under the conditions prescribed by its domestic law, take the necessary measures to allow for the appropriate use
of controlled delivery and, where it deems appropriate, for the use of other special investigative techniques, such as electronic or other forms of surveillance and undercover operations, by its competent authorities in its territory for the purpose of effectively combating organized crime. […]. 4. Decisions to use controlled delivery at the international level may, with the consent of the States Parties concerned, include methods such as intercepting and allowing the goods to continue intact or be removed or replaced in whole or in part".

[64] A similar provision is contained in article 50 of the Merida Convention.

[65] See the article 13 of Law Decree 13 May 1991, no. 152. The consequences were:

- less stringent conditions for ordering wiretapping (instead of serious evidence of crime, sufficient evidence is needed) and the need to intercept is sufficient, not requiring that it be "absolutely essential for the prosecution of investigations", as generally provided for by article 267, first paragraph, of the code of criminal procedure;
- the interception terms are longer (40 days for the first request, with an extension of 20 days, compared to the 15 days ordinarily provided for the first and subsequent extensions).

of different States, as required by article 49 of the UN Convention against Corruption[66]. The relationship between corruption and tax revenues is particularly relevant also for the European Union.

The Treaty on the Functioning of the European Union (TFEU) introduced provisions on judicial cooperation in criminal matters and the possibility of providing, through directives, minimum standards concerning the mutual admissibility of evidence between Member States (Article 82[67]). Moreover, the EU may adopt directives containing the minimum definition of offences and sanctions, including serious criminal areas having a transnational dimension such as corruption (Article 83[68]). The strengthening and coordination of investigations and prosecutions through Eurojust (Article 85) and the establishment of the European Public Prosecutor's Office to fight offences affecting the EU's financial interests (Article 86[69]) represents other further relevant steps. The EU may adopt necessary and dissuasive measures to allow adequate and equivalent protection to the EU's financial interests in the Member States and the institutions, bodies and agencies of the Union (Article 325, first and fourth paragraphs).

Taking into account the constitutional relevance of the interests at stake, this does not mean that the criminal penalty should be the only applicable one because the most vigorous one is not necessarily the best possible solution. In this perspective, it is also necessary to consider the sensitivity to the consequences[70] and the level of certainty and timeliness of the punishment[71].

3.3. Sanctions and compensation for damage. The principle that crime does not pay, indeed it costs

[66] Article 49 (Joint investigations): "States Parties shall consider concluding bilateral or multilateral agreements or arrangements whereby, in relation to matters that are the subject of investigations, prosecutions or judicial proceedings in one or more States, the competent authorities concerned may establish joint investigative bodies. In the absence of such agreements or arrangements, joint investigations may be undertaken by agreement on a case-by-case basis. The States Parties involved shall ensure that the sovereignty of the State Party in whose territory such investigation is to take place is fully respected".

[67] This is the regulatory basis of Directive 2014/41/EU of 3 April 2014, regarding the European Investigation Order in criminal matter, applicable to any investigative measure, except for the establishment of a joint investigation team (JIT) and the acquisition of evidence within this team according to article 13 of the Convention on Mutual Assistance in Criminal Matters between the Member States of the Union and of the Council Framework Decision 2002/465/JHA of 13 June 2002. Compared to traditional forms of judicial and police cooperation, JITs allow the collection and direct exchange of information and evidence without the need for traditional mutual legal assistance channels. Information and evidence collected in accordance with the law of the State where the team operates may be shared on the (sole) basis of the JIT agreement.

[68] Based on this provision, Directive (EU) 2017/1371 of 5 July 2017, on the fight against fraud to the Union's financial interests by means of criminal law, was adopted.

[69] This is the regulatory basis of Regulation (EU) 2017/1939 of 12 October 2017, relating to the implementation of enhanced cooperation on the establishment of the European Public Prosecutor's Office ("EPPO").

[70] A disqualification sanction can be more afflictive than a monetary or even custodial sanction, especially if the interdiction is permanent.

[71] See BECCARIA C. (1764), On crimes and penalties, Livorno, (edited by FABIETTI R.), Milan, 1973, p. 51: "the more the punishment is ready and the closer to the crime committed she will be the more just and the more useful [...] the promptness of the punishments is more useful, because the shorter the time that passes between the sentence and crime, the stronger and more enduring is the association of these two ideas, crime and punishment in the human soul, so that one sensibly considers one as a cause and the other as an inevitable necessary effect ".

The last regulatory problem concerns the deprivation of any crime benefits.

Due to its ability to affect the sphere of profit, "confiscation of property the value of which correspond to proceeds of crime"[72] has a marked homogeneity with the economic interest pursued both by the corrupting taxpayer and by the corrupt public official. It, therefore, represents an important instrument of criminal policy because it allows overcoming the narrow scope of the traditional confiscation, which, according to article 240 of Italian criminal code[73] and some special cases apart from, is anchored to the direct connection between the crime and the outcome in the Italian legal system, confiscation is a multifunctional institution[74]. In addition to the sanction's general preventive purpose, which aims to dissuade from committing crimes, it is also a security measure with a special preventive function aimed at preventing the commission of future crimes by persons deemed socially dangerous. The debate on the legal nature of confiscation has received new impetus due to some evolutionary trends that can be found in the following legislative innovations:

- expansion of cases of mandatory confiscation[75];
- confiscation even after the extinction of the crime due to prescription, provided that there has been at least one sentence of conviction (Article 578-*bis* of the criminal code);
- confiscation of value, regardless of the direct link between confiscable assets and crime.

[72] See, for example, Article 31 (Freezing, seizure and confiscation) of UN Merida Convention: "1. Each State shall take, to the greatest extent possible within its domestic legal system, such measures as may be necessary to enable confiscation of: a. proceeds of crime derived from offences established in accordance with this Convention or property the value of which corespond to proceeds of crime […]".

[73] Confiscation involves apprehension and the devolution to the State of assets that in various ways refer to the perpetration of a crime, in order to prevent the commission of other crimes. Article 240 of the criminal code distinguishes between optional confiscation (first paragraph) and mandatory confiscation (second paragraph). In the case of conviction, where it is only provided as optional, the judge can order the confiscation of the things that served or were intended to commit the crime, and of the things that are the product or the profit, on the assumption of the ascertained danger with reference use that the offender can make of the thing having the availability. The second paragraph of Article 240 provides for the mandatory confiscation of the things that constitute the price of the crime and of the things, the manufacture, use, port, possession or sale of which constitutes a crime even if no conviction has been pronounced.

[74] In the various laws, confiscation can have a different legal nature. However, if it involves the deprivation of economic assets, it can nevertheless be arranged for different purposes by assuming, from time to time, the nature and function of a penalty, or a security measure, or even a civil and administrative legal measure. For this reason, it is necessary to consider not an abstract figure of confiscation, but, in practice, confiscation as it results from a specific law. In these terms Constitutional Court, 25.05.1961, n. 29. See also Court of Cassation, Criminal United Section 02.07.2008, n. 26654: "it appears very difficult to categorize the confiscation in the rigid scheme of the security measure, since it is easy to recognize, in that of value, the distinctive features of a real sanction and, in the special one, a ambiguous, suspended between a special-preventive function and a real punitive intent. The term "confiscation", beyond the mere nominalistic aspect, identifies ablative measures of a different nature, depending on the regulatory context in which the same term is used".

[75] Obligation means lack of discretion in ordering the confiscation, not the possibility of always ordering it, even without a conviction.

The weak point of the ordinary confiscation provided for in Article 240 of criminal code concerns the need for a link to the criminal conduct, which limits what can be legitimately confiscated. As long as such a link is necessary, confiscation cannot effectively perform a disincentive function. Relieving from these evidential difficulties, confiscation of value is an irreplaceable instrument of criminal policy.

For corruption offences, in the case of conviction or plea bargain, the confiscation "for the corresponding value" provided for in Article 322-*ter* of the criminal code is mandatory and is ordered on the assets for a value corresponding to the price or profit of the crime, unless they belong to a person unrelated to it. Unlike traditional confiscation, in this case, it is not necessary to prove that the asset to be confiscated derives from the crime.

The combined provisions of Articles 19 and 25[76] of Legislative Decree 231/2001 allows for a similar measure also against the legal entities, which has pursued an interest or benefited from the crime. Mandatory confiscation, even in the "for-value form", is provided for also in Article 12-*bis* of Legislative Decree 74/2000 for the tax offences provided for therein, except for the part that the taxpayer undertakes to pay to the State: the latter condition integrates a significant incentive for the fulfilment of the tax obligation. Although not spontaneous and late, it still allows the State to receive the due taxes. Also, in tax crimes, the liability of legal persons was recently introduced, with the consequent confiscation also for value.
From a *de iure condendo* point of view, it appears interesting to generalise confiscation in the "for-value form" because it is not currently applicable to all offences provided by the Italian system. This possibility would be a strong disincentive to "by profit-motived crime" because it would allow the confiscation of assets without having to prove their direct derivation from the crime.

Confiscation, whether optional or mandatory, directly[77] or for value, is accompanied by special cases of confiscation, which simplify its application by exploiting the reversal of the burden of proof: this is the confiscation of assets whose value is disproportionate to the income declared by the recipient of the confiscation (so-called confiscation due to "disproportion").

This form of confiscation is provided for in the Article 240-*bis* of the criminal code and it concerns money, goods and other tangible and intangible assets of which whoever has been convicted of certain serious crimes is the owner or has the availability for any reason, including through a natural

[76] These are crimes of extortion, undue inducement to give or promise benefits and corruption. The provision of article 6, last paragraph, of Legislative Decree no. 231/2001 is particularly significant, according to which "the confiscation of the profit that the entity has derived from the crime is in any case disposed, even in the for value form" even when the legal person is able to provide the release proof against him.
[77] For the United Sections of the Court of Cassation, judgment 05.03.2014, n. 10561, Gubert and 21.07.2015, no. 31617, Lucci, regardless of the existence of a link with the alleged offense, the money resulting from the offense can always be confiscated since it is a fungible asset.

or legal person, in a disproportionate value to what he declared for the income taxes. This kind of confiscation operates through a presumption of unlawful accumulation. It affects all disproportionate assets to the convict's income or economic activity whose origin cannot be justified, regardless of when they have been possessed or to a certain extent back in time. The recipient has to provide an exhaustive explanation in economic (and not simply legal-formal) terms of their origin's lawfulness, presenting valid elements to overcome the presumption of illegality[78].
The conditions for applying the confiscation due to disproportion are:

- a conviction or a plea bargain for any of the crimes strictly provided for in article 240-*bis* of the criminal code, including those against the public administration, but not (originally) those for tax evasion;
- standard of living, derived from active assets such as money, goods or other utilities which he owns or has, even through a third party, available for any reason;
- disproportion between assets and declared income or economic activity carried out (it is not possible to argue that the money to purchase goods is income or reuse of tax evasion);
- failure to overcome the burden of justifying the legitimate origin of such goods.

After the last criminal tax law reform by Legislative Decree no. 124/2019, this kind of confiscation has also been extended to some tax crimes of Legislative Decree no. 74/2000, upon exceeding certain thresholds expressly set out by the Article 12-*ter* of the same Legislative Decree[79].
In the asset recovery system, the last important tool is confiscation as a preventive measure provided for in the Article 24 of Legislative Decree no. 159/2011. It operates similarly to the Article 240-*bis* of criminal code, except that a previous conviction for specific crimes is not necessary to confiscate the assets held disproportionately: the burden of proof inversion is therefore exploited and a sentence for a previous crime is not required[80]. In this case, if the asset disproportion is the objective requirement, on a subjective level, this confiscation is applicable to a series of people who can be defined as "socially dangerous"[81].

At the end of the review on the different forms of confiscation, it is necessary to mention a provision whose application is an alternative to confiscation. Given that the obligation to pay taxes arises in the presence of an income, Article 14 of the law of 24 December 1993, no. 537, introduced the

[78] In these terms Court of Cassation, United Sections, 17.12.2003.
[79] For example, in the case of the crime of tax declaration through invoices for non-existent operations, confiscation is applicable when the fictitious costs exceed € 200,000.
[80] This is the reason why this type of confiscation is a preventive measure or so-called "ante delictum" Since preventive confiscation is an *ante delictum* measure, practice has demonstrated the synergy of these tools. Pursuant to Article 29 (Independence from the exercise of criminal action) of Legislative Decree 159/2011, "the preventive action can also be exercised independently of the exercise of the criminal action".
[81] Pursuant to Article 16 of Legislative Decree 159 of 2011, confiscation as a preventive measure is applied, among others, not only to those who, due to their conduct and standard of living, must be considered habitually living, even partially, with the proceeds of criminal activities, but also to subjects who are suspected (not necessarely convicted) of particular serious crimes.

taxation of the proceeds deriving from facts, acts or activities qualifying as a civil, criminal or administrative offence, if not seized or confiscated. Since this provision precedes the introduction, in Italian law, of the first hypothesis of confiscation of value[82], the confiscation's execution entails the consequent non-applicability of the aforementioned article 14. As a further disincentive to the violation of the rule, the pecuniary reparation is noted. It takes the perspective that crime not only does not pay, but it costs money.

Before explaining this provision, it is necessary to identify the meaning of reparation and then compare it with the Italian legal system's functions attributed to pecuniary reparation. If from the semantic point of view, reparation is equivalent to compensation and it also means expiation, on the juridical level the pecuniary reparation recalls both a civil sanction, with a compensatory-restorative function, and one of the functions of the penalty[83]. On the functional level, civil sanctions and criminal sanctions are traditionally very different instruments (the former "repair", the latter "punish"). However, pecuniary reparation demonstrates how the boundary between these two sanctions has become less clear due to a functional hybridism for which reparation has an overcompensating function with respect to the damage, typical of the punitive damages.

A few years after the first Italian anti-corruption law, law 05.27.2015, no. 69 has further strengthened the law enforcement system from various points of view, including the financial reparation provided for in article 322-*quater* of the criminal code. The purpose of this measure was to repair the public administration for the most harmful serious offences[84] and to strengthen deterrence. Regardless of the instance of the damaged public administration, pecuniary reparation is mandatory because the criminal judge always orders it against the public official or the briber[85]. The custodial sanction is therefore accompanied by both pecuniary reparation, the extent of which is legally predetermined as "sum equivalent to the price or profit of the crime", and confiscation of a corresponding amount. The offender is also charged with compensation for damage to the public administration injured by the crime committed, including damage to image[86].

[82] The reference is to confiscation for value of usurious interests provided for in article 644 of criminal code as replaced by the law of 7 March 1996, no. 18.

[83] On the one hand, in fact, the civil penalty traditionally has a restorative nature because its function is not to punish, but to neutralize the consequences of the violation of the rule by restoring the *status quo ante* or by compensating the injured person with the monetary equivalent; on the other hand, the penal sanction entails suffering, being painfulness and retribution "minimum conditions, without which the penalty would cease to be such". Thus, Constitutional Court, 02.07.1990, no. 313.

[84] Including corruption for the exercise of the function (article 318), corruption for an act contrary to official duties (article 319), undue inducement to give or promise benefits (article 319-*quater*), including cases of corruption of the public service officer (article 320) and those of article 321 (penalty for the briber) of the penal code.

[85] Law 3/2019 has included in article 322-*quater* also article 321, allowing this measure also against the private briber.

[86] Pursuant to Article 1 (Liability Action), paragraph 1-*sexies*, of Law 14.01.1994, no. 20, in the judgment of liability before the Court of Auditors "the extent of the damage to the image of the public administration deriving from the commission of a crime against the same public administration ascertained with final judgment is presumed, without prejudice to evidence to the contrary, double the sum of money or the asset value of other unlawfully received".

There is, therefore a multiplier effect of the consequences with respect to the sentence for some crimes against the public administration. Still, from the offenders' perspective, the transition from the logic that crime does not pay to the logic that crime costs a lot is now clearer. However, it should be noted that while in pecuniary reparation the equivalent to the price or profit crime is a mere criterion for quantifying the sanction, in confiscation by value it is the very object of the sanction: this means that if the corrupt public official spontaneously delivered the bribe, his assets would not be confiscated for the equivalent amount[87]. On the contrary, pecuniary reparation, unlike confiscation, may be ordered in a plea bargain's case.

In addition to these disincentives, the economic analysis of the aforementioned regulatory problems also considers the incentives granted in repenting through restorative or otherwise collaborative conduct. In a paradigm where punishment and reparation interact, once the crime has been committed, restorative conduct is useful to the State, to the offender and also to the victim: to the State, because if absolute crime prevention is not possible, the elimination or damage mitigation can also be achieved through the utilitarian behaviour of the offender; to offender, who will gain differently modulated advantages (exclusion of punishment, mitigating circumstances, suspension or replacement of the sanction); to the victim who is finally being included in the "punitive mechanism".
With reference to crimes against the public administration, in accordance with the principles of the UN Convention against Corruption[88], Article 323-*bis* of the criminal code provides mitigating circumstances for collaboration. Above all, the following article 323-*ter*[89] introduces a cause of exemption from punishment provided that the wrongdoer, before being informed that investigations have been carried out against him and, in any case, within four months of the fact, voluntarily reports it and provides useful information to ensure proof of the crime and to identify the other offenders.

A wider application of this exemption requires a longer-term than four months because the provision of impunity is certainly a strong incentive, also because it would avoid the pecuniary reparation[90]. Similar reward provisions related to remedial behaviour are also provided for in the

[87] In the event of spontaneous restitution there is no confiscation, but pecuniary compensation is still applied
[88] Article 37 (Cooperation with law enforcement authorities): "1. Each State Party shall take appropriate measures to encourage persons who participate or who have participated in the commission of an offence […] to supply information useful to competent authorities for investigative and evidentiary purposes and to provide factual, specific help to competent authorities that may contribute to depriving offenders of the proceeds of crime and to recovering such proceeds. 2. Each State Party shall consider providing for the possibility, in appropriate cases, of mitigating punishment of an accused person who provides substantial cooperation in the investigation or prosecution of an offence established in accordance with this Convention. 3. Each State Party shall consider providing for the possibility, in accordance with fundamental principles of its domestic law, of granting immunity from prosecution to a person who provides substantial cooperation in the investigation or prosecution of an offence established in accordance with this Convention. […]".
[89] The provision was recently introduced by the aforementioned law no. 3/2019.
[90] Non-punishment is conditional on the delivery of the perceived utility or, in case of impossibility, of a sum of money of equivalent value or on the indication of useful and concrete elements to identify the recipient within the same four-month period. Spontaneous

criminal tax discipline, which recognises, depending on the type of crime, non-punishment[91] or mitigating circumstances[92] on condition of payment of tax debts, including administrative penalties and interests.

4. Fundamental rights as a limit to criminal policy.

The different tools to protect the public administration and public resources deriving from taxes have been examined in the typical perspective of the EAL. Although this is a useful method, it is also necessary to avoid "the risk of exploiting the individual for general purposes of criminal policy"[93] because fundamental rights limit the same criminal policy. In this perspective, some institutional vulnerabilities become apparent:

- if in tax matters the aim is the spontaneous fulfillment by taxpayers, tax rules must be clear and tax administration has to recognise the right to be heard before adopting a prejudicial measure, as provided for in article 41, second paragraph, of the Charter of Fundamental Rights of the European Union.

Voluntary tax compliance also depends on a legal system's ability to ensure the enforcement of criminal sanctions. From this perspective, it is necessary to avoid cyclical amnesties because these create a short circuit in the system deterrence caused by the taxpayer's reliance on an upcoming amnesty[94].

- the repressive discipline of corruption provides for an accumulation of financial penalties. Even if they are differently denominated (confiscation for value and pecuniary reparation), they share the afflictive purpose. It also adds to the compensation for damage to the public administration following a different judgment before the Court of Auditors.

This convergence of sanctions on the same (corruptive) fact does not pose a *ne bis in idem* problem pursuant to Article e 50 of the Charter of Fundamental Rights of the European Union. According to the interpretation of the Article 4[95] of Protocol No. 7 to the European Convention for the Protection

restitution in this case allows impunity; outside the application of this article, it excludes the confiscation of value, but not of the conviction and the consequent pecuniary reparation.

[91] Article 13 (Cause of non-punishment. Payment of tax debt) of Legislative Decree 10 March 2000, no. 4.

[92] Article 13-*bis* (Circumstances of the crime) of Legislative Decree 10 March 2000, no. 74. The same article conditions the plea bargain to the prior payment of the amounts due by way of tax, administrative fine and interest.

[93] In these terms, Constitutional Court, sentence no. 313/1990.

[94] If tax amnesties are periodically adopted, in relation to the probability of control, the taxpayer may deem tax evasion convenient, but then regularize through the amnesty by paying a lump sum (lower than the taxes due).

[95] Article 4 (Right not to be tried or punished twice): "1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance

of Human Rights and Fundamental Freedoms, provided by the European Court of Human Rights, the principle of *ne bis in idem* also applies to sanctions which, although not formally criminal, are substantially criminal due to their afflictive content. In *A and B v. Norway* (15.11.2016), the European Court on Human Rights affirmed that this fundamental right is not violated if there is a "sufficiently close connection in substance and time" between the two proceedings, in this case the criminal one and the one before the Court of Accounts with compensation for damages in an overcompensating measure. The sanctioning reaction appears disproportionate.

On the tax side, the *ne bis in idem* problem, about the application of administrative and criminal sanctions for the same offence, is tempered by the presence of an express provision (Article 19 of the Legislative decree 74 of 2000[96]) that avoids the concurrence of the administrative offence with the criminal one.

5. General conclusions.

The phenomenon of tax evasion has assumed such large dimensions in Italy as to require constant and effective counteraction, which is not based exclusively on legal measures but also on cultural leverage.

Tax evasion causes distortions in the distribution of resources, interferes with the normal functioning of the market, alters the fairness and progressiveness of the tax system, generating social inequity and, finally, it is criminogenic with respect to corruption. For its part, corruption constitutes a threat to development, democracy and stability, slows down a country's economic growth, discourages foreign investment, erodes public service and trust in the state. A synergic counteraction to the two illicit phenomena must move from improving relations between the tax authorities and contributions, increasing tax compliance (through a simpler taxation because it is based on more understandable rules) and resorting to cooperative compliance. The contrast is based on the effectiveness of control increased by risk analysis through the automatic crossing of information thanks to artificial intelligence. Alongside the penalties, whether administrative or criminal, it is necessary to identify tools to make the violation of the rule inconvenient or, in any case, to make subsequent reparation convenient.

In the choice of these instruments, the criminal policy of the State is not free, but meets the limits of the necessary respect for fundamental human rights. It is also necessary to intervene on the cultural level by strengthening the values, duties and integrity of the public employee, but also the

with the law and penal procedure of that State". The same right is recognized in Article 50 (Right not to be tried or punished twice in criminal proceedings for the same criminal offence) of the Charter of Fundamental Rights of the European Union.

[96] Article 19 (Principle of specialty): "when the same fact is punished by one of the provisions of Title II [crimes relating to declarations, documents and payment of taxes] and by a provision which provides for an administrative sanction, the special provision is applied".

duty of the citizen to contribute to public spending: the removal of inequity, an efficient management of public spending and the understanding of how important the common good is can increase tax compliance much more than the threat of sanctions.

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Grant Agreement number: 878619
Project Coordinator: Dr. Costantino Grasso,
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