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## Much Ado About Something? The PIF Directive Proposal and its Impact on the Italian Legal System

### *Abstract*

The essay analyses and compares the supranational and the Italian legal frameworks on the protection of the financial interests of the EU, with a view to investigating the significance of the developments in this field for the Italian criminal justice system. After an historical overview of the evolution of EU frauds and fraud-related offences, the article analyses the 2012 PIF Directive Proposal, providing a state of play of the current negotiations. The author then examines the Italian legal framework on EU frauds: the study covers the discipline provided for by both the Penal Code and by complementary legislation, in order to point out the provisions that could be concerned by the new harmonised criminal law instrument. The final paragraph focuses on the different criminal policies pursued by the national and supranational legislators in the contrast to tax frauds.

Keywords: financial interests of the EU – PIF Directive proposal – tax frauds – Italy

Summary: I. Introduction – II. The protection of the financial interests of the EU in supranational criminal law: EU frauds and fraud-related offences – III. The PIF Directive Proposal – IV. EU frauds in the Italian Penal Code – V. VAT frauds in the Italian complementary legislation – VI. Conclusion

### *I. Introduction*

The protection of the financial interests of the European Union has always been a burning issue of criminal policy: since the early stages of European integration “the absence of a criminal competence of the EU in this domain appeared as paradoxical”<sup>1</sup>. As early as 1976, the Commission unsuccessfully tried to redress this shortcoming by emending the Treaties<sup>2</sup>. For over thirty years, legal scholars have investigated crimes

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1 *Flore*, Droit Pénal Européen, 2009, p. 26 (original in French language).

2 Former draft Treaty amending the Treaties establishing the European Communities so as to permit the adoption of common rules on the protection under criminal law of the financial

affecting the European financial interests and their studies have influenced the development of supranational criminal law.

In the last few years, the protection of the EU financial interests has attracted new attention, as the approval of a harmonised text in this domain<sup>3</sup> has triggered a legal and political dispute between European institutions. The debate has been further exacerbated by the recent preliminary ruling of the Court of Justice of the EU (hereinafter, “the ECJ”) in the *Taricco* case<sup>4</sup>, which indirectly but decisively addressed some of the most controversial issues under negotiation. In particular, the judgment has stated the relevance of VAT frauds for the protection of European financial interests, touching upon the most controversial issue currently being discussed. This ruling has given rise to a major controversy within the Italian justice system: both the Court of Appeal of Milan and the Court of Cassation have argued that the decision would infringe upon the founding principles of the Italian criminal justice system and have challenged the constitutionality of its application before the Italian Constitutional Court<sup>5</sup>. A part of the scholarship has backed this interpretation, vigorously criticising the decision of the ECJ<sup>6</sup>.

The effect of the *Taricco* judgment has drawn almost all the attention of the Italian scholarship; the impact of the directive proposal on the Italian criminal justice system as a whole has instead been largely overlooked. The aim of this article is to fill this gap by investigating if and to what extent such harmonisation instrument could affect the Italian legal framework on frauds, in particular VAT-related frauds. The purpose is to provide an insight into the possible effects of the PIF Directive Proposal on the criminal policy of a member State, with a view to providing a possible explanation of the political difficulties which negotiations are undergoing. To this end, the article describes the evolution of the discipline on EU frauds and details the possible outcomes of the negotiations on the new directive proposal on the protection of the EU financial interest through criminal law. It also analyses the Italian discipline on frauds in the Penal code and complementary legislation, inquiring into the criminal policy pursued by the Italian legislator when regulating frauds and fraud related offences.

interests of the Communities and the prosecution of infringements of the provisions of those treaties, COM(76)418, OJ 1976 C 222.

- 3 Proposal for a directive of the European parliament and of the council on the fight against fraud to the Union's financial interests by means of criminal law, COM (2012) 363, issued on July 11<sup>th</sup>, 2012.
- 4 European Court of Justice (ECJ), 8.09.2015, case 105/2014 (*Taricco and others*).
- 5 Court of Appeal of Milan, 2<sup>nd</sup> Penal Chamber, 18.9.2015 n. 6421/2014 (pres. Maiga); *Corte di Cassazione*, III Sezione Penale, 30.3.2016 (pres. Grillo), *Cestari*.
- 6 *L.Eusebi*, Nemmeno la Corte di Giustizia può erigere il giudice a legislatore, [www.penalecontemporaneo.it](http://www.penalecontemporaneo.it) (PC), 10 December 2015. For an overview on the Italian scholarship, see *A.Venegoni*, La sentenza Taricco: una ulteriore lettura sotto il profilo dei riflessi sulla potestà legislativa dell'Unione in diritto penale nell'area della lotta alle frodi, [www.penalecontemporaneo.it](http://www.penalecontemporaneo.it) (PC), 29 October 2015; *Viganò*, Disapplicare le norme vigenti sulla prescrizione nelle frodi in materia di IVA?, [www.penalecontemporaneo.it](http://www.penalecontemporaneo.it) (PC), 14 September 2015.

## II. *The protection of the financial interests of the EU in supranational criminal law: EU frauds and fraud-related offences*

The budget of the European Union, unlike that of other international organisations, does not depend on voluntary contributions of its Member States (hereinafter, the “MSs”). Its legal foundations were set in the early seventies. After the 1970 Luxemburg Council Decision<sup>7</sup>, the EU<sup>8</sup> has developed an independent system of financing based on own resources, which it receives pursuant to European legislation without any decision being needed by national authorities<sup>9</sup>. Today, the own resources of the EU come essentially from customs duties, agricultural duties and sugar levies (the «traditional own resources»), from a fixed-rate portion of VAT receipts and from a fixed-rate levy on gross national income of MSs. A minor part of the EU budget is covered through tax and other deductions from EU staff remunerations, bank interests, contributions from non-EU countries and interests on late payments and fines.

The establishment of an autonomous budget represented a key element in order to consolidate the EU institutional framework and sustain its development and enlargement. Since the early stages of European integration, it was clear that the protection of the own resources system needed to be ensured as crimes affecting European financial interests were a threat to the functioning of the EU and the implementation of its policies. Nevertheless, it was only in the last two decades of the 20<sup>th</sup> century that the protection of the EU financial interests gained political importance and that the contrast to EU frauds through criminal law became a crucial question in European policy<sup>10</sup>.

Article 209A of the Maastricht Treaty was the first provision of primary EU law to expressly demand that MSs protect the Community’s budget and counter fraud affecting its financial interests with “the same measure [...] as they take to counter fraud affecting their own financial interests”. This provision was later amended and inserted in the EC Treaty as Article 280 (it is current Article 325 of the TFEU). Its fourth paragraph empowered the Council to adopt the necessary measures in the fields of the prevention of and fight against EU fraud. Notably, the provision specified that “these measures shall *not* concern the application of national criminal law”.

The first criminal law instrument concerning the protection of the EU financial interests was the so-called “PIF Convention”, adopted on July 26<sup>th</sup> 1995 in the context

7 Council Decision of 21 April 1970 on the Replacement of Financial Contributions from Member States by the Communities’ own Resources, OJ 1970 L 94, p. 19.

8 To facilitate the reading, the European institutional framework shall be hereinafter referred to as European Union, though certain references are made to European Communities (EEC, ECSC and EAEC) or to the EC.

9 For an in-depth analysis of the PIF legal framework, see *V. Covolo, L’emergence d’un droit pénal en réseau. Analyse critique du système européen de lutte antifraude*, 2015.

10 In this sense, *E. Mezzetti, La tutela penale degli interessi finanziari dell’Unione Padova*, 1994. See also *N. Parisi, La Procura Europea: un tassello per lo spazio europeo di giustizia penale, Studi sull’Integrazione Europea (SIE)*, I, 2013, p. 4 seq.

of the third EU Pillar<sup>11</sup>. The Convention defined a common legal framework on EU frauds, with the aim of providing a minimum standard of the protection to the EU financial interests within the MSs.

Article 1 of the Convention provides a broad definition of EU fraud, which today still represents the centrepiece of the protection of EU financial interests. Three different conducts qualify as frauds for the purpose of the Convention: on the one hand, the employment of fraudulent documentation or the non-disclosure of due information to public authorities, which allow the misappropriation or the wrongful retention of EU funding (“in respect of expenditure”) or result in the illegal diminution of EU budget resources (“in respect of revenue”); on the other hand, the misapplication of legally obtained EU funding or benefits. EU frauds can be punished only insofar as they directly cause financial harm to European Institutions. They can be perpetrated both by act or omission and must be carried out intentionally. Each MS is asked to take the necessary and appropriate measures to transpose such provisions into their national criminal law in such a way that the conduct referred to therein constitutes criminal offences. MSs are also demanded to make sure that intentional preparation or supply of fraudulent documentation causing financial harm to the EU be punished as a criminal offence, in case this was not already possible under national criminal law.

Article 2 requires MSs to introduce “effective, proportionate and dissuasive criminal penalties, including [...] penalties involving deprivation of liberty which can give rise to extradition”. In this respect, the Convention distinguishes between serious and minor frauds: minor frauds are those not involving a total amount of more than 4,000[€] nor relating to particularly serious circumstances, and they may be subject to non-criminal sanctions. The Convention also establishes that corporate managers “[...] shall also be declared liable [...] in cases of fraud [...] by a person under their authority acting on behalf of the business” (Article 3).

Two Additional Protocols followed the PIF Convention, significantly widening the scope of the European legal framework against EU frauds. Among other things, such instruments introduced into the PIF *acquis* the so-called “fraud-related offences”. The first Protocol – signed on September 27<sup>th</sup>, 1996 – disciplined active and passive corruption and required MSs to assimilate “national” and “community officials” (as defined by Article 1) in all domestic provisions concerning corruption. The second Protocol – signed on June 19<sup>th</sup>, 1997 – extended the PIF discipline to money laundering (Article 2) and required MSs to ensure that “legal persons [could] be held liable for fraud, active corruption and money laundering committed for their benefit [...]” (Article 3); it also stated that all “instruments and proceeds” [...] of such crimes, as well as “property the value of which corresponds to such proceeds”, were to be confiscated or removed (Article 5).

Over the years, European Institutions intensified their efforts – both politically and legally – to control and prevent financial crime. This led to the approval, *inter alia*, of

11 Council Act of 26 July 1995 drawing up the Convention on the protection of the European Communities’ financial interests, OJ 1995 C 316, p. 48 seq.

Regulation (EC, Euratom) n. 2988/1995 and Regulation (EC) n. 2185/1996 (on administrative investigations of the Commission against frauds), of Framework Decision 2005/212/GAI (on confiscation and asset recovery) and of Directive n. 2005/60/CE (the so-called “Third money laundering Convention”). The EU also reinforced its institutional architecture for the contrast to transnational criminality, by establishing UCLAF<sup>12</sup> and OLAF<sup>13</sup>, as well as EUROPOL<sup>14</sup> and EUROJUST<sup>15</sup>. These developments as well as the increasing incidence of financial crime in the EU prompted the interest of the scholarship, which enthroned the protection of the EU financial interests as a centrepiece of European criminal law<sup>16</sup>.

### III. The PIF Directive Proposal

In spite of the ever-more comprehensive legal framework for the contrast to EU frauds, the weakness of supranational criminal law ultimately lay with the hesitation of many MSs in ensuring proper implementation and with the lack of an effective enforcement mechanism<sup>17</sup>. In this respect, the approval of the Lisbon Treaty seemed to mark the beginning of a new phase: it granted the EU an express competence on criminal law (Article 83 TFUE) and it extended the powers of both the Commission and the ECJ to oversee and enforce implementation.

This encouraged the Commission to issue, on July 11<sup>th</sup> 2012, the Proposal COM(2012) 363 FINAL for a Directive “on the fight against fraud to the Union’s financial interests by means of criminal law”<sup>18</sup>. The Proposal was issued under Article 325 TFUE which, unlike its predecessor (Article 280 of the EC Treaty), no longer pre-

12 Report from the Commission on tougher measures to fight against fraud affecting the Community budget, COM (87) 572 final, 20 November 1987.

13 Commission Decision 1999/352/EC, ECSC, Euratom, of 28 April 1999, establishing the European Anti-Fraud Office (OJ 1999 L 136, p. 20).

14 Council Act of 26 July 1995, Convention based on Article K.3 of the Treaty on European Union on the establishment of a European Police Office, (OJ 1995 C 316, p. 1-32).

15 Council Decision of 28<sup>th</sup> February 2002, setting up Eurojust with a view to reinforcing the fight against serious crime, 2002/187/GAI (OJ 2002 L 63, p. 1-13).

16 Among the numerous important contributions, see *J.A.E. Vervaele*, *Fraud against the Community*, 1992; *M. Delmas-Marty*, *Corpus Juris Portant Dispositions Pénales Pour la Protection des Intérêts Financiers de l’Union Européenne*, 1997.

17 Spectacularly so, with reference to EU frauds, in the case of Italy: the 1997 PIF Protocol was definitively ratified and implemented only on August 4<sup>th</sup> 2008. On the shortcomings of the implementing discipline, see *L. Picotti*, *L’attuazione in Italia degli strumenti dell’Unione Europea per la protezione penale degli interessi finanziari comunitari*, *Rivista Trimestrale Diritto Penale dell’Economia (RTDPE)*, 2006, III, p. 615 et seq. On criminal enforcement of EU policies, see *J.A.E. Vervaele*, *European criminal justice in the post-Lisbon area of freedom, security and justice*, 2014.

18 See *A. Venegoni*, *Prime brevi note sulla proposta di direttiva della Commissione europea per la protezione degli interessi finanziari dell’Unione attraverso la legge penale*, *www.penale-contemporaneo.it (PC)*, 5 September 2012, p. 1. See also *D.G. Rinaldi*, *Principi in materia di politica legislativa penale europea e tutela degli interessi finanziari dell’Unione*, *Diritto del Commercio Internazionale (DCI)*, 2013, IV, p. 1049 et seq.

cludes that the measures adopted to protect the financial interest of the EU concern criminal law. The choice of Article 325 TFUE and not of Article 83 TFUE as legal basis for the Proposal was not unbiased.<sup>19</sup> The former provision allows for both wider content (not confined to “minimum rules”) and wider geographical scope of application (automatically including the UK, Ireland and Denmark), and prevents MSs from using the so-called «emergency brake», provided for by Article 83(3)<sup>20</sup>.

The Proposal is not a mere “lisbonisation” of the PIF Convention as it introduces significant innovations in the legal framework on EU frauds. Its recitals emphasise the link existing between the collection of VAT revenue and the sustainment of the EU budget, stating the relevance of tax fraud for the PIF legal framework. It also introduces new fraud-related offences, such as the delivery of fraudulent information “in a public procurement or grant procedure involving the Union’s financial interests” (Article 4(1), the so-called procurement fraud), and the unlawful appropriation or use of assets by public officials (Article 4(4)). With reference to corruption, the Proposal extends punishment to bribery concerning lawful acts (Article 4(3)) and provides a binding definition of “community officials”, that would no longer require assimilation by MSs (Article 4(5)). It establishes a prescription period of “at least five years from the time when the offence was committed”, applicable to all PIF offences and extendable for other five years – at least – in case of interruption (Article 12); it also states that all PIF offences be prosecuted *ex officio* (Article 11), and provides minimum and maximum thresholds for imprisonment (Article 9).

In some respects, the Proposal is not entirely satisfying<sup>21</sup>: the European legislator showed caution in drafting the Proposal and arguably the Lisbon Treaty could have allowed otherwise. In a way, the choice of the legal basis contradicts the choice of the legal instrument: Article 325 TFUE makes no reference to the type of instrument to deploy in order to “counter fraud [...]”, thereby empowering the Commission to directly propose a regulation. Nevertheless, the Proposal does extend considerably the scope of the PIF legal framework, and most importantly, the Commission had little room for more substantial changes from a political point of view. Indeed, the following

19 For an extensive analysis of the competence of the EU in criminal matters and its relevant consequences, see S. Miettinen, *The Europeanization of criminal law: competence and its control in the Lisbon era*, 2015.

20 Is strong favour with this choice L. Picotti, *Le Basi Giuridiche per l’Introduzione di Norme Penali Comuni Relative ai Reati Oggetto della Competenza della Procura Europea*, in: R. Sicurella/G.Grasso/G.Illuminati /S.Allegrezza (eds.), *Le Sfide dell’Attuazione di una Procura Europea: Definizione di Regole Comuni e loro Impatto sugli Ordinamenti Interni*, 2013, p. 66-108. The Author is instead highly critical about the actual content of the Proposal and about «*the scarcity of substantial changes [...] to the PIF legal instruments of the 90s, in spite of the significant development of European integration and of the subsequent legitimation that the basis of EU criminal law can offer*».

21 For example, the Convention frequently resorts to outside references, thereby leaving unchanged a significant part of the existing discipline and the definition of fraud has not been amended. Furthermore, the threshold for “minor offences” (which may entail the infliction of non-criminal sanctions) has been raised from 5,000 € to 10,000 €.

steps of the approval procedure showed just how controversial the regulation of financial crime is for both EU institutions and MSs.

Within the EU Council, the text was initially discussed under the Cypriot presidency and received a relatively cold welcome. As early as October 2012, the Legal Service issued an opinion<sup>22</sup> concerning the PIF Directive Proposal, entirely devoted to (criticizing and discussing the consequence of) the choice of its legal basis. The Presidency then issued a note<sup>23</sup> on the most relevant aspects of the text, already highlighting that “some member States have argued that VAT resources should not be included in the scope of the Directive”.

On June 10<sup>th</sup> 2013, under the Irish presidency, the Council finally reached a General Approach<sup>24</sup> on the compromise text, to serve as the “basis for the forthcoming discussions with the European Parliament”. The amended text completely redefines the scope and the content of the PIF Proposal. Most notably, the General Approach is based on Article 83(2) of the TFUE and expressly excludes VAT frauds from the scope of the Directive. In line with its new legal basis, the Proposal no longer aims at establishing “necessary measures for the prevention and fight against EU frauds”, but rather “minimum rules” in the field. Article 4(1) on procurement fraud has been amended and transposed into Article 3; the references to minimum imprisonment thresholds are completely left out, while maximum imprisonment thresholds are lowered to 4 years (from the initial 5) and only in case of “serious offences” (Article 7(1) Para. 2 and 3). The General approach requires that the commitment of PIF crimes within a criminal organisation be regarded as aggravating circumstance, but no longer mentions the obligation for MSs to punish this offence with a maximum penalty of at least 10 years of imprisonment. Furthermore, MSs are no longer asked to establish their jurisdiction when PIF offences were committed “by means of information and communication technology accessed from outside their territory”.

One of the most sensitive issues raised during negotiations has been the statute of limitations applicable to PIF offences. Article 12 of the Proposal has been completely rewritten and watered down; MSs are now only required to enable investigation, prosecution, trial and judicial decision “for a *sufficient period of time* [...], such that those offences be tackled effectively”; only in case of “serious offences” are MSs required to establish that the prescription period amount to at least five years, but also in this case they are allowed to establish a shorter period “provided that [...] it may be interrupted or suspended upon specific acts”. At last, the General Approach is particularly careful in stressing the need for European institutions to cooperate “within their respective competences”, and that the scope of application of the Directive is limited to MSs “participating to [its] adoption”.

22 Council of the European Union, *Opinion of the legal service*, Brussels, 22 October 2012, (file n. 15309/2012)

23 Council of the European Union, *Note of the Presidency to the Working Party on Substantive Criminal Law (DROIPEN)*, Brussels, 11 December 2012, (file n. 17359/2012).

24 Council of the European Union (Justice and Home affairs), *General Approach*, Brussels, 10 June 2013 (file n. 10729/2013).

The amendments to the Proposal had an immediate effect on negotiations. In accordance with Protocols 21 and 22, UK and Denmark automatically fell outside the scope of application of the Proposal, while Ireland expressed its wish to take part in the adoption of the Directive. In the following trilogues and technical meetings, the General Approach met with the opposition of the EU Commission<sup>25</sup> and the scepticism of the EU Parliament.

On April 2014<sup>26</sup>, the Parliament adopted a legislative Resolution, introducing new substantial changes to the text issued by the Commission. Some of the amendments proposed by the Council were incorporated into the Resolution, most notably the choice of Article 83(2) as legal basis for the Directive and the deletion of minimum thresholds for imprisonment. On the contrary, the Parliament rejected the exclusion of VAT-related offences from the scope of the Directive, as well as the description of procurement fraud proposed by Council and the amendments establishing a less stringent statute of limitations. The Resolution places particular emphasis on the importance of intent in the description of PIF offences and introduces subtle but significant changes in the description of certain offences. In particular, active and passive corruption have been extended to public officers who unlawfully “delay action” or “accept the promise” of any advantage. The Resolution lowers to 5,000€ the threshold of offences that may be subject to non-criminal sanctions, as in the 1995 PIF Convention (unlike both the proposals of the Commission and of the Council), and it devotes one entire provision to the *ne bis in idem* principle. It also follows the Council’s Approach in stressing that EU institutions must cooperate within their respective competences and in requiring yearly assessments on the effectiveness and appropriateness of the implementation.

After the approval of the Resolution, the Council immediately opened formal and informal negotiations. Four official political trilogues were held between autumn 2014 and late spring 2015, which highlighted four major substantive issues remaining open<sup>27</sup>: the exclusion of VAT fraud, the description of fraud procurement, the sanctions for serious offences and the minimum prescription period. On May 2015,<sup>28</sup> the Council tried to reboot negotiations by issuing a slightly redrafted version of the Proposal, but it introduced rather minor changes to the previous general framework.

In the summer of 2015, negotiations took a decisive turn. Under the auspices of the Luxemburg presidency, the Council became open to the possibility of including VAT

25 Under both under the Barroso and Juncker presidencies: see, for example, Commissioner Jourova’s speech to the EP’s Committee on Civil liberties, Justice and Home Affairs, given on May 26<sup>th</sup>, 2015.

26 EU Parliament on March 20<sup>th</sup> 2014; Plenary Session on April 14<sup>th</sup> 2014. Draft European Parliament Legislative Resolution «on the proposal for a directive of the European Parliament and of the Council on the fight against fraud to the Union's financial interests by means of criminal law», procedure – C7-0192/2012 – 2012/0193(COD) 2012/0193 (COD).

27 Council of the European Union, *Note of the Presidency to the Council: state of play*, Brussels, 27 November 2014, (file n. 15221/2014).

28 Council of the European Union, *Note of the Presidency to the Permanent Representatives Committee: preparation of the next trilogue*, Brussels, 7 May 2015, (file n. 8604/2015).

revenues in the description EU fraud.<sup>29</sup> Then, in early September, the ECJ stepped in and took an indirect but unequivocal stand on some of the most controversial questions involved in the approval of the PIF Directive. In a preliminary ruling concerning the statute of limitations in the Italian legal system<sup>30</sup>, the ECJ stated that “the concept of ‘fraud’ is defined in Article 1 of the PIF Convention” and it “covers revenue derived from applying uniform rate to the harmonised VAT assessment bases determined according to EU rules” (Para. 41); it also clarified that “the Member States’ obligation to counter illegal activities affecting the financial interests of the European Union [...] is imposed, inter alia, by EU primary law, namely *Article 325(1) and (2) TFUE*” (Para. 50). Although the Court makes obviously no reference to the negotiations of the PIF Directive Proposal, its ruling unmistakably affirms that VAT revenues are crucial to the EU budget and thereby advocates the inclusion of VAT frauds within the PIF legal framework. By identifying Article 325 TFUE as centrepiece of EU primary law on the protection of the Union’s financial interests, the Court also seems to challenge the choice of Article 83(2) as legal basis for the PIF Directive Proposal.

As expected, the *Taricco* judgment immediately affected the negotiations on the PIF Directive Proposal. After consultation with the Justice Ministers and among CATS<sup>31</sup>, the Luxembourg Presidency obtained from the Council “an informal go-ahead to have the experts examine the possible inclusion of VAT fraud in the Directive, with a view to re-opening the negotiations with the European Parliament on this file”<sup>32</sup>. Technical meetings were held on October 28<sup>th</sup> and November 1<sup>st</sup> 2015. Then, on November 24<sup>th</sup>, the Presidency issued a note<sup>33</sup> which stated that “the Council *must* at some point take a step towards the Parliament if the PIF Directive is ever going to be adopted”; it also stressed the need to “clarify the exact scope and impact of VAT fraud in general [...], to define the scope that could be covered in the Directive [...] and to explore the link between the possible VAT provision in the Directive with the Regulation on the establishment of a European Public Prosecutor’s Office”.

At the time of the writing, the PIF Directive Proposal is still under negotiation. In light of the recent events, the key issue in the debate will indisputably remain the inclusion of VAT frauds within the PIF legal framework.

29 See the *Discussion Paper* of the Informal Justice and Home Affairs Minister’s meeting, held in Luxembourg on July 9<sup>th</sup> and 10<sup>th</sup>, 2015.

30 ECJ *Taricco and others* (fn. 4).

31 Council of the European Union, *Note of the Presidency to the Coordinating Committee in the area of police and judicial cooperation in criminal matters (CATS): Judgment in the case C-105/14 Taricco*, Brussels, 17 September 2015, (file n. 12088/15).

32 Council of the European Union, *Note of the Presidency to the delegations: Examination of the Presidency document in DROIPEN*, Brussels, 22 October 2015, (file n. 13219/2015).

33 Council of the European Union, *Note of the Presidency to the Permanent Representatives Committee: State of play*, Brussels, 24 November 2015, (file n. 14281/2015).

#### IV. EU frauds in the Italian Penal Code

Within the Italian Penal Code, the offences that can qualify as EU frauds are the aggravated fraud for the purpose of obtaining public funds (Article 640-*bis*), the mismanagement of funds to the detriment of the State (Article 316-*bis*) and the undue receipt of public funding (Article 316-*ter*).

The provision that most directly protects the financial interests of the EU is covered by Article 640-*bis*. It was introduced in 1990, in order to toughen the criminal response against crimes targeting the national Public Administration, so it was not specifically designed to protect the financial interests of the EU. The provision was entirely modelled on the “common” offence of fraud, outlawed by Article 640<sup>34</sup>; the only significant difference is that the “aggravated fraud” must target funding allocated by public institutions.

Fraud requires the victim be deceived by “artifices and trickeries”; the victim must be deceived into cooperating without the aid of any kind of force or violence, as this would trigger other provisions of the Penal Code (such as theft or extortion). The reference to artifices and trickeries implies that the conduct must be intrinsically fraudulent, *i.e.* “it must leave the victim no other reasonable way to form his/her will”<sup>35</sup>. According to the letter of Article 640-*bis*, the fraudulent conduct must *first* deceive the victim and *then* cause him/her to suffer a financial loss and to provide to the agent an unjust profit<sup>36</sup>. In spite of this clear wording, Italian Courts frequently ignore such requisites and convict the defendant even though the victim of a fraud has not been directly deceived by the defendant’s conduct or even though the financial harm suffered by the victim is not a direct consequence of the fraudulent behaviour<sup>37</sup>.

The fraud punished by Article 640-*bis* must target funding allocated by public institutions, that is “contributions, grants, subsidized loans or any kind of disbursements [...] allocated or granted [...] by the European [Union]”. The formal purpose of the aid is irrelevant, inasmuch as it translates into “subsidies which appear to be justified by the pursuit of the public interest”<sup>38</sup>.

34 For a general introduction to the fraud in the Italian legal system, see A. Ravizza, *La truffa*, Digesto Italiano (DI), 1926, p. 781 seq.; G. Marini, *Truffa*, Digesto Discipline Penalistiche (DDP), 1999, p. 353 seq.; F. Mantovani, *Diritto Penale, Parte Speciale*, 2011, p. 189; A. Fanelli, *La truffa*, 2009.

35 Marini, DDP 1999, p. 367 and 368.

36 Any impairment of the victim’s financial interests may qualify as «damage», and the «profit» can consist of an increase in wealth or of the impediment to its decrease (non-financial repercussions thus fall outside the scope of the offence). Even though it is disputed by a part of the Scholarship, it is generally excluded that the financial prejudice be merely «legal», *i.e.* not determining a diminishment in the victim’s patrimony. The economic damage must also be regarded under strictly objective terms. See Fanelli (fn. 34), p. 57 seq.

37 Examples are frequent and rather emblematic. See, *ex multis*, Cass. Pen., Sez. II, 4 December 2013, n. 51136; Cass. Pen., Sez. II, 12 July 2011, n. 33841; Cass. Pen., Sez. II, 16 January 2009, n. 9773. For an overview of the relevant jurisprudence, see Fanelli (fn. 34), p. 26 seq.

38 *Cassazione Penale*, Sez. II, 25.2.2011, n. 19539. Such aspect is still disputed among the Scholarship. See Fanelli (fn. 34), p. 57.

Fraud does not require specific intent, but it does require that the entire criminal event – both the victim’s deception and the realisation of the financial harm and profit – be carried out intentionally; for this reason, “the erroneous belief that the obtained profit is lawful [...] excludes the intent of fraud”<sup>39</sup>.

As for sanctions, Article 640-*bis* punishes frauds with imprisonment from one to six years, which is *twice* the penalty envisaged for common frauds<sup>40</sup>. In addition, all goods representing “the profit, the price of the crime” or the value thereof shall be confiscated (Article 640-*quater*). Such particular fraud also constitutes a predicate offence for the criminal liability of legal persons, entailing both monetary and interdictory sanctions<sup>41</sup>.

One question that has sparked fierce debate is whether Article 640-*bis* disciplines an autonomous offence or a mere aggravating circumstance of the crime of fraud. The difference, in terms of applicable discipline, is considerable. In case the provision is qualified as an aggravating circumstance, Article 69 of the Italian Penal Code empowers the judge to balance it with other concurring mitigating circumstances, thereby applying the penalty envisaged for “common” frauds; the judge could also decide to further reduce the sanctions, if he/she believes that the concurring mitigating circumstances should be deemed as more significant. Should instead Article 640-*bis* be qualified as an autonomous offence, this balancing mechanism would not be applicable.

The criminal policy pursued by the legislator, the location of the provision within the Penal Code, its prosecution *ex officio* and the toughness of the relevant penalty seem to suggest that Article 640-*bis* is an autonomous offence.<sup>42</sup> The opposite conclusion is suggested by the wording of the provision and by the clear similarities with other forms of aggravated fraud<sup>43</sup>. After an intense debate in the early 2000s, the United Chambers of the Italian Court of Cassation stated<sup>44</sup> that Article 640-*bis* is indeed an aggravated form of fraud<sup>45</sup>. This interpretation, though in line with the wording of the

39 *Mantovani* (fn. 34), p. 191.

40 «Common» frauds are punished with imprisonment from six months to three years and with a monetary sanction ranging from 51 € to 1032 €. Only certain types of aggravated fraud can be punished with imprisonment from one to five years and with monetary sanction from 309 € to 1549 € (Article 640, 2<sup>nd</sup> para.).

41 In particular: prohibition to negotiate with the Public Administration, unless for the delivery of a public services; exclusion from grants, facilities, incentives and revocation of those already granted, if any (Article 9, 2<sup>nd</sup> para., letters c), d) and e) d.lgs. 231/2001.

42 In this sense, *Mantovani* (fn. 34), p. 206-207; *G.Fiandaca/E.Musco*, *Diritto Penale – Parte Speciale*, 2011, p. 186.

43 In particular the fraud “committed to the detriment of the State” (Art. 640, 2<sup>nd</sup> para.). In this sense *Marini*, *DDP* 1999, p. 390-391.

44 The case-law was predominantly in favour of regarding the provision as an autonomous offence. See *Cassazione Penale*, Sez. II, 9.7.1996 n. 3086; *Cassazione Penale*, Sez. I, 1.12.1997 n. 6753; *Cassazione Penale*, Sez. II, 15.10.1998 n. 11582; *Cassazione Penale*, Sez. I, 19.3.1999 n. 2286; *Cassazione Penale*, Sez. I, 4.06.1999, n. 4240; *Cassazione Penale*, Sez. II, 20.10.2000, n. 11077.

45 Such interpretation has been definitely established by the Joint Chambers of the Court of Cassation with the decision of June 26<sup>th</sup> 2002, n. 26351, and has become established case-law.

provision, allows the application of the balancing mechanism described above, thereby considerably hindering the efficacy of Article 640-*bis* in terms of criminal response.

The second offence falling within the scope of the PIF legal framework is the mismanagement of funds to the detriment of the State, proscribed by Article 316-*bis* of the Italian Penal Code. It punishes with imprisonment from six months to four years whoever obtains any form of public disbursement and does not allocate it for the intended purposes. Essential for the application of the provision is that the funding be obtained lawfully. At the core of the offence is in fact the inappropriate use of the funds and the resulting “disruption of the trust-based relationship existing between the financing Public Institution and the private citizen”<sup>46</sup>.

The offence seeks to protect the sound management of the Public Administration or, according to a part of the Scholarship, the public economy<sup>47</sup>. The conduct may concern any kind of aid “which appears to be profitable for the recipient and entails specific use obligations”<sup>48</sup>. To fall within the scope of the PIF discipline, the mismanaged funds must of course come from a European institution or anyway affect the EU budget. The offender can also be a public officer, as long as the disbursement is not related to his/her public service<sup>49</sup>.

Though the conduct is construed essentially as an omission, the offence is generally carried out in an active fashion. As for the mental element, the offence can only be punished when committed intentionally but it does not require specific intent.

The third offence that can qualify as EU fraud within the Italian Penal Code is the crime of undue receipt of public funds, provided for by Article 316-*ter*. It was introduced in September 2000 as a general offence<sup>50</sup> aimed at protecting the sound management of the Public Administration<sup>51</sup> and it was designed as implementing legislation of the PIF discipline. As in Article 640-*bis*, the criminal conduct must concern “contributions, grants, subsidized loans or any kind of disbursements [...] allocated or granted

See *Cassazione Penale*, Sez. III, 15.10.2013, n. 44446; *Cassazione Penale*, Sez. II, 16.1.2009, n. 11889.

46 *Cassazione Penale*, II Sez., 3.11.2003, n. 24109.

47 In favour of the latter the established case-law. See *Cassazione Penale*, Sez. VI, 21.5.2010, n. 20847. About the incomprehensible systematic location of the provision see *Mantovani* (fn. 34), p. 221; *Fiandaca/Musco*. (fn. 42), p. 89

48 *G.Fornasari*, Malversazione a danno dello Stato, in A.Bondi/A.Di Martino/G.Fornasari, *Reati contro la Pubblica Amministrazione*, 2009, p.146. See also *Cassazione Penale*, Sez. VI, 13.12.2011, n. 23778. It is worth noting that such limitation does not apply to the offences regulated by Articles 640-*bis* and 316-*ter* c.p.; on this regard, see *Cassazione Penale*, Sez. VI, 5.10.2010, n. 38457; *Cassazione Penale*, Sez. II, 22.11.2007, n. 12100; *Cassazione Penale*, SS.UU., 19.4.2007, n. 16568.

49 Otherwise the offender shall be charged with embezzlement or abuse of power. See *Cassazione Penale*, Sez. VI, 29.9.2005, 41178.

50 This point is challenged by a part of the Scholarship. On this aspect see *Fornasari* (fn. 48), p. 159.

51 Or, as in the case of the «mismanagement of funds», the Public Economy. In favour of the former option *F.Aprea*, *Sul rapporto fra truffa e indebita percezione di erogazioni pubbliche*, *Giurisprudenza Italiana* (GI), 2012, p. 1656 seq.; in favour of the latter *Fornasari* (fn. 48), p. 158.

[...] by the European [Union]”, but in the case of Article 316-ter these funds must be obtained “by using or submitting false statements or documents, or by omitting due information”.

Undue receipt of public funding is punished with imprisonment of six months to three years. When the funding amounts to less than 4,000€, the conduct shall be qualified as a mere administrative offence and be punished with a maximum fine of approximately 26,000 €; this fine shall not, under any circumstance, amount to more than three times the profit unlawfully acquired by the offender (Article 316-ter, 3<sup>rd</sup> para.). As in the case of Article 640-bis, all goods representing “the profit, the price of the crime” or the value thereof shall be confiscated and the offence can also entail the criminal liability of legal persons.

In the letter of Article 316-ter, the provision shall be applied “unless the fact constitutes the offence regulated by Article 640-bis”. Despite this apparently clear wording, its meaning and the resulting relationship between the two types of fraud are still challenged today. Indeed, Article 316-ter was introduced as implementing legislation of the PIF legal framework, with the aim of providing a more comprehensive legal framework for the contrast to frauds targeting Public Administrations. Nevertheless, its sanctions are significantly lower than the ones provided for other types of fraud, and may even amount to mere administrative fines. This means that, on the one hand, applying Article 316-ter instead of the other existing provisions on frauds paradoxically lowers the criminal response against crime targeting Public Administrations; on the other, though, not to apply Article 316-ter, is basically to discard its very existence.

For this reason, at first, the Court of Cassation<sup>52</sup> stated that Article 316-ter should be preferred to other existing provisions, thereby trying to find space for the application of the newly introduced provision. Scholarship immediately challenged this case-law<sup>53</sup> and in 2004 the Constitutional Court disregarded it as being contrary to “an unequivocal regulatory framework”<sup>54</sup>, so the interpretation was soon abandoned<sup>55</sup>. It is now established case-law that Article 316-ter only punishes conducts that are not intrinsically fraudulent and therefore cannot qualify as “artifices and trickeries”<sup>56</sup>.

Though this interpretation ensures higher criminal protection against frauds by resorting to Article 640-bis, it confines the application of Article 316-ter to minor

52 See *Cassazione Penale*, Sez. V, 13.6.2000, n. 8995. See also *Tribunal of Bolzano* (TB), 21 January 2001 (pres. Busato): the drawbacks of this interpretations are outlined by the judge who clearly affirms that «*the consequences of the new discipline haven't been adequately assessed by the legislator*».

53 For an overview of the different opinions, see *Fornasari* (fn. 48) p. 159 seq.; see also *Picotti*, RTDPE 2006, p. 615.

54 *Italian Constitutional Court*, ord. 12.3.2004, n. 95 (author prof. Giovanni Maria Flick).

55 Not without a certain scepticism.: see for example *Cassazione Penale*, Sez. VI, 15.10.2004, n. 43202. On this subject, see *N.A.Ferla, G.Tramontano*, Corte di Cassazione, sent. n. 43202/2004: il rapporto tra truffa aggravata nei confronti dello Stato e indebite percezioni di finanziamenti, *Impresa Commerciale e Industriale* (ICI), 2005, IV, p. 35 seq.

56 See *Cassazione Penale*, SS.UU., 19.4.2007, n. 16568. More recently, *ex multis*, *Cassazione Penale*, Sez. II, 14.5.2013, n. 22428; *Cassazione Penale*, Sez. II, 19.10.2012, n. 46064; *Cassazione Penale*, Sez. III, 1.12.2011, n. 2382; *Cassazione Penale*, Sez. II, 8.02.2011, n. 21000.

wrongdoings<sup>57</sup>, leaving the provision with a very limited scope of application. This conclusion is in some ways unsettling: the offence was designed to provide wider protection to the financial interests of the EU, and yet its wording and low sanctions render it almost inapplicable. For this reason, within the Italian Penal Code, the fight against EU frauds is almost exclusively left to Article 640-*bis*.

### V. VAT frauds in the Italian complementary legislation

In the Italian legal system, tax evasion and tax fraud are regulated by Legislative Decree n. 74, of March 10<sup>th</sup> 2000 (hereinafter, the “Decree”)<sup>58</sup>: this is composite piece of legislation containing definition clauses, provisions of substantive criminal law, rules of criminal procedure and sanctions, which define a very specific and unique regulatory framework. The Decree only concerns offences in the field of income taxes and VAT. Its approval marked a significant change in the Italian criminal policy on fiscal offences, as it aimed at “confining the use of criminal law to facts directly linked to the harm of fiscal interests, with reference to both the criminal conduct and the mental element, thereby abandoning the criminalisation of merely formal or preparatory violations”<sup>59</sup>.

The offences that can fall under the scope of the PIF Directive Proposal are the crimes of fraudulent and false tax returns, proscribed by Articles 2, 3 and 4 of the Decree. These provisions seek to protect the interest of the national Tax Authorities (hereinafter, the “TAs”) to collect and acquire taxes, but they differ from one another for the mechanism used by the offender to enact the fraud. Though the perpetrator must always act with the aim of evading income taxes and VAT (specific intent), he/she can be held criminally liable regardless of the financial loss the TA actually suffers: indeed, the mere filing of a fraudulent or false tax return is in itself grounds for punishment.

Article 2 punishes whoever indicates false liabilities in tax returns through the use of fraudulent invoices or other documents concerning fictitious operations. Any document that can serve as fiscal evidence before the TAs pursuant to applicable tax law can also qualify as “other document” for the purposes of Article 2. The fraudulent conduct

57 For example, the Court of Cassation applied Article 316-*ter* in cases of incorrect documentation being drafted by the PA and simply signed by the offender or when procedures require the PA to verify the entitlements after the aid has been granted, for in both cases the disbursement is (allegedly) not directly caused by deception. This conclusion is stressed by *S.Grillo*, *Truffa aggravata e indebita percezione di erogazioni a danno dello Stato: intervengono le Sezioni Unite, Diritto Penale e Processo (DPP)*, 2007, p. 897. See also *G.Izzo*, *Rapporto tra indebita percezione di erogazioni pubbliche e truffa aggravata, Impresa (I)*, 2007, IX, 221; *S.Corbetta*, *Indebita percezione di erogazioni pubbliche e truffa aggravata: quale rapporto?*, *Diritto Penale e Processo (DPP)* 2012, III, 300; *Aprea*, *GI* 2012, 1661.

58 For a general introduction to the relevant Italian discipline see *G.L.Soana*, *I reati tributari*, 2013; *E.Boffelli*, *I reati tributari (2005 – 2012) – Rassegna di Giurisprudenza*, 2012. *A.Mereu*, *La repressione penale delle frodi IVA. Indagine ricostruttiva e prospettive di riforma*, 2011.

59 Government Explanatory Memorandum on Legislative Decree n. 74, 10 March 2000.

is structured into two segments: the taxpayer must initially issue the invoices or the other fraudulent documents and *then* file the relevant tax return to the TAs. It is this latter segment – the transmission of the tax return to the TAs – that triggers the punishment and marks the commission of the crime (and the beginning of the prescription period). In this respect, issuing fraudulent invoices cannot in itself qualify as tax fraud (though it is a criminal offence punished by Article 8 of the Decree); conversely, filing a second non-fraudulent tax return represents an irrelevant *post factum* for the purpose of Article 2.

Article 3 punishes tax frauds perpetrated through “other suitable means” and can be applied except where provided for by Article 2. The offender must indicate in his/her tax return “false liabilities [...] or fewer tax assets [...]”, by simulating transactions or by using “other fraudulent means capable of hindering the discovery of the crime and deceiving the TA”. It is debated among scholars whether this kind of tax fraud can be enacted by omission<sup>60</sup>; in general, it is crucial that the offender deploy some kind of deceiving mechanism and that this be *ex ante* capable of deceiving the TA, as otherwise the conduct would amount to mere false tax declaration and fall under the scope of Article 4.

Unlike the previous offence, tax fraud perpetrated “through other suitable means” is characterised by the express provision of tolerance thresholds. The offence is punishable only when the amount of tax evaded exceeds 30,000€ *and* “the total amount of assets that were not subject to taxation [...] exceeds 5% of what indicated in the tax return, or else it exceeds 1,000,000€”. Both conditions have to be met in order for the conduct to qualify as a criminal offence. The scope of Article 3 is thus considerably narrower than the one of Article 2.

When the taxpayer simply indicates in his/her tax return “false liabilities [...] or fewer tax assets” without resorting to fraudulent mechanisms, the conduct falls under the scope of Article 4 and qualifies as false tax return. Tolerance threshold are also provided for, but they are substantially higher than in Article 3. Filing a merely false tax return is punishable only when the amount of tax evaded exceeds 150,000€ *and* “the total amount of assets that were not subject to taxation [...] exceeds 10% of the assets indicated in the tax return, or else it exceeds 3,000,000€”. In September 2015, the Italian legislator also added that the conduct is not punishable in case such thresholds are exceeded as a result of formal or accounting inaccuracies which concern existing assets or true liabilities; furthermore, any discrepancy amounting to less than 10% of the value of the asset shall not be considered for the purpose of the threshold of Article 4.

Tax frauds, when perpetrated through the use of invoices (Article 2) or through other suitable means (Article 3), are punished with imprisonment from eighteen months to six years; when the filed tax return is simply false (Article 4), the offender is subject to imprisonment from one to three years. In case of conviction for any tax fraud, the offender is also subject to accessory sanctions, including the disqualification from pub-

60 In favour is the prevailing case-law: see *Cassazione Penale*, Sez. III, 8.3.2011, n. 8962. See also, especially for the abundance of described cases, *Boffelli* (fn. 58), p. 589.

lic office for up to three years and the ban from any public procurement procedure for up to five years (Article 12). In addition, all goods representing “the profit, the price of the crime” or the value thereof shall be confiscated (Article 12-*bis*). Astonishingly, tax frauds entail criminal liability of legal persons only when perpetrated in the context of a transnational criminal association (Article 10 of Law n. 146 of march 16<sup>th</sup> 2006)<sup>61</sup>. This limitation is particularly disappointing, all the more when we consider that the legislator has recently amended the Decree leaving this aspect unchanged.

As for the issue of concurrent offences, the relationship between tax frauds and the frauds punished by Italian Penal Code is still debated among scholars<sup>62</sup>. In this respect, while considerable controversy has arisen over Article 640, 2<sup>nd</sup> para. (fraud “committed to the detriment of the State”), there is a general understanding on the fact that the same conduct can qualify both as tax and non-tax fraud. In case a fraud allows the offender to evade taxes *and* to receive public funding, the agent can therefore be punished under both Article 640-*bis* of the Penal Code and Article 2 (or 3) of Decree 74/2000<sup>63</sup>.

As mentioned above, the regulatory framework on tax frauds is quite unique in the context of the Italian criminal justice system. According to the Decree, the attempt of tax fraud is not punishable under criminal law (Article 6). The author of a tax fraud committed by using fraudulent invoices (Article 2) cannot be punished as accomplice in the crime of “release of fraudulent invoices” (Article 8) and *vice versa*, “by way of derogation from Article 110 of the Penal Code” – *i.e.* the discipline concerning complicity in criminal offences (Article 9). In case a tax fraud offender pays all due tax liabilities, including sanctions and default interests, before the opening of the first instance hearing, sanctions shall be lowered by half and accessory sanctions shall not be applicable (Article 13-*bis*). If such tax liabilities are time-barred, the offender can still file a request in order to be allowed to pay before the opening of the first instance hearing and benefit from the penalty reduction (Article 14). With reference to false tax return (Article 4), in case the tax liabilities are paid before the offender has been formally informed that he/she is under fiscal investigation, the offence shall be considered

61 See in particular *Cassazione Penale*, Sez. III, 19.9.2012 (10.1.2013), n. 1256. On this subject, see the short but interesting essay by A. Giovannini, *Persona giuridica e sanzione tributaria: idee per una riforma*, *Rassegna Tributaria* (RI), 2013, III, p. 509.

62 On this subject see M. Scoletta, *Frode in erogazioni pubbliche attraverso false fatturazioni e profitto confiscabile*, *Le Società* (LS), 2012, p. 854 seq.; A. Mereu, *La frode IVA tra truffa e frode fiscale: il concorso apparente di norme/concorso di reati al vaglio delle Sezioni Unite della Corte di Cassazione*, *Diritto e Pratica Tributaria* (DPT), 2011, p. 375 seq.; A. Scarcella, *Specialità, concorso e consumazione nei reati tributari: per le Sezioni Unite c'è frode e frode...*, *Diritto Penale e Processo* (DPP), 2011, p. 567 seq.; G. D'Angelo, *Reati di emissione di fatture fasulle e truffa ai danni dello Stato: la Cassazione torna sui rapporti tra normativa penale tributaria e normativa penale comune*, *Rassegna Tributaria* (RT) 2008, p. 1760 seq. See also Boffelli (fn. 58), p. 580.

63 This conclusion in perfectly undisputed in the case-law. See in particular *Cassazione Penale*, SS.UU., 25.10.2000, n. 27 and *Cassazione Penale*, SS.UU., 28.10.2010, n. 1235. More recently see also *Cassazione Penale*, Sez. III, 15.1.2013, n. 10580; *Tribunal of Milan*, 19.5.2011. On this point, see also D'Angelo, RT 2008, p. 1763.

extinguished and no punishment shall be inflicted (Article 13). At last, the Decree specifies that no punishment shall be inflicted in case the offence can be in any way related to the lack clarity of tax legislation or to the uncertainty regarding its scope of application.

Clearly, this legal framework is construed with a view of ensuring that tax frauds are punished only when they are very serious, either because they are committed by using particularly fraudulent means or because they exceed tolerance thresholds. The use of such thresholds and their relevant scope are in a way the touchstone of the Italian policy on tax offences: tax frauds *as such* are qualified as criminal offences only insofar as they are perpetrated through the use of particularly deceiving mechanisms; should the offender resort to other (*fraudulent*, but *less deceiving*) mechanisms, his/her act shall not be punished under criminal law unless the tax fraud exceeds considerably high thresholds; when no fraudulent mechanism is deployed, thresholds are even higher. The use of specific intent also goes in the direction of limiting the scope of application of tax frauds. In addition, the legislator has provided for mitigating or exempting circumstances that are designed to encourage compliance to the largest extent possible, even after the beginning of the criminal proceeding.

In brief, the Italian legislator has tried to reduce as much as possible the use of criminal law in the contrast to fiscal crime, by following a sort of *extremissima ratio* policy, aimed at tackling the extensive tax non-compliance without saturating the criminal justice system.

## VI. Conclusion

The essay has addressed the issue of EU frauds from two different perspectives: on the one side, it has analysed the evolution of the discipline of PIF offences, providing a state of play of the current negotiations on the Directive Proposal, in order to outline the general trends of supranational discipline. On the other, it has focused on the Italian legal framework on EU frauds, including the discipline on VAT-related frauds, with a view to pointing out the provisions that could be concerned by the new harmonised criminal law instrument.

With reference to the supranational perspective, recent developments seem to point towards an expansion of the PIF legal framework and the inclusion therein of VAT-related offences. The difficulties in taking such a step reside in its political relevance, rather than its complexity as a question of law: VAT frauds certainly affect the EU budget, so their exclusion from the PIF *acquis* represents a shortcoming in the protection of European financial instruments. In this respect, that the ECJ has embraced this vision comes as no surprise. MSs might succeed in leaving VAT frauds outside the PIF Directive proposal and decide to take the fight into the negotiations on the EPPO Regulation Proposal.<sup>64</sup> Sooner or later, though, the issue will have to be addressed.

64 Proposal for a Council regulation on the establishment of the European Public Prosecutor's Office, COM/2013/0534 final – 2013/0255 (APP)

As for the domestic perspective, the study has not shown substantial differences between the supranational and the Italian legal frameworks on frauds, except with respect to tax frauds. Most of the PIF offences were already punishable under domestic law when the various PIF instruments were adopted. So, insofar as the description of conducts is concerned, little implementing legislation was required. Notably, the few provisions that have been introduced to this purpose have proven to be largely ineffective, and courts have resorted to other pre-existing offences regulated within the Penal Code. In other respects, the PIF supranational discipline has had considerable influence on the Italian sanctioning system as a whole, for it widened the scope of confiscation and prompted the introduction of the liability of legal persons for offences committed on their behalf or in their interest.

With respect to VAT frauds, the research has instead shown major discrepancies between national and (prospective) supranational disciplines. Such differences do not lie so much in the description of the unlawful conduct: VAT-related offences disciplined by the Legislative Decree n. 74/2000 seem to fit the description of VAT-related frauds, as provided for by the PIF Directive Proposal. It could be further argued that the sanctioning levels for natural persons in the Italian legal system are also considerably high and would not infringe upon the future supranational mandate. This remains the case even with reference to EU frauds being committed within a criminal organisation, as the participation to a criminal organisation would be qualified as an autonomous offence and be punished severely.

What dramatically distinguishes the two legal systems is the criminal policy being pursued in the contrast to tax frauds. As stressed above, the Italian legislator has tried to confine the use of criminal law to particularly serious offences and to encourage *post delictum* compliance. Within the Italian criminal law system, tax frauds are punished only insofar as they exceed high tolerance thresholds, which narrow the scope of application of the offences. The liability of legal persons does not extend to any tax fraud committed on their behalf or in their interest. Furthermore, the delayed payment of tax liabilities qualifies as a mitigating circumstance (under certain conditions even as an exempting one), and exempting provisions specifically concern participation in tax offences. In this respect, though thresholds are being negotiated at EU level as a possible condition for the introduction of tax offences within the PIF legal framework, the high tolerance thresholds provided for by Italian criminal law are likely to be considered incompatible with the European criminal policy. The same can be said for the limited scope of corporate liability as well as for exempting and mitigating conditions, at least to the extent to which such discipline could encroach upon the “effective, proportionate and dissuasive criminal penalties” doctrine that has been the founding principle of European criminal law.

In light of the above, it can be contended that the extension of the PIF discipline to VAT frauds would have a strong impact on the Italian criminal law system, compelling the legislator to partially redefine its policy on fiscal offences. The question remains as to whether these changes would ultimately be beneficial for the contrast to frauds in Italy. Whereas there is little doubt that the extension of corporate liability to all fiscal

offences would positively strengthen the criminal response against frauds, a more nuanced view might be taken on the issue tolerance thresholds.

It is common knowledge that Italy has a comparatively high VAT gap in comparison to most European countries. It should though be taken into account that the available data include tax losses that do not stem from tax frauds (e.g., errors in accounting statements or taxpayers' insolvency) and tend to overweight fiscal non-compliance of countries with more exhaustive reporting systems (such as Italy), so the figures on VAT gap partially distort picture. Nevertheless, it can be maintained that tax frauds have a considerably higher incidence in Italy than in several other EU countries. According to the latest governmental reports on tax evasion<sup>65</sup>, the overall VAT gap concerning the years 2001-2013 ranges between 35 to 45 billion Euros. It is though outlined that the rate of tax compliance has grown steadily over the last five years and that, over the same time-period, the revenues deriving from inspections and consequent tax collection have increased by 100% (despite the decline in general tax revenues resulting from the financial crisis). A particularly significant increase concerns revenues resulting from delayed voluntary compliance, *i.e.* post-infringement compliance performed in order to avoid the relevant fines. The strategic guidelines on the contrast to tax evasion further require Tax Authorities to focus *significantly* on the most insidious forms of frauds and emphasise the importance that the tax strategy be perceived as *correct and proportionate* by taxpayers. In general, Italian governments have developed tax policies largely based on compliance-encouraging mechanisms. The legal framework on tax frauds seems to be consistent with this policy approach.

These remarks help us understanding why including VAT frauds within the PIF legal framework could be regarded as a deal-breaker by Italian officials negotiating the Directive Proposal. As for the question above, though an expansion in the scope of tax frauds would arguably be beneficial for the contrast to fiscal crime, a particularly aggressive criminal policy might trigger a paradoxical effect, as it would risk overwhelming the criminal courts and public prosecutors' offices, thereby weakening the overall response to fiscal offences.

65 See, in particular, *Rapporto sui risultati conseguiti in materia di misure di contrasto dell'evasione fiscale* (Doc. LVII, n. 3-bis – Allegato II alla Nota di aggiornamento al Documento di economia e finanza 2015) and *Rapporto sulla realizzazione delle strategie di contrasto all'evasione fiscale, sui risultati conseguiti nel 2013 e nell'anno in corso, nonché su quelli attesi* (c.d. Rapporto evasione fiscale 2014), Ministero dell'Economia, Governo Italiano.