CYBER VAT FRAUDS, *NE BIS IN IDEM* AND JUDICIAL COOPERATION

A comparative study between Italy, Belgium, Spain and Germany

edited by

Luigi Foffani, Ludovico Bin, Maria Federica Carriero

This publication was funded by the European Union's HERCULE III programme

Research project

EUROPE AGAINST CYBER VAT FRAUDS – EACVF

G. Giappichelli Editore

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3. Spain

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3.1. Relevant discipline on VAT FRAUDS

3.1.1. General overview

The Spanish system in tax matter is based on criminal and administrative penalties. Of course, we can say that administrative penalties are differentiated from crimes both for the amount of the fee defrauded and for the fraudulent intent (will or intention to realise a conduct prohibited by law) which is always present only in crimes [125]. In fact, arts. 305 and 305-*bis* of the Spanish Penal Code consider conducts aimed to defraud the state, community, regional and local tax authorities, provided that the sum of the defrauded payment, the unpaid sum of retentions or payments or of rebates or tax benefits irregularly obtained or enjoyed are in excess of 120.000 €. Instead, art. 183 of General Taxation Law (*Ley General Tributaria*) 58/2003 of 17 December (BOE of 18 December), hereinafter "GTA", considers "intentional or unintentional act or omission of any degree of negligence (…)".

More in detail, tax crimes and their punishment are regulated under Title XIV of the Penal Code (Organic Act 10/1995 of November 23), "On felonies against the Exchequer and the Social Security" (*Delitos contra la Hacienda Pública y Seguridad Social*) and, in particular, by "*articles 305, 305-bis, 306, and 310 SCC that contain the definition of tax crimes and crimes related to breach of other duties*" [126].

On the other hand, for what concerns administrative penalties, first of all, we have to consider VAT Law (*Ley 37/1992, de 28 de diciembre, del Impuesto sobre el Valor Añadido*). Moreover, tax violations in VAT are qualified and sanc-

[125] A. LÓPEZ DÍAZ, "*Surcharges and Penalties in Tax Law". Spanish Report*, EATLP Congress, 2015, available on: http://www.eatlp.org/uploads/public/2015/National%20report%20Spain.pdf.

[126] A. LÓPEZ DÍAZ, "*Surcharges and Penalties in Tax Law". Spanish Report*, cit., 5. See also, in general, J.C. FERRÉ OLIVÉ, *Tratado de los Delitos Contra la Hacienda Pública y Contra la Seguridad Social*, Valencia, 2018.

tioned in accordance with the provisions of the General Tax Act (GTA, *Ley 58/2003, de 17 de diciembre, General Tributaria*), which regulates the "*principles, general concepts and tax procedures for the whole tax system*" [127]. In particular, this Act has been amended several times in order to adapt it to the changing tax environment. In fact, until the GTA reform of 2015, there was a radical dysfunction between provisions contained in GTA and those contained in the SCC, specially with regard to the relation between inspection procedures and judicial proceedings, since the previous model was based on completely different premises. Therefore, on 22 September 2015, Law 34/2015 – which has entered into force on 12 October 2015, except for the obligation to keep specific electronic ledgers that has entered into force from 1 January 2017 – partially amended the Spanish General Tax Law. The main objectives behind the reform were to achieve a more accurate and systematic governance of all procedures through which the tax system was applied and processed, in order to reduce the litigation in tax matter; and to improve the prevention of tax fraud, by encouraging voluntary compliance with tax obligations.

In this way, as regards settlement and quantification of taxes, currently two systems coexist: the self-assessment mechanisms (which are ultimately preponderant), and the settlement system by the government. In particular, with regard to the self-assessment, the taxpayer is obliged to file his tax return and also to establish the amount due. More in detail, obligations to the taxpayer are systematised in art. 29 of the GTA (*Obligaciones tributarias formales*) [128] under

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[127] S. IBÁÑEZ MARSILLA, *Guide to Spanish Tax Law Research*, available on: https://www.uv.es/ibanezs/SpanishTLRG.pdf.

[128] Art. 29 of the GTA: "*a) The obligation to submit tax register declaration for registration by persons or entities that develop or will be developed professional activities or business operations or meet income subject to withholding tax in Spanish territory; b) The obligation to apply for and use the tax identification number on their relationships with fiscal significance; c) The obligation to submit statements, self-settlements and communications. d) The requirement to keep and maintain books and records, as well as programs, files and computer files that supporting them and coding systems used to enable the interpretation of the data when the obligation is fulfilled with use of electronic devices (...) In any case, taxpayers required to submit self-settlements or statements by electronic means shall keep copies of the programs, files and generated files containing the original of the financial statements and self-settlements or statements submitted data; e) The obligation to issue and deliver invoices or equivalent documents and keep invoices, documents and evidence relevant to their tax obligations; f) The obligation to provide to the tax authorities books, records, documents or information that the taxpayer is required to maintain in relation to the performance of tax obligations themselves or others, and any data, reports, background and taxation-proof at the request of the Administration or on periodic statements. Where the required information is kept in digital format should be provided on said support so when this is required g) the obligation to provide the practice of administrative checking and inspections; h) (...)*". In this way, see A. LÓPEZ DÍAZ, "*Surcharges and Penalties in Tax Law". Spanish Report*, cit., 6 et seq.

which, together with the payment obligation, the taxpayer has certain documentary and reporting duties, which consist "*if he is a merchant, in bookkeeping according to commerce law; and, if he is a professional, in keeping certain books established by the Tax Administration*". In this sense, bookkeeping required to traders by the Commercial Code and complementary legislation is especially relevant with regard to "entrepreneurs" and "professionals", both for the purposes of income tax and VAT. In addition, there is also the obligation to provide to the tax authorities "*files or information that the taxpayer is required to maintain in relation to the performance of own tax obligations*" [129], and any other relevant taxation evidence (also in digital form), at the request of the Administration or in regular taxpayer's reports.

In the end, in this contest, it is important to underline that, currently, in the Spanish tax system, just in order to speed up self-assessment of taxes, different electronic forms have been introduced [130]. In particular, quarterly or monthly Spanish VAT returns must be completed by subjects which are trading with a valid "Spanish VAT registration". Thus, they have to provide to the Spanish tax office not only all the details of their taxable supplies, but also to indicate the amount of VAT due. The frequency of VAT reporting in Spain depends on the level of trading [131].

3.1.2. Main relevant offences

The most serious violations of tax law are considered by the lawmaker as a criminal offence. In particular, there are two kinds of tax crimes: tax fraud (art. 305 SCC) and tax accounting crime (art. 310 SCC) [132].

Tax fraud (art. 305 SCC) is committed by any person who, whether by action or omission, defrauds the state, regional or local treasury, avoiding the payment of taxes [133], deductions or amounts that should have been deducted, or payments on account, wrongfully obtaining rebates or likewise enjoying fiscal

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[129] See A. LÓPEZ DÍAZ, "*Surcharges and Penalties in Tax Law". Spanish Report*, cit., 6 et seq.

[130] In this way, see the Royal Decree 1619/2012 of 30 November.

[131] More in detail, "*Spanish VAT filings are due on the 20th of the month following the period end*". Instead, "*annual tax summaries are due on the 30th January in the following year*". In this way, see: https://www.avalara.com/vatlive/en/country-guides/europe/spain.html.

[132] J.C. FERRÉ OLIVÉ, *Tratado de los Delitos Contra la Hacienda Pública y Contra la Seguridad Social*, cit.

[133] For the meaning of the term "*tributo*" (tax) see art. 2, para 2, GTA. A. SERRANO GÓMEZ, *Curso de derecho penal. Parte especial*, Madrid, 2017, 454.

benefits, provided that the amount of the defrauded payment, the unpaid amount of deductions or payments on account or the amount of the rebates or fiscal benefits wrongfully obtained or enjoyed, exceeds one hundred and twenty thousand euros.

More in detail, for what concerns the computation of the 120.000 € threshold, in the case of tax fraud, if the assessment period is shorter than a year – for instance in the case of VAT that, as mentioned above, is assessed quarterly or monthly – the amount evaded in the natural year should be taken into account [134]. The punishments for this type of tax fraud are: imprisonment from one to five years; a fine of up to six times the aforesaid amount; and, in addition to the sentences stated, the person accountable shall lose the possibility of receiving state grants and aid and the right to enjoy fiscal or social security benefits or incentives for a period of between three and six years.

There are two basic elements on which this crime pivots: the concepts of "fraud" ("*by action or omission, defraud the Public Treasury*") and "circumvention" ("*eluding the payment of taxes …*"). That is to say, it is necessary the presence, joint and simultaneous, not only of an "occultation" of the existing economic capacity, but also of a "deceit" (for instance, the use of fraudulent means, according to art. 184.3 of the GTA) [135]. Indeed, tax fraud requires the existence of an intentional and deliberately directed behaviour to defraud the Public Treasury (fraudulent intent), but also the use of deception (or artifice) able to elude the payment of taxes [136]. In addition, from the "material" perspective, as we can see, the lawmaker has chosen not to focus on specific modalities of realisation of the frauds. Instead, the core of the infraction is "defraud the public Treasury", which can be committed through one of the four formulas that are established in art. 305 SCC [137]. More in detail, the first and the second prohibited conducts ("*evading the payment of taxes, amounts which were withheld or which should have been withheld or tax payments*") can be realised, for

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[134] A. LÓPEZ DÍAZ, "*Surcharges and Penalties in Tax Law*". *Spanish Report*, cit., 21.

[135] A. SERRANO GÓMEZ, *Curso de derecho penal. Parte especial*, cit., 453 et seq.; A. APARICIO PÉREZ, *Delitos contra la Hacienda Pública*, Universidad de Oviedo, 1990.

[136] However, according to the jurisprudence (STS – *Spanish Tribunal Supremo* – n. 817/2010), tax fraud is not excluded in case of "dolo eventual", when tax-payer uses mendacious data, capable of hiding or masking reality. In this way, more specifically, J. M. CISNEROS GONZÁLEZ, *Dolo directo y dolo eventual en el delito fiscal. El conocimiento sobre los elementos normativos del tipo del artículo 305 del código penal*, in *La Ley Penal*, n. 122, 2016; R. ECHAVARRÍA RAMÍREZ, *Consideraciones sobre el bien jurídico penalmente protegido por el delito de defraudación tributaria del art. 305 C.P. español*, in *Revista Electrónica de Ciencia Penal y Criminología*, 2014, 1-39.

[137] A. SERRANO GÓMEZ, *Curso de derecho penal. Parte especial*, cit., 454 et seq.

example, through the use of false invoices. In fact – as we will see shortly – in most cases, tax fraud involves the use of *fraudulent measures* (such as, false invoices, use of persons or companies to avoid revealing the real taxpayer) capable of hiding the real economic capacity of the tax payer.

Moreover, art. 305, para. 3, SCC, establishes that the same penalties shall be imposed on whoever commits the behaviours described in section 1 and who avoids payment of any amount that must be paid, or improperly enjoys a legally obtained benefit, when the facts are committed against the Treasury of the European Union, provided that the amount defrauded exceeds fifty thousand euros in a period of one calendar year. The foregoing notwithstanding, in those cases where the fraud is committed within an organisation or criminal group, or by persons or entities acting under the appearance of a genuine economic activity without in fact carrying it out, the offence may be prosecuted from the very moment at which the sum established in this section is reached. Nevertheless, if the amount defrauded does not exceed fifty thousand euros, but does exceed ten thousand, a prison sentence of between three months and one year or a fine of up to three times the aforesaid amount shall be imposed, as well as the loss of the possibility of receiving state grants and aid and the right to enjoy fiscal or social security benefits or incentives for a period of between six months and two years [138].

On the other hand, art. 310 (*tax accounting crime*) establishes that who is obliged by the law to keep corporate accounting, books or tax records shall be punished when: a) he absolutely fails to fulfil that obligation under the direct assessment of the tax bases regime; b) he keeps different accounts that, related to the same activity and business year, conceal or simulate the true situation of the business; c) he has not recorded businesses, acts, operations or economic transactions in general, in the obligatory books, or has recorded them with figures different to the true ones; d) he has recorded fictitious accounting entries in the obligatory books. The consideration as a felony of the cases of fact referred to in Sections c) and d) above, shall require the tax returns to have been omitted, or for those submitted to provide a record of the false accounting and that the amount, by more or less, of the charges or payments omitted or forged exceeds, without arithmetic compensation between them, 240.000 € for each business year. Punishment for this type of crime is imprisonment from five to seven months [139].

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[138] This paragraph has been modified by L.O. n. 1/2019, of February 20th, which modified the Penal Code (Organic Act n. 10/1995 of November 23th), in order to implement the European Union directives in financial and terrorism sectors.

[139] A. SERRANO GÓMEZ, *Curso de derecho penal. Parte especial,* cit., 477 et seq.; J.C. FERRÉ OLIVÉ, *El delito contable*, *Análisis del art. 350 bis del Código Penal*, Barcelona, 1988.

This provision should be considered as a "special" offence, since it is based on irregularities on accounting or registration; indeed, it presupposes the existence of a "prior legal duties to keep accounts, books or records" (see § 3.1.1., art. 29 GTA). Moreover, it is a "crime of danger", because if it had been consummated, it would be subsumed in other crimes against the Treasury Public; more in detail, it is an "abstract dangerous crime", since it is not required, for its existence, a real danger to the Treasury. Thus, it has an "instrumental nature", since it realises an advanced protection of the legal asset, insofar as it sanctions preparatory acts for a tax offense, anticipating in this way the barrier of criminal protection to the legal asset. In other words, this crime regulates a case in which an offence is committed in order to realise another offence, clearly "tax fraud" (art. 305 SCC).

Furthermore, the Organic Act n. 7/2012 also has introduced an aggravated type of tax fraud (art. 305-*bis* SCC), characterised by any of the following circumstances: a) the amount defrauded exceeds six hundred thousand euros; b) the fraud was committed by an organisation or criminal group; c) where the use of natural or legal persons or entities without legal personality as proxies, businesses or trust instruments or tax havens or territories with no taxation obscures or makes it difficult to determine the identity of the taxpayer or the person responsible for the office, the amount defrauded or the assets of the taxpayer or the person responsible for the offence. Punishment for this type of tax fraud is imprisonment from two to six years and a fine from twice to six times the defrauded amount [140].

In addition, it is important to point out that the art. 306 SCC establishes that any person who, whether by action or omission, defrauds the general budget of the European Union, or any other budget managed by that entity, of an amount greater than fifty thousand euros, avoiding, other than in the cases provided for in section 3 of art. 305 SCC, the payment of amounts that should be paid, using the funds obtained for a purpose different from that for which they were intended or wrongfully obtaining funds by falsifying the conditions required for being granted them or hiding those that would have prevented them being granted, shall be punished with a prison sentence of between one and five years and a fine of up to six times the aforesaid amount, as well as the loss of the possibility of receiving state grants and aid and the right to enjoy fiscal or social security benefits or incentives for a period of between three to six years [141]. If the

[140] Art. 305-*bis* SCC was introduced by L.O. n. 7/2012, of December 27th, through which the Penal Code (Organic Act n. 10/1995 of November 23th) was amended on Transparency, Fight against Tax Fraud and Social Security.

[141] This paragraph has been modified by L.O. n. 1/2015, of March 30th, which has modified the Penal Code (Organic Act n. 10/1995 of November 23th).

amount defrauded or wrongfully used does not exceed fifty thousand euros, but does exceed four thousand, a prison sentence of between three months and one year or a fine of up to three times the aforesaid amount shall be imposed, as well as the loss of the possibility of receiving state grants and aid and the right to enjoy fiscal or social security benefits or incentives for a period of between six months and two years.

That said, for what concerns administrative penalties, as mentioned above, art. 183.1 GTA defines tax contraventions as "*those actions or omissions intentional or negligent in any degree typified and punished as such in this or any other law*"; moreover, art. 183.2 GTA classifies tax contraventions into three group (minor, serious and very serious), according to whether they cause economic damage or not, actual or potential, to the public finance; and depending on the use of fraudulent (*medios fraudulentos*) or hidden means (*la ocultación de datos*). In fact, as mentioned above, generally, tax crimes occur through the use of *fraudulent* (i.e., false invoices, use of persons or companies to avoid revealing the real taxpayer) or *hidden means* [142]. In particular, there is an occultation of data to the Administration (*la ocultación de datos*) when no statements are presented or those presented include facts or transactions that are non-existent, or which contains false amounts (art. 184.2 GTA). Instead, regarding fraudulent means (*medios fraudulentos*), according to art. 184.3 GTA, we can consider three examples: a) substantial anomalies in accounting and in books or records established by tax regulations; b) the use of invoices, supporting documents or other documents, false or falsified; c) the use of interposed persons or companies [143].

In this way, in accordance with the provision of art. 171 of the VAT Law, the infractions provided by art. 170 of the VAT Law are "serious", and may be reduced according also to the rules provided by the art. 188, para. 3, GTA.

In addition, we have to consider that the Law n. 36/2006, of November 29, on *Measures for the Prevention of Tax Fraud,* has incorporated a section (five) to art. 87 of the VAT Law. More in detail, through this provision a new tax liability case with a "subsidiary nature" was introduced, precisely with the aim of countering the "carrousel fraud". In fact, from the tax relationship can be derived penalties not only to the taxpayer, but also to the recipients which shall be

[142] J. MARTÍN FERNÁNDEZ, *Tratado Práctico de Derecho Tributario General Español*, Valencia, 2017.

[143] In this context, one of the most frequent *fraudulent measure* is the use of invoices, supporting documents or other documents, false or falsified, in order to lower the taxable bases and therefore the tax rate. We are facing an infringement that has a very important development in Spain in recent years. M.Á. OGANDO DELGADO, *El fraude tributario en el nuevo Código penal*, in *Boletín de la Facultad de Derecho de la UNED*, 1996, 191 et seq.

jointly and severally liable for the tax debt accruing to the taxable person in respect of transactions on which the tax is not properly levied. In particular, this kind of responsibility may be applied in cases where the addressee of the operation is an "entrepreneur" or "professional" which can reasonably presume that the tax will not be declared or deposited, since – according to the second paragraph of art. 87, para. 5, of the VAT Law – he has paid goods with a "notoriously anomalous price" (*precio notoriamente anómalo*). Nevertheless, the same precept states that if the price is "*justified by the existence of economic factors*", it is not considered anomalous [144].

3.2. Relevant discipline on CYBERCRIMES

3.2.1. General overview

In Spain, both the Penal Code of 1995 and the subsequent reforms have played a great deal of attention to cybercrime.

In general, the normative approach of the Spanish lawmaker in 1995 was very particular considering that, instead of creating autonomous criminal types, he has mostly preferred to modify and extend traditional crimes (frauds, damages, etc.) which presented similarities with the new and emerging form of (cyber)crimes. In this way, we have to highlight the absence of a supra-individual or collective legal asset that could be identified with "computer security", or some similar concept. On the contrary, most of the time, the protected legal interest coincided with the legal interest protected by the traditional crimes (i.e., privacy, heritage or socioeconomic order, etc.) [145].

More specifically, the legislature preferred to adopt two strategies [146]. Firstly, he has established legal models parallel to the classic models which cover conduct equivalent to traditional behaviour, using new technologies, or materials that use advanced technology. In this first group, we can certainly bring in the crime of computer fraud (*Estafa informática*, provided by art. 248.2 SCC). Secondly, he has also decided to protect new IT "objects", such as, data, pro-

[144] N. PUEBLA AGRAMUNT, *La solución española a los fraudes carrusel: responsabilidad subsidiaria del adquirente por el IVA no ingresado en la cadena*, in *Crónica tributaria*, n. 123, 2007, 149-169.

[145] I. SALVADORI, *I nuovi reati informatici introdotti nel codice penale spagnolo con la legge organica n. 5/2010*, in *Profili di diritto comparato*, in *Indice Penale*, 2011, 767 et seq., 770.

[146] P. FARALDO CABANA, *Estrategias legislativas en las reformas de los delitos informáticos contra el patrimonio*, in *Revista Aranzadi de Derecho y Nuevas Tecnologías*, 2015, 27-60.

grams and IT documents. In this context, we can remember the crime of damaging data, programs and IT documents contained in networks, media or IT systems (*Danos informáticos*, provided by art. 264.2 SCC, which currently constitutes an autonomous offence provided by art. 264 SCC) [147].

Moreover, the lawmaker has also defined new criminal offences that are, in reality, preparatory acts of other classic offences. In particular, in these cases, the normative approach consists to create crimes that materially constituted "preparatory acts" or "attempts" of other offences, thus giving rise to problems in relation to the "harm principle", "principle of minimum intervention" and the "principle proportionality".

On the other hand, on November 27, 2009, the government presented a draft of organic law (*Ley Orgánica* 5/2010) to reform the Spanish penal code [148], which – in addition to the introduction of the criminal liability for the legal persons – provided for the modification of numerous crimes (including those concerning the exploitation of minors, the fight against terrorism, etc.). In particular, with this reform, the Spanish legislator, substantially in line with the technique adopted in 1995, placed the new computer crimes in the matter of protection of the privacy, integrity and availability of data and IT systems, alongside those traditional cases that presented with these analogies. Thus, new crimes were introduced, for example, computer fraud committed by credit cards and – in the wake of the provisions of Framework Decision 2005/222/GAI – the unlawful access to an information system (so-called Hacking), etc. [149].

In the end, we should mention the last reform of the Penal Code by the Organic Law 1/2015, of 30 March, (*Ley Orgánica 1/2015, de 30 de marzo*) which, as well, has played a great deal of attention to cybercrime.

3.2.2. Main relevant offences

In case of crimes we are interested to mention, it is important to highlight that the Spanish criminal code does not provide for specific forms of cybercrimes related to false documents, but does simply extend the discipline of the traditional false offences to informatic documents.

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[147] I. SALVADORI, *I nuovi reati informatici introdotti nel codice penale spagnolo con la legge organica n. 5/2010*, cit., 770 et seq.

[148] Available on the website http://www.congreso.es/public_oficiales/L9/CONG/BOCG/A/A_052-01.PDF. I. SALVADORI, *I nuovi reati informatici introdotti nel codice penale spagnolo con la legge organica n. 5/2010*, cit., 767 et seq.

[149] I. SALVADORI, *I nuovi reati informatici introdotti nel codice penale spagnolo con la legge organica n. 5/2010*, cit., 768.

In general, a "computer document" (*documento informático*) is defined not as a specific kind of document comparable to public, official, mercantile or private documents, but as a "special" way of materialising a statement of thought or an information. In this sense, art. 26 of the penal code provides that: "*a document shall be deemed any material medium that expresses or includes data, facts or narrations that are effective as evidence, or of any other kind of legal importance*" [150]. Therefore, for criminal purposes, it is a document any material medium (*soporte material*) that can express any fact with legal-evidentiary relevance; and certainly, the electronic/computer document fulfils that circumstance [151].

As far as we are concerned, it is important to remember arts. 390 and 392 SCC since they can be considered in case of false invoices. In particular, the first one establishes that a punishment by imprisonment from three to six years shall be handed down to the authority or public officer who, while carrying out the duties of office, commits forgery: a) by altering any of the essential elements or requisites of a document; b) simulating all or part of a document, so as to lead to error concerning its authenticity; c) claiming intervention in an act by persons who were not party to it, or attributing those who intervened declarations or statements other than those they made; d) untruthful narration of the facts. Instead, art. 392 SCC establishes that the private individual that commits in public, official or mercantile document, any forgery described in the first three issues of section 1 of art. 390, shall be punished with imprisonment from six months to three years. For this type of crime (documentary forgery) we have to consider two different legal assets: the "public faith" and/or the "security in the legal trade". Instead, as regards to the subjective element, it is required the existence of so-called "*dolo falsario*": this means that the active subject must be aware that the essential elements of the document are not true; moreover, he must have the conscience and willingness to alter the truth [152].

That said, first of all, we must highlight that the falsification of the content of a document by a private citizen is not punishable by the Spanish penal code, because there is no a legal obligation for the private citizen to "tell the truth", except in some cases when the document has public meaning or legal effects [153]. The legal obligation to tell the truth is, instead, imposed on the public officer. In this way, according to the jurisprudence, the conduct of a private citizen may

[150] M.Á. MORENO NAVARRETE, *Contratos Electrónicos*, Madrid, 1999, cap. VII.

[151] More in detail see: STS 788/2006; STS 426/2016; STS 645/2017.

[152] M.Á. MORENO NAVARRETE, *Contratos Electrónicos*, cit., 160 et seq.; A. SERRANO GÓMEZ, *Curso de derecho penal. Parte especial,* cit., 642 et seq., 647.

[153] A. SERRANO GÓMEZ, *Curso de derecho penal. Parte especial,* cit., 647 et seq.

be criminally relevant, for instance, when the invoice reflects "*a totally non-existent or simulated operations*", pursuant to art. 390, para. 1, lett. b) (*Simulating all or part of a document, so as to lead to error concerning its authenticity*) and not to art. 390, para. 1, lett. d) (*Untruthful narration of the facts*) SCC [154].

In addition, closely related to false documentary offenses is art. 264 SCC, (*delitos de daños informáticos)* that punished with a sentence of imprisonment of six months to three years who, by "*any means, without authorisation and in a serious way, gravely delete, damage or make inaccessible external computer data, computer programs or electronic data*" [155]. Also this article provides an aggravated form where the crime is committed by a criminal organization, either affects a large number of computer systems or the computer systems of critical infrastructures (such as those regarding health, security, protection and economic and social well-being) or entails a serious threat to the security of the State, the European Union or an EU Member State. In these cases, a penalty of imprisonment from two to five years and a fine of ten times the damage caused can be imposed. As regards to the legal asset protected, the behaviour may present a multi-offense character: in fact, as well as the property (*Delitos contra el patrimonio*), the performance of the computer systems itself should be protected. Moreover, it is necessary the intention of generating other data different from the original ones. For this reason, it is possible to consider the conduct of "*manipulation of computer data concurring with an offence of documentary forgery*". Nevertheless, since the conduct sanctioned by the art. 264 SCC generally produces economic damage, it may be criminally relevant in a different way, such as a conduct contained in art. 248.2 SCC [156].

Arti. 248, para. 2, SCC (*Estafa informática*) establishes who shall also be found guilty of fraud: a) persons who, for profit, and by making use of a computer manipulation or similar scheme, bring about an unauthorised transfer of assets to the detriment of another person; b) persons who manufacture, upload, possess or supply computer programmes specifically aimed at committing the

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[154] In this way, see: STS 1302/2002 of the 11th of July; STS 1536/2002 of the 26th of September; STS 2028/2002 of the 2th of December; STS 325/2004 of the 11th of March; STS 145/2005 of the 7th of February; STS 37/2006 of the 25th of January; STS 900/2006 of the 22th of September; STS 63/2007 of the 30th of January; STS 641/2008 of the 10th of October.

[155] In this way, see: https://iclg.com/practice-areas/business-crime-laws-and-regulations/spain. In addition, see arts. 264-*bis*, 264-*ter* and 264-*quater* which are also related to computer damage.

[156] In this way, see: https://www.coe.int/en/web/octopus/country-legislative-profile/-/asset_publisher/LA6eR74aAohY/content/spa-1?inheritRedirect=false. N.J. DE LA MATA BARRANCO, L. HERNÁNDEZ DÍAZ, *El delito de daños informáticos: una tipificación defectuosa*, in *Estudios Penales y Criminológicos*, 2009, 311-362; A. SERRANO GÓMEZ, *Curso de derecho penal. Parte especial*, cit., 341 et seq.

swindles provided for in this article; c) persons who, by using credit or debit cards, or travellers' cheques, or the data contained in any of these, perform operations of any kind to the detriment of their holder or a third person.

Compared to the traditional fraud (art. 248.1 SCC) – that always places emphasis on verbs like "deceit", "contrivance", or similar words – the computer fraud is carried out by anyone who obtains an economic benefit through a "computer manipulation", or other similar artifice, which takes the place of the "deception" aimed at misleading the third party [157]. Indeed, it is important to point out that in case of the computer fraud the traditional notions used in art. 248.1 SCC (such as, "deception" or "deceit") wouldn't apply, because the hardware and software do not have the capacity to make decisions right or wrong: they only executed mechanical orders. Moreover, the automated system is not the victim of the offense, but the means used by the active subject to execute the criminal offense.

On the other hand, the concept of "computer manipulation" may be defined in different ways, such as the "introduction", "alteration", "deletion" or "undue suppression" of computer data, or like an "illegitimate interference" with computer programmes or systems. Therefore, the "introduction of false data", the "improper introduction of real data" and the "manipulation of the data" contained in the system are included in the term "manipulation". In this way, if the manipulation is carried out through the "abusive access" to other people's computer systems, there may be a *concurso medial* (see § 3.3.1.) with the crime provided for by the art. 197-*bis*, para. 1, SCC (*Illegal access*) [158]. Anyway, either of these cases always require that the conduct of the active subject is realised with a "desire for illicit cash profits": indeed, if the lucrative intention does not exist, there may be another type of crime.

In the end, it is important also to mention art. 197-*bis*, para. 1, SCC that punishes the access or facilitating access to an information system (to a part or the whole) violating the security measures and without due authorisation (*Illegal access*). More in detail, art. 197-*bis*, para. 1, SCC (*Intrusismo informático*) punishes whoever, by any means or procedure, in breach of the security measures established to prevent it, and without being duly authorised, obtains or provides another person with access to a computer system or part thereof, or who remains within it

[157] A. SERRANO GÓMEZ, *Curso de derecho penal. Parte especial*, cit., 301; J.G. FERNÁNDEZ TERUELO, *Respuesta penal frente a fraudes cometidos en internet: estafa, estafa informática y los nudos de la red*, in *Revista de derecho penal y criminología*, 2007, 217-243; I. SALVADORI, *I nuovi reati informatici*, cit.

[158] A. ZÁRATE CONDE, P. DÍAZ TORREJÓN, E. GONZÁLEZ CAMPO, Á. MAÑAS DE ORDUÑA, J. MORAL DE LA ROSA, *Derecho Penal. Parte especial: 2ª Edición. Obra adaptada al temario de oposición para el acceso a la Carrera Judicial y Fiscal*, Madrid, 2018, 366 et seq.

against the will of whoever has the lawful right to exclude him or her, shall be punished with a prison sentence of six months to two years [159]. So that, art. 197-*bis*, para. 1, SCC sanctions two alternative conducts: the active hypothesis of those who "*access without authorization*" to a computer system or part thereof; and the omissive conduct of who "*remain in the system against the will of whoever has the lawful right to exclude him*" [160]. In any case, the new art. 197-*bis* SCC, para. 1, requires that the unauthorised introduction take place through the violation of security measures, designed to prevent access to data and computer programs contained in a system, that may have a "physical" (such as keys) or "logical" nature; in the last case, there may be very sophisticated technical means of identification (e.g., passwords, numerical sequences, fingerprints, biometric data, etc.).

In addition, art. 197-*bis*, para. 2, SCC, (*Ciberespionaje*) punishes "Illegal interception" stating that any person, without being duly authorised, using technical devices or means to intercept non-public transmissions of computer data to, from or within an information system, including electromagnetic emissions therefrom, shall be punishable by imprisonment of three months to two years. Unlike the crime of computer intrusion provided in art. 197-*bis* (first paragraph) – in which the privacy of the person who suffers the intrusion is protected – the crime provided by the art. 197-*bis*, para. 2, SCC may protect the security of the computer system itself; therefore, in order to consummate this type of crime, it is not necessary to publish the information.

Instead, art. 197-*ter* SCC punishes, with an imprisonment of six months to two years any person who, with the intention of facilitating the commission of one of the offences referred to in art. 197(1) and (2) and art. 197-*bis*, produces, procures, imports or otherwise makes available, without being duly authorised: a) a computer program designed or adapted principally to commit such offences; or b) a computer password, access code, or similar data by which the whole or any part of an information system is capable of being accessed. In the end, art. 197-*quarter* SCC provides an aggravating circumstance if facts described in this Chapter were committed within a criminal organisation or group.

3.3. Issues arising from CYBER VAT FRAUDS

The Spanish system presents some issues related to the *ne bis in idem* principle both under the aspects of VAT frauds and that of cybercrimes. In particu-

[159] This article and the following were introduced by L.O. n. 1/2015, of March 30.

[160] See I. SALVADORI, *I nuovi reati informatici*, cit., 775, with respect to previous crime provided by the art. 197.3 SCC.

lar, for what concerns VAT frauds, problems may arise considering that, in the Spanish tax law system, the administrative sanctions are parallel to criminal ones. In this way, the Constitutional Court "*have established that criminal offences and administrative contraventions have substantially the same character since they are both manifestations of a single* ius puniendi *of the state.*" . Thus, administrative penalties may have in Spanish law a repressive and a preventive purpose [161], just like the criminal ones, so as to be generally considered to fall within the scope of the notion of *matière pénale* elaborated by the ECtHR. Instead, for what concerns the cybercrimes, the issues are mostly related to the possible pluri-qualification of a single fact.

3.3.1. Substantial perspective

First of all, it is important to highlight the difference that currently exists in Spanish law between "concurrency of criminal provisions" (*concurso de leyes o de normas*) and "concurrency of crimes" (*concurso de delitos*).

In short, in the first case (concurrency of criminal provisions), one or more events may be included in various criminal provisions but only one of them can be applied. In this case, some of the rules contained in the art. 8 of the Spanish penal code may be used. Therefore, it is possible to use: 1) *principle of specialty*, according to which if all actions fall within the definition of the crime set out in law A (general) also fall within the definition of the crime set out in law B (special), in order to consider law B more specific than law A, precept B is applied preferentially; 2) *principle of subsidiarity*, that arises when a criminal precept only governs in the case that it does not put another criminal precept at stake; 3) *principle of consumption*, that arises when a precept includes all the damage arising from the facts; 4) *principle of alternativity* that arises when the case cannot be resolved by these rules, it must be resolved using the law that establishes the higher penalty [162].

In the second case (concurrency of crimes), one or more events may be in-

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[161] A. LÓPEZ DÍAZ, "*Surcharges and Penalties in Tax Law". Spanish Report*, cit., 14.

[162] In particular, art. 8 of the Spanish penal code establishes that «*Acts liable to be defined pursuant to two or more provisions of this Code and not included in Articles 73 to 77 shall be punishable by observing the following rules: 1. A special provision shall have preferential application rather than a general one; 2. A subsidiary provision shall be applied only if the principal one is not, whether such a subsidiary nature is specifically declared or when it may tacitly be deduced. 3. The most ample or complex penal provision shall absorb those that punish offences committed therein. 4. Failing the preceding criteria, the most serious criminal provision shall exclude those punishing the act with a minor punishment*».

cluded in various penal provisions and several may be applied simultaneously. In this case, there are several types of concurrencies with different rules of solution. In particular, according to art. 77, para 2, SCC, in case of *concurso ideal* (one action/multiple criminal outcomes) the penalty for the severest crime in the upper half should be applicable; instead, according to art. 77, para 3, SCC, in case of *concurso medial* (several actions/several criminal outcomes - are in a means-end relationship) a higher penalty will be imposed than would have been imposed, in the specific case, for the more serious crime. In any case, the penalty may not exceed the sum of those that would apply if the crimes were punished separately. At the same time, according to arts. 73, 75, 76 and 78 SCC, in case of *real concurrency* (several actions/several criminal outcomes) there may be an accumulation of all penalties, with some limits. In the end, art. 74 SCC regulates the *continued crime* (several actions/several criminal outcomes - breach of the same or similar precepts occurring at an identical occasion (continued *mens rea*) or within a preconceived plan (overall *mens rea*)[163].

Given the above, from the "substantial" point of view of *ne bis in idem* principle, it must firstly be noted that in Spain, the Constitution does not explicitly recognize the *ne bis in idem* principle, but according to the Constitutional Court this principle may be a direct consequence of the *principle of legality* (art. 25 of the Constitution) [164].

At the same time, art. 10.2 of the Spanish Constitution establishes that "*the principles relating to the fundamental rights and liberties recognised by the Constitution shall be interpreted in conformity with the Universal Declaration of Human Rights and the international treaties and agreements thereon ratified by*

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[163] Art. 74 SCC «1. *Notwithstanding what is set forth in the preceding Article, whoever perpetrates multiple actions or omissions, in the execution of a preconceived plan or taking advantage of an identical occasion, that offend one or several subjects and infringe the same criminal provision or provisions that are equal to or of a similar nature, shall be punished as the principal of a continued felony or misdemeanour with the punishment stated for the most serious offence, that shall be imposed in its upper half, it being possible to reach the lower half of the higher degree of punishment. 2. In the case of crimes against property, the punishment shall be imposed taking into account the full damage caused. In these crimes, the Judge or Court of Law shall justify imposition of the punishment raised by one or two degrees, to the extent deemed convenient, if the fact were to be evidently serious and were to have damaged persons at large. 3. What is set forth in the previous Sections does not include offences against eminently personal property, except those constituting offences against honour and sexual freedom and indemnity that affect the same victim. In these cases, the nature of the fact and the provision infringed shall be deemed to apply criminal continuity or not*».

[164] To be honest, the Spanish doctrine is not unanimous regarding the connection between art. 25 of the Spanish Constitution and the *ne bis in idem* principle. In general, see: L. ARROYO ZAPATERO, *Principio de legalidad y reserva de ley en materia penal*, in *Revista Española de Derecho Constitucional*, 1983, 9-46, 19-20.

Spain". Thus, Courts invoke the international instruments on human rights – such as, the International Covenant on Civil and Political Rights of 16 December 1966 (art. 17.7) and Protocol n. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms (art. 4) – to declare this principle [165].

Moreover, according to the Spanish legal system (and in particular – as we'll see in the next paragraph – to the art. 133 of the Act 30/1992, of November 26) if facts may be punished under criminal or administrative law, they cannot be at the same time punished if an identity of "subject", "fact" and "foundation" exists. Consequently, in the presence of these three criteria ("*identity* of *subject*, *fact* and *foundation*") an administrative penalty cannot be simultaneously imposed with another administrative penalty or/and with a criminal penalty; or more simply, the same fact can not be punished twice [166]. In this way, it is important to highlight that for the majority jurisprudence, the interpretation of "identity of the fact" should be not carried out in a "strictly naturalistic sense", but in a "legal sense". Therefore, those elements that as a whole have been considered by the legislator to construct the criminal or administrative penalties, must be taken into account to establish if there is "*identity of the fact or not*" [167]. On the other hand, there is a "foundation identity" when the legal assets protected by crimes are the same; so that, when there are two or more legal assets, the double sanction is deemed not to conflict with the *ne bis in idem* (and of *proportionality*) principle [168].

Nevertheless, it is also important to mention the "*teoría de la compensación* o *del descuento*", according to which, despite the occurrence of the "triple identity", the violating the prohibition of *bis in idem* does not occur if the second sanction is "discounted" with respect to what have been imposed by the first

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[165] A. LÓPEZ DÍAZ, "*Surcharges and Penalties in Tax Law". Spanish Report*, cit., 15.

[166] P. PASSAGLIA (edited by), *Il principio del* ne bis in idem, 2016, 79, available on: https://www.cortecostituzionale.it/documenti/convegni_seminari/CC_SS_nebis2016.pdf. M. DEL MAR DÍAZ PITA, *Informe sobre el principio* non bis in idem *y la concurrencia de jurisdicciones entre los tribunales penales españoles y los tribunales penales internacionales*, in *Revue internationale de droit pénal*, 2002, 873-899.

[167] STC 77/2010, of 19 October, FJ 6. On the other hand, the Supreme Court (*Sala de lo Penal*, dated 26 January, ric. n. 10733/2015) found that the EU Court of Justice opted for a "concept of naturalistic or historical idem", and cited the cases *Gözütok* and *Brügge*, *Miraglia, Van Straaten, Turansk, Klaus Bourquain and Kretzinger, Van Esbroeck, Van Straaten, Kretzinger, Kraaijenbrink and Gasparini*. In this way, see: P. PASSAGLIA (edited by), *Il principio del* ne bis in idem, cit., 81.

[168] In particular, the Constitutional Tribunal considers that the essential content of the *ne bis in idem* principle is to avoid a "disproportionate punitive reaction" (see: SSTC 154/1990, of the 15th of October, FJ 3; 177/1999, of the 11th of October, FJ 3). In this way, see: P. PASSAGLIA (edited by), *Il principio del* ne bis in idem, cit., 83.

sanction [169]. In this way, taxpayers may be "protected if administrative surcharges are considered (deducted) in case of criminal penalties" [170].

That said, as regards to cybercrimes used for committing VAT Fraud, of course we can take the example of false invoices (and in particular, false electronic invoices) used in order to commit a VAT Fraud, to verify the presence of a pluri-qualification of a single material episode.

As we partly see, the Spanish criminal code does not provide for specific forms of cybercrimes related to false documents but, through the art. 26 SCC, does simply extend the discipline of the traditional false offences to informatic documents .

In this way, according to the doctrine, the falsehoods committed by private citizens with regards to their tax obligations, must be distinguished in two different cases. On the one hand, we should consider the falsehood committed in the self-assessment, whose criminal devalue is absorbed in the fiscal offense (according to the *principle of consumption*), thus the application of the fiscal offense takes the place of falsehoods, since a *concurso aparente* o *de leyes* occurs. Indeed, in this case, the falsehood committed in the self-assessment has already been taken into account by the legislator by typifying the fraud, and considering it again would violate the prohibition of the *ne bis in idem* [171].

On the other hand, we may consider the case of the preparation and later use of a false invoice in order to commit a VAT fraud. To be honest, the question is no longer so clear in jurisprudence and also in doctrine, since if the falsification of documents (i.e., invoices) is a "sufficient means" to carry out a tax fraud, at the same time, sometimes it is not "necessary" because it may concern facts that are already criminally relevant (themselves) [172]. In this way, it seems reasonable admitting the existence of the concurrency of the crimes; so that, the fiscal offense does not absorb the falsehood used as a means, but thanks to the means-end relationship, these crimes may enter in *concurso (ideal) medial* (art. 77 SCC) [173].

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[169] STC 2/2003, dated January 16th. In this way, see: P. PASSAGLIA (edited by), *Il principio del* ne bis in idem, cit.

[170] A. LÓPEZ DÍAZ, "*Surcharges and Penalties in Tax Law". Spanish Report*, cit., 15 et seq.

[171] I. MERINO JARA, J.L. SERRANO GONZÁLEZ DE MURILLO, *El delito fiscal*, Madrid, 2004, cap. XI.

[172] L.M. ALONSO GONZÁLEZ, *Fraude y delito fiscal en el Iva: fraude carrusel, truchas y otras tramas,* Madrid, 2008, 140 et seq.

[173] More in detail, most of the time, there is a "continued crime" of falsification of commercial documents (arts. 392, 390.1.1 or/and 2 and 74 SCC), in *concurso medial* with crime against the Public Treasury (i.e. art. 305 SCC). See: L.M. ALONSO GONZÁLEZ, *Fraude y delito fiscal en el Iva: fraude carrusel, truchas y otras tramas*, cit., 161.

In addition, it may be noted that there is no doubt that the modalities described in art. 310 (specially in let. c) and let. d) can be classified as falsehoods in commercial documents, punishable under art. 392 of the Penal Code, with penalties higher than those foreseen for this crime of fraud. In this way, when such falsehood has an exclusively "fiscal purpose" (*finalidad exclusivamente fiscal*) we would be facing a "concurrency of criminal provisions" (*concurso de normas*) that can be resolved, according to the *principle of consumption*, in favour of art. 310 SCC by its speciality (art. 8 SCC). Instead, there may be a *concurso ideal/medial* in cases of irregularities in accounting if falsehoods are directed against the Public Treasury [174].

In addition, it is also important to highlight the relation that may exist between the "falsification of invoices", "informatic fraud" (art. 248.1, art. 248.2 and art. 250 SCC) and "fiscal fraud" (art. 305 SCC).

In general, we can note the relationship of almost overlap between (common) fraud (art. 248 SCC) and tax fraud (art. 305 SCC), since it is possible to say that the structure of general fraud – that is based on "deception", "error" and "patrimonial displacement" – is reproduced in a certain way in tax crimes, particularly in cases in which it is possible to cause a damage to the assets of the Public Treasury. Thus, similarly to the fraud, also in tax fraud, at first glance, the tax-payer can act with the intention of obtaining some illegitimate wealth enrichment, through "deception" and "error" provoked to the State (art. 305 SCC), with the use of more or less devious means, for example, false invoices. However, although dogmatically tax crimes have in most cases a structure similar to fraud provided by art. 248 SCC, there are a lot of differences between these crimes. Indeed, generally, in the art. 305 SCC the "breach of duties" takes the place of "deception", becoming the central element of this article. Moreover, of course, the protected legal assets are different: in fact, tax crime should guarantee the protection of the "institutional function" of the tribute (and consequently, of the Treasury itself); this means that the legal asset can not be intended (and defended) in tax crimes in the same way as it is intended (and defended) in (classic) fraud [175]. In any case, according to the majority jurisprudence, the offenses in tax matters, referred to in arts. 305, 305-*bis* SCC are "specific" from the point of view of the fraud [176].

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[174] J.C. FERRÉ OLIVÉ*, El delito contable*, cit., 235; A. APARICIO PÉREZ, S. ÁLVAREZ GARCÍA, *El llamado delito contable*, in *Cronica tributaria*, 2010, 7 et seq., 32.

[175] In this sense, see: M. MONTE FERREIRA, *Estafa y fraude tributario: ¿convergencia o divergencia en los fundamentos para su tipificación? Análisis desde el Derecho español y portugués,* in *Anuario de derecho penal y ciencias penales*, 2005, 495-516.

[176] In particular, see: STS 4214/2017, where the Supreme Court stated that: «*Es cierto que en*

That said, we should take into account that in fraud the aforementioned deception requires, in many cases, the use of false documents ("estafa" through falsification of document); so that, it is important to establish the relation that, actually, may exist between "falsification" and "fraud". Generally, according to the jurisprudence, when the falsification of public, official or commercial documents (art. 392 SCC and art. 390 SCC) is a *medium* for the perpetration of the fraud, since forgery crimes do not require for their perfection any fraud or purpose of causing it, and since there are two different protected legal assets, there should be a *concurso* (*ideal*) *medial* [177]. Instead, for what concern the relation between "computer fraud" (art. 248.2 SCC) and "falsification of document", it is important to check – case by case – if the conduct of falsification is absorbed in manipulation or not, to establish if there is a concurrence of crime or a concurrency of criminal provisions (and therefore, a *concurso aparente* o *de leyes*). Indeed, when a person directly manipulates data contained in a "commercial (electronic) document" (such as an electronic invoice or a bank account etc.), in order to obtain an economic advantage, there may be not a "*concurso*", since the crime of fraud already involves manipulation data.

On the other hand, it is clear that, in addition to the typical crimes of forgery (falsification of electronic document), the illicit purpose to cause a damage (and fraud) to the Treasury, can be achieved through an "Informatic fraud" (art. 248.2 SCC), considering also the aggravated form provided by art. 250.1 which establishes at n. 2 that: "*The offence of swindling shall be punished with imprisonment from one year to six years and a fine from six to twelve months, when*: 1.(…) 2. *perpetrated by forging the signature of another, or by stealing, concealing or fully or partially destroying any process, file, archive or public or official document of any kind*".

In particular, we may consider the example of a computer fraud committed with the intention of undermining the integrity of the EDI (Electric Data Interchange) mechanisms (for example, in case of exchange of invoices or bank accounts between different operators) [178]; or also, the case of a cyber-attack to the

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nuestra jurisprudencia hemos afirmado la naturaleza especial del delito fiscal asentado en una triple situación. De una parte, una la relación jurídica tributaria (...); de otra, porque la tipicidad exige una cuantía a la que se concreta la relación tributaria, 120.000 euros; en tercer lugar, porque la Hacienda es uno de los sujetos de la relación».

[177] On the contrary, for what concerns the case of falsification of a private document see: March 14, 1988 (RJ 2001) and February 7, 1991 (RJ 899); July 1, 1991 (RJ 5495).

[178] In this sense, we have to consider that there are three different ways to ensure the "authenticity" and "integrity" of electronic invoices: 1) through electronic signature; 2) through EDI (Electric Data Interchange) mechanisms; 3) through a previous authorisation given by the Tax Agency. In this contest, currently the most widespread mode to ensure the authenticity and integrity of electronic invoices certainly is the electronic signature (in particular, "recognised" or

fiscal authorities informatic systems aimed at "manipulating" relevant fiscal data in order to successively perpetrate a VAT fraud. These examples may conduct to problems that are not exactly trivial, if we consider that attacks might also be committed from another Member State, thus raising issues on the transnational point of view of *the ne bis in idem* principle.

Moreover, it is also important to analyse the crime provided by art. 197-*bis*, para. 1, SCC (*Illegal access*) which also may be relevant in the case of a cyber-attack to the fiscal authorities informatic systems aimed at "manipulating" relevant fiscal data in order to successively perpetrate a VAT fraud; or also, in the case of cyber-attacks aimed at "deleting" or "modifying" the relevant fiscal data of a "physical" (or "juridical") person.

In the end, we may consider the case of "digital identity theft", that may be relevant, for example, in case of *corporate identity theft*, if it is realised with the intention of carrying out "interposition (real or fictitious) of natural or legal person" in order to obtain a deduction from the VAT amount. In this way, we should consider art. 401 of the Spanish Penal Code, which sanctions the theft of civil identity with a term of imprisonment ranging from 6 months up to 3 year, in conjunction, for example, with arts. 197-*bis*, 197, para. 2, SCC [179], or eventually with art. 248.2 SCC.

3.3.2. Procedural perspective

From the "procedural" point of view, as mentioned above, the Constitution does not explicitly recognise the principle *ne bis in idem*, but according also to the Constitutional Court, it may be a direct consequence of the legality princi-

"advanced" electronic signature). Moreover, in addition to this measure, it is also important to highlight the great development of "cryptography" which has been extended to several sectors, especially commercial ones, as a method of safeguarding secret information. Nevertheless, traditional coding systems have the problem of the "reversibility of the system" which means that one time the cryptographic-key is noted, it is easy to know the content of the document transmitted, without that the issuer and/or recipient discover(s) it. This leads to the "vulnerability of information", since by discovering the mechanism on which cryptography is based nothing prevents the content of a document from being modified. In this way, see: J.J. MARTOS GARCÍA, *Tributación y defraudación fiscal en el comercio electrónico recomendaciones para mejorar el control administrativo*, Sevilla, 2007, 130 et seq., 135, 139.

[179] In particular, art. 197, para. 2, SCC punishes, with a prison sentence of one to four years, whoever without being authorized seizes, uses or amends, to the detriment of a third party, reserved data of a personal or family nature of another that are recorded in computer, electronic or telematic files or media, or in any other kind of file or public or private record. Moreover, the same penalties shall be imposed on whoever, without being authorised, accesses these by any means, and whoever alters or uses them to the detriment of the data subject or a third party.

ple of Criminal Law (art. 25 of the Constitution). Furthermore, the Constitutional Court has always identified in the principle of effective judicial protection, pursuant to art. 24, para. 1, of the Constitution, the guarantee consisting in the prohibition of a double criminal trial on the same facts [180].

At the same time, although the *ne bis in idem* principle is not expressly regulated in the Criminal Procedure Code (*Ley de Enjuiciamiento Criminal*), it should be considered included within the concept of "*res judicata*" (art. 666 of the Criminal Procedure Code) [181]. Besides, art. 114 of the Criminal Procedural Code establishes that once a criminal judgment on a crime has begun, it will not be possible to follow a new trial on the same fact [182].

In addition, as already mentioned, this principle is expressly established in ordinary law and, in particular, in the Act n. 30/1992, of November 26. More in detail, art. 133 (*Concurrencia de sanciones*) of this Act establishes that if facts have been punished under criminal or administrative law, they cannot be at the same time punished if an "identity of subject, fact and foundation" exists [183]. Therefore, the facts proved by a definitive criminal sentence bind the administrative bodies; this implies that: a) if the criminal court declares that the facts do not exist, the administration cannot impose any sanctions for them; b) if the court declares that the facts exist, but decides in the sense of the acquittal for other reasons, the administration may evaluate them from the administrative law point of view, and eventually impose administrative sanctions; c) if the court finds that the facts have not been proven, the administration can prove them according to the administrative procedure and, if necessary, sanction them administratively [184].

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[180] In this way, see: STC 159/1987, of the 26th of October, FJ 3. In addition, see: P. PASSAGLIA (edited by), *Il principio del* ne bis in idem, cit., 87 et seq.

[181] M. DEL MAR DÍAZ PITA, *Informe sobre el principio* non bis in idem *y la concurrencia de jurisdicciones entre los tribunales penales españoles y los tribunales penales internacionales*, cit. L. HERNÁNDEZ MENDOZA, *Dilemas sobre la naturaleza jurídica y el fundamento del "non bis in ídem" en España y México*, in *Ciencia Jurídica*, 2017, 73 et seq. In general: SSTC 249/2005, of the 10th of October; 69/2010, of the 18th October. A. CAYÓN GALIARDO**,** *La vertiente procesal del principio* ne bis in idem*: la posibilidad de dictar un segundo acuerdo sancionador cuando el primero ha sido anulado*, in *Revista Técnica Tributaria*, n. 112, 2016, available on: https://www.gtt.es/boletinjuridico/la-vertiente-procesal-del-principio-ne-bis-in-idem-la-posibilidad-de-dictar-un-segundo-acuerdo-sancionador-cuando-el-primero-ha-sido-anulado/.

[182] P. PASSAGLIA (edited by), *Il principio del* ne bis in idem, cit., 87.

[183] S. RAMÍREZ GÓMEZ, *El principio* non bis in idem *en el ámbito tributario (aspectos sustantivos y procedimentales)*, Madrid, 2000, 42 et seq. See moreover, STS (*Sala de lo Contencioso*) of the 27th of November 2015, n. ric., 3346/2014, FD 4.

[184] STS 3346/2014, FD 4. See also, P. PASSAGLIA (edited by), *Il principio del* ne bis in idem, cit., 92.

In the end, as mentioned above, the Court invokes the international instruments on human rights of which Spain is a signatory, to declare this principle [185].

Given the above, from the "*procedural*" point of view, the *ne bis in idem* principle (and also the principle of *proportionality*) is surely applied to tax penalties: so that, theoretically, when administrative and criminal sanctions may both apply, only one sanction and one procedure should be applied.

In this way, we should consider that the partial reform of the GTA through the Law n. 34/2015 has focused on "material" and "formal" aspects of the principle *non bis in idem* such as art. 180 of the GTA (*Principio de no concurrencia de sanciones tributaries*) has been modified and actually provides prohibition of imposing double administrative penalties.

Moreover, the prohibition of double penalties (*both criminal and administrative*) on the same facts, as well as the regulation of procedures in cases of tax crime are also regulated under the new Title VI of the GTA. In particular, art. 250.2 of the GTA provides with regard to the penalty procedure that "*the judgment will impede the imposition of an administrative penalty for the same facts*", but "*in case no tax crime was observed, the Tax Administration will start, where applicable, the penalty procedure according to the facts that were proved by the criminal court*". Therefore, this provision impedes the beginning or the continuation of an administrative penalty procedure when a criminal trial, that is related to the same facts, has started; thus, this article avoids parallel procedures in order also to protect the taxpayer's right in pending cases. However, art. 250.2 GTA does not prevent the proceedings from being again resumed in front of Tax administration, if it is not found a criminal liability (and more specifically, if it has not found the existence of a tax crime). Indeed, once the criminal process ends, in those cases where the Court has not observed the existence of a tax crime, the new procedure of the Title VI of the GTA does not impede the beginning of an administrative penalty procedure, with the sole limitation of taking into account the facts proved in the criminal judgment [186]. In this sense, it may be submitted

[185] In this sense, the Strasbourg jurisprudence undoubtedly played a decisive role, but a problematic aspect remains linked to the circumstance that, starting from the entry into force of art. 4 of Protocol n. 7, there was almost no change in the constitutional jurisprudence aimed at incorporating the new criteria established by the Strasbourg Court after the *Zolotoukhine case*, or also at contemplating of any repercussions deriving from the interpretation of art. 50 of the EU Charter of Fundamental Rights. See P. PASSAGLIA (edited by), *Il principio del* ne bis in idem, cit., 98 et seq.; M.C. CHINCHILLA MARÍN, *El régimen de supervisión, inspección y sanción del Banco de España en la Ley 10/2014*, in *Revista Vasca de Administración Pública*, 2015, 17-106, 98-104. In particular, on 18 October 2005, the EDU Court declared Luis Roldan Ibañez's appeal against Spain for violation of the *ne bis in idem* inadmissible, because this principle was guaranteed only by art. 4 of Protocol n. 7 that had not yet been ratified by Spain.

[186] J.A. MARTÍNEZ RODRÍGUEZ, *El principio non bis in idem y la subordinación de la potes-*

that the Spanish legislation is effectively aligned with that interpretation of art. 4 of Protocol n. 7, considering also the new doctrine of the *non bis in idem* principle stated by the ECtHR in the *Case A and B* v. *Norway* of 15 November 2016. In fact, it is known that, by this case, a kind of derogation to the *ne bis in idem* principle was introduced for those cases in which two different proceeding, in view of the strict temporal and substantial connection that binds them, may be considered as a "unique proceeding". So that, the beginning of the penalty procedure in the tax field when the criminal court has not found a tax crime, does not imply the contravention of the *ne bis in idem* principle as, according to the new ECtHR interpretation, both procedures can also be considered connected in the time when they are carried out simultaneously.

Nevertheless, the reforms of the CP of 2010 and 2015, as well as the reform of the GTA by Law n. 34/2015, have meant a change in the configuration of *ne bis in idem* principle, since the Administration does not always have to paralyse the procedure if there is the "mere suspicion" that the facts may be a crime: in fact, it is possible the continuation of the assessment and collection procedure (*práctica de liquidaciones*), but not the contravention procedure [187]. In particular, according to the art. 250.1 GTA "*When the Tax Administration find indications of crime against the Public Treasury, the collection procedure will continue according to the general norms that are applicable* (…)". Moreover, art. 305 SCC, para. 5, establishes that "*where the tax authorities find indications of an offence having been committed against the treasury, they may collect separately, on the one hand, the items and amounts that are not linked to the possible offence against the treasury and, on the other hand, those that are linked to the possible offence against the treasury. The collection shall be processed in the ordinary way and subject to the arrangement for collection of own resources accruing from all tax settlements. Collection, where appropriate, arising from those items and amounts that are linked to the possible offence against the treasury shall follow the process established by the tax regulations for that purpose, without prejudice to it ultimately being adapted to what is decided in*

tad sancionadora administrativa al orden jurisdiccional penal, in *Noticias jurídicas*, 2011, available on: http://noticias.juridicas.com/conocimiento/articulos-doctrinales/4617-el-principio-non-bis-in-idem-y-la-subordinacion-de-la-potestad-sancionadora-administrativa-al-orden-jurisdiccional-%20penal-/. V.A. GARCÍA MORENO, *Cuota defraudada en el IVA, prejudicialidad penal y paralización de procedimientos sancionadores de obligaciones tributarias carentes de relevancia penal*, in *Carta Tributaria*, 2016, 32-40.

[187] A. LÓPEZ DÍAZ, "*Surcharges and Penalties in Tax Law". Spanish Report*, cit., 16. In general, S. RAMÍREZ GÓMEZ, *El principio non bis in idem en el ámbito tributario (aspectos sustantivos y procedimentales)*, cit., 114; J. MARTÍN FERNÁNDEZ, *Tratado Práctico de Derecho Tributario General Español*, cit., 620 et seq.

criminal proceedings". Furthermore, the same provision states that "*the existence of criminal proceedings for an offence against the treasury shall not freeze the collection of the tax liability. The tax authorities may commence steps aimed at collection, unless the judge, on his own initiative or at the request of one of the parties, has ordered the suspension of enforcement action, subject to the provision of guarantees.* (…)". On the contrary, the cases in which it is necessary directly forward the proceedings to the public prosecutor and interrupt the assessment and collection procedure, pursuant to art. 251.1 GTA, are: a) where the assessment procedure may cause the prescription of the offense in accordance with the terms provided by the art. 131 of the Penal Code; b) where the amount of the liquidation could not be determined with exactitude or could not have been attributed to a specific taxpayer; c) where the administrative liquidation could harm in any way the investigation or verification of the fraud.

In this contest, some problems may arise having regard to issues related to the *ne bis in idem* principle: e.g., when there is a single act constituting various offences (pluri-qualification of a single fact) and, in particular, when a (cyber-) crime is a means to commit another crime (i.e., VAT fraud) [188]. For instance, there may be a fact that can constitute a *preparatory act* for the tax fraud and simultaneously represents a cybercrime, whose evaluation is competence of a judge different from the one that would be competent for the tax fraud. In this way, if Tax Administration ignores the commission of the cybercrime in reality aimed at carrying out a VAT fraud, the "*Práctica de liquidaciones*" can compromise the criminal proceeding for the fiscal fraud.

[188] A. LÓPEZ DÍAZ, "*Surcharges and Penalties in Tax Law". Spanish Report*, cit., 16.

4. Germany

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4.1. Relevant discipline on VAT FRAUDS

4.1.1. General overview

As the German Federal Ministry of Finance states "VAT fraud comes in many forms: it can range from the failure to declare and/or pay VAT and the fraudulent use of the right to deduct input tax, to what is known as VAT carousel fraud. With the spread of digital technology, new ways of committing fraud are emerging"[189]. Even if one does not presuppose such a broad understanding of VAT fraud, but limits it to such conduct which is specifically directed to take advantage of particular weaknesses of the VAT system [190], the ways to combat VAT fraud are numerous and vary according to the specific form in question [191]. The respective sanction system consists of double-track of both criminal and administrative sanction regimes. Furthermore, there are consequences according to tax law, such as for example ancillary tax payments in the sense of § 3 subpara. 4 of the German tax code (*Abgabenordnung* – AO) (interests, fees for delay or late-payment penalties for instance) which may be of such gravity that it is appropriate to classify them as sanctions at least in the broad sense [192].

Of primary relevance for the German sanctioning system regarding VAT frauds are the general German regime of value added taxes on the one hand and the general German criminal tax law regime on the other hand. Besides, many

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[189] *German Federal Ministry of Justice*, Taxation, Combating VAT Fraud, Note of 13 November 2018, available under https://www.bundesfinanzministerium.de/Content/EN/Standardartikel/Topics/Taxation/Articles/2018-11-08-combating-vat-fraud.html (last visited September 2019).

[190] So does KEMPER, *Die Bekämpfung der Umsatzsteuerhinterziehung – Versuch einer Bestandsaufnahme –*, in *Deutsche Steuer-Zeitung*, 2016, 664, 668.

[191] See e.g. Y.T. CHIANG, *Die Sanktionierung des Umsatzsteuerbetruges im Vergleich zwischen Deutschland und Taiwan*, Münster 2017, 55 et seq.

[192] Cf. KEMPER, *Die Bekämpfung,* cit. , 2016, 664, 670.