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

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Research project

EUROPE AGAINST CYBER VAT FRAUDS – EACVF

G. Giappichelli Editore

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Summary

Chapter 3

Possible solutions to the lack of harmonisation in the field of cyber VAT frauds

Ludovico Bin

Chapter 2

Comparative study on cyber VAT frauds

1. Italy

Maria Federica Carriero

1.1. Relevant discipline on VAT FRAUDS

1.1.1. General overview

Italian criminal tax law was firstly fully disciplined by Law n. 4/1929, which constituted the first real organic criminal law discipline of the sector and created a criminal law system separated and autonomous from the general one, as it even provided for some rules that were in derogation of the "general part" of the Criminal Code. Among these derogations, the most important were the prohibition to retroactively apply successive and more lenient criminal laws in this specific field and the need for an express indication of every legislative change as "implicit" modifications could not be accepted.

Furthermore, Law n. 4/1929 was on the one hand inspired by the principle of "alternativity" between criminal and administrative offences – meaning that administrative sanctions could not be applied if the fact constituted a criminal offence – but it also required, on the other hand, that the criminal proceedings had to wait for the conclusion of the financial administration preliminary evaluations with regard to the commission of the fact and the economic entity of the fraud.

Due to the progressive increase of the relevance of financial interests and of the quantity of tax frauds, many changes have been brought to tax criminal law over the years, from the introduction of detention measures – while at first the sanction were only pecuniary – and accessory sanction to the elimination of the principle of "alternativity", which allowed the infliction of both administrative and criminal sanctions for the same fact.

As all the other features of Law n. 4/1929 were successively replaced with several other more repressive tools – such as a significant "anticipation" of the criminal punishment to offences related to facts only prodromical to the fraud and therefore poorly meaningful on a social perspective and legitimating only low penalties – which proved to be unable to counter the emerging phenomena of tax evasion, the whole discipline has then been re-organized in a new legislative act, the Legislative Decree n. 74/2000.

This new discipline has been inspired by the principles of "harm" and of "subsidiarity": it, in fact, describes only few criminal offences which are related to the moment of tax declaration and require therefore actual frauds (the thresholds are also intended to this purpose), so that the use of criminal sanctions could be reasonably heavy and deterring.

The most recent reforms have aimed to increase the poor effectivity of the system introducing new criminal offences – among which those related to VAT – that do not require any actual "fraud" intended as a particular modality of the evasion, but are content with the mere incorrect declaration; but above all the most prevailing tendency is an increased attention to the recovery of the lost entries, which is pursued through the providing for grounds for exclusion of the punishment and other procedural or substantial benefits that are based on the payment of the amount. To the preventive goals of those criminal offences based on the moment of the declaration, therefore, it has been added a recovery function that aims at least to reduce the damage to the Treasury [1].

On the other hand, the regular VAT declaration must be done between the 1st February and the 30th April of every year in relation to the previous year. For intra-community acquisitions under 10.000 € of value it is necessary to fill in a form before the operation. For intra-community acquisitions over 10.000 € of value it is necessary to fill a different form every three months. All these declarations must be done only via internet, using specific software. In this way, according to the art. 21 of the Presidential Decree of 26 October 1972, No. 633 (VCA = VAT Consolidated Act) for "electronic invoice" means the invoice that has been issued and received in any electronic format; the use of electronic invoices is subject to acceptance by the recipient.

1.1.2. Main relevant offences

As mentioned above, all the criminal offences related to VAT frauds are

[1] In general, see: R. BRICCHETTI, P. VENEZIANI (edited by), *I reati tributari*, Turin, 2017; E. MUSCO, F. ARDITO, *Diritto penale tributario*, Bologna, 2016.

contained in the Legislative Decree n. 74/2000 (TCPCA= Tax Criminal Penalties Consolidated Act[2]). As this act had an original structure precisely oriented to the "harm principle", it initially embodied only criminal offences which require a "fraud" or the particular "will" to evade the tax payment, and are strictly connected to the moment of "tax declaration"; however, successive legislative interventions have added other offences that consist in mere failure in the declaration – i.e. regardless of the existence of a specific malice – or in acts that are intended to frustrate possible assessments by the authorities.

The main tax crimes are related to accounting duties and, as already mentioned, the seriousness of the act determines the duration of the imprisonment. Intentional crimes (i.e. use of false or counterfeit documents, use fraudulent means of any kind, etc.) are severely punished. For other types of violations, the TCPCA provides quantitative thresholds of evaded taxes as a dividing line between mere administrative and criminal offenses.

In particular, tax crimes provided by TCPCA are punished only in case of *dolus* (will or intention to realise a conduct prohibited by law) and most of them require the special intent of evading taxes (*dolus specialis*).

More in detail, art. 2 (*Dichiarazione fraudolenta mediante uso di fatture o altri documenti per operazioni inesistenti*) and art. 3 (*Dichiarazione fraudolenta mediante altri artifici*) TCPCA punish with up to six years of imprisonment the fraudulent declaration, dividing the offence according to the kind of "fraudulent" modality used.

The first provision describes the use of false invoices or other documents in order to prove *non-existence operations* intended to justify fictitious passives or expenses, modalities that are then better explained in the second paragraph without requiring any other condition: the invoices or documents must be recorded in the mandatory accounting records or held as purposes of evidence against the authorities.

The second provision, instead, regards the declaration of incomes lower or passives or credits higher than the actual ones through other possible fraudulent modalities, which may consist in performing transactions that are objectively or subjectively simulated or in using false documents or in other fraudulent means to hinder the assessment and mislead the financial administration. However, two more conditions needs to be satisfied in order for the fact to constitute a crime: all tax[3] evaded must have been of at least 30.000 € and the total amount

[2] In this way, see: AA.VV., *"Surcharges and Penalties in Tax Law". Italy Report*, EATLP Congress, 2015, 19 et seq., available on: http://www.eatlp.org/uploads/public/2015/National%20report%20Italy.pdf.

[3] Intended as "kind of tax": the following rules apply therefore to VAT frauds as a unique tax.

of income subtracted from taxation must be higher than the 5% of the total income declared or higher than 1.500.000 € or the total amount of fictitious passives is higher than the 5% of the tax amount or at least higher than 30.000 €. Below these thresholds, only administrative tax penalties shall apply.

In a subsidiary and progressive logic, the successive art. 4 TCPCA (*Dichiarazione infedele*) disciplines, instead, the crime of misrepresentation. In particular, it punishes those declarations that contain false incomes or passives that have not been made using the above-described fraudulent modalities, which means that the agent has not tried to produce false evidence of his incorrect declaration, but has just reported false information. As fraudulent modalities are here less grievous and alarming, the offence also requires that the evaded tax is higher than 150.000€ and that the total amount of incomes subtracted from taxation is higher than 10% of the total incomes declared or at least higher than 3.000.000€. As evident, the *ratio* is that of a progressive increase of requisites for the punishment in respect of a decrease of the harmfulness of the fact.

In addition, according to art. 6 TCPCA, the crimes provided for in arts. 2, 3 and 4 are not punishable by way of attempt.

Finally, art. 5 TCPCA (*Omessa dichiarazione*) completes the original framework of the crimes concerning VAT declaration with a less-harming hypothesis, which consists in the mere omission of declaration, i.e. in a form of VAT evasion that presents no fraudulent modalities at all. The offence requires a minimum "harm" of 50.000 € and does not extend to negligent omissions, as a specific intention to evade is prescribed, but allows the author to comply with 90 extra days. It punishes with up to 4 years of imprisonment.

On the other hand, art. 8 TCPCA (*Emissione di fatture o altri documenti per operazioni inesistenti*) establishes that anyone who, for the purpose of allowing third parties to evade income tax or value added tax, issues or released invoices or other documents for non-existent transactions, is liable to imprisonment for one year and six months to six years. Moreover, for the purpose of applying the provision set forth in para. 1, the issue or release of several invoices or documents for non-existent transactions during the same tax period is considered as a single offense.

Art. 8 TCPCA is important considering also the discipline provided by the following art. 9 TCPCA which establishes, notwithstanding art. 110 of the Criminal Code, that: a) the issuer of invoices or other documents for non-existent operations and who concurs with the same are not punishable in concurrence with the crime provided by art. 2; and, b) who uses invoices or other documents for non-existent operations and who concurs with the same are not punishable in concurrence with the crime provided by art. 8. In particular, the aim pursued by the legislature in introducing art. 9 is different depending on

whether we consider the responsibility of the issuer (*emittente*) or the user (*utilizzatore*).

In the first case (art. 9, para. 1, lett. a, TCPCA), the lawmaker wanted to prevent the same conduct from being punished twice, in violation of the *ne bis in idem* principle [4]. In fact, as an exception to the provision pursuant to art. 110 of the Italian Criminal Code (*concorso di persone*), the legislature has expressly excluded the concurrence between the issuance and use of fictitious documents, because if the issuer is called upon to respond both to the crime of issuing and in concurrence with the offense of using a fraudulent tax declaration, he may be punished twice for the same conduct.

Alike, the legislature has also excluded the concurrence of the user in issuing crime, starting from the consideration that the issuance of fictitious documents normally originates from an agreement between the beneficiary and the issuer. Nevertheless, the *ratio legis* of art. 9, para. 1, lett. b), TCPCA is more articulated: in this case, the provision has the same logic underlying art. 6, which is that of anchoring the punishment at the time of the "declaration", avoiding an "indirect resurrection" of the prodromal crime.

That said, the TCPCA contains other offences related to VAT frauds. In particular, there are final offences that have nothing to do with the moment of declaration, but refer to those activities that are intended to obstruct the reconstruction of the amount of taxes due to the Administration, such as the "hiding" or "destruction" of tax records. In this way, we can remember art. 10 TCPCA (*Occultamento o distruzione di documenti contabili*) that, unless the fact constitutes a more serious offense, punishes with the sanction of imprisonment from one year and six months to six years, anyone that, in order to evade taxes on income or on added value, or to allow evasion to third parties, conceals or destroys in whole or in part the accounting records or documents, whose conservation is obligatory, so as not to allow the reconstruction of income or turnover.

In addition, the least serious tax crimes (i.e. omitted payment of withholdings, omitted payment of VAT, unlawful tax compensation, respectively provided by arts. 10-*bis*, 10-*ter* and 10-*quater* TCPCA) are punished with the imprisonment from a minimum of six months to a maximum of two years[5]. More in detail, arts. 10-*bis* (*Omesso versamento di ritenute dovute o certificate*) punishes anyone who does not pay, within the period set for the submission of the annual substitute tax declaration, withholdings due on the same declaration or resulting from the certification issued to the substitutes, for a amount exceeding

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[4] F. D'ARCANGELO, *L'emissione di fatture per operazioni inesistenti ed i limiti al concorso di persone nel reato tra emittente ed utilizzatore*, in *I reati tributari*, cit., 277 et seq.

[5] AA.VV., *"Surcharges and Penalties in Tax Law". Italy Report*, cit., 18.

one hundred and fifty thousand euros for each tax period. Instead, art. 10-*ter* (*Omesso versamento di IVA*) punishes anyone who does not pay the value added tax due on the basis of the annual return, within the deadline for the payment of the subsequent tax period, if the amount exceeds two hundred and fifty thousand euros for each tax period. In the end, art. 10-*quater* (*Indebita compensazione*) punishes anyone who does not pay the sums due, by compensating, pursuant to art. 17 of the Legislative Decree 9 July 1997, n. 241, credits not due, for an annual amount exceeding fifty thousand euros. Moreover, the same article, para. 2, punishes, with the sanction of imprisonment from one year and six months to six years, anyone who does not pay the sums due, by compensating, pursuant to art. 17 of the Legislative Decree 9 July 1997, n. 241, inexistence credits for an annual amount exceeding fifty thousand euros.

On the other hand, according to art. 5 ATPCA (Administrative Tax Penalties Consolidated Act, Legislative Decree of 18 December 1997, n. 472), administrative tax penalties require indifferent *dolus* or negligence. In particular, for what concern the notion of "negligence", the legislature implicitly refers to only the "serious negligence", that is the case of "indisputable malpractice". Tax Courts also require that the taxpayer's behaviour is characterised by a "professional diligence". Thus, negligence exists even in the form of *culpa in vigilando*, when the taxpayer, for example, "*does not control the receipt that demonstrates that the tax return has been properly filed and sent*" [6]. Nevertheless, although doctrine criticises the use of presumptions concerning the subjective element (such as negligence, imprudence or malpractice), it has become settled practice that negligence is presumed. Moreover, the tax law expressly defines the concept of *dolus* for administrative tax penalties, considering "*intentional the violation made with the intent of compromising the calculation of the taxable basis or of the tax or of obstructing the administrative assessment activity* (art. 5, para. 4, ATPCA). *This definition differs from the concept of dolus for criminal tax penalties purposes, according to which the event must be willed by the offender as a consequence of his action or omission*" [7].

In the end, it is important to remember that the fiscal legislature, with para. 386 of art. 1 of the Law n. 311/2004, wanted to introduce a specific provision aimed at countering the mechanism of "carousel fraud" for VAT purposes (art. 60-*bis*, para. 2, of Presidential Decree n. 633/1972 - *Solidarity in the payment of tax*). In particular, this provision states that, in case of failure to pay the tax

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[6] In this way, see: AA.VV., *"Surcharges and Penalties in Tax Law". Italy Report*, cit., 19 et seq. See, for example, ISC (*Italian Supreme Court*), Tax Chamber, 14 March 2014, n. 5965, according to which the taxpayer shall prove the absence of fault.

[7] AA.VV., *"Surcharges and Penalties in Tax Law". Italy Report*, cit., 19 et seq.

by the transferor, the transferee, who is a professional operator subject to VAT (and not a final consumer), is jointly liable for the payment of VAT due by the transferor, if the price of the sale is lower than the normal value of the goods sold, having regard to goods that are provided for in specific ministerial decrees (i.e., the Ministerial Decree of 22 December 2005) which identify the product categories most "sensitive" to the risk of VAT fraud. Nevertheless, the joint liability ceases if – pursuant to art. 60-*bis*, para. 3 of Presidential Decree n. 633/1972 – the buyer demonstrates that "*the lower price of the goods was determined based on events or situations that are objectively detectable, or based on specific provisions of the law, and that, in any case, it is not connected with the non-payment of the tax*".

1.2. Relevant discipline on CYBERCRIMES

1.2.1. General overview

Italy has been one of the first countries in Europe that implemented the recommendation «on computer-related crime» adopted on 13 September 1989 by the Committee of Ministers of the Council of Europe [8].

In particular, in the early 90's the legislative framework related to computer crimes changed significantly. In this way, there are two important legislative reforms: the first one, Legislative Decree n. 518 of 29 December 1992, modified the existing Italian Copyright Act (Law n. 633/1941); and, the second one, Act n. 547 of 23 December 1993 (*Modificazioni ed integrazioni delle norme del codice penale e del codice di procedura penale in tema di criminalità informatica*), modified the Italian Criminal Code and the Criminal Procedure Code, in order to introduce new provisions related to computer crimes [9].

More in detail, in contrast to the 1992 Decree n. 518 (so-called *the Copyright Decree*), the 1993 Act n. 547 focused completely on criminal issues, updating the Italian Criminal Code and the Criminal Procedure Code to punish also "virtual" (and so that, "non-traditional") conducts related to computer crimes. This Act, in fact, added several articles to the Italian Criminal Code – concerning "*many*

[8] In this way, see: https://www.coe.int/en/web/octopus/country-wiki/-/asset_publisher/hFPA5fbKjyCJ/content/italy/pop_up?inheritRedirect=false.

[9] L. PICOTTI, *Diritto Penale e tecnologie informatiche: una visione d'insieme*, in A. CADOPPI, S. CANESTRARI, A. MANNA (edited by), *Cybercrime*, Turin, 2019, 35 et seq., 59 et seq.; G. ZICCARDI, *Cybercrime and Jurisdiction in Italy*, in *Cybercrime and jurisdiction: a global survey*, B.J. KOOPS, S.W. BRENNER (edited by), The Hague, 2006, 227 et seq.

computer-related criminal activities, such as voluntary damage to information systems, illegal access to information systems", etc. – thus becoming "*the heart of the Italian computer-crime discipline*". It also includes a definition of "computer crime" which, for the purposes of the Italian legislative system, is "*an offense committed by using computer technologies, from a personal one to portable telephone devices created on the basis of microchips*" [10].

More specifically, Italian Computer Crimes Act can be divided into three parts, each one concerning different types of provisions and conducts. The first part deals with the "*possession, alteration, or destruction of data or computer systems*" [11]. In these cases, the typical damage that is encountered in the physical world, is extended to information-technology objects; so that, for example, currently someone who damages the data and computer systems of someone else is now also punishable under art. 635-*bis* ICC et seq. The second part of the act deals with "*unauthorized or pirated access to systems and with the interception of communications*" [12]. Also in this case, the Italian lawmaker moves from the physical point of view in order to punish i.e., the access to a system against the will of the owner, or the illegal interception or possession of private information. In the end, the last part of Act concerns "*forging an electronic transmission, spreading computer viruses, disclosing confidential information*, *etc*." [13].

At the same time, the amendments to the Criminal Code by Statute Law n. 547 have been enhanced with new content by the recent Statute Law of 18 March 2008, n. 48 which implemented the Budapest Convention of 2001 on cybercrime. In this way, new types of computer crimes were typified, such as, art. 495-*bis* ICC (*Falsa dichiarazione o attestazione al certificatore di firma elettronica*), or other sophisticated crimes concerning computer damage and computer fraud. Finally, the recent government Decree of 18 May 2018, n. 65 implemented the European Directive 2016/1148 of the European Parliament and of the Council of 6 July 2016, concerning measures for high common level of security of network and information system across the Union.

Cybersecurity is also taken into account in Legislative Decree n. 231/2001, which introduced corporate criminal liability in connection with cyber and computer crimes perpetrated in the interest of the legal person (company) [14].

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[10] G. ZICCARDI, *Cybercrime and Jurisdiction in Italy*, cit., 229.

[11] G. ZICCARDI, *Cybercrime and Jurisdiction in Italy*, cit., 229.

[12] G. ZICCARDI, *Cybercrime and Jurisdiction in Italy*, cit., 230.

[13] G. ZICCARDI, *Cybercrime and Jurisdiction in Italy*, cit., 230.

[14] D. FONDAROLI, *La responsabilità di persone giuridiche ed enti per i reati informatici ex D.lgs. n. 231/2001*, in *Cybercrime*, cit., 193.

1.2.2. Main relevant offences

For what concerns crimes we are interested to mention, we may start from "forgery" and "fraud". As mentioned above, the Italian lawmaker has moved from the "physical point of view" in order to punish these offences. In fact, both "fraud" and "forgery" – that are basically "manipulation-based conducts" – may be perpetrated in the real world, in the traditional manner, but they may also be "*perpetrated via computer networks, which consequently became the means by which offences are committed*" [15].

In particular, the ICC does not provide for specific forms of cybercrimes related to false documents but does simply extend the discipline on the traditional false offences to informatic documents [16]. Computer related forgery is, in particular, contained in the art. 491-*bis* of Italian Penal Code – that was introduced by art. 3 of the Act n. 547 of 23 December 1993 to the Penal Code – which establishes that if any of the falsity refers to a public informatic document having probative value, the regulations foreseen for public deeds are applied respectively [17]. As we can see, the aim of the provision of computer related forgery is to "*fill gaps in criminal law related in traditional forgery that always requires visual readability of statements, or declarations embodied in a document, and which does not apply to electronically stored data*" [18]. More in detail, computer related forgery, according also to the convention of cybercrime, "*involves unauthorised creating or altering stored data, so that they can acquire a different evidentiary value*" [19]. In this way, the course of legal transactions is subject to a "deception", since it relies on the authenticity of information contained in the data [20].

In addition, we should underline that until 2008, the article also contained a

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[15] P. CSONKA, *The council of europe's convention on cyber-crime and other European initiatives*, in *Revue internationale de droit pénal*, 2006/3-4 (Vol. 77), 473-501, available on: https://www.cairn.info/revue-internationale-de-droit-pénal-2006-3-page-473.htm.

[16] G. SALCUNI, *Le falsità informatiche*, in *Cybercrime,* cit., 273 et seq.

[17] It is important to highlight that with the legislative decree n. 7/2016 there was an *abolitio criminis* with respect to conducts having as material object a private IT document, that left a "protection vacuum". In this way, G. SALCUNI, *Le falsità informatiche*, in *Cybercrime,* cit., 274.

[18] G. ZICCARDI, *Cybercrime and Jurisdiction in Italy*, cit., 227 et seq.

[19] In this way, see the *Explanatory Report to the Convention on Cybercrime*, available on: https://rm.coe.int/16800cce5b which has been adopted by the Committee of Ministers of the Council of Europe at its 109th Session (8 November 2001). Moreover, see: P. CSONKA, *The council of europe's convention on cyber-crime and other European initiatives*, cit.

[20] M. GROTTO, *Council of Europe Convention on cyber crime and its ratification in the Italian legal system*, in *Sistema Penal & Violência*, 2010, 1 et seq.

definition of "informatics document" which was defined as an "informatics support" containing "*information or data that are relevant for legal transactions, or also containing programs useful to read or modify data contained in PCs*"[21]. Therefore, an informatics document was considered inseparable from its informatics support, nevertheless, in the IT world the principal characteristic of a document is that it can be transmitted without any support. Anyway, in 2008 the legislator deleted the previous definition, though Act no. 82/2005 contains a definition of informatics document that is an informatics "*representation of acts, facts or data relevant for the legal transactions*" (art. 1).

On the other hand, art. 640-*ter* of the Penal Code punishes any person, in any way altering the functioning of a computer or telematic system, or intervening without right by any method on the data, information or programs contained in a computer or telecommunications system or system belonging to the latter, obtains unjust profit for himself or others to the harm of others; the punishment is imprisonment for between six months and three years. In other words, this crime occurs when whoever – knowingly and with intent to defraud – manumit one or more digital devices, unlawfully using information, data or software on digital devices, in order to get an illicit profit and harm someone else[22]. So that, the aim of computer related fraud is to punish any illegal manipulation in the course of data processing (including "*input, alteration, deletion, suppression of data as well as interference with the functioning of a computer programme or system*"[23]). More in detail, according to the jurisprudence, the crime in question differs from the crime of (common) fraud (art. 640 ICC) because the fraudulent activity of the agent invests not the person, of which the induction in error is lacking, but the IT system through its manipulation[24].

At the same time, it is also important to consider arts. 640-*ter*, § 3, and 494 ICC for cases or "identity fraud" or "identity theft"[25]. In particular, as for the

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[21] M. GROTTO, *Council of Europe Convention on cyber crime and its ratification in the Italian legal system*, cit., 11.

[22] G. MINICUCCI, *Le frodi informatiche*, in *Cybercrime*, cit., 827 et seq.

[23] In this way, see the definition provided by the *Convention on Cybercrime Budapest*, 23.XI.2001, Title 2 – Computer-related offences, art. 8.

[24] ISC, sec. II, 11 November 2009, n. 44720.

[25] G. MINICUCCI, *Le frodi informatiche*, cit., 838 et seq.; M. MARRAFFINO, *La sostituzione di persona mediante furto di identità digitale*, in *Cybercrime*, cit., 307 et seq.; R. FLOR, *Phishing, identity theft e identity abuse: le prospettive applicative del diritto penale vigente*, in *Rivista italiana diritto e procedura penale*, 2007, 899 et seq.; F. CAJANI, *La tutela penale dell'identità digitale alla luce delle novità introdotte dal d.l. 14 agosto 2013, n. 93 (convertito con modificazioni dalla l. 15 ottobre 2013, n. 119)*, in *Cassazione penale*, 2014, 1094 et seq.

creation of false digital identities the Italian legal system does not provide for an autonomous offence, but does provide for an aggravating circumstance of the informatic fraud described by § 3 of art. 640-*ter* ICC in case the fraud has been committed through the theft or undue use of a personal digital identity. In addition, art. 494 ICC is applicable to real identities as well as digital identities, and it "*is perpetrated when someone falsely and wilfully represents himself or herself to be someone else; the punishment is imprisonment for up to one year*" [26].

The crime of computer fraud is also closely connected to the crime of "computer damn". In particular, we may remember art. 635-*bis* (*Danneggiamento di informazioni, dati e programmi informatici*) which punishes, unless the fact constitutes a more serious offence, any persons who destroys, damages, cancels, alters or suppresses computer information, data or software belonging to others; art. 635-*ter (Danneggiamento di informazioni, dati e programmi informatici utilizzati dallo Stato o da altro ente pubblico o comunque di pubblica utilità*) which punishes, unless the deed constitutes a more serious offence, any person who destroys, damages, cancels, alters or suppresses computer information, data or software used by the Government or another public Entity or by an organization providing a public service; and in the end, art. 635-*quarter* (*Danneggiamento di sistemi informatici o telematici*) which punishes, unless the fact constitutes a more serious offence, any person who, by the conducts referred to in art. 635-*bis*, i.e. by introducing or transmitting data, information or software, destroys, damages or makes it impossible, either in whole or in part, to use another person's computer or telecommunication system or seriously obstructs its functioning [27].

In this context, according to the majority jurisprudence, the crime of "computer fraud" differs from the crime of "damage to computer data", pursuant to arts. 635-*bis* et seq. ICC because in the first the computer system continues to function, albeit in an altered way compared to the programmed one; while in the second, the material element is constituted by the mere damage to the IT or telematic system: in this case, the conduct aims at impeding the functioning of the system [28].

In the end, art. 615-*ter* ICC (*Accesso abusivo ad un sistema informatico o telematico*) defines the conduct of "illegal access" to a computer system, carry-

[26] In this way, see: https://iclg.com/practice-areas/cybersecurity-laws-and-regulations/italy.

[27] In general, see: A. CAPPELLINI, *I delitti contro l'integrità dei dati, dei programmi e dei sistemi informatici*, in *Cybercrime*, cit., 762 et seq., 776 et seq.

[28] In this way, see: ISC, sec. II, 1 December 2016, n. 54715.

ing a penalty of one to three years imprisonment for anyone who abusively gains access to a computer system or telecommunications system protected by safety measures or retains access thereto against the explicit or tacit will of any person who is entitled to deny such access. In particular, security measures are considered as a way of declaring the *ius excludendi alios* (right to exclude the others)[29]. In this sense, it is clear that the content of art. 615-*ter* ICC was drafted using the offense of violation of domicile as defined in art. 614 ICC as a model. In fact, as noted above, most of the time the Italian lawmaker tends to identifies new forms of unlawful conduct as different kinds of aggression against the (same) traditional legal assets.

1.3. Issues arising from CYBER VAT FRAUDS

The *ne bis in idem* constitutes a principle, protected by a plurality of national (i.e. art. 649 of the Italian Criminal Procedure Code) and European rules (art. 4 protocol n. 7 ECtHR and art. 50 CDFUE).

The Italian system presents some issues related to the *ne bis in idem* principle both under the aspects of VAT frauds and that of cybercrimes. In particular, in order to repress the VAT frauds, Italian lawmaker makes use also of the administrative sanctions that possess a *significant punitive nature* (see § 1.3.2). In this way, tax law provides the *principle of specialty* (art. 19 TCPCA) which regulates the application of the "special provision" in case the same conduct may be punished by both criminal and administrative tax sanctions. Instead, for what concerns the cybercrimes, the issues are mostly related to the possible plu-ri-qualification of a single fact.

1.3.1. Substantial perspective

The *ne bis in idem* principle, in a substantial point of view, denies to sanction two or more times the *eadem persona* for the *idem factum*.

In particular, in the Italian criminal system, if it is excluded that the penal norms are placed between them in "apparent concurrence" (*concorso apparente*) – which can derive from a relationship of *specialty* (abstractly, concretely or bilaterally), *subsidiarity*, or *absorption* among the incriminating cases – there are no doubts that it is necessary to attribute to the author of the

[29] I. SALVADORI, *I reati contro la riservatezza informatica*, in *Cybercrime*, cit., 656 et seq., 666.

conduct all the offenses that have been consummated through a single commissive or omissive conduct [30]. "*This arises when an individual violates the criminal law more than once, in which case he becomes liable for several crimes*" [31].

In this sense, the legislative regulation of *multiplicity* has the purpose to limit the accumulation of the penalties provided for the several crimes. More in detail, multiple crimes may be either *material* (*concorso materiale* that arise when an individual violates one or more criminal norms through a plurality of acts or omissions); or *formal* (*concorso formale* that arise when several crimes are committed pursuant to a single act or omission of the accused). The general principle adopted by ICC, in the first case, is the *material accumulation* of the penalties applicable to each crime committed by the subject, considering also certain limits established by art. 78 and 79 ICC. On the other hand, the reforms of 1974 extended the penalty system provided for *continuing crimes* – the so-called *legal accumulation of penalties* – to cases of "formal multiplicity" (art. 81 ICC); this rule consists of the application of the most serious penalty increased by a defined proportion (up to triple) [32].

In addition, we should consider the so-called *composite crime* (art. 84 ICC, *Reato complesso*) which consists of "*unification of several crimes into a single one*" [33].

Nevertheless, in contrast to the composite crime, the *compound crime* is a crime that "*necessarily embodies a less serious crime*" [34]. The basis for this category of crime is not art. 84 ICC, but art. 15 ICC, according to which "*where several provisions deal with the same matter, a more specific provision overrides a more general one*"; or, in other words, "*the minor crime is not separately punished, but it is absorbed in the major crime*" [35].

That said, the prohibition to sanction two or more times the *eadem persona*

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[30] G. RANALDI, F. GAITO, *Introduzione allo studio dei rapporti tra* ne bis in idem *sostanziale e processuale*, in *Archivio Penale*, 2017, 103-127; G. FIANDACA, E. MUSCO, *Diritto penale. Parte Generale*, Turin, 2019, 721 et seq.

[31] G. LEROY CERTOMA, *The Italian Legal System***,** London, 1985, 293 et seq.

[32] In this way, see: G. LEROY CERTOMA, *The Italian Legal System***,** cit., 293 et seq.; G. FIANDACA, E. MUSCO, *Diritto penale. Parte Generale*, cit., 706 et seq.

[33] G. LEROY CERTOMA, *The Italian Legal System***,** cit., 293; G. FIANDACA, E. MUSCO, *Diritto penale. Parte Generale*, cit., 732.

[34] G. LEROY CERTOMA, *The Italian Legal System***,** cit., 295.

[35] G. LEROY CERTOMA, *The Italian Legal System***,** cit., 295; G. FIANDACA, E. MUSCO, *Diritto penale. Parte Generale*, cit., 723 et seq., 728.

for the *idem factum* finds a clear echo in the art. 15 ICC, but also in arts. 84, 61, 62, first part, and 68, 581, co. 2, ICC [36]. In this sense, it is important to establish what is meant by the *idem factum*, since there may be a "legal interpretation", in the light of the legal definition of offences; or a "strictly naturalistic interpretation". The question has been recently resolved by the Italian Constitutional Court with the Sentence n. 200/2016 [37] in the matter of procedural *bis in idem* and formal concurrence of crimes, which declares illegitimate the art. 649 ICCP in the part that excludes that the "*fact is the same only by circumstance that there is a «formal concurrence» between other crimes already processed with final judgment and the crime for which began the new criminal procedure*" [38]. Nevertheless, the Constitutional Court has also denied that, according to the European case-law, the '*idem factum*' should be interpreted as a 'same conduct', and has stated that *factum* is *idem* when essential elements of the offence (such as, event, conduct and causal relationship) correspond.

Given the above, as regards cybercrimes used for committing VAT Fraud, of course we could take the example of false invoices (and in particular, false electronic invoices) used in order to perform a fiscal fraud.

In particular, as mentioned above, art. 2 TCPCA describes the use of false invoices or other documents in order to prove *non-existence operations* intended to justify fictitious passives or expense. From the literal tenor of the aforementioned rule, the impossibility of identifying a univocal definition of "non-existent operation" emerges. Instead, according to the doctrine, we have to keep in mind a bipartition between *objective* and *subjective* non-existence [39]. More in detail, an *objectively non-existent* operation is configured in two hypotheses: 1. when the invoices document operations never realized; or 2. when the invoices document operations carried out only in part, i.e. in different quantitative terms

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[36] G. RANALDI, F. GAITO, *Introduzione allo studio dei rapporti tra* ne bis in idem *sostanziale e processuale*, cit.

[37] See ICC (*Italian Constitutional Court*), 21 July 2016, n. 200, (so-called, processo Eternit *bis*).

[38] In this way, see: B. CAPPARELLI, V.G. VASCONCELLOS*, A decisão da Corte constitucional italiana no "caso Eternit-bis": questões novas sobre as relações entre bis in idem processual e concurso formal de crimes?*, in *Revista de Estudos Criminais*, 2018, 129 et seq.; S. ZIRULIA, Ne bis in idem: *la Consulta dichiara l'illegittimità dell'art. 649 c.p.p. nell'interpretazione datane dal diritto vivente italiano (ma il processo Eternit bis prosegue),* in *Diritto penale contemporaneo*, 24 July 2016; P. FERRUA, *La sentenza costituzionale sul caso Eternit: il* ne bis in idem *tra diritto vigente e diritto vivente*, in *Cassazione penale*, 2017, 78 et seq. See also the *Zolotukhine c. Russia* case which "consolidated" European jurisprudence in the sense that the "idem fact" is appreciated in the light of "concrete factual circumstances", inextricably linked in time and space.

[39] V. E. FALSITTA, M. FAGGIOLI, *La normativa tributaria di riferimento e le definizioni legali*, in *I reati tributari*, cit., 37 et seq.

and lower than those represented on the invoices [40]. On the other hand, the falsity of the invoices is *subjective* when the transaction has actually been carried out, but between subjects other than those appearing on the invoice as part of the relationship. So that, the cases of "interposition", both "fictitious" and "real", fall within the scope of *subjective non-existence* operation [41].

Instead, art. 3 TCPCA regards the declaration of incomes lower or passives or credits higher than the actual ones through other possible fraudulent modalities, which may consist in performing transactions that are objectively or subjectively simulated or in using false documents or in other fraudulent means to hinder the assessment and mislead the financial administration. In the end, art. 8 TCPCA punishes anyone who, for the purpose of allowing third parties to evade income tax or value added tax, issues or releases invoices or other documents for non-existent transactions.

That said, we should concentrate on computer related forgery, considering also that VAT declarations have become electronic. In this way, as mentioned above, the ICC does not provide for specific forms of cybercrimes related to false documents, but does simply extend – through art. 491-*bis* ICC – the discipline on the traditional false offences to informatic documents.

In particular, according to the majority jurisprudence, the crime envisaged by art. 2 TCPCA can be configured in case of use of invoices or documents both "ideologically" and "materially" false [42]. In fact, according to national case-law, the conduct of a fraudulent declaration, by means of invoices or documents for non-existent operations, presents a "biphasic structure" in which the declaration, as a conclusive moment, gives rise to a false content (*falso ideologico*), while the preparatory conduct – that is the recording or holding of documents that will constitute the support of the declaration – may have as its object documents that are false in content (because they are issued by others in favour of the user), or materially false, as counterfeit or altered (*falso materiale*) [43]. In other words, the conclusive conduct, that is the indication of the fictitious elements, undoubtedly configures a "false ideology"; while the preparatory conduct can have as object documents both materially and ideologically false [44].

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[40] V. E. FALSITTA, M. FAGGIOLI, *La normativa tributaria di riferimento e le definizioni legali*, cit., 43 et seq.

[41] V. E. FALSITTA, M. FAGGIOLI, *La normativa tributaria di riferimento e le definizioni legali*, cit., 49 et seq.

[42] ISC, sec. III, 10 November 2011, n. 46785.

[43] ISC, sec. III, 28 February 2018, n. 17126.

[44] Therefore, according to this thesis, the fraud sanctioned by the art. 2 TCPCA differs from that of art. 3 TCPCA not for the nature of the forgery, but for the relationship of *mutual specialty* existing between the two provisions.

On the contrary, according to the doctrine, the only hypothesis of forgery that is taken into consideration by the art. 2 TCPCA is the "false ideology". Indeed, the provision, pursuant to art. 1 lett. a) TCPCA, refers to invoices or other documents for *non-existent* transactions issued against transactions not actually carried out in whole or in part, or issued between different parties; which implies that the component of falsehood must be present from the origin of the document itself, that is, from its issuance which is considered to be perfected with the exit of the document from the sphere of the subject that originated it. The main consequence is that, if the invoice has been issued on a regular basis, the criminal hypothesis referred to in art. 2 TCPCA – which focuses on invoices formally correct but relating to *non-existent* transactions – cannot be configured [45].

Anyway, for what concern the relation between art. 2 TCPCA and forgery crimes, in the hypothesis in which the document that attests the non-existence of the operation has the nature of a public act, of course, a concurrence with the crime of ideological falsehood in public acts can be configured. Instead, as regard art. 3 TCPCA, it is also possible to set up a concurrence with the crimes of material or ideological falsehood in public act [46].

On the other hand, it is important to establish the relationship that may exist between (computer) fraud and arts. 2, 3 and 8 TCPCA. In this sense, we should start from art. 640, para. 2, n. 1, ICC, which punishes any person who uses deception or fraudulent conduct to induce someone into error to obtain an illegitimate profit, to the detriment of others, providing for a penalty increase when it is committed against the State. According to the majority jurisprudence, the offenses in tax matters, referred to in arts. 2, 3 and 8 TCPCA, are "special" with respect to the crime of aggravated fraud against the State pursuant to art. 640 para. 2, n. 1, ICC, since they are characterized by a "specific artifice" and by a conduct realised in a vinculated form (*Condotta a forma vincolata*). So that, any fraudulent conduct aimed at tax evasion exhausts its penal negative value within the framework outlined by the special legislation [47]. Nevertheless, it is important to highlight that this specialty relationship (*rapporto di specialità*) exists provided that the conduct of tax fraud does not result in a further and different profit than tax evasion [48].

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[45] See E. MUSCO, F. ARDITO, *Diritto penale tributario*, cit., 137 et seq.; P. VENEZIANI, *Commento all'art. 3*, in I. CARACCIOLI, A. GIARDA, A. LANZI (edited by), *Diritto e procedura penale tributaria – Commentario al decreto legislativo 10 marzo 2000 n. 74*, Padua, 2001, 131 et seq., 153.

[46] E. MUSCO, F. ARDITO, *Diritto penale tributario*, cit., 150, 190.

[47] E. MUSCO, F. ARDITO, *Diritto penale tributario*, cit., 153. ISC, sec. III, 21 January 2015, n. 5177. See also: E. DOLCINI, G.L. GATTA, (directed by), *Codice Penale commentato*, Tomo 3, *Artt. 593-734-*bis*, leggi complementari, Milanofiori Assago, 2015, 1115 et seq.

[48] F. CINGARI, *La dichiarazione fraudolenta mediante altri artifici*, in *I reati tributari*, cit., 225 et seq.; ISC, sec. II, 10 March 2016, n. 12872. ISC, sec. un., 28 October 2010, n. 1235.

In addition, we should take into account that in fraud the aforementioned deception requires, in many cases, the use of false documents; thus, it is important also to establish the relation that, actually, may exist between "forgery" and "fraud". According to the major jurisprudence, a *material concurrence* – and not an absorption – may be configured between the "crime of forgery in public deed" and the "crime of fraud" when the falsification constitutes an artifice for committing the fraud; in this case, in fact, there is no hypothesis of a *composite crime* (art. 84 ICC) for which configurability is necessary that the law provides for a crime as a constitutive element or an aggravating circumstance of another [49].

On the contrary, in the case of "computer fraud" and "forgery offenses", the problem takes on a different connotation. Unlike the scam, the art. 640-*ter* makes explicit reference to a behaviour of alteration or intervention on data, information or programs: therefore, a *latu sensu* "falsificatoria conduct" is necessarily presupposed in the commission of the crime in question. At the same time, in cases of alteration of an electronic document theoretically suitable to integrate "computer related forgery" and aimed at the commission of a fraud, it is not always easy to recognize the injury, in addition to the assets of the victim, also of public faith.

On the other hand, it is clear that, in addition to the typical "forgery crimes" (falsification of electronic document, such as invoices), the illicit purpose to cause damage (and a fraud) to the Treasury, can be achieved through other types of criminally relevant conducts.

In this way, the large audience of VAT payers is subject to the transmission of data through the interchange system SdI (so-called *Sistema di Interscambio*), which is an IT platform of the Inland Revenue for the management of electronic invoicing and that, in substance, constitutes a synoptic and chronological map of all the VAT payers' activities. In fact, the transmission of the data of the invoices issued and received allows the administration to have an inexhaustible source of information and to use the data transmitted by the tax payers for the purposes of cross-checks. That said, we may consider the example of a "computer fraud" committed with the intention of undermining the integrity of the SdI mechanism; or also, the case of a cyber-attack to the fiscal authorities informatic systems aimed "deleting" or "modifying" the relevant fiscal data of a "physical" or "legal" person [50]. It is clear that, these types of conduct can inte-

[49] ISC, sec. V, 5 November 2018, n. 2935; ISC, sec. V, 5 February 2008, n. 21409. See also: E. DOLCINI, G.L. GATTA, (directed by), *Codice Penale commentato*, Tomo 3, cit., 1111 et seq.

[50] These examples may conduct to problems if we consider that cyber-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.

grate the crime of computer fraud referred to in art. 640-*ter* ICC, or also the crime of illegitimate access pursuant to the art. 615-*ter* ICC. In this sense, the offence of informatic fraud is not "special" – according to the Italian case-law – in relation to the offence of illegitimate access to an informatic system punishable under art. 615-*ter* ICC. In fact, the Supreme Court stated that the two crimes can concur because the protected legal assets are different: the art. 615-*ter* ICC protects the IT domicile under the profile of *jus excludendi alios*, while the computer fraud consists in altering data and aims to the perception of an unfair profit [51]. So that, art. 640-*ter* does not exclude the applicability of 615-*ter* ICC. In addition, these articles may be relevant, also, in the case of "illicit access" of a public officer in the system of the tax authority in order to advantage another person by inserting non-existing tax relieves [52].

Moreover, it is important to consider the relationship between "computer fraud" and the "abusive use of credit cards", pursuant to the art. 493-*ter* ICC [53]. In this way, the Supreme Court concluded for the application of the sole offence of informatic fraud (excluding the offence related to the use of credit card) in case where subject had created a "fake credit card" and had used a fraudulently-obtained pin code in order to access an informatic bank system and perform illicit operations [54]. In fact, the specializing element, represented by the "fraudulent use of the IT system", provided for by the art. 640-*ter*, constitutes an absorbing prerequisite with respect to the generic undue use of the credit card.

In the end, it is also important to consider arts. 640-*ter*, para. 3, and 494 ICC for the cases of "identity fraud" or "identity theft". These provisions 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 VAT amount.

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[51] ISC, sec. V, 30 September 2008, n. 1727.

[52] ISC, sec. V, 28 May 2018, n. 39311.

[53] This article has been introduced by art. 4 of Legislative Decree 3 January 2018, n. 21. In particular, it punishes, with imprisonment from one to five years and a fine from 310 to 1.550 euros, anyone that, for the purpose of making profit for himself or for others, improperly uses, as it is not the owner, credit or payment cards, or any other similar document that enables the withdrawal of cash or the purchase of goods or the provision of services. The same penalty shall apply to those who, for the purpose of making profit for themselves or for others, falsify or alter credit or payment cards or any other similar document that enables cash withdrawals or the purchase of goods or services, or possesses, sells or acquires such cards or documents of illicit origin or otherwise falsified or altered, as well as payment orders produced with them. A. GALANTE, *La tutela penale delle carte di pagamento*, in *Cybercrime*, cit., 285 et seq.

[54] ISC, sec. II, 15 April 2011, n. 17748.

1.3.2. Procedural perspective

The principle of *ne bis in idem* has been accepted in our criminal procedural system, since the first unitary rite code of the Kingdom of Italy, that is, since the code of 1865, and so, it was subsequently reaffirmed in the codes of 1913, 1930, up to the latest criminal procedure code. Now, it is crystallised within the provision of the art. 649 ICCP, which states: «The accused person who has been dismissed or acquitted by a judgment or criminal decree that has become final shall not be prosecuted again for the same offence, even if his conduct is considered differently in terms of legal definition, stage of the offence or circumstances, without prejudice to arts. 69, paras. 2 and 345. If however, the criminal proceedings are started again, the court shall deliver a judgment of dismissal or of no grounds to proceed, at any stage and instance of the proceedings, specifying the cause in the operative part of the judgment». More in detail, the *ne bis in idem* principle aims to guarantee not only the "objective certainty" – which consists in allowing individuals to predict which acts or omissions are liable to be subjected to penalties – but also the "subjective certainty" so outlined in the art. 649 ICCP which, in this sense, may constitute "a practical expedient that removes the individual from a theoretically unlimited possibility of criminal persecution" [55].

However, precisely the "multilevel protection" of fundamental rights, such as the *ne bis in idem*, leads to the necessity to analyse the "dialogue" which currently exists between the European Courts and National judges (ordinary and constitutional). In particular, the interpretation of the same provisions by the Supranational and National Courts makes the boundaries of the *ne bis in idem* principle even more uncertain, especially "*in the hypotheses in which the same fact is sanctioned both by penal and administrative dispositions and, thus, where the* ne bis in idem *is linked with parallel proceedings*" [56].

In this way, first of all, it is important to establish what falls into the notion of "criminal matter" (*matiére pénale*) occurring in art. 4 of the 7th Protocol, considering also that the Italian criminal code follows a *double-track system* of both criminal and administrative sanctions (so-called "*doppio binario*"). In particular, we may point out that in March 2014, the Second Section of the ECtHR appraised the validity of the Italian regulation on market abuse in the light of art. 4 of the 7th Protocol to the ECtHR (and, as well as, in the light of

[55] G. RANALDI, F. GAITO, *Introduzione allo studio dei rapporti tra* ne bis in idem *sostanziale e processuale*, cit.

[56] F.S. CASSIBBA, *I limiti oggettivi del* ne bis in idem *in Italia tra fonti nazionali ed europee*, in *Revista Brasileira de Direito Processual Penal*, 2018, 953-1002.

art. 6)[57]. More in detail, under the Italian law, the Legislative Decree n. 58/1998 provides for both a criminal (art. 185) and administrative sanction (art. 187-*ter*) for market manipulation[58]. Nevertheless, the Court has stated that the proceeding before CONSOB led to a sanction actually too severe for being considered just administrative, which widely went beyond the threshold fixed by the second and third *Engel Criteria* (i.e. the nature of the offence; the severity of the penalty that the person concerned risks incurring)[59]. So that, the combination of the two sanctions (criminal and administrative) could produce a duplication of sanctioning, in violation of art. 4 of the 7th Protocol to the ECtHR.

At the same time, it is important to highlight that in four Italian cases[60], the Court of Justice of the European Union is requested to interpret the *ne bis in idem* principle having regard to the context of the VAT directive (Council Directive 2006/112/EC of 28 November 2006) and also to the directive concerning financial markets (Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003). In these four cases, the Italian tax authorities and courts conducted criminal and administrative proceedings and imposed both penalties against the same person with respect to the same acts. In this way, the Court of Justice established that limitations of the *ne bis in idem* principle require a "specific justification" that should be subject to requirements under EU law. More in detail, there may be an authorised duplication of proceedings and penalties of a criminal nature if national legislation: a) pursues an objective of general interest; b) according to the interrelated principles of *predictability* and *certainty*, establishes clear and precise rules allowing individuals to predict which acts or omissions are liable to be subject to such a duplication of proceedings and penalties; c) ensures that the proceedings are coordinated in order to limit the additional disadvantage; d) ensures that the severity of all of the penalties imposed is limited in relation to the seriousness of the offence and

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[57] *Grande Stevens* and *Others* v. *Italy* App nos 18640/10, 18647/10, 18663/10, 18668/10 and 18698/10 (ECtHR, 4 March 2014).

[58] As the Court of Cassation has ruled in 2006 (ISC, sec. VI, n. 15199, 16 March 2006, *Labella*), arts. 185 and 187-*ter* are linked by a specialty relation and, in particular, the criminal provision would represent *lex specialis* in respect of the general provision of administrative nature. In fact, despite both indicate the requirement of "price sensitiveness", only the criminal provision requires the judge to ascertain whether it actually occurs. In this way, see: G. GIACOMELLI, Ne Bis In Idem *Profiles in EU Criminal Law*, 2013/2014, 82, available on: https://www.penalecontemporaneo.it/upload/1422126174full%20text%204917958%20GIACOMELLI.pdf.

[59] G. GIACOMELLI, Ne Bis In Idem *Profiles in EU Criminal Law*, cit., 75.

[60] Case C-524/15, *Menci Case*; C-537/16, *Garlsson Real Estate and Others*; Joined Cases C-596/16 and C-597/16, *Di Puma and Zecca.*

to what is strictly necessary. However, the Court held that the objective of ensuring the collection of all the VAT due in a certain Member State is capable of justifying the duplication of criminal proceedings and penalties [61].

That said, in order to avoid a duplication of state's punitive reaction, tax law is based on a *principle of specialty* that has taken the place of the *principle of the accumulation of criminal and administrative* sanctions envisaged by art. 10, of Decree Lawn n. 429/1982 (l. 7 August 1982, n. 516) [62].

In particular, since administrative and criminal tax penalties are "*characterized by a teleological and functional identity*" [63], tax law provides the *principle of specialty*, which regulates the application of the "special provision" in case the same conduct may be punished by both criminal and administrative tax sanctions. Art. 19, para. 1, TCPCA, in fact, establishes that when the same fact is punished by one of the provisions of Title II and by a provision that states for an administrative sanction, the special provision applies. In this way, it is important to point out that there is not a general criterion that defines which is the "special" penalty, and this should be decided by the judge on a case-by-case basis. However, since criminal tax penalties have a natural subsidiary function and considering that they expressly require certain qualifying elements (such as fraudulent intent, exceeding of certain quantitative thresholds, etc.), criminal tax penalties seem to be the special ones [64].

Closely connected to the *principle of specialty* is art. 21 TCPCA by virtue of which "The competent office, in any case, issues the administrative sanctions relating to tax violations that are subject of crime reports. These sanctions can-

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[61] More in detail, see: https://curia.europa.eu/jcms/upload/docs/application/pdf/2018-03/cp180034en.pdf.

[62] See A. GIOVANNINI, *Principio di specialità, illecito tributario e responsabilità dell'ente*, in *Rivista di Diritto Tributario*, 2000, 859 et seq. In general, see also: F. MAZZACUVA, *I rapporti con il sistema sanzionatorio amministrativo e fra procedimenti*, in *I reati tributari*, cit., 581 et seq.

[63] AA.VV., *"Surcharges and Penalties in Tax Law". Italy Report*, cit., 13.

[64] AA.VV., *"Surcharges and Penalties in Tax Law". Italy Report*, cit., 13; E. MUSCO, F. ARDITO, *Diritto penale tributario*, cit., 361 et seq. More in detail, the violation of the omitted payment of the certified or declared withholdings and of the VAT (art. 10-*bis* and 10-*ter* TCPCA) are manned both by the penal sanction and by the administrative one (art. 13, co. 1, Legislative Decree n. 471/1997). Therefore, also in these cases, there may be a problem of concurrence of rules which should be resolved by virtue of the *principle of specialty*, pursuant to art. 19 TCPCA. Nevertheless, this approach was contradicted by the ISC which has excluded a violation of the *ne bis in idem* principle, stating that administrative and criminal tax penalties would not be in a relation of specialty, since administrative tax penalty cannot be considered a penalty having a nature similar to the criminal tax penalty. Thus, they shall be framed in terms "unlawful progression" of the offense. In this sense, see: ISC, sec. un., 12 September 2013, n. 37424.

not be enforced against subjects other than those indicated in art. 19, para. 2 TCPCA, unless the criminal proceedings are settled with an archiving order or irrevocable sentence of acquittal or acquittal with a formula that excludes the criminal relevance of the fact (…)" [65]. This essentially means that the administrative sanction would not be enforceable against the person convicted in criminal proceedings, by virtue of the *principle of specialty*. The administrative sanction would, instead, be enforceable against the person acquitted for lack of intent, or for not exceeding the thresholds, since in these cases the penal sanctioning norm would not be applied whereas there is a fact which is not criminally relevant.

Moreover, the *principle of specialty* must be related and balanced with the *principle of autonomy* of administrative tax investigations and assessment with respect to criminal proceedings (*double track principle*) which is regulated by art. 20 TCPCA [66]. In fact, according to this provision, the administrative ascertainment procedure and the tax trial cannot be suspended due to the pending criminal proceedings concerning the same facts or facts on the basis of which the relative definition depends[67]. In this way, the Italian system has 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 [68].

[65] E. MUSCO, F. ARDITO, *Diritto penale tributario*, cit., 364.

[66] AA.VV., *"Surcharges and Penalties in Tax Law". Italy Report,* cit., 13.

[67] However, it is necessary to specify that the separation of the processes cannot be intended in an absolute way: the tax and criminal courts must in fact consider, with appropriate attention, what was examined and deduced by the other judge, as well as what was accomplished by the financial administration.

[68] In this way, see the solution adopted by the ISC in 2014 (ISC, sec. III, 15 May 2014, n. 20266). F. VIGANÓ, *La Grande Camera della Corte di Strasburgo su* ne bis in idem *e reati tributari*, in *Diritto penale contemporaneo*, 18 November 2016; ID., *Una nuova sentenza di Strasburgo su* ne bis in idem *e reati tributari*, in *Diritto penale contemporaneo*, 5/2017, 392 et seq.