CHAPTER 6

Tax Crimes Inclusion in "Criminal Activity" Definition

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Abstract The new European Union (EU) Directive 2015/849 includes tax offences in the range of predicate offences that qualify criminal activity, such as to constitute the basis of money laundering, in line with the revised FATF Recommendations. The Directive IV provides that each Member State identify tax offences constituting "criminal activity". The tax crimes inclusion in the definition of criminal activity is undoubtedly an important innovation of Directive IV, especially considering that the most part of money laundered arise from tax crimes activities.

The year 2014 was a record year for hidden and laundering money operations in Italy with thousands of illegal criminal activities. The annual Financial Police Report estimates that during last year in Italy the total amount of Euros involved in laundering money activity was approximately 2.8 billion euro. The main category of predicate offences from which money laundered arise are related to tax crimes: almost 1.1 billion of euros on a total amount of 2.8 billion comes from tax evasion. They are money evaded from the State balance, saved and hidden by those who do not pay taxes. Despite the law enforcement of Financial Police, the illegal business continues to grow. It is easy to understand how this situation affects severely the economy of the States, already weakened by European sovereign debt crisis that has been taking place in the European Union (EU) since the end of 2009. It is on the basis of these considerations that EU Member States have felt the need to combat money laundering with any tools. Already in its

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12 February 2012 Recommendations, FATF-GAFI included expressly tax crimes in the category of "predicate offences" in order to extend the application field of Anti Laundering Law. The third FATF's Recommendations states that: "Countries should criminalise money laundering on the basis of the Vienna Convention and the Palermo Convention. Countries should apply the crime of money laundering to all serious offences, with a view to including the widest range of predicate offences."[1]

In particular, in the section "Interpretative note to recommendation 3 (Money laundering offence)", FATF ruled that:

1. Countries should criminalise money laundering on the basis of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988 (the Vienna Convention) and the United Nations Convention against Transnational Organized Crime, 2000 (the Palermo Convention).
2. Countries should apply the crime of money laundering to all serious offences, with a view to including the widest range of predicate offences. Predicate offences may be described by reference to all offences; or to a threshold linked either to a category of serious offences; or to the penalty of imprisonment applicable to the predicate offence (threshold approach); or to a list of predicate offences; or a combination of these approaches.
3. Where countries apply a threshold approach, predicate offences should, at a minimum, comprise all offences that fall within the category of serious offences under their national law, or should include offences that are punishable by a maximum penalty of more than one year's imprisonment, or, for those countries that have a minimum threshold for offences in their legal system, predicate offences should comprise all offences that are punished by a minimum penalty of more than six months imprisonment.
4. Whichever approach is adopted, each country should, at a minimum, include a range of offences within each of the designated categories of offences. The offence of money laundering should extend to any type of property, regardless of its value, that directly or indirectly represents the proceeds of crime. When proving that property is the proceeds of crime, it should not be necessary that a person be convicted of a predicate offence.
5. Predicate offences for money laundering should extend to conduct that occurred in another country, which constitutes an offence in

that country, and which would have constituted a predicate offence had it occurred domestically. Countries may provide that the only prerequisite is that the conduct would have constituted a predicate offence, had it occurred domestically.

6. Countries may provide that the offence of money laundering does not apply to persons who committed the predicate offence, where this is required by fundamental principles of their domestic law.
7. Countries should ensure that: (a) The intent and knowledge required to prove the offence of money laundering may be inferred from objective factual circumstances. (b) Effective, proportionate, and dissuasive criminal sanctions should apply to natural persons convicted of money laundering. (c) Criminal liability and sanctions, and, where that is not possible (due to fundamental principles of domestic law), civil or administrative liability and sanctions, should apply to legal persons. This should not preclude parallel criminal, civil, or administrative proceedings with respect to legal persons in countries in which more than one form of liability is available. Such measures should be without prejudice to the criminal liability of natural persons. All sanctions should be effective, proportionate, and dissuasive. (d) There should be appropriate ancillary offences to the offence of money laundering, including participation in, association with, or conspiracy to commit, attempt, aiding and abetting, facilitating, and counselling the commission, unless this is not permitted by fundamental principles of domestic law.

The 2012 April Paper from the European Commission proposed to examine if the current approach of use of "all serious offences" could be sufficient to include also tax crimes or if they should be included in the specific category of "serious offences" according to art. 3, n. 5 or if it would be better to give a more precise definition of tax crimes.

The solution chosen by Directive IV is the second one such as the inclusion of tax crimes in a specific category of "serious offences" to art. 3, n. 4 letter f. The new EU Directive 2015/849 of the so-called fourth Money Laundering Directive, dated 20 May 2015 includes tax offences in the range of predicate offences that qualify criminal activity, such as to constitute the basis of money laundering.

Not all the tax crimes are included in this category but only such tax crimes that in the national legislations are punished with a maximum fine of over one year of prison and a minimum of over six months of prison.

The 11th whereas of Directive IV highlights that “tax crimes” relating to direct and indirect taxes are included in the in the broad definition of “criminal activity”, in line with the revised FATF Recommendations. Given that different tax offences may be designated in each Member State as constituting “criminal activity”, national law definitions of tax crimes may diverge. While no harmonisation of the definitions of tax crimes in Member States’ national law is sought, Member States should allow, to the greatest extent possible under their national law, the exchange of information or the provision of assistance between EU Financial Intelligence Units (FIUs).

The article 3, number 4 of the Directive gives the definition of criminal activity, such as any kind of criminal involvement in the commission of the following serious crimes:

1. acts set out in articles 1–4 of Framework Decision 2002/475/JHA;
2. any of the offences referred in Article 3(1)(a) of the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances;
3. the activities of criminal organisations as defined in Article 1 of Council Joint Action 98/733/JHA;[2]
4. fraud affecting the Union’s financial interests, where it is at least serious, as defined in Article 1(1) and Article 2(1) of the Convention on the protection of the European Communities’ financial interests;[3]
5. corruption;
6. all offences, including tax crimes relating to direct taxes and indirect taxes and as defined in the national law of the Member States, which are punishable by deprivation of liberty or a detention order for a maximum of more than one year or, as regards Member States that have a minimum threshold for offences in their legal system, all offences punishable by deprivation of liberty or a detention order for a minimum of more than six months.

The tax crimes inclusion in the definition of criminal activity is undoubtedly an important innovation of Fourth Directive, especially considering that the most part of money laundered arise from tax crimes activities.

Of course, for such tax crimes, it is essential to verify the moment in which the offence occurs and the presence of eventual punishment thresholds under which there is no punishment.

Tax crimes are set by Legislative Decree n°74/2000 which splits them into two main categories:

1. Tax crimes related to tax returns;
2. Tax crimes related to accounting records and tax payments.

The first category includes the following offences:

- Art. 2—Fraudulent tax return by the use of invoices or other documents for non-existent transactions. This article shall punish anyone, in order to evade income tax or value-added tax, making use of invoices or other documents for non-existent transactions and indicates in the annual tax return relating to these tax items, false liabilities. The fraud is realised with no minimum threshold.
- Art. 3—Fraudulent tax return by the use of other devices: it shall punish with imprisonment from one year and six months to six years anyone, in order to evade income tax or value-added tax, on the basis of a false representation in the compulsory accounting and making use of fraudulent means such as to hinder the investigation. It indicates in one of the annual statements relating to such taxes active elements for an amount less than the actual or false liabilities, when jointly:
  1. the unpaid tax is higher, with reference to single out any of the taxes, of 75,000 euro;
  2. the total amount of the assets taken from taxation, also by indicating false liabilities, and more than 5 % of the total amount of the assets mentioned in the statement, or, in any case, and more than 1.5 million euro.
- Art. 4—Misrepresented tax return, when someone, in order to evade taxes, reports in his annual tax return, false assets and liabilities. This crime is realised only if the tax evaded is more than Euro 10,329,138 and at the same time the total amount of activities and liabilities is more than 10 % of the total amount of activities indicated in the tax return or more than Euro 206,582,760.
- Art. 5—Annual tax return omission: in order to be punished, the total amount of tax evaded shall be higher than 7,746,853 euro.

In any case, the above-mentioned offences are not punishable if just attempted.

The second category of tax crimes is related to accounting records and tax payments.

- The art. 8 of the legislative Decree punishes with imprisonment from one year and six months to six years anyone who, in order to permit any other evasion of income tax or value-added tax, issues invoices or other documents for non-existent transactions.
- The art. 10 (Hidden or destruction of accounting records) punishes anyone who, in order to evade taxes, acts with the purpose to not allow the reconstruction of incomes or business cash flow.
- The art. 10—bis (Omitted payment of withholdings) punishes anyone who, within the term for submitting tax return, does not pay withholdings for an amount exceeding 50,000 euro.
- The art. 10—ter (Omitted VAT payment) punishes anyone who, within the term for the payment of the first advance payment, does not pay an amount of VAT exceeding 50,000 euro.
- The art. 10—quater (Undue tax compensation) punishes anyone who does not pay taxes using in compensation undue or not existing tax credits for an amount exceeding 50,000 euro.
- The art. 11 (Fraudulent subtraction to tax payments) punishes anyone who, in order to not pay taxes, simulates the selling or carrying out of fraudulent acts on own or others' properties with the scope to make inefficient the collection of taxes. The fraudulent subtraction is realised only if the total amount of taxes evaded is exceeding 5,164,569 euro.

The problem of tax crimes as predicate offences for money laundering is currently debated. The Italian doctrine[4] is not unanimous in considering tax crimes as predicate offences for money laundering because tax evasion does not generate new income but results in a tax savings on an income produced by another activity. In accordance with such opinion is the thesis that the concept of origin indicates a motion from a location so the object of laundering money could be only an increase of income, considered as illegal flow of income coming from outside and held by recycler.[5]

According to this opinion, a relevant part of tax crimes should not be included in the category of predicate offences for money laundering. For example, the selling of goods is not declared in balance sheet with related

misrepresented tax return (see art. 4 Dlgs. 74/2000): the flow of income is generated by economical activity and not by tax evasion that determines a saving and not a new income.[6]

Despite this trend, the current position of Italian criminal jurisdiction is to consider tax crimes as predicate offences of money laundering, in accordance with the above-mentioned FATF's Recommendations and the 23 April 2012 Bank of Italy UIF's Communication that consider tax evasion and money laundering strictly linked.

Moreover, it is important to notice that for criminal law, laundering money definition (art. 648 *bis* Italian Criminal Code) is wider than tax definition provided by Legislative Decree 231/2007; thus, tax crimes should be undoubtedly considered predicate offence for laundering money.

The Italian legal system has been recently updated with the introduction of the article 648 *ter*, 1st coma, so-called Self money laundering.[7] Self money laundering consists in hide and use of proceeds arising from self-crimes and it is particularly frequent in tax offences such as tax evasion.

The Directive IV lays the foundation for an effective and enhanced implementation of a system to combat money laundering, also to give greater clarity and force the rules of the Member States.

From 26 June this year and in two years, the EU countries are obliged to put in place provisions to comply with Directive IV. In particular, they will have to include in its national legislation the definition of criminal activity by broadening the range of predicate offences with the inclusion of tax crimes, related to direct and indirect taxes, punishable by a custodial sentence or other measure of equivalent maximum of more than one year or, in the case of legal system that have a minimum threshold for offences, those offences, again by way of detention or equivalent measure, the minimum duration of six months.

Unfortunately, this new Directive does not still lead to full harmonisation at Community level of the scope of criminal activities, such as the assumption of laundering money: it would be better to take this opportunity to define exactly what is meant by tax offence in the individual countries of the European Community, regardless of the legislation of a criminal tax in force in each State and the type of punishment that the rules further provide in the case of commission of a tax offence.

In any case, it is however a huge step forward in the fight against international money laundering because by now many countries have already included in their legislation the tax crimes and the new offence of self-laundering whose predicate offence may well be the tax offence.

Since the entry into force of the Directive, even the appearance that the source of funds may result from tax offences will trigger the obligation for the broker reporting of suspicious activity.

Therefore, the tax compliance of law which enters now essential requirement of verification of customers without any doubt first generated from the non-express reference to these offences among those who could qualify criminal activity.

It is worth remembering that among the European countries that have already incorporated the crime of self-laundering, there are—as well as Italy—also France, Spain, the UK, Germany, Belgium, and Portugal.

Moreover, the new Directive and the new legislation contained in it is quoted and echoed last directive on the exchange of information between tax authorities will come into effect the same timing predicting that intermediaries adopt European anti-money laundering standards for the identification of the owner actual and then communicate automatically to the countries with whom such persons are residents.

The entry into force of the new joint European standards raises crucial information assets of European states contributing to the international fight against tax evasion.

The European Parliament resolution of 25 October 2011 on organised crime in the EU, while not binding, has contributed a lot to the introduction of self-laundering crime in Italian legal system. Through its resolution, European Parliament has requested expressly to Member States to introduce a legal tool to counteract the laundering of illegal money done directly by the crime's author. Currently only Italy, Belgium, Greece, Portugal, and UK have introduced a specific law on self-laundering money while it is not present in France, Germany, Austria, and Denmark.

With reference to Italian legal system, the article 3 of Law n. 186/2014 has introduced the new article 648—*ter* of Italian Criminal Code (i.e. Codice Penale) so-called self-laundering, as well as an amendment to Art. 25-octies of Legislative Decree 231/01, which will now also consider this new offence (entered into force on 01/01/2015).

The self-laundering is the activity of occultation of the proceeds of crimes committed by the author of the principal crime. It is seen above all as a result of specific offences, such as tax evasion, corruption, and the appropriation of company assets.

It is interesting to notice that the Article. 648-ter, paragraph 1, of the Criminal Code, unlike what happens, for example, for recycling, specifically lists the conduct subject to prosecution.

These are related to three behaviours: use, substitution, or transfer activities in economic, financial, entrepreneurial, or speculative money, of goods or other benefits from the predicate crime.

The object of reutilization must be in fact related to revenues resulting from the commission of the predicate offence and it must actually hinder the identification of the criminal origin.

From the foregoing emerges, as anticipated above, the difference between the structure of the offence in question and that of recycling.

The legislature, in fact, for the new offence introduced a listing, peremptory, pipelines punishable.

While recycling, not only is the conduct of using (but only those of substitution or transfer) of proceeds not provided, but there is also a general clause given by the formula: "or carries out other transactions in their" (clause obviously refers money, goods, and other benefits).

This then allows, for the purposes of money laundering, to use among the prohibited conducts, any recycling conducts while this is not possible in the new offence of self-laundering.

With the term "use", it may be concluded that the legislature intended to affect the use of money, goods, or other economic benefit from the predicate offence and specific to a particular aim.

However, it is still too early to assess the impact of the new legislation on the Italian legal system and on the fight against criminality. The coming months will be a useful test in assessing the true effectiveness of the EU reforms (Fig. 6.1).

Fig. 6.1 Data from Corriere della Sera 9 August 2015

Notes

1. FATF Recommendation 3rd pag. 14.
2. Joint Action 98/733/JHA of 21 December 1998 adopted by the Council on the basis of Article K.3 of the Treaty on EU, on making it a criminal offence to participate in a criminal organisation in the Member States of the EU (OJ L 351, 29.12.1998, p. 1).
3. OJ C 316, 27.11.1995, p. 49.
4. Zanchetti, *Il riciclaggio di denaro proveniente da reato*, Milano, 1997, 398 ss. Manes, *Riciclaggio* in A.A.V.V. *Diritto Penale, Lineamenti di parte speciale*, Bologna, 2009 pag. 722; Flora, *Sulla configurabilità del riciclaggio di proventi da frode fiscale*, in Foro Ambrosiano 1999, pag. 411.
5. Luigi Domenico Cerqua, Il delitto di riciclaggio dei proventi illeciti, in Il riciclaggio del denaro. Il fenomeno, il reato, le norme di contrasto a cura di CAPPA-CERQUA, Mlano 2012, pag. 78.
6. Studio Antiriciclaggio n. 261-2013/B, Reati fiscali e normativa antiriciclaggio: i confini dell'obbligo di segnalazione a carico dei notai by Consiglio Nazionale Del Notariato.
7. Introduced by art. 3 Law 186/2014 published on 17 December 2014 with the related change of art. 25 *octies* Legislative Decree n° 231/2001.