

## VAT FRAUD COULD BE INCLUDED IN THE LIST OF OFFENCES PROVIDED FOR BY LEGISLATIVE DECREE 231/2001 SO TRIGGERING THE LIABILITY OF LEGAL ENTITIES, COMPANIES AND ASSOCIATIONS

### 1. New offences could be added to the list of offences provided for by Legislative Decree 231/2001

It is more than 17 years ago that Legislative Decree no. 231 of 2001, which came into force on 4 July 2001 ("**Decree 231**"), introduced the "administrative" liability (substantially, a quasi-criminal liability) of "**Legal Entities**" (to be understood as legal persons, companies, associations, consortia, etc.)<sup>1</sup> for certain listed crimes (the "**231 Offences**") committed, in the interest or for the benefit of the Legal Entity, by their top management, employees, agents or other people subject to the direction or supervision of the management. Yet, Decree 231 has been continuing evolving over time, principally through a myriad of reforms that have gradually extended the list of 231 Crimes well beyond the original anti-bribery scope<sup>2</sup>. As a result of new directives enacted at EU level, it is now at the gate a new broadening of the list of 231 Offences to the effect of including VAT frauds.

### 2. Directive (EU) 2017/1371 on the protection of financial interests

On 26 September 2018, the Italian Government presented to the Chamber of Deputies the bill of law on "*Delegation to the Government for the transposition of European directives and the implementation of other acts of the European Union - European Delegation Law 2018*"<sup>3</sup>. The bill was approved by the Chamber of Deputies on 13 November 2018 and sent to the Senate on 14 November 2018 (the "**Bill**").

Article 3 of the Bill contains the principles and guidelines for implementing **Directive (EU) 2017/1371 "on the fight against fraud affecting the financial interests of the Union by means of criminal law" ("PFI Directive")**, which aims at establishing "*minimum rules concerning the definition of criminal offences and penalties in the fight against fraud and any other illegal activity detrimental to the financial*

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<sup>1</sup> The scope of application of Decree 231 excludes the State, territorial public Entities, non-economic public Entities and those that perform functions of constitutional importance.

<sup>2</sup> The types of offences to which the rules apply may be included, for convenience of presentation, in the following categories: offences committed in relations with the Public Administration (Articles 24 and 25); computer crimes and unlawful processing of data (Article 24-bis); organised crime offences (Article 24-ter); crimes of forgery of money, public credit cards, revenue stamps and identification instruments or signs (Article 25-bis); crimes against industry and commerce (Article 25-bis.1); corporate crimes (Article 25-ter); crimes for the purpose of terrorism or subversion of the democratic order (Article 25-quater); practices of mutilation of female genital organs (Article 25-quater. 1); crimes against the individual (Article 25-quinquies); market abuse (Article 25-sexies); manslaughter and serious or very serious negligent injuries committed in violation of the accident prevention and health and safety at work regulations (Article 25-septies); receiving of stolen goods, money laundering and use of money, goods or utilities of illegal origin as well as self-money laundering (Article 25-octies); crimes relating to violation of copyright (Article 25-novies); inducing people not to make statements or to make false statements to the judicial authorities (Article 25-decies); environmental crimes (Article 25-undecies); employment of illegally staying third-country nationals (Article 25-duodecies); crimes of racism and xenophobia (Article 25-terdecies); transnational crimes (Law no. 146 of 16 March 2006, articles 3 and 10).

<sup>3</sup> It consists of 22 articles, which contain delegation provisions concerning the transposition of 22 European directives included in Annex A, as well as the adaptation of national legislation to 9 European regulations. The article also contains specific principles and guidelines for the exercise of the delegation regarding 12 directives.

interests of the Union, in order to strengthen protection against criminal offences detrimental to those financial interests" (Article 1), save for the Member States' "possibility of maintaining or adopting stricter rules for offences affecting the financial interests of the Union" (recital 16). The **deadline for transposition** is **6 July 2019**.

The notion of "**financial interest**" is contained in Article 2 (1)(a) of the PFI Directive and refers to "all revenue, expenditure and property which is covered or acquired or due under: the budget of the Union; the budgets of the institutions, bodies, offices and agencies of the Union established by the Treaties or budgets directly or indirectly managed and controlled by them".

Paragraph 2 of the same article is of particular relevance, in that it contains an important clause limiting the extensive scope of the PFI Directive, which applies to **VAT offences** only if they are considered "**serious**", where the concept of seriousness is defined having regard to the cross-border nature of the unlawful conduct ("connected to two or more Member States") and to the high total amount of damage ("at least equal to ten million Euros").

Articles 3 and 4 are devoted to the analysis of offences affecting the financial interests of the Union.

- Article 3, under the heading "*Fraud affecting the financial interests of the Union*", divides **fraud** into four sub-categories: on expenditure not relating to contracts (point (a)); on expenditure relating to contracts (point (b)); on revenue other than own resources accruing from VAT (point (c)); and on revenue accruing from VAT resources (point (d)).
- Article 4, entitled "*Other offences affecting the financial interests of the Union*", refers to **money laundering** (paragraph 1), **active and passive corruption** (paragraph 2) and, finally, **misappropriation** by public officials (paragraph 3) (the "**PFI Offences**").

**Instigation, participation, aiding, abetting, and attempting** of PFI offences must also be punished (Article 5).

### 3. Administrative liability of legal persons as a criminal offence also for offences against financial interests

Letter e) of Article 3 of the Bill requires the Government to **supplement the rules on the administrative liability** of Legal Entities (as contained in Decree 231), **expressly providing for the administrative liability of Legal Entities also for crimes that damage the financial interests** of the European Union<sup>4</sup>.

As anticipated, Decree 231 has a **much broader scope and currently already covers a large part of the PFI Offences**. In particular:

- Article 24 establishes pecuniary sanctions in the event of undue receipt of disbursements to the detriment of the State (Article 316-ter of the Italian Criminal Code) and aggravated fraud to obtain public funds (Article 640-bis of the Italian Criminal Code);
- Article 24-ter establishes pecuniary sanctions in the case of criminal associations and mafia-type associations, including foreign ones (Articles 416 and 416-bis of the Italian Criminal Code);

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<sup>4</sup> In this regard, Article 6 of the PFI Directive lays down specific provisions on the liability of legal persons in relation to offences against the financial interests of the Union committed for their own benefit by their top members, or following the failure to carry out checks by the company's top management. The definition of "legal person" is contained in Article 2(1)(b) of the PFI Directive and is understood to mean any entity having legal personality under the applicable law, with the exception of States or other public bodies in the exercise of public powers and authority and public international organisations.

- Article 25 establishes pecuniary sanctions for Entities in the event of extortion, undue induction to give or promise benefits and corruption;
- Article 25-octies establishes pecuniary sanctions in the event of receiving stolen goods, money laundering and use of money, goods or benefits of illicit origin, as well as self-money laundering.

That being said, of the PFI Offences, all tax offences, and therefore those relating to VAT, were excluded from the list of 231 Offences.

**Letter e) of Article 3 of the Bill therefore seems to be mainly aimed at extending the list of 231 Offences to VAT fraud.**

Furthermore, Article 9 of the PFI Directive provides for the adoption by Member States of the measures necessary to ensure that a Legal Entity held liable pursuant to Article 6 is subject to effective, proportionate and dissuasive sanctions, which include criminal or non-criminal fines, and which may also include **other sanctions**, such as: exclusion from entitlement to public benefits or aid, temporary or permanent exclusion from public procurement procedures, temporary or permanent disqualification from the carrying out of commercial activities, placing under judicial supervision, judicial winding-up orders, and temporary or permanent closure of establishments which have been used to commit the offence.

Letter h) of the Bill therefore delegates the Government to **provide, where necessary, in the case of crimes that damage the financial interests of the European Union, for some of the aforementioned sanctions provided for by the Directive**, in addition to the administrative sanctions provided for by Decree 231<sup>5</sup>.

Always with a view to a more effective repression of conduct detrimental to the financial interests, the PFI Directive calls on the Member States to provide also for **forms of freezing and confiscation of the proceeds of illicit activities** (Article 10) and sufficiently long **limitation** periods, in any case, **no less than five years** (Article 12), in order to avoid that the passage of time frustrates the law enforcement activity.

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<sup>5</sup> Decree 231 establishes the following sanctions for administrative offences related to crimes: a) pecuniary sanctions (applied for "shares", from one hundred to one thousand, while the amount of each share ranges from € 258 to € 1,549); b) disqualification sanctions; c) confiscation (mandatory sanction that follows any conviction); and d) publication of the sentence.

# Newsletter

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