The exemption from the duty to report: the criminal lawyer point of view

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International Taxation:

DAC 6 and the new reporting duties for professional intermediaries and taxpayers regarding cross-border transactions

The duty to report is a paradigm coming from anti-money laundering law

- Paragraphs 4 and 5 of Art. 35 of Legislative Decree 231/2007

- 4. Disclosures made in good faith by obliged parties, their employees or directors for the purpose of reporting suspicious transactions do not constitute a breach of any restrictions on disclosure of information imposed by agreement or by legislative, regulatory or administrative provisions. The same disclosures do not involve liability of any kind even if the person making the disclosure is unaware of the underlying criminal activity and regardless of whether the illegal activity was committed.

- 5. The duty to report suspicious transactions does not apply to professionals regarding information they receive from or obtain about a client in connection with the examination of the legal position or the execution of the defence or representation in proceedings before a judicial authority or in connection with such proceedings, even through a negotiation agreement supported by one or more lawyers in accordance with the law, including advice on whether to institute or avoid such proceedings, where such information is received or obtained before, during or after such proceedings.

Direct Penalty: art. 12 Legislative Decree 100/2020

- 1. In cases of omitted communication of the information specified in article 6, the pecuniary administrative sanction established in article 10, paragraph 1, of Legislative Decree no. 471 of 18 December 1997, increased by half, is applied.
- 2. In cases of incomplete or incorrect communication of the information specified in article 6, the pecuniary administrative sanction established in article 10, paragraph 1, of Legislative Decree no. 471 of 18 December 1997, reduced by half, is applied.
- Compatibility with the principles of due process should be assessed in relation to proceedings involving a criminal matter.

The most important indirect penalty: the crime of aiding and abetting?

- Beyond the administrative penalty, there is the issue of the consultant's participation in the tax offense committed by the client.
- It cannot be merely omissive behaviour, however. The mere lack of communication cannot in itself give rise to participation because there is no position of guarantee that makes inaction relevant, making it a violation of an obligation to prevent the offense.
- In abstract terms, this could represent aiding and abetting, if the appropriate subjective element is found, in accordance with article 378 of the Italian Criminal Code. The norm mentions in a general way the aid to avoid investigation by the authorities.

The heart of the regulation for criminal lawyers: Article 3

- Paragraphs 4 and 5 are a copy of article 35 of Legislative Decree 231/2007.
- In accordance with paragraph 6, the intermediary (promoter or service provder) who is exempt is obliged to inform the other intermediaries that he has not been able to fulfill the duty, making it clear that there is a possible question of criminal relevance.
- If there is a similar issue it could affect other intermediaries or it could be the only intermediary.

The obligation shifts to the taxpayer (paragraph 7 of article 3)

- If the intermediary or intermediaries are exempt, the duty is upon the taxpayer, but the taxpayer is exempt himself if the information may reveal his criminal liability (paragraph 9).
- In this case, the IRS will not have any reporting.
- The situation is common since the communication must be made under Article 5 when there is a distinctive element and the distinctive element is found when there is a risk of tax avoidance or EVASION.
- The duty to report must be balanced with Article 6 ECHR which protects professional confidentiality and the prohibition of self-incrimination.

Article 622 of the Italian Criminal Code

- «1. *Whoever, having knowledge of a secret due to his status or office, or his profession or activity, reveals it without good cause, or uses it for his own benefit or for the benefit of others, shall be punished, if the fact may cause damage, with imprisonment up to one year or with a fine ranging from 30 to 516 euros.*
- […].
- *3. The crime is punished on complaint by the injured party».*

- The injured party is the taxpayer.
- There is a dearth of case law on good cause because the interests of the administration of justice or other public interests always prevail.
- Jurisprudence is very reticent to recognize the guarantee of nemo tenetur se detegere (see in the case of accounting fraud).

Duty to report and disclosure of professional secrecy (Article 622 of the Italian Criminal Code)

- Art. 3, paragraph 4, last section reads as follows «*In any case, the communications made in accordance with this legislative decree, if made for the purposes provided for therein and in good faith, do not constitute a violation of any restrictions on the communication of information imposed by agreement or by legislative, regulatory or administrative provisions and do not involve liability of any kind*».

Lack of accuracy?

Pursuant to art. 2(f): the hallmark is an index of risk of tax avoidance or evasion.

Please refer to Annex 1

It is likely that what happened in the case of market manipulation with the CONSOB communication of November 2005 will happen: the judges will look at these elements (which should be mere indicators) and, starting from them, they will consider proven an avoidance-evasive mechanism.

Unsolved problem: the taxpayer who is a company

- According to article 3, paragraph 9, as well as for intermediaries, the cause of exemption relating to preclusion from self-incrimination also applies to taxpayers. The textual wording of the decree creates problems for cases referring to taxpayers who are legal persons.
- Although it would not be meaningful if the cause of exoneration were to be limited to cases involving taxpayers who are natural persons, it should be considered that it can be applied to cases in which a possible criminal liability is assessed against those acting in the name and on behalf of the entity.

- The textual reference to "criminal liability" should lead to the exclusion that the exemption can cover cases of administrative liability of the company pursuant to Legislative Decree no. 231/2001, but not because there is reference to administrative liability, rather because it is not a criminal area, since the elaboration of the concept of criminal matter by the European Court of Human Rights currently applies only to physical persons.
- Furthermore, looking at our Code of Criminal Procedure, Legislative Decree 231/2001 makes reference only in cases of compatibility pursuant to articles 34 and 35. Therefore, it cannot be inferred that the principle of nemo tenetur, which can be deduced from the set of provisions set out in articles 63 and 350 of the Code of Criminal Procedure for suspects/defendants, applies to companies. Nor the principle set out in art. 384 of the Criminal Code can apply.

The nemo tenetur se detegere principle

- In the cases contemplated by articles 361, 362, 363, 364, 365, 366, 369, 371 bis, 371 ter, 372, 373, 374 and 378 of the Italian Criminal Code, whoever has committed the fact is not punishable if he was forced to do so by the need to save himself or a close relative from serious and unavoidable harm in freedom or honor.
- In the cases contemplated by articles 371 bis, 371 ter, 372 and 373 of the Italian Criminal Code, the punishment is excluded if the fact is committed by a person who, by law, should not have been required to provide information for the purposes of investigations or taken on as a witness, expert, technical consultant or interpreter, or who could not have been obliged to testify or in any case to answer, or who should have been warned of the right to abstain from providing information, testimony, expertise, consultancy or interpretation.

Rule of law issues

Growing duties of the individual to cooperate with the judicial authorities for economic offences (from money laundering to tax offences)

Progressive restriction of the principle of nemo tenetur, despite the fact that the Supreme Court has always said that the principle safeguards the person who has committed a crime and not the person who is about to commit it.

See precisely on the subject of tax crimes Cass., III, no. 53656 of 03/10/2018, Rv. 275452 – 01

The question of the constitutionality of the combined provisions of articles 5 of legislative decree no. 74 of March 10, 2000, 14 of law no. 537 of December 24, 1993, and 36, paragraph 34-bis, of legislative decree no. 223 of July 4, 2006, is manifestly groundless in relation to articles 24 of the Constitution and 6 of the ECHR, in the part in which these provisions require, in order not to commit the offence of failure to submit the income declaration, the obligation to submit the declaration to the IRS, even if it concerns income from illegal activities, as the principle of "nemo tenetur se detegere" applies only in the context of criminal proceedings that have already begun and must be considered irrelevant with respect to the obligation to contribute to public expenditure provided for by Article 53 of the Constitution.