Deliverable 1

The Protection of EU Financial Interests across Four National Legal Systems: a Comparative Perspective

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The Protection of EU Financial Interests across Four National Legal Systems: a Comparative Perspective

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1. Introduction

Among the different powers presented in Task 1, IGRUE also manages the Cohesion Policy's Monitoring National System (*Sistema nazionale di monitoraggio*, SMN, *ex* Article 1, para. 245, Law No 147/2013 and Article 1, para. 703, letter l, Law No 190/2014 - 2015 Annual Budget Law). SMN is a fundamental element in ensuring equal treatment among programmes and consistency with the Performance Framework (PF) provided by Articles 20-22, Regulation (EU) No 1303/2013. The System is powered by the information that, at predefined deadlines – and as specified by Document No 10/2017, MEF-IGRUE – the managing authorities transfer through their own information systems, according to common and shared rules appointed in IGRUE's *ad hoc* technical document. This data flow is also integrated with other external sources, such as the Public Administrations database (*Banca dati della Pubblica Amministrazione*), the national anti-corruption Agency's database, the Tax Register and the Projects Register obtained through the assignment of a unique project code (*Codice unico di progetto*, CUP) to all financial and administrative operations that involve public investments (both national or European resources). Interestingly enough, the latter has been in the pipeline since the nineties and is managed by the above-mentioned Department for Political economics planning and co-ordination, with the involvement of CIPE, now CIPESS (see Task 1).

According to the last IGRUE report of December 2020, there has been an advancement of 70.08% in terms of commitments and 48.75% in terms of payments for the overall resources programmed under the ESI Funds, including both the EU and national shares as well as commitments and payments relating to financial instruments. Regarding POR EFRD and ESF, less developed regions seem to have returned better performance than the more developed ones and those in transition. In a previous phase, the National Court of Auditors (NCA) reported a different trend, affirming that more developed regions were showing better performance than the less developed ones (NCA, Annual Report 2019, *I rapporti finanziari con l'Unione europea e l'utilizzazione dei Fondi europei*, 10-11). This can be explained with the extra effort in the implementation of the CP, particularly in 2019. Thus, after a year, the MEF-IGRUE Report 2020 has been able to obtain a different picture of the context.

In fact, as observed by the same NCA Report in 2019, after a first phase seeing many delays and difficulties, in 2019 was a certain acceleration, both in terms of commitments and payments, which have not only allowed a recovery of the degree of financial implementation but also to emerge almost unscathed from the first automatic decommitment with the EC at the end of 2018 (NCA, Annual Report 2019, 10). However, as seen in Task 1, the effects of implementing programmes and projects under the

SIF system are not always a guarantee of real or significant impact on the economy, society, and the environment. Despite the stricter regulation of current programming, the Italian habit of concentrating expenditure certifications near the deadlines and, above all, of spending without effective planning in order to use the resources anyway, still remains a weak point (NCA, Annual Report 2019, 11).

In terms of fraud and irregularities on the revenue side, according to the EC – and as reported by the NCA – Italy's irregularity rate in the collection of traditional own resources remains below average, while the recovery rate of financial volumes is improving despite remaining below average. Italy is in fact in ninth position in terms of the number of irregularities reported (104 reports 2018; 145 in 2017) and in seventh position in terms of the amounts communicated, with approximately 9.8 million euros worth of total irregularities recorded in the system, which represent 0.43% of the total traditional own resources paid to the EU budget (an improvement compared with 2017, the year in which the same index was equal to 0.57%). As regards the cases reported as potentially fraudulent, Italy – in sixth position – reported 38 cases of suspected fraud. In terms of the financial volume of non-fraudulent irregularities, Italy ranks in twelfth position, at about 4 million euros. Lastly, as regards recovery percentages, Italy, with 35%, has a percentage below the European average of 55%. However, this percentage is increasing, comparing 2018 to the data collected for 2017 (21% of recoveries in 2018 compared with a European average of 47% in 2017). It should also be said that, despite the measures taken to combat tax evasion, the VAT gap (which gives the measure of the tax lost due to tax evasion and avoidance) for Italy is still very high. In absolute value, the country has the primacy of evaded VAT (33.6 billion). However, Italy is witnessing a reduction in the propensity to evade compared with the past (from 26.6% in 2017 to 23.8% in 2018 of potential revenue). However, the European average is attested at much lower values (11%) (NCA, Annual Report 2019, 9 ff. and 24-25).

In terms of fraud and irregularities on the expenditure side, the trend is positive, since it can be observed that in 2018 there was an overall decrease in irregularities, with a total of reports from OLAF falling from 1227 to 779. The partial results for 2019 can be considered even more significant (487). The decrease is entirely attributable to the reports in the context of the Structural Funds, while they are substantially constant for the agriculture sector. Disaggregating the data from the reports highlighting the closed ones, it emerges that for the agricultural funds the open reports are in a clear majority but for the Structural Funds, the closed ones prevail. Taking into consideration the closed reports (mainly decertified for the Structural Funds) of the 2018 reporting year, the recovery activity carried out by the Structural Funds managing authorities is good, at 66.6% of the total irregular amount while the amount recovered in the agricultural policy sector is excellent at 100%. Considering the amounts still to be recovered, with reference to open cases, the total for 2018 significantly decreased from 143.4 million euros in the first half to 87.9 million euros at 31.12.2018, with a sharp decline in the ERDF and an average and constant value (42 million) for the two agricultural funds. Regarding the managing authorities most affected by irregularities still open in the context of SIF, it should be noted that the phenomenon is observed mainly in the Calabria Region and in the Ministry of University and Research for pending judicial proceedings. Among the permanently significant areas in terms of irregularities and fraud is the procurement sector, especially for violation of procurement regulations (NCA, Annual Report 2019, 9 ff. and 26 ff.).

To sum up, the NCA expresses the necessity to exercise, in any case – even in the comparison of data from different territories and different states – a prudent assessment in assigning a unique meaning to high data for irregularities or fraud. In fact, greater diligence or effectiveness in detecting and reporting them cannot be ignored among the relevant factors. The NCA, in its special composition for European affairs, continued to carry out, on the matter of irregularities and fraud, a specific monitoring programme, using its own database (SIDIF-ConosCO). This uses information entered in the Community database, in view of a direct relation between the systems through the B2B (business-to-business) connection and has started a collaborative partnership with the special Committee or *Comitato per la lotta contro le frodi nei confronti dell'Unione europea* (COLAF) to create the Integrated Anti-Fraud Platform. According to the NCA, there is an urgent need to become fully aware, on the part of all the bodies concerned, of the importance of combating irregularities and fraud to the detriment of the EU's financial interest and concurring national resources, both in terms of prevention and repression, making use of analysis and mechanisms underlying the irregularities, particularly in severe cases. The

close attention of the NCA is especially confirmed with regard to the recovery phase, which has been more widely analysed and evaluated in other reports (NCA, Report No 14/2018 and No 6/2019; see). It is important to highlight how financial relations with the EU constitute an important area of activity for the NCA, both regarding the exercise of its "control" function and with reference to "jurisdictional powers" (for the latter, see Task 3). Regarding the former, the functions of the NCA are based on Article 100, Const. and on Law No 20/1994, which expressly provides for providing feedback on public management performance in relation to funds of European origin (Article 3.4). Hence, the Court is responsible for the unitary examination of the phenomenon of irregularities and fraud, monitoring trends over time, and assessing the management of underlying proceedings, with the aim of identifying critical and risk situations so that the administrations can autonomously implement self-correction procedures. Obviously, the control function, unlike the jurisdictional one, which intervenes in the repressive phase of unlawfulness, operates with regard to the examination of the phenomenon as a whole and thus involves prevention, verification and contrast. With specific reference to European funds, the function is specifically entrusted to the Control Section for Community and International Affairs, which, as seen, reports to the Parliament, at least annually. It carries out specific inquiries on the management of European funds and has a function of collaboration with the European Court of Auditors and with other EU institutions in the implementation of international treaties and agreements (Dossier Senato, 2017, 57 ff.).

In the end, and in view of the future, none of the actors mentioned can fail to take into account the renewed global socio/economic scenario resulting from the COVID-19 pandemic. It is no coincidence that the European Union has already adopted a series of extraordinary emergency measures (i.e. the Member States are allowed to use European SIF Funds with an exceptional additional flexibility), and there is a range of new interventions and different implementations of existing European programmes (in particular, the RRF). Through its role as co-ordinator of the relevant administrations in the National anti-fraud policy and as a fundamental liaison with the European institutions, COLAF, for example, will provide an extraordinary input of ideas that must take into account two important and concomitant factors: the conclusion of the 2014/2020 programming period of SIF Funds, and the simultaneous launch of the above-mentioned extraordinary financial programmes. The implementation of these latter, despite the exceptional nature of the instruments, must not lack adequate mechanisms for the functioning of the management and control system, which must remain an important and irreplaceable safeguard of the legality and regularity of the operations to be financed (COLAF Annual report 2019, 3).

2. The administrative system of controls and sanctions for the protection of the EU's financial interests, especially in the light of the European structural and investment funds

The NCA's control activity seeks to assess which are the organisational tools that the administrations competent for the management of Union resources – both central, regional and local – use to monitor irregularities, how the management and payment functions are structured and controlled, which are the procedural phases most affected by the phenomenon, what actions are taken after the events, the length of the investigations, the bodies responsible for this function, the consequent systemic checks and the precautionary actions undertaken, as well as the recovery of sums unduly paid out.

Hence, also considering the above rebuilt context, the next section will present a sketch of all the relevant actors and tools (mainly controls and sanctions) involved in the fight against irregularities and fraud to the detriment of public resources involved in the management of EU indirect funds (especially SIF Funds). The perspective will mainly be that of Administrative Law and expenditure.

2.1 The internal system of controls and overlap with Si.Ge.Co

The Italian system of administrative controls is characterised by many interposed layers, considering also its historical evolution from an external to an internal/self-control approach, from an "in merit" control (political opportunity) to a more "legality-based" one, and from a mixture of these developments (i.e. from an *ex-ante* external control of the legality of the administrative act to an *in-*

itinere internal control, and *ex-post* external control over the legality and performance of an administrative action). The reasons for this complexity can be found mainly in the continuing existence of a certain number of external controls overlapping with internal ones – with a lack of co-ordination and sometimes an excess of supervision (i.e., in terms of the detection of administrative responsibility based on the NCA's external control activity) – the evolution of the same internal system of controls, with numerous reforms over the last few years (i.e., towards a system even more based on performances), the specificity of some sectors (i.e., local authorities or independent ones for strategic sectors such as the energy or the financial markets), and the often chaotic features of administrative organisation and activity that, in themselves, cause the inefficiency and ineffectiveness of the control process (i.e. in terms of accounting rules, especially for local authorities). In other words, this is an area of Italian Administrative Law that is still growing, especially with regard to the supervision of budgets and expenditures (De Benedetto, 2017; D'Alerio, 2015; Della Cananea, 1996; Cassese, 1993, 19; Sandulli A.M., 1984, 571; Giannini M.S., 1970, 308).

The Constitutional basis for the development of administrative control functions can be found in Art 97.1, Cost., one of the few articles expressly dedicated to the role of the public administrations. It lays down that public offices are organised according to the provisions of law so as to ensure the efficiency and impartiality of administration. Hence, this general provision can be considered the general starting benchmark according to which administrative control activity should be run, considering that Article 100, Cost. only details the NCA's control function (Clarich, 2013, 282 ff.; D'Auria, 2006; Giannini, 1974, 1264) and that also Articles 13-15, Const. are important for the limitation on State control over private persons (De Benedetto, 2019, 855 ff.). The normative evolution for administrative controls began after the Second World War, but it received new impetus in the nineties, a decade of great reforms in the field of administrative law thanks to the adoption of the general Administrative Procedure Act – APA, Law No 241/1990 – (Della Cananea, 2011, *passim*; Sandulli A., 2010, 202) and a shift towards the logic of New Public Management, together with liberalisation and privatisation processes (Hinna, Ceschel, 2021; Cepiku, 2018, 488 ff.; Cepiku, 2011; Ongaro, 2010, 174-190; Kickert, 2007, 26 ff.). Three sectors to experience many changes, with consequences for the internal control system as well, were: the local system (Law No 142/1990, with the affirmation for the first time of the principle of separation between political and administrative powers), the Public Labour regime (Legislative Decree No 29/1993, the so-called privatisation of the public labour sector) and the functions of the NCA (Law No 20/1994). At the end of this period, a new Legislative Decree was adopted with the goal of systematising the regime of internal administrative controls towards a more managerial paradigm (Legislative Decree No 296/1999, still applicable). Then, the Constitutional Reform of 2001 was approved, and a new Local Government Code (Legislative Decree No 267/2001), together with an updated Public Labour Code (Legislative Decree No 165/2001), were adopted, transposing the changes that were approved two years before for the general discipline of administrative internal controls. The l999 legal text was later supplemented in 2009 through the adoption of Legislative Decree No 150, the so-called *Riforma Brunetta*, that established the performance cycle (Lacava, 2008; Battini, 2004, 1253; Cassese, 2004; Perez, 2002; D'Auria, 2000, 1217 ff.; Cassese, 1993b).

Hence, since the end of nineties, there have been four main kinds of control over the internal structure of public organisations, emphasising the principle of autonomy – meaning through processes specifically set up by each administration: the evaluation of administrative and financial lawfulness – based on the respect of all the relevant rules in the adoption of the act and the way in which the administrative action is led, more in general, under the *in-itinere* responsibility of the person in charge of the single process/the public manager/or the accounting office and the *ex post* control of a Board of auditors (lastly updated by Legislative Decree No 123/2011, that implements the new Law of public accountability No 196/2009); the *ex-post* internal management control, mainly under the principle of efficacy – in terms of means employed to achieve planned goals; the control and evaluation of public managers; and the strategic control, under the principle of effectiveness – which means the objectives established by political subjects have been achieved (Mastroianni, 2010; Monda, 2010; D'Orsogna, 2008; De Martin G. C. 2007; Cerulli-Irelli, Luciani, 2002; Borrello, 2000). The NCA has the mission to monitor and evaluate the entire system of internal controls planned and fulfilled by each public administration as an external and *ex post* control. Over the years, specific bodies have been created or appointed by the national legislator for specific purposes. For example, the internal evaluation body –

Organismo interno di valutazione, OIV – was introduced by the *Riforma Brunetta* (2009) with the goal of internally monitoring n the system of controls and the implementation of the performance cycle (representing an evolution in the previous self-evaluation bodies, known as *nuclei di valutazione interna*). The performance cycle represented one of the main innovations in the general discipline on internal controls since 1999 and – with regard to public employment since 2001, highlighting the connections among the concepts of performance, evaluation, merit, and transparency in administrative actions and organisation (see the transparency and anti-corruption system; Hinna, 2010).

The internal control system is also important for indirect funds, and it contributes to the protection of (European) financial interest as well, considering the phenomenon from a bottom-up point of view. This happens because the SIF Funds management system is based on the idea of a shared administration (see Task 1, D.1 for Italy). Hence, considering the requirements of European regulations in terms of monitoring expenditure and the management systems for implementing the programmes, the Italian administrations use the instruments available at national level (Porras-Gómez, 2020, 145 ff.). Thus, if one imagines a paradigm to recognise the specific kind of internal control – subject, object, benchmark, measure, consequences – it is possible to affirm that, for SIF Funds, the controlling subject is first of all the administration with its personnel internal organisation (management/certifying authority); the subjects under control are the administrations themselves and the groups of beneficiaries that receive benefits; the object is administrative action (each process, each act, etc.) and the management system in its entirety. The benchmark is the legality principle, both in terms of general procedural rules (i.e. the *ex-ante* authorisation of expenditure or the respect for internal regulations, such as in terms of publicity or transparency), or technical rules (i.e. regarding the specific procedures under the SIF system in terms of accounting or reporting rules); the measures to be adopted to avoid irregularities or fraud are those that prevent *ex-ante* the act from producing effects (i.e. the decision of the person in charge of the financial office not to sign the act, hence precluding its effects), or solutions that always work internally but after the adoption of the act, such as in cases of self-protection (fixing the act or recovering unduly paid sums) and repression (for example through sanctions).

Now, taking as an example the role of the managing authority in the field of the EFRD, the task seeks to present the system of management and control known as Si.Ge.Co. (*Sistema di gestione e controllo*), which, under the EU regulation is considered a "first level" control (*ex* Article 122 and Article 125.3-7, Regulation (EU) No 1303/2013, both as systematic controls on administrative documentation or as samples for *in loco* inspections). In other words, Si.ge.co. systems adapt the national system of internal controls to the requirements of EU regulations in terms of "first level" control (Annex XIII, Regulation (EU) No 1303/2013), in order to guarantee efficient governance of programmes and projects (i.e. respecting the principle of sound financial management). "Second level" internal controls under the responsibility of the Audit authorities were introduced in Task 1, while what can be called "second level" but "external" controls by IGRUE-MEF and the NCA have been mentioned at the beginning of this Task. Regarding other external administrative controls, especially by bodies with functions of co-ordination in the field of EU resources at a national level, see section 2.5.

In 2018, the National Agency for Territorial cohesion (ACT) published a document with guidelines for the effective performance of first level controls of the ESI Funds for the 2014-2020 Programming (*Linee guida per l'efficace espletamento dei controlli di I livello dei Fondi SIE per la Programmazione 2014-2020*, 2018). It followed the indications provided by the European Commission Guidance on a common methodology for the assessment of management and control systems in the Member States (EGESIF_14-0010-final 18/12/2014). ACT proposes two systems of first level controls: a centralised model and a decentralised one. In the first case, controls are performed by the staff of a specific Control Office within the management structure, responsible for carrying out administrative and *in loco* checks. It is independent of the other bodies of the management authority. In the second case, the staff who carry out first level controls are selected from within the offices and bodies competent for the individual operations. This division does not mean that, in concrete terms, a combination of the two models cannot be adopted. Normally, "first level" and "internal" administrative controls envisaged by Si.Ge.Co. systems take into account two main kinds of procedures: on the one hand, the adjudication of services, works or goods and the implementation of the respective contracts or financial services, on the base of which funds are then released (i.e. to realise infrastructures in the

field of development projects); and, on the other, the direct issuance of in-cash or in-kind benefits or tax credits to a list of potential beneficiaries by the managing authority/intermediate authorities.

Especially for the latter, the controls on general administrative aspects are those provided for by Presidential Decree No 22/2018, the regulation laying down the criteria on the eligibility of expenditure for programmes co-financed by the European Structural Investment Funds (ESI) for the 2014/2020 programming period, namely respecting the admissibility period, checking that the beneficiaries receiving funds have declared their expenditures fairly and respecting all relevant European, National, and Regional regulations (i.e. in terms of public procurement, State aid or anti-money laundering), that the administrative and accounting regularity "visa" (*visto di regolarità amministrativa e contabile*) has been issued, that the documents provided are suitable to support the procedure, that the latter respect the non-discrimination and pro-transparency rules in the selection of contractors, that fair and gender opportunities or the sustainable development parameters are guaranteed, that the administration respects the established deadlines for reimbursements or payments, etc. Si.Ge.Co. should guarantee that all checks carried out are documented and that they follow the conventional steps envisaged (the *piste di controllo*). Attention must also be paid for the potential recovery phase and for compliance with the maximum period of time for payments and/or reimbursements by the public administrations.

A concrete example of a kind of *ex ante* control over administrative documents, namely one considered worthy of special attention by the managing authority Regione Basilicata in its EFRD Si.Ge.Co., thus valorising the principle of autonomy but considering also that preliminary checks on information provided by beneficiaries are mentioned in Annex XII, Regulation (EU) No 1303/2013, is the one on self-declarations. The latter is an administrative instrument employed by the Italian legal order to simplify administrative activity, avoiding expressing authorisations by public administrations (Articles 46 and 47, Presidential Decree No 445/2000). However, from its adoption, also a function of control of the declarations provided by private persons is expected (Articles 43 and 71, Presidential Decree No 445/2000). Regione Basilicata considers this a critical element in the management of the European programme, especially with regard to the list of beneficiaries of funds. For this reason, the Si.Ge.Co. explicitly mentions it. This example makes clear how important it is to concentrate the control activity, generally speaking, where the criticalities are. In fact, as already mentioned, systems of controls can be really complex and expensive. and it is a priority to understand how to make it the most efficient and simplest is possible.

Another example of personalisation of the general control function comes from the EFRD managing authority Regione Toscana's Si.Ge.Co, even though the *sui generis* solution adopted in this case derived from a COLAF initiative. In order to implement an effective anti-fraud prevention strategy and to assure a reasonable time for beneficiaries for reimbursements, Regione Toscana promotes the involvement of accountants with specific skills in the "first level" control system (Regione Toscana, EFRD Si.Ge.Co., Annex 5, 14; see also COLAF Annual Report, 2019, 27).

2.2. The importance of the public procurement sector and the role of the Anti-corruption Authority

In the case of European resources managed through public competition and financial instruments, what stands out is the special discipline on public procurement, both for the adjudication phase and the execution of the contract (i.e. the control that the products and services planned will be effectively provided or that they respect the agreed quality parameters, checks that, for example, can be carried out only *in loco*). Considering the importance of the Public Procurement Sector in the realisation of programmes and projects under EU funding, both in terms of spending capacity of – and incidence of – irregularities and fraud, it is important to introduce the role of the National Anti-corruption Authority (*Autorità anti corruzione*, ANAC). In fact, the 2019 COLAF Annual Report, based on data from the IMS system (see section 2.5), observes a decrease in "Violation of public procurement rules" (21% of the total communication of irregularities/fraud) compared with the previous year; nonetheless, this category highlights the high level of criticality in this field, as reported by many administrations, especially at regional level. This is inevitably connected to a higher risk of error resulting from particularly complex legislation (COLAF Annual Report, 2019, 60). Also from the special report of the

European Court of Auditors (ECA) of 15 July 2015 on the subject of procurement, carried out precisely in the context of the Cohesion Policy, it emerged that failure to comply with public procurement rules constitutes a constant and significant source of criticality (Special Report, *Efforts to address problems with public procurement in EU cohesion expenditure should be intensified*, No 10, 2015, 18 ff.). Later, the EC also adopted Public Procurement Guidance for practitioners on avoiding the most common errors in projects funded by the European Structural and Investment Funds (2018).

For reasons of brevity, presentation of the relevant legal framework for the context mentioned above will start from the recent collaboration between the ANAC, IGRUE-MEF and ATC (2018) and the decision, in view of the 2021-2027 cycle, to appoint the ANAC, as 1st of January 2021, as the lead administration in charge of drafting the final report to be presented to the European Commission on the subject of control mechanisms for the public procurement market. In fact, in order to access EU funds, there are stringent conditions that Member States must be seen to respect. Already in 2018, the possibility of setting up a collaboration among these institutional subjects was explored, in view of strengthening supervision of the correct functioning of the management and control systems under the 2014/2020 EU programming. At that time, there was already a collaboration in place between the ANAC and the State General Accounting Office in the sector of public contracts by virtue of the Memoranda of Understanding of 2 August 2013 and 11 February 2015, concerning, respectively, the exchange of information relating to the life cycle of public works and collaboration in the inspections under the responsibility of the ANAC.

The 2018 three-year agreement, concerns collaboration among the above mentioned national institutions in order to ensure the correct and uniform application of national and community legislation in the field of public procurement and concessions by the managing authorities, the audit authorities and all the other subjects involved in the operational programmes, especially in order to improve the management and control systems in the field of interventions financed using the SIF Funds and to strengthen fairness and transparency of operations carried out through public tenders and concessions of works and services. In particular, the areas of the aforementioned collaboration will concern the analysis and sharing of tools to support the control of expenditure relating to operations for the management of public contracts, incurred in implementing interventions cofinanced by the FIS fund, such as checklists for audits and first level controls on operations involving the construction of public works and the acquisition of goods and services. The ANAC has asked ACT and IGRUE to identify criticalities or specific recurring problems of particular importance regarding compliance with the legislation on public contracts, for the possible adoption of guidelines to be shared between the parties, aimed at orienting contracting authorities in the correct application of the legislation on public contracts.

In carrying out this activity, ACT and IGRUE undertake to raise awareness among contracting authorities on the exercise of collaborative supervision, including preventive ones, pursuant to Article 213, paragraph 3, *lett*. h), Legislative Decree No 50/2016 (Public Procurement Code) and the ANAC's relevant regulation of 28 June 2017 (having regard in particular to the conditions set out in its Article 4, paragraph 1, *lett*. *d)*). The first legal source provides that the ANAC – through a set of flexible regulation tools – guarantees the promotion of efficiency in the activity of the contracting authorities, to which it also provides support, facilitating the exchange of information and the homogeneity of administrative procedures. Hence, among all its specific tasks, the independent authority supervises public contracts of works, services, and supplies in the ordinary and special sectors, including those of regional interest; it ensures that the principle of fair financial management in contractual execution is guaranteed and that no prejudice to the public financial interest can derive from it. It reports to the Government and the Parliament on its activity and on the results of its surveys and analysis; it formulates proposals to the Government regarding changes in the current sector legislation; it supervises the qualification system of the executors of the public works contracts and exercises sanctioning powers. Again in order to guarantee the principle of fair financial management in public contracts, together with the transparency of the purchase conditions, ANAC provides specific guidelines for processing the standard costs of the works and the reference prices of goods and services. The Authority also manages the qualification system for centralised purchasing authorities (the *stazioni appaltanti*); it may order inspections, also upon receiving a reasoned request from anyone who has an interest, in collaboration

with other national administration and Police corps, such as the financial politic (Parisi, 2020; Gaspare, 2020).

Many examples of the difficulties that managing authorities, especially regional ones, can meet in the sector of public procurement, and mainly with respect to complex operations, can be found in their presentations of Si.Ge.Co (see also, for a more general perspective, Giorgiantonio, Decarolis, 2020: Torricelli, 2018). For example, Regione Basilicata was the responsible authority for the first-level controls of ultra-broadband, to be implement with regard to EFRD, Pillar 2, and "Digital Agenda". The main beneficiary was the Ministry of Economic Development, which normally operates through the *in house* company INFRATEL. The concessionaire of public services selected under a competitive procedure was "Open Fiber". The regional managing authority delegated the control function on the fairness of the tender procedure to the Ministry, considering that the EU allows the managing authority to exploit the beneficiaries' control procedures and expertise (EC, *Guidance for Member States on Management verifications*, EGESIF_14-0012_02 final 17/09/2015, 19).

2.3. The importance of transparency and anti-corruption actions, together with the performance cycle and civil-servants/public managers' conduct (deontological codes)

As seen, the ANAC's supervision and control of public contracts and activities are specified by Article 213 of the Public Procurement Code. However, the independent authority was created, with its current features, by Article 19, Decree Law No 90/2014, which integrates the old independent Commission for the evaluation, transparency, and integrity of public administrations (established in 2009 by the *Riforma Brunetta* and reformed in 2012 by Law No 190/2012, the national anti-corruption law) with the Authority for the supervision of public works contracts, services, and supplies (established by Law No 109/1994). Hence, the ANAC plays a key role also in regard to the co-ordination, rule-making and supervision of transparency, and anti-corruption measures at all administrative levels, also in co-ordination with other national actors, such as the NCA (Felden, 2020; Di Mascio F., Maggetti M., Natalini A., 2018; De Benedetto, 2015, 479; Sargiacomo, Ianni, D'Andreamatteo, Servalli, 2015; Neu D., Everett J., Rahaman A. S. 2014).

Nowadays, anti-corruption instruments constitute an important part of the internal controls system and, thus, also of the first-level controls for the implementation of PORs and PONs. For example, the Regione Toscana's managing authority for EFRD has produced an "anti-corruption kit" annexed to its Si.Ge.Co., following the EC Delegated Regulation (EU) No 2015/1970 that, supplementing Regulation (EU) No 1303/2013, provides further specific provisions on the reporting of irregularities concerning SIF Funds. There is also a manual for the prevention, detection, management and reporting of irregularities, including cases of fraud. Furthermore, the anti-fraud working group created by the managing authority itself works especially on the self-evaluation processes and on the fight against corruption through the diffusion of ethical codes and the declarations of incompatibility in the exercise of public functions (for a European overview see Pantiru M. C., 2019). In the light of the implementation of the NRRP, however, it is foreseen a certain reduction of the role of ANAC in favour of the central government (see Section III, Italian conclusions for the last updates).

The ethical code is an instrument already adopted by the National Public Labour discipline (Article 54, Public Labour Code, as modified by Article 1.44, National anti-corruption Law) and, as the Regione Toscana example demonstrates, it can be specified regarding deontological behaviours in the management of European programmes. The general legal framework is better specified by the regulation adopted with the Presidential Decree No 62/2013. The latter reports the ideal type of an ethical code, on the basis of which each administration should personalise its own document to the benefit of its public civil servants and managers. Also the discipline of incompatibilities has been planned by the same 2012 national anti-corruption reform and implemented through Legislative Decree No 39/2013 together with the modification of the Public Labour Code. The aim of the reform is to guarantee a fair public management and to avoid conflicts of interest between politics and administration, public and private and legal and illegal. For the latter aspect, for example, it is impossible to be appointed to public offices if a person has been convicted of crimes against the public

administration (see the Criminal Code and the last modifications, in 2012, 2015, 2017 and 2019 for a repressive approach towards the criminal activity in the exercise of public powers). Great efforts have also been made regarding the contrast of irregularities perpetrated by civil servants, through the increased role of disciplinary administrative sanctions (Article 55 ff. Public Labour Code, also regarding co-ordination with parallel criminal proceedings) (Venanzoni, 2017; Caridà, 2016; Gola; 2016; Mattarella, 2013; D'Alterio E. 2013; Buzacchi, 2013; Cerulli Irelli, 2010).

Although these specific disciplines, the internal efforts made by each public administration in the contrast to corruption and in favour of transparency and good performances are programmed and synthesised by two three-yearly plans to be updated annually: the anti-corruption and transparency plan (*Piano triennale per la trasparenza e anti corruzione*) and the performance plan (*Piano della performance*) – considering that the latter is also coordinated with the management and strategic controls mentioned above, especially for the evaluation of public managers. The two plans work together, considering that the fight against risks of corruption and non-transparency depend on the efforts made by the administration itself (primarily to the external kind of control) (critically, Delsignore M., Ramajoli M., 2019). The idea of asking administrations to include in the anti-corruption plan a risk assessment and management activity, a measure introduced by the so-called Severino Law (No 190/2012), is based on the intention to introduce also in the public sphere, while taking into account the specific features of the sector, the experience of corporate compliance programmes in the private sphere referred to in Legislative Decree No 231/2001, in the belief that the entity (public or private) should play a proactive role in the prevention of economic crime and corruption (see Severino, 2019).

All these aspects are relevant for the management of EU resources as well, and they can be taken into consideration in the Si.Ge.Co. by the managing authority (Domorenok, 2020, 160 ff.). For example, considering the importance of reporting irregularities or suspected fraud against the European financial interest at all administrative levels, of especial relevance is the new discipline for whistle-blower protection against discrimination (Article 54-*bis*, Public Labour Law) also in the light of the provisions, regarding WB in the public and private sectors, of Law No 179/2017 and the EU Directive 1937/2019. Reports have to be addressed directly to the person in charge for the anti-corruption action or to ANAC. The name of those persons remains confidential and it can be divulged only after an opinion of the specific Authority in charge for the protection of privacy.

Lastly, it is important to remember that the European Commission has requested some measures aimed at the adoption of calculation methods that can give awareness of the anti-fraud activities developed by the Member States and the connected results. For example, a new index – the Fraud detection rate (FDR) – has been created, whose percentage is the ratio between the number of irregularities/fraud discovered and the total of payments made by the individual Member State. Thus, each administration is meant to make the FDR a living instrument in its organisation, in order to evaluate coherently its detection activity and efforts. It can be considered as a further step in improving performance analysis of the Member States in the fight against fraud against the EU's financial interests. This also means that the index is today – and it will be even more in the future a parameter – to consider in the performance evaluation of administrations and administrators.

2.4 The recovery phase and the relevant administrative sanctions for the protection of European financial interests

With regard to the *in extremis* tools that can follow the control process, two elements must be mentioned: recoveries and sanctions.

Regarding the first aspect, as observed in the 2019 COLAF Annual Report, it is undeniable that the phase of recovery of unduly paid amounts is a real critical issue in Italy. Through the IMS database, three main categories have been recognised: administrative/civil – concerning all those cases for which, through administrative/judicial proceedings (administrative recovery actions, Regional Administrative Courts, Council of State, Civil Courts) the sums involved in irregularities/fraud could be recovered; Criminal, i.e. cases involved in judicial criminal proceedings that ended successfully for the purposes

of recovery (see in detail paragraph 3)); NCA, concerning those cases for which the Accounting Judiciary issued a judgment.

As already observed by the NCA in its special report on the recovery phase dedicated to EFRD 2007-2013 (No 14/2018, 1), it is a question of examining the procedure that follows the reporting of the irregularity to OLAF by the competent bodies. In particular, the "decertification" (*decertificazione*, as amounts withdrawn) procedure that can follow this communication has the aim to replenish the Treasury of the amounts assessed as irregular. Recourse to decertification is quite common in Italy. This method is recognised by the Commission and consists in the elimination of the amounts deemed irregular from the subsequent EU payment application. These amounts, deducted from the EU accounts, fall exclusively on the national or regional budgets, depending on whether it is a PON or POR. This mechanism causes financial loss on national finances, with obvious damage to them, from the very moment that nothing is due to the Union budget. In this way it is the Member State that will have to activate its own internal mechanisms for the recovery of irregular sums. This also means that it is extremely urgent to create and incentive effective "early warning" mechanisms of irregularity and fraud, in terms of an efficient prevention strategy, as well as functioning recovery systems (as an historical problem in the management of EU funds see White, 1997, 175 ff.).

With regard to internal administrative actions, each managing authority is called to specify in its Si.Ge.Co. the way in which it will operate regarding the recovery phase, while the certifying authority should keep a register of the sums recovered or to recover because of irregularities. Hence, two situations must be distinguished: *ex-ante* and *ex-post* the certification of the expenditures to the EC (this will depend on the moment in which the irregularity/fraud is detected, despite it should be always communicated through the IMS system). In any case, each administration can personalise its recovery phase and implement different tools. For example, for the Regione Basilicata EFRD Si.Ge.Co., the document affirms that for payments/reimbursements by public beneficiaries, the system of "compensation" will generally be adopted. Conversely, for private beneficiaries, a formal communication for the opening of an administrative revocation procedure (*ex* Article 7, APA) will be sent to the interested person, specifying the deadline to present counter observations (*ex* Article 10, APA). The procedure will end with the adoption of an act of revocation and recovery that will be formally notified. The invitation to spontaneously give back the sum will be followed eventually by a coercive recovery. In general, recovery activities can be entrusted to bodies external to the administrations in addition to be carried out within the same managing authorities. The NCA commented on the small number of employees assigned to the recovery activity, a situation that highlights an underestimation of the relative function, even in cases where the amounts to be recovered are significant and the number of cases is particularly high (NCA, Special Report, No 14/2018, 23).

Regarding the system of administrative sanctions, particularly interesting is Article 9 of the PIF Directive which provides that Member States must take the necessary measures to ensure that a legal person is held liable pursuant to Article 6. On the contrary, Article 7, on natural persons, mentions only criminal sanctions (however for more details on the point see D.2 and below in the following paragraphs).

It is important to point out that the national legal framework on the topic of sanctions is complex within the Administrative Law discipline, similarly to what happens for the system of controls. To the complexity that derives from the co-ordination between the general discipline (Law. No 689/1981) and the sectorial ones (taxation, traffic, independent authorities), or among different kinds of sanctions – i.e. monetary, disciplinary, interdiction or confiscatory ones – (Cerbo, 2016; Sandulli M. A., 2012; Fratini, 2008; Cerbo, 2003), the further issue of overlapping with criminal sanctions (Arslan, 2019; Travi, 2014; Provenzano, 2012; Sandulli M. A., 1983) and the problem of *ne bis in idem* (see the Grande Stevens and Others *v*. Italy case before the ECHR; Vitale, 2018; Goisis, 2018 and 2016) must be added too. The aspect of co-ordination between two legal regimes is present also for the specific field of the management of European funds and the protection of the public (also EU) financial interest (with respect to the links between administrative controls and criminal proceedings see the next paragraph 3).). The Italian Criminal Code provides administrative sanctions applicable to the matter of undue receipt of European funds, for example enforcing Article 316-*ter*.2 for cases to the detriment of the

State interest – when the unduly received sum is equal to or less than €3,999.96, only the administrative sanction of payment of a sum of money from €5,164 to € 25,822 is applied, considering that this penalty cannot exceed three times the benefit achieved. Secondly, there is the administrative sanction system relating to the EU's aid to the agricultural sector (Article 3, Law No 898/1986). This special discipline contemplates, for cases of undue receipt of all kinds of disbursements at full or partial expense of the financial instrument of CAP and regardless of the possible subsumability of a specific case of a criminal nature, a particular administrative sanction regime, which involves the application – together with any criminal sanction, where applicable – of a pecuniary sanction commensurate with the undue amount.

2.5 The external, mainly in itinere and ex post, system of controls: the Anti-fraud Committee in the Department for European affairs and the role of the Financial Police

The Italian Anti-fraud Committee (*Comitato per la lotta contro le frodi nei confronti dell'Unione europea*, COLAF) was established by Article 76, Law No 142/1992 and confirmed by Article 54, Law No 234/2012. According to Article 3.4 of Reg. (EU) No 883/2013 concerning investigations conducted by OLAF, the COLAF has been designated as the central anti-fraud Co-ordination service for Italy. The COLAF operates at the Department for European Policies, inside the Presidency of the Council of Ministers, but it has no direct operational authority (Article 3, Presidential Decree No 91/2007 and Article 54, Law No 234/2012). In fact, it is chaired by the political authority responsible for European Affairs (the Minister or Secretary of State) or by his/her delegate. It is not a coincidence that the 2012 Law mentioned above provides the general discipline regarding the Italian participation in the formation and implementation of the EU legal system and policies (Allegrezza, 2017, 129 ff.).

The mixed composition of the Committee reflects the involvement of different agencies, bodies and police corps cooperating to support OLAF at the national level. Thus, in addition to the Head of Department for European Policies, it is composed of the Chief of the Financial Police Anti-fraud Unit (*Guardia di Finanza, Nucleo per la repressione delle frodi nei confronti dell'UE*, created by Article 55, Law No 52/1996), the Directors General of the Department for European Policies, the Directors General of the Ministries responsible for combating tax and agricultural fraud and the misuse of European funds, who are appointed by the Chair, and Members appointed by the national Conference of Regions, Cities and Local Authorities. As COLAF is a composite puzzle of different authorities, it is not possible to describe a common legal framework for judicial review. When it comes to fiscal breaches, the appeal should be lodged before the Territorial Tax Commissions and up to the NCA (see Task 3). When it is a criminal matter, ordinary appeals on criminal matters will apply (see in Task 4).

Among its several tasks, COLAF provides advice and co-ordination at national level against fraud and irregularities in the fields of taxation, the Common Agricultural Policy and structural funds; it monitors the data flow on irregularities and fraud concerning European funds and on their recovery in case of misuse; it reports to the European Commission according to Article 325 TFEU. In addition to them, the national legislation provides that COLAF prepares, pursuant to Article 54 of the aforementioned Law No 234/2012, a specific annual report for the Italian Parliament in which it illustrates the initiatives taken, the measures adopted, the results achieved ,and the national strategy to protect the EU's economic and financial interests. Moreover, through COLAF's technical Secretariat, the authority facilitates the closure of dossiers relating to cases of irregularity/fraud, even suspected, opened with the European Commission, and ensures the updating of the list of beneficiaries of European funding published on the website of the Department for European affairs, in the spirit of the European transparency initiative (Allegrezza, 2017, 130; Dossier Senato, 2017, 55). The committee has also an important role in the professional training for all the administrations involved in the management of EU resources. Moreover, considering that the fight against fraud and irregularities presumes a strong awareness and stimulus of all the institutional actors and the public opinion through the most detailed diffusion of data, news and elements of possible interest, COLAF has implemented a series of actions to inform both qualified and interested users, as well as citizens, of anti-fraud issues (i.e., through the implementation of suitable links on the website of the Presidency of the Council – Department for

European Policies, among them the lists of European financing "beneficiaries", for the so-called "transparency initiative") (see COLAF Annual Report, 2019, 22-23).

Reporting (suspected) irregularities or fraud to the European Commission finds a legal basis, regarding the financial planning of the European Union 2007-2013, in Regulation (EC) No 1848/2006 (on the common agricultural policy) and in Regulation (EC) No 1828/2006 (for the Structural Funds). In relation to the 2014-2020 financial cycle, the regulatory basis can be identified, however, in the Commission Delegated Regulations (EU) of 8 July 2015, No 1971/2015 and No 1975/2015, in the matter of Common Agricultural Policy and No 1970/2015 and No 1974/2015 (for the ESI Funds). This communication constitutes an obligation for each Member State, to be fulfilled – electronically – within two months following the end of each quarter in relation to the cases subject to "first administrative or judicial report" (so-called PACA49, *Premier Acte de Constat Administratif ou judiciaire*) for an amount greater than 10,000 euros. However, there is no one-size-fits-all interpretation of the PACA concept by the Member States. Thus, over time, a pattern of inhomogeneous behaviours has arisen due precisely to the different interpretations of the moment in which cases of suspected irregularity or fraud can be considered detected, with consequent discrepancies in the timing of communication to OLAF. As the 2015 Annual Report to the Parliament of COLAF noted, the different approach in the practical application of PACA generates considerable differences in data entry into the Irregularity Management System (IMS) of the Commission and, therefore, an evident impossibility of comparing statistical data. In Italy, the rules of PACA are currently contained in the inter-ministerial circular of 12 October 2007 (*Modalità di comunicazione alla Commissione europea delle irregolarità e frodi a danno del bilancio comunitario*, Official Bulletin No 240, 15 October 2007) and in its related explanatory notes, both issued in relation to the 2007-2013 financial programming and of which updating by a special working group promoted by COLAF was envisaged. In 2019, the Minister for European Affairs signed COLAF Resolution No 20, specifically regarding the approval of the Guidelines on the methods of communicating irregularities and fraud to the detriment of the European budget to the European Commission (*Linee Guida sulle modalità di comunicazione alla Commissione europea delle irregolarità e frodi a danno del bilancio europeo*). The Guidelines represent the completion of the sector provisions mentioned above. The document is the result of a working group set up *ad hoc* within the COLAF that had the goal to collect the possible critical elements in the data flow with the European Anti-Fraud Office (OLAF) of the data concerning cases of irregularities/fraud against the EU budget (Dossier Senato, 2017, 51-54). According to the current regulations, the moment in which the obligation to notify the European Commission arises must be traced back to the first administrative or judicial report, that is the first written evaluation drawn up by a competent administrative or judicial authority – a so-called decision-making body – which, albeit not definitively, ascertains, on the basis of concrete facts, the existence of an irregularity or fraud to the detriment of the Union. Hence, to sum up, in Italy, due to the effect of the Inter-ministerial Circular of 2007 (and connected COLAF explanatory notes) the PACA has been distinguished by two levels: administrative - in which context is to be found in the first act drawn up at the end of the evaluation, by the decision-making bodies, on the data and information contained in the first report of challenge (also drafted by the so-called "External Control bodies" which are, for example, the police forces); the judiciary – where it coincides in the ordinary proceeding with the request for prosecution or alternative proceedings, pursuant to Article 405 of the Criminal Procedural Code (C.P.C), in proceedings before a monocratic Court (in which the Public Prosecutor proceeds to summon to the court) with the issuance of a summons, pursuant to Articles 550 and 552 C.C.C. – (COLAF Annual Report, 2019, 44; with respect to the links between administrative controls and criminal proceedings see the next paragraph 3).

Hence, COLAF has no direct investigative authority, its function being limited to co-ordination. However, COLAF is the subject responsible for the final communication to the EC through the IMS system, at least for SIF funds. At national level, the platform is managed through a system of differentiated keys of access. At the first step of the process there are the managing authorities, with two different kinds of access: as "creator" of the communication, under the responsibility of appointed civil servants in the managing or certifying authority; and as "sub-manager", under the responsibility of the public manager of the managing or certifying authority that has the power to give a first feedback on the communications inserted. At the second level, "manager" access can be found, under the

responsibility of the national authority competent for the final communication to OLAF (COLAF for SIF funds and the Ministry of Agriculture for CAP, for the expenditure side). At the third level, there is "observer" status that makes it possible to the NCA, for example, to monitor data. According to the last annual report by COLAF, there was a further decline in the levels of irregularities/fraud in 2019: in fact, the ongoing downward trend from -2.4% in 2018 has been confirmed (in absolute terms equal to -2.2 million euros compared with 2017) to a further -59.91% in 2019 (in absolute terms equal to -53.8 million euros compared with 2018). In addition, the meticulous and prompt co-ordination by the Anti-Fraud Unit of the *Guardia di Finanza* – the COLAF Technical Secretariat – allowed to close, in agreement with the European Commission, the considerable number of 583 files concerning old cases of irregularities/fraud. This effort avoids a financial correction to the national budget of about €133 million (COLAF Annual Report, 2019, 2).

Generally speaking, the distribution of competences for administrative investigations in fraud cases depends on the specific case and on the complex division of competences between actors, such as the managing authorities of SIF funds *ex ante* the communication to COLAF through the IMS system or the different police corps in Italy, *in itinere* (hence, in support of) or *ex post* to the activity of the managing authorities. Specifically, under the co-ordination role of COLAF at national level, administrative investigative powers are conferred mainly on the above mentioned *Nucleo per la repressione delle frodi nei confronti dell'UE*, a special Unit of the Italian Financial Police that operates at the Department for European Policies to counter fraud against the European Union's budget (Article 54, Law No 234/2012). However, COLAF can also rely on the tax police or on the customs police.

After the creation of the special Unit of the Italian Financial Police in 1996, Article 30, Law No 526/1999 formally recognised the *Guardia di Finanza* a central role in the protection of Community financial interests, extending to its members the investigative powers used on the tax side also for ascertaining and repressing violations to the detriment of the European Union and those detrimental to the national budget connected to the former. This role was therefore confirmed by Legislative Decree No 68/2001, with which the institutional mission of the *Guardia di Finanza* was reorganised. Article 2 of this Decree, in fact, has entrusted to the Financial Police a competence for the purposes of protecting the integrity of public budgets, including that of the European Union, together with specific tasks of prevention, research and repression of violations that can affect the correlated financial flows, not only on the income side but also on the expenditure side. By extending the intervention model already identified by the aforementioned Law No 526/1999, Article 2.4, Legislative Decree No 68/200 has attributed to the Corps the possibility of having recourse, in carrying out all the tasks envisaged by the law, to the penetrating powers of control that can be exercised in the fiscal sector (Dossier Senato, 2017).

According to Article 32, Presidential Decree No 600/73 and Article 51, Presidential Decree No 633/72 (respectively, the code on the powers of investigation in the field of income taxes and the code relating to the VAT), the financial police may invite taxpayers, company managers or any person exercising a business to attend an interview. The previous legal sources allow the financial police to request the disclosure of relevant data or documents. In principle, it is not mandatory for the invited person to cooperate in the interview or to submit the documents required, and if that person does not cooperate the relevant documents or data cannot be evaluated *pro reo* in the case of an administrative one. When the level of suspicion suggests that a criminal investigation should be commenced, the relevant rules of the Code of Criminal Procedure will apply, and co-operation with the investigative authorities (in several cases the same authorities that were in charge of the administrative investigation) then becomes an obligation (Article 371-bis Criminal Code; see Allegrezza, 2017, 139).

The legal framework for institutional competences in the sector of the control of the expenditure side, including those of supranational origin, has recently been strengthened by Article 29, Law No 161/2014 which, by inserting paragraph 1-*bis* in Article 25 of Decree Law No 83/2012, granted the Special Unit, with an updated name (*Nucleo Speciale Spesa Pubblica e Repressione Frodi Comunitarie*) the faculty to carry out analysis, inspections, and controls on the use of the resources of the State budget, regions, local authorities, and the European Union. For these activities, the same Article 25, in addition to allowing access (also electronically) to the information held in the databases used by the Ministry of

Economic Development, to social security and welfare bodies, and to public and private entities that instruct and disburse public funds, has extended to the members of the aforementioned Department the powers and faculties envisaged in the area of anti-money laundering (Article 9.4, *lett. a)* and 9.6, *lett. b)*, Legislative Decree No 231/2007).

3. The Italian criminal law system in the field of protection of the EU's financial interests: an overview outlining in greater detail the 'national catalogue' of crimes aimed at protecting the EU's financial interests, together with sanctions

As now widely recognised – in Italian criminal law and literature – that the protection of the European Union's financial interests constitutes a legal asset that deserves criminal protection.

This is because this legal asset does not only express a 'need for self-protection' of the EU institution, but also the common interest of European citizens in the proper and efficient acquisition, management, and spending of resources whose proper allocation and availability is a key factor for the growth and protection of fundamental social interests affected by EU action (see Sicurella, 2018; Venegoni, 2018; for an analysis of this topic see also Delmas-Marty, 2000; Mezzetti, 1994; Parlato, 2007; Vervaele, 1992).

From the Italian perspective, moreover, it is worth noting that in Italy the need to adapt the domestic legal system in order to fulfil the obligations to protect the European Union's financial interests has made it possible to overcome some traditional resistances – linked to dogmatic and criminal policy reasons – to the modernisation of criminal enforcement mechanisms as to effectively tackle the new criminological scenario of illegal conduct in the economic system, especially with respect to the primary role in this area of corporations.

In fact, just to cite a clear example, it is precisely in order to comply with such EU obligations that Italy introduced for the first time a system of corporate criminal liability (Legislative Decree No 231 of 2001 implementing Law No 300 of 2000 for ratification and execution, *inter alia*, of the Convention on the protection of the financial interests of the European Communities – Brussels, 26 July 1995 –) and, after a long debate, included tax crimes within the list of predicate crimes that can trigger corporate criminal liability (this integration was initially provided for by Decree Law No 1247/2019 and Law No 159/2019, and then by Legislative Decree No 75/2020, implementing EU Directive 2017/1731 on the fight against fraud affecting the financial interests of the Union through criminal law).

Therefore, this testifies how the fulfilment of these obligations was not only a way to ensure the effective protection of the legal framework of the financial interests of the European Union, but also a fundamental driver for the modernisation of the Italian system of preventing and combating crime in the economic-financial sphere (see Gullo, 2020).

Even before the enactment of EU Directive 2017/1731, moreover, and despite what will be seen in the next paragraph, the obligation to criminalise imposed by that harmonisation provision and, before that, the aforementioned so-called PIF Convention were, in principle, already met in the Italian criminal law system, since, moreover, in Italy there are offences which, as we shall see now more clearly, in some cases have a broader scope than that defined by the minimum rules of Directive No 1731, thus ensuring enhanced protection of the interests at stake.

Indeed, in the Italian legal system, crimes regarding fraud and other offences affecting the financial interests of the Union referred to in Articles 3 and 4 of Directive 2017/1731 can be found in a 'vast constellation' consisting of several groups of criminal offences contained both within and outside the Criminal Code, which can be divided into four macro-areas (for an overview of these offences see also Reale, 2018 and the Dossier of the Italian Senate available here).

First of all, there are offences relating to the misappropriation and misapplication of public funds of the Member States and the European Union (see, for an overview of these offences, Romano, 2019).

In this area, under Article 314 of the Italian Criminal Code, the conduct of a public official who appropriates money or other movable property belonging to another person, in his possession or at his disposal due to his office, or makes temporary use of the property he appropriates, is criminalised, as well as that of the public official who, taking advantage of the error of others in the exercise of his duties or service, unduly receives or retains, for himself or for a third party, money or other benefits (Article 316 of the Criminal Code). Under Article 322-*bis* of the Italian Criminal Code these conducts are criminalised even when committed by a member of the European Institutions or other foreign bodies mentioned by the same provision.

Similarly, anyone who, by means of artifice or deception, misleads others and procures for himself or others an undue advantage and causes a loss to the Italian State or the European Union is punished, also taking into consideration a specific aggravating circumstance (Article 640-*bis* of the Criminal Code) when the act relates to funds, going by any name, granted or disbursed by the Italian State or the European Union, which is also applicable for IT fraud where the undue advantage – causing loss to the Italian State or the European Union – is obtained by altering a computer system or by intervening without the right to do so on the data of a computer system (Article 640-*ter* of the Criminal Code). This area of crimes also includes fraud in public procurement under Article 356 of the Criminal Code.

Moreover, the Italian criminal system, in order to fully cover all possible cases of fraud and crimes aimed at illegally obtaining national and EU funds, also provides for a subsidiary criminal offence – applicable when the conditions of Articles 640 and 640-*bis* of the Criminal Code are not met (i.e., when the fraud has not reached a level of deception such as to produce a misleading effect) – which punishes the mere fact of obtaining any disbursement, by whatever name, granted by the State or by the European Union, through the use or presentation of false documents or non-disclosure of information which it is mandatory to disclose. This offence largely corresponds to the offence referred to in Article 2 of Law No 898/1986, which is still in force and concerns the fact of obtaining undue disbursement of any kind paid out in whole or in part by the European Agricultural Guarantee Fund and the European Agricultural Fund for Rural Development (see also above para. 2.4).

In addition, unlawful conducts carried out after the funds have been obtained are also criminalised under Article 316-*bis* of the Criminal Code, which punishes anyone who, having obtained the aforementioned disbursements from the Italian State or the European Union, does not use them for the intended purposes. This conduct is similar to that of "misapplication of funds" as defined in Article 3 of the 2017 Directive, but the former seems to be broader as it may also cover the mere passive failure to use the funds (see Mezzetti, 2010). This offence (Article 316-*bis*) and the related sanction, moreover, will be in addition to the aforementioned offences applicable to a person in the event of illegal conduct or fraud in obtaining funds (see Italian Court of Cassation, SS.UU., Judgment No 20664/2017). Scholars have correctly pointed out that such offences of misappropriation and misapplication of public funds cannot apply in respect of funds provided by a private entity and guaranteed by public bodies, insofar as these particular funds are not referred to in the criminal provisions in question. With respect to such funds, the normal offences of misrepresentation and against property become applicable (see Bell and Valsecchi, 2020).

A second group of offences, which can be traced back to those described in letters c) and d) of Article 3 of EU Directive 2017/1371 on revenues contributing to the Union's budget, including with respect to revenues deriving from VAT, concerns the tax offences set out in Legislative Decree No 74/2000, which seems to ensure adequate criminalisation of the various fraudulent and illegal conducts that may occur in the tax sphere, with negative effects on the Union's finances (for an overview see Bellacosa, 2016 and Fimiani, 2020).

Indeed, in this Legislative Decree there is a long list of criminalised conducts, made with the aim of evading income tax or value added tax such as: fraudulent tax declarations by means of invoices or other documents for non-existent transactions (Article 2), or by carrying out simulated transactions or by using false documents or other fraudulent means likely to hinder the assessment and mislead the tax authorities (Article 3), indicating (Article 4) in the tax declaration assets lower than the actual

amount or fictitious liabilities (with respect to the criminalisation of the attempt to commit the offences referred to in Article 2, 3 and 4, see the next section); failure to submit a tax declaration, where mandatory (Article 5). In the latter cases (Articles 3, 4, and 5), however, specific quantitative thresholds of evasion – below which the fact is not criminally punishable – are provided for.

Legislative Decree No 74 of 2000 also criminalises further unlawful conduct in the field of taxes, such as the issue of invoices or other documents for non-existent transactions, carried out in order to allow third parties to evade income tax or value added tax (Article 8); the total or partial concealment or destruction, with the aim of evading income tax or value added tax or of allowing third parties to evade them, of accounting records or documents whose conservation is mandatory, so as not to allow the reconstruction of income or turnover (Article 10); the failure to pay withholding taxes (Article 10-*bis*); the failure to pay VAT, within the prescribed period, for an amount exceeding € 250,000 for each tax period (Article 10-*ter*); undue compensation (Article 10-*quater*); simulated sales or the commission of other fraudulent acts on one's own or other assets that is likely to render ineffective the enforced recovery procedure in whole or in part, with the aim of avoiding payment of income tax or value added tax or interests or administrative sanctions for a value higher than € 50,000 (Article 11, first paragraph); the indication in the documentation submitted for the tax settlement procedure of assets for an amount lower than the actual amount or fictitious liabilities for a total amount higher than € 50,000 (Article 11, second paragraph).

In this area we can also mention the offence of smuggling, as provided for in Articles 282 ff., Decree of the President of the Republic No 43/1973, with respect to the legislative provisions on customs. This is a sector, however, in which the overlapping of interventions of decriminalisation and then the reintroduction of the criminal importance of various conducts (see also the next paragraph on this point) has made the reconstruction of the criminal offences still in force very difficult (see Bellacosa, 2020).

A third group of offences concerns bribery (in the "broad sense") of Articles 317 ff. of the Italian Criminal Code. The criminalisation here concerns various types of conduct, starting from the abuse by the public agent of forcing (Article 317) or simply inducing (Article 319-*quater*) a private individual to give or promise him or a third-party money or other benefits unduly. It must be noted, then, that under Article 319-*quarter*, unlike the former (Article 318), the private individual not forced but simply induced to pay the bribe is liable for punishment (for a complete overview of these offences and the different reforms made in Italy with respect to these sectors, see Mongillo, 2019 and Romano, 2019).

Therefore, the conduct of a public official who unduly receives or accepts the promise, for himself or for a third party, of money or other benefits for the exercise of his functions or powers (so-called improper bribery under Article 318 of the Italian Criminal Code) is also, of course, criminalised, as well as that of the public agent who, in order to omit or delay or to have omitted or delayed an act of his office, or to perform or to have performed an act contrary to the duties of his office, receives or accepts the promise, for himself or for a third party, of money or another benefit. There is also an autonomous type of offence (see, *ex multis*, Italian Court of Cassation No 24349/2012) where such conduct is committed to favour or damage a party in a trial (Article 319-*ter* of the Italian Criminal Code).

In this context, however, the conducts punished concern both public officials and individuals exercising a public service (even with reference to agents from European institutions and other international bodies listed in the Article 322-*bis*), and active bribery is obviously also criminalised (Article 321), as well as active and passive incitement (Article 322) and trading in influence (Article 346-*bis*). The scope of application of the latter offence, introduced by the so-called "Severino-Law" (Law No 190/2012), has moreover recently been extended by Law No 3/2019 (the so-called "bribe-destroyer" bill), as to tackle the exploitation of a real or supposed influence which takes the form of receiving or accepting the promise of money or other benefits as the price of a mediation aimed, in substance, to conclude an illicit agreement that can fall under the scope of application of the above-mentioned corruption offences.

With respect to corruption offences *stricto sensu* it has been noted (see Picotti, 2018) that the offences provided for by Articles 318 ff. of the Italian Criminal Code have a broader scope of application than those of the EU Directive 2017/1731, which in fact in its Italian translation seems to require that the illicit agreement must necessarily relate to a specific act of the public agent, thus not considering the hypothesis of corruption for the (mere) exercise of a function, which are instead covered by the Italian legislation. But the English text of the Directive actually uses the more general phrase "to act or to refrain from acting", so that, at least according to the letter of the law, it seems to cover also cases of corruption for the exercise of function.

The regulation of the subjective qualifications of public servants for the purposes of criminal law as defined by Articles 357 ff. of the Italian Criminal Code, then, is also in line with the EU Directive 2017/1731, as (in short) what matters in Italian Law is not the existence of an employment relationship with a public body but the exercise, in the specific case, of an activity whose regulation can be considered to be of a public nature – as it is in many cases with respect to the management of State or EU funds (on these issues see Severino, 1995; Severino, 1983).

Ultimately, this area of crimes ensures full transposition of the indications contained most recently in Article 4(2) of the EU Directive 2017/1731. Italy, moreover, has also greatly enhanced the preventive side of the fight against corruption since the aforementioned "Severino-Law", introducing key measures such as, among many others, the creation of an anti-corruption authority with enforcement powers especially in the area of public procurement, the obligation for public bodies to build an anti-corruption plan, the protection of whistleblowers in the public and private sectors (Law No 179/2017), and the regulation of the transparency of public administrations, etc. (for some of these aspects under an administrative point of view see the previous sections; see also Severino, 2019).

The fourth and last area of offences, also taking into account the indications of Article 4(1) of the EU Directive 2017/1731, relates to offences concerning money laundering or self-laundering (see Gullo, 2015) or the putting into circulation of proceeds deriving from the aforementioned offences against the Union's financial interests and offences with respect to conspiracy (criminal association) in committing the same criminal offences against the Union's financial interests (especially Articles 416 and 416-*bis* of the Criminal Code).

In this respect, the following offences of the Italian Criminal Code are particularly relevant: the acquisition, receipt, or concealment (or intermediation in such activities) of things deriving from any offence (with the exclusion of misdemeanour) with the aim of procuring an advantage for oneself or others and outside cases of complicity in the aforementioned crime (Article 648) and the re-use of such proceeds (Article 648-*ter*); money-laundering (Article 648-*bis*) and self-laundering (Article 648-*ter*1) of proceeds deriving from any offence (with the exclusion of misdemeanour and culpable crimes); helping someone to secure proceeds of crimes (Article 379 of the Criminal Code): an offence subsidiary to those listed above and applicable only where the aim of the agent is merely to help the perpetrator of the predicate offence. The offence of fraudulent transfer of assets (Article 512-*bis* of the Criminal Code.) can also be framed in this area.

For all four groups of offences analysed here, there are criminal penalties ranging from imprisonment to fines (naturally to different extents depending on the seriousness of the offence), as well as other sanctions for individuals such as the inability to contract with the public administration or disqualification from holding public office (in some cases they can be permanent bans: this is, for example, the case of Article 317-*bis* of the Italian Criminal Code in case of conviction for more than two years of imprisonment under the aforementioned Articles 314, 317, 318, 319, 319-*bis*, 319-*ter*, 319-*quater - para. 1*, 320, 321, 322-*bis*, 346-*bis*).

It must be noted also that with the aforementioned Law No 3/2019 (the so-called "bribe-destroyer" bill) Italy has reformed its statute of limitations system for criminal offences (of all types, including the so called PIF crimes), essentially providing for a cancellation of the statute of limitations after the judgment of first instance (although the law actually speaks of a "suspension" of the statute of limitations from the judgment of first instance until the date of enforceability of the final judgment). This is of course a very important provision in the light of the provision of Article 12 of the 2017

Directive, which obliged States to provide for an appropriate limitation period for PIF crimes, as well as with respect to the issues that emerged on this point during the "Taricco saga" (see in this respect Task 3).

Then, in line with the provision of Article 10 of the EU Directive 2017/1731, for all the four groups of offences we have mentioned, the Italian legislation provides for asset recovery measures (see for example, for corruption offences, Articles 322-*ter* and 322-*quater* of the Italian Criminal Code) such as seizure and confiscation of proceeds of crimes, and in some cases (for example tax crimes, corruption offences, money-laundering etc.), and under certain conditions, also of assets of equivalent value in the event of the impossibility of direct confiscation of the proceeds deriving from the predicate crime, as well as of money, goods or other benefit under the availability of the convicted agent and with respect to which he/she cannot justify their legitimate acquisition, if these assets are out of proportion considering the income declared by the individual for tax purposes or his/her business.

This provision, under certain conditions, can be applied also as a non-conviction-based confiscation, especially (but not only) with reference to individuals suspected of being part of a Mafia-type association under Articles 20 and 24 of the Anti-Mafia Code (Legislative Decree No 159/2011), in an enforcement proceeding independent of the criminal one (see Article 29 of Antimafia Code).

In addition, Articles 82 ff. of the Anti-Mafia Code also regulate the system of anti-Mafia certifications, which aims to prevent access to the public procurement sector for companies that have been subject to certain measures (indicated in Article 67 of the Anti-Mafia Code) or for companies in respect of which it can be demonstrated that the Mafia is attempting to infiltrate them in order to influence their operational choices.

The Anti-Mafia Code (see Articles 34 and 34-*bis*) also allows the application of other preventive measures – not linked to the commission of a crime, but to the facilitation of the activities of dangerous individuals by certain entities – such as the judicial administration or control of economic activities. The latter measure may also be requested by a company subject to a disqualification measure pursuant to Articles 82 ff. of the Anti-Mafia Code. In general, Articles 34 and 34-*bis* can be applied with respect to economic activities not under the direct control of the Mafia (otherwise, they would be confiscated under the aforementioned Article 24) and have the scope of preserving economic activities which are not totally hetero-directed by the mafia or dangerous individuals, while eliminating the criminal infiltration in place and equipping them with the control systems necessary to prevent new forms of criminal influences.

All these innovative tools of the Anti-Mafia Code have made the Italian legal system an international "gold standard" in the fight against organised crime, making it possible to prevent the penetration of illegal capital into the legal economy and the procurement sector, (even) irrespective of whether the economic activity is directly linked to the mafia.

Then, ensuring a holistic approach in the fight against economic crime, these instruments, albeit indirectly, become useful tools to protect (also) the financial interests of the State and the Union, insofar as they strike at the economic interests of one of the main actors (Mafia-type organisations) which, in the Italian scenario, are among the main protagonists of fraud and acts of corruption of this kind (on this issue and the importance of these tools see Balsamo, 2016; on this legislative tool see also the UNODC Italy Country Report available here).

The enforcement of the PIF offences we have analysed has so far fallen under the responsibility of the territorially competent national public prosecutor, who in the immediate future will have to coordinate with the EPPO for the investigation activities of their respective competences (see D2, Task 2 for a detailed analysis of the role of the EPPO and on the relationship between this and the national public prosecutors; see also Sicurella, 2019 and Grasso *et. al.*, 2020).

In general, Italian prosecutors may use as evidence the results of the administrative control activity previously carried out by the competent bodies (see the previous sections) and, to carry out further investigative acts, they can rely on the judicial police whose activity they coordinate in the framework of the criminal proceedings: it should also be noted that in Italy there is a police force

specialised in financial matters (*Guardia di Finanza*), which, in addition to acting as a judicial police authority in the context of criminal proceedings on the basis of the directives of the public prosecutor, can also act as a public security authority by carrying out the ordinary preventive and periodic controls provided for by law as normal administrative controls also with reference to economic activities even in the absence of a specific report of a crime. Administrative controls which, therefore, should be placed within the framework of those already analysed in the previous paragraphs and which, therefore, pose a need for co-ordination between administrative police activities and the supervisory role played by other bodies responsible for administrative control.

In this respect, there are no specific problems of overlap between administrative controls and criminal proceedings insofar as criminal proceedings are a possible subsequent phase of the administrative control. Indeed, if the checks carried out by public administrations or administrative enforcement authorities reveal conduct that may constitute a criminal offence, those public officials are obliged to report it to the competent judicial authorities (an obligation whose violation constitutes a criminal offence under Article 361 and 362 of the Italian Criminal Code). Only at this point can criminal proceedings begin. It should also be borne in mind that it is quite normal, in practice, for the public prosecutor to receive reports of offences (even against the Union's financial interests) from different administrative authorities and control bodies, even those not specifically assigned to carry out enforcement activities with respect to the criminal behaviour that they report in the concrete case.

In fact, it can often happen that, for example, fraud against the Union's financial interests is discovered in the course of a control activity (or a criminal procedure) not concerning the use of European or public funds.

Criminal proceedings, in short, only intervene as a phase at the end of the administrative control, so that the relationship between administrative and criminal proceedings in this context must be analysed according to the general principles of the legal order and do not pose specific problems regarding the protection of the financial interests of the Union.

4. A critical assessment of the impact of PIF Directive on the Italian criminal framework: summarising strengths and pitfalls relating to the implementation of PIF Directive in the Italian context

We have already noted that the Italian legislation with respect to crimes against the Union's financial interests were as a whole in line with European standards even before the enactment of the EU Directive 2017/1731 (see also the explanatory memorandum on Legislative Decree No 75/2020, available here), although the absence of consolidated data on the number and outcome of criminal proceedings concerning such offences against the Union's financial interests renders it difficult to make broader assessments of the concrete capacity of the criminal justice system – from a law in action perspective – to effectively combat the criminal phenomenon in question (with reference to this issue see D1, Task 2).

After the entry into force of the 2017 Directive, the Italian legislator, in particular by means of Legislative Decree No 75/2020, made – with just 9 Articles – only a few specific changes to correct a legislative framework which already complied with the obligations to criminalise imposed by the Directive, for example, by providing that legislative references to the "European Community" be replaced by references to the "European Union" (Article 7) and that the Ministry of Justice would send the European Commission certain statistical data on crimes against the financial interests of the Union (Article 7).

However, it must be pointed out that the Italian legislator has taken, in some respects, a mechanical approach to transposing the Directive (see Mazzanti, 2020), for example – in order to comply with the criteria laid down in its Article 7 – by increasing the penalties laid down for some of the aforementioned offences (see Articles 1 and 6 of the Decree No 75/2020) or by establishing the possibility of criminalising the attempt to commit certain tax offences (see Article 2) only where these crimes can be considered (having regard to the characteristics of the fact) to go against the Union's

financial interests, or some other elements required by the Directive are met (for example the amount of the loss or advantage or the cross-border dimension of the offence).

The same approach has led to the reintroduction of the criminal importance of various smuggling offences (see Articles 3 and 4) exceeding certain quantitative thresholds (see Bellacosa, 2020), and, as we will see in the next section, some legislative changes with respect to Legislative Decree No 231/2001 concerning corporate criminal liability for offences against the Union's financial interests.

The evaluation of this reform must obviously take into account that, as we have pointed out, the Italian legal system was already in line with the aforementioned obligations to criminalise and that it was therefore only a matter of making some simple corrections.

The overall assessment of the Italian system in terms of adequate protection of the financial interests of the Union is therefore positive, and indeed it should be pointed out once again that in many respects Italy protects such interests with a higher level of protection than the minimum required by the Directive to the point that is not a matter of introducing new crimes, but in some way of rationalising the existing framework with better co-ordination between some overlapping figures. The reference is made here especially with respect to the aforementioned issue of the difference between Articles 640-*bis* and 316-*ter* of the Italian Criminal Code or to the possibility to apply, at the same time, one of these offences and the Article 316-*bis* of the Criminal Code when a fund illegally obtained it is not used for the intended purpose, thus justifying a possible violation of the substantial *ne bis in idem* principle (see these issues Finocchiaro, 2017).

However, it should be noted that, with this latest reform, the Italian legislator has done no more than the minimum necessary to complete the aforementioned framework of protection of European financial interests (for an overview of the changes see also Ballini, 2020).

Therefore, despite the fact that these were mere complementary interventions to complete a framework already defined, it is necessary to reflect on whether it is acceptable that, for example, the aforementioned increases in penalties or the integration of the list of predicate crimes that can trigger corporate criminal liability refer only to acts against the Union's financial interests and not also, at the same time, to the same conduct against national financial interests.

In this sense, indeed, there could be a risk of legitimising, in some ways and at least in some cases, a "reverse" violation of the assimilation principle, ensuring greater protection of EU interests than national ones without a justification in line with the principle of equality (see in general, with respect to the problematic practices in the harmonisation process: Basile, 2020; Bernardi, 2012; Foffani, 2010; Grasso, 1989; Gullo, 2016; Manacorda, 2014; Manes, Caianiello 2020; Salcuni, 2011; Satzger, 2019; Sicurella, 2016; Sicurella, 2005; Sotis, 2007).

5. Corporate criminal liability and the protection of financial interests of the EU: introducing the topic of corporate criminal liability for EU financial interests-related offences under the national regime – Legislative Decree No 231 of 2001

As we noted in the previous paragraphs (see especially para. 3), it is precisely in order to comply with EU obligations concerning crimes affecting Union's financial interests that Italy introduced for the first time a system of corporate criminal liability.

According to Legislative Decree No 231/2001, indeed – despite some difference on whether the offence is committed by managers (Article 6) or a person under their supervision (Article 7) – a legal person can be held liable for committing a crime committed in its interest or for its benefit and if the legal person has not put in place, prior to the commission of the crime, a compliance program suitable to prevent that crime from occurring (see, *ex multis*, De Maglie, 2011).

As anticipated, only crimes listed in Decree No 231 can trigger corporate criminal liability, and, in this respect, it should be stressed that, especially after the aforementioned Legislative Decree No

75/2020, all the analysed crimes affecting the European Union's financial interests are now predicate crimes of corporate criminal liability: the only exceptions are Articles 379 and 512-*bis* of the Italian Criminal Code and Articles 10-*bis* and 10-*ter*, Legislative Decree No 74/2000 (see Bellacosa, 2020), but they fall outside the scope of application of EU Directive 2017/1731. Under Articles 19 and 53 ff. of Legislative Decree No 231/2001, moreover, it is possible to issue seizure and confiscation orders against the legal person with respect to the proceeds of crime, also of assets of equivalent value if direct confiscation of the proceeds deriving from the crime is impossible.

Therefore, on this point too, the Italian legal system has fully complied with its obligations under the Directive, and in particular with its Articles 6 and 9, also considering that for these crimes the corporation is subject to fines and, in many cases, also other sanctions such as exclusion from entitlement to public benefit or exclusion from tender procedures, as well as temporary or permanent disqualification from practising the activity or placing under judicial supervision (see especially Articles 9 and 15, Legislative Decree No 231/2001). In this case too (see the previous paragraph), the problem may be to rationalise the existing system of offences, also considering that, for example, with respect to corporate criminal liability for tax offences, the issue of the potential risk of violation of the *ne bis in idem* principle has been raised with respect to the concurrent administrative sanctions to which legal entities are subject for tax violations (see Bellacosa, 2020).

On the other hand, as noted in the previous paragraph, after the changes made by Legislative Decree No 75/2020, certain predicate crimes (for examples Article 314 of Italian Criminal Code or Articles 4, 5 and 10-*quater* of Legislative Decree No 74/2000) can trigger corporate criminal liability only if they can be considered against the European Union's financial interests, or if specific conditions established in the Directive are met (such as the amount of evasion and the cross-border dimension of the crime). This also increases (see the previous section) the risk of legitimising, in some ways and at least in some cases, a "reverse" violation of the assimilation principle, ensuring greater protection of EU interests than national ones without a justification that could be in line with the principle of equality.

In any case, this system ensures the appropriate involvement of legal persons in the fight against crimes affecting EU financial interests, requiring entities to play a proactive role in the prevention of crime through the implementation of compliance programs and internal control systems that nowadays make corporations key players in the public activities to combat crime in the economic and financial sphere.

The enhancement of organisational guilt as a prerequisite for attributing the crime to the legal entity, then, unlike other regimes of corporate criminal liability (e.g. the so-called derivative models such as vicarious liability of identification doctrine), ensures the reward of virtuous entities, without putting on the same level companies that have done nothing to prevent crime and companies that have seriously invested significant resources in prevention activities, although on these aspects there is still much to be done also to further stimulate the preventive compliance of legal persons in the Italian system (see, among many, Mongillo, 2018; Piergallini, 2019).

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