INSERTI

BRIEF REFLECTIONS ON THE CRIME OF SELF-LAUNDERING

Giuseppe Tondi, Dottore commercialista e pubblicista

The recent national law n. 186, issued on December 15, 2014, will almost certainly provoke a broad debate on its importance and consequences with regards the whole organizational structure of companies that will need to comply with it.
The law in question is the crime of self-laundering and it has been introduced in the Italian legal system thereby modifying the penal code.
Firstly, the law in question does not deal with offences such as murder, burglary or armed robbery in a direct way, but moreover it considers the financial resources which come from the illegal activities committed by company directors, managers and employees and for which the company has been sentenced by justice in matters of vicarious liability.
Secondly, this standard represents a step towards adopting, within corporate responsibility, a sort of punishment for the offence of tax fraud, which is not currently covered in the compliance regulations established in the updated legislative decree n. 231, on 8 June, 2001.

1. Nature of the offence

With the approval of the so-called standard «voluntary disclosure» – reference *Law No. 186 on December 15, 2014* – the Italian legal system introduced the *self-laundering crime* for the first time.

It is a diverse crime to that of money laundering, primarily because the object of the illegal behavior of factory managers, directors and employees does not originate from external sources, but from internal ones.

Naturally, for enterprises situated within the national territory, the measure refers to a type of *«vicarious liability»*, merely because it has also modified the compliance system codified in the Legislative decree No. 231 on June 8, 2001.

This represents an important legislative innovation that brings Italian enterprises towards an economy which could be more compliant with, and closer to, the best worldwide industrial economies.

These are the provisions of the new law with reference to the general object of the crime and its subjective aspects:

- unjust enrichment of the company resulting from the integration of predicate offences and not (e.g. tax fraud) pursuant to Legislative Decree No. 231/2001, committed by both senior positions and subordinate positions, willfully achieved in order to benefit from, or in the interest of, the institution represented;
- the subsequent use, transfer and concealment of financial resources and other supplies illegally drained, even for reasons directly related to the covering of

financial needs generated by current operations and corporate finance transactions, such as «investments in tangible and intangible assets, mergers, stock securities business or transfer pricing policy», in a manner which makes the recognition of their criminal origin quite difficult to identify.

Committing a crime in order to produce *«dirty money»*, even with limited amounts of funds, to finance factory activities, requires a willful misconduct, and no-one can be convicted of a gross negligence when speaking of *self-laundering*.

On the face of it, both offences, *money laundering* and *money self-laundering*, seem to be the same thing, notwithstanding the different origins of the criminal object.

Supporting this idea means to confuse the intents of the author's misconduct.

When someone commits the crime of money laundering, the agent of the crime collects money from illegal activities and contextually attempts to place it in other legal activities, often with the manipulation of unsuspecting credit institutions, and then proceeds to transfer that money into foreign bank accounts where the AML laws are less rigorous and structured, or perhaps do not exist at all.

In the case of money self-laundering, it is not the activity itself that is illegal, but rather the way to gather the resources, which is.

The money comes from the legal economic activities of all the sectors, however, the directors and managers of the respective enterprises have obtained that money through committing other kinds of crimes, in the interests of, or to the advantage of, the administered enterprises.

The immediate, and also not so apparent, effects of these two types of offences are quite similar in theory but are substantially different in their effect on the economies of several industrialized nations and, above all, on their social welfare and tax system.

On the one hand, organized crime has a deep influence on the macroeconomic environment, where it assists in the growing of a parallel economy, obviously illegal and not incurred by a correct and shared free competitiveness, mainly with no kind of taxation and regulation.

This pollution of healthy and advanced economies results in collecting less financial resources in public revenues and, for this reason, governments are often obliged to fall into debt, also at an international level, while at the same time cutting down on social spending.

Moreover, dirty money is frequently used for paying bribes and corrupting politicians and public officials. This leads to a shattering of the social structure and to the human rights violation, that can represent a huge threat for modern democracies.

On the other hand, when dirty money is taken from activities conducted within legally constituted enterprises, it is often used to create or enhance *illegal accounts* which are held abroad.

This money is illegally subtracted from citizens who are the owners of the shares, in the form of less dividends and to the State in the form of reduced taxes, not only to support the needs of enterprises belonging to large multinationals and to reinforce the trade of a single organized business, but moreover to finance corruption and global terrorism.

The results of Greco's commission report on the study of self-laundering, issued on 23 April, 2013, state that «(...) *self-laundering* is the process of recycling put into practice by the author, also in competition with the predicate offence. It is, therefore,

the typical conduct, not only of who transfers or conceals the proceeds to then invest them on productive or financial activities, and also outside the enterprise, without making use of recycling services provided by a third party *'recycler'*; but also the conduct of the same subject *recycler*, who, before delivering the *services of recycling*, makes a significant contribution to the fulfillment of the predicate offence, thereby contributing to the latter with the lead author (...)».

This behavior is particularly widespread in the phenomena of the appropriation of social goods, tax evasion and corruption when top management or owners of a company agree with a third *recycler*, to adopting various methods including creating fictitious companies that emit false invoices, to stealing from the company and subtracting money from taxation, and then recycling those funds for corruption purposes or otherwise.

Moreover, during Enrico Letta's presidency, the Government Acts of the Italian parliament of October 4, 2013, stated that a historic turning point in the world was ongoing and that we must take action in order to win, through legal means, and regain financial resources that will consent, as early as the following financial year, to reduce the deficit and accomplish our main goal which is to diminish taxes to the benefit of honest citizens.

The new predicate offence added to the decree 231 does not have a single source, or rather, it is not a case generated as an autonomous crime, in the strict sense of the term, with a specific object and an underlying illicit cause, but is produced as an outcome of a universal population of possible, not culpable illegal activities, which theoretically may result from any form of crime committed by an individual, who could be a representative, officer, agent, broker, collaborator or consultant of the represented company.

Therefore, it constitutes a relevant setting error, made by a wide part of the legal doctrine that has so far discussed on this subject, considering the possible commission of self-laundering crimes in particular and almost only in the presence of tax crimes.

First, while it is undoubtedly true that the so-called *tax fraud* – is currently not considered a predicate offence under the Legislative Decree No. 231/2001 – arising by false or altered tax returns and VAT returns, it will bring into the corporate coffers illicit supplies of money, usable in Italy or abroad after the creation of values known as *«illegal funds»* and potentially destined to the financing of corruption and/or terrorism, it is equally true that those monetary resources will most probably be exploited by the same owners of enterprises to feed the self-financing process.

This reality constitutes the operating environment of the majority of Italian SMEs and is believed to be the more plausible hypothesis, particularly during periods of economic crisis.

The self-laundering activity might very well result from the commission of other offences referred to in the Legislative Decree 231/2001, including:

1. a large percentage of the crimes against public administration, answering to *«fraud of the State»* and *«misappropriation of public funds»*;
2. a large percentage of corporate crimes, primarily the crime of *«false accounting»*, in its two main configurations which are:
   - the alteration/adulteration of objective items posted in the balance sheet;
   - the false representation of balance sheet data that are subject to estimated processes in the phase of adjustment entries;

3. crimes against industry and commerce, among which the most important being *«fraudulent trading»* and *«counterfeiting of rightful owners' trademarks and labels»*;
4. environmental crimes, with the majority answering to *«illicit trafficking in wastes»*;
5. offences relating to copyright, particularly in relation to the *«illegal reproduction and sale of works, products and/or databases owned by others»*;
6. *«market abuse offenses»*, which itemize, primarily, the crime of *«insider trading»*.

This list is not intended as being complete, because the biggest problem of the new legislation we are dealing with is given precisely by the high number of cases from which the self-laundering offense might spring up.

2. Proof of the offence

The law has not identified an exact field within which decision-makers might chase down a malicious intent to succeed in draining major financial resources and determining unjust enrichment of the managed company.

All types of crimes that have the features of increasing money not employed to personally benefit the author and in any way redeployed in whatever activity inside or outside the corporation, could be considered herald of self-laundering offence.

Hence, accusing a company of self-laundering, means that they must uncover three causes of wrongful conduct:

a) the source-crime from which the self-laundering crime might descend;
b) the money raked in from those events blamed by justice;
c) the willful concealment or disguise of the derived financial resources given to and used by the company.

Factors a), b) and c) are directly related to each other, but without collecting a) it is virtually impossible to distinguish b), and the lack of b) renders an analysis of c) useless.

It is generally asserted that being accused of money self-laundering, pursuant the recently updated Decree-Law No 231/2001, would not be in need of a judgment establishing the crime, by comparing the crime with a similar offence such as money laundering.

This idea is that the element of proof is substantially known by justice when referring to money laundering, since it generally comes from organized crime.

Nevertheless, this too simplified interpretation of the legislative dynamics is not acceptable, for the simple reason that illegal money, in the case of self-laundering, follows a different logic and its origins are not immediately perceptible and do not come from the illegal activities system that lives and acts outside the company.

In this new discipline, the simple presumption of guilt does not exist and is provided only with the suspicious presence of willful misconduct, as for the laundering crime, where all criminal intents are taken for granted.

This penal responsibility is more objectively thought to be ascertained with a final sentence of the courts, in both the proceedings in the first instance than of the succeeding ones, by making the required predicate offence emerge when investigating crimes of self-laundering.

Therefore, the perception of the history of our case law on money recycling is less important, with regards the subjective and objective elements of the crime, since the

self-laundering is a discipline which has only recently been developed in matters of *«vicarious responsibility»*.

Even though this instance is not considered an absolute novelty in our legal system, referring to article 12, of Legislative decree No 306/1992, that was set up to fight the growing phenomenon of the Mafia and organized crime and referring also to the recent sentence of the Supreme Court No 25191 on February 27 – June 13, 2014, joined chambers, its regulation is completely new regarding the administrative responsibility of legal entities, including the companies.

Furthermore, being true that «(...) whoever substitutes or transfers money, property or other benefits deriving from intentional criminal acts, or carries in relation to these other operations, in order to prevent the identification of their criminal origin, shall be punished with imprisonment from four to twelve years and a fine from EUR 1,032.00 to EUR 15,493.00 (...)» – with reference to articles 648-bis e 648-ter penal code – it is equally true that an increase in a similar sort of responsibility to those private firms, offered by the recent article of penal code No 648 ter1, has opened a more complex set of problems on the proof system that should hold up the entire construction of the company's culpability under Decree No 231/2001.

It is important to point out that between the two offences, laundering and self-laundering, nobody is permitted to apply the elementary transitive formula in order to forcefully link inhomogeneous causes of criminal responsibility and punishment.

If the company is charged of laundering crime, pursuant to Legislative Decree No 231/2001, it must plead not guilty in order to avoid being condemned, by showing that it has rid itself of all structural shortcomings in the functioning of the organization, according to the principle of the reversal of the burden of the proof – already highlighted by experts as diabolical proof – when it comes to the crime of self-laundering the whole judiciary procedure takes on different connotations.

A just trial must be ensured and in this case it will necessarily be the *«assistant district attorney»* who takes on the assignment to expose, in court, any positive evidence regarding the existence of the self-laundering felony by considering all points underlined in previously mentioned a) b) and c).

It is, in fact, unthinkable that the company has to prove its innocence for not having run out the crime-source of illegal money, for not having mopped up money from that event and for not having delivered its will, through management bodies, to behaviors not compliant to the rules, aiming to hide consequential unlawful revenues.

The company should cope a threefold diabolical proof and this would be too hard to withstand!

Thus, in the case of the crime of self-laundering, it is, once again, emphasized, that no presumption of culpability will be applicable to the company, that should be dealt with any evidence to the contrary.

The crime-source must be declared by a judge with the help of evidence collected during the pre-trial phase, the quantity of money returned must be identified in the same way, and any willful misconduct must turn out to be in all its dramatic nature and obviousness.

Moreover, such reasoning also follows a logical trend in other ways and here I will try to explain by illustrating that a contrary argument would conduct to contend against a legal paradox.

Let us examine the tax fraud crime, which is not contemplated in the Italian legal system of compliance, as referred to the legislative Decree 231/2001.

It is currently possible to confirm, with great conviction, that more and more cases of the self-laundering felony will be uncovered in those companies which have always had the awful habit of presenting false or altered tax returns to the tax agency and other violations in matters of VAT, in order to pay less taxes.

The ascertaining of this crime by courts does not require any reversal of the burden of the proof, and the trial follows its path according to evidence gathered.

Notwithstanding this, reality is never all that it is meant to be! Being convicted of the self-laundering crime, unless we are face to face with the companies belonging to organized crime, will prove more difficult and controversial than we imagined.

In Italy Law No 516/1982 brought an end to the so-called «*preliminary tax ruling*» – nda. *pregiudiziale tributaria* – permitting the definition of criminal action on the subject of tax fraud, without definite proof of the evasion by the competent tax authority.

Thus now, the company might be condemned by the court for tax fraud, but parallel, though with different times, the same company might agree with the tax agency about the discount of tax to pay, to the point of bringing the final tax liability due by the company below the threshold of criminal punishment prescribed by the Legislative decree No 74/2000, such as modified by Decree No 138/2011.

In this case, there would no longer be the object of crime on which to continue the trial of self-laundering.

In other cases, along the different grades of the Italian fiscal justice, it is likely that the company could be acquitted by every other accusation of evasion, and so I wonder, where is the object of the self-laundering crime in similar circumstances?

Another fact shows up and should be considered thoroughly. Very often the elements of an alleged tax evasion are discovered by a tax agency during the ascertaining activities, simply through a different interpretation of fiscal rules, mostly in the presence of specific tax benefits.

A typical example comes from the different kinds of indemnities that the company is entitled to due to natural calamities or thefts.

These incidents do not benefit from the general accrual principle, which is usual in accounting, but moreover the cash principle, and the proceeds are taxed at the moment the enterprise receives the money from the insurance companies or public authorities.

It is not unusual when obtaining payments from insurance companies or public authorities that the firm is obliged to sue them and wait for a positive judgment, which is immediately enforceable, thereby allowing the enterprise to take possession of the money temporarily.

Therefore, the administrative director, abiding by the correct principles of accounting, sets up an accounting entry, under the form of a fund, among the liabilities to offset the income entry from reimbursements and neutralize the taxation, in total transparency of the balance sheet data, while waiting for all the legal proceedings to come to a conclusion.

Despite this, when there is a not definitive sentence in favor of the enterprise by the court of the first grade, the tax agency expects the integral payment of tax, even if the sentence of the Court of Appeals may completely overturn the first and provide for a different solution, which is not profitable for the firm.

We are talking about a great deal of money, since these kinds of reimbursements are being given directly in case of lost of enterprise's strategic and estate assets or its stocked goods.

Naturally, the enterprise will not proceed with the payment of taxes, as the money gained does not belong in a consolidated way to its property capital.

In this context, the amount of tax payment is deferred up to such time as the trial in matter of civil law come to an end in a positive way and the indemnities are being completely acquired in the business assets.

In the opposite case, the company will need to pay back the money and consequently no tax is owed anymore.

According to the tax agency, in this case, not paying taxes at the time of first temporary reimbursement means having committed the crime of tax fraud, with the transmission of the acts to the prosecutor's office.

Even under those circumstances, the enterprise will, more than likely, be declared not guilty before the fiscal justice and therefore, once again, there will be no crime to evidence for lack of its object.

Which is why it is never a waste of time depositing opposition to the first sentence of being condemned for fiscal fraud in constancy of the proceedings before the tax courts.

And we have to underline again, the company must not show its innocence by using the reversal of the burden of the proof for the statement of a good state of tax compliance or arguing that its models of compliance have worked well and better, by deleting any harmful event which may engender the crimes.

It will be sufficient to deliver, in court, the dossier regarding the tax process to get a complete discharge from the imputation of self-laundering.

If the source-crime that draws out the self-laundering offence is one of the about 170 conjectures of crime covered in the Legislative decree No 231/2001, the discussion until now treated, will take on a considerable interpretative value.

Basically, the evidence of the fraudulence of managers in the commission of a source-crime driving towards the self-laundering, does not have to be provided by the company, but must be demonstrated by the public prosecutor, as well as for the misconduct in the correlated use of the dirty money.

The companies will more than likely be questioned for presenting and illustrating their own model of compliance and demonstrate that they have undertaken all possible measures in order to avoid committing illegal acts, without needing to offer any other defense instrument and without having to demonstrate the willful misconduct of their managers.

The same illegal behavior cannot suffer from a double punishment nor of inadequate treatment before the law.

In both cases, the principle of the reversal of the burden of the proof comes hopelessly to fall down.

Moreover, the issue regarding this turn back on principle, was seriously discussed among the experts at the time of launching the decree in 2001, and was also raised by the Supreme Court with the judgment No 27735, on July 16, 2010.

Here it is literally ruled that:

«(...) No reversal of the burden of proof is, therefore, apparent in the regulations that govern the accountability for felonies and penalties attributable to the institution, however, it is the task of the public prosecutor to provide evidence of the commission

of the offence by the person who covers primary responsibilities referred to in Decree. n. 231, art. 5, and the deficient internal rules of the institution. Furthermore, the latter has broad authority to provide proof regarding the correct working of the own compliance model (...)».

This action is claimed to be contrary to article 6 of Decree 231/2001, but it is a clear example of the Supreme Court's new address in this very delicate matter.

The device has taken into account all complaints which have been expressed respectively by lawyers, consultants, managers and directors of national enterprises and others experts such as law scientists and researchers.

3. The codes of conduct for the prevention of the crime

A system designed to monitor the self-laundering risk, for example, should be based on the following qualifying elements capable of ensuring objectivity and transparency of decision making:

I. designing a regulatory system built on the principles widely accepted as righteous and that, hence, help to foster shared understanding of the enterprise's mission, in a legal global environment of social ethics, accountability and legality;
II. training company officers, employees, consultants and other members of staff with regards relevant laws, regulations, corporate policies and prohibited conducts;
III. authorization levels defined on the basis of which the decisions on investments and allocation of financial resources may be taken only by explicitly delegated departments and offices;
IV. ensure to having a consistent and correct application of the authorization powers in the field of investment management and the use of the current money;
V. functional segregation within the processes that include the involvement of a plurality of actors, with management responsibilities, verification or approval of strategic and innovative projects and spending processes of the acquired money;
VI. traceability of decision-making through documentation and archiving of each operation carried out within involved processes.

Not only is a Tax Compliance System necessary, but rather a more structured and enlarged Compliance System based on the *ERM (Enterprise Risk Management)* model, framework known under the name of *CoSO Report*, as was proposed in the years 1992 and 2004 by the *Treadeway Commission of Sponsoring Organization*, with the managerial figures of the *risk manager* and of the *compliance officer*, able to assess all risks and all human activities inside the organization and in this way, as management bodies of second level control, ensuring the highest respect of legality in every organizational intersection.

With this regard, therefore, the persons responsible within the company and all the staff, including employees, intermediaries and/or consultants, will be required to perform a more strict observance of the activities, in order to guarantee, as far as possible, that the financial resources managed by the enterprise originate from the current production processes and that their nature is entirely lawful, such as the result of normal and compliant succession of financial flows in and out of the firm, while avoiding behavior that, as a result of the integration of one of the above mentioned offences, might generate illicit funds available to the company management or for other occult or misleading uses.

Let us now determine which are considered *«sensitive areas»* where there is a more elevated risk of disclosing behavior, not compliant, also related to voluntary omissions from who detains the important task of the control, capable of the engender hypothesis of the self-laundering crime, while also giving a listing of the principal recommendations and prohibitions.

These first ones are the following:

1. the corporate governance;
2. the administrative area;
3. the purchasing office;
4. the sales office;
5. the financial office;
6. the information technology system, here as instrumental;
7. the department of auditing and monitoring of the processes.

The second ones are the following:

a) to everyone operating, for different reasons, in the above mentioned areas, there will be imposed the absolute interdiction of pursuing or contributing to realize a willful misconduct in order to provide an illicit enrichment of the company;
b) hence, it is absolutely forbidden:
   - altering, even only partially, account documents or other material elements that justify the managed events;
   - producing or registering documents without the existence of contracts and economic conventions that hold them up;
   - registering those documents in order to mystify or change their content and their figures;
   - destroying or hiding those documents in order to avoid being registered;
   - failing to apply the accounting principles and legal principles fixed by the civil law and the national and international principles of accounting (OIC and IAS-IRFS) when the balance sheets and income statements are being set up;
   - presenting false tax returns and false VAT returns, writing down events not true and not supported by a real economic relationship with third parties or companies;
   - doing business in which the involved subjects have reached commercial agreements through attempts of corruption towards public officials or others responsible for private partners.

Finally, in this paper I would like to consider another effect derived by the new law under discussion.

The Italian pro-tempore governments have never succeeded in inserting the crime of tax fraud into the Decree 231/2001.

Perhaps there has always been a conflict of interests that has not led to an arrangement among the political groups when the parliamentary debate was considered.

The new disposition allows the entry of the tax fraud crime under *«vicarious responsibility»* through another mediate path, where the self-laundering offence acts as a driver that captures the crime-source of tax fraud and drags it indirectly into the logic of the Italian system of compliance.

In this way, from the perspective of the companies, referred to as small and medium-sized enterprises (SMEs), and inverting the order of factors, the eventuality to be accused of the self-laundering crime could become a strong deterrent for the construction of tax fraud.

Also for this reason, the new standards have been welcomed favorably by both judiciary and doctrine, despite all the problems that their application will show in the near future.