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In The Case of False Financial Reporting/False Corporate Communications, Is it Appropriate to Identify Quantitative Thresholds that Trigger Criminal Sanctions, or is it Desirable not to Set Such Thresholds?

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ABSTRACT: False corporate communications characterised by the circumstance that they are punished with criminal sanctions may be governed by dual legislation: on the one hand, it is possible to identify legislations that provide for quantitative thresholds that must be exceeded to speak of a criminal offence, while in other cases, such points do not exist. This article compares the advantages and disadvantages of the two potential regulations representing the Italian legislation concerning false corporate communications before and after 2015.

KEYWORDS: Thresholds In Criminal False Financial Reporting, Fraudulent Corporate Communications Criminally Sanctioned, Civil Invalidity Of Financial Reporting Not Criminally Sanctioned.

1) FALSE FINANCIAL REPORTING AND FALSE CORPORATE COMMUNICATIONS UNDER CRIMINAL LAW: INITIAL INTRODUCTORY CONSIDERATIONS.

In Italy, false corporate communications are regulated by a criminal article in the Civil Code. Although we often speak of fraudulent financial reporting, in reality, we should, correctly, speak of false corporate communications. From now on, although we know that the correct definition is false corporate communications, we will use the two terms as synonyms given the widespread use of both in the doctrinal and operational spheres.

False corporate communications are triggered when financial reporting is untrue and sometimes when it is qualitatively unclear. In this article, we will focus on the hypothesis of fraudulent corporate communications in the idea of the untruthfulness of the data included in financial reporting, and we will leave aside the qualitative falsehood.

The quantitative inaccuracy of the values entered in financial reporting does not always lead to applying Article 2621 of the Civil Code, an article that, although it is included in the civil law context, is of criminal relevance. In fact, it is possible that the inclusion of untrue quantitative values in financial reporting may lead to the invalidity of financial reporting under civil law, which may lead to the possibility of a challenge by anyone to the resolution approving the financial reporting itself. However, the application of criminal sanctions does not follow this.

Therefore, it is possible that the untruthfulness and incorrectness of the data included in one of the documents constituting financial reporting "only" causes the civil invalidity and not the criminal falsity of financial reporting. The difference is significant as civil sanctions are reduced to the obligation to redo the incorrect financial reporting with administrative sanctions. In contrast, criminal sanctions can lead to criminal fines as well as imprisonment. Identifying the reason why the impropriety may fall under civil or criminal law is therefore essential. Each country has its own specific and diverse legislation, and it is impossible to make apodictic statements that apply to all countries in the world. However, what distinguishes Italian legislation in this field is found in most of the legislation of other international countries. In Italy, what triggers criminal sanctions and makes financial reporting truly civil law invalid is the presence of two characteristics that can be immediately identified by reading Article 2621 of the Civil Code, which regulates false corporate communications.

Before reporting on Article 2621 of the Civil Code. It is important to note that, between the civil and criminal legal spheres, there is, in fact, an "inter-relationship" which, while leaving intact their respective roles and the specific constitutive and/or sanctioning

characteristics of the cases regulated, inevitably creates the conditions for the establishment of an "osmosis" which, as we shall see, on the one hand, is only partial (in the sense that a complete overlap between the two legal spheres cannot be identified) and, on the other hand, according to the doctrine, is not reciprocal but one-way: from civil rule to criminal provision.
In the following pages, an attempt will be made to understand whether this inter-relationship exists and whether the 'osmosis' can consider as two-way rather than one-way. Without a shadow of a doubt, there is no possibility of "substitution" and/or "transfer" of constituent elements between the criminal rules on false communications and the regulations on financial reporting irregularities. Concerning this, some scholars have pointed out that it can consider that the article governing fraudulent criminal communications has a "variable" substantive content as it is interrelated with the evolution that the civil law provisions undergo over time.
However, there is no doubt that 'the systematic placement of the criminal provisions on companies in the Civil Code and the appendix to the regulations on companies determine an inevitable connection between civil and criminal rules so that the identification of criminal cases cannot disregard the regulations and concepts established in civil law. From the literal content of these considerations, which are shared by doctrine and jurisprudence, it can be understood how part of the scholars and the judiciary identifies, or at least has done so in the past, a one-way relationship from civil law (or rather from the interpretation of civil law) to criminal law (or rather from the interpretation of criminal law).
In order to avoid misunderstandings, it is necessary, however, to anticipate how the identification of a possible "osmosis" from criminal law to civil law can never have as its object the constituent elements of the crime since the criminal sanction can only be consequent to criminally illegal conduct.
In the following pages, we shall therefore attempt to identify differentiation and areas of overlap between civil law and criminal law provisions concerning disclosure to third parties, bearing in mind, however, the circumstance that the application of criminal sanctions can never be connected to unlawful civil law conduct lacking the constituent elements of a corporate offence. What we will try to highlight in the following pages is, therefore, on the one hand, the possible presence of principles that identify an overlap between civil and criminal law and, on the other hand, the many discrepancies that qualify the two legislations.
Therefore, the objective of this brief examination is only to highlight the relationship between criminal sanctions and civil law profiles connected to the irregular preparation of financial reporting, as this is not the most appropriate place to develop an in-depth analysis of the wide-ranging and complex subject of corporate offences.

There is an "inter-relationship" between the civil and criminal legal spheres which, while leaving intact their respective roles and the specific constitutive and/or sanctioning characteristics of the cases regulated, inevitably creates the conditions for the establishment of an "osmosis" which, as we shall see, on the one hand, is only partial (in the sense that a complete overlap between the two legal areas cannot be identified) and, on the other hand, according to the doctrine, is not reciprocal but one-way: from civil law to criminal law provisions.
Without a shadow of a doubt, there is no possibility of "substitution" and/or "transfer" of constituent elements between the criminal rules on false communications and the regulations on civil law irregularities in financial reporting. Concerning this, some scholars have pointed out that it can consider that Article 2621 has a "variable" substantive content as it is interrelated with the evolution that the statutory provisions undergo over time. Therefore, this criminal law "proves to be an instrument endowed with a special dutifulness of use in defence of the interests that the legislator from time to time identifies in the regulation of corporate matters".
To avoid misunderstandings, however, it is necessary to anticipate how the identification of a possible "osmosis" from a criminal provision to a civil condition can never have as its object the constituent elements of the offence since the criminal sanction can only be consequent to criminally unlawful conduct.
To make a comparison between the concept of civil law irregularities in financial reporting and false corporate communications, it is necessary to point out that Articles 2621 and 2622 are characterised by specific elements, in the absence of which cannot apply the criminal law.
The issue we intend to explore in this article is common to all countries. Despite the differences between the various civil and criminal laws concerning false financial reporting and the invalidity of financial reporting, there are common basic principles to all legislations. Therefore, specific references to Italian legislation must be understood as identifying principles that can generally be found in most countries' legislation.
To facilitate the understanding of the comparison between civil law and criminal law provisions, and to understand the differentiation and/or overlaps that can be identified between financial reporting that is invalid from a civil point of view and false financial reporting that is criminally sanctioned, the following issues will be analysed on a comparative basis:

In The Case of False Financial Reporting/False Corporate Communications, Is it Appropriate to Identify Quantitative Thresholds that Trigger Criminal Sanctions, or is it Desirable not to Set Such Thresholds?

1) Interest protected by civil and criminal law
2) Typical fact causing the civil invalidity of financial reporting (i.e. of the resolution approving financial reporting) and the falsity of corporate communications
3) Subjective element (purpose of the irregular conduct) connected to the civil irregularity of financial reporting and the criminal falsity of corporate communications.

1)Interest protected by civil and criminal law

Civil law concerning the preparation of financial reporting for the financial year protects a general interest in the correct, precise and truthful presentation of the company's financial, equity and economic situation. The legislation does not identify particular categories of "privileged" parties in terms of corporate reporting. Civil law aims to protect every user outside the company who has a right to communication, a request which, in general, is recognised for the entire community and consequently, by the transitive principle, for every component of the latter. The right to information, in the civil law field, is therefore not subject to any limitation, and it is for this reason, for example, that financial statements must be deposited at the companies' register office, which is obliged to issue a copy of what is in its possession to anyone who requests it (without any explanation being necessary).
Usually, as in Italy, there are restrictions on the right to challenge resolutions approving financial reporting. These limitations are characterised by quantitative graduation depending on whether the solution is void or voidable. Moreover, even in the absence of specific quantitative limits indicated by the law, the action, in particular of nullity, may be brought only by those who have a substantial and current interest in challenging the resolution. This means that, even though the law recognises a right to information for anyone outside the company, the legislation requires that may request an appeal against irregularly drafted financial reporting only by persons with a legally protected interest in having the approval resolution declared null and void by the court. In the absence of the latter element, even though the law acknowledges the existence of the general interest of the community and each of its members in the financial reporting of companies, the law prevents the challenge of an irregularly drafted financial report (i.e. the resolution approving it). It should also be remembered that the irrelevance of any errors and/or omissions prevents the possibility of the appeal being upheld, favourably, by the judge. In fact, the interest in disclosure is deemed to be protected even in the presence of discrepancies, with respect to the company's reality, which have no substantial relevance. The identification of an error or omission that does not alter the overall company situation must therefore be considered irrelevant concerning the broad company information intended for the outside world. The quantification of "irrelevance" is highly subjective. However, it is correct to assume the principle according to which an appeal only makes sense if the information deducible from the balance sheet, profit and loss, and the notes show a situation that differs from the "real" one; a circumstance that does not occur in the presence of tiny discrepancies between the accounting item indicated in financial reporting and the thing that should record in that document according to the postulates of truthfulness, correctness and clarity.
As regards the interest protected by the articles of criminal law governing false corporate communications, it should note that the reforms that have taken place in Italy in recent decades have had a particularly significant impact on this issue.
This is not the appropriate place to go into the Italian evolution of the subject of our interest. We can say that, at present, the interests protected by the regulatory articles governing the criminal falsehood in financial reporting are transparency and correct corporate information intended for the outside world, i.e. accurate and truthful information intended for third parties outside the companies. Therefore, the criminal legislation on financial reporting does not protect mere pecuniary interests but is a guarantee of correct communication of the company's economic, patrimonial, and financial situation.
It is clear from the above that the interests protected by civil law correspond, in substance, to those covered by criminal law. Providing third parties outside the company with correct and truthful, and understandable financial reporting practically identifies the interests protected by both regulations. From this point of view, at least at present, there are no significant differences in safeguarding the interests of third parties outside the company who are guaranteed the dissemination of understandable, truthful and correct communications, from both a civil and a criminal point of view.

2) Typical fact causing the invalidity of financial reporting (i.e. of the resolution approving financial reporting) and false corporate communications

The conduct sanctioned by the criminal law concerning false corporate communications may be carried out in two ways:
1) knowingly exposing material facts that are not true;
2) or they omit material facts whose disclosure is required by law on the economic, asset or financial situation of the company or the group to which it belongs, in a way that is likely to mislead others, are punished with imprisonment from one to five years.

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According to the legislation, the same penalty also applies if the falsehoods or omissions concern assets owned or administered by the company on behalf of third parties

As can be understood, the first conduct is of a commission nature, while the second identifies an offence of omission.
For such conduct to constitute a criminal offence under Article 2621 of the Civil Code, which governs illegal, false accounting, it is necessary to use specific means of communication, analytically indicated by Article 2621 and identified in the financial statements, reports or other corporate communications required by law, addressed to shareholders or the public.
From what has been stated above, considering the explicit reference to documents other than and in addition to the financial reporting for the year, it can be understood that the criminal scope of false corporate communications is much broader than the civil law scope concerning the invalidity of financial reporting (i.e. the resolution approving the latter document). In reality, even the invalidity of the shareholders' meeting resolutions approving the financial reporting extends its scope to documents that, legally, are not part of the latter. We are referring, for example, to the hypothesis of a declaration of civil nullity of the shareholders' meeting due to the irregular drafting of the directors' report, a document which, as is well known, completes the financial reporting but is not part of the financial reporting itself. This position by the judiciary clarifies that, in reality, even in the civil law field, the concept of "invalidity of financial reporting" must be interpreted more flexibly and broadly than the legal notion of the parts of this composite document.
In the criminal law context, financial statements represent only one means of communication that may carry out the modes of conduct (commission or omission) sanctioned by Article 2621 of the Civil Code.
First of all, it should be recalled that the article that criminally regulates false corporate communications (Art. 2621 - False corporate communications. - Except for the cases provided for by Art. Except for the cases provided for in Article 2622, directors, general managers, managers responsible for preparing the company's financial reports, statutory auditors and liquidators who, to obtain an unjust profit for themselves or others, knowingly present material facts that are not relevant to the company's business, in financial statements, reports or other corporate communications addressed to shareholders or the public, as provided for by law, knowingly present material facts that are not true, or omit material facts whose disclosure is required by law on the economic and financial situation of the company or of the group to which it belongs, in a manner that is likely to mislead others, shall be punished by imprisonment of from one to five years.
The same punishment also applies if the falsehoods or omissions concern assets owned or administered by the company on behalf of third parties); using the generic term "financial statements" has included financial reporting for the year and so-called extraordinary financial statements. Because of the explicit reference to information relating to the group to which a company belongs, the doctrine considers that the concept of financial reporting mentioned in Article 2621 of the Italian Civil Code also includes consolidated financial reporting. However, all the authors are unanimous that the so-called forecast financial statements (or budgets) are not included in this category.
In addition to financial reporting, reports also identify means through which false corporate communications can be carried out. In the context of this issue, a report is to be understood as an information report whose preparation is required by law and which contains elements concerning the company's situation in the broad sense of the term.
The term "report" must therefore be interpreted in a technical sense, which does not imply, however, that the document must also be textually qualified as a "report" by the legislator. Il can also achieve false corporate communications through "other corporate communications" - in addition to financial reporting and reports - provided for by law, addressed to shareholders and the public.
The explicit reference in the law to forms of communication addressed to shareholders and the public excludes that documents sent to a single addressee (e.g. documents provided to a bank to obtain a credit line) or unofficial forms of communication, voluntarily put in place by the company, fall within this scope. Since the law requires that communications be addressed to shareholders or the public, information exchanged between internal company bodies cannot constitute the offence of false corporate communications.
The progressive expansion of the concept of false financial reporting under the legislation in force in the past has therefore led to the specific identification of the forms of communication which, theoretically, represent how fraudulent corporate communications may be provided and punished under criminal law.

The above observations lead us to believe that, at least concerning the specific issue considered herein, it can identify no discrepancies between the concepts of truthfulness and correctness in civil law and criminal "non-falsehood". Therefore, there is a perfect coincidence between civil law and criminal law provisions from this point of view. Any value entered in financial reporting thus becomes relevant when investigating the civil law truthfulness and criminal law falsity of information intended for outside the company. No category of accounts escapes the scope of the illegal articles governing false corporate communications.

3) Subjective element (purpose of the irregular conduct) connected with the civil irregularity of financial reporting and the criminal falsity of corporate communications.

The criminal articles governing false financial reporting provide that the criminal sanction) of the dissemination of fraudulent communications only in the presence of specific subjective elements which, in the civil law context, on the contrary, are absent.

The articles as mentioned above state that false corporate communications are sanctioned under criminal law (or under administrative law if the thresholds mentioned above are not exceeded) only if

1) it can identify a precise intention to deceive the shareholders or the public

2) and it is proven that the ultimate aim of the active party was to obtain an unjust profit for himself or others.

The absence of one of these subjective elements prevents the applicability of criminal sanctions.

In criminal law, therefore, deception must be accompanied by intention, which, in addition, must have the purpose of unfair profit. The lack of even one of the above-mentioned subjective elements prevents the concept of false corporate communications from being criminally (or administratively) sanctioned.

It is imperative to underline that the necessary presence, on the one hand, of an intention to deceive the shareholders or the public and, on the other hand, of a purpose to obtain an unfair profit for oneself or others, identifies the clear and radical divide between the civil law invalidity of financial reporting and the criminal (or administrative) relevance of false corporate communications.

In fact, it is common ground that civil sanctions (nullity and annulment of the resolution approving the financial reporting) are entirely "released" from any subjective element of deception and/or achievement of unjust profit.

Financial reporting is legally invalid when the preparer fails to apply the postulates of truthfulness, fairness and clarity. The reasons and/or causes for such accounting behaviour are not known. Even in the hypothesis of a mere error made in perfect good faith, it is, therefore, possible to invalidate the financial reporting for the financial year as an untruthful and/or incomprehensible document from a civil law point of view. Thus, the lack of awareness of having carried out unlawful conduct and/or of a wilful and deceptive intention does not identify elements based on which it is possible to request to "save" the financial reporting by preserving it from actions of nullity and/or annulment.

On the other hand, false corporate communications under criminal law identify, in wilful conduct and the search for unjust profit, the subjective elements indispensable for the imposition of the criminal sanctions governed therein.

It is clear that, from this point of view, the civil law context of the invalidity of financial reporting is substantially different from the criminal field of corporate offences governed by the articles mentioned above. Therefore, regarding this specific element, on the subject of "false financial reporting," there is no overlap between civil and criminal law.

Some authors have pointed out that the concept of "unfair profit" should not be restricted to a purely and necessarily economic sphere. Even a profit of a strictly moral nature, according to some scholars, would identify the subjective element required, as a mandatory requirement, by the articles governing false corporate communications criminally sanctioned. Such an interpretation extends the sanctioning capacity of the rules mentioned above. However, it is equally clear that, even if the law were to be interpreted in such an "extended" manner, the furrow between civil invalidity and criminal sanctions would remain intact, demonstrating that criminal punishability can only concern different conducts as they are more "treacherous and dangerous" than those sanctioned in the civil sphere.

2) INDICATION OF QUANTITATIVE THRESHOLDS TO DELIMIT FALSE FINANCIAL REPORTING: OPPORTUNITY OR UNACCEPTABLE CHOICE?

As can be seen, by reading Article 2621, set out in the preceding pages, which provides for criminal sanctions for false corporate communications, there is no indication of quantitative thresholds beyond which criminal sanctions are triggered. The situation is profoundly different from what happened before the reform was enacted in 2015. The regulation previously in force stated: "..... Punishability is excluded if the falsehood or omissions do not significantly alter the representation of the company's economic and financial situation or the group to which it belongs. However, punishment is excluded if the falsehoods or omissions result in a change in the economic result for the year, before tax, of no more than 5% or a change in equity of no more than 1%. In any event, the fact is not punishable if it is the consequence of estimated valuations which, taken individually, differ by no more than 10% from the correct one [....]".

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The specific thresholds of non-punishability mentioned above (variation in the economic result of the financial year, before tax, not exceeding 5% or a variation in net equity not exceeding 1% and estimated valuations which, taken individually, differ by no more than 10% from the correct one) should however be read in the light of the third paragraph of the above-mentioned Article, which excludes (criminal) punishability if the falsehoods or omissions do not significantly alter the representation of the economic and financial situation of the company or of the group to which it belongs. This means that the legislator wished to avoid the application of criminal sanctions in the presence of irrelevant falsehoods/omissions and, after having indicated the basic principle, considered it necessary to identify quantitative thresholds which, from the point of view of the rule, represent, in substance, situations that do not significantly alter the communication intended for the outside world.

As highlighted above, the introduction of thresholds below which false corporate communications were not punishable under criminal law provoked sharply contrasting reactions. Against those who, already at the time of the draft, claimed that with the reform, those who drew up the financial statements would be able to conceal profits and quickly draw up false financial statements, some authors instead greeted this new legislative indication in a very favourable sense. For example, in the years preceding the reform, Colombo had already pointed out that "the discrepancies from the truth contained in financial reporting can constitute the offence in question insofar as they have the requirement of informative relevance to the economic conditions of the company" (Colombo 1996).

According to this doctrine, it was therefore fitting that the irrelevant error and/or omission - understood in the sense of not significant - was not criminally punished. "The particular reason (in fact) that justifies the repression of false financial reporting can only be identified in need to protect.... the interests of the recipients (shareholders, creditors, aspiring shareholders, etc.) of the information on the company's economic conditions. But the interest of those persons is to have a true picture of the company's overall situation, not to know details that are irrelevant for a judgement on that situation. This confirms .... the need for falsehoods in financial reporting, to be criminally sanctioned, to have the requirement of relevance". (Colombo, 1996).

The provisions governing false corporate communications and the so-called damaging falsehood, as has already been pointed out, in addition to establishing a general principle based on which only appreciable variations can be criminally penalised, set exact percentage limits whose failure to be exceeded certainly excludes all criminal punishability and therefore, implicitly, provides certain quantitative elements capable of identifying what, from the legislator's point of view, is not, by definition, an appreciable variation between the data communicated externally and the 'real' data concerning the economic and financial situation of the company or the group to which it belongs.

As the first threshold of non-punishability, the articles governing criminal falsehood before the 2015 reform indicated the pre-tax profit or loss variation not exceeding 5 %.

The quantitative threshold of non-punishability determined as not exceeding 5 % of the economic result for the financial year had already been provided for in the first draft of the legislative decree.

On the recommendation of the Senate, the legislature had also introduced an alternative threshold of 1% of the change in net assets, in order, of course, to avoid penalising companies with high share capital and low profitability for the same economic result. According to most of the authors, it was sufficient for the offence to be committed if even one of the thresholds was exceeded. Otherwise, the scope of non-punishability would have been abnormally extended. However, there was no shortage of voices opposed to this interpretation, which interpreted the two thresholds as unique and therefore intended to be interpreted simultaneously in the sense that exceeding one could be remedied by meeting the other.

In addition to the above thresholds, Legislative Decree 61/01 also identified another level within which omissions, errors and falsehoods are not criminally punishable. The articles governing false financial reporting established that "in any case, the fact is not punishable if it is the result of estimated valuations which, considered individually, differ by no more than 10% from the correct one".

However, this provision must be interpreted correctly. The phrase "the fact is not punishable" leads one to believe that this cause of non-punishability was intended to exclude the criminal relevance not so much of the mere incorrect estimative evaluations (which are outside the concept of fact) but of the wrong assessment (exceeding 10%) of material facts.

Scholars were unanimous that the thresholds mentioned above should be referred to the individual financial reporting items and not to the accounting items which, upstream, are recorded in the general accounts. If, for example, the focus was on charges receivable, which in turn are subject to subjective appraisal, the quantitative threshold should have referred not to individual accounts receivable but the overall balance sheet item.

Concerning the 10% threshold concerning estimated valuations and the relationship that can identify between these amounts and the limits of criminal non-punishability connected to changes in income and net equity, it should be noted that most scholars believe that "the amounts relating to valuations that remain within the 10% threshold should be taken into account in the calculation to verify whether the other percentage thresholds are exceeded: this is because the contrary solution would result in an unjustified disparity of treatment concerning directors (admittedly rare) who do not have valuations in financial reporting. Not to mention that this would further reduce the informative function of financial reporting" (Zanotti, 2006).

It should note, however, that the quantitative thresholds concerning the change in net income (5%), shareholders' equity (1%) and individual appraisals (10%) identified quantitative parameters that, in reality, were subject to - and therefore, in a sense, were subordinate to - the main criterion concerning the significant alteration of information. The latter principle (appreciable alteration) could not even be applied when the quantitative thresholds could not be used, as in qualitative misrepresentation, or when the exceeding of the thresholds was, in any case, irrelevant. In this case, as we shall see later, the offence is extinguished,

After reporting the article governing false corporate communications currently in force and the rule previously contained in the code, before the reform that took place in Italy in 2015, it can be seen that, among the many differences between the two successive legislations, there is the presence and, subsequently, the absence of precise quantitative thresholds that identified parameters to assess whether or not accounting behaviour in financial reporting could fall within the criminal scope. Currently, reading Article 2621 of the Civil Code, one can see that no reference is made to any threshold. At this point, we must ask ourselves whether it is more appropriate to have legislation that identifies quantitative thresholds determining the criminal offence or whether it is desirable, as is currently the case in Italy, to have no such thresholds. Before expressing our thoughts, it is necessary to point out that rivers of ink have been spilt on this issue. When the reform of financial reporting, subject to criminal sanctions, came into force, the doctrine was divided. While some authors applauded the elimination of the quantitative thresholds, other scholars highlighted the negativity of the reform and the substantial elimination of false financial reporting.

This article does not intend to go over the considerations of the two doctrinal currents and the concerns that both brought to support their thesis. In this article, we want to highlight some technical observations on the presence or absence of these thresholds.

What is very relevant is that identifying quantitative thresholds that trigger the criminal sanctions related to false corporate communications gives the mistaken impression of identifying false financial reporting precisely. Stating that criminal sanctions are applied when specific percentages of deviation from 'correct' profit or 'correct' shareholders' equity or 'correct' estimated valuation are exceeded gives the reader the clear impression that he can identify the true profit, the true shareholders' equity and the true estimated valuation; that is, values that are real and true in absolute terms, which must represent the reference point for assessing whether or not a criminal offence has been committed.

Such a reading of the criminal articles is exceptionally misleading. Anyone familiar with financial reporting knows that there can be no such thing as true financial reporting, i.e. absolute true financial reporting. The presence of subjective values in the balance sheet and in the profit-and-loss statement, alongside objectively true values, makes it impossible to speak of the truth concerning these documents. Truth is only present about objective values arising from transactions with third economies and for which there is a valid tax document with a quantitatively indicated figure. Alongside these values, however, accounting data are deriving from subjective evaluations of the compiler of the financial reporting, which, as estimative evaluations, cannot, by definition, be true but, at most, can be defined as accurate in the sense that they come close to a figure that reflects reality but which cannot be precisely identified.

Among the primarily estimated valuations, we can mention depreciation, the valuation of closing inventories, the valuation of receivables and, in general, of provisions for risks and charges.

The indication of a threshold percentage, quantitatively determined, the exceeding of which causes a penal impact on the financial reporting manager's behaviour, indirectly calls to mind a variation concerning a precise figure, which can be unambiguously determined.

The indication of a threshold percentage, quantitatively determined, the exceeding of which causes a penal impact of the conduct of the financial reporter, indirectly calls to mind a variation concerning a precise datum, which can be unambiguously determined. In valuations, such a value does not exist. It can only be possible to identify an accounting datum close to a real value but which is not quantitatively determinable in a specific way.

The indication of precise quantitative thresholds has this significant defect and limitation: the implicit reference to a non-existent value.

Of course, every expert in financial reporting knows this reality and, therefore, certainly does not allow himself to be misled by the writing of an article which, however, remains ambiguous since it is undoubtedly true that the indication of a quantitative

threshold to be exceeded refers, implicitly, to a datum that can be considered precise and, consequently, true—a datum which, however, cannot be identified.
In all subjective evaluations, the true value is, in reality, an approximation of a datum that cannot identify. The valuation determined by the preparer of financial reporting based on accounting principles and general rules does not identify an objective and true value but refers to a value specified in a personal and subjective way by the preparer of financial reporting and therefore a set of potentially true values. Any subjective valuation in financial reporting is true if it is within a reasonable range of a value that should potentially reflect the true and actual outcome of the estimate to be included in financial reporting. Reasonableness is probably the principle we must refer to in determining whether a subjective assessment is true. The valuation that requires the personal intervention of the financial reporting preparer to determine the value to be included in the balance sheet or the profit and loss must have as its objective; therefore, the approximation to a figure that is not a . but is an approximation of a point. The truthfulness of the subjective evaluation will therefore be acceptable if the figure entered in the financial reporting falls within the range of a . which, in theory, exists, but in reality, cannot be identified quantitatively.
Given these premises, bringing under criminal law valuations that exceed a quantitative percentage concerning a value that, in reality, is not quantitatively determinable in a precise manner, does not seem to be the correct way to punish false corporate communications.
For this reason, the writer prefers the drafting of the article on false financial reporting and false corporate communications currently in force. This article does not refer to any threshold. Still, it merely indicates the conduct that must be present to bring the accounting values recorded in financial reporting within the scope of criminal law.
Also, in this case, of course, the reference to a given "focus" of estimated valuations is implicit. Otherwise, it would not be evident when a figure is false or when it is not. But this reference is, in the writer's opinion, more understandable as it lacks a quantitative determination concerning which the identification of a true datum seems almost as evident and apparent as it is non-existent.

There is no such distorting element in the current wording of the article governing false financial reporting and false corporate communications under criminal law. It will be up to the judge and his advisors to highlight conduct that has led to the inclusion in financial reporting of a false figure compared to the true value, which, by definition, is subjective.
The writer, therefore, considers this formulation of the legislation preferable, as it does not implicitly refer to a quantitative comparison between the figure recorded in financial reporting and the value considered as a reference, which would seem to identify the absolute true value.
It should be noted that, from a certain point of view, this method of determining false corporate communications gives more power to the judge to decide when an incorrect value recorded in financial reporting constitutes fraudulent corporate communications. While this is true, it should note that in reality, even the indication of quantitatively determining threshold percentages gives the judge a power similar to that which he has in the absence of such quantitative thresholds. The total lack of threshold percentages means that the judge can interpret the rule very broadly. All this is true. However, it is equally valid that the presence of quantitative thresholds expressed in percentages which must be referred to a value which, in reality, is a subjective value whose truthfulness is a matter to be determined in an equally subjective manner by the preparer of the financial report, does not provide the judge with less power in interpreting the rule. Therefore, one does not agree with those who say that the absence of quantitative thresholds makes a case for false financial reporting considerably smaller in practice. In reality, precisely because valuations are subjective, the presence of quantitative percentages that identify thresholds above which one enters the criminal field does not ensure greater justice in the area of transparent and truthful financial reporting.
In conclusion, however, it should note that in the civil law field, about the invalidity of financial reporting that does not have a criminal impact, all the doctrine agrees that the irrelevance of the error cannot lead to the declaration of invalidity of financial reporting.
In the civilisitic field, the concept of the relevance of the error and/or omission has taken on, in recent years, an importance of a constitutive nature of the tort. In the presence of irrelevant variations, as in the criminal sphere and in the civil sphere, it is not considered necessary to invalidate financial reporting.
Financial reporting that presents values that differ from the truthful ones but do not distort the company's income, financial, and asset situation cannot, therefore, be declared invalid. The judge's civil invalidity of financial reporting will be decreed only when the error or incorrect data is significant. Therefore, provides an entirely erroneous communication to third parties about the company's situation.
A similar situation is also found in the criminal field. Article 2621-ter - non-punishability for particular tenuity states: 'For non-punishability for particular tenuity of the fact, referred to in Article 131-bis of the Criminal Code, the judge shall assess, in a

predominant manner, the extent of any damage caused to the company, shareholders or creditors as a result of the facts referred to in Articles 2621 and 2621-bis'.
Concerning the tenuousness of the offence, Article 131 bis of the Criminal Code - Exclusion of punishability on the grounds of particular tenuousness - states: 'In offences for which the maximum term of imprisonment is no more than five years, or a fine, alone or in conjunction with the penalty mentioned above, punishability is excluded when, due to the manner of conduct and the insignificance of the damage or danger, [.....] the offence is particularly tenuous, and the behaviour is not habitual
The conduct is habitual if the perpetrator has been declared a traditional, professional or trendy delinquent or has committed several offences of the exact nature, even if each fact, considered separately, is mainly minor, as well as in the case of crimes involving multiple, chronic and repeated conduct [.....]".
If, therefore, the judge identifies the tenuousness of the fact, the incorrect values included in financial reporting and the erroneous communications provided in the information tools envisaged by the law do not entail any criminal sanction since, in essence, the fact is considered not to exist.
The irrelevance of incorrect information is therefore irrelevant and has no sanction, neither civil nor criminal.
What is desirable is that it should not widely use this rule to provide information that is, at least in part, incorrect. This, even if the fact is irrelevant, would constitute a severe violation of the right to information of third parties outside the company.

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