

# Paradigm

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FALL 2014

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# The Italian FCPA: A Little Known Issue for Foreign Companies Operating in Italy?

Over the last years the United States and many other countries around the world have been creating provisions aiming to hold corporations liable for committing criminal offenses for their own advantage. Principally, these provisions seek to prevent corrupt practices and similar offenses and lead to the adoption of dispositions set out by the Organisation for Economic Co-operation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, known also as the OECD Anti-Bribery Convention (Paris, December 1997).

The Italian Republic followed this legislative trend by adopting in 2001 Decree No. 231 concerning the “administrative liability of legal entities deriving from the commission of criminal offenses” (hereinafter the “Decree”). As a result of this Decree, criminal sanctions are now applicable against companies, not just against individuals. Companies, whether resident or non-resident,

conducting business within the Italian territory, are thus liable for not only severe pecuniary sanctions but, even more seriously, debarment which leads to the forced suspension of business activities.

This is an additional liability, separate from the specific individual liability of the person committing the criminal offenses and also separate from ordinary liability for damages.

This risk arises (in broad terms) whenever a criminal offense is committed by an individual in the interest of a company (however minimal). One of the main differences between Italian law and similar laws in other countries is that the Italian system aims to sanction a far wider range of criminal offenses than the “usual” bribery or corruption (e.g. environmental criminal offenses, criminal offenses regarding the health and the safety of workers, computer and IT crimes, immigration-related criminal offenses, corporate criminal offenses and so on<sup>1</sup> – which shall hereinafter be referred to collectively as “231 offenses”).

The three conditions for corporate liability under the Decree are as follows:

- (a) a 231 offense committed by representatives, directors or managers of the company or by one of its operative units (“managers”), including those individuals who are responsible for the *de facto* management and control of the company or by individuals subject to their direction or supervision (“non-managerial employees”);
- (b) a connection between the offense and the company’s interests, or the company’s advantage. The company is not liable if it can be proved that the individual acted in his own interests or for the interests of a third party;
- (c) “organizational negligence” on the part of the company.

The sanctions provided for company liability are, first, fines (up to 1.5 million euros) and the forfeiture of all



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profits deriving from the commission of the crime. These fines apply upon the ascertainment of corporate liability. Moreover, in some cases, the following debarments are also applicable: suspension of business activities, suspension or revocation of the authorizations, concessions, licences or permits related to the crime, prohibition from entering into contractual agreements with the Italian public administration, exclusion from all government concessions, grants, loans or subsidies, and possible revocation of those granted previously, and, finally, prohibition from advertising goods or services. These sanctions are applied only upon certain conditions, however. If a “restraining” sanction is applied, the judgment may be published.

Moreover, debarments may also be imposed as a precautionary measure, on the basis of the presumption of serious evidence of the company’s liability and even while a trial is still pending. Alternatively, an official receiver for the company may be appointed by the court.

The Decree provides, on certain conditions, for the exemption of companies from the liability. In this regard, it is necessary to distinguish between a criminal offense committed (A) by managers or (B) by employees subject to their direction (this due to the different presumptions forming the basis of company liability).

In case A, in order to avoid any liability, the company must provide evidence of the following facts:

- (1) the managing body has adopted and efficiently created, before the commission of any 231 offense, an appropriate management, organization and control model (“231 Model”) in order to prevent the commission of such offenses;
- (2) the task of controlling the full functioning and the implementation of the 231 Model and of keeping it up to date has been assigned to an independent Supervisory Board with appropriate auditing and surveillance powers<sup>2</sup>;

- (3) the Supervisory Board has duly and effectively complied with its duties;
- (4) the individual committing the offense has eluded, with intent to commit fraud, the provisions of 231 Model and the policies implemented by the company in order to carry out the 231 Model.

In case B, in order to avoid liability, the company must be able to prove that it has duly controlled and supervised the actions of its non-managerial employees. Thus the liability of the company may be excluded when, notwithstanding the failure to comply on the part of the non-managerial employees of the obligations of direction or supervision imposed on them, the company has adopted an efficient preventive 231 Model.

The enforcement of these provisions has caused a certain amount of both economic and credibility damage to a number of well-known companies (including ThyssenKrupp, Morgan Stanley, Bank of America, Credit Suisse and Citibank). Moreover, the lack of a 231 Model and of an independent and efficient Supervisory Board may be considered as a hint of an overall lack of proper corporate control systems, if not of the propensity of the company to commit violations other than 231 offenses.

This particular trend, together with the range of offenses sanctioned by Italian law (a range wider, as mentioned above, than similar laws in other countries), must be carefully evaluated by foreign companies doing business in Italy, in order to draft a 231 Model that provides appropriate protection, which – while it may be based on similar organizational models already used by the foreign corporation – must reflect the somewhat different realities in Italy and, as such, requires attention to certain specific areas.<sup>1</sup>

1 As of May 15, 2014, the criminal offenses which may lead to administrative liability for companies number approximately 130. Moreover, the number of such criminal offenses has been increasing each year.

2 A company’s 231 Model must be periodically updated and verified, and must provide for a suitable disciplinary system (in the event of any violation). The supervisory board must exercise its powers of control and initiative even with respect to the levels of implementation and efficiency of the Model in question.

