JONES DAY | One Firm Worldwide®

WHITE PAPER

June 2020

Italy: Administrative (Quasi-Criminal) Liability for Employee Actions Extended to Tax Offenses

The Italian legal framework provides for the administrative (quasi-criminal) liability of companies for certain criminal offenses committed by their directors, executives, and employees in the interest, or for the benefit, of the companies. This system did not apply to criminal tax offenses.

In the context of the implementation of Directive (EU) 2017/1371, intended to combat fraud to the European Union's financial interests by means of criminal law ("PIF Directive"), the administrative (quasi-criminal) liability of companies has been extended to certain criminal tax offenses. Italian companies that are members of multinational enterprises ("MNEs") and MNEs operating in Italy (whether through a branch or not) are advised to amend their organizational, management, and control models and to revise their internal procedures to take into account the new rules.

TABLE OF CONTENTS

Legislative Decree No. 231 of June 8, 2001 ("Decree No. 231/01") introduced in the Italian legal framework a complex system of sanctions governing the so-called administrative (quasi-criminal) liability of legal entities, companies, and associations (with or without juridical personality). This system applies to certain criminal offenses committed in companies' interest, or for their benefit, by senior managers (legal representatives, directors, and executives) and other individuals subject to direction or supervision by senior managers. Its reach has now been expanded to apply to tax-related offenses as well.

HOW DECREE NO. 231/01 WORKS

Applicable Sanctions

Should a criminal court sentence one or more individuals for one or more of the criminal offenses covered by Decree No. 231/01, the same court can also sanction the entity in whose interest, or for whose benefit, the crime or crimes were committed. In certain cases, the entity can be sanctioned even if no criminal penalty was actually imposed on the individual(s) (see, for some cases, "Critical Issues Raised by the New Rules," below).

In particular, the court can levy a monetary fine to be calculated based on the so-called "units" involved in the perpetration of the criminal offense(s). Decree No. 231/01 sets forth the maximum number of units applicable to each crime and the value of each unit, which varies from a minimum amount of €258 to a maximum amount of €1,549. The number of units and the amount of each unit to be used by the court to determine the monetary fine depends on, respectively: (i) the severity of the conduct, the level of the entity's involvement, the actions taken by the entity to eliminate or mitigate the consequences of the offense and to prevent the perpetration of criminal offenses; and (ii) the economic and financial situation of the entity.

Depending on the type of crime(s) involved, the court may also impose certain precautionary prohibitions, such as: (i) a temporary ban on carrying out certain businesses; (ii) the suspension or revocation of authorizations, licenses, or permits; (iii) a temporary ban on entering into agreements with public entities; (iv) the exclusion from, or revocation of, concessions, grants, and subsidies; and (v) a temporary ban on advertising goods or services. Finally, forfeiture, precautionary seizure, and publication of the judgment can be ordered by the court.

Safeguard from Administrative (Quasi-Criminal) Liability

To effectively avoid liability, the relevant entity must demonstrate that it had adopted adequate internal policies as well as organizational and supervisory procedures to prevent the perpetration of the criminal offenses covered by Decree 231/01. To this end:

- The management body must have adopted and implemented, prior to the charges in question, a model of organization, management, and control ("Compliance Model") suitable to prevent the perpetration of the criminal offense(s).
- The company must have set up a supervisory board to supervise the efficiency of the Compliance Model.
- The company must demonstrate that individual(s) who commit criminal offense(s) fraudulently failed to comply with the Compliance Model.
- The supervisory board must have been compliant with its supervisory duties.

Foreign Companies and Administrative (Quasi-Criminal) Liability

In its decision No. 11626 issued on April 7, 2020, the Italian Supreme Court maintained Italian jurisdiction over foreign companies in relation to administrative (quasi-criminal) liability under Decree No. 231/01. According to the Italian Supreme Court, foreign entities that operate in Italy are subject to the administrative (quasi-criminal) liability set forth by Decree No. 231/01 regardless of their nationality or where their headquarters or branches are located. In the view of the Italian Supreme Court, for purposes of assessing whether a company is subject to liability under Decree No. 231/01, it is also not relevant whether the foreign law governing the foreign entity provides for a compliance system similar to the one prescribed by Italian law to prevent the perpetration of criminal offenses by directors, executives, and employees of companies (namely, Decree No. 231/01).

DECREE NO. 231/01 SYSTEM EXTENDED TO CRIMINAL TAX OFFENSES

Until the end of 2019, the list of criminal offenses addressed by Decree No. 231/01 did not include any criminal tax offense. In the context of the implementation of the PIF Directive, aimed at protecting EU financial resources by tackling tax fraud (e.g.,

VAT frauds) through criminal law, Legislative Decree No. 124 of October 26, 2019, as amended by Law No. 157 of December 19, 2019, supplemented the list of criminal offenses governed by Decree No. 231/01 by adding the following tax crimes:

- Fraudulent tax returns obtained through nonexistent transactions, false documents, and other fraudulent acts;
- Issuance of invoices and other documents for nonexistent transactions;
- Concealing or destruction of accounting documents;
- Fraudulent nonpayment of taxes, and
- Tax avoidance through the use of invoices or other documents for nonexistent transactions.

The maximum amount of units relevant to determine the monetary fine connected to the perpetration of criminal tax offenses varies between 400 and 500 units, entailing maximum monetary fines of, respectively, €619,600 and €774,500. However, the fine may be increased to up to one third (arriving at a maximum amount of, respectively, €815,333 and €1,032,666) if the benefit obtained by the entity is of a "relevant magnitude."

In addition to the monetary fines, the court may impose the following precautionary sanctions: (i) a ban on entering into agreements with public entities; (ii) exclusion from, or revocation of, concessions, grants, and subsidies; and (iii) a ban on advertising goods or services. Finally, forfeiture and precautionary seizure for the amount of taxes not paid (plus interest and tax penalties) may be imposed by the court.

CRITICAL ISSUES RAISED BY THE NEW RULES

The extension of Decree No. 231/01 to certain criminal tax offenses raises issues as to its compliance with the general legal principle of *ne bis in idem* in the criminal field, which precludes the application of two (or more) sanctions for the same conduct.

These issues are heightened by the factual approach taken by the European Court on Human Rights ("ECHR") in this regard. As a general rule, a violation of the *ne bis in idem* principle occurs if the following conditions are met: (i) both proceedings are "criminal" in nature; (ii) the offense is the same in both proceedings; and (iii) there is a duplication of proceedings. The ECHR has, in a number of decisions, highlighted the potential violation of the *ne bis in idem* principle in situations where both administrative and criminal proceedings and sanctions apply.

To this end, in the ECHR's view, one should follow a factual approach rather than merely relying on the legal characterization under the national law (i.e., administrative vs. criminal). In fact, reference also should be made to (i) the very nature of the offense and (ii) the degree of severity of the penalty that the person concerned risks incurring. In addition, it is relevant if there is no sufficiently close connection in substance (i.e., autonomy in collection and evaluation of the evidence) and in time (i.e., timing coordination) between the two proceedings.

Thus stated, under Italian tax law, violations of tax rules entail (in addition to, and separately from, any criminal liability that may be sentenced) the application of tax (monetary) penalties. As a rule, when violations are committed by an employee or a legal representative of a company, an association, or another entity (whether or not a juridical person) on behalf of the entity, the company is jointly and severally liable for the tax penalties. On the other hand, whenever the tax violations relate only to corporations or juridical persons, only the company is deemed liable for the tax (monetary) penalties. Under the new provisions, the administrative liability of an entity pursuant to Decree No. 231/01 may, in certain scenarios, overlap with the liability of the same entity for the tax penalties, thereby giving rise to the *ne bis in idem* issue noted above. It should be noted that criminal proceedings generally take place years after the (non-criminal) tax proceedings, and there is no consistency between the two proceedings in the collection of the evidence.

Another potential issue is that in most cases, under the Italian criminal tax law system, if the taxes, interest, and tax penalties due are eventually settled, no criminal tax charges will be made against the individual(s) involved. Decree No. 231/01, however, states that the entity is still subject to administrative liability even if the tax penalties are discharged.

WHAT TO DO LOOKING FORWARD

Amend Compliance Models

In light of Decree N. 231/01's recent extension of corporate administrative liability to certain criminal offenses, Italian and foreign companies operating in Italy (including members of multinational enterprises) are strongly advised to take actions

to amend their Compliance Models and their internal policies to implement effective systems and prevent risks linked to potential tax violations. This preferably should be done with a view to integration with other compliance duties (e.g., safety in the workplace, privacy, anti-money laundering, etc.).

Perform Internal Investigations

In order to monitor actual and potential risks attached to improper management of tax matters, Italian companies (primarily members of MNEs) are advised to perform internal investigations (possibly on a cross-border basis) to examine actual or potential violations of applicable tax rules when appropriate. Internal investigations are often an important tool in a company's ability to identify and mitigate potential legal, financial, and reputational risks associated with legal compliance requirements, including those related to taxation.

LAWYER CONTACTS

Marco Lombardi
Milan
+39.02.7645.4001
mlombardi@jonesday.com

Luca Ferrari
Milan
+39.02.7645.4001
lferrari@jonesday.com

Antonio Rodontini, ACR LEX—Studio Legale, assisted in the preparation of this White Paper.