DLA PIPER

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CLIENT ALERT

LEGISLATIVE DECREE N. 231/2001: THE STANCE TAKEN BY THE ITALIAN SUPREME COURT ON CONSPIRACY CRIMES, THE COMPLIANCE PROGRAMS/ GUIDELINES OF THE TRADE ASSOCIATIONS AND THE CONTROL ACTIVITY OF THE VIGILANCE BODY

1. THE *ILVA* CASE

By decision filed on 24 January 2014, the Sixth Section of the Italian Supreme Court has passed judgement on the age-old *quaestio* concerning the crime of conspiracy as predicate offence pursuant to Legislative Decree n. 231/2001, as well as on the importance, if any, of the so-called 'target offences' of a criminal organization.

The company involved in the proceedings was challenged with the administrative offence under art. 24 *ter* paragraph 2 of Legislative Decree n. 231/2001, in relation to the commission of the predicate offence of conspiracy (art. 416 of the Italian Criminal Code), as well as with the offence under art. 25 *undecies* paragraph 2 of Legislative Decree n. 231/2001 concerning the breaches of the environmental rules provided for in Legislative Decree n. 152/2006. The criminal proceedings initiated against the individuals under investigation was also pending in relation to offences not included in the predicate offences to which Legislative Decree n. 231/2001 applies (such as, for instance, innominate disaster (art. 434 of the Italian Criminal Code), culpable removal or omission of precautions against workplace accidents (art. 437 of the Italian Criminal Code), water and food contamination (art. 439 of the Italian Criminal Code)).

In such context, the Judge for Preliminary Investigations ordered the seizure – an order that was subsequently confirmed by the Italian Court of Review – of nearly 8 billion Euros from the two companies involved in the proceeding. The Italian Supreme Court quashed the seizure order adopted by the Court of Review ("*Tribunale del Riesame*") remarking that:

- the reason for the seizure against the companies is wrong (and is, according to the Supreme Court, "*vitiated by a basic flaw*") if adopted on the basis of offences not contemplated by Legislative Decree 231/2001, being it inadmissible to use, in a specious manner, the challenge as target offences of the crime of conspiracy which otherwise "*would be changed, breaching the principle of peremptoriness of the sanction system envisaged by Legislative Decree n. 231/2001, into an "open" provision, having an elastic content, potentially capable of including within the list of predicate offences any instance of offence with the risk of expanding, without any justification, the area of potential liability of the corporation*".
- such an approach would present a serious risk of "*unjustified expansion of the area of potential liability of the corporation, the managing bodies of which would moreover be forced to adopt, on the basis of*

an absolute uncertainty and in the total absence of objective reference criteria, the organizational and management compliance program envisaged in art. 6 of the aforesaid Legislative Decree, which in actual fact would lose its effectiveness with respect to the much desired prevention that it aims to achieve".

The Italian Supreme Court therefore reiterates that it is necessary to comply with the principle of peremptoriness to ensure the actual effectiveness of the organizational compliance programs in terms of prevention given that, if, for the purpose of avoiding possible charges, a different approach is adopted, the compliance programs should also consider offences that are not expressly contemplated by Legislative Decree 231/2001, i.e. something that would make it impossible to arrange for an effective control.

2. THE *IMPREGILO* CASE

By decision rendered on 18 December 2013, the Fifth Section of the Italian Criminal Supreme Court overturned the acquittal of the Court of Appeal of Milan in the *Impregilo* proceeding, pending for the criminal offence established by the art. 25 *ter* of Legislative Decree n. 231/2001 in relation to the offence of stock manipulation committed by some of its top managers.

The Supreme Court quashed the decision and returned the case to the Court of Appeal for re-determination, ruling that:

- if on the one hand, it is definitely impossible to affirm that when an offence falling under the scope of Legislative Decree 231/2001 is committed by an individual, the liability of the legal entity must be automatically acknowledged;
- the codes of conduct prepared by the trade associations, even if they successfully pass, in accordance with art. 6, paragraph 3 of Legislative Decree 231/2001, the close examination of the Ministry of Justice, **cannot anoint the 231 compliance programs prepared on the basis of such codes with "*the oil of irreproachability, as if the judge were bound by a sort of corporate and/or ministerial* ipse dixit"**;
- the simple adoption of a compliance program is not in itself sufficient to avoid liability, being it necessary to entrust a body, having autonomous powers of initiative and control, with the task of overseeing: "*this is what on the other hand art. 6, letter b) of paragraph 1, of Legislative Decree 231/2001 prescribes"*. The Court goes on by also saying that ***"paragraph 2 of the same article envisages (sub d) a duty of disclosure towards the Vigilance Body, in order to evidently enable the latter to "autonomously" exercise its power"****;* with respect to the role to be played by the Vigilance Body ('SB'), ***"it has not been clarified if the amendment (or, as you wish to call it, the manipulation) of the draft prepared by the internal bodies was notified (obviously: before the announcement was circulated) to the body in charge of control or if instead, as it seems to emerge from the decision on the merits, this was an additional step not included among the duties of the President and of the Managing Partner. If that were the case, the control envisaged in art. 6 would evidently be reduced to a mere simulacrum, as it would be exercised on an in-the-making announcement rather than on the final version of the same (i.e. the version meant to be circulated)****.*

The latter stance taken by the Judges of the Supreme Court would seem to hint that any activity qualified as a crime risk activity within the scope of the compliance program (as is the creation/amendment of an announcement in the case under review) should be prior examined by the Vigilance Body ("*obviously: before the announcement is being circulated"*). In following such approach, we might thus sustain that the fulfilment suggested by the Court for the purpose of effectively controlling the risk activity of "creating/amending an announcement" must also be applied to all other sensitive activities to be mapped in a compliance program, such as the creation of a file for participating in public tenders, the decision to make donations to public entities, etc. In these cases, **according to the reasoning of the Court, the action expected by the Vigilance Body (i.e. verifying the appropriateness of making a donation, and the like) should be a preparatory decision to the decisions taken by the management**. Such an approach must be clarified, otherwise the Vigilance Body, rather than being a body in charge of control, would run the risk of becoming an executive body, capable of determining the decisions of a company.

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