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Il Direttore

Modelos comparados de Responsabilidad Penal de las Personas Juridicas

El Modelo Italiano

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Modelos comparados de Responsabilidad Penal (...???) de las Personas Juridicas

A bit of history: the “origins” ...

- **Second protocol** to the EU convention on the **protection of financial interests** of the European Communities (19 June 1997)
- **OECD Convention** against bribery in international business transactions (21 November 1997)

Setting the standards: the second “PIF” protocol

Article 3.1. **Liability of legal persons**

« ...legal persons can be held liable for fraud, **active corruption** and money laundering... »

The second “PIF” protocol

Article 3.1. **Liability of legal persons**

« ...committed **for their benefit** by any person, acting either individually or as part of an organ of the legal person, ... »

The second “PIF” protocol

Article 3.1. **Liability of legal persons**

« ...who has a **leading position** within the legal person, based on- a **power of representation** of the legal person, or- an **authority to take decisions** on behalf of the legal person, or- an **authority to exercise control** within the legal person... »

Setting the standards: the second “PIF” protocol

Article 3.1. **Liability of legal persons**

« ...as well as for **involvement** as **accessories** or **instigators** in such fraud, active corruption or money laundering or the **attempted commission** of such fraud. »

The second ‘PIF protocol

Article 3. **Liability of legal persons**

Para 2. «...a legal person can be held liable where the **lack of supervision or control** by a person referred to in paragraph 1 has made possible the commission of a fraud or an act of active corruption or money laundering for the benefit of that legal person by a person under its authority. »

The second PIF protocol

Article 4. **Sanctions for legal persons**

Para 1. « ...ensure that a legal person held liable pursuant to Article 3 (1) is punishable by effective, proportionate and dissuasive sanctions, which shall include **criminal or non-criminal fines...** »

The second PIF protocol

Article 4. **Sanctions for legal persons**

« ...and may include **other sanctions** such as:(a) exclusion from entitlement to public benefits or aid;(b) temporary or permanent disqualification from the practice of commercial activities;(c) placing under judicial supervision;(d) a judicial winding-up order. »

The second PIF protocol

Article 4. Sanctions for legal persons

Para 2. « Each Member State shall take the necessary measures to ensure that a legal person held liable pursuant to Article 3 (2) [*i.e. lack of supervision or control*] is punishable by **effective, proportionate and dissuasive sanctions or measures.** »

Setting the standards: the OECD Convention

Article 1. Bribery of Foreign Public officials

Para 1. «... to **establish that it is a criminal offence** under its law for **any person** intentionally to offer, promise or give any undue pecuniary or other advantage...in order to obtain or retain business or other improper advantage in the conduct of international business...»

The OECD Convention

Para 2. «...complicity in, including incitement, aiding and abetting...attempt and conspiracy...»

Para 3. « The offences set out in paragraphs 1 and 2 above are hereinafter referred to as “bribery of a foreign public official”...»

The OECD Convention

Article 2. **Responsibility of Legal Persons**

« Each Party shall take such measures as may be necessary, in accordance with its legal principles, to **establish the liability of legal persons** for the bribery of a foreign public official. »

The OECD Convention

Article 3. Sanctions

Para 1. « The bribery of a foreign public official shall be punishable by **effective, proportionate and dissuasive criminal penalties**. The range of penalties shall be comparable to that applicable to the bribery of the Party's own public officials and shall, in the case of natural persons, include deprivation of liberty sufficient to enable effective mutual legal assistance and extradition. »

The OECD Convention

Para 2. « In the event that, under the legal system of a Party, **criminal responsibility is no applicable to legal persons**, that Party shall ensure that legal persons shall be subject to effective, proportionate and dissuasive **non-criminal** sanctions, including **monetary sanctions**, for bribery of foreign public officials.»

The implementation in Italy

Societas delinquere non potest!

*Only “ancillary” liability
ex art.197 c.p.*

The implementation in Italy

- **Article 11 of Law no. 300 of September 2000**



- **Executive decree no. 231 of 8 June 2001**

Law 300/2000

- **Ratifies** a number of instruments in the field of corruption and fraud...
 - PIF Convention 1995
 - 1st protocol 1996 (and Court of Justice) protocol
 - OECD Convention 1997
 - EU Convention on corruption 1997

Law 300/2000

- Provides for the introduction in the Criminal Code the new incriminations of « European » active and passive bribery and of « International » active bribery
- Provides for Confiscation of proceeds of bribery

Art. 11 of Law 300/2000

- **Delegates** to the Government to introduce **liability** for **legal persons** on the basis of some directive **criteria**...
 - **Administrative** liability...
 - Imposed by the **Criminal Judge** competent for the criminal case and using the **Criminal Procedure Code** with the **effective participation** of the defence.

The implementing Decree 231/2001

Liability of **legal persons**: « **Who** »?...

- **Article 1. Subjects** “... subjects having legal personality and companies and associations even if without legal personalities...” ...

The implementing Decree 231/2001

- ...with the exclusion of the State and other public entities exercising public powers (e.g. bodies of local administration and other public entities...)

Decree 231/2001: which offences covered?

In 2001:

- “**Swindling**” against the State or the European Communities also through information technology” (truffa e malversazione);
- “**Bribery**” (Corruzione e concussione);
- “Attempted crimes” (delitto tentato).

Decree 231/2001: which offences covered?

At present:

- Swindling
- Bribery
- “Cybercrime”
- “Organised crimes”
- “Forgery and counterfeiting currency, including the euro”

Decree 231/2001: which offences covered?

- “Crimes against industry and trade”;
- “Corporate crimes”;
- “Terrorism”
- “Trafficking of Human beings, Child pornography and child prostitution, Sex Tourism, Mutilation practices on female genital organs”
- “Insider trading”

Decree 231/2001: which offences covered?

- “Manslaughter or serious injuries committed in violation of law about healthcare or against industrial accident”
- “Money laundering”
- “Piracy against intellectual property rights”
- “Offences against administration of justice - perjury”

The implementing Decree 231/2001

Exceptions...when?...

- For “**Persons in leading position**”... if, prior to the commission of the fact, “**organisational models**” and of management suitable to prevent crimes have been adopted and...

The implementing Decree 231/2001

- ...the task of supervising...and the observance of the models...entrusted to an organ...possessing autonomous powers...” “...the persons have committed the crime fraudulently...” “...supervision has not been omitted or insufficient...” (Article 6);

The implementing Decree 231/2001

- In case “**Persons subject to supervision by others**”... the legal person is responsible in case of lack of surveillance or supervision, but...

The implementing Decree 231/2001

- ...liability **is excluded** if, prior to the commission of the crime, the legal person has adopted and effectively implemented a **model of organization, management and control** suitable to prevent crimes of the same sort as the one committed...”.

The implementing Decree 231/2001

- In any event the legal person is not answerable if the persons (in leading or subordinate position) have acted in their own sole interest or that of third parties.
(*see case law...*)

The implementing Decree 231/2001

The “**Organisational Model**”:

- Is **not** mandatory, but...
- If not adopted it will be quite impossible for the legal person to escape responsibility for acts committed by subject in leading position or for lack of surveillance.

The implementing Decree 231/2001

The “Organisational Models”:

- Are usually adopted by the legal person making use of general model «**Codes of conduct**» prepared by the Associations of categories, each for its sector of competence.

The implementing Decree 231/2001

The model “Codes of conduct”:

- The Ministry of Justice exercises a preliminary supervision on the **adequacy** of the model “Codes of conduct”

Procedure

- Procedural provisions relating to the accused apply to the legal person, insofar as they are compatible.
- Competent on the administrative infringements is the criminal judge competent for the crimes on which they depend.

Sanctions

**Legislative Decree No. 231/2001
(Article 9):**

- **Fines**
- **Interdictory sanctions**
- **Confiscation;**
- **Publication of the verdict.**

Sanctions

Fines:

- fines (ranging between 26,000 and 1,550,000 €) determined through a system of “quotas”;

Sanctions

Quotas:

- The “number” (from 100 to 1.000) is based on the gravity of the fact, the degree of the liability and the activity carried out to eliminate or attenuate the consequences of the fact and to prevent the committing of further infringements

Sanctions

Quotas:

- The “amount” (from +/- 250 to 1.550 €) is fixed on the basis of the agency’s economic condition and assets, in order to ensure that the sanction shall be effective

Sanctions

Interdictory sanctions

- are applied in relation to the crimes for which they are expressly foreseen,
- when at least certain conditions applies:

Sanctions

Conditions for applying interdictory sanctions:

- a) **profit of considerable amount** and the crime was committed by persons in top positions or by persons subject to supervision by others when, in this case, the commission of the crime has been determined or facilitated by grave organizational shortcomings
- b) in case of **reiteration of the infringements.**

Sanctions

Disqualification from certain activities :

- professional bans,
- suspension or revocation of authorisations, licenses or concessions instrumental to the commission of the offence,
- Prohibition to contract with public administration, etc.

Sanctions

Disqualification from certain activities :

- If the court considers that none of the aforementioned temporary disqualifications / bans are adequate, it may prohibit the legal person from conducting business activities;

Sanctions

Interdictory sanctions are excluded if:

- (a) prior to the start of a trial, the legal entity implements an appropriate organisational model to prevent similar offences in the future;
- (b) fully compensates all victims;
- (c) takes effective steps to eliminate any consequences of the offence; and
- (d) surrenders any profits derived from the offence for confiscation

Urgent measures

- In case of well-founded and specific elements indicating the concrete danger that similar infringements could be committed again, the public prosecutor can request the application, as a urgent measure, of one of the following interdictory sanctions:

Urgent measures

- Temporary disqualification from exercising activity;
- Suspension or revocation of authorizations, licences or concessions;
- Disqualification from contracting with the public administration;
- Exclusion from subsidies or revocation of those already granted;
- Disqualification from publicizing goods or services.

Urgent measures

- The urgent measures cannot last more than half the maximum of the definitive sanctions (> 3 months, < 2 years)

Judicial Commissioner

- 1. If the assumptions exist for the application of an interdictory sanction which causes the interruption of the agency's activity, the judge, in lieu of the application of the sanction, orders the continuation of the agency's activity under a commissioner for a period equal to the duration of the punishment when at least one of the following conditions exists:

Judicial Commissioner

- a) the agency performs a **public service** or a service of public necessity, whose interruption could cause a serious prejudice to the general public
- b) the interruption of the agency's activity could cause, taking account of its size and of the economic condition of the territory in which it is situated, **considerable repercussions on employment.**

**Law in practice 1: final decisions on
administrative liability of legal persons
(since 2001)**

136

Law in practice 1: final sentences in Italy for corruption of public officials abroad (art. 322 bis Criminal Code)

Legislative act	Article	Date of the order	Total
Criminal Code	322 bis c.p.	2005	1
Criminal Code	322 bis c.p.	2008	1

Italy under scrutiny



Transparency International

GRECO 2008 Recommendations to Italy:

- “that corporate liability be extended to cover offences of active bribery in the private sector” (**recommendation 19** of the *Draft Evaluation Report on Italy 2009*);

GRECO 2008 Recommendations to Italy:

- *“to consider the possibility of establishing bans on holding executive positions on legal persons in all cases of conviction for serious offences (such as corruption), independently of whether these offences were committed in conjunction with abuse of power or in violation of the duties inherent to a given office” (recommendation 20 of the Draft Evaluation Report on Italy 2009);*

GRECO 2008 Recommendations to Italy:

- *“that the operation in practice of the “organisational model” defence be kept under constant review and the case law of the courts be regularly and systematically monitored in order to allow for the expeditious intervention of the authorities, as may be necessary, to prevent that the defence is abused” (recommendation 21 of the Draft Evaluation Report on Italy 2009).*



Report on the implementation of the phase 2 recommendations Conclusions by the working group on bribery (2007)

“...the Working Group will continue to follow-up on issues 8(d)(i) and 8(d)(ii) on the liability of legal persons for the foreign bribery offence as practice develops...”



Report on the implementation of the phase 2 recommendations Conclusions by the working group on bribery (2007)

“...In particular, follow-up is still needed to confirm the application of the Legislative Decree on the liability of legal persons in certain situations, including where the foreign bribery offence is committed by a state-owned or controlled enterprise, or by a foreign enterprise not registered in Italy...”



Report on the implementation of the phase 2 recommendations Conclusions by the working group on bribery (2007)

*“...The defence of “organisational models”
also warrants follow-up, in part due to its
novelty....”*



Report on the implementation of the phase 2 recommendations Conclusions by the working group on bribery (2007)

“...Finally, regarding follow-up issue 8(e), the Working Group also agreed to continue to follow-up the sanctions for natural and legal persons as practice develops”.



Transparency International

2010 Report

Italy

ACTIVE ENFORCEMENT:

- 18 cases, including two in 2009. Three investigations. Share of world trade is 3,31%.



Transparency International

Inadequacies in legal framework:

- There are some inadequacies. There is a three-year statute of limitations and the March 2007 OECD Phase 2 Follow-Up Report on Italy found that Italy had not followed the recommendation to eliminate the defence of “*concessione*” from the offence of bribing a public official. There is no criminal liability for companies, only administrative liability.



Transparency International

Inadequacies in enforcement system:

- There are inadequacies including weaknesses in the whistleblower protection system and in complaint procedures. There is also an insufficient level of resources for enforcement and a lack of awareness-raising by the government.



Transparency International

Access to information about cases and investigations:

Numbers and case details are accessible in principle, but there is no central database of cases and in practice information is difficult to obtain. However, the recent draft law against corruption provides for the creation of a central supervising body (Osservatorio sulla Corruzione) responsible for collecting data and statistics about corruption.



Transparency International

Requirements of export credit agencies:

Companies are required to make a no-bribery commitment. They do extend to conduct by an agent or business partner. They are required to demonstrate that they have effective anti-bribery compliance programs. They are required to report.



Transparency International

- **Recommendations**: Increase the statute of limitations, introduce criminal liability for companies and eliminate the defence of “*concessione*”. Improve the whistleblowers’ protection system to encourage bribery reports, increase the resources for foreign bribery enforcement and increase awareness-raising.

At present in Italy

Suggestion for improvement of the Decree No. 231/2001 drafted by A.R.E.L. (*Agenzia di Ricerche e Legislazione*).

- Reinforcing the efficacy of the organisational model in order to exclude liability of the legal persons
- Extend to small companies and holding.