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Contributions to this newsletter are always welcome and should be sent to the Communications Officer, Saskia Zandieh, at **szandieh@milchev.com**.

This newsletter is intended to provide general information regarding recent developments in anti-corruption law. The views expressed are not necessarily those of the International Bar Association.

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Anti-Corruption Law No 190/2012 and Bill No 19/2013 – how the administrative liability of entities is liable to change

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Impact of the Bill on the liability of entities pursuant to Legislative Decree No 231/2001

On 15 March 2013, a Bill was tabled to the Senate on 'Provisions on Corruption, Pork-Barreling, Fraudulent Accounting and Money Laundering' that, although currently under consideration by the Committee, is aimed to introduce a series of amendments to Anti-Corruption Law No 190/2012 (which entered into force on 28 November 2012).

The changes envisioned by the Bill will also affect Legislative Decree No 231/2001, insofar as it puts forward certain proposals for the introduction of a number of measures of coordination, such as:

- the amendment of Article 25 *ter* of Legislative Decree No 231/2001, taking into account the changes made by the Bill to the rules and regulations governing fraudulent accounting (articles 2621 and 2622 of the Civil Code);
- the amendment of Article 25 *ter* of Legislative Decree No 231/2001, as a result of the repeal of Article 2624 of the Civil Code for the crime of accounting misrepresentation and the subsequent introduction of the relevant crime, punished by Article 27 of the Legislative Decree No 39/2010, in the new Article 25 *quaterdecies* of Legislative Decree No 231/2001.

In addition, the Bill implies some innovative measures, such as:

- the application of disqualifying measures for the crimes of false accounting and of obstruction to the exercise of supervisory functions.
  This regulatory action is of significant interest because the Legislator (with the 2002 reform of corporate crimes) had solely provided for financial penalties applicable to entities, the only, albeit the disqualifying, measures have a far greater deterrent effect;
- the extension of the entity's liability to include tax offences – especially as they are often instrumental to the consummation of the crime of corruption. Furthermore, a proposal has been submitted for stricter financial penalties to be applied alongside the disqualifying measures for those crimes that encompass the element of 'fraudulence', 'concealment' or 'destruction';
- the introduction of the offence of self-laundering, by which whoever has participated in the non-culpable crime which money, assets or benefits derive from, is made punishable. The Bill also extends to the entity the liability for the crime, without, however, affecting Legislative Decree No 231/2001, but rather introducing Article 518 *quinquies* ('administrative liability offence') within the criminal code, and providing for the application of the financial penalty to the company on the 'quotas criterion' (ie, by estabilishing a given number of quotas according to the standard indexes and determining the economic value of each quota, assessing the financial status of the entity and finally applying the penalty ranging between €400 and €1000).

The impact of the crime of corruption among private parties on the model of organisation pursuant to Legislative Decree No 231/2001

As the Bill is still being considered, the only innovative measure that has had a significant impact on companies and institutions, was the introduction, through Anti-Corruption Law No 190/2012, of the crime of corruption among private parties pursuant to Article 2635 of the Civil Code, which the Bill proposes to amend as follows:

i. rewrite as a dangerous offence and not as a damage offence;
ii. eliminate the prosecution on complaint;
iii. equalise penalties to be applied to either directors or employees who commit the crime.

In particular, Article 77, paragraph 1(b), of the Anti-Corruption Law, has added to Article 25 *ter* of Legislative Decree No 231/2001, (s) bis, specifying that the company is liable for the crime of private corruption with exclusive reference to the corrupter – that is, the company, the top management or employee which gives or promises money or other benefits to the administrators, general managers, managers responsible for corporate accounting documents, auditors, liquidators and persons subject to their direction or supervision. This is because only the suborning company pursues an interest or an advantage through the commission of an act of corruption, while the suborned subject generally suffers damage.

The introduction of the crime of private corruption has, from the entry into force of the Anti-Corruption Law, significantly influenced companies which were asked to arrange for and implement the updating of the models of organisation pursuant to D. Lgs No 231/2001.

Whoever intends to adapt the model of organisation to Article 2635 of the Civil Code, must check whether the company conducts any 'sensitive activities' that present a potential risk of commission of corruption among private parties, so as to provide monitoring protocols.

Sensitive activities may include the following:

- acquisition of new customers or new supplies (for a price higher than the market value);
- selection of new suppliers (at more advantageous economic conditions as compared to the market standards, without any justification in terms of quality of the goods/service);
- maintenance of contractual relationships with existing customers; or
- performance of acts of unfair competition.

Once such sensitive activities have been identified, it is then necessary to implement the model of organisation, taking into account the specific activities carried out by the company in order to identify the concrete situations in which there is a risk of commission of the crime.

Control protocols will mainly cover the active and passive cycle:

- with reference to the active cycle, control protocols must provide for:
  - a stratification in the powers of authorisation of sales processes;
  - the distinction of roles and responsibilities in the relationship with the customer (ie, account manager), the identification of the liability for determining the offering price and terms of payment; and
  - the criteria for determining the maximum price for each good and service.

In addition, the adoption of these processes must be notified to the Supervisory Body (OdV), establishing, for example, the obligation to report transactions exceeding a specified amount that may represent the risk threshold;

- with reference to the passive cycle, control protocols must provide for:
  - stratification in the powers of authorisation of the purchasing processes;
  - the distinction of roles and responsibilities in the relationship with the customer (ie, account manager), the identification of specific liability in the selection of the supplier, service provider or consultant, or in management control and traceability of the operations; and
  - criteria for the determination of the maximum purchase price for each good and service.

In this case, the adoption of these processes must also be reported to the OdV, establishing, for example, the obligation to notify all purchase operations performed at non-market values or outside the ordinary terms of payment.

Conclusions

The innovative character of the reform will cause, should the Bill be approved, the necessary strengthening of the preventive activities of the companies, through the implementation and updating of models of organisation pursuant to Legislative Decree No N 231/2001; indeed, such intervention, has already been requested following the introduction of the crime of private corruption, thus making necessary the adoption of specific business protocols suitable to prevent the commission of the crime.