

The new laws on bribery in the private sector

The Law ("**Law**") of 15 March 2017 no. 38 on the *"Implementation of the framework decision 2003/568/JHA of the Council of 22 July 2003 relating to the fight against bribery in the private sector"* has been published in the *Gazzetta Ufficiale* no. 75 of 30 March 2017. The Law makes significant changes to the law regarding bribery in the private sector for the purpose of bringing Italy into line with European standards.

The Law will enter into force on **14 April 2017**. The new provisions will significantly impact also on Law no. 231 of 2001, therefore, since its entry into force, it will be necessary to conduct a new assessment of the Systems and Controls Model.

What changes?

- The Law reformulates the offence of *"Bribery in the private sector"* set out at article 2635 of the Civil Code.
 - **From the subjective point of view**, the scope of application of the provision has been extended in several directions:
 - the provision applies no longer only to companies, but also to **any "private body"**; the list of potential "bribed" persons covers no longer just those who hold administration or control positions (company directors, executives in charge of drawing up the corporate accounting documents, auditors and liquidators), **but also "those who perform duties through the exercise of management functions or private bodies"** (as well as those who are subject to the management or supervision of the persons referred to above). The third paragraph of article 2635 sanctions the behaviour of the "briber" and provides that the extraneous person, in other words the person who gives money or other gain not due to the persons

Key issues

- Reformulation of article 2635 of the Civil Code entitled *"Bribery in the private sector"*, and widening of the category of persons and behaviours that may be sanctioned;
- Introduction of the new offence of *"Instigation to commit bribery in the private sector"* (article 2635-bis of the Civil Code);
- Amendment to the relevant offences listed under article 25-ter of Law no. 231 of 2001 by updating the crime of *"Bribery in the private sector"* according to the new formulation and introducing the new crime of *"Instigation to commit bribery in the private sector"*;
- Increase of the relevant financial penalties under Law no. 231 of 2001 and introduction of prohibitions.

- indicated as potential "bribed" persons is punished;
- the behaviour of an **intermediary** who can act in the interests of both the "briber" and the "bribed" person has been standardised;
- **From the objective point of view of the behaviours:**
- it is specified that the behaviour must relate to "*money or other gain not due*";
 - the list of behaviours through which the corrupt agreement is reached is lengthened and introduces, alongside the receipt and acceptance of the promise, **the solicitation** of money or any other gain not due by the "bribed" person as well as **the offer** of money or other profits not due by the "briber";
 - finally, it is pointed out that the solicitation, receipt or acceptance of the promise of money or other gain not due must occur **in order to perform or omit an act in breach of the obligations pertaining to their office and the loyalty obligations**" (the obligations pertaining to their office are generally identified as those deriving from the law and those from a contractual source whilst in relation to the identification of the loyalty obligation the reference is, in particular, article 2105 of the Civil Code). It is therefore no longer necessary to actually perform or omit an act; this is an element which becomes, however, the object of specific intent, in other words the purposes of the behaviour implementing the corrupt agreement.
- The reference to the causation of "**damage to the company**" disappears: for the offence to be committed it is necessary for the behaviour to lead to an actual damage to the company, anticipating in this way the criminal relevance of the behaviour. The purpose of the rule no longer appears to be punishment of the behaviours which damage the interests (mainly financial) of the company, but rather to strike at fiduciary relations which link the "bribed" person to the company or the body in whose area of responsibility it performs its activity.
- Prosecution of the offence on complaint by the injured party remains: therefore, unless it leads to
- a distortion of the competition in the acquisition of goods or services, it is necessary that the "bribed" company submits the complaint within three months of knowledge of the corrupt acts. The original sanctions involving a prison term of one to three years (up to one year and six months if the act is committed by whoever is subject to management or supervision) is confirmed. In case of listed companies the sanction is doubled.
- The Law also introduces the new offence of "**Instigation to commit bribery in the private sector**" (article 2635-*bis* of the Civil Code).
 - **From the subjective point of view**, the scope of application of the law is the same as article 2635 of the Civil Code in relation to both legal persons (companies and private bodies) and in relation to the potentially "bribed" persons.
 - **From the objective point of view of the behaviours**, the offence of instigation to commit bribery punishes respectively the "briber" who offers or promises money or other gain not due and the "bribed" person who solicits – including through an intermediary – a promise or giving of money or other gain for the purpose of performance or omission of acts in breach of the obligations pertaining to the office or loyalty obligations **if the offer, the promise or the solicitation are not accepted**.
 - Instigation to commit bribery is punished with a prison term of eight months to two years and also in this case action is taken only in the event of a complaint by the "bribed" company.
 - Finally, pursuant to article 2635-*ter* of the Civil Code, a conviction for the offence set out at article 2635, first paragraph, entails the application to the "bribed" person, as a natural person, of the incidental penalty of temporary disqualifications from management positions of legal persons and undertakings set out at article 32-*bis* of the Criminal Code solely against whoever has already been convicted for the same offence or for "**Instigation to commit bribery in the private sector**", again in its capacity as "bribed person".

In what direction is Europe going?

In Europe there is a tendency towards greater criminalisation of phenomena of a corrupt nature, including in the private sector, as they have a large impact on the market in terms of fair competition between undertakings, the economic system and savings.

Companies are having to make a greater commitment to adopt systems of control which are real and effective in preventing bribery.

The new measures introduced recently in various European countries are going in this direction. Particularly worthy of note are Spain (Organic Law no. 1 of 2015) and France with the Anti-Bribery Law ("**Sapin II**") enacted on 9 December 2016.

The Spanish Organic Law no. 1 of 2015 incorporated several international recommendations and gave particular weight to the "*Corporate Compliance Programmes*", which are configured as a cause of exclusion from criminal liability, thereby placing them at the centre of the rules on the liability of the body with a view to preventing the offences which can be committed by the undertaking during its activities. This determines the (almost) perfect overlap of the 2015 Spanish reform with the provisions of Law no. 231/2001.

In France, by way of the Sapin II Law:

- a new agency was set up to combat bribery: Agence Française Antibribery ("**AFA**");
- a concrete and strict obligation was imposed on French undertakings to "*prevent bribery*": the companies must accordingly adopt an adequate Anti-Bribery and Compliance Management System – "**ABC Model**";
- the failure to adopt this system may be sanctioned by the AFA. This is the major reform to the provisions of our Law no. 231/2001: a company may be sanctioned for merely failing to adopt the ABC model without any predicate offence having been previously committed.

Bribery in the private sector and Law no. 231/2001

As regards administrative liability for offences committed by legal persons under Law no. 231/2001, the corrupt acts in the private sector involve the Body to the extent that they are committed (i) by executives or persons subject to their management and supervision and (ii) in the interests of or to the benefit of the Body.

With the approval of the new Law:

- in specific relation to the offence of "*Bribery in the private sector*" (article 2635 of the Civil Code) only the offence committed by the "briber" in order to benefit its company, albeit reformulated in the description of the behaviour, remains the predicate offence;
- there is however a **significant increase in the financial penalty** provided for such case, which rises from a minimum of around € 103.000 up to a maximum of around € 930.000¹;
- **the new offence of "*Instigation to commit bribery in the private sector*"** also becomes a predicate offence (under article 2635-*bis* of the Civil Code), with a penalty from a minimum of around € 51.000 up to a maximum of around € 620.000: also in this sole case against the company of the person who instigates to bribery the corporate officers of other companies – who do not accept the instigation – in order to benefit their company;
- the **big novelty** lies in the application in both cases of the **administrative prohibition sanctions set out at article 9, paragraph 2**, of Law no. 231 of 2001 that encompasses: disqualification from carrying on the business, the suspension or revocation of authorisations, licenses or concessions and a ban on contracting with the public administration, exclusion from tax breaks, loans, contributions or subsidies and, finally, a ban on advertising goods or services. The duration will not be less than three months and not more than two years. **They are the only corporate offences for which there is a possibility to apply to the body the prohibitions, including on a precautionary basis.**

¹ The financial penalty may be increased by a third for the aggravating factor of having gained a relevant substantial profit both in the event of article 2635 and 2635-*bis*.

What is to be done?

The reformulation of the offence set out at article 2635 of the Civil Code (already a predicate offence) as well as the insertion in the catalogue of predicate offences of Law no. 231 of 2001 of the offence of "*Instigation to commit bribery in the private sector*" entails for the Body the need to:

- map out afresh the activities sensitive to a risk of an offence under Law no. 231 of 2001, in other words updating the **Risk Assessment**, with particular reference to those activities that are sensitive and/or company processes which could be impacted following the criminalisation of corrupt acts carried out by the intermediary and by the instigators. In particular, it will be useful to conduct a new assessment (of the risk) in relation to the following activities:
 - Selection of suppliers;
 - Consulting and professional services;
 - Selection and hiring of personnel;
 - Management of gifts;
 - Representation expenditure (expenses report);
 - Purchase of goods and services.

- Once the Risk Assessment has been completed it will be necessary to conduct a new assessment of the system of internal controls to prevent the commission of the new (and/or amended) predicate offences (**Gap Analysis**).

- Following this assessment it will be possible to examine the adequacy of the Systems and Controls

Model in relation to the amendments made by the new Law and possibly conduct a revision of it.

During the assessment of the system of internal controls for the prevention of bribery offences (both public and private) it may be useful to consider also the opportunity to bring the system into line with the standards provided for by the ISO 37001 regarding the prevention of bribery. On 15 October 2016 the ISO published the Anti-Bribery Management System which lays down specific standards for the prevention of bribery. It is a type A norm, and therefore certifiable, which quickly becomes the first international parameter for the construction of anti-bribery management systems.

In case of obtaining the ISO 37001 certification the intervention of an independent third party such as a certification body represents on the one hand a stimulus and an opportunity for dialogue and on the other an element which could strengthen the judgment of suitability of a Model under Law no. 231/2001.

Therefore, the recent reforms in relation to bribery (not only at national level) and the related liability of the companies should lead the latter to consider the possibility of updating the system of controls for the prevention of bribery also in relation to the standards provided for by the ISO 37001.

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