FRAUD IN COMPETITIVE SPORT AND SYSTEMS AND CONTROLS UNDER LAW 231/2001: WHAT'S NEW?

Main aspects

- Introduction of the new offence of Sport Fraud in Law 231/2001
- The exclusion and mitigation of liability for companies provided with a Model
- The reforms introduced by the FIGC's new Code of Sport Justice
- What should be done?

On 16 May 2019, by way of publication in the Official Journal of the Republic of Italy of the Law 39/2019 concerning the ratification of the "*Convention of the Council of Europe on the manipulation of sports competition, made at Magglingen on 18 September 2014*", the offence of "*Fraud in competitive sport and the illegal betting"* was placed on the list of relevant criminal offences pursuant to Law 231/2001. In parallel, the new Code of Sport Justice of the Italian Football Federation ("**FIGC**") entered into force on 11 June 2019 and also assigns in respect of sport offences exemption or exoneration where systems and controls under Law 231/2001 (the "**Model**") have been adopted and effectively implemented.

Sporting companies will therefore be required to implement a Model based on the specific characteristics of their activities so that they can conduct an independent line of defence in cases of offences (both of a criminal and sporting nature) committed by persons within the company.

THE NEW OFFENCE OF SPORT FRAUD

On 16 May the legislator added to the list of relevant offences under Law 231/2001 by introducing a new article 25 *quaterdecies* entitled "*Fraud in competitive sport and illegal betting by way of prohibited devices"*.

Specifically, the recently introduced offence has also been extended to companies with legal capacity in relation to the commission of offences referenced at artt. 1 and 4 of Law 401/1989 where they are committed by (i) senior executives or persons subject to their management and supervision and (ii) in the interest of or on behalf of the company.

The crime of sport fraud referenced in **art. 1** of the Law of 401/1989 targets:

- **anyone** who **promises** or **offers** *"money or other profit or benefit to any of the participants in a sporting competition organised by the recognised federations*" or performs "*other fraudulent acts*" with the purpose of "*achieving an outcome that does not result from proper and fair competition*";

- **a participant in a sporting competition**: *"who **accepts** money or other profit or benefit or **accepts the promise**".*

Particularly complex is the wording of **art. 4** of the same law entitled "*Illegal betting*" which sets forth numerous types of offences, some of them criminal and some of them misdemeanours, connected to the **operation, organisation, sale** of activities, games and betting in breach of authorisations or administrative concessions.

The description of the offences at art. 25 *quaterdecies* of Law 231/2001 immediately makes plain that it is a wide-ranging scheme of punishment in terms of incriminated behaviour as well as the persons identified as possible offenders. This seems to be the result of a precise legislative decision to make sports companies more accountable towards the **sporting community and ensure that games are played in accordance with the rules and that the results are genuine**.

The provision for sanctions is as decisive as the other legislative changes.

Art. 25 *quaterdecies* of Law 231/2001 provides that an entity that has not prepared a Model suitable for preventing fraud in competitive sports and illegal betting be subject to:

- **fines**: up to Euro 774,500 for crimes and up to Euro 402,740 for misdemeanours;

- **industry bans:** solely with reference to crimes, all the offences referenced in art. 9, par. 2 of Law 231/2001[1] **for a period of at least a year.**

EXCLUSION AND MITIGATION OF LIABILITY UNDER LAW 231/2001 AND THE FIGC'S CODE OF SPORT JUSTICE

Art. 6 of Law 231/2001 lays down that administrative liability arising out of an offence by the company is excluded for offences committed by senior executives if the company can demonstrate that:

- it has prepared and effectively implemented, prior to the commission of the offence, "*organisational models of management suitable for preventing the type of offence that occurred*";
- it has established and made operational an autonomous and independent surveillance committee;
- the offence was committed through fraudulent evasion of the Model;

[1] Art. 9, par. 2, of Law 231/2001 makes reference to the following sanctions: *a) disqualification from carrying on the business activity; b) termination or revocation of authorisations, licences or concessions relating to the commission of the offence; c) ban on entering into contracts with the public administration unless the purpose is to obtain a public service; d) exclusion from incentives, loans or subsidies or revocation of those already granted; e) ban on advertising or assets or services"*

- failure of or insufficient supervision by the surveillance committee.

If the Model was adopted *post factum*, however, the Model is a mitigating factor as regards the sanctions that may be applied.

Further, art. 7 of Law 231/2001 provides that the liability of the company is in any case excluded if it has adopted and effectively implemented, *ante factum*, a Model that provides measures suitable for preventing offences of the type that occurred and eliminating in good time risk situations.

The aforementioned exemptions and extenuating factors are applicable to the persons mentioned at art. 1, par. 2 of Law 231/2001. These clearly include sports clubs which can therefore enjoy significant benefits in terms of sanctions where an executive or subordinate has committed a predicate offence.

This situation has for a long time led to reflection about the usefulness of the Model in sports legislation for the purposes of a hypothetical exclusion or mitigation of liability of clubs for the behaviour of their executives and members. For example, the FIGC's Code of Sport Justice did not contain any provision that ensured that companies with effective Models could benefit from circumstances exempting or mitigating their liability where their executives or members commit disciplinary offences except for violent or discriminatory behaviour engaged in by their supporters.

THE NEW CODE OF SPORT JUSTICE

This contradiction was (finally) resolved with the publication of FIGC's new Code of Sport Justice approved on 11 June 2019.

In relation to the FIGC's new Code of Sport Justice regarding companies belonging to the Federation, it is worth casting light on important reforms of the disciplinary liability of companies in the sports legislation in cases of disciplinary offences by persons belonging to the company.

First and foremost, it must be pointed out that **art. 6** of the new Code defines the prerequisites for the recognition of liability on the part of the companies belonging to the Federation.

The most significant reform, however, is the introduction at **art. 7** of the new Code of an explicit provision that from a substantial point of view assigns in respect of the systems and control model referenced at art. 7, par. 5 an exemption or exoneration where the court finds *"adoption, suitability, effectiveness and effective operation"*

As art. 7 of the Articles of Association of the Federation clearly states, *"the models … must provide: a) measures suitable for ensuring sporting activities in compliance with the law and sports legislation that identify in good time risk situations; b) the adoption of a code of conduct, specific procedures for the decision-making phase of both administrative and technical and sporting nature and appropriate control mechanisms; c) the adoption of an effective internal*

disciplinary system suitable for sanctioning non-compliance with the measures indicated in the Model; d) the appointment of a guarantee institution comprised of persons of the utmost independence and professionalism vested with autonomous powers of initiative and control, appointed to supervise the operation of and compliance with the models and to ensure their update" **the systems and control model to which the new Code of Sporting Justice makes reference is nothing other than the Model.**

Further, the prerequisites for the application of the sanction benefits to the clubs of the Federation follows those set forth in artt. 6 and 7 of Law 231/2001 and simplify the evidentiary mechanism outlined in art. 13 of the previous version of the Code and widens its scope of application.

	Art. 13 old Code	**Art. 7 new Code**
Text	*1. The disciplinary sanction is reduced if one or more of the following circumstances emerge from the facts:* *a) having reacted immediately to the behaviour or unfair acts of others;* *b) having contributed, in respect of the intentional or grossly negligent act against the injured party, to causing the event, together with the action or omission of the person responsible;* *c) having made good in full the damage or having taken steps voluntarily and effectively to remove or mitigate the damaging or dangerous effects of the breach prior to the proceedings;* *d) having acted for reasons of particular moral or social reasons;* *e) having admitted liability or having cooperated constructively in the discovery or ascertainment of disciplinary offences.* *2. The organs of sporting justice may take into consideration, on appropriate grounds, further circumstances they deem suitable for justifying a reduction in the sanction.*	*"For the purpose of excluding or mitigating the liability of the company referenced in art. 6, as set out and referenced in the Code, the court shall evaluate the adoption, suitability, effectiveness and the effective operation of the systems and controls model as per art. 7, par. 5 of the Articles of Association".*
Field of application	• Discriminatory behaviour • Acts of violence	All offences
Condition for the application of the exemption	The fulfillment of all four conditions	Not specified *(presumably the adoption of the Model prior to the offences)*
Condition for the application of the extenuating factor	The fulfillment of the other conditions	Not specified *(presumably the adoption of the Model at a point in time subsequent to the offences)*

WHAT SHOULD BE DONE?

The entry into force of the new legislation makes it necessary for companies to:

- carry out a mapping or a **new mapping** (for companies that have already availed themselves of a Model) of the sensitive activities potentially at risk in relation to the new criminal offence of *Fraud in competitive sport and the*

illegal betting, where applicable in respect of the company business (**Risk Assessment**);

- for the sporting companies, take into account during the mapping activities, not only the areas at risk under Law 231/2001 but also the activities that entail the risk of disciplinary sporting offences, drafting an updated *Risk Assessment*, with particular reference to the sensitive activities and/or corporate processes that could suffer an impact following the double reform.

Specifically, in addition to the criminal offences detailed above it will be necessary to take steps to ensure the prevention of the commission of some of the main sporting offences.

By way of example, it will be useful to carry out a new risk assessment in relation to the following activities:

- bets on sporting events organised by FIGC, FIFA and UEFA;
- brawls and/or other violent acts before, during and after the sporting event;
- entertaining relations with referees or other members of sport justice bodies;
- the presence of doping substances on the club premises;
- public statements made by the executives and members of the club.

It will also be useful to extend the analysis from the **subjective point of view** not only to the behaviour that may typically be engaged in by executives and members but also to the shareholders and non-shareholders who directly or indirectly control the club, the persons in any case working for the clubs and those who perform any duties within or on behalf of the club or any case relevant to the federation rules.

Once the risk assessment has been conducted it will necessary to conduct a new assessment of the effectiveness of the system of internal controls for the prevention of the commission of the new predicate offences and the most important disciplinary offences (***Gap Analysis***).

Following the analysis it will be possible for the company to assess the appropriateness of the Model in relation to the amendments introduced by Law 39/2019 and possibly conduct a review of them for the purpose of ensuring it can benefit from a line of defence that is different from and additional to that of natural persons who are the perpetrators of the offence both in the criminal courts and in relation to disciplinary proceedings.

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