

## CORPORATE LIABILITY IN ITALY: CORONAVIRUS AND APPLICATION OF THE LEGISLATIVE DECREE 231/2001 TO FOREIGN COMPANIES

On 10 June, the employers' association Confindustria published a document **setting out initial instructions on administrative corporate liability during the Coronavirus pandemic**. The paper offers suggestions on what systems and controls adopted in accordance with Legislative Decree 231/2001 may be adequate to manage the risks linked to the emergency, the obligations for employers and for the corporate structure, as well as the critical role of the Supervisory Board.

In addition, the Italian Supreme Court (Court di Cassation) recently ruled that companies registered outside of Italy can be liable for administrative offences under Italian law committed by the company's representative/agent in Italy. It is no defence to say that the company is not registered in Italy and is in compliance with the law where it is registered. This briefing explores the implications of these changes for businesses.

### TYPES OF RISK

The operating instructions published by Confindustria ("**Position Paper**") first and foremost identify the two types of risks to which a business is exposed because of the current global pandemic:

- **Indirect risks:** these are the indirect consequences of the Coronavirus pandemic, which creates an environment that may foster the commission of additional criminal offences;
- **Direct risks:** these risks derive directly from contagion, to which all businesses are exposed indistinctly, with effects on the health and safety of the employees, which is a risk-offence that is already listed (in Articles 25-*septies*) as an offence relevant for the application of corporate administrative law under Legislative 231/2001 (a "relevant offence") and is governed by Legislative Decree 81/2008.

#### Key topics

- Actions to minimise indirect risk
- Actions to contain direct risks
- The role of the Supervisory Board when managing emergencies
- The liability for employers
- The Supreme Court expresses its position on the liability of foreign companies that commit an offence in Italy

## INDIRECT RISKS

The new work performance modalities and the new organisational instruments that companies have had to implement and use to face the conditions created by the pandemic could give rise to new relevant offences for the purpose of Legislative Decree 231/2001, such as:

- **Non-public corruptions, corruption and other offences involving the public administration;**
- **Unlawful employment of foreign citizens who are not lawfully residing in Italy;**
- **Purchase of stolen goods, money-laundering and self money-laundering;**
- **Offences related to organised crime;**
- **Offences against industry and commerce;**
- **Digital offences and breaches of copyright.**

In optimal systems and controls adopted in accordance with Legislative Decree 231/2001 ("**Model**"), the above risks should be already mapped, although in light of the emergency, perhaps the offence committed could be committed differently than envisaged at the time of mapping, pre-emergency.

## DIRECT RISKS AND EFFECTS ON THE MODELS

Confindustria includes as direct risks those risks that are more strictly linked to health and medical issues, such as the risk of contagion, and identifies as such **negligent personal injury** and **involuntary homicide**, committed in breach of the provisions for the protection of accidents at work, pursuant to Articles 589 and 590 of the Criminal Code. In relation to these risks, the Model should envisage **a set of general systems and controls suitable to ensure a valid and effective management system**, which contemplates all specific, necessary measures to perform the legal obligations to safeguard the health and safety of workers.

The Position Paper underlines that the exposure of workers to the risk of contagion in the workplace gives rise, in terms of civil and criminal liability of the employer, **to an obligation to devise and implement suitable measures to protect each worker from the risk of contagion**, pursuant to Article 2087 of the Italian Civil Code, although the risk of Coronavirus contagion affects the whole of the populace, regardless of the work activity performed.

Moreover, the Position Paper underscores that not even the scientific community has yet been able to draw a precisely designed picture as to the ongoing phenomenon *"it is evident that employers do not have the proven experience and techniques required under Article 2087 of the Civil Code, or the scientific skills necessary to adequately assess such type of risk and its consequences and therefore cannot independently decide the measures necessary to contain such risk"*, as already explained in Communication no. 89 from Italian National Labour Inspectorate, dated 13 March 2020. Therefore, the only inference that can be made is that it is the **obligation of the Public Authority to identify the general containment and prevention measures to be adopted by manufacturing companies** and that the only discretion that employers have, in the context of the above assessment, is limited to the

implementation of the anti-contagion measures provided by such Authorities, for under:

- The Law Decrees and Decrees of the President of the Council of Ministers issued in the past few months;
- Joint protocol signed by the Government, the unions and the employers' associations on 14 March 2020, as amended on 24 April 2020 and attached to the following Decrees of the President of the Council of Ministers;
- Other protocols for each of several sectors, (such as construction, transportation, logistics, attached to the Decrees of the President of the Council of Ministers ).

Therefore, the employer is required to follow the above prescriptions, implementing the organisational measures necessary to implement the anti-contagion measures and, especially, to **communicate with and inform** all workers and anyone who accesses the corporate premises, **to clean and to sanitize** the workplace **daily**, to ensure that **individual protection equipment is available** to workers, **to manage the common areas**, to comply with the minimum **interpersonal distance**, **to manage cases where persons with symptom are** on the company premises, **to create a Committee that implements and monitors compliance with the rules of the protocol** and updates the protocol as necessary. Confindustria has reiterated that all activities and measures performed and put in place by the company to comply with the new prescriptions must necessarily **be recorded and reported on adequately**.

## ROLE OF THE SUPERVISORY BOARD

The Position Paper also covers the activities of the Supervisory Board and information flows, clarifying that, even if the Coronavirus emergency does not automatically trigger an obligation to update the Model, the Supervisory Board must in any event pay careful attention to whether it is necessary to review or supplement the Model in case of an increase in the intensity or frequency of those risks that are already mapped.

The Supervisory Board's main responsibility will be to expand its monitoring ***"over the correct and effective implementation of the existing Model, as well as the measures implemented by the employer in compliance with the prescriptions of the public Authorities"***.

To achieve the above, the Supervisory Board must:

- Ensure it **coordinates closely with the company's top management**, with the **Committee created ad hoc to face the emergency** and **with the corporate divisions involved**, with **greater frequency** than planned before the pandemic;
- Ensure **expanded information flows** from and to the company, obtaining from the employer and the corporate divisions involved adequate **information flows on the anti-contagion measures actually implemented** within the company;
- Monitor the evolution of the **applicable legislative framework**;
- **Request an upgrade or the adoption of anti-contagion measures** where the company fails to do so on its own;
- Monitor and analyse, in the context of its monitoring activities, any **reports of violations of the Model** and of the precautions

implemented by the company, especially paying attention to due compliance with the anti-contagion protocol;

- **Report, also on its own initiative**, to the company's top management and the company divisions in charge of operating controls, any weaknesses it has found during its monitoring activities (through continued monitoring activities based on the analysis of potential red flags);
- Prepare suitable reports on the monitoring activities it performs.

## **CONCLUSIONS OF THE CONFINDUSTRIA POSITION PAPER**

In light of the foregoing, Confindustria deems reasonable **to exclude any liability, including under Legislative Decree 231/2001, for an employer and a company that have adopted and actually implemented anti-contagion measures prescribed by the public Authorities.**

In this scenario, the Position Paper refers to the interpretative<sup>1</sup> clarifications and the law provision recently introduced, after repeated reminders from Confindustria itself, by Law no. 40 of 5 June 2020 on the conversion of Legislative Decree no. 23 of 8 April 2020, the so-called Liquidity Decree.

The law provision is Article 29 bis, which provides that, against the risk of contagion from Coronavirus, the employer fulfil its obligation under Article 2087 of the Italian Civil Code by applying the provisions contained in the joint protocol signed on 24 April 2020 between the Government, the unions and the employers' associations, and subsequent amendments and additions, and in the other protocols and guidelines referred to in Article 1, paragraph 14, of Legislative Decree no. 33 of 16 May 2020, as well as through the adoption and maintenance of the measures provided for therein (where the aforementioned provisions are not applicable, the measures contained in the protocols or sector agreements entered into by the unions and employers' associations that are comparatively more representative at national level will apply).

## **THE COURT OF CASSATION ON THE LIABILITY OF FOREIGN COMPANIES**

With a recent ruling (Ruling 11626) of the Court of Cassation, Division VI of 7 April 2020, the Italian Supreme Court for the first time explained its position on an issue that has been the object of much recent debate, i.e., whether the Italian law provisions on corporate administrative liability under Legislative Decree 231/2001 can apply to companies whose registered office is outside of Italy, in case of an offence committed in Italy.

The Court has deemed that a foreign legal person must be liable for an administrative offence deriving from a relevant offence committed by one of its

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<sup>1</sup> <https://www.fippa.it/wp-content/uploads/2020/05/INTERROGAZIONE-GRIBAUDO.pdf>  
<https://www.inail.it/cs/internet/docs/alg-circolare-inail-n-22-del-20-maggio-2020>  
<https://www.inail.it/cs/internet/docs/circolare-13-del-3-aprile-2020-testo>

representative in Italy, and assuming the criteria for a finding of liability are met, because even such foreign company is subject to the obligation to comply and ensure compliance with Italian law, especially criminal law, regardless of its nationality or the place where it has its registered office and independently of whether (or not) local laws in its country of residence provide for corporate liability also in relation to the preparation and the effective implementation of systems and controls suitable to prevent the commission of criminal offences that give rise to liability for the corporation itself.

As a result of the above ruling, the defence according to which liability pursuant to Legislative Decree 231/2001 should be ascertained on the basis of the foreign company's country of residence would no longer be a valid argument to raise in the context of legal proceedings.

Given this ruling, foreign companies that operate in Italy, even if only occasionally, should adopt and implement a Model pursuant to Legislative Decree 231/2001, because the existence of a compliance system in line with the laws of the country of residence is no longer sufficient.

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