

The administrative liability of entities under Legislative Decree No. 231/2001 also applies to the crimes of bribery among private persons and undue induction to give or promise benefits

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On 13 November 2012, the Law of 6 November 2012, No. 190 (“**Law**”), containing “*Provisions on Prevention and Repression of Corruption and Unlawful Practices within the Public Administration*” has been published on the Official Gazette, general series, No. 265/2012. The Law came into force on 28 November 2012 and – among others – extended the scope of application of Legislative Decree No. 231/2011 (“**Decree**”) (i) to the crimes committed breaching the provisions on bribery among private persons, adding Article 25-*ter*, letter s-*bis*, to the Decree and (ii) with reference to the undue induction to give or promise benefits, amending Article 25 of the Decree (“**New Crimes**”).

The extension of the crimes follows of a few months the introduction, through Legislative Decree of 16 July 2012, No. 109, of the crime of employment of other countries’ citizens with irregular stay, now a crime under Article 25-*duodecies* of the Decree.

1. The New Crimes

The Law, within the framework of the amendments to the Italian civil code and the Italian criminal code relevant to the administrative liability of entities, on one side extends the crime of “*Unfaithfulness Following Giving or Promise of Benefits*” (heading it as “*Bribery Among Private Persons*”) to the persons indicated under paragraph 2 of Article 2635 of the Italian civil code and, on the other side, adds the crime of undue induction to give or promise benefits, and namely provides for:

- (i) the crime of “bribery among private persons” also if committed by persons subject to the direction and coordination of directors, general managers, officers in charge with drafting corporate accounting documents, statutory auditors and liquidators who, following the giving or promise of money or any other benefits, for themselves or a third party, carry out or omit acts, breaching the duties related to their office or duties of loyalty, causing damage to the company (Article 2635, paragraph 2, of the Italian civil code); and
- (ii) the crime of “undue induction to give or promise benefits” committed by those who promise money or any other benefit to the public official or person in charge of a public service who, abusing of his quality or powers, induces someone to unduly give or promise, to himself or a third party, money or any other benefits (Article 319-*quarter*, paragraph 2, of the Italian criminal code).

The crimes of bribery among private persons and undue induction to give or promise benefits represent new crimes for the purposes of the Decree, whose commission may entail administrative liability of the entity if they have been committed, upon the occurrence of the other conditions set forth under the Decree – in the interest or for the benefit of the same entity – by (i) persons vested with representation, administration or direction functions of the entity, or any of its organizational units having financial and organizational independence, as well as those who exercise, also *de facto*, the management and control of the same entity (“**Individuals in Top Position**”); or (ii) persons subject to the direction or surveillance of any of the persons under (i) above (“**Individuals in Subordinate Position**”).

With regard to the administrative liability of entities, the crime of bribery among private persons under Article 2635, paragraph 3, of the Italian civil code quoted in the Decree, contemplates the case of Individuals in Top Position or Individuals in Subordinate Position who, in their capacity as active subjects, give or promise money or any other benefits to:

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(i) directors, general managers, officers in charge with drafting corporate accounting documents, statutory auditors and liquidators; or

(ii) those who are subject to the direction or surveillance of any of the persons under (i) above.

Therefore, the entity shall be held liable for the crime whenever the above individuals act as corruptors, and not if they have been corrupted.

The crime of undue induction to give or promise benefits, set forth under Article 319-*quater* of the Italian criminal code, sanctions the Individuals in Top Position or Individuals in Subordinate Position who are induced to give or promise money or other benefits, by virtue of the abuse of power of the public official or the person in charge of a public service.

2. Sanctions

With reference to the sanctions applicable to the introduced crimes, Law provides:

- as regards the crime of bribery among private persons, exclusively pecuniary sanctions ranging from 200 to 400 quotas. If, following the commission of the crime, the entity has gained a material profit, the pecuniary sanction is increased up to one third;
- as regards the crime of undue induction to give or promise benefits, pecuniary sanctions ranging from 300 to 800 quotas and disqualification sanctions for a period not shorter than one year.

The pecuniary sanctions are applied “*pro quota*”, in a number not lower than 100.00 and not higher than 1,000.00. The amount of each quota ranges from a minimum of Euro 258.23 to a maximum of Euro 1,549.37.

The disqualification sanctions consist of (a) prohibition to exercise the activity; (b) suspension or revocation of authorizations, licenses or permits aimed at committing the crime; (c) prohibition to contract with the public administration, except for obtaining the supply of a public service; (d) exclusion of facilitations, financing, contributions or subsidies and revocation of those already granted, if any; (e) prohibition to advertise goods or services. Such sanctions may be applied jointly or also as a precautionary measure.

3. Implementation of the new models under the Decree and risk analysis

The Decree provides for the possibility that the liability of the entity is excluded if it proves (i) to have adopted and efficaciously implemented, prior to the commission of the crime, organizational, management and control model aimed at preventing the crimes belonging to the same category as those occurred (“**Model**”) and (ii) to have entrusted the surveillance over the functioning and compliance of the Model and taking care of its update to a body of the entity vested with independent initiative and control powers (“**Supervisory Body**”).

Following the coming into force of the Law, the entities shall verify the impact and applicability to their corporate structure of the new crimes added by the Decree, in order to evaluate the adoption of a proper Model under the Decree and the relevant appointment of the Supervisory Body, or the update of the Model already adopted in order to make it compliant with the new crimes.

According to certain scholars,¹ the control systems shall include (i) the processes allowing the realization of the benefits deriving from the corruption agreement, operating on the controls required to ensure the transparency of the active cycle and (ii) the processes related to the creation of the funds required to perform the corruption, activating controls on the passive cycle aimed at ensuring the matching between purchases and cash expenditures, and shall be accompanied by proper corresponding information flows towards the Supervisory Body.

¹ De Angelis – Jannone “D.L. Anticorruzione. La corruzione tra privati e la tentazione del “panpenalismo”. Cosa cambia nel modello”, in Rivista 231, 4/2012.