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Focus Team Corporate Governance
10 June 2020

Applicability of Legislative Decree No. 231 of 2001 to foreign companies that do not have offices in Italy

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1. Introduction

This case (Italian Supreme Court, Sixth Division, Decision No. 11626 of 11 February 2020, filed on 7 April 2020)[1] gave the Supreme Court an opportunity – for the first time since Legislative Decree No. 231 of 2001 ("**Decree 231**") entered into force – to express its view on the long-standing issue of Decree 231's applicability to companies that **do not have offices** in Italy.

The Supreme Court agreed with the conclusions reached over time by the lower courts and affirmed the following principle of law (emphasis added): "a **legal entity is liable** for the administrative offence deriving from a presupposed crime [*reato presupposto*] committed in Italy by its authorised representatives or by people subject to its direction or supervision, **regardless of its nationality and the location of its registered office, and regardless of whether laws govern the same matter in a similar way in its home country**; the same applies to the adoption and effective implementation of compliance programmes to prevent the commission of crimes that give rise to corporate administrative liability".

2. The matter at hand

The case concerned charges of bribery in court proceedings. The charges were brought against a legal consultant to a company's bankruptcy receiver – the consultant had received a large sum of money from people acting on behalf of two companies under foreign law ("**Foreign Companies**") in exchange for acts in their favour contrary to the duties of the

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[1] Main reference regulations follow:
- Wording of Art. 1 of Decree 231: "*1. This legislative decree governs corporate liability for administrative offences resulting from crimes. 2. The provisions contained herein apply to companies with and without legal personality and to unincorporated associations. 3. The provisions do not apply to the State, to territorial public bodies, to other non-economic public bodies or to entities that perform functions of constitutional importance".*
- Wording of Art. 36 of Decree 231: "*1. The criminal judge who has jurisdiction over the crimes from which an administrative offence derives has authority to decide on that administrative offence. […]"*

consultant's office. The Foreign Companies were charged with the corresponding administrative offence under Art. 25 of Decree 231.

3. The Foreign Companies' Defence

The defence argued that Decree 231 cannot apply to companies that do not have their operational office in Italy and that merely carry out an occasional or purely formal activity in the national territory. Specifically, they argued that an administrative offence, despite deriving from the commission of a presupposed crime, nonetheless differs from it and occurs in the place where the "organisational fault" occurred, i.e., the place the company's decision-making centre is located.

Therefore, if the offence is attributable to a company that has its management centre and headquarters abroad, the illegal conduct cannot be considered to have been committed in Italy. Consequently, the Italian courts have no jurisdiction over the matter.

4. The Supreme Court's decision

The Supreme Court rebutted all arguments in support of the Foreign Companies' defence, mainly based on the following considerations:

- The letter of the law: Art. 1 of Decree 231, which defines the entities that fall under the decree's scope of application, makes no distinction between Italian and foreign entities. The decree makes explicit reference to the location of corporate offices when needed, as is the case with Art. 4, which governs crimes committed abroad. Conversely, Art. 36 (which as mentioned stipulates that the criminal judge who has jurisdiction over the crime from which an administrative offence derives has authority to decide on that administrative offence) places no importance on the location of a company's headquarters or where the organisational shortcoming occurred and envisages that both the administrative offence and the crime from which it derived are dealt with in the same proceedings.

- The rationale of the 231 system: Decree 231's purpose is to ensure that all companies operating in Italy adopt suitable precautions and organisational measures to prevent people who act on their behalf from breaking Italian criminal law. Thus, foreign legal entities operating in Italy – just like foreign people – must comply with Italian legal obligations in accordance with the principles of mandatory prosecution and territoriality under Arts. 3 and 6, respectively, of the Italian Criminal Code.

- Distortion of competition: If Decree 231 did not apply to foreign companies without their headquarters in Italy, they would be able

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to ignore the decree's organisational obligations with impunity. They would thus enjoy preferential treatment to the detriment of foreign companies based in Italy and Italian companies, which should adopt (expensive) precautions to comply with Decree 231.

5. Implications of the principle of law affirmed by the Supreme Court

The Supreme Court's affirmation of the above principle of law confirms that even foreign companies without their headquarters in Italy are subject to Italian jurisdiction and can be held liable under Decree 231 – regardless of their nationality and the location of their registered office, and regardless of whether laws govern the same matter in a similar way in their home country.

The consolidated principles laid down in the caselaw on this matter thus apply also to foreign companies. Consequently,

> The Supreme Court's decision is only further reason for foreign companies to adopt adequate compliance programmes, at least for their operations in Italy, to prevent the risk of their top managers and subordinates committing presupposed crimes.

6. Liability of foreign holding companies for crimes involving Italian subsidiaries

Even if foreign companies decide to operate through an Italy-based subsidiary, they are still strongly recommended to adopt organisational measures to prevent "231" risks. Indeed, although Decree 231 does not expressly address the liability of foreign holding companies, consolidated caselaw shows that they can be held liable even when the presupposed **crime involves a subsidiary with registered office in Italy** if the following conditions are met:

a) the **presupposed crime** was **committed by** someone from the **subsidiary in collusion** with someone from the parent company (or by a representative of the parent company who is charged also as the subsidiary's **de facto director**); and

b) the person who committed the crime was acting **also in the interest of the parent company**.

> Therefore, charging an Italian subsidiary with an administrative offence does not protect the parent company from the "chain of liability" In this case, the parent company can defend itself on a subjective level only by demonstrating that it has a suitable and

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effective compliance program in place. Whether its subsidiary has one is irrelevant to exclude the holding's liability.

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The focus team is a constellation of skills in different practice areas with a focus on *corporate governance*.

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