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ALERT MEMORANDUM

Italy Enlarges Corporate Criminal Liability to Encompass EU VAT Frauds

July 27, 2020

On July 15, 2020, the Italian Government issued Legislative Decree no. 75 (the "Decree"), implementing Directive (EU) 2017/1371 (known as the "PIF Directive") aimed at ensuring the ongoing harmonization process of EU Member States' criminal laws.

The Decree, which will become effective on July 30, 2020, introduces a new set of criminal offences in the context of corporate liability as set forth under Legislative Decree no. 231 of June 8, 2001 ("Decree 231"), whereby material criminal conducts perpetrated in the interest or to the advantage of an entity by its legal representatives, directors or executives (whether formally or de facto), or employees, trigger criminal liability for the offender as well as the company having possibly benefitted therefrom.

Although Decree 231 liability is labelled "administrative", in practice it has a quasi-criminal nature: as the individual offender's crime, Decree 231 violations are investigated by public prosecutors and the related cases are heard by criminal courts pursuant to criminal procedural rules.

While originally Decree 231 did not contemplate tax crimes, at the end of 2019 the rules were amended to include a number of tax offenses, such as

- filing fraudulent tax returns featuring non-existent transactions by means of invoices and other documents;
- filing fraudulent tax returns by means of other artifices;
- issuance of invoices and other documents for non-existent transactions;
- concealing or destroying accounting documents;
- fraudulent failure to pay taxes.

If you have any questions concerning this memorandum, please reach out to your regular firm contact or the following authors.

ROME

Vania Petrella
+39 06 6952 2204
vpetrella@cgsh.com

Paola Albano
+39 06 6952 2637
palbano@cgsh.com

MILAN

Gianluca Russo
+39 02 7260 8226
grusso@cgsh.com

The Decree supplements such list by expressly contemplating “serious offences against the common VAT system” (“EU - VAT frauds”). The notion of “serious offence” is defined under the PIF Directive: it has to be (i) cross-border (it must be “connected with the territory of two or more Member States”), and (ii) for a significant amount (“at least equal to ten million euro”). As a result, the list of tax crimes has been enriched to include:

- failure to file VAT tax returns;
- filing false VAT tax returns;
- undue VAT offsetting.

In order to strengthen the tools available to challenge such criminal behaviors, as suggested by the PIF Directive, for the first time the Italian criminal tax system now contemplates the enforcement against attempts to commit certain tax crimes (namely, tax return fraud by means of false invoices, tax fraud by means of other artifices and false tax return filing), provided that the conducts aimed at perpetrating those crimes would be cross-border and the unpaid VAT were to exceed Euro 10 million[1].

The applicable penalties consist of monetary fines and bans such as: (i) ban to continue to do business; (ii) suspension or revocation of the authorizations, licenses or concessions that enabled to perpetrate the offense; (iii) ban on contracting with the public administration; (iv) ineligibility for public incentives, loans, contributions or subsidies and the possible revocation of those already granted; (v) ban on advertising goods or services.

In light of this development, since, under applicable law, Decree 231 liabilities may be shelter thanks to appropriate compliance programs, companies should carefully review their existing programs with a view to updating them to ensure a precise identification and thorough analysis of all the new potential Decree 231 and set up an adequate management system thereof.

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1 In addition, the Decree 231 crime has been widen to include public supplies and agricultural frauds as well as smuggling in order to challenge misappropriation or wrongful retention of funds or assets coming from the EU or EU-managed budgets.