

Public Procurement-Related Crimes Will Also Trigger Corporate Liability: Companies Should Assess and Review Their Compliance Models

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On October 10, 2023, Law No. 137, on urgent provisions on criminal procedure, civil procedure, forest fire fighting, drug addiction rehabilitation, health and culture, and personnel in the judiciary and public administration (the “Law No. 137/2023”) came into force.

Law No. 137/2023 extends the quasi-criminal liability of companies pursuant to Legislative Decree No. 231 of June 8, 2001 (“Decree 231”) and strengthens criminal penalties for environmental crimes.

In brief, Law No. 137/2023:

- extends quasi-criminal liability for legal entities provided for by Decree 231 to include public procurement-related crimes (Article 353 and 353-*bis* of the Italian Criminal Code (the “ICC”), and the crime of fraudulent transfer of goods (Article 512-*bis* ICC), requiring companies participating in public procurement procedures to assess the adequacy of their compliance models;
- increases criminal penalties for some environmental crimes, and amends Legislative Decree No. 152 of April 3, 2006 (the “Environmental Code”), by turning the administrative offense of waste dumping (Article 255 of the Environmental Code) into a criminal offense.

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1. Amendments to Decree 231

The newly enacted Law No. 137/2023, expands the list of crimes that may trigger liability for companies and other legal entities under Decree 231. The list now also includes:

- (i) **public procurement-related crimes** (*i.e.* bid-rigging and interference in the tender preparation process, pursuant to Articles 353 and 353-*bis* ICC); and
- (ii) **fraudulent transfer of goods** (art. 512-*bis*, ICC).

The novel public procurement-related crimes are included in the list of crimes against the Public Administration under Article 24 of Decree 231 and are subject to the following penalties:

- a maximum fine of € 774,500 (which may be increased to € 929,400 in cases where the company has obtained a significant profit or caused particularly serious damages);
- the prohibition from entering into contracts with the Public Administration;
- the exclusion from grants, loans, contributions and subsidies with the possible withdrawal of those already granted; and
- the ban on advertising goods and services.

The fraudulent transfer of goods is included in the new paragraph 2-*bis* of Article 25-*octies*.1 of Decree 231 (on crimes involving non-cash means of payment) and is punishable by a maximum fine of € 929,400 and the disqualification penalties set out in Article 9(2) of Decree 231, *i.e.*:

- the disqualification from conducting business;
- the suspension or withdrawal of authorizations, licenses or concessions instrumental to the commission of the crime;

- the prohibition from entering into contracts with the Public Administration;
- the exclusion from grants, loans, contributions and subsidies with the possible withdrawal of those already granted; and
- the ban on advertising goods and services.

The list of crimes that may trigger corporate criminal liability had already been expanded by:

- Legislative Decree No. 19 of March 22, 2023, which introduced into Decree 231 the crime of false or omitted statements for the issuance of the certificate prior to cross-border mergers;¹ and
- Law No. 93 of July 14, 2023, which added a new crime of digital piracy to the list of copyright infringement crimes.²

2. What to Do Next

In light of these developments, companies should consider updating their policies and procedures to ensure that they are adequate to prevent new offenses that may trigger liability under Decree 231.

In particular, all companies participating in public procurement procedures should carry out a specific risk assessment with respect to public procurement-related crimes. On the one hand, to prevent such crimes, companies could use most of the control measures already in place to prevent different crimes against the Public Administration (*e.g.*, corruption crimes), including those aimed at ensuring transparency, fairness and fair cooperation with government officials. On the other hand, companies should now consider implementing new and more specific controls with regard to the management of public tenders, public auctions and private bids, to ensure that such areas are adequately addressed.

¹ This criminal offense (which punishes anyone who draws up wholly or partially false documents, alters true documents, makes false statements or omits relevant information in order to make it appear that the conditions for the issuance of the certificate prior to a cross-border merger have been met) has been included in Article 25-*ter* of Decree 231 (concerning corporate crimes) and is punishable by a fine of up to € 464,700, which may be increased by one-third in cases where the company has obtained a significant profit.

² In particular, Law No. 93/2023 amended paragraph 1 of Article 171-*ter* of Law No. 633/1941 (Law on the protection of copyright), introducing a new letter *h-bis*, which punishes anyone who unlawfully records a cinematographic, audio-visual or editorial work, in whole or in part, on a digital, audio, video or audio-visual device, or who in any way disseminates the unlawfully made recording. This criminal offense, which is referred to in Article 25-*novies* of Decree 231, is punishable by a fine of up to € 774,500 and the disqualification penalties set out by Article 9(2) of Decree 231, for a period of up to one year.

Moreover, in order to prevent the fraudulent transfer of goods, companies may use the control measures already in place to prevent money laundering offenses. In fact, the crime of fraudulent transfer of goods³ is aimed at protecting the transparency of legal transactions, and preventing organized crime's influence on economy. For this reason, companies should (i) review their anti-money laundering procedures (especially if they are subject to anti-money laundering and terrorist financing requirements pursuant to Legislative Decree 231/2007), and (ii) assess their internal policies and procedures regarding management of financial flows, purchases and sales, as well as company's property, to determine whether they are adequate to prevent the crime of fraudulent transfer of goods.

3. Amendments to the Regulation on Environmental Crimes

Law No. 137/2023 also increases penalties against individuals for environmental crimes. Although some of the crimes amended by Law No. 137/2023 may also trigger corporate liability pursuant to Article 25-*undecies* of Decree 231, the criminal penalties provided against companies for such crimes remain unchanged.

In particular, Law No. 137/2023 amends the following provisions:

- The crime of **forest fire** (Article 423-*bis* ICC), by (i) expanding its scope to punish those who cause a fire in places where the natural and urban areas are closely connected (so-called "urban-rural interface areas"); (ii) increasing the minimum penalty from four to six years' imprisonment for arson and from one to two years' imprisonment for culpable fire; (iii) providing for an aggravating circumstance (increasing penalty from one-half to two-thirds) if arson is committed with the intent to benefit oneself or others, with abuse of authority, or by infringing duties related to the provision of services in the field of forest fire prevention; (iv) adding new penalties, *i.e.*, disqualification from holding

public office and prohibition from entering into contracts with the public administration, except for obtaining public services, for a period of 5 years;

- **Article 240-*bis* ICC**, concerning the confiscation of money or property the origin of which the convicted person cannot justify and the value of which is disproportionate to his or her income. Pursuant to Law No. 137/2023, this type of confiscation will also apply to the crimes of (i) environmental pollution and death or injury as a result of environmental pollution (Articles 452-*bis* and 452-*ter* ICC); (ii) trafficking in and abandoning highly radioactive materials (Article 452-*sexies* ICC); and (iii) conspiracy to commit illicit trafficking in waste (Article 452-*quaterdecies* ICC);
- The crimes of **environmental pollution** (Article 452-*bis* ICC)⁴ and **environmental disaster** (Article 452-*quarter* ICC)⁵, providing for an increased penalty ranging between one-third and one-half, if such crimes are committed in a protected natural area or in an area subject to landscape, environmental, historical, artistic or archaeological restrictions, or to the detriment of protected animal or plant species. Law No. 137/2023 also provides for an increased penalty ranging between one-third and two-thirds if the environmental pollution causes the degradation, impairment or destruction of a habitat in the aforementioned areas.

Law No. 137/2023 also amends Article 255 of the Environmental Code, turning the administrative offense of **waste dumping** (punishable by a fine of € 300 to € 3,000) into a criminal offense punishable by a fine of € 1,000 to € 10,000, which can be doubled if the dumping involves hazardous waste.

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³ In particular, Article 512-*bis* ICC punishes with imprisonment from two to six years whoever fictitiously attributes to others the ownership or a availability of money, goods or other utilities in order to evade the enforcement of asset protection measures or smuggling prevention measures, or to facilitate money laundering, unless the act constitutes a more serious crime.

⁴ Punishable by imprisonment from two to six years and a fine of € 10,000 to € 100,000.

⁵ Punishable by imprisonment from five to fifteen years.