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White-Collar Crime

Italy
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Law and Practice

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1. Legal Framework

1.1 Classification of Criminal Offences

The Italian legal system distinguishes between two main categories of criminal offence:

- felonies (*delitti*) – more serious crimes which require mens rea (criminal intent), unless specific provisions extend the accountability to actions committed through negligence as well; and
- misdemeanours (*contravvenzioni*) – less serious crimes which do not necessarily require mens rea, and which can be punished, without any extra provisions, in cases of mere negligence.

Every criminal act consists of both a so-called objective element and a so-called subjective one. The objective element pertains to the material facts of the case and includes the criminal act itself and, where envisaged by the crime in question, the occurrence of an event which has to be a causal consequence of that act. The subjective element pertains to the psychological state of the perpetrator of the act (ie, whether there was wilful intent).

Wilful intent represents the normal subjective criterion for criminal charges, as one can infer from Article 42, paragraph 2 of the Italian Criminal Code (ICC), which states that "No-one may be punished for a fact that the law considers to be a crime, if that person has not committed it with intent, except for cases of unpremeditated or unintentional crimes expressly provided for by the law". Therefore, criminal law presumes wilful intent to be a subjective element for the charge of criminal responsibility.

1.2 Statute of Limitations

According to Section 157 of the ICC, the statute of limitations extinguishes a crime:

- in the amount of time corresponding to the maximum penalty provided for by the law with reference to the criminal offence in question; or
- in an amount of time which, in any case, cannot be less than six years for a felony and four years for a misdemeanour.

The ICC provides for specific cases in which the limitation period is interrupted, in such cases the amount of time needed to extinguish the crime is increased.

The limitation period begins to run from the moment when the crime is committed. They are doubled for specific criminal offences set out by the ICC.

The ICC provides for particular cases in which the limitation period is suspended. An important legislative reform – in force since 1 January 2020 – introduced the rule (Section 159, paragraph 3 of the ICC) based on which the statute of limitation is suspended from the first instance decision until the irrevocability of the decision that conclude the proceedings. The defendant can always expressly waive the statute of limitations.

In the case of a permanent offence (*reato permanente*) or of a continuing offence (*reato continuato*) the limitation period begins to run from the day on which the permanence or the continuation has ended.

The statute of limitations does not apply to crimes punished with life sentence.

1.3 Extraterritorial Reach

Italian criminal law does not provide a specific regulation for white-collar crimes outside Italian jurisdiction.

Pursuant to Section 7 of the ICC, an Italian citizen or a foreigner are punished according to Italian Law if he or she commits, in a foreign territory, the following crimes:

- crimes against the Italian State;
- crimes of forgery of the Italian State seal and of use of that forged seal;
- crimes concerning the forgery of Italian currencies which are legal tender in the territory of the Italian state, or forgery of other Italian valuables and securities;
- crimes committed, with abuse of powers or with violation of legal duties, by Italian public officials; and
- any other criminal offence for which special rules of law or international conventions establish the enforceability of the Italian law.

The ICC prescribes other particular cases in which a crime, committed outside Italian territory by an Italian citizen or by a foreigner, can be punished according to Italian Law (eg, cases in which a request of the Ministry of Justice is needed or cases in which a complaint by the offended party is needed).

1.4 Corporate Liability and Personal Liability

Legislative Decree 231/2001 introduced, into the Italian legal system, the liability of legal entities themselves with regard to certain criminal offences committed by their directors, representatives or employees in the interest, or to the advantage, of the legal entities themselves.

The liability of the legal entity only arises from criminal offences committed by "individuals who are representatives, directors or managers of the company" (generally only individuals that are in top management positions), or "by individuals who are managed or supervised by an individual in a top position". The

legal entity cannot be held liable if the individuals indicated have acted solely in their own interest or in the interest of others.

The body is not liable for the criminal offences committed by the above-mentioned people, if it can demonstrate the adoption and implementation, prior to the commission of the crime, of organisational models suitable for preventing offences similar to the one that was committed.

Three kinds of sanctions can be imposed on the legal entity found guilty: fines, banning sanctions and confiscation.

The legal entity's liability is autonomous from the liability of the individual charged. There is no personal liability for managers and directors for the sole reason that the legal entity is deemed liable for an offence. Nevertheless, the legal entity's managers or directors may be deemed personally liable for the same offence as that charged against the entity. In such cases, the legal entity cannot be legally represented, in the criminal proceedings, by the director charged with the same criminal offence.

According to Section 42 of Legislative Decree 231/2001, in cases of transformation, merger or splitting up of the originally responsible legal entity, the trial proceeds against the legal entity resulting from the modification or benefitting from the division.

1.5 Damages and Compensation

As a general rule of Italian criminal law, every crime which caused financial or non-financial damage, obliges the party found guilty to compensate the suffering party for the damage itself. Any other subjects, who are considered liable for such damage according to the civil laws, are also obliged to offer compensation.

The offended party who suffered damage from the commission of a crime can act as plaintiff in the criminal proceedings, asking for compensation for that damage. The plaintiff is represented, in the criminal proceedings, by a defence counsel, who has the same procedural rights, powers and faculties as the other trial parties. If the offended party has acted as a plaintiff in the criminal proceedings, the criminal court, in case of conviction, can order compensation from the convicted party.

The quantification of the damage is usually remitted to a civil court.

Nevertheless, the criminal court has the power to order the immediate paying of a part of the compensation, on a provisional basis, if a certain percentage of the damage is considered already proved.

Class actions are regulated by the Italian Code of Civil Procedure and can take place only in civil proceedings.

1.6 Recent Case Law and Latest Developments

The COVID-19 epidemic led the Italian government to issue emergency legislation with several criminal law repercussions. This legislation – composed of a number of different Acts – highlights four main criminal risk areas.

Misdemeanour Set Out by Section 650 of the ICC

Section 650 of the ICC provides for the crime of failing to comply with the orders of the authority. This criminal offence may be charged against those who do not respect the health and safety legislative acts issued by the government.

Misdemeanours Set Out by Legislative Decree 81/2008

Legislative Decree 81/2008 is the law that contains the health and safety regulation for the workplace.

The law prescribes a number of misdemeanours which may take place in the current situation. For instance, the following violations should be noted:

- failure to perform an evaluation of the risks coming from exposure to biological agents existing in the workplace;
- failure to inform employees of the existing risks, of the relevant measures undertaken to combat those risks and of behaviours to be observed; and
- failure to provide employees with the necessary personal protection equipment.

Felonies Set Out by Sections 589 and 590 of the ICC

If a COVID-19 infection takes place inside the workplace, or if a death occurs,, it is not possible to rule out, from a theoretical standpoint, the occurrence of the following crimes:

- culpable injuries due to violation of health and safety regulation (Section 590, paragraph 3 of the ICC), which is punishable by:
  - (a) in the case of serious injuries, imprisonment for between three months and one year or a fine of EUR500–2,000; and
  - (b) in the case of very serious injuries, imprisonment for between one year and three years; or
- culpable manslaughter due to violation of health and safety regulation (Section 589, paragraph 2 of the ICC), which is punishable by imprisonment for two to seven years.

These criminal offences can also trigger the liability of the legal entity according to Section 25-septies of Legislative Decree 231/2001.

Misdemeanour Set Out by Section 260 of Decree 1265/1934
Section 260 of Decree 1265/1934 sets out the crime of failure to respect a legally issued order aimed at preventing the spread of an infectious disease. The crime is punished with imprisonment for up to six months and a fine of EUR20,658–41,316. The penalty is increased if the crime is committed by a person who works in the healthcare field. The crime does not trigger the liability of the legal entity, but, theoretically, could be charged against the legal representative of a company who fails to comply with the behavioural and organisational rules imposed by the Italian government to prevent the spread of COVID-19.

2. Enforcement

2.1 Enforcement Authorities

The Italian prosecution service is divided into several prosecutor's offices, based in the main cities of Italy. Every single prosecutor's office is staffed by a chief prosecutor and by a certain number of public prosecutors. The biggest prosecutor's offices are divided into departments with particular specialisations (eg, a financial crimes department, a crimes against the public administration department and a crimes against the environment department).

According to the Italian Code of Criminal Procedure (ICCP), the preliminary investigations are directed by the prosecutor, who directly manage the judicial police.

The judicial police are composed of a number of different units. With reference to white-collar crimes, the most specialised unit is the Italian Tax Police (*Guardia di Finanza*), which has specific responsibility for tax crimes, corporate crimes, bankruptcy crimes, fraud, etc.

That said, there are a number of other units which have a specific responsibility for some type of crime: the Health and Safety Police, the Revenue Agency, the Customs Agency, the Regional Agency for Environment Protection, the Carabinieri Anti-adulteration Unit, and many others.

Italian prosecutor's offices work in co-operation with other public sector organisations, as the National Anti-Corruption Authority, the National Antitrust Authority and the Bank of Italy. Some prosecutor's offices have undersigned memoranda of understanding with these public sector organisations that guarantee a direct flow of information and documents between them.

The most important criminal courts in Italy are divided into specialised departments, with specific responsibility for particular categories of crime, such as financial crime.

2.2 Initiating an Investigation

Every criminal investigation is initiated by the prosecutor's office when the commission of a crime is reported to the office itself or to the judicial police.

The initiation of criminal preliminary investigations is regulated by Sections 326 et seq of the ICCP.

Pursuant to Section 330, the public prosecutor and the judicial police are notified, ex officio, of the commission of a crime, and receive information of the commission of that crime through the procedure provided for by the following Sections (eg, the filing of a complaint).

In greater detail, according to Section 347 of the ICCP, when the judicial police become aware of the commission of a crime, they immediately inform the prosecutor in a written communication which describes the main elements of fact and the evidence collected. If possible, the judicial police have to provide the prosecutor with the identity of the individual under investigation and of any potential witnesses.

When a criminal investigation is initiated, the prosecutor is bound to perform any activity necessary to evaluate the prosecution and also to perform investigative assessments for the benefit of the individual under investigation (Section 358).

With reference to white-collar crimes, the relevant criminal investigations are often instigated by administrative proceedings, in which the public sector authority reports the notice of a crime to the prosecutor's office (for instance, a tax audit carried out by the Revenue Agency or by the Tax Police, or an inspection carried out by the National Commission for Companies and the Stock Market).

2.3 Powers of Investigation

In the Italian legal framework, the prosecutor's office has wide and far-reaching investigative powers aiming at gathering information and documents related to white-collar criminal offences (for instance: acquisition of information from other public sector organisations, investigative interrogations, interviews of the individual under investigation, inspections of places, searches of premises or personal searches, technical expertise, wire taps, shadowing and the seizure of documents, correspondence and data).

In greater detail:

- investigative authorities can directly ask an individual or a legal entity to hand over documentation or information every time they deem that such an initiative is considered useful for the investigation;

- investigative authorities can seize documents (emails, computer forensic copies, etc), when the latter are considered relevant for the investigation, seizures can be ordered by the public prosecutor or performed, ex officio, by the judicial police (in this case, the seizure must be carried out within 48 hours of its being granted by the prosecutor); and
- during the preliminary investigations, the judicial police and the prosecutor can carry out the interrogation of any individual (including those not under investigation) who is considered to be in a position to provide the authorities with information that may be useful for the investigation.

2.4 Internal Investigations

Internal investigations are not mandatory in the Italian legal framework; they are carried out on a voluntary basis.

That said, internal investigations can be considered necessary, or at least highly advisable, for a corporation, in the event that the company becomes aware of a crime committed by one of its employees or directors.

The advantages of carrying out an internal investigation usually increase in cases where a crime which can trigger the liability of the legal entity involved (according to Legislative Decree 231/2001), since – in such cases – the investigation can be crucial for the legal entity to demonstrate the validity of its organisational models in preventing offences similar to the one that was committed.

Internal investigations are usually considered by prosecutor's offices and courts as items of evidence, although the relevant judicial authority is free to evaluate them at its own discretion.

Italian law does not provide any specific regulation governing internal investigations, instead they are usually regulated by corporate procedures. Internal investigations may be limited by the provisions of Italian civil and labour law.

2.5 Mutual Legal Assistance Treaties and Cross-Border Co-operation

Within the European Union, two main legal instruments are available to local authorities for cross-border co-operation:

- European Investigation Orders (regulated by Legislative Decree 108/2018) – acts issued by judicial authorities or by administrative authorities, and confirmed by a member state's judicial authority, ordering investigative acts or evidence collection, whose subjects are individuals or entities that are already in the territory of the Italian state or in the territory of another member state.
- European Arrest Warrants (regulated by Law 69/2005) – an arrest order valid throughout all member states of the European Union.

Italy has undersigned several mutual-legal-assistance treaties with other countries, which allow the flow of information and documents and other forms of co-operation between the judicial authorities.

Extradition

Extradition is regulated by the ICCP. An extradition request towards Italy cannot be granted with reference to a political crime, nor in cases in which there is a reason to believe that the defendant or the convicted person will be persecuted or subjected to discriminatory acts due to his or her race, religion, sexual orientation, nationality, language, political opinions or personal conditions, or that he or she will be subjected to inhumane and degrading treatment. An extradition request towards Italy cannot be granted without the positive decision of the Court of Appeal (known as a "jurisdictional guarantee"); such a decision can be appealed before the Supreme Court of Cassation.

When Italy files an extradition request, the Ministry of Justice is in charge of the relevant procedure.

In general, the regulation of extradition is ruled by the principle of speciality, under which an extradited person may not be prosecuted by the requesting state for any offence committed prior to their extradition or surrender other than those for which extradition was granted.

2.6 Prosecution

White-collar prosecution (as is the case for other crimes) is initiated by the enrolment in the prosecution office record of a notitia criminis and, as soon as available, of the names of the investigated people. Preliminary investigation is then carried out by the prosecutor, collecting evidence of the existence of the crime. If the collection is positive, the prosecutor serves a notice of the conclusion of the investigation. This provides a first description of the alleged crime and allows the investigated people to have access, for the first time, to the case file and put forward their defence arguments within 20 days. If still convinced of the existence of criminal liability at the end of this stage, the prosecutor goes forward with an act of formal indictment: a request of committal for trial (addressed to the judge of the preliminary hearing) or a decree of direct committal for trial (a fast-track procedure provided for crimes indicated in Section 550 of the ICCP).

Criminal prosecution is mandated by Section 112 of the Constitution, which means that the prosecutor has no discretion to decide whether or not to prosecute crimes that he or she deems

proved at the end of the investigation. However, the guarantee of this constitutional duty is different in proceedings against individuals than it is in those against corporations. In the first case, if the prosecutor decides to drop the case, he or she must file a formal request to the judge of the preliminary investigation, who is in the final position to drop the case or not. In the second case, the prosecutor may directly drop the case, with a motivated decree that must, however, be served to the general prosecutor, who can disagree and decide to continue the case.

2.7 Deferred Prosecution

Italy does not have legislation on deferred prosecution agreements or non-prosecution agreements. Such provisions are not compatible with the Italian system of criminal law, which is based on the principle of mandatory prosecution (Section 112 of the Constitution). The discretionary possibility for the prosecutor to defer a prosecution, or not to prosecute a crime at all, would be considered in conflict with this principle.

2.8 Plea Agreements

A plea bargain is a recognised special proceeding, prescribed by Section 444 of the ICCP, through which the indicted person asks for the application of a penalty of up to five years imprisonment in order to end the criminal proceedings and obviate the risk of a harsher penalty.

The plea bargain application, indicating the requested penalty and the criteria to determine it, must be addressed to the prosecutor to obtain his or her consent and then to the judge for his or her legal evaluation. The judge verifies the lack of grounds to issue a dismissal judgment, the correctness of the legal qualification of the fact and circumstances, and the correctness of the penalty calculation. If this legal check is passed, the judgment applying the penalty is issued.

The plea bargain allows for a penalty reduction of up to one third and other legal benefits (such as the possibility of an early extinction of the crime and freedom from the obligation to pay the proceedings' expenses). Moreover, its legal effects and outcomes are, compared to the ones for a conviction, less detrimental. The plea bargain judgment has no effect of res judicata in civil or administrative proceedings. Due to its beneficial nature, and to the fact that it prevents a criminal court deciding on the compensation for damages (which must then be addressed by the civil courts), in Italy the option of a plea bargain may be expressly excluded for some crimes (eg, sexual crimes) or made conditional on the payment of a due sum (eg, tax crimes).

3. White-Collar Offences

3.1 Criminal Company Law and Corporate Fraud

Criminal company law is regulated in Italy by the Italian Code of Civil Procedure. The main criminal offences are:

- Sections 2621-2622 – false accounting (see **3.6 Financial Record Keeping**);
- Section 2625 – hindrance of the internal control functions of a company, which amounts to a crime if it causes damage to shareholders (punishment is imprisonment for up to one year and a fine, doubled if the offence is committed in listed companies);
- Sections 2626-2627 – undue restitution to shareholders of capital contributions, profits or capital buffers of the company, punishable with imprisonment for up to one year;
- Section 2628 – illegal operations with the company shares, punishable with imprisonment for up to one year;
- Section 2629 – operations in prejudice of the company creditors, punishable with imprisonment for six months to three years;
- Section 2629-bis – omitted communication of a conflict of interests, punishable with imprisonment for one to three years if the omission causes damage to the company or others;
- Section 2632 – fictitious formation of the company capital, punishable with imprisonment for up to one year;
- Section 2634 – patrimonial disloyalty, committed when the author causes damage to the company by pursuing their own or another's interest, in conflict with the company's one, punishable with imprisonment for six months to three years;
- Section 2635 – private corruption (see **3.2 Bribery, Influence Peddling and Related Offences**);
- Section 2636 – illegal influence on the assembly, committed when the author determines a fictitious majority in the assembly pursuing an unfair profit, punishable with imprisonment for six months to three years;
- Section 2637 – price manipulation of non-listed financial instruments, punishable with imprisonment for one to five years for any person who disseminates false information or employs other devices likely to cause a significant alteration in the price of a financial instruments of a non-listed company; and
- Section 2638 – hindrance to the regulatory authorities (see **3.7 Cartels and Criminal Competition Law**).

In all these cases, confiscation of the profit, product and goods derived from the crime is provided by Section 2641.

When committed in the interest, or to the advantage, of the company, the aforementioned crimes may trigger corporate liability pursuant to Section 25-ter of Legislative Decree 231/2001.

In the same decree, Section 24 provides for liability of the company if the predicate crime of fraud against the state, or another public entity, is committed in the interest, or to the advantage, of the company. If held liable, the legal entity is punished with a pecuniary sanction of up to EUR774,500 and the application of disqualifying sanctions.

Other forms of corporate fraud are punished by Italian criminal law, but they do not trigger corporate liability (eg, Section 515 of the ICC, fraud in commerce).

3.2 Bribery, Influence Peddling and Related Offences

Bribery

Bribery in the public sector is punished by the ICC as follows:

- Section 318 – so-called "improper corruption", which is committed by a public officer (or a person in charge of a public service, see Section 320) who unduly receives or accepts the promise of money or other goods for carrying out an act of his or her function. Punishment (also applicable to the corruptor) is imprisonment for three to eight years, plus disqualifying sanctions and confiscation of the profit.
- Section 319 – so-called "proper corruption", which is committed by a public officer (or a person in charge of a public service, see Section 320) who receives or accepts the promise of money or other goods for omitting or delaying an act of his or her function, or for carrying out an act which is contrary to his or her duties. Punishment (also applicable to the corruptor) is imprisonment for six to ten years, plus disqualifying sanctions and confiscation of the profit; various aggravating circumstances are provided (eg, if the act is committed in a judicial proceeding (Section 319-ter)).

Under some conditions (Section 322-bis), the act is punishable in Italy even if bribery involves a public officer from a foreign country.

Influence Peddling

The above crimes may also amount to influence peddling (Section 346-bis) if anyone, taking advantage of a relationship with a public officer or a person in charge of a public service, unduly receives or accepts the promise of money or other goods as a price for his or her intermediation with that person or to pay that person for carrying out his or her functions. Punishment (extended to the payer) is imprisonment for one to four years.

Private Corruption

In the private sector, in 2012, the new Section 2635 of the Civil Code was introduced, punishing the crime of private corruption. It is committed by a corporation employee (either a manager or a subordinate person) who solicits or receives (even as a mere promise) money or other goods to commit or omit an act in violation of duty of loyalty. Punishment is imprisonment for one to three years, doubled if the act is committed in a listed company.

When committed in the interest, or to the advantage, of the company, the aforementioned crimes may trigger corporate liability pursuant to Sections 25 or 25-ter of Legislative Decree 231/2001.

3.3 Anti-bribery Regulation

Italian criminal legislation does not provide a specific obligation to prevent bribery or influence peddling and to implement a compliance programme.

However, bribery is a possible predicate crime to corporate administrative liability under Legislative Decree 231/2001, whereby it is mandated that the corporation can exclude the liability (Sections 6 and 7) only if certain conditions are met, amongst which is having adopted and effectively implemented a compliance programme.

Hence, even if the introduction of the compliance programme is not an obligation (and there are no sanctions for not having introduced one), it must be considered a precondition for the corporation's legal defence and attempt to avoid liability.

In order to ensure its exemption effect, the compliance programme must be specifically for (and suited to) the prevention of crimes of the type that has occurred, taking note of the requirements set forth by Section 6 (eg, identify the activities at risk, provide for specific protocols of action, introduce a supervisory body and a disciplinary system against violations, and introduce a whistle-blowing system).

3.4 Insider Dealing, Market Abuse and Criminal Banking Law

Criminal Banking

Legislative Decree 385/1993 (the consolidated law on banking or TUB) provides criminal sanctions for various offences around unauthorised banking activities. Amongst these are:

- unauthorised collection of savings (Section 130, imprisonment for one to three years and a fine);
- unauthorised collection of savings and performing of credit services (Section 131, imprisonment for one to eight years and a fine); and
- unauthorised performance of specific financial activities (Section 132, imprisonment for six months to four years and a fine).

An example of illicit banking conduct is the crime of usury punished by Section 644 of the ICC. It is committed by whoever lends money, receiving or accepting usurious interest in return. Punishment is imprisonment for two to ten years and a fine.

Legislative Decree 58/1998 (the consolidated law on financial markets or TUF) provides criminal sanctions for various offences of unauthorised financial activity. Amongst these is Section 166, which punishes with imprisonment of one to eight years and a fine any person who, without authorisation, provides investment or collective asset management services, markets units or shares of collective investment undertakings, sells financial products or financial instruments or investment services.

Market Abuse
Specific criminal sanctions are then provided in the TUF for market abuse offences, namely:

- insider trading (Section 184), punishable with imprisonment for two to twelve years and a fine of EUR20,000 to EUR3 million for any person who, possessing inside information by virtue of his or her role in the issuer company or in the exercise of his or her duties, carries out transactions on financial instruments using such information, or discloses such information to others outside the normal exercise of his or her duties, or recommends or induces others to carry out any financial transactions on the basis of such information; and
- market manipulation (Section 185), punishable with imprisonment for two to twelve years and a fine of EUR20,000 to EUR5 million for any person who disseminates false information or sets up sham transactions or employs other devices likely to cause a significant alteration in the price of financial instruments.

In both of these cases, confiscation of the profit, product and goods used to commit the crime is provided by Section 187. Courts may increase the fine when it appears inadequate even if the maximum is applied. Moreover, when committed in the interest or to the advantage of a company, the aforementioned crimes may trigger corporate liability pursuant to Section 25-sexies of Legislative Decree 231/2001.

3.5 Tax Fraud

In Italy there is not any specific obligation to prevent tax crimes, nor is it a criminal, administrative or civil offence to fail to do so.

Criminal tax law is covered by Legislative Decree 74/2000. The decree sets forth different tax crimes based on fraudulent conduct and a specific mens rea of tax evasion (for oneself or others). This area has been recently renewed with Decree 124/2019 (Law 157/2019), which has sharpened the sanctions against tax frauds.

Section 2 punishes (now with imprisonment for four to eight years) the crime of filing a fraudulent tax return by using invoices or other documents relating to non-existent operations. The crime is committed with the filing of a tax return whereby the tax income has been illicitly reduced by deducting costs for operations which are deemed non-existent from an objective (ie, total lack of the service or over-invoicing of an existing service) or subjective (ie, real service invoiced to or by a wrong person or entity) standpoint.

Section 3 punishes (now with imprisonment for three to eight years) the crime of filing a fraudulent tax return by means of other artifices. The crime is committed by filing a tax return whereby the tax income has been illicitly reduced through simulated operations, or using false documents or other fraudulent means that are suitable to deceive the Tax Authority, if the thresholds of punishment are met.

Section 8 punishes (now with imprisonment for four to eight years) the crime of issuing the false invoices that are then used to commit the Section 2 crime.

Section 11 punishes with imprisonment for six months to four years the crime of fraudulent escape from the payment of tax, committed if, with the intent to escape the payment of taxes for an amount higher than EUR50,000, the agent:

- sells in a simulated way;
- carries out other fraudulent actions on his or others' goods in a way that could concretely impair the tax collection procedure; or
- indicates a reduced amount of tax income in the papers submitted for a tax settlement.

All the crimes listed above are also punished with the mandatory confiscation of the price or profit and application of disqualifying sanctions. Moreover, the recent reform has introduced corporate liability (Decree 231/2001) for all the above-mentioned tax crimes (providing both pecuniary and disqualifying sanctions) and the possibility of a discretionary confiscation of any asset that turns out to be disproportionate to the income of the taxpayer.

3.6 Financial Record-Keeping

Criminal offences are set forth to ensure the transparency and correctness of the financial records with regard to both the market and the shareholders. This legal area has been comprehensively renewed with the introduction of new legislation in 2015.

False accounting is a crime punished by Sections 2621-2622 of the Civil Code. The crime is committed if the agent, pursuing a profit, intentionally places in the financial records (or in other mandatory communications) false material facts or fails to report material facts whose communication is imposed by law, in a way that is designed to mislead the reader. Punishment is imprisonment for three to eight years when the misreporting involves listed companies, or one to five years in non-listed companies. Confiscation of the profit, product and goods used to commit the crime is provided by Section 2641. As discussed in **3.1 Criminal Company Law**, the crime is possibly predicate to corporate liability under Legislative Decree 231/2001.

The omitted deposit of the financial records does not amount to a crime but only to an administrative offence sanctioned with a fine (Section 2630).

3.7 Cartels and Criminal Competition Law

Antitrust and competition legislation in Italy has a largely administrative or civil nature. Criminal sanctions are provided only in specific cases.

Antitrust administrative sanctions are provided by Section 15 of Law 287/1990, in cases of unfair cartel agreements or abuse of a dominant position the author of the offence is ordered to eliminate the unfair situation and can be sanctioned with a fine up to 10% of its latest revenue.

A criminal sanction may be applied if the conduct is carried out as a form of hindrance to the functions of a regulatory authority such as AGCOM, the regulator for competition and markets in Italy. Section 2638 of the Civil Code may be applied, punishment is imprisonment for one to four years, doubled if the act is committed in a listed company. Confiscation of the profit, product and goods used to commit the crime is provided by Section 2641.

Unfair competition is a civil offence set forth by Section 2598 of the Civil Code, which is committed if the author carries out acts to create confusion with a competitor or its products, denigrates a competitor or damages a competitor by any means contrary to professional ethics. In this case, the author is ordered to stop the conduct and can be convicted to provide compensation for the damage.

A criminal sanction may be applied if the act of unfair competition is committed with menace or violence against a competitor (Section 513-bis of the ICC). In this case, the sanction is imprisonment for two to six years.

3.8 Consumer Criminal Law

Consumer law in Italy is of an administrative nature and is regulated by Legislative Decree 206/2005.

The regulatory authority (AGCOM) may identify, investigate and order the stopping of any commercial conduct which is unfair towards consumers, also imposing an administrative sanction from EUR5,000 to EUR5 million (Section 24).

Common criminal law offences, set forth in the ICC, may also find application in the protection of consumers, such as:

- Section 442 – commerce of adulterated or counterfeit food, punished with imprisonment for three to ten years;
- Section 443 – commerce of adulterated drugs, punished with imprisonment for six months to three years and a fine;
- Section 515 – fraud in commerce, punished with imprisonment for up to two years and a fine;
- Section 517 – commerce of industrial goods with forged brands, punished with imprisonment for up to two years and a fine;
- Section 640 – fraud, punished with imprisonment for six months to three years and a fine; and
- Section 644 – usury, punished with imprisonment for two to ten years and a fine.

A new legislation (Draft Law S.283) is currently being discussed by the Italian Parliament with regard to consumer protection in some key domains (food, environment, health, etc), introducing new crimes, heavier sanctions and cases of corporate liability under Decree 231/2001. To date, the draft law has not been approved.

3.9 Cybercrimes, Computer Fraud and Protection of Company Secrets

The ICC provides for several criminal offences relevant to cybercrimes and computer fraud:

- Section 615-ter, unauthorised access to an IT system, punished with imprisonment for up to three years;
- Sections 635-bis et seq, damage to IT systems, punished with imprisonment for one to five years; and
- Section 640-ter, wire fraud, punished with imprisonment for six months to three years and a fine.

With reference to the protection of company secrets, the ICC provides for the crime of revelation of scientific or commercial secrets, punished with imprisonment for up to two years.

3.10 Financial/Trade/Customs Sanctions

Customs law violations may amount to administrative or, in the most serious cases, criminal offences. This sector is mainly regulated by Legislative Decree 43/1973, amended over the years.

Most recently, Legislative Decree 8/2016 introduced new criteria for distinguishing between administrative and criminal offences, which has had an important effect on customs law.

The main customs law offence is smuggling (ie, the fact of introducing goods into the territory of the state without paying the due customs charges). In accordance with the new distinction introduced in 2016:

- Smuggling offences punished with a pecuniary sanction only amount to administrative offences; these pecuniary sanctions are in most cases calculated as a multiple of the evaded custom charge (from two to ten times).
- Smuggling offences punished with imprisonment still amount to criminal offences (eg, conspiracy to smuggle refined tobacco, punished with imprisonment of three to eight years).
- Aggravated cases of smuggling, punished with imprisonment from three to five years, still have criminal relevance and now amount to an autonomous crime; these cases occur when the act is committed with the use of weapons, by three or more people, together with forgery offences or crimes against the public administration, or by a person who is part of a conspiracy aimed at committing smuggling.

In all cases, confiscation of the profit or product of the crime and confiscation of the things used to commit the crime are mandatory (Section 301).

3.11 Concealment

In Italian criminal law, concealment is a generic concept which may assume criminal relevance in different ways.

First of all, concealment is a main constituent element of the crime of handling goods deriving from a crime (*ricettazione*) set forth by Section 648 of the ICC, which is punished by imprisonment for two to eight years and a fine of EUR516–10,329 for whoever purchases, receives or conceals money or goods deriving from a crime, with the intent of gaining a profit for oneself or others.

Any felony (*delitto*) can be predicate to the crime of concealment; however, a person can be held liable for concealment only if he or she has not taken part (even as a mere participant) in the commission of the predicate crime.

Moreover, the act of "concealing" may also be the constituent element of other white-collar crimes such as:

- the concealment of information whose communication to a counter-party was – in good faith – deemed mandatory may lead to the finding of the crime of fraud (Section 640 of the ICC), punished with imprisonment from six months to three years; and
- the concealment of accounting sheets may lead to the finding of the tax crime of concealment or destruction of accounting sheets (Section 10 of Legislative Decree 74/2000), punished with imprisonment of 18 months to six years.

Finally, any crime is aggravated (Section 61, (2) of the ICC) if committed with the purpose of concealing another one.

3.12 Aiding and Abetting

Aiding and abetting another person to commit a crime is regulated by Section 110 of the ICC. According to this provision, aiders and abettors are subject to the same penalties provided by the corporate crime to the main offender. Pursuant to settled Italian case law, four preconditions must occur in order to establish liability for aiding and abetting:

- plurality of people committing the crime;
- commission of a crime (or of an attempt to commit a crime) by the principal author;
- facilitation provided by the aider and abettor to the main author; and
- awareness on the part of the aider and abettor to help the main author commit the crime.

As to the facilitation requirement, the provided help can be material or psychological. Material help occurs when the aider or abettor makes it simpler for the author to commit the crime (for example, the handing over of a picklock to the thief in order to facilitate the opening of the door). Psychological help occurs when the aider or abettor instigates, encourages or drives the main author to commit the crime (for example, a promise to a thief to buy a stolen painting, before a crime is committed, is held responsible for the psychological instigation of that thief).

Sections 112 and 114 of the ICC provide for aggravating and mitigating factors. An example of an aggravating factor is the participation in the crime of five or more people; an example of a mitigating factor is the negligible contribution provided by the aider and abettor.

3.13 Money Laundering

Money laundering and self laundering (the latter from 1 January 2015 onwards) can have, as a predicate offence, any wilful

crime with the exception of misdemeanours. Money laundering occurs when the agent, being aware of the circumstance that money or other goods stem from the predicate offence, conceals their provenance (paper trail tampering). The applicable penalty is a custodial sentence of two to eight years and a fine of EUR5,000–25,000 (self laundering) and a custodial sentence of four to twelve years and a fine of EUR10,000–25,000 (money laundering). Confiscation of the profit is mandatory. Both crimes trigger corporate liability when committed in the interest, or to the advantage, of the legal entity.

Legislative Decree 231/2007, recently amended, provides for specific duties targeted at preventing money laundering. The infringement of these duties can lead to administrative and, in the most serious cases, criminal liability.

The prosecution of administrative offences is carried out by different bodies, depending on the identity of the obliged person who has infringed the anti-money laundering obligations: a general competence is attributed to the Italian Ministry of Economics, while sanctions in regulated sectors are applied by the relevant regulatory authorities (eg, Bank of Italy, *Istituto per la vigilanza sulle assicurazioni* (the Italian insurance regulator) or *Commissione Nazionale per le Società e la Borsa* (the Italian securities regulator)). Examples of administrative offences are:

- infringement of the obligation to carry out adequate verification of a client (Section 56), punished with a pecuniary sanction of EUR2,000 or, in aggravated cases, with a pecuniary sanction of EUR2,500–50,000 Euro; and
- failure to report a suspect operation (Section 58), punished with a pecuniary sanction of EUR3,000 or, in aggravated cases, with a pecuniary sanction of EUR30,000–300,000.

The responsibility for the prosecution of criminal offences is held by the public prosecutor. The main criminal offences, besides the ones set forth in the ICC, are (Section 55):

- falsity or fraud in the verification of a client, punishable with imprisonment for six months to three years and a fine for anyone who, obliged to carry out adequate verification of a client, forges the data or information received from the client, or knowingly receives and uses forged data or information; and
- violation of the prohibition to report a suspect operation, punishable with imprisonment for six months to one year.

4. Defences/Exceptions

4.1 Defences

With reference to individuals, two kinds of defence can be employed.

The first one relates to the actus reus and it is aimed at establishing that the alleged illegal behaviour did not occur. Since, in most cases, white-collar offences provide criminal punishment for violations of financial, tax or regulatory provisions, it is of the utmost importance for the criminal defence to be supported by the expertise of colleagues adept in these areas.

The second type of defence relates to the mens rea. Almost all white-collar offences require wilful intent and therefore the defence must aim at proving that there was no intention to commit a crime (mere negligence is not sufficient to establish the mens rea).

With reference to corporate defence, the existence of a suitable compliance programme (an organisational model pursuant to Law 231/2001) at the time when the crime was committed can amount to a valid excuse. This is the case when the crime was committed by the management of the company and it can be proved that managers fraudulently circumvented the compliance programme or, automatically, in cases where the crime was committed by a subordinate employee. The implementation of the organisational model after the commission of the crime does not exclude corporate liability but can effectively mitigate the punishment.

Corporate liability in the Italian system is not triggered by any crime but only by specific categories of crime listed by Law 231/2001, such as bribery, false balance sheets or money-laundering. A suitable compliance programme can provide a liability shield with reference to each of the aforementioned crimes.

4.2 Exceptions

Section 131-bis of the ICC provides for a general exemption from criminal liability (applicable also to white-collar offences) when the offence brought about by the conduct is negligible and there is no reiteration of the conduct.

Other specific exceptions are set out by single provisions in the field of white-collar offences. Examples are:

- tax crimes where the tax evasion does not cross given thresholds;
- false balance sheets where no meaningful offence for the company or for the creditors occurs; and

- the crime of undue collection of public loans, which is not punishable when the amount of money does not exceed EUR4,000.

4.3 Co-operation, Self-Disclosure and Leniency

The idea of rewarding the author of a crime for post factum co-operation or self-disclosure has traditionally been regarded with scepticism in the Italian criminal law system, since such rewards might reduce the general preventative function of the criminal penalty, or might induce the author of the crime to accuse (even groundlessly) other people in order to mitigate their position.

However, Italian criminal legislation has recently shown an increasing interest in this kind of provision:

- The new Section 13 of Legislative Decree 74/2000, introduced in 2015, states that the tax crimes of incorrect or omitted tax returns shall not be punished if the taxpayer voluntarily self-corrects its tax position – before having knowledge of any tax inspection – and pays the due sums.
- The new Section 323-ter of the ICC, introduced in 2019, states that the authors of crimes against the public administration (including bribery) shall not be punished if, before having knowledge of any investigation, and in any case within four months from the commission of the fact, they voluntarily self-denounce, providing useful information for the prosecution of the crime and of the other participants in it; restitution of the profit of the crime is a further precondition in order not to be punished.
- In 2014, so-called "voluntary disclosure" legislation was introduced (Law 186/2014) in order to encourage the self-reporting of some tax crimes, in cases of positive conclusion of the disclosure procedure, the taxpayer was not punished for the tax crimes reported and for money-laundering facts linked to them.

Out of these cases, co-operative conduct with the investigation might be taken into consideration by the judge when applying the penalty (eg, reducing it because of the generic mitigating circumstances (Section 62-bis of the ICC)).

4.4 Whistle-Blower Protection

Private Sector

The practice of whistle-blowing in the private sector has been regulated by Law 179/2017, which amended the framework of the organisational models provided for by Section 6 of Legislative Decree 231/2001. Legislative Decree 231/2001 introduced the liability of the legal entity with regard to certain criminal offences committed by its directors, representatives or employees, in the interest or to the advantage of the legal entity itself. The body is not liable for the criminal offences committed by the said people if it can demonstrate the adoption and implementation, prior to the commission of the crime, of organisational models suitable for preventing offences similar to the one that was committed.

Section 6 mentioned above (as amended by Law 179/2017) sets out that the organisational models must provide for:

- one or more ways to offer detailed reporting of unlawful conduct (relevant according to Legislative Decree 231/2001) that the individual believes has occurred, based on precise and consistent factual elements, which are known because of the corporate functions performed, in order to protect the integrity of the legal entity;
- alternative ways of reporting, which guarantee (through technological anonymity) the confidentiality of the whistle-blower;
- the prohibition of retaliatory and discriminatory acts against the whistle-blower, in relation (directly or indirectly) to the reporting; and
- disciplinary sanctions against anyone who violates the confidentiality obligations in relation to the identity of the whistle-blower or against anyone who carries out, intentionally or with gross negligence, ungrounded reporting.

Retaliatory dismissal against the whistle-blower is void.

The addressees of the reporting obligation are the individuals mentioned by Section 5, a) and b), of the Legislative Decree 231/2001 (employees that are in top management positions and employees that are subject to the management or supervision of others).

Public Sector

A specific regulation is in force for public employment (Section 54-bis Legislative Decree 165/2001, amended by Law 179/2017). The public employee who reports unlawful conduct – of which he or she became aware due to their employment – cannot be sanctioned, demoted dismissed, moved, or subjected to any other negative organisational measures due to this reporting. The identity of the whistle-blower cannot be revealed. In criminal proceedings, their identity is protected within the limits provided for by the ICCP.

Law 179/2017 also introduced, for both the private and public sectors, a special exemption from criminal liability for the whistle-blower with reference to crimes of unlawful disclosure of secrets. This exemption is subject to certain limits, expressly prescribed by law.

5. Burden of Proof and Assessment of Penalties

5.1 Burden of Proof

In the Italian criminal trial, the burden of proof is entirely on the public prosecutor.

Section 27, paragraph 2 of the Italian Constitution sets out that the defendant is not considered guilty until a final judgment of conviction (ie, an irrevocable conviction decision).

The relevant standard of proof is expressly indicated by Section 533 of the ICCP: a conviction decision is issued by the judge only when the defendant is proven guilty beyond any reasonable doubt.

The proof of criminal liability does not allow any presumption mechanism, but Italian jurisprudence admits so called "indirect or circumstantial evidence" in order to prove the liability of the defendant.

5.2 Assessment of Penalties

In cases where a defendant is deemed guilty of a criminal offence by a criminal court, the assessment of penalties is specifically regulated by the ICC.

According to Section 132 of the ICC, the judge applies the penalty on a discretionary basis, but he or she must point out the reasons that justify the use of such discretionary power.

In any case, in increasing or decreasing the penalty, the judge cannot exceed the relevant limits provided for by the law.

According to Section 133 of the ICC, using the discretionary power prescribed by Section 132, the judge must take into consideration the seriousness of the crime, which is inferred from:

- the nature, the kind, the means, the subject, the time, the place and any other aspect of the conduct;
- the seriousness of the damage or of the risk caused by the crime to the injured party; and
- the level of mens rea or fault.

Moreover, the judge must also take into consideration the tendency or capacity of the defendant to commit further crimes, which is inferred from:

- the reasons that led the offender to commit the crime and the character of the offender;
- the criminal and judicial records of the offender and, in general, the background of the offender (their conduct and life before the commission of the crime);
- the conduct simultaneous with and subsequent to the crime; and
- the individual, familial and social conditions of the offender.

In the case of a plea agreement between the defendant and the prosecutor, the judge must verify the adequacy of the penalty agreed. The judge cannot modify this penalty; only grant it or, if he or she deems the penalty inadequate, reject it.

Cagnola & Associati Studio Legale was set up in July 2016 and is based in Milan, Italy. The firm specialises in corporate criminal law, an area in which its team of professional lawyers has developed significant expertise by participating in some of the most notable national and international trials. Its lawyers provide legal defence for both individuals and corporations in criminal proceedings and advisory services. The firm consistently relies on the most qualified experts and consultants in each specialised area. Amongst the firm's areas of expertise are anti-corruption, anti-money laundering, criminal tax law, environmental criminal law, banking and financial criminal law, and corporate and bankruptcy criminal law. The firm is composed of 15 people and provides legal assistance throughout Italy and internationally.

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