UNIVERSITA' degli STUDI di ROMA
TOR VERGATA

COURSE OF BUSINESS AUDITING

GOVERNANCE AND COMPLIANCE:

INTERNATIONAL LAWS AND REGULATIONS

11 dicembre 2015

AVV. NICOLETTA MINCATO

MINCATO&RUSSO ASSOCIATI

INTRODUCTION

BUSINESS AUDITING: COMPLIANCE PROGRAMS TO PREVENT CORPORATE CRIMINAL OFFENCES

MINCATO&RUSSO ASSOCIATI

Since the early 2000 years a paramount part of business auditing and control system is represented by compliance programs to prevent corporate criminal offence.

General context:

- 2001: crack of Enron (energy and commodities – default of 10 billions Dollars)
- 2002: crack of WorldCom (tlc – default 11 billions Dollars)
- 2002 -2003: crack of Cirio (default for being unable to reimburse a bond worth 75 millions Euors; total amount of debts: 700 millions Euros)
- 2003: crack of Parmalat (14 billions Euros)

OECD CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN FOREIGN BUSINESS TRANSACTION (adopted by the Negotiating Conference in 1997)

"Bribery is a widespread phenomenon in international business transactions, including trade and investment, which raises serious moral and political concerns, undermines good governance and economic development, and distorts international competitive conditions"

Responsibility of legal persons:

Measures must be taken to establish the liability of legal persons for the bribery of a foreign public official

Money laundering:

bribery of a foreign public official has to become a predicate offence for money laundering as well as common bribery

OECD CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN FOREIGN BUSINESS TRANSACTION (continued)

Adequate accounting requirements:

Within the framework of accounting laws and regulations of a country on the maintenance of books and records and financial statement disclosure, measures must be taken to prohibit the establishment of off-the-book accounts, the making of off-the-book transactions, the recording of non-existent expenditures, the use of false documents

Independent external auditors:

Objective assessment of company's accounts, financial statements and internal controls; reporting of discovery of bribery acts of a foreign public officials by external auditors to management and corporate monitoring bodies

Internal controls, ethics and compliance

FCPA

FCPA – FOREIGN CORRUPT PRACTICES ACT

United States Federal Law enforced by Securities and Exchange Commission (SEC)and the Department of Justice (DOJ)

1977

1988

1998

2012 → **guide to FCPA issued jointly by SEC and DOJ**

MAIN PURPOSE:

make it illegal for companies / natural persons acting on behalf of companies to influence any foreign officials or parties with any personal payments or rewards.

FCPA – FOREIGN CORRUPT PRACTICES ACT

"Corporate bribery is bad business. In our free market system it is basic that the sale of products should take place on the basis of price, quality and service. Corporate bribery is fundamentally destructive of this basic tenet. Corporate bribery of foreign officials takes place primarily to assist corporations in gaining business. Thus foreign corporate bribery affects the very stability of overseas business. Foreign corporate bribes also affect our domestic competitive climate when domestic firms engage in such practices as a substitute for healthy competition for foreign business"

- UNITED STATES SENATE, 1977 -

FCPA – FOREIGN CORRUPT PRACTICES ACT

LOCKHEED BRIBERY SCANDAL

Officials of aerospace company Lockheed paid foreign officials to favour their company's products

BANANAGATE SCANDAL (CHIQUITA BRANDS)

Officials of the Chiquita brands had bribed the President of Honduras to lower taxes

*** NO REQUIREMENT OF MATERIALITY because the Act concerns the intent of bribery rather than the amount**

FCPA – FOREIGN CORRUPT PRACTICES ACT

It applies to:

- ✓ **U.S. business**
- ✓ **foreign corporations trading securities in the U.S.**
- ✓ **American nationals, citizens, residents (whether or not physcally present in the U.S.)**

NATIONALITY PRINCIPLE

- ✓ **foreign natural and legal persons (if they are in the U.S. at the time of the corrupt conduct)**

PROTECTIVE PRINCIPLE

FCPA – FOREIGN CORRUPT PRACTICES ACT

BRIBERY: unlawful act to secure some type of favorable action by a foreign government

FACILITATING PAYMENTS: not necessarily unlawful act to ensure that government functionaries discharged certain duties or to expedite the performance

GREASING THE WHEELS: the official has no choiche but to bribe and bribery is legal in the Country

FCPA – FOREIGN CORRUPT PRACTICES ACT

2 MAIN SECTIONS

A. ACCOUNTING PROVISIONS: corporations must:

a. make and keep books and records that accurately and fairly reflect the transactions of the corporations;

b. devise and mantain an adequate system of internal accounting controls

B. ANTIBRIBERY PROVISIONS

ACCOUNTING PROVISIONS ⟷ ANTIBRIBERY PROVISIONS

Corporate bribery is often concealed by falsification of corporate books and records

BRIBES HAVE BEEN MISCHARACTERIZED AS:

- commissions or royalties
- consulting fees
- sales and marketing expenses
- scientific incentives and studies
- travel and entertainment expenses
- rebates and discount
- after sales services fees
- miscellaneous expenses
- petty cash withdrawal
- intercompany accounts
- supplier / vendor payments

FCPA – FOREIGN CORRUPT PRACTICES ACT

ANTIBRIBERY PROVISIONS:

IT IS PROHIBITED TO:

- ✓ **issuers, domestic concerns, others while acting in the territory of U.S. to**
- ✓ **offer to pay, pay, promise to pay, authorize the payment of**
- ✓ **money or any other value**
- ✓ **to a foreign official**
- ✓ **to influence any act or decision in his / her official capacity or to secure any other improper advantage**
- ✓ **in order to obtain or retain business (BUSINESS PURPOSE TEST)**

EXAMPLES OF OBTAINING OR RETAINING BUSINESS:

- winning a contract
- circumventing the rules for importation of products
- gaining access to non-public bid tender information
- evading taxes or penalities
- influencing the adjiudication of lawsuits or enforcement actions
- obtaining exceptions to regulations
- avoiding contract termination

PAYMENTS DONE BY THIRD PARTIES

FCPA expressly prohibits corrupt payments made through third parties or intermediaries when knowing that all or a portion of such money will be offered, given, promised to a foreign official.

RED FLAGS ASSOCIATED WITH THIRD PARTIES:

- ✓ excessive commissions to third - party agents or consultants;
- ✓ unreasonably large discounts to third - party distributors;
- ✓ third - party "consulting agreements" that include only vaguely described services;
- ✓ third party closely related or associated whit foreign officials
- ✓ the third party is merely a shell company incorporated in an off - shore jurisdiction;
- ✓ the third party requests payment to off – shore bank account.

PRACTICAL TIPS TO REDUCE FCPA RISK IN THIRD - PARTIES RELATIONSHIPS:

MINCATO&RUSSO ASSOCIATI

"Anti – Bribery / Anti – Corruption" (ABAC) solutions adopted by companies to fight against the regulatory and reputational risk of third parties FCPA violations:

- ✓ accurate due diligence on third parties to find out
  - competence
  - potential conflict of interests
  - former civil or criminal penalties
  - reputation
  - relationship with public officials
- ✓ provisions of anti – bribery clauses in the agreements
  - respect of the company's code of ethics;
  - respect of the company's anti - bribery policy;
  - termination of contract in case of third party's FCPA violation;
  - payments to be done on the bank account or the third party in the country where the third party is incorporated;
  - right of audit on the third party's books and records;
  - price definition in accordance with market benchmark for similar agreements and subjects;
  - timely based review and evaluation on third party's services.

SUCCESSOR LIABILITY:

Companies that merge with or acquire another company assume the predecessor company's liability of all kinds (civil or criminal).

FCPA violations are no exception.

PRACTICAL TIPS TO REDUCE FCPA RISK IN MERGER AND ACQUISITIONS:

- ✓ **conduct through risk - based FCPA and anti - corruption due diligence in potential new business acquisitions;**
- ✓ **ensure that the acquiring company's code of conduct and compliance policies and procedures regarding the FCPA and anti - corruption laws apply as quickly as is predictable to newly acquired business;**
- ✓ **train the directors, officers and employees of newly acquired business (and agents and business partners) on the FCPA and other relevant anti – corruption laws and the company's code of conduct and compliance programs;**
- ✓ **conduct an FCPA specific audit on newly acquired business;**
- ✓ **disclose any corrupt payments discovered as part of the due diligence of newly acquired entities.**

CORPORATE COMPLIANCE PROGRAMS

- critical component of a company's internal control system
- tailored to the company's specific business and to the related risks
- dynamic and in constant evolution

MAIN POINTS AND HALLMARKS OF COMPLIANCE PROGRAM ACCORDING TO SEC AND DOJ GUIDE:

1. commitment from Senior management and
2. code of conduct and compliance policies and procedures
3. oversight, autonomy and adequate resources to the senior executives who are set the task to improve compliance programs
4. risk assessment
5. training and continuing advice
6. incentives and disciplinary measures
7. THIRD - PARTIES DUE diligence and payments
8. confidential reporting and internal investigation
9. CONTINUOUS IMPROVEMENT: periodic testing and review
10. mergers and acquisitions: pre – acquisition due diligence and post acquisition integration

WHISTLEBLOWER PROVISIONS AND PROTECTIONS

whistleblowers are considered among the most powerful weapons to fight bribery and securitis law violations

- Sarbanes – Oxley Act (2002)
- Dodd – Frank Act (2010)

- it is forbidden to retaliate against whistleblowers
- incentives and protections are addressed to whistleblowers
- if they allow finding out violations fined with over $ 1.000.000, they are given an award (10% to 30% of the monetary sanctions recovered) by SEC

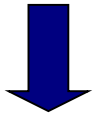
SARBANES – OXLEY ACT

The Sarbanes – Oxley Act, also known as *"Public Company Accounting Reform and Investor Protection Act"*, is a U.S. Federal Law issued on July 30, 2002: it is the legislative response to the wide spate of financial scandals that involved some of the most important U.S. commercial and accounting companies (Enron, Arthur Andersen, WorldCom, Tyco, …)

SOX introduced significant changes to companies' corporate governance discipline and financial markets' rules .

SARBANES – OXLEY ACT BACKGROUND

- **"ENRON" & "ARTHUR ANDERSEN" COLLAPSE**



- **problems related to the transparency and stability of financial markets**
- **heavy distrust of investors towards financial system**
- **need to improve companies' *corporate governance* rules, to ensure accounting records' transparency, to promote the quality of financial reporting by internal and external auditors, to enhance supervision on companies' management.**

THE ENRON SCANDAL

Enron was a Houston - based natural gas pipeline company formed by merger in 1985.

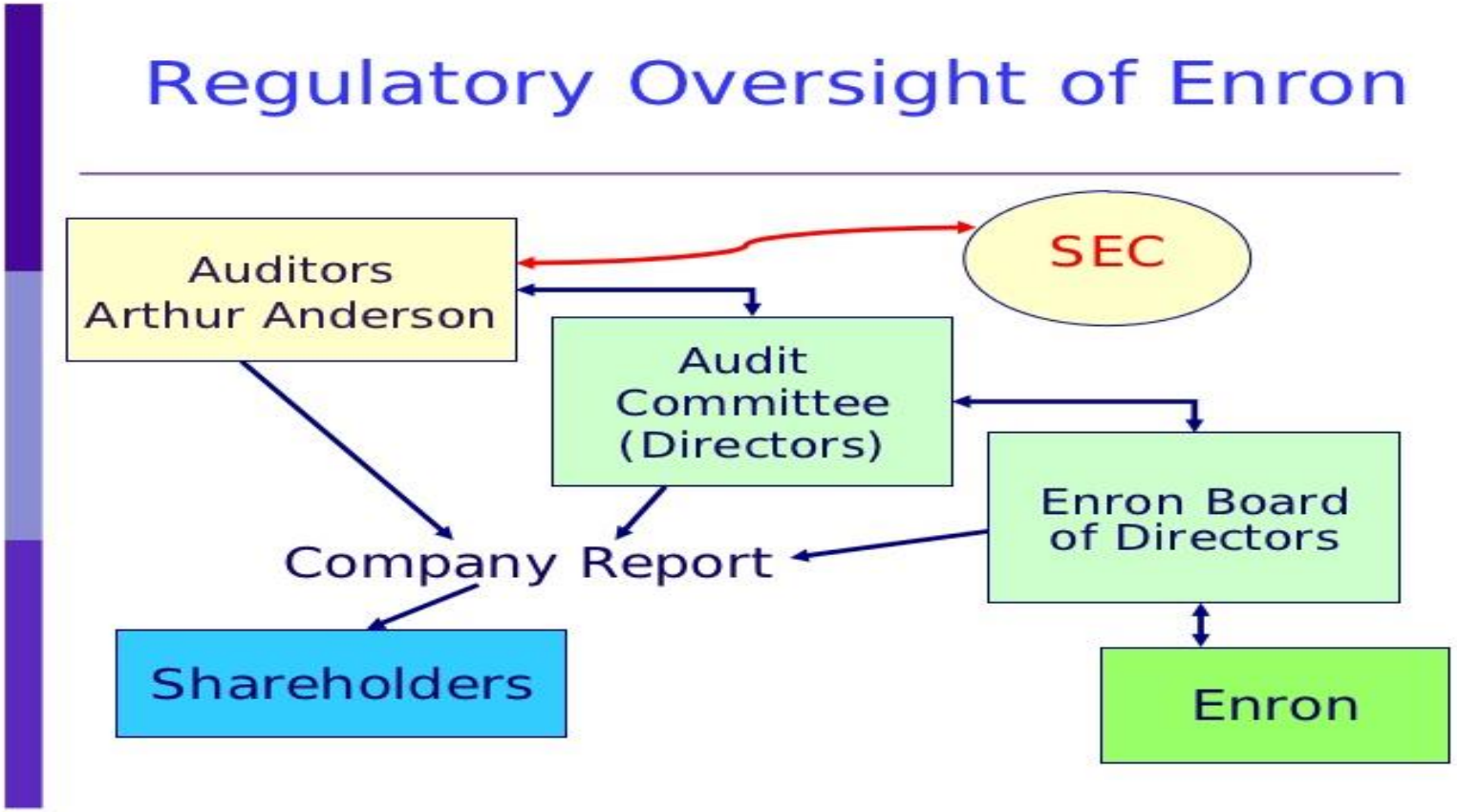
By early 2001 Enron became the 7th largest U.S. Company and the largest U.S. buyer / seller of natural gas and electricity

Enron was heavily involved in energy brokering, electronic energy trading, global commodity and options trading

- On October 16, 2001, in the first major public sign of trouble, Enron announced a huge third-quarter loss of $ 618 million.
- On October 22, 2001 the SEC began an inquiry into Enron's accounting practices
- Enron filed for bankruptcy on December 2, 2001
- Enron investors and retirees were left with worthless stocks.
- Enron was charged with security fraud (fraudulent manipulation of publicly reported financial results, lying to SEC, …)

QUESTION: in what ways were security market moral hazard problems at the heart of the Enron bankruptcy scandal?

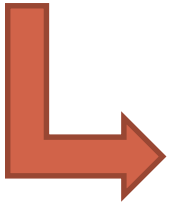
THE ENRON SCANDAL (continued)



THE ENRON SCANDAL (continued)

Enron's misconduct

- ❑ the Company's rapid growth in the late 1990s involved large capital investments … not expected to generate significant cash flow in short term.
- ❑ it was vital to Enron's energy trading business to maintaining credit ratings at an investment grade



SOLUTION: creation of many different partnerships (3000) structured as special purpose entities, that could borrow money from outside investors without having to be consolidated into Enron's balance sheet

Enron used such vehicle together with complex and dubious accounting schemes to: reduce tax payments, inflate income and profits, inflate stock price and credit rating, hide losses in off-balance sheet subsidiaries, fraudulently misrepresent the Company's financial condition in public reports (with the collusion of the auditing company Arthur Andersen).

ENRON & ARTHUR ANDERSEN

- Enron was one of the biggest clients of AA.
- Enron paid fees to AA for provision of better auditing consequences.
- AA completed the better report by sending untrained auditors to the client's sides or other unethical methods.

- When Enron came under investigation, the relationship between that company and Arthur Andersen was seen as a cozy one which made it easy to maintain the improper accounting practices by both parties.
- Enron and Arthur Andersen had set out to make as much money for themselves as possible.

These selfish acts led both companies into an eventual downfall in bankruptcy and affected the public of private investors with hard consequences, consisting of the total loss of their saved money.

BAD ACCOUNTING PRACTICES?

GENERAL ACCEPTED ACCOUNTING PRACTICES (prior to 2002)

- auditing companies often consult for the companies they audit (confict of interest)
- audit companies partners often later accept jobs from their clients companies
- companies often retain the same auditing company for long periods of time
- auditing companies have been allowed to police themselves
- appointment of auditor company was in theory by shareholders but in practice by senior management
- Audit Committee members often were not indipendent to senior management
- Audit Committee members had tipically been required to own company's stocks to align their incentives with those of company.

SARBANES – OXLEY ACT TOPICS

PURPOSE

TO RESTORE INVESTORS' TRUST AND SHAREHOLDERS' PROTECTION AGAINST POSSIBLE FRAUDS BY:

- ✓ introducing a supervisory body on external auditors, equipped with deep inspecting and sanctioning powers;
- ✓ introducing effective controls upon audit companies, submitted to strict operating rules in carrying out their activities (auditing and consulting);
- ✓ enhancing "*corporate responsibility*" principles;
- ✓ introducing new disclosure requirements for companies, to ensure completeness, clarity and promptness of information given to the market;
- ✓ improving quality and transparency with reference to financial reporting and auditing activities;
- ✓ providing for the prohibition of money lending to company's insiders;
- ✓ strenghtening the penalties against proven law's violation and against fraudulent behaviours by company's management ;
- ✓ giving more resources and powers to the Securities and Exchange Commission.

SOX structure consists of 11 titles:

1. Public Company Accounting Oversight Board
2. Auditor Indipendence
3. Corporate Responsibility
4. Enhanced Financial Disclosure
5. Analyst Conflict of Interest
6. Commission Resources and Authority
7. Studies and Reports
8. Corporate and Criminal Fraud Accountability
9. White-Collar Crime Penalty Enhancement
10. Corporate tax returns
11. Corporate Fraud and Accountability

FUNDAMENTAL PROVISIONS

- establishment (as no profit company) of the *Public Company Accounting Oversight Board* – PCAOB, having the specific task of supervising auditing activities related to listed companies;
- prohibition (subject to limited exceptions) for auditing companies to carry out additional services other than auditing activities for listed companies
- strict rules to ensure the independence of the auditing company (c.d. Auditor Partner Rotation) and to detect and prevent conflicts of interest;
- appointment of an Audit Committee, entirely composed of indipendent directors, within the Board of listed companies;
- management's responsibility for internal controls, through the requirement for their periodic evaluation - and certification – as far as their effectiveness and practicality is concerned;
- adoption by each listed company of a Code of Ethics and a Code of business' conduct;
- commitment, for each listed company, to send to SEC an Annual Report, to which are annexed the statements of the CEO and CFO that certify the accuracy and truthfulness of the information contained therein.

SARBANES OXLEY ACT APPLICATION

U.S. companies listed on NYSE and NASDAQ

+

Foreign companies that issue securities and are subject to compulsory "*registration*" (Sec. 12 SEA del 1934) or "*reporting*" (Sec. 15(d)), to SEC

ALSO ITALIAN COMPANIES LISTED ON NYSE OR BELONGING TO INTERNATIONAL GROUPS LISTED ON U.S. MARKETS

PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD

TASKS:

- to record accounting and auditing firms who work in / for listed companies (registration is a prerequisite for the provision of audit services to listed companies);

- to set uniform auditing standards, by adopting appropriate regulations to carry out auditing activities, to ensure quality of controls, ethics and independence in the preparation of the final reporting referred to accounting records;

- to make periodic inspections on registered companies;

- to start, when required, investigative procedures and disciplinary proceedings, also imposing sanctions

- to control and monitor the application of law provisions.

AUDITING COMPANIES

To ensure their independence and to prevent possible conflicts of interest – in addiction to the compulsory replacement of auditors every 5 consecutive tax years - it is forbidden to audit companies

A. to perform in favor of a listed company, while carrying out auditing activities, consulting activities, with reference to certain sensitive business areas and special services (exceptions can / must be authorized case by case by PCAOB).

B. to carry out audits in a given listed company if the CEO, the CFO, the CAO or any other member of management, or employees, of the listed company have previously worked at the auditing company and have participated in the revision of the same listed company, in the year before the starting date of the current audit review.

THE INTERNAL AUDIT COMMITTEE

U.S. listed companies have to appoint an *Audit Committee* which meets all the requirements provided by Rule 10A-3 of Security Exchange Act and the further provisions of Sec. 301 of Sarbanes-Oxley Act and of Sec. 303.A.07 of NYSE Listed Company Manual

TASKS AND POWERS:

- **supervisory functions on company's accounts**
- **control activities with reference to compliance with and respect of laws and regulations**
- **appointment of external auditors, determination of their compensation (within the *budget* set out by the Board of Directos) and verification of their work**
- **it can use external consultants to carry out its activities**
- **it is responsible for the adoption of specific procedures to receive and manage any confidential report could be sent by corporate functions or employees.**

MANAGEMENT'S LIABILITY FOR CERTIFICATION

DOUBLE ("civil" + "criminal") personal liability of CEO and CFO for the certifications issued.

→ obligation to give back incentives and bonuses received ("civil liability") and to pay fines or to be subjected to imprisonment ("criminal liability")

- **the "civil certification" consists of a declaration of conformity of the annual / quarterly reports to the legal requirements imposed by the Securities Exchange Act of 1934; the CEO and CFO must certify that, as far as they know, the reported financial situation can represent ("fairly present") the company's financial condition and the results of the operations carried out during the period to which the document refers. They also declare that the effectiveness of the internal control function has been checked out.**
- **the "criminal certification" refers such obbligation of conformity declaration to any "*periodic report*" on company's financial situation, whose content can represent ("*fairly present*") "*in all material aspects*" the company's financial condition; directors' liability arises when the director are informed / aware of the found non – conformity, but in any case they proceed to certification ("*certifies…knowing that…*").**

U.K. BRIBERY ACT

U.K. BRIBERY ACT

Act of the Parliament of United Kingdom issued in 2010; it came into force on July 1, 2011.

It punishes:

1. **bribery**
2. **being bribed**
3. **bribery of foreign public officials**
4. **failure of a commercial organization to prevent bribery**

BRIBERY OFFENCES PUNISHED UNDER THE U.K. BRIBERY ACT

- ✓ a person offers, promises or gives a financial or other advantage to another person to induce him / her to perform improperly a relevant function or to reward him / her for the improper performance
- ✓ a person requests, agrees to accept or receive a financial or other advantage to perform improperly a relevant function or as a reward for the improper performance

→ both the person who bribes and that who receives bribes are punished under U.K. Bribery Act

→ both public and private bribery is punished

BRIBERY OFFENCES PUNISHED UNDER THE U.K. BRIBERY ACT (continued)

- ✓ **a person bribes a foreign public official in order to influence him in his capacity as a foreign public official**

→ **foreign public official is whoever holds a legislative, administrative or judicial position of any kind in a Country other than U.K. or is an official or agent of a public international organization**

FAILURE OF A COMMERCIAL ORGANIZATION TO PREVENT BRIBERY

Provision applicable to all commercial organizations which have business in the U.K.

INNOVATION: the provisions apply to the organization itself (along with individuals / employees)

STRICT LIABILITY → **no need to prove any kind of intention or positive action of the organization**

WHAT IS A RELEVANT FUNCTION?

- ✓ any function of a public nature
- ✓ any activity connected with a business, trade or profession
- ✓ any activity performed in the course of a person's employment

and such function / activity must be performed in good faith, impartially and in a position of trust by virtue of performing it

regardless the fact that the activity has connection with the U.K. or is performed in a Country outside the U.K.

COMPANY'S LIABILITY

A commercial organization — **incorporated under the law of U.K.**
or
carrying on a business in the U.K.

is guilty if

a person associated with such commercial organization, who performs services for or on behalf of it in whatever capacity → **employee**, **agent**, **subsidiary**

bribes another person to
- **obtain or retain business for the organization**
- **obtain or retain an advantage in the conduct of business**

unless the commercial organization proves it has in place adequate procedures designed to prevent bribery

U.K. BRIBERY ACT AND COMPANIES' POLICIES

FULL DEFENCE FOR A COMMERCIAL ORGANIZATION TO AVOID BEING LIABLE TO PROSECUTION UNDER THE UK BRIBERY ACT

- adequate procedures to prevent people associated with it from bribing

THE UK BRIBERY ACT SETS OUT SIX PRINCIPLES THAT MUST INFORM PROCEDURES TO BE PUT IN PLACE BY COMMERCIAL ORGANIZATIONS TO PREVENT BRIBERY BEING COMMITTED ON THEIR BEHALF

PRINCIPLE 1
PROPORTIONATE PROCEDURES:

MINCATO&RUSSO ASSOCIATI

a commercial organization's procedures to prevent bribery by persons associated with it are proportionate to the bribery risks it faces and to the nature, scale and complexity of the commercial organization's activities.

Procedures include policies that set out common, general elements and procedures implementing policies, like those on:

- ✓ **gifts, hospitality and promotional expenditure, charitable and political donations, demands for facilitation payments;**
- ✓ **direct and indirect employment, including recruitment, disciplinary act and remuneration;**
- ✓ **financial and commercial controls such as adequate bookkeeping, auditing and approval of expenditure;**
- ✓ **decision making, such as delegation of authority procedures, separation of functions and the avoidance of conflicts of interest.**

They are also clear, practical, accessible, effectively implemented and enforced.

PRINCIPLE 2
TOP-LEVEL COMMITMENT:

the top-level management of a commercial organization (be it a board of directors, the owners or any other equivalent body or person) are committed to preventing bribery by persons associated with it. They foster a culture within the organization in which bribery is never acceptable.

Such commitment may involve internal and external communication of the commitment to zero tolerance to bribery.

PRINCIPLE 3
RISK ASSESSMENT:

the commercial organization assesses the nature and extent of its exposure to potential external and internal risks of bribery on its behalf by persons associated with it. The assessment is periodic, informed and documented.

Commonly encountered external risks can be categorized in five broad groups:

- ✓ **country risk**
- ✓ **sectorial risk (extractive industry and large scale infrastructure sector)**
- ✓ **transaction risk**
- ✓ **business opportunity risk**
- ✓ **business partnership risk**

OTHER PRINCIPLES

PRINCIPLE 4 – DUE DILIGENCE: the commercial organization applies due diligence procedures, taking a proportionate and risk based approach, in respect of persons who perform or will perform services for or on behalf of the organization, in order to mitigate identified bribery risks.

PRINCIPLE 5 – COMMUNICATION (INCLUDING TRAINING): the commercial organization seeks to ensure that its bribery prevention policies and procedures are embedded and understood throughout the organization through internal and external communication, including training, that is proportionate to the risks it faces.

PRINCIPLE 6 – MONITORING AND REVIEW: the commercial organization monitors and reviews procedures designed to prevent bribery by persons associated with it and makes improvements where necessary.

FACILITATION PAYMENTS (small bribes paid to facilitate routine Government acts):

Unlike under the FCPA and in accordance with OECD Bribery Convention, (that recognizes corrosive effect of facilitation payments) these payments are not exempted

D. LGS. 231/2001

ENTITIES' ADMINISTRATIVE RESPONSIBILITIES

D. LGS. 231/2001

ENTITIES' ADMINISTRATIVE RESPONSIBILITIES

INTRODUCTION AND BASIC PRINCIPLES

THE ITALIAN DECRETO LEGISLATIVO NO. 231 OF JUNE 8, 2001

- **Prior to the enactment of D. Lgs. 231/2001: *societas delinquere non potest***
  (Art. 27 of the Constitution of Italy "Criminal liability is a personal liability")

- **After the enactment of D. Lgs. 231/2001: *societas delinquere potest***
  - **(equivalence of the natural person holding a corporate office and the legal person: Cassation in criminal proceedings, July 9, 2009, Case No. 36083;**
  - **organizational deficiency: Cassation in criminal proceedings, July 16, 2010, Case No. 27735)**

LEGAL PERSON'S LIABILITY

- **Formally, an administrative-law liability**
  because the liability under the criminal law is solely attributable to natural persons and because it entails the imposition of administrative sanctions

- **Substantially, a criminal-law liability,** because:
  - ✓ it originates from an offence
  - ✓ and is established in accordance with criminal-law provisions;
  - ✓ has no objective nature (organizational deficiency)

ENTITIES LIABLE FOR THE COMMISSION OF A PREDICATE OFFENCE

In the event an internal resource (or, within certain limits) an external resource – when fulfilling his/her duties – commits any of the offences provided for by the Decreto, the liability is attributed to:

a. the individual having committed the offence (*just like in the past*) and

b. the corporate entity the individual works for (novelty), in the event it may be established that an advantage even only potential has been obtained by the corporate entity

ESTABLISHING THE ADMINISTRATIVE LAW LIABILITY OF LEGAL ENTITIES

MINCATO&RUSSO ASSOCIATI

The procedure corresponds to the criminal-law procedure.

- ✓ **Registration of the legal entity in the Roll of suspects (art. 55)**
- ✓ **Execution of preliminary investigations by the Public Prosecutor (art. 56)**
- ✓ **Case dismissal (directly by the Public Prosecutor, *under* art. 58), or notice of alleged offence under the administrative law (art. 59)**
- ✓ **Preliminary hearing (art. 61):** → judgement of case dismissal or
  → request of indictment
- ✓ **Trial**
- ✓ **Decision:** → of inexistence of legal person's liability (art. 66) or
  → issue of writ of nolle prosequi (art. 67) or
  → issue of judgment of conviction (art. 69)

ESTABLISHING THE ADMINISTRATIVE-LAW LIABILITY OF LEGAL ENTITIES (continued)

But the two proceedings are independent each from the other (art. 8)

The legal person's liability exists also when:

- ✓ the offender is not identified or is not prosecutable
- ✓ the offence is extinct for a reason other than an amnesty

- ❖ notice of the offence can not be given if the offence is time-barred (art. 60);
- ❖ the commission of the offence may not be established if the criminal proceedings can not be brought or continued due to the non-fulfilment of a condition for prosecutability (art. 37).

MINCATO&RUSSO ASSOCIATI

WHEN IS A CORPORATE ENTITY HELD LIABLE PURSUANT TO DECRETO 231?

Conditions for bringing an action against a Legal person

A: Subject

article 5, paragraph 1

The offence is committed by:

- persons serving as representatives, or holding administrative or senior executive positions within the body;

- persons under the direction or supervision of one of the persons above.

B: Interest or advantage

article 5, paragraph 1

The offence is committed

In the interest of the body

or

to the advantage of the body.

C: Type of offence

articles 24 and following

The offence must be expressely provided in the so-called

List of predicate offences.

WHICH ARE THE CONSEQUENCES FOR A LEGAL PERSON JUDGED LIABLE UNDER THE DECRETO (ART. 9)?

MINCATO&RUSSO ASSOCIATI

ADMINISTRA-TIVE FINES | **DISQUALIFICA-TION** | **SEIZURE** | **PUBBLICATION OF THE DECISION**

Sanctions of disqualification:

- prohibition to exercise the company's activity;
- suspension or revocation of authorizations, licences or concessions;
- prohibition to enter into contracts with Public Authorities;
- exclusion from facilitations, public financing, etc.;
- prohibition to advertise goods and services.

Monetary sanctions:

Method of calculation:

- the sanction has to be appied by quotas: from a minimum of 100 up to a maximum of 1000
- the amount of each quota ranges from a minimum of € 258 up to maximum of € 1,549

The monetary sanction, if applied, may amount to a maximum of € 1,549,000

The amount of the monetary sanction is determined by taking into account:

- the seriousness of the offence;
- the company's size.

WHEN IS THE BODY NOT LIABLE ACCORDING TO DECRETO 231?

MINCATO&RUSSO ASSOCIATI

Mechanism of exemption (article 6):

Adoption and efficient enactment, prior to commission of the act, of organizational and management models which are capable of preventing offences of the type occurring;	• Organisational Model 231
Appointment of a supervisory body	• Supervisory body
Fraudulent circumvention of the organizational and management models by the person who committed the offence	• Acceptable risk
There has been no omission or insufficient oversight on the part of the supervisory body	• Audit

MAIN CHARACTERISTICS OF THE ORGANI-SATIONAL AND MANAGEMENT MODEL?

MINCATO&RUSSO ASSOCIATI

Article 6, paragraph 2: the Model must

identify the activities in relation to which offences may be committed	• Risk assessment
provide for specific direct protocols and schedule training and implementation of decisions by the body regarding offences to be prevented	• "Protocols" as per article 6, paragraph 2
identify procedures for managing financial resources which are fit to prevent the commission of offences	• Procedures on financial resources
provide for obligations to disclose information to the supervisory body	• Reporting systems to the Supervisory Body
introduce a new disciplinary system to punish noncompliance with the measures set out in the model	• Disciplinary System

THE UPDATED LIST OF PREDICATE OFFENCES

Art. 24	Undue collection of contributions, fraud to the detriment of the State or other public body or fraud in order to obtain public funds and computer fraud to the detriment of the State or other Public Authority.
Art. 24-bis*	Cybercrime offences and unauthorized processing of data.
Art. 24-ter	Organized criminality offences.
Art. 25	Concussion and illegal inducement to give or promise money and corruption
Art. 25-bis	Counterfeiting currencydi monete, public credit instruments or stamps and distinguishing signs or instruments
Art. 25-bis1	Offences against industry and commerce

* Art. 9 of Decree Law No. 93 of August 14, 2013 - in force since August 17, 2013 the conversion into law of which is pending - amended paragraph 1 of article 24-bis including, among preidcate offences, also the following: *(i)* **Computer fraud by electronic identity theft** (art. 640-*ter*, c.3, c.p.); *(ii)* **Computer fraud by the entity providing electronic-signature certification services** (art. 640-*quinquies* c.p.); *(iii)* **Illegal use and forgery of credit cards** (art. 55, c.9, D.lgs. 231/07; *(iv)* **Unauthorized processing of data, False declarations and notices to the Authority for the protection of personal data, Failure to comply with decisions of the Authority for the protection of personal data** (Part III, Title III, Chapter II, D.lgs. 196/2003)

THE UPDATED LIST OF PREDICATE OFFENCES (continued)

Art. 25-ter	Corporate offences (including corruption between private entities)
Art. 25-quater	Offences committed for purposes of terrorism or subversion of the democratic order.
Art. 25-quater1	Female genital mutilation practices.
Art. 25-quinquies	Offences against the individual and solicitation of children.
Art. 25-sexies	Market abuse.
Art. 25-septies	Culpable homicide or culpable serious or very serious injuries due to infringement of occupational health and safety laws and rules.
Art. 25-octies	Handling of stolen goods, money laundering and use of money, assets or benefits of an illegal origin.
Art. 25-novies	Offences for infringement of copyright law.
Art. 25-decies	Offences of inducing not to give testimony or to give false testimony to judicial authorities.
Art. 25-undecies	Offences against the environment.
Art. 25-duodecies	Employment of illegally staying third-country nationals.

THE IMPREGILO CASE (G.I.P. (Preliminary Investigation Judge) Milan, November 17, 2009):

MINCATO&RUSSO ASSOCIATI

1st case of application of the condition releasing the entity from the administrative responsibility *as per* art. 6

FACTS: The Chairman and the Managing Director are indicted for agiotage (art. 2637 of the Italian Civil Code, outbound disclosure of *price sensitive,* manipulated or false information, so as to obtain a misrepresentation of the shares' performance).

In particular, the outbound information was correctly conceived, but the Company's Chairman requested the competent corporate office to look for a better financial statements indicator, thus affecting the elements necessary for an evaluation in order to give an unfair (better) view of the Company's performance.

THE IMPREGILO CASE (continued)

What was the *status* of the Company's compliance with the provisions of D. Lgs. 231/01 at the time when the offence was committed? *

✓ **on March 27, 2001 the Company adopted a procedure governing the disclosure of *price sensitive* requiring the following:**

a. description of the operation by the corporate office having direct knowledge of the fact which is the subject-matter of the communication;

b. drafting the press release by the Investor Relations' department;

c. approval of the final text by the Chairman and the Managing Director;

d. forwarding the communication to the press by the NIS electronic system, to Borsa Italiana, Consob and to at least 2 press agencies.

***Since the year 2000, the Company adopted an internal control system in conformity with the Self-Governance Code recommended by Borsa italiana s.p.a.**

THE IMPREGILO CASE (continued)

- ✓**on the 29th of January, 2003, the Board of Directors approved the Model of Organization and the Code of Ethics;**
- ✓ **on that same date, the Board of Directors appointed the Supervisory Body (a single-member body identified with the *compliance officer* entrusted with the internal audit = *internal audit manager*; the internal audit manager is "disconnected" from the Administration, Finance and Control Directorate and placed as a staff unit to the Chairman;**
- ✓ **the Model provides for obligations of annual verification of the most important corporate operations and on the effectiveness and efficiency of control procedures;**
- ✓ **the Model sets specific controls for the prevention of the agiotage offence:**
  - reference to the strict compliance with procedures governing the management of *price sensitive information*;
  - obligation to promptly disclose complete, adequate and non-selective information.

THE IMPREGILO CASE (continued)

The Company was acquitted because:

- it took prompt action to conform to the provisions of D.lgs. 231/01;
- it adopted a Model suitable for preventing the commission of the offence;
- the effective implementation of the Model was ascertained by an independent Supervisory Body;
- the offence could be committed by the fraudulent infringement of the provisions of the Model by a top manager.

N.B. By ruling No. 4677/2014 the Court of Cassation revised the judgment of the Court, confirmed by the Court of Appeal, deeming that the commission of the offence was not made possible by the fraudulent infringement of the Model, but by a procedure which neither provided for a cross-verification of press releases nor a preventive notice to be given to the control body.

THE "THISSEN KRUPP" CASE (Court of Turin, April 15, 2011

FACTS: burst of fire at Line 5 of the plant located in Turin, during the night between the 5th and the 6th of December, 2007, causing the death of 7 workers.

NATURAL PERSONS' LIABILITY UNDER THE CRIMINAL LAW: incorrect assessment of the risks connected with the production process and, in particular – ***conscious and voluntary*** – inaccurate / omitted assessment of the risk of "fire" – serious structural and organizational deficiencies connected with work and safety conditions.

THE "THISSEN KRUPP" CASE (continued)

The legal person's liability

- **Existence of interest and advantage:** *"The very serious infringements of the laws and rules governing the prevention of accidents and fire, the culpable omissions are characterized by an* ***economic significance, which the company was not only interested in, but it even undoubtedly drew an advantage out of them****, from the point of view of the considerable economic saving that it achieved by omitting to take any preventive measure in the plant in Turin".*

- **Failure to adopt, prior the occurrence of the accident, a Model of Organitazion and Management appropriate to prevent the commission of the offence:** *"only during the meeting of the board of directors held on December 21, 2007, amendments to the previously existing model of organization were approved, supplementing the same exactly with the provisions relating to culpable homicide aggravated by the infringement of the laws and rules in matter of prevention of accidents"*

- **Failure to divulge, even only *de facto* (→ reference to the so - called "principle of actual application") the Model of Organitazion and Management**, in consideration of the composition of the Supervisory Board and of the activity carried out by the same.

THE "THISSEN KRUPP" CASE (continued)

The legal person's liability, in particular with reference to the Supervisory Board:

- Only by the resolution taken on December 21, 2007, a person having specific competence of occupational safety was caused to join the Supervisory Board → **incorrect composition of the Supervisory Board**
- The inspection and audits in matter of occupational safety were started to be carried out from the first months of 2008 → **failure to carry out control activities**
- RSSP (Manager of the environment and safety sector), just because of his skills and knowledge, was appointed as member of the Supervisory Board → **correspondence between controller and controlled Company and, therefore, failure to meet the "autonomy" requirement**
- Such latter circumstances alone led the Court to consider that "**the Model, also after formal adoption, could not be made operative, and even less in an effective manner, due to the fact that the Supervisory Board did not meet the autonomy requirement**".

THE "THISSEN KRUPP" CASE (continued)

The law provisions in matter of health and safety

The general principles resulting from the selection of the laws and regulations governing the work relationship might cause the application of safety standards which are less demanding that those ensured by the laws of Italy.

BUT

To such respect, the safeguard provisions of arts. 7 and 16 of the Rome Agreement impose the compliance with international public order principles, by identifying a set of laws and regulations the application of which is mandatory.

EU MEMBER COUNTRIES	**Standard conditions ensured by Community laws and regulations uniformly in all EU member Countries**
NON - EU COUNTRIES	**The work relationship is governed by the application of the provisions of law No. 398/1987; therefore, in the event the *locus laboris* law applies to the work relationship, such law shall be anyway supplemented with the principles which ensure levels of protection appropriate to guarantee the workers safety, in the event of parameters which may be not in conformity with those taken as reference by local and international laws.**

THE "THISSEN KRUPP" CASE (continued)

The law provisions in matter of health and safety (continued)

The mandatory provisions which are required to be applied to work relationships include **art. 2087 of the Italian Civil Code**, according to which:

"The entrepreneur is required to adopt, in carrying ou the business, measures which, according to the specific characteristics of the work, skills and technique, are necessary to protect the physical safety and moral integrity of the workers".

Therefore, the employer has **a specific obligation to protect the workers** (regardless of the law applicable to the work relationship), extensively construed by case law as

obligation to comply with the principle of the maximum safety which may be technologically achieved.

D. LGS. 231/2001
ENTITIES' ADMINISTRATIVE RESPONSIBILITIES

SUPERVISORY BODY
appointment, characteristics, duties and powers

FRAMING AND CHARACTERISTICS

THE SUPERVISORY BODY

- is the body which, according to the law, is entrusted with supervising the effectivevess and efficiency of and the compliance with the Model, for the purpose of preventing offences from being committed: it is, therefore, "a corporate body" and must be "provided with autonomous powers of initiative and control" (article 6, paragraph 1, lett. b);
- it operates in a steady and continuous way watching over the adequacy, the updating of and the compliance with the Model.

REQUIREMENTS

Companies may freely adopt the solutions they consider as more appropriate to their business, provided that the following requirements are met:

a. **fairness, autonomy and independence:**
b. **professionalism and reputation;**
c. **continuity of action;**
d. **compliance with internal regulations.**

COMPOSITION OF THE SUPERVISORY BODY

Only external members:

advantages:
more independence
disadvantages:
less knowledge of the company's activity

Only internal members:

advantages:
better knowledge of the company's activity
disadvantages:
less independence

Mixed composition

An intermediate solution is more desirable, since it better satisfies the various needs:

- ✓ presence of external professionals operating jointly with Company's personnel;
- ✓ presence of external professionals, availing themselves of the support given by company's departments and offices (by way of example, Internal Audit)

The Supervisory Body may be constituted of one sole member or by a plurality of members.

The choice, which anyway has to be made by the company, shall take into account several elements:

- **higher or lower complexity of the corporate structure;**
- **inherent risk of commission of offences;**
- **characteristics of corporate processes**

COMPOSITION OF THE SUPERVISORY BODY

Supervisory Body constituted of one sole individual in the event of:

- a lower complexity of the corporate structure;
- the mapping of risks shows that risks are neither significant nor too differentiated and do not require any specific and heterogeneous range of professionals;
- corporate processes simple and limited in number.

Supervisory Body constituted of a plurality of members (collegiate) in the event of:

- complex structure provided with several departments and corporate bodies (a plurality of individuals who are required to concurrently refer to the Supervisory Body)
- inherent risk of commission of significant and differentiated offences, requiring specific skills which can not be found in one sole individual;
- a large number of complex corporate processes.

DUTIES AND POWERS OF THE SUPERVISORY BODY

MINCATO&RUSSO ASSOCIATI

The Supervisory Body has not any operational tasks and powers of action; it may avail itself of external advisor in order to carry out the technical operations necessary for carrying out controls, or of internal departments/offices having specific competence in the various sectors of the company which are from time to time caused to undergo the necessary controls.

POWERS

- ✓ taking initiatives and establishing infringements
- ✓ controls (inspections, requests of documents)

TASKS

1) control and supervision activity;
2) updating the Model;
3) administering training activities.

1. CONTROL AND SUPERVISION ACTIVITY

- **Supervising the effectiveness and efficiency of the Model: adequacy in terms of suitability to prevent predicate offences from being committed**

  Tools:

  - verifications about the effectiveness and efficiency of the Model with respect to the evolution of laws and regulations and/or the corporate organization;
  - periodical verification on the enforceability and adequacy of protocols;
  - verification on the adequacy of and compliance with the information obligations;
  - verifications on the compliance of management, operative, and accounting-administrative procedures with the principles of D.Lgs. 231.

- **Supervising the compliance with the Model: actual application**

  Tools:

  - periodical verification on the most significant transactions;
  - verifications on the management of funds;
  - actions taken in coordination with other control bodies;
  - specific verifications on single areas of risk mapped in the Model.

2. UPDATING THE MODEL

- **The Supervisory Body is responsible for giving the Company's top management notice of the occurrence of conditions (originating both within or out of the Company) requiring to amend and/or supplement the Model,** so that the latter be appropriate to the characteristics of the company and may, therefore, have a liability-releasing effect

- **The Model is a dynamic document** which has to be constantly updated upon occurrence of any of the following events
  - changes in laws and regulations;
  - changes in the organizational structure;
  - infringement of the Model.

3. INFORMATION AND TRAINING ACTIVITY

Information	**Determining and governing the "flows of information" from and to the Supervisory Body.**
Training	**The Supervisory Body, with the collaboration to be provided by the *management,* must take appropriate initiatives aimed at promoting the knowledge of the Model and of its provisions within the Company.**

THE INFORMATION FLOWS

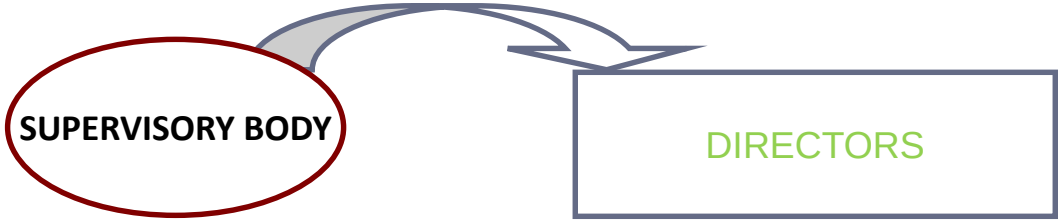
MINCATO&RUSSO ASSOCIATI

In order to effectively fulfil its control duties, the Supervisory Body must be made aware of events and information relating to the Company; on its turn, it must inform the management of the activities carried out and of the critical issues which have been found.

How are the information flows organized ?

1. **Flows toward the Supervisory Body**

2. **Flows from the Supervisory Body**



1. INFORMATION FLOWS TOWARD THE SUPERVISORY BODY

- **The *reporting activity* toward the Supervisory Body is aimed at enabling such body to be informed about facts which may entail a company's liability pursuant to the Italian D.lgs. 231/2001.**

- **Some particularly significant information must mandatorily and timely be reported to the Supervisory Body**

failure to comply with the obligations of information by the individuals from time to time involved is an infringement of the Model and is considered as a breach eligible for the imposition of sanctions.

1. INFORMATION FLOWS TOWARD THE SUPERVISORY BODY

The obligation of information, on the basis of the *best practices*, refers to:

- **any fact or information relating to events which may even only potentially entail a company's liability;**
- **infringementsof the Model and behaviours which may give rise to the suspicion that an offence has been committed, or that a behaviour in breach of the provisions of the Model has been put into practice;**
- **start of a judicial action against executives or employees, which are considered as liable for having committed any of the offences provided for by the Italian D.lgs. 231/2001;**
- **inbound or outbound communications on facts and events which may be put in relation with alleged commission of any of the offences provided for by the Decreto (by way of example, decisions and/or information given by judicial police bodies, disciplinary measured started/adopted vis-à-vis of employees);**
- **irregular or atypical events with respect to the principles stated in the Model;**
- **decisions to carry out operations causing any changes in the company's governance.**

Who is required to give notices to the Supervisory Body?

a. **anyone who is award of facts or information**, including external individuals (self-employed workers, economically-dependent self-employed workers);
b. **any corporate department/office which is vested with a specific role within a relevant process phase** must promptly give notice of any behaviour which may be meaningfully not in conformity with those described in the process and state the reasons which made such non-conformity advisable or necessary.

PERIODICAL FLOWS OF INFORMATION

- **The Supervisory Body must be given notice (on a quarterly or half-yearly basis, according to the best practices) of the outcome of periodical control activities carried out by the entities identified to such purposes by the Model; in particular:**
  - ✓ information relating to the actual implementation, at all levels of the corporate organization, of the Model;
  - ✓ recommendations on the compliance with the principles of control and behaviour;
  - ✓ significant critical issues relating to the application of the Model, which have become apparent following to control activities;
  - ✓ information relating to significant changes in the organization (changes in the processes and in the procedures, in the corporate governance, etc.);
  - ✓ updates to the powers conferred;
  - ✓ changes in the situations of risk or potential risk in relation to any of the offences provided for by the Decreto;
  - ✓ any notice given by the Board of Auditors relating to aspects which may point out any deficiency in the internal audit system, facts considered as censurable, remarks relating to the Company's financial statements.

2. INFORMATION FLOWS FROM THE SUPERVISORY BODY

- **The outcome of the activities carried out by the Supervisory Body must be reported to the Company's top management, for the adoption of the necessary decisions, if any.**

- **According to the *best practices*, various kinds of *reports* may be differentiated by timing and contents; the Supervisory Body:**
  1. **reports and/or gives notice of:**
     - the annual plan of the activities the same intends to carry out, specifying the relevant timing and the subject-matter of verification (in general, at the beginning of the financial year);
     - a report on the activities carried out, with particular reference to the audit activities and the outcome ofthe same, and on the implementation of the Model (on a periodical basis);
  2. **reports to the BoD** (on a continuous basis) the significant issues which have become apparent following to the activities carried out, the behaviours, if any, which are in breach of the corporate procedures, any infringement of the Model and the necessity of updating the same.

THE ENFORCEABILITY OF D. LGS. 231/2001 PROVISIONS TO OFFENCES COMMITTED IN FOREIGN COUNTRIES

REFERENCE LAWS AND REGULATIONS

ART. 4 D.LGS. 231/01: provision based on the principle of the university of jurisdiction, according to which a Company is accountable also for offences committed abroad.

<<In the cases and under the conditions of articles 7,8,9 and 10 of the Italian penal Code, any Company is also accountable for offences committed in foreign Countries provided that any such Company has its registered office in Italy and provided that such offence is not prosecuted by the authorities of the Countries where the same has been committed>>.

Pursuant to art. 4 of D.lgs. 231/01, in order to be prosecuted under the provisions of said *Decreto* for offences committed in foreign Countries

- ✓ the Company must have its **head office** in Italy
- ✓ the Company is not prosecuted by the foreign Country in the territory of which the offence has been committed (under law provisions equivalent to those of D.Lgs. 231) [the so-called **esclusive jurisdition clause**]
- ✓ the conditions for bringing legal proceedings against the natural person as per articles 7,8,9 and 10 of the Italian Criminal Code are met;
- ✓ the conditions for bringing legal proceedings against the natural person consists in the Ministri of Justice's request, then **such request must refers also to the Company**;
- ✓ the **conditions for imposing a sanction on the Company under art. 5 of D.Lgs. 231 must be met.**

The enforceability of D.Lgs. 231/01 provisions against offences committed in foreign countries

MINCATO&RUSSO ASSOCIATI

ART. 6, § 2, OF THE ITALIAN CRIMINAL CODE: "The offence is considered as committed in the territory of the State when the unlawful act has taken place even only in part thereat".

In order to consider the offence as committed in Italy it is only sufficient that "any of the plurality if offenders has taken any action contributing to join offence thereat, regardless of whether such action was unlawful *per se*, since it has to be regarded as part of the same offence to be considered as indivisible"

(Criminal Court of Cassation, 4284/00).

OTHERWISE

The offence is considered as committed in a foreign Country if the whole act infringing the law is accomplisched (both physically and otherwise) out of the territory of the Repubblic of Italy.

These are the only cases in which it must be verified whether teh conditions as per art. 4 of D.Lgs. 231/01 are met.

SUMMARY

COMPARATION BETWEEN UK BRIBERY ACT, FCPA AND D. Lgs. 231/2001

MINCATO&RUSSO ASSOCIATI

UK BRIBERY ACT 2010	FCPA 2003	D. Lgs. 231/2001
Provides for a defense for commercial organizations, consisting of adopting compliance programs	The adoption of compliance programs only allows a reduction of penalty	Provides for a defense for commercial organizations, consisting of adopting compliance programs
It concerns any kind of bribery, whoever the bribed person is	It only concerns bribery of foreign public officials	It concerns any kind of bribery, whoever the bribed person is
The company is responsible for adopting adequate compliance programs (strict liability)	The company is responsible for adopting an adequate accounting system	The company is responsible for adopting adequate compliance programs (strict liability)
No execption: payments to obtain or retain business in an improper manner are banned	Payments considered as legal under the local laws and regulations are allowed also under FCPA	
Facilitation payments are banned	Facilitation payments to facilitate routine governmental acts are allowed	