

# THE ITALIAN CORPORATE CRIMINAL LIABILITY LAW



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-PROF FABIO ACCARDI

- ❖ **FOUNDING PRINCIPLES OF ITALIAN CORPORATE CRIMINAL LIABILITY LAW**
- ❖ **CRIMES COMMITTED ABROAD**
- ❖ **INTERNATIONAL CORRUPTION**
- ❖ **INFORMATION FLOWS TO THE SUPERVISORY BODY**
- ❖ **WHISTLEBLOWING**
- ❖ **LATEST UPDATE : TAX CRIMES**

## Corporate Criminal Liability - What is it?

### ❖ **Formally**, an administrative-law liability

*because*

- ✓ the liability under the criminal law is attributable only to natural persons and not to entities.
- ✓ the Administrative-law liability stems from the commission of a crime into the organization but it entails the **imposition of administrative sanctions**

### ❖ **Substantially**, this is a criminal-law liability,

*because :*

- ✓ it originates from an offence
- ✓ It is established in accordance with criminal-law provisions;
- ✓ It has no objective nature (it depends on organizational deficiency that have favored the occurrence of a crime)

## Entities liable for the commission of a predicate crime

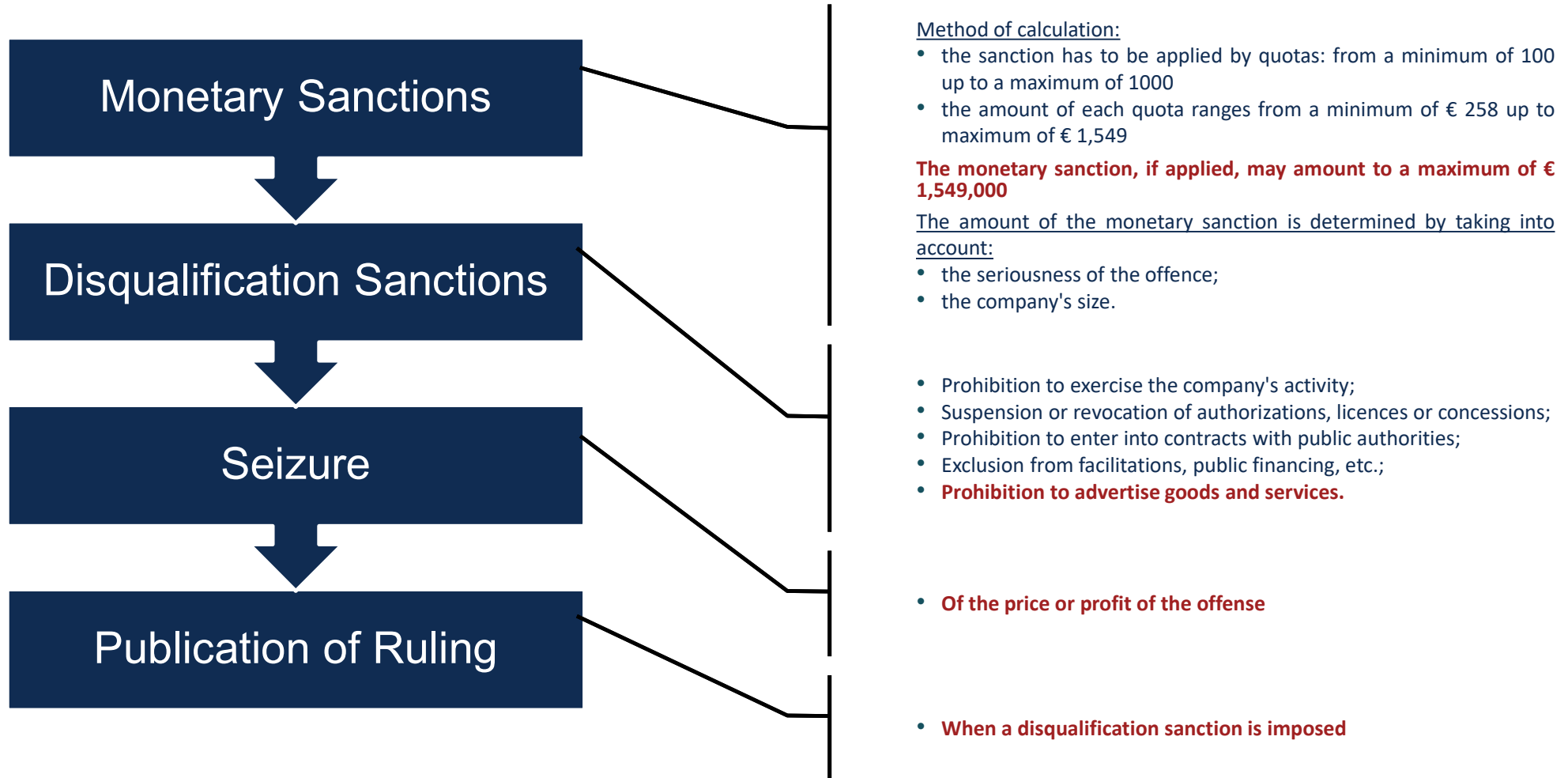
In the event internal personnel or (within certain limits) external individuals – when fulfilling his/her duties – commits any of the offences provided for by the Decreto, the liability is attributed to:

❖ **the individual having committed the offence (just like in the past) e**

❖ **the legal entity the individual works for, if it may be established that an interest or an advantage - even only potential - has been obtained by the corporate entity**

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

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## WHEN IS A LEGAL ENTITY HELD LIABLE PURSUANT TO DECRETO 231?

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Conditions  
for a trial  
against a  
Legal Entity

### A: Subjective Element

**art. 5, c. 1**

The offence is committed by:

- **individuals holding top positions** (those fulfilling representation, administration or management duties);
- **individuals operating under the direction or supervision of top managers**

### B: Objective Element

**art. 5, c. 1**

The offence is committed

**in the interest**

**or**

**to the benefit of the  
corporate entity**

### C: Predicate Offences

**artt. 24 e ss.**

The offence is any of those  
included in the

**List of predicate  
offences and crimes**

**The Company is not liable if the offense is committed in the exclusive interest of third parties**

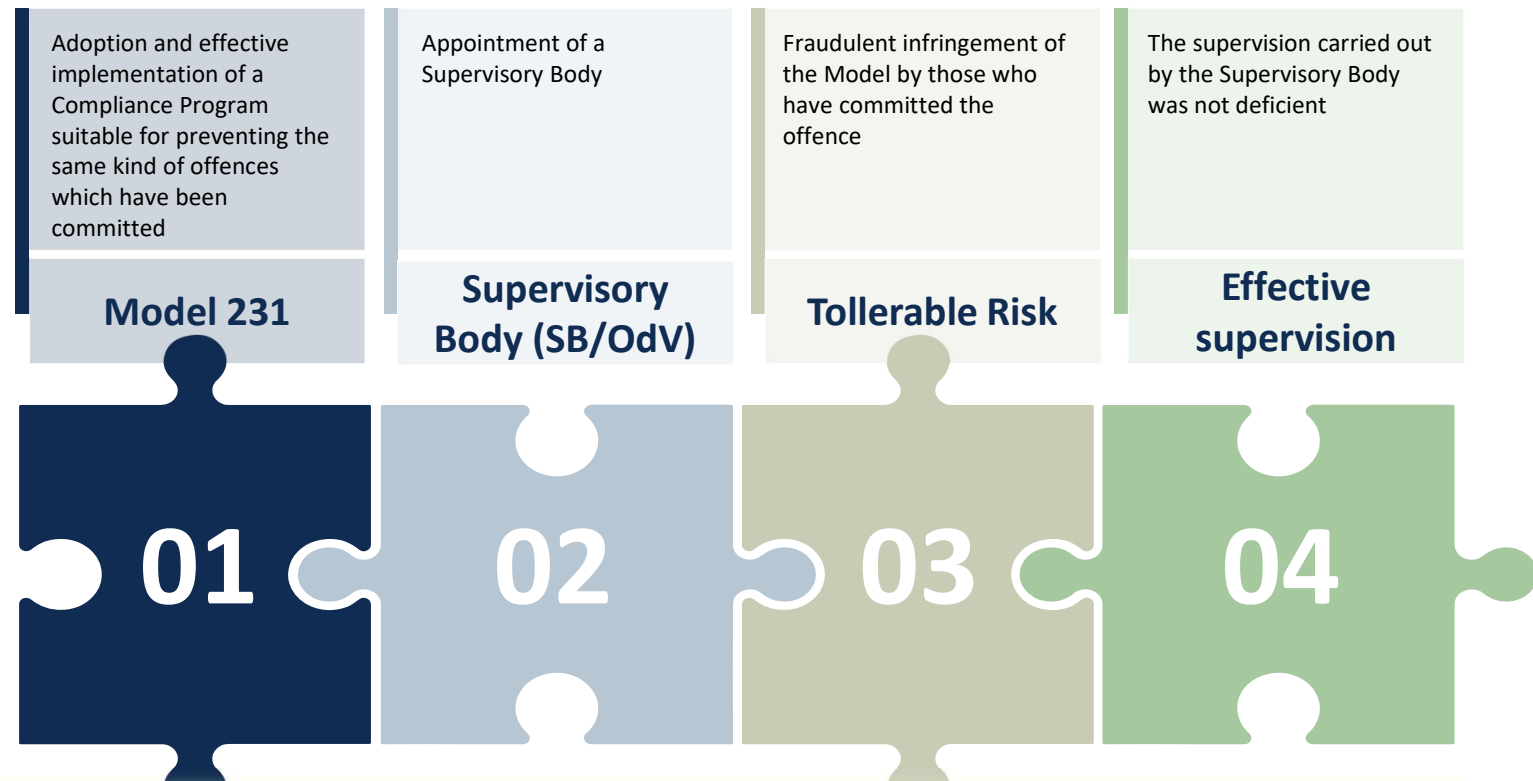
## WHEN IS THE LEGAL ENTITY HELD NOT LIABLE EVEN IF AN OFFENCES HAS BEEN COMMITTED?

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The liability of the Company is not objective and automatic, but is configured as an organizational fault for which an **EXEMPTING MECHANISM** is provided by law

**The Company is not liable for the offense if it proves:**

### Liability-releasing mechanism (art. 6)



When drawing up the Model of Organization as per D.Lgs. 231/01, it is important that an actual threshold allowing to limit the quantity/quality of the prevention measures to be adopted to avoid the commission of the offences provided for be defined. Failing to do so, the quantity/quality of preventive controls which may be set in place is virtually endless, with imaginable consequences on corporate operations and costs. As far as concerns the preventive control system to be set up in order to curb the risk of committing any of the offences provided for by D.Lgs. 231 of 2001, the conceptual threshold of acceptability, in the cases of offences resulting from willful misconduct, is represented by a prevention system which can be eluded **ONLY FRAUDULENTLY**. Guidelines by Confindustria – 2014

## THE UPDATED LIST OF PREDICATE OFFENCES

### Article D.Lgs. 231/01

**24**

Embezzlement to the detriment of the State, 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

**24 bis**

Cybercrime offences and unauthorized processing of data

**24 ter**

Organized criminality offences

**25**

Concussion, corruption and illegal inducement to give or promise money or other benefits misusing his powers and capacities

**25 bis**

Offences Of Counterfeiting Currency, Public Credit Instruments or stamps, trademarks, sign and patent

**25 bis1**

Offences against industry and commerce

**25 ter**

Corporate law offences (including false corporate communications, agiotage, corruption in the private sector)

**25 quater**

Offences committed for purposes of terrorism or subversion of the democratic order

**25 quater1**

Female genital mutilation practices

**25 quinquies**

Offences against individuals (including modern slavery)

## THE UPDATED LIST OF PREDICATE OFFENCES

### Article D.Lgs. 231/01

<b>25 sexies</b>	Market abuse
<b>25 septies</b>	Culpable homicide or culpable serious or very serious injuries due to infringement of occupational health and safety laws and rules
<b>25 octies</b>	Handling of stolen goods, money laundering and use of money, assets or benefits of an illegal origin (including Self-laundering)
<b>25 novies</b>	Offences for infringement of copyright law
<b>25 decies</b>	Offences of inducing not to give testimony or to give false testimony to judicial authorities
<b>25 undecies</b>	Offences against the environment (including offences connected with the discharge of industrial waste water containing hazardous substances, Illegal traffic in wastes, Environment pollution and disaster)
<b>25 duodecies</b>	Employment of illegally staying third-country nationals
<b>25 terdecies</b>	Racism and xenophobia
<b>25 quaterdecies</b>	Fraud in sporting events, abusive gambling or betting and games of chance exercised by means of prohibited devices
<b>25 quinquiesdecies</b>	Tax crimes
<b>25 sexiesdecies</b>	Smuggling
<b>Art. 12, L. n. 9/2013</b>	Liability of entities for administrative offenses resulting from a crime. Fraud relating to the production and sale of olive oil
<b>(L. n. 146/2006)</b>	Transnational Offences



### Norms

According to art. 4 of D.Lgs. 231/01 (and in compliance with

**universality of jurisdiction,**

meaning any entity is liable even for offences committed in foreign countries),

In order to in order to prosecute an entity under the provisions of said Decreto some condition precedents must be met

- ☐ The Company must have its **head office** (≠ registered office) in Italy;
- ☐ The Company must not be 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 **exclusive jurisdiction clause**];
- ☐ The conditions for bringing legal proceedings against the natural person as per arts. 7, 8, 9 and 10 of the Italian Criminal Code are met;
- ☐ If the condition for bringing legal proceedings against the natural person consists in the Ministry of Justice's request, then **such request must refer also to the Company**;
- ☐ The **conditions for imposing a sanction on the Company under art. 5 of D.Lgs. 231/01 must be met**

## THE ENFORCEABILITY OF ITALIAN CORPORATE CRIMINAL LIABILITY AGAINST OFFENCES COMMITTED IN FOREIGN COUNTRIES

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The Company, except in the cases provided for by art. 4 of Legislative Decree. 231/01, can respond pursuant to art. 6, 2, Italian Criminal Code

**Offenses that are partially committed abroad**

**“THE OFFENCE IS CONSIDERED AS COMMITTED IN THE TERRITORY OF ITALY WHEN THE UNLAWFUL ACTION HAS TAKEN PLACE EVEN ONLY IN PART THEREAT”**

For the Italian laws to be enforced, it is only sufficient that “any of the plurality of offenders has taken any action contributing to the joint offence, 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 accomplished (both physically and otherwise) out of the territory of the Republic of Italy.**

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

- International corruption is one of the several predicate offences which may involve an administrative responsibility
- The international character derives from the involvement of **public officials / individuals entrusted with a public service belonging to European Community bodies, EC Member Countries, foreign countries, public international organizations**
- Provisions of articles **319-quater, par. 2, 321 and 322, par. 1 and 2 of Italian Penal Code**, are applied even when money or any other advantage is given, offered or promised to **foreign public officials**
- International **corruption is not considered, as such, as an offence committed in a foreign country**. In fact, the offence of international corruption **may be committed**:
  - ❖ **in Italy**: only the general administrative responsibility preconditions are required to be fulfilled for its existence;
  - ❖ **in a foreign country but originating in Italy**: only the general administrative responsibility preconditions are required to be fulfilled for its existence;
  - ❖ **entirely in a foreign country**: for the company to be held liable, not only the general preconditions but also some special conditions provided for by art. 4 of D.Lgs. 231/01 have to be met.
- **Essentially, just like all other offences included in the Italian D.Lgs. 231/01, international corruption depends on where the offence is committed**

The version currently in force is the one contained in Legislative Decree 75/2020 which definitively implemented the European Directive PIF / 2017

### **art. 322 bis Italian Criminal Code**

The provisions of articles 314, 316, from 317 to 320 and 322, third and fourth paragraphs, also apply:

- 1) members of the Commission of the European Communities, the European Parliament, the Court of Justice and the Court of Auditors of the European Communities;
- 2) officials and agents hired under contract under the statute of officials of the European Communities or the regime applicable to agents of the European Communities;
- 3) to persons seconded by Member States or by any public or private body within the European Communities, who perform functions corresponding to those of officials or agents of the European Communities;
- 4) members and employees of bodies established on the basis of the Treaties establishing the European Communities;
- 5) to those who, in the context of other Member States of the European Union, perform functions or activities corresponding to those of public officials and persons in charge of a public service.
- 5-bis) to judges, prosecutors, deputy prosecutors, officials and agents of the International Criminal Court, to persons seconded by States parties to the Treaty establishing the International Criminal Court who perform functions corresponding to those of officials or agents of the Court itself, to members and employees of entities established on the basis of the Treaty establishing the International Criminal Court.
- 5-ter) to persons who carry out functions or activities corresponding to those of public officials and persons in charge of a public service in the context of international public organizations;
- 5-quater) to members of international parliamentary assemblies or of an international or supranational organization and to judges and officials of international courts;
- 5-quinquies) to persons who carry out functions or activities corresponding to those of public officials and persons in charge of a public service in non-EU states, when the fact offends the financial interests of the Union.

The provisions of articles 319 quater, second paragraph, 321 and 322, first and second paragraph, apply even if money or other benefits are given, offered or promised:

- 1) to the persons indicated in the first paragraph of this article;
- 2) to persons who perform functions or activities corresponding to those of public officials and persons in charge of a public service in the context of other foreign States or international public organizations.

The persons indicated in the first paragraph are assimilated to public officials, if they perform corresponding functions, and to persons in charge of a public service in other cases

Compared to the previous version in Paragraph 1 n. 5 quinquies, the punishment for passive corruption or incitement to corruption of P.U. or persons in charge of a public service also within countries not belonging to the European Union but only if the fact offends the financial interests of the Union.

Furthermore, with respect to the previous version, the reference to specific fraud represented by the purpose of procuring an undue advantage for oneself or others in international economic transactions or to obtain or maintain an activity has been eliminated in Paragraph 2 n.2 for the punishment of the corruptor economic or financial



- ❖ Research of potential partners in JV (*due diligence* and standard contractual clauses, compulsory compliance to the Company's Organizational Model and the Code of Ethics);
- ❖ Brokerage and agency relationship to be awarded contracts in foreign countries;
- ❖ Sponsorship agreements / parties funding;
- ❖ gifts and donations to foreign public officials;
- ❖ Personnel selection;
- ❖ Identification of consultants.

# INTERNATIONAL CORRUPTION

## SENSITIVE ACTIVITIES AND CONNECTED PROTOCOLS

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- 
- ❖ Brokerage and agency relationship
  - ❖ Relationship with commercial partners (JV, consortium)
  - ❖ Management of banks accounts / Management of payments
  - ❖ Donations and promotional expenses

- Adequate due diligence when selecting brokers and agents
- Written agreement
- Clause of respect of Code of Ethics
- Adequate fee

- Adequate due diligence
- Clause of respect of Code of Ethics

- Ban on the use of encrypted current accounts;
- Centralized monitoring on local c / c;
- Execution of checks on the correct management of financial flows in order to prevent the formation of hidden reserves and / or money laundering, self-laundering of money;
- carrying out checks on the amounts to be paid with the provisions of the Purchase Requests / Orders;
- Ban on making cash payments;
- Ban on the use of virtual credit institutions.

- Formal definition of powers to act
- Prior authorization procedure
- Definition of the maximum amount that can be spent
- Traceability of financial flows
- Internal financial procedures
- No conflict of interest

**The Supervisory Body has not any operational responsibilities and powers of action; it may avail itself of external advisor in order to carry out the technical operations necessary for carrying our 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)

### RESPONSABILITIES

Control and supervision activity

Updating the Model

Training activities



## B. PERIODIC INFORMATION FLOWS TO THE SUPERVISORY BODY (CERTIFICATIONS)

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The SB must also be informed

- ✓ through the Internal Audit Service
- ✓ by the heads of the Corporate Departments and Services, the Country Managers of the Branches and the Project Managers of the Italian and foreign Operating Units
- ✓ through the attestation tool
- ✓ on a quarterly basis

Public tender procedures /  
negotiated procedures and  
relevant measures

Relations with relevant third  
parties: commercial,  
industrial and financial  
partners; transactions with  
related parties; Public  
Administration

Extraordinary transactions:  
mergers, spin-offs,  
acquisitions and sales of  
company branches, share  
capital increases;

This information can also be sent to the Supervisory Body on an "ad hoc" basis, if justified by events relevant for 231 purposes

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- Recruitment of senior staff
- Litigation pending
- Gifts and donations paid

- Sponsorships carried out
- audits received (internal and external)
- Accidents at work

- Environmental accidents
- real estate assets (with reference to purchases and sales and active and passive leases of properties)

This information can also be sent to the Supervisory Body on an "ad hoc" basis, if justified by events relevant for 231 purposes

LAW November, 30 2017, n. 179

Paragraph 2-bis. The models referred to in letter a) of paragraph 1 provide

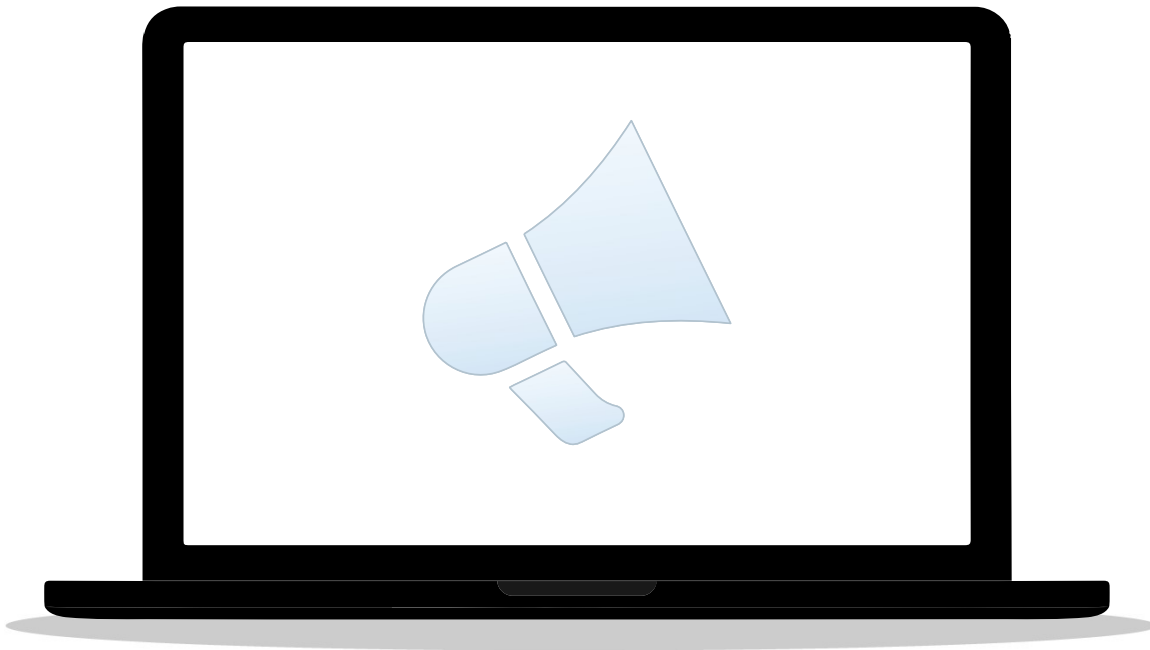
- a) **one or more channels** that allow the subjects indicated in article 5, paragraph 1, letters a) and b), to submit, to protect the integrity of the entity, detailed reports of unlawful conduct, relevant pursuant to this decree and based on precise and consistent factual elements, or violations of the organization and management model of the entity, of which they have become aware due to the functions performed; **these channels guarantee the confidentiality of the identity of the whistleblower in the management of the report;**
- b) at least one alternative reporting channel suitable for guaranteeing the confidentiality of the identity of the whistleblower **using IT methods;**
- c) **the prohibition of retaliation or discriminatory acts**, direct or indirect, against the whistleblower for reasons connected, directly or indirectly, to the report;
- d) in the disciplinary system adopted pursuant to paragraph 2, letter e), **sanctions against anyone who violates the protection measures of the whistleblower, as well as those who make reports with willful misconduct or gross negligence that prove to be unfounded.**

LAW November, 30 2017, n. 179

**Paragraph 2-ter.** The adoption of discriminatory measures against the subjects who make the reports referred to in paragraph 2-bis can be reported to the National Labor Inspectorate, for the measures within its competence, as well as by the reporting party, also by the trade union organization indicated by the same

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**Paragraph 2-quater.** Retaliatory or discriminatory dismissal of the reporting subject is void. The change of duties pursuant to article 2103 of the civil code, as well as any other retaliatory or discriminatory measure adopted against the whistleblower are also void. It is the responsibility of the employer, in the event of disputes related to the imposition of disciplinary sanctions, or to demotion, dismissal, transfer, or subjecting the whistleblower to other organizational measures having negative, direct or indirect effects, on the working conditions, subsequent to the presentation. of the report, demonstrate that such measures are based on reasons unrelated to the report itself.



### CONTENT OF THE REPORT

- No personal complaints
- A fact that constitutes a danger to the entity
- Detailed information (need to provide useful information for internal investigations but not need for evidence)



### REPORTING CHANNELS

They must have the characteristics necessary to guarantee the confidentiality of the reporting management process

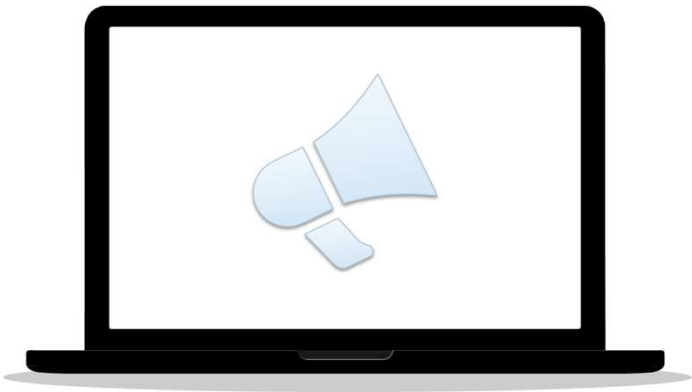


\* The identification data are acquired but are separated from the content of the report and replaced with alpha-numeric codes, so that the report is processed anonymously and that only subsequently, only in cases where it is strictly necessary, it is possible to associate the report with the identity of the whistleblower (ANAC Guidelines, Determination no. 6 of 28/04/2015 [so-called " anonymized " report])

### Possibility of disclosing the identity of the reporting party only:

1. with the consent of the reporting party, or;
2. when identity is absolutely essential to investigate investigative investigations, to ensure the protection of the company and / or the defense of the reported person (e.g. maliciously false reports)

In case 2. access to the identity of the whistleblower is allowed only after a reasoned request by the SB archived in the system



SANCTIONS  
\* POSSIBLE  
TO:

reported if responsible

reporting → if he has abused the report

employer → if it adopts discriminatory or retaliatory behavior

recipient of the report → if he violates confidentiality obligations

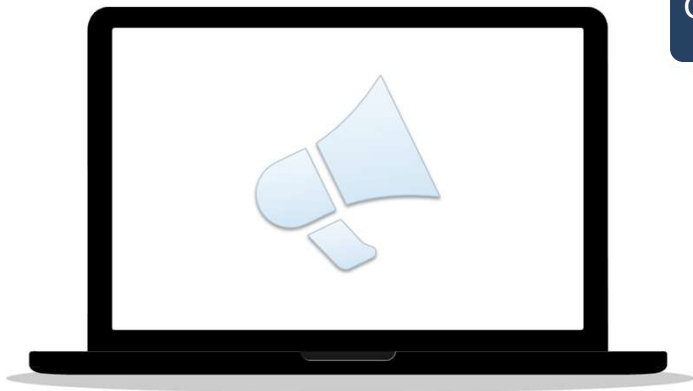
**\* STATUTE OF WORKERS**

**or**

**RESOLUTION / PENALTY CLAUSES for collaborators**

## WHISTLEBLOWING E D. LGS. 231/2001 (ART. 6, COMMA 2-BIS)

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ONE OR MORE CHANNELS + A CHANNEL SUITABLE TO  
GUARANTEE CONFIDENTIALITY WITH IT METHODS

TO MAKE CIRCUMSTANCED REPORTING BASED ON  
PRECISE AND CONCORDING ELEMENTS

OF RELEVANT UNLAWFUL CONDUCT PURSUANT TO D.  
LGS. 231 (CRIMES)

or

VIOLATIONS OF THE MODEL

SUITABILITY TO GUARANTEE THE CONFIDENTIALITY OF  
THE REPORTING AGENT



Tax offenses included in Legislative Decree 231/2001 with the Decree-Law of 26 October 2019, n. 124, coordinated with the conversion law of 19 December 2019, n. 157, bearing: "Urgent provisions on tax matters and for non-postponable needs"

### Art. 2

Fraudulent declaration through the use of invoices or other documents for non-existent transactions

### Art. 3

Fraudulent declaration by other artifice

### Art. 8

Issue of invoices or other documents for non-existent transactions

### Art. 10

Concealment or destruction of accounting documents

### Art. 11

Fraudulent evasion of tax payments

On 15 July 2020, Legislative Decree no. 75 of 14 July 2020 "Implementation of the EU Directive 2017/1371 relating to the fight against fraud affecting the financial interests of the Union through criminal law" (the so-called PIF Directive) which, among the various innovations, has expanded the catalog of predicate offenses referred to in Legislative Decree 231/2001.

UNFAITHFUL DECLARATION (Article 4 of Legislative Decree 74/2000) if the VAT fraud is of a transactional nature and the evasion is not less than 10 million euros;

OMITTED DECLARATION (Article 5 of Legislative Decree 74/2000) if the VAT fraud has a transactional character and the evasion is not less than 10 million euros

UNDUE COMPENSATION (Article 10-quater of Legislative Decree 74/2000) if the VAT fraud is of a transactional nature and the evasion is not less than 10 million euros

### *25-quinquiesdecies del D.Lgs. 231/2001*

FRAUD IN PUBLIC SUPPLIES (Article 356 of the Criminal Code)

FRAUD TO DAMAGES OF THE EUROPEAN AGRICULTURAL GUARANTEE FUND AND THE EUROPEAN AGRICULTURAL FUND FOR RURAL DEVELOPMENT (art.2 L. 898/1986)

SMUGGLING (D.P.R. 43/1973)

### *art. 24 del D.Lgs. 231/2001*

### *art. 25 sexdecies 231/2001*

PECULATE (Article 314 paragraph 1 of the Criminal Code) when the fact offends the financial interests of the European Union

PECULATO MEDIANTE PROFITTO DELL'ERRORE ALTRUI (art. 316 c.p.) quando il fatto offende gli interessi finanziari dell'Unione europea; PECULATION BY PROFIT OF THE ERROR OF OTHERS (art. 316 of the criminal code) when the fact offends the financial interests of the European Union;

ABUSE OF OFFICE (Article 323 of the Italian Criminal Code) when the fact offends the financial interests of the European Union

### *art. 25 del D.Lgs. 231/2001*