New Rules on Private-to-Private Corruption Adopted in Italy

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On April 14, 2017 Legislative Decree No. 38 of March 15, 2017 ("Legislative Decree No. 38/2017") entered into force. The Decree is aimed at reinforcing the fight against corruption in the private sector in line with decision No. 2003/568 of July 22, 2003 of the European Council.

The discipline of private-to-private corruption contained in article 2635 of the Italian Civil Code was one of the points severely criticized by the Evaluation Report on Italy adopted by the Council of Europe’s Group of States against Corruption ("GRECO") at its 54th plenary meeting held in Strasbourg on March 20-23, 2012.

The 2012 reform had already changed the Italian private-to-private corruption legislation, but further amendments were deemed necessary in order to avoid the risk of an infringement proceeding by the European Commission.

The new legislation amends both the Italian Civil Code and Italian Legislative Decree No. 231 of June 8, 2001 on the quasi-criminal liability of legal persons, companies, and associations ("Law 231") and provides for important innovations aimed at strengthening the protection of public interests, such as expectations of transparency and proper functioning of markets, safeguard of competitiveness of enterprises, and competition rules.

Affected Parties

The old version of Article 2635 of the Italian Civil Code sanctioned executives, general managers, directors, auditors, and liquidators of a company (or any employee of a company acting under the direction or supervision of any of these persons) that acted—or omitted to act—in breach of the duties relating to their office or in breach of the duty of loyalty incumbent upon them, to the detriment of the company, in exchange for the payment or the promise of money or other kinds of advantage.

The same sanctions applied to the persons who bribed the persons above.

The new wording of the provision sets forth important innovations as to the persons who commit the offence: firstly, the offence is punished even when committed through a third party ("per interposta persona"); secondly, it can be committed even by persons that hold representative, administrative, or executive positions (even de facto) within the company other than those indicated under Article 2635 of the Italian Civil Code.

The reform also extends the scope of the provision to legal entities other than companies, including foundations, non-profit organizations, political parties, unions, associations, etc.
The Offence

The most significant innovations concern the structure of the offence.

It is irrelevant whether the person actually carried out the action or omission in breach of his duties, since what matters is whether he requested, accepted, or received an undue advantage to commit or omit such acts.

In such cases, under the new provision the offence is punished not only when the person promises or gives an undue advantage, but also when he merely offers such advantage.

Moreover, as opposed to the old provision, the offence is now punished even if the act or omission does not cause detriment to the company.

The New Provision Concerning Instigation to Private Corruption

Legislative Decree No. 38/2017 introduces under Article 2635-bis of the Italian Civil Code the new offence of instigation to corruption, both from the active and passive side.

In particular, Article 2635-bis of the Italian Civil Code punishes executives, general managers, directors, auditors, and liquidators of a company (or any employee of a company acting under the direction or supervision of any of these persons) who demand, for themselves or others, the payment or promise of money or other kinds of advantage, in order to act—or omit to act—in breach of the duties relating to their office or in breach of the duty of loyalty incumbent upon them, even when such demand is not accepted.

Moreover, such provision sanctions any person outside the company who offers or promises the payment of money or other kinds of undue advantage to someone holding representative, administrative, or executive positions within the company in order to persuade them to act—or omit to act—in breach of the duties relating to their office or in breach of the duty of loyalty incumbent upon them.

It follows that, as a result of the amendments introduced by Legislative Decree No. 38/2017, both active and passive corrupt behaviors are punished irrespective of whether the subject accepts or declines the offer of undue advantage or not.

Moreover, Legislative Decree No. 38/2017 also includes the offence of instigation to private corruption among the offences that can lead to the liability of corporations under Law 231.

Sanctions

The innovations introduced by Legislative Decree No. 38/2017 as to sanctions concern both natural and legal persons. As for individuals, sanctions remain the same, but the reform adds the sanction of temporary interdiction from holding representative, administrative, or executive positions in corporations for any individuals convicted. In other words, throughout the interdiction, the convicted person cannot hold the role of executive, general manager, director, auditor, and liquidator of a company.

As for legal persons, Law 231 has been amended in order to introduce financial penalties for instigation to corruption and increase the ones applicable to active corruption. In particular, the fine for active corruption is increased from a maximum of €400,000 to a maximum of €600,000; instigation to corruption is punished with a fine up to €400,000.

Moreover, in case of conviction for the above-mentioned offences, companies are subject to disqualifying measures such as preclusion from operating their business, suspension or revocation of authorizations, licenses, or concessions used to commit the unlawful act, prohibition from
entering into contracts with the public administration—unless done in order to obtain a public service—exclusion from benefits, loans, contributions, or subsidies and possible cancellation of those already granted, and prohibition from publicizing goods or services.

**Conclusion**

Legislative Decree No. 38/2017 is a further step in the fight against corruption, even if some relevant uncertainties of the previous legislation remain unsolved.

Most importantly, the reform has not considered issues concerning the prosecution of such crimes on complaint, which is one of the reasons why private-to-private corruption has been rarely prosecuted. The report accompanying the draft bill has stressed that between 2013 and 2014 only eight cases have been brought before the Judge of Preliminary Hearing and only two have reached the hearing phase.

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**If you have any questions concerning these developing issues, please do not hesitate to contact either of the following Paul Hastings Milan lawyers:**

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