

Conversion into law of the Justice Decree

What is new in the field of crimes pursuant to Legislative Decree 231, disturbed freedom of enchantment, environmental crimes and the practical implications for the Organisational Models of entities

On 9 October 2023, the law converting Decree-Law No. 105 of 10 August 2023 (the **Law**), which – *inter alia* – introduces significant changes in criminal matters, and Legislative Decree No. 231 of 8 June 2001 (**Decree 231**) was published in the Official Gazette.

What's new at a glance

Among the numerous innovations provided for by the Law in various sectors, it is worth mentioning the amendments to Articles 24 and 25-*octies* 1 of Decree 231, thus extending the range of predicate offences for which entities are liable, pursuant to Decree 231, with respect to:

- i. disturbed freedom of enchantment (Article 353 of the Criminal Code);
- ii. disturbed freedom to choose a contractor (353-*bis* of the Criminal Code); and
- iii. fraudulent transfer of values (Article 512-*bis* of the Criminal Code).

In addition, the Law provides for an increase in penalties for certain environmental crimes and extends the applicability of criminal confiscation pursuant to Article 240-*bis* of the Criminal Code and the accessory penalty of disqualification from public office and the inability to contract with the Public Administration in relation to further environmental crimes.

New offences introduced in the 231 catalogue of offences and practical tips

Rules	Highlights	Take aways
<p><i>Disturbed Freedom of Enchantment</i> (Article 353 of the Criminal Code)</p>	<ul style="list-style-type: none"> – Pecuniary penalties are provided of up to 500 quotas (increased in the event of significant profit or particularly serious damage). Disqualification sanctions are also applicable. – The law punishes anyone who obstructs or displaces tenderers with violence or threats, or with gifts, promises, collusion or other fraudulent means, or who prevents or disrupts tendering procedures. – It is punishable not only to prevent the tendering procedure but also only to frustrate it, i.e., when the fraudulent or collusive conduct affects the proper procedure for the tender itself, it being irrelevant whether there is an actual alteration in the results of the tender. – The criminal conduct must be carried out in the context of public tenders or private tenders on behalf of a Public Authority or on behalf of private individuals. <ul style="list-style-type: none"> – Broad interpretation of the case-law on the concept of tender. Any case in which a tender can be considered to have been carried out, under the direction of a public office, which, albeit informally, is in any event similar to formal public tenders or private tenders. – The offence can also take place where the tender procedure involves a contract by a formally private company which manages a public service or in the event of the execution of a public work. 	<ul style="list-style-type: none"> – It is necessary to update the Organisation, Management and Control Model pursuant to Decree 231 (Model 231) – Carrying out a risk assessment aimed at identifying/evaluating: <ol style="list-style-type: none"> (i) whether the entity is exposed to the risk of committing the offence; (ii) which areas of activity are at risk and which are the relevant sensitive activities; (iii) the business functions involved; and (iv) the control measures already in place. – The areas to be overseen include: the management of private tenders/tenders, sales, purchasing and the selection of suppliers, the management of partnerships, joint ventures, ATIs and RTIs (Temporary Association of Companies) and, more generally, relations with public authorities, customers, suppliers and partners. – Carrying out a gap analysis, to verify any gaps in the internal control system or in the safeguards that can prevent the commission of the new, relevant cases. The objective is to integrate and/or strengthen the internal control system. – Model 231 Special Parts update. – Updating the company's Code of Ethics, providing for ad hoc principles in relation to the new, relevant cases. – Given the peculiarity of these types of crimes, it is very important that company offices operating in risk areas are subject to targeted and specific training. – Possible updating/integration of procedures impacting on relevant risk areas.

Rules

Highlights

Take aways

Disturbed freedom to choose a contractor (Article 353-bis of the Criminal Code)

- Pecuniary penalties are provided of up to 500 quotas (increased in the event of significant profit or particularly serious damage). Disqualification sanctions are also applicable.
- The rule punishes anyone who, with violence or threats, or with gifts, promises, collusion or other fraudulent means, attempts to frustrate the administrative procedure aimed at establishing the content of the notice or other equivalent act in order to influence the methods of choice of contractor by the public authority.
- The offence applies to the calling for tenders stage and, in particular, the approving of the notice stage. It can therefore occur in cases where an administrative procedure has been initiated to establish the content of the notice or an equivalent act.
 - Broad meaning to “equivalent act”, which also means, for example: (a) a resolution to contract if this, as a result of the unlawful frustration, does not provide for the completion of the tender but involves a direct assignment to a specific subject; (b) the notice in the pre-commercial procurement procedure with which the phase of choosing the contractor begins, as well as the technical annex.
- For the offence to take place, it is sufficient that the correctness of the procedure for preparing the notice is concretely endangered, but it is not necessary that the content be modified in such a way as to condition the choice of the contractor.



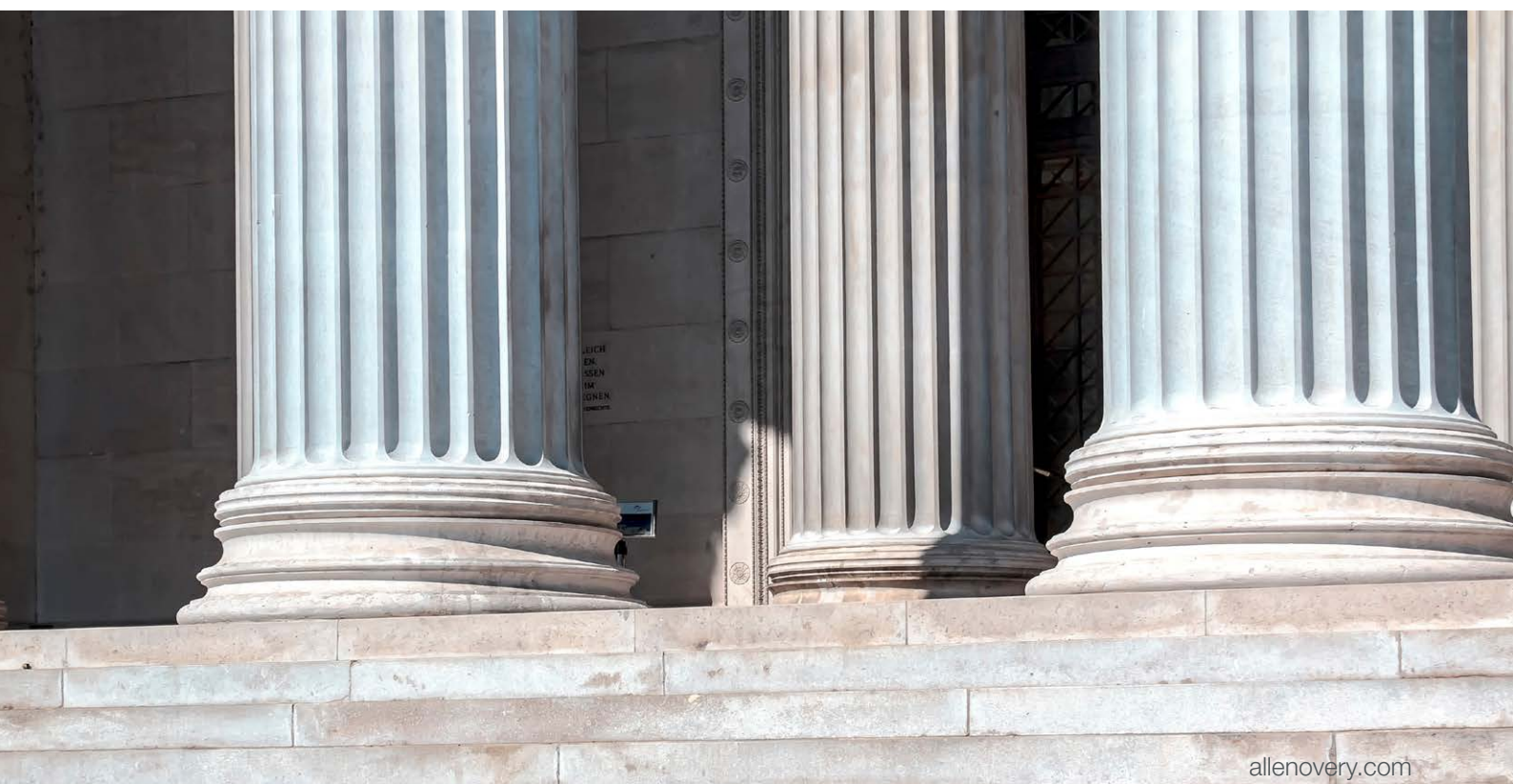
Rules	Highlights	Take aways
<p><i>Fraudulent transfer of assets (Article 512-bis of the Criminal Code).</i></p>	<ul style="list-style-type: none"> - A fine of between 250 and 600 quotas is levied. Disqualification sanctions are also applicable. - The law punishes the fictitious attribution of ownership or the availability of money, goods or other benefits in order to evade the provisions of the law on asset prevention or smuggling measures, or to facilitate the commission of one of the crimes referred to in articles 648, 648-bis and 648-ter. - There are many relevant forms of conduct that will constitute a crime, e.g., the fictitious attribution of the office of director of a company and the acquisition of <i>de facto</i> ownership of part of the company shares of a third party. - A person who becomes the fraudulent owner of assets is liable by way of complicity in the same criminal enterprise as that carried out by the person who made the fraudulent attribution. - The crime forms part of the wider offence of money laundering, when, for example, the fictitious registration of assets takes place. 	<ul style="list-style-type: none"> - As for the cases indicated above, these legislative innovations also require a reassessment of the preventive control system for the commission of relevant crimes pursuant to Decree 231 and the activities indicated above with specific reference to “new” crimes. - The areas most affected by this rule are those relating to the management of a company's real estate assets, its relations with shareholders and control bodies, accounting and tax areas, the management of company shares, extraordinary transactions, and relations with third parties that must be monitored through the implementation of an adequate due diligence process (on the third parties themselves and/or on the transaction), which also covers, where necessary, a verification of the origin of the counterparty's funds to identify any red flags.



Further relevant changes in the area of environmental crime and forest fires

The Law also introduces important changes in relation to other types of crime. Especially:

Rules	Highlights
<i>Forest fires</i> (Article 423bis of the Criminal Code)	<ul style="list-style-type: none">– Extension of the applicability of the offence in “urban-rural interface areas”.– In the event of conviction, extension of the penalty of disqualification from public office and the inability to contract with the Public Administration, except to obtain the performance of a public service, for a period of five years.
<i>Littering</i> (art. 255, Legislative Decree 152/2006)	<ul style="list-style-type: none">– Transformation from an administrative offence to a contraventional offence.– Increase in the applicable penalties (fine from EUR1,000 to EUR10,000). Penalty increased by up to twice as much in cases involving hazardous waste.
<i>Environmental pollution</i> (Article 452 bis of the Criminal Code) and <i>environmental disaster</i> (Article 452 quarter of the Criminal Code)	<ul style="list-style-type: none">– Specific increase in the penalties applicable (from one-third to one-half) in the event of pollution or environmental disaster produced in a protected natural area or subject to landscape, environmental, historical, artistic, architectural or archaeological constraints, or resulting in damage to protected animal or plant species.– In the event that pollution causes a deterioration, impairment or destruction of a <i>habitat</i> within a protected natural area or one that is subject to landscape, environmental, historical, artistic, architectural or archaeological constraints, the penalty is increased from one-third to two-thirds.
<i>Confiscation in special cases</i> (Article 240 bis of the Criminal Code)	<ul style="list-style-type: none">– In cases of conviction or plea bargaining, the confiscation of money or property has been extended to those who cannot prove the origin of their gains and where their value is disproportionate to the convicted person’s income (“confiscation in <i>special cases</i>”) as well as to crimes of environmental pollution which result in death or injury, trafficking, the abandonment of highly radioactive material and the illicit trafficking of waste.





Conclusions

As entities have learned in more than 20 years of the application of Decree 231, the catalogue of relevant crimes under Decree 231 itself is constantly expanding.

The severity of the sanctions provided for (which also include disqualification sanctions, including: disqualification from carrying out the activity, suspension or revocation of authorisations and licences, prohibition from contracting with a public authority, etc.) require timely and effective action by management in order to adequately manage the “new” risks, giving impetus to a reassessment of internal control systems to verify the opportunity to integrate and/or strengthen the controls with regard to the new, relevant cases pursuant to Decree 231. It will also be necessary to update Model 231 and other compliance tools and to provide an effective training programme on the new risks introduced by the Law in question.

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