CORPORATE FINANCE/M&A - ITALY

Acquiring company liable for offences committed by acquired company

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The High Court recently held that in the event of a merger, including merger by incorporation, the new entity that results from the merger is liable for the offences committed by the entities that participated in the merger, as provided for in Article 29 of Decree-Law 231/2001.(1)

In the case at hand, a company was responsible – together with others – for corrupting members of a foreign government in order to obtain the right to extract oil. The company was acquired by another firm after the crime had been committed, but before the start of the investigation. The court held the acquiring company liable for the corruption, despite the fact that it had not been involved in the facts of the case.

The court applied Article 29 of Decree-Law 231/2001 and supported its conclusion on different grounds. It quoted the Organisation for Economic Cooperation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the EU Convention against Corruption Involving Officials, to which Italy is a signatory. The conventions require states to establish effective, proportionate and dissuasive penalties against bribery and corruption. To be effective, the penalties must not be easily circumvented (eg, if a company can escape sanctions through a merger).

The court also quoted the European Court of Justice which, in a number of cases concerning corporate administrative liability for criminal offences, invoked the need for effective penalties to counterbalance the rule that criminal liability is personal. Regarding legal entities, the strict application of the principle that criminal liability is personal may result in a lack of effectiveness (and consequently a lack of persuasiveness) of the established penalties.

Further, the EU Merger Directive (78/855/EC) concerning mergers of public limited liability companies, Decree-Law 6/2003 and Article 2504-*bis* of the Civil Code confirm that in a merger or incorporation, the acquired company does not cease to exist, but instead continues as part of the acquiring company. In other words, a merger can be compared to a company's reorganisation rather than a company's death. Therefore, the merger determines the accumulation of the liabilities of the merged company with those of the incorporating company.

Finally, the court underlined that the merger is an operation freely undertaken by the acquiring company and that due diligence makes the acquiring company fully aware of the risks incurred. This conclusion is even more apt in cases in which the merger concerns companies that are part of the same group.

The rule that criminal liability is personal does not contradict Article 29 of Decree-Law 231/2001, under which the acquiring company in a merger is responsible for the offences committed by the acquired company.

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Endnotes

(1) Case 1444/2016.