

Customs and Excise Reform: Excise Offenses Will Also Trigger Corporate Liability – Companies Should Assess and Review their Compliance Models

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On October 4, 2024, Legislative Decree No. 141 of September 26, 2024 (the “Decree 141”) entered into force, reforming the customs and excise rules and the penalties for smuggling and excise offenses.

The Decree 141, among other things, extends the criminal liability of companies under Legislative Decree No. 231 of June 8, 2001 (“Decree 231”).

The Decree 141 amends the rules on criminal and administrative penalties in relation to customs and excise matters by:

- Including import VAT as a customs duty, making it subject to penalties in relation to customs matters;
- Amending and streamlining the rules on smuggling offenses by introducing the offenses of “*smuggling by failure to make a customs declaration*” and “*smuggling by making a false customs declaration*,” in relation to which criminal penalties can be imposed when the threshold of €10,000 in undeclared or incorrectly -declared customs duties is exceeded, or when there are certain aggravating circumstances;
- Introducing a new offense of evading the collection or payment of excise taxes on tobacco products and a new offense of selling tobacco products without authorization or purchasing them from persons not authorized to sell (in relation to which only an administrative penalty can be imposed);
- Providing for confiscation of property following a conviction in relation to the most serious excise offenses;
- Extending criminal liability for legal entities provided for by Decree 231 in order to include excise offenses under Legislative Decree No. 504 of October 26, 1995 (the “Excise Tax Law”).

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1. Amending the Customs and Excise Rules on Penalties

The Decree 141 introduces important changes affecting the rules on both customs and excise.

With regard to the rules on customs, the 122 articles of the new National Provisions Supplementary to the European Union Customs Code (the “National Provisions”), which repeal and replace Presidential Decree No. 43 of January 23, 1973 (the “Customs Law”) and other specific laws, enter into force. As such, the Decree 141 comprehensively amends the relevant regulatory framework in this area.

Among the main changes that specifically affect the rules on penalties in relation to customs, the Decree 141:

- Includes import VAT as a customs duty, making it subject to penalties in relation to customs matters. Pursuant to Article 27 of the National Provisions, the VAT due on importation is treated as a customs duty unless the goods are: (i) intended for subsequent release for consumption in another EU Member State; or (ii) are subject to a warehousing procedure other than customs warehousing;
- Introduces two main categories of offenses: smuggling by failure to make a customs declaration and smuggling by making a false customs declaration (Articles 78 and 79 of the new National Provisions),¹ which group together all cases of smuggling that were previously regulated in various provisions² and that differ from those specifically regulated in certain articles.³ In particular, the new offense of smuggling by making a false customs declaration includes conduct that was previously only subject to an administrative penalty under former Article 303 of the Customs Law. As a result of the Decree 141, such conduct will now be subject to criminal penalties if the conditions set out in Article 96 of the new National Provisions are met (see below);
- Imposes criminal penalties for smuggling offenses⁴ when one (or more) of the following conditions, set out in Article 96 of the National Provisions, is met: (i) the amount of customs duties owed, wrongly received or wrongly claimed to be refunded exceeds €10,000;⁵ or (ii) one of the aggravating circumstances provided for in the National

¹ In particular: (i) Article 78 (Smuggling by failure to make a customs declaration) applies to anyone who intentionally fails to comply with the obligation to declare goods in respect of customs procedures not specifically regulated by the specific rules set out in the following articles (i.e., Articles 80, 81, 82, and 83), thereby evading customs supervision and payment of the related customs duties, in any manner and for any reason; and (ii) Article 79 (Smuggling by making a false customs declaration) applies to anyone who, despite having made the required declaration, makes false statements with intent to deceive concerning the quality, quantity, origin and value of the goods or any other element necessary for the application of the customs duties due.

² In particular, the new offense of smuggling by failure to make a customs declaration includes all the previous offenses of failing to make a customs declaration, and introducing, transporting, and evading customs supervision under Articles 282, 288, 289, and 294 of the previous Customs Law. The new offense of smuggling by making a false customs declaration includes the previous offense of making a false customs declaration under Article 303 of the previous Customs Law (which was only subject to an administrative penalty).

³ In particular, Articles 80 to 83 of the new National Provisions (smuggling in the movement of goods, by air and in border lakes; smuggling by illegal use of imported goods with a total or partial reduction in duties; smuggling in the export of authorized goods and refund of duties; and smuggling in the temporary export, special use and processing regimes).

⁴ In particular, those under Articles 78 to 83 of the National Provisions (smuggling by failure to make a customs declaration; smuggling by making a false customs declaration; smuggling in the movement of goods, by air and in border lakes; smuggling by illegal use of imported goods with a total or partial reduction in duties; smuggling in the export of authorized goods and refund of duties; and smuggling in the temporary export, special use and processing regimes).

⁵ The threshold was determined taking into account the provisions of Article 4(1) of Legislative Decree No. 75 of 2020 implementing Directive (EU) 2017/1371 on the fight against fraud to the Union’s financial interests by means of criminal law (the “PIF Directive”).

Provisions applies.⁶ If none of the above conditions are met, the conduct will be subject to an administrative penalty. In particular, in cases of smuggling by making a false customs declaration, which under the previous Customs Law could only be subject to an administrative penalty, administrative penalties will now be used as a residual measure in cases of violations of less than €10,000 or which do not include aggravated circumstances, or where there is no intent (even if the amount of duties due exceeds the abovementioned threshold).⁷ Therefore, the Customs Agency will have to send more reports of offenses to the judicial authority and, in particular, to the European Public Prosecutor's Office (EPPO), which has jurisdiction over smuggling offenses.⁸

With regard to excise taxes, the Decree 141 introduces specific rules in relation to tobacco products, as is already the case for energy products (gas and fuels) and alcohol and alcoholic beverages. In particular, the

Decree 141 introduces:

- A new offense of evading the collection or payment of excise taxes on tobacco products (new Article 40-*bis* of the Excise Tax Law), which is punishable by imprisonment from two to five years if the conduct involves a quantity of tobacco exceeding 15 kilograms. Below this threshold, only an administrative penalty can be imposed, which is set according to the amount of tobacco products, and the nature and seriousness of the act. The same rules apply to all smoking substitutes, nicotine-containing products that do not involve combustion or inhalation, and smoking-related products;
- Specific aggravating and mitigating circumstances applicable to the above offense;⁹
- A new offense, punishable only by an administrative penalty, for those who (i) sell or offer for sale manufactured tobacco

⁶ In particular, those referred to in Article 88(2)(a) to (d) of the National Provisions, applicable when: (a) the offender is found armed in the customs surveillance zone while committing the offense or immediately thereafter; (b) three or more offenders are found together in the customs surveillance zone, at the time of the commission of the offense or immediately thereafter, in such a condition as to obstruct the law enforcement authorities; (c) the offense is linked to another offense against public trust or public administration; and (d) the offender committed the smuggling offense as part of an association whose purpose is, *inter alia*, to commit smuggling offenses.

⁷ According to Article 96(14) of the new National Provisions, in the circumstances referred to in Article 79, if the court does not find intent, the offender shall be subject to an administrative fine of 80 to 150 percent of the customs duty due, but in any case of not less than €500.

⁸ Pursuant to Article 22 of Regulation (EU) 2017/1939, the EPPO has jurisdiction over criminal offenses affecting the Union's financial interests, as referred to in Directive (EU) 2017/1371, where the total damage or advantage is at least €10,000 (for VAT offenses, the EPPO's jurisdiction is instead triggered when the damage exceeds €10 million). Thus, smuggling offenses are considered to fall under EPPO jurisdiction, also in light of the Italian European Public Prosecutor's note of April 23, 2021, which points out that customs duties are "*an own and exclusive resource of the Union*".

⁹ In particular, the new Article 40-*ter* of the Excise Tax Law provides for (i) an increase in the penalty by up to one third in the case of acts committed using a means of transport belonging to persons not involved in the offense, and (ii) the application of a fine of €25 for each gram of product and imprisonment from three to seven years if: (a) in committing the offense or in any act aimed at securing the price, product, profit or impunity in relation to the offense, the offender uses weapons or is found to have possessed them in the execution of the offense; (b) the offender is caught while committing the offense or immediately thereafter with two or more persons in such a condition as to obstruct law enforcement officials; (c) the offense is linked to another offense against public trust or public administration; (d) the offender used a means of transport that has been modified or altered in such a way as to impede the intervention of the police or to endanger public safety; (e) in committing the offense, the offender used companies or financial assets located in States that have not ratified the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime, which was opened for signature in Strasbourg on November 8, 1990, and ratified and made enforceable by Law No. 328, and that have not otherwise concluded and ratified with Italy agreements on mutual legal assistance in respect of the offense of smuggling.

With regard to mitigating circumstances, the new Article 40-*quater* provides for a one-third to one-half reduction in the penalty for the offender who, by actively cooperating with the police or judicial authority, works to prevent the criminal activity from having further consequences.

without a license from the Customs and Monopolies Agency; or (ii) purchase manufactured tobacco from a person not authorized to sell (new Article 40-*quinquies* of the Excise Tax Law). However, the above acts become criminal offenses if the amount of processed tobacco exceeds 5 or 10 kilograms, respectively.¹⁰ The same rules apply to all smoking substitutes, nicotine-containing products that do not involve combustion or inhalation, and smoking-related products;

- A new paragraph 1-*quater* of Article 44 of the Excise Tax Law, which provides for confiscation of property¹¹ following a conviction or plea bargain in relation to any of the excise offenses punishable by a maximum term of imprisonment of at least 5 years.

2. Amendments to Decree 231

The Decree 141 introduces significant amendments to Decree 231, and in particular to Article 25-*sexiesdecies* on smuggling offenses. In this regard, the Decree 141:

- Replaces the reference to the previous Customs Law with the reference to the new National Provisions;
- Consistent with the new National Provisions, includes import VAT among the taxes relevant to the offense of smuggling concerning legal entities under Article 25-*sexiesdecies*;
- Expands the list of offenses that may trigger liability for companies and other legal entities under Decree 231, by including the new offenses set out in the Excise Tax Law. Such offenses – including that of evading the collection or payment of excise taxes on energy products and alcoholic beverages and those related to the clandestine manufacture

of alcohol and alcoholic beverages, as well as the newly introduced offense of the collection or payment of excise taxes on tobacco products – are subject to the following penalties: (i) a maximum fine of €309,800; and (ii) disqualification penalties set out in Article 9(2)(c), (d) and (e) of Decree 231 (*i.e.*, prohibition from entering into contracts with the public administration; exclusion from grants, loans, contributions and subsidies and the possible revocation of those already granted; and a ban on advertising goods and services);

- Expands the range of disqualification penalties applicable in the case of failure to pay taxes or customs duties in amounts exceeding €100,000. In such cases, in fact, in addition to the disqualification penalties mentioned above, legal entities may be subject to the penalties referred to in Article 9(2)(a) and (b) of Decree 231 (disqualification from conducting business; and suspension or revocation of authorizations, licenses or concessions instrumental to the commission of the offense) and to a maximum fine of €619,600.

3. Next Steps for Companies

In light of these developments, companies should consider reviewing and updating their policies and procedures to ensure that they are adequate to prevent new offenses that may trigger liability under Decree 231.

In particular, companies that produce or trade in excisable products such as energy products, lubricating oils, alcohol and tobacco should conduct a specific assessment of the risks associated with the new excise offenses. This assessment should include the possible implementation of new and more specific control measures, in addition to those already in place to prevent the commission of smuggling offenses (that, since 2020, have been included among the

¹⁰ In particular, such minor offenses are punishable by imprisonment of up to one year and a fine of between €25 and €64.

¹¹ Pursuant to Article 240-*bis* of the Italian Criminal Code, in the event of a conviction or plea bargain in relation to one of the offenses specifically listed in that provision, the court must order the confiscation of money, property or other assets in relation to which the convicted person has not justified the origin and appears to be the owner, even through an intermediary natural or legal person, or to have at his or her disposal in any capacity, and the value of which is disproportionate to his or her income or economic activity.

crimes that may trigger criminal liability for companies). The control measures already in place may constitute a safeguard to some extent, even with regard to the newly introduced excise offenses. Control measures may include supervising; the supplier and carrier identification and selection processes (including maintaining and constantly updating a specific database for these purposes); the raw material procurement process (including technical and documentary quality control of goods); the warehouse handling process; and the document retention process suitable for tracking goods.

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