# SPECIAL B&P

# QUALIFICATION AND CONTROL OF SUPPLIERS AND THIRD PARTIES: ENVIRONMENT, OCCUPATIONAL SAFETY AND CORPORATE RESPONSIBILITY

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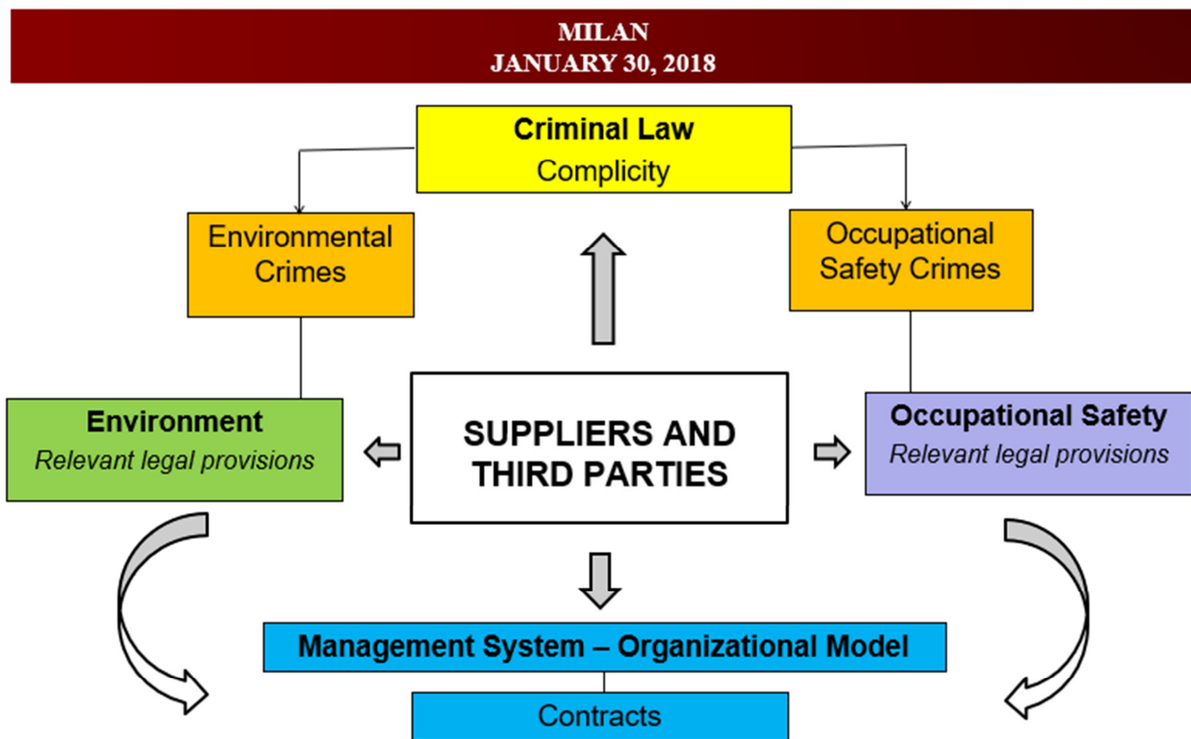

## INTRODUCTION

Perhaps, somewhere we have read that "**liability is personal**". However, it does not mean that legal issues can occur only as a consequence of what it has been directly done. Notably, companies' liability can also arise from **omitted preventive audits or from omitted subsequent supervision of the behavior of suppliers and third parties in general**.

This was the matter of the B&P conference on January 31, 2018, which was focused on those aspects that our Law Firm mainly deals with: environmental obligations, occupational safety and corporate liability. We have addressed these issues by highlighting risks and possible sanctions, but also precautions and prevention tools that should be adopted by management.

A few days before the date of the conference, an **important ruling by the Court of Cassation** confirmed the enduring relevance of the issue, not without providing some useful comments in order to tackle stringent orientations of supervisory bodies and of a part of the jurisprudence. This is the judgment n. 3623 of the first criminal section of the Court of Cassation, filed on January 25, 2018 (President Carcano, rapporteur Centonze, date of the public hearing December 22, 2017). In this decision the Supreme Court stated that:

«*The duty of care does not imply, on the occurrence of the event, an automatic charge of culpable liability against the person on which the duty of care lies* [which in our case could be the client] *since the principle of culpability requires the concrete verification of both the existence of the violation – by the person on which the duty of care lies – of a precautionary rule (generic or specific), and the predictability and avoidability of the harmful event that the violated precautionary rule aimed at preventing (the so-called "materialization of risk"), and the existence of the causal link between the conduct ascribable to the person on which the duty of care lies and the harmful event. Therefore, it should be excluded any automatism with respect to the charge of criminal liability*».

This decision confirms that the client has an interest in taking every precaution, in order to be able to demonstrate the lack of his/her responsibility in the unfortunate case that an accident or pollution occurs, involving suppliers or third parties.

As we indicated during the conference, it is necessary to implement an adequate management of environmental and safety issues, to coordinate the various documents existing at the company and to pay extreme attention to the drafting of contracts.

## CRIMINAL LAW: THE GENERAL PART

The possibility to be held criminally responsible, under certain conditions, for failing to prevent crimes committed by others is a well-established reasoning of jurisprudence, as according to the settled case law «*it is incontrovertible that the duty to prevent crimes* […] *is able to determine accomplice liability*» (Criminal Section of the Court of Cassation, no. 43273/2013).

The criminal liability of a person for not having prevented the wrongful act of another person is generally traced back to the legal archetype of the criminal negligence by omission – a very intricated category in which the duty of care and the obligation of due diligence intertwine, so that it constitutes a test bench for the principle of legality and of responsibility: a legal construction allowed by the combined provisions of article 40 of the criminal code (according to which if someone has the legal obligation to prevent a crime, failing to prevent that crime is the same as committing it) and articles 110 and 113 dealing with the law of complicity.

In short, this is the typical (jurisprudential) reasoning: if different conducts are able to cause a single event, and if the failure to prevent such event notwithstanding an obligation to do so is equated to its active causation, it follows that **failing a person endowed with an obligation of care to hinder such crime makes that same person criminally liable for a wrongful act committed in complicity**.

On the basis of this assumption, it should be specified that:

a) not every omission is relevant under criminal law, but solely the one which is the necessary or facilitating condition of the event that had to be prevented: in other words, such event must fall within the risk that the rule want to mitigate.

b) the significant omission is only the one committed by a subject having a specific role towards the person entitled with the interest affected by the event: the so-called *duty of care*, understood as the duty to prevent a specific event, which burdens upon those functionally related to a specific source of danger.

Turning the attention to **corporate crimes**, it is very common, especially in the case-law of trial and appeal courts, to charge administrators – either legally vested or *de facto*, as well as either CEOs or not-executive ones – with criminal responsibility on the basis of their failure to prevent the crime perpetrated by other subjects within the company.

With regards to the *actus reus* element, Public Attorneys from time to time omit to ascertain the effective existence and the adequacy of the managers' powers to impede such crimes: the indictment therefore becomes merely a blame for not making the commission of the crime more difficult (or even impossible). As far as the *mens rea* requirement is concerned, the assessment is usually based on the so-called "*warning signs*" theory and on the "***it could not have been known***" paradigm.

The reasons for such disfunctions arise from the marked dichotomy between general criminal law (concerning common crimes), from whom all the principles above mentioned stem, and economic criminal law. The patterns of responsibility in these two branches follow two different antithetical models:

- ✓ In <u>general criminal law</u>, the component elements of a crime required for the imputation are: **(a)** an individual responsibility; **(b)** a conduct taken by a single person; **(c)** more commonly, an active conduct; **(d)** a conduct resulting in damage; and **(e)** with regard to the *mens rea* element, "a real mental element".

- ✓ In <u>economic criminal law</u>, everything is basically upside-down: **(a)** collective responsibility is typical; **(b)** the organized and hierarchical structure of modern corporate realities makes worthless the search for the primary individual conduct, in relation to which other secondary conducts must be taken into account; **(c)** there is full interchangeability between acting and omitting, to such an extent that responsibility by omission becomes the standard rule and not the exception in the framework of a more aggregated collective behavior against which only the distinction between "role" and "area of risk" becomes meaningful; (d) crimes shaped on abstract danger and so-called "duty crimes" prevail; (e) the *mens rea* element loses

its connotation of real mental element and becomes a mere reproach for not behaving as imposed by the law.

Therefore, a proper management of the corporate responsibility can only take place:

### a) on the organizational level:

**i.** with the identification of the legal duty to prevent the crime, which is based on a norm which expressly and precisely imposes a duty of prevention; circumstance that allows to identify with sufficient certainty both the person on which the duty of care lies, and the event that must be avoided.

**ii.** with the identification of powers which allows to prevent the commission of crimes: in other words, those faculties created by the source of the legal duty and related to the specific duty of care binding upon the guarantee;

### b) on the trial level:

**iii.** with the rigorous proof of the causal link according with the assessment model put forward by the most recent, even if often disregarded, jurisprudence.

**iv.** with the retrieval of the *mens rea* element of the person on which the duty of care lies, through the identification of his or her possible inspection criteria.

## CRIMINAL LAW: RELEVANT CASE STUDIES CONCERNING ENVIRONMENT AND OCCUPATIONAL SECURITY

The above makes clear how trials concerning environmental or occupational security issues are the breeding ground for the proliferation of responsibilities among all the subjects who, in various ways, are involved in environmental management activities or in the execution of a contract from which arise breaches of the sectoral legislation. This stems from the binomial "multiplicity of precautionary rules and corresponding duties to control" in the two above mentioned fields on one hand, and "complicity responsibility" on the other.

The outcome is the involvement of a wide range of subject not only with regard to something which has already been committed (an active conduct, such as the treatment of waste which was untreatable), but also and above all in relation to something not done (an omission, e.g. omitted verification of an authorization, of the acquisition of the so-called document of social DUVRI, which is the document for the evaluation of risks arising from interferences in the case of contracts, of the OSP or omitted verification of its eligibility etc.). In order to understand the transversal natural of this challenging issue it is necessary to get into the prospective of all the subjects involved in the sector. For this purpose, we will now proceed illustrating some of the most relevant cases that can happen during the supply chain.

### THE WASTE PRODUCER

The first case concerns the involvement of the produces for the waste management practice of the shredder with regard to the omitted verification by the former of the

enduring validity of the authorization at the time of the conferral. The Public Prosecutor's Office envisaged the crimes as provided for by articles 113 and 256, paragraph 1, of the legislative decree no. 152/2006 (the so-called "Single Environmental Text") perpetrated by the holder of the waste treatment plant, with the negligent cooperation of the manager of a company producing waste containing oils, washing aqueous solution and sludge with dangerous substances. Essentially, it was contested the delivery of waste to a plant with a revoked license and so without any legal titles to receive waste.

## THE ACQUIRER OF THE BY-PRODUCT

The second case concerns the involvement of the acquirer of plastic trimmings for the incorrect legal classification committed by the producer of the commercialized materials as *by-product* rather than as *waste*. In that particular situation, the Prosecutor hypothesized the crimes provided for by articles 113 and 256, paragraph 1, of the legislative decree no. 152/2006 perpetrated by the owner of a company involved in the processing of plastic (producer/seller), with the negligent cooperation of another company involved in the processing – through the volumetric reduction – of plastic as well (acquirer). The assumption for the indictment was that the purchased materials should have been qualified by the producer as waste rather than as by-products: in fact, the condition established by art. 184-*bis*, letter d), of the legislative decree no. 152/2006 with regard to the percentage of impurity in the materials was not proved.

## THE DELIVERER, THE DISPOSER, THE LABORATORY FOR ANALYSIS

The third case is the one where all the subjects of the supply chain for the erroneous qualification of waste with mirror entry codes by the laboratory for analysis. The hypothesis was a violation of article 110 of the criminal code in conjunction with article 260 of the legislative decree no. 152/2006, which means the crime of illegal waste trafficking in the form of criminal enterprise. The charge was related to delivery of waste treated with ECW (European Catalogue for Waste) code with "mirror entry" and qualified as not hazardous following the allegedly incomplete analysis in the knowledge of such bias by all the subjects involved.

## THE DISPOSER OF WASTE

Another hypothesis is the one concerning the involvement of the disposer as an indirect consequence of a measure of the public authorities for the environmental pollution of superficial groundwaters. The Prosecutor's Office indicted the landfill operator containing non-hazardous waste for the crimes provided for by articles 452-*terdecies* and article 452-*bis* of the criminal code (omitted remediation and pollution of water). The ground for the charge was the co-causal contribution in the pollution as a consequence of the delay in the implementation of the remediation project by the operator himself. Such project had become already unsustainable due to an order of the public authorities which affected one of the necessary preconditions for the implementation of the project itself. The peculiarity of this case can be appreciated in relation to further profiles regarding the time extension of the fact. The Prosecutor's Office cumulated: **(i)** in the two criminal trials, the legal qualifications of omitted remediation pursuant to article 254 of the Single Environmental Text, and so in the less serious form of misdemeanor, and the omitted remediation in the most serious form in accordance with article 452-*bis* of the criminal code and with the crime of environmental pollution provided for by article 452-*bis* of the same code; **(ii)** the charges on the different subjects who, over time, followed each other in the administration

of the company and assumed the duty of care concerning the safeguard of the environment.

### The Subcontracting Subject

This hypothesis concerns the involvement of the contractor/subcontracting for the omitted verification of the adequacy of the Operational Safety Plan of the sub-contractor. The Public Prosecutor's Office indicted the contractor for the implementation of a road project in negligent cooperation with the Safety Coordinator during Execution and the subcontractor for the crime established by article 589, paragraphs 1 and 2, of the criminal code read in conjunction with article 113. In this particular case the client company contracted the implementation of the project to the contractor who, in turn, sub-contracted a specific phase of the working in which the event occurred. The ground for the charge was the vagueness and the lack of critical assessment towards the specific working phase of the Safety Coordinator during Execution of the subcontracting company.

### The Client

The last hypothesis concerns the involvement of the client company for an occupational accident occurred to an employee of a contracting company for the maintenance work of its own building. The charge concerned the crime provided by article 590, paragraph 1 and 3 of the criminal code, in conjunction with article 113, namely the crime of bodily harm through negligence aggravated by the breach of the legislative body relating to occupational security following a fall from a scaffolding. The ground of the charge was the interference of the client company towards the maintenance works materialized both in the supply of facilities and equipment (the scaffolding), which besides was unsuitable, and in the imposing of operational directives on the installation of the facility itself.

## ENVIRONMENT: RELEVANT SITUATIONS

Our legal system governing environmental issues has peculiar characteristics: **i)** it is usually based on expressed provisions (that is to say provisions formalized by Public Authorities) for the exercise of activities; **ii)** it places significant obligations on the asset manager, which are contained in law provisions, authorizations, good-operating practices and in the jurisprudence in this area; **iii)** however, it does not define individual operators' duties; **iv)** it provides for significant criteria for the extension of responsibility; **v)** it does not specifically identify operational figures and their roles. In all this, a significant risk factor for operators derives from the outside, that is to say from relations with suppliers and third parties. Among the most critical aspects we identify, for reasons of frequency, magnitude, relevance (in terms of sanctions) and operational effects, the following ones.

### Qualification of Production Residues: The By-Product

Managing a production residue as *waste* or *by-product* has significant impacts in terms of responsibilities, administrative costs and expenses for companies. In order to have a *by-product*: **i)** it must be a residue (neither final product nor waste) of the production process; **ii)** the reuse must be certain; **iii)** no treatment other than the normal industrial practice has to be performed; **iv)** the use must be "legal", thus compliant with the management rules of the material. The producer and the user of the *by-product* must guarantee and be able to

prove in advance the compliance with the four requirements (specified in Article 184-*bis* of Legislative Decree 152/2006 and today clarified by Ministerial Decree 264/2016 and Circular Letter 7619/2017 of the Ministry of the Environment). In order to do this, even in the contest of a still uncertain jurisprudence (see, for example, criminal section of the Court of Cassation 17453/2012, 40109/2015, 41533/2017 on the subject of the *normal industrial practice*), **there must be specific contractual clauses, documents supporting legal requirements and concrete management methods in compliance with the nature of asset (and not of *waste*) of the production residue.**

## Identifying The Waste Producer

The environmental legislation places significant burdens and related responsibilities on the waste producer. In many cases (for example in the relationship between client and contractor), it is not easy to identify this person. The normative and jurisprudential evolution of the last decades has often provided different interpretations, and the most recent regulatory intervention in 2015, far from dispelling interpretative doubts, has generated further debates. Today it can be identified a "**material producer**" (the one who materially produces the waste) and a "**legal producer**" (the one to whom the production is "legally related"): two roles that often, but not always, overlap. The distinction can occur when the client interferes in the contractor's activity (not to be confused with the monitoring of the performance of the contracted activities, even if the line is often blurred). If the contractor works in full managerial and operational autonomy and this is also mirrored in contract clauses, he will be, for all intents and purposes (material and legal), a waste producer; otherwise, as for example when the client intervenes during the execution phase of the activities in order to identify operating methods of waste management (such as waste disposal agents, ECW codes), he can take on the role of the legal producer. Therefore, in case of interference there could be co-responsibility.

## "Extended" Liability in Waste Management

The issue of "extended" liability in waste management (Article 188 of Legislative Decree 152/2006) – which has survived due to the misguided development of the Italian SISTRI, namely the control system of waste tracking (see the Court of Cassation, criminal section, no. 34525/2017) and has been extended, sometimes excessively, by the Judiciary – has a significant impact on relations between companies and third parties. Is there a limit to the extent of liability? Is the waste producer liable for it "*from cradle to grave*"? Is this criterion applicable vice versa, too? A general response would be, by its nature, generic; indeed, in this context, the peculiarities of concrete cases are really relevant, as the jurisprudence increasingly tends to value them. Nevertheless, two aspects are clear: **i)** the producer has to care about the management of others: he must make a documentable qualification of the suppliers and guarantee the formal and substantial compliance with the monitoring activities required by the law according to the specific type of activity; **ii)** however, he must not interfere if he does not want to become part of it.

## Classification of Waste and Relationships with Laboratories and Third Parties

The erroneous classification, and consequent management, of waste often involves not only the producer, recipient and transporter, but also laboratories and technical consultants, who are asked to carry out the checks in their respective area of expertise. Thus, this is an area in which the relationship with suppliers and third parties is crucial. In a context characterized by a strong technicality, regulatory complexity and turbulent

jurisprudence (important issues are currently being examined by the European Court of Justice), the approach can only be preventive and be supported, even in this case, by appropriate documents. Indeed, today the central theme is the exhaustiveness of classification. In order to guarantee it, it is necessary to be able to document the steps taken to identify the genesis, characteristics, composition of waste and its dangerousness; this activity involves the company and the consultants and, if correctly implemented, allows to support, in each location, the validity of the classification made.

### Maintenance and Outsourcing Activities

Outsourcing and maintenance are areas that generate environmental issues very frequently. Some of the relevant cases are: the management of waste produced in activities, the compliance with the authorization's requirements the plant is subject to, the implementation of appropriate environmental precautions in carrying out activities. Often, at the basis of the issue there is a lack of confrontation on environmental profiles between the company and the third-party operator; indeed, in many cases, only the commercial profiles are faced in the contract and in the confrontation between parties. It is therefore essential that environmental issues become an integral part of relations with outsourcers and maintenance personnel and are adequately regulated.

## OCCUPATIONAL SAFETY: MOST SIGNIFICANT SITUATIONS

While dealing with "**qualification of suppliers**" in the context of occupational health and safety, it is usual to think about **the so-called "internal" contract and construction sites**. The term "internal contract" refers to all those contracted activities that are part of the contractor's production cycle or have to take place within his workplaces, with the "contractor employer" as the "first" person with which lies the duty of care. The term "construction sites" concern the works listed in Annex X of the legislative decree 81/2008, for which various people, such as the "contractor" (which is not always the "employer"), the project supervisor or the coordinators, can be held responsible for the duty of care.

In many cases, the qualification - before - and the modalities of the execution's management - then - of the suppliers, are important in the assessment of the involvement (or not) of subjects, which take part to the contractor's organization chart. The most significant situations, as said above, concern the crimes of accidental bodily injuries and manslaughter: in these cases, serious consequences can potentially arise in terms of responsibility both directly for the natural persons with which lies the so called "duty of care" and indirectly for the company (legislative decree 231/2001).

However, it is not unusual, nor at all negligible, the relevance of these situations even in connection with the worker's right to compensation or INAIL's right to redress: they are the basis for the contractor's responsibility in cases of both violation of specific obligations and contract not considered "genuine" (in this case, with further labor risks).

### Qualification

The qualification of the supplier is particularly important in both cases. As regards the contracts, article 26 of Legislative Decree 81/2008 states that «*The employer …: **a)** checks ... the technical-professional suitability... through ...: 1) acquisition of the certificate of registration at the Chamber of Commerce ...; 2) acquisition of self-certification ...* ». As far as the so-called construction sites are concerned, Annex XVII of the decree (referred to in Article 90) states that it is necessary to obtain also the « ... ***b)** document of risk assessment...; **c)** Document of Social DURC...;*

***d)*** *declaration not to be the subject to any suspension or prohibition measure pursuant to article 14...* » and, for self-employed workers, also (but "at least ") «... *b) specific documentation certifying the compliance ... of machines, equipment and provisional commitments c) list of personal protective equipment available d) training certificates and medical certificates of fitness* ... ».

First of all, the **field of application**: as regards the contract, the legislator did not provide the due of care only in connection with "works contract" in the strict sense and the jurisprudence expressly extended it to "third parties" in the broad sense (this means, not just contractors, but also visitors and any other person within the management and control of the "host" employer). therefore, it is very important to pay attention to the qualification of the contractual relationship (rental often requires the maintenance, the contract of carriage is not always simply such described by legislator ...).

**The supplier's suitability has to concern not only his "technical" ability to perform the assignment, but also his ability to perform it "safely".** There are two mistakes that are usual and that can negatively affect the process: first, to restrict the qualification to the contracts in the strict sense and to act as if it were a mere formal obligation; second, to look at it as an obligation binding on the purchasing office.

The acquisition of the documentation listed in the legislation is not exhaustive and cannot be considered as a mere formal obligation. The jurisprudence has repeatedly stated (already under article 7 of Legislative Decree 626/1994) that the client is held responsible «*if there is the proof that, in the concrete case, it was easily perceivable the risk arising from the organization's inadequacy*»; in this case, the Court stated that «*the obligation to control that the contractor has not only the certificates required by the law, such as the not sufficient certificate of registration at the Chamber of Commerce, but also the technical-professional suitability necessary for the activity that must be contracted and for the concrete methods of execution of that activity... the claimant could have recognized these deficiency if he had controlled the documents ... and could have verified that the contractor did not appoint an health and safety manager nor it provided an adequate document of risk assessment, just as he could easily verify the lack of training and information*» (Court of Cassation, Criminal Section, 36268/2014).

**The acquisition and the verification cover all the significant documentation concerning the qualification of suitability and have to be carried out examining the documentation in the content and on the merits.** This is also important in the labor context, in order not to incur disputes concerning the genuineness of the contract (Ministry of Labor's Circular Letter 5/2011).

It follows, therefore, the additional requirement (from which often the second mistake arises) that the purchasing office works together both with the subjects involved in the contract (which well know the purpose of the assignment and the conditions under which it must be performed), and with the protective and preventive service in the identification of the supplier.

## Implementation: Control And Interference

More and more frequently, the implementation methods are deepened by judges who, in criminal matters, want to ascertain with which subjects lied the duty of care object of the dispute, while in civil / labor matter, they have to ascertain whether the client can be held responsible as such (and possibly for joint liability) or as the actual employer.

As concerning health and safety obligation, wrong execution has to be verified and, if necessary, prevented and punished by the client who, however, **must prevent such "supervision" from becoming interference**, characterized by specific directives directly to contractor's workers which affect his autonomy with the consequence of transferring the obligations of the employer on the client and his organization.

This interference involves also the absolute ineffectiveness of the delegation's system (article 16 Legislative Decree 81/2008) and the substantial inapplicability (and ineffectiveness) of the "Model 231". The most common and dangerous cases concern maintenance and outsourcing services (which therefore constantly and within the client's production cycle).

### Some Cases And Operative Indications

**1)** First case: the certification of registration at the Chamber of Commerce was acquired in a merely formal way, therefor - only after the accident – it became evident that the contractor **(i)** had no actual employees, but a series of supply contract involving the increase of the risk's degree, **(ii)** established the company just before the contract and the company's headquarters was abroad, so that it becomes hard to say that the assessment of the technical-professional suitability was actual and effective. Another similar case: further documentation was acquired, but this documentation was not checked, so that – only after the accident – it became evident that the policy was absolutely unsuitable and some training certificates were over;

**2)** second case: the contract, qualified as a "contract of carriage" (so that article 26 of the legislative decree 81/2008 was not applied), was actually a "contract" because of the additional obligation concerning loading and unloading;

**3)** third case: it was used the standard contractual model in a situation of indoor working, therefor the necessary documentation had not been acquired. Furthermore, the contract also included the loan of equipment, without having been acquired the necessary documentation according to article 72 legislative decree 81/2008;

**4)** forth case: the accident occurred during activities not directly related to the subject of the contract, but on request and directed by client's employees.

Therefore, it is important to identify (organizational) instruments, **which can combine the requirements of safety and those of production**. For example, **(i)** a preliminary assessment of the contract that exactly identifies the object of the performance and the relevant contractual provisions **(ii)** either application of annex XVII by analogy (document of social DURC seems to be not sufficient, but the insurance policy or the list of employees, in order to check the regular employment relationship, can be acquired) or control that the relevant documentation complies with the object and qualification of the contract; **(iii)** entering into clear contracts (not necessary full-bodied contracts) with specific cancellation clauses and penalty clauses, according to models which can be adapted to any situation; **(iv)** drawing up the Document of Risks Assessment Interfering together with the supplier and before signing the contract; **(v)** entering into a contract only at the presence of the involved functions and the prevention and protection service, and, therefore, provide for procedures that can prevent the signing of contracts without the relevant documentation and the protection and prevention service's approval; **(vi)** clearly identifying the offices of the organization chart and ensuring – thanks to specific training – that subjects who will supervise the implementation fully understand the difference between control and interference.

## CAUTIONS AND PREVENTION INSTRUMENTS
## EMS and LEGISLATIVE DECREE 231/2001

The company can and has to - jointly - operate on three distinct layers of protection.

**First layer: contracts, standard terms and specific terms**. Entering into a contract involves the stipulation of (safeguard) terms, guarantees, controls and penalties, through which the suppliers' activities can be bound as concerning legal compliance. Furthermore, as concerning waste, the contractual provisions become the interpretative means of the parties' intention (Court of Cassation 35692/2011), very important as concerning interference and qualification of the client as a legal producer. Clearly, the contract is a means of protection if it is effective. This means that the contractual definition of important issues as concerning environment and safety cannot be regulated through simple order confirmations, or standard contracts unnecessarily long and difficult. Contracts has to be simple, clear and based on the relationship they regulate.

Second layer: the organization of the company as provided in the **Management System** (in compliance with the **ISO 14001** environmental standard or the **EMAS** regulations, or the **OHSAS 18001** and **ISO 45001** safety standards). The regulation of the relationship with suppliers is not new with a view of continuous improvement of quality: for example, the assessment of indirect environmental issues in the supply chain's management (it is **the purpose of ISO 14001 in force since 2009**). This purpose was not fully achieved, therefor UNI improved it since 2015, stating that the company has to pay more attention to the third parties chain both upstream and downstream of the production process (*Life Cycle Perspective*).

Within MS, successful procedures and operational protocols ensure both the continuous improvement of quality and the company's and the third parties' legal compliance, becoming a means of risk prevention and reduction.

Third layer: consists of the **Organization and Management Model (OMM) pursuant to Legislative Decree 231/2001**. As said, the activities of third parties can be considered as risk factors, therefor, they have to be considered ad regulated as such within the company's responsibility. A strict symmetry between the MS' procedures and protocols and the OMM is not appropriate (for example, the so called "segregation" is essential only as concerning the OMM); however, effective protocols and management procedures can be a suitable obstacle to the commission of the so called "predicate offenses" related to third parties. Therefore, the Management System as to be considered a OMM's strengthening element.

This is even more important in the view of the environmental crimes (especially pollution and environmental disaster): model 231 has also to concern third-party suppliers other than those typically considered (shredders, waste transporters), such as plant maintenance worker (tanks, pipeways, sewerage, tournaround, ...), raw materials and final products transporters (long ago subject of the EMS).

As said, contracts, management systems and OMM become means of protect for the company in its relationship with third parties only if they are effective. Let see some **operation advices for critical situations** (which could reduce the risk of dispute or, at least, become a useful defense).

**(1) Checking documentation, title and authorization of third-party suppliers.** They are usually checked during the qualification phase and the acquisition of (examples of) documentation. It is not sufficient, for two main reasons: **i)** titles has to be not only acquired but also assessed in substance because «*the responsibility is not ruled out because of the third party's authorization which concern waste other than those object of delivery, because it can be considered as lack of authorization*» (Court of Cassation, Criminal Section 26938/2013). This assessment cannot be considered as an exclusive obligation of the purchasing office, but it is necessary to involve subjects who have competence to verify the titles' suitability (in-house legal and environmental counsels, protective and preventive service, lawyers), as well as requiring those subjects' approval for the third party's qualification; **ii)** an authorization (especially an environmental authorization) can be suspended or revoked by the competent

authority. This means that the company has to «*obtain information by the competent authorities about the authorization's validity*» (Court of Cassation, Criminal Section 40596/2013). Therefore, access to documents petition and / or telephone contacts with the public administration should be provided and regulated in the EMS in terms of frequency and management needs. At the same time, the company may ask the third party for a periodic confirmation about the title's validity and for a timely reporting of any modification, providing for penalties in the event of delay and breach, or even the removal of the third party from the supplier list.

**(2) Qualification of raw materials, materials or residues as by-products**. The Presidential Decree 120/2017 on the subject of *excavated materials* - yet this applies to every *by-product* - joins together the fate and responsibilities of the producer and the user. Even if the Ministry of the Environment (Circular Letter No. 7319/2017) considers that, if one of the four conditions provided by art. 184-*bis* of the Legislative Decree 152/2006 is not fulfilled, «*the responsibility of the previous owners is lost»,* Public Prosecutors may not always be of the same opinion. It is therefore important, from a contractual point of view, that the third party (the supplier or the purchaser of *by-products*) guarantees in advance the existence of the conditions required by the legislation (perhaps using the contents of the Technical File provided for in Annex 2 of Ministerial Decree 264/2016). Similarly, from a procedural point of view, the company must provide for initial and periodic environmental training of the purchasing and sales office, as well as provide for prior consultation with the environmental and legal offices to obtain their express consent; the subscription and/or the modification of contracts on the subject of *by-products* may be conditioned to their consent. Finally, it is advisable to provide for *audits* and inspections at the third party's plant to make sure that the four conditions are met not only "on paper".

**(3) Interference**. If in terms of occupational safety, the objective must be the avoidance of interference (by contractually and procedurally identifying a single entity responsible for communicating with the contractor), when it comes to the environment the interference – to which the client's qualification as the "*legal producer*" of waste is linked – is often a duty. As far as contracts are concerned, it is therefore appropriate to clearly identify who and how many subjects can be qualified as waste producers. Once the company has chosen to interfere, a procedural by-pass must be envisaged in the EMS: **a)** in the event of interference, it must be applied a procedure that guarantees to the company the fulfillment of the regulatory obligations imposed on the manufacturer; **b)** on the contrary, if there is no interference, it must be applied a procedure that prevents the customer from conditioning, in practice, the activity of the contractor.

**(4) Analysis laboratories**. The activity carried out by analysis laboratories is a prerequisite for the most important management decisions (waste characterization, opening of the remediation process, communication of the excess of emission limits, etc.), as well as an area characterized by a debate with the Public Authority. In order to avoid disputes, the company must adopt management procedures such as: **i)** preferring (or supporting) external laboratories rather than the internal one, so as to ensure greater reliability of the analytical data; **ii)** providing for a cyclical rotation of external laboratories (also with regard to the single third-party supplier); **iii)** during the qualification, verifying the accreditation of the methodology applied by the laboratory; **iv)** verifying, in the laboratory's certificate of registration at the Chamber of Commerce, any company shareholding incompatible with its neutrality; **v)** using analysis certificates, not mere reports, in original or in true copy of the original. The analytical laboratory is often a supplier of the company's supplier: this practice is to be discouraged because, in the absence of a direct relationship, the company cannot regulate its activity. Indeed, it is appropriate to impose on the laboratory: **a)** the prohibition to send drafts of analysis before the delivering of the definitive certificate; **b)** the prohibition to suspend the delivering of the certificate and the related obligation of timely transmission. All this should occur having clear that telephone contacts and

correspondence between the laboratory and the company may be subject to surveillance and/or seizures of documents.

## FINAL CONSIDERATIONS

**Everything is connected**. The clauses that regulate the contract with the supplier can also be relevant, for example, to identify the waste producer, in a material and/or legal sense. From this regulation, typical of private law, may therefore descend consequences in terms of administrative and criminal liability.

**Jurisprudence is at the core**. Environmental legislation is recent, technical and must combine aspects and institutions of civil law and public law. In this context, either because the different needs and the different goals that are pursued do not always coincide, or because the legislator rarely manages to incorporate the new landings of science with the necessary timeliness, the jurisprudence plays a central role in interpreting (and sometimes completing) the often-uncertain regulatory framework.

**Customized solutions**. In drafting the documentation, be it a contract or a management system, it is not advisable to rely on models available on the internet or on schemes previously adopted within the same company. These are certainly a valid starting point, but the final product will always have to be tailor-made.

**Sometimes not much is needed**. In order to achieve these tailor-made solutions, sometimes it is sufficient to make only small, timely and well-thought-out changes to the initial model.

**Third parties are partners**. The legislator requires us to draw this last conclusion when he created the figure of the legal producer, which is sometimes accompanied by the role of the material producer of the waste, or when, in the matter of excavated materials, he imposed that the executant of the work shall endorse the Use Plan drawn up by the proponent. Loyal collaboration between parties is therefore a crucial factor.

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