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*Il Direttore*

## ENCUENTRO REGIONAL SOBRE SECTOR PRIVADO Y LUCHA CONTRA LA CORRUPCIÓN

Responsabilidad de personas jurídicas (modelos de legislación comparada en América Latina y Europa). Mesa técnica organizada en conjunto y con expertos de la OCDE

Enfoques comparativos a la responsabilidad de las personas jurídicas: examen de la legislación actual y los proyectos de Ley en la región

El Modelo Italiano

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# 1. *Introduction*

- A regime of liability of legal persons was introduced in Italy in 2001, with Legislative Decree n 231 of June 8, implementing Law n 300/2000.
- It was so reversed the traditional principle “*Societas delinquere non potest*”, also affirmed in art. 27 of the Italian Constitution.

## **1. *Introduction***

Law n° 30/2000 ratified a “package” of European/international instrument in the field of corruption and fraud:

- The 1997 OECD Convention
- The 1997 EU Convention against Corruption
- The 1995 EU Convention combating fraud against the European financial interests together with two of its protocols

# **1. *Introduction***

“Decree n° 231” introduced the liability of companies and other legal entities (with the exclusion of the State, local public entities and no-profit public entities).

*A recent decision of the Supreme Court stated that if a private company performs the activity of collection and recycling of garbage, pursuant to authority delegated to it by the Italian government, it is fully subject to the legislation on liability of legal persons.*

*LD 231/2001 is meant to exclude from liability only public entities that are not also enterprises, that are performing non-profit activities and that are carrying out functions of constitutional importance*

## 1. *Introduction*

The responsibility of legal entities in Italy is generally considered and defined as of an “administrative” nature.

## **1. *Introduction***

Though, it differs under many aspects from the traditional categories of “traditional” administrative liability...

## 1. *Introduction*

■ ...

... the violation attributed to  
the institution is the result of  
an offence and...

## **1. *Introduction***

... provisions of L.D. “231” are complied with, in addition, to the provisions of the criminal procedure code and...

## 1. *Introduction*

... competence to decide on unlawful administrative acts committed by the body lies with the criminal law court which has jurisdiction over the offences relating to such acts and...

## 1. *Introduction*

.... a legal person may be held liable even if the offender has not been identified or is not indictable and...

## **1. *Introduction***

... procedural provisions relating to defendants, to the extent that they are compatible, also apply to legal persons.

## 1. *Introduction*

This brings to the conclusion that this form of liability - although formally labeled as “administrative” - is to be considered as “*para-criminal* liability” or as a liability “*sui generis*”.

## 1. *Introduction*

As stated in the accompanying report to the Decree, this “*constructive ambiguity*” was adopted in order to avoid possible objections concerning the relationship between the corporate criminal liability and the principle of “personality”.

## **1. *Introduction***

The entity can be held liable for crimes committed by directors, executives, their subordinates and other subjects acting on behalf of the legal entity (e.g. the agents), when the unlawful conduct has been carried out in the interest of or to the benefit of the company concerned.

## 1. *Introduction*

- Liability of legal persons in Italy is NOT of a general nature but applies to a long list of typified cases provided for by the Criminal Code or by other criminal provisions.

## **1. *Introduction***

The scope of LD 231/2001 has been progressively expanded in the last few years to encompass a number of new offences “predicate” to the liability of legal persons, including notably money laundering. These incriminations include all different cases of corruption provided for by Italian legislation.

## **1. *Introduction***

*Last but not least*, the principle of mandatory prosecution (“principle of legality”), provided for by Italian constitution for criminal proceedings, is not considered to be of application in case of liability of legal persons.

## *2. Organizational models*

LD 231/2001 provides a “*defence*” from liability for a legal person that has put in place an “organizational model” aimed at preventing an offence that has nevertheless occurred.

## ***2. Organizational models***

**A body is not liable for an offence if it proves that before the offence was committed**

- (i) the body's management had adopted and effectively implemented an appropriate organisational and management model to prevent offences of the kind that occurred;
- (ii) the body had set up an autonomous organ to supervise, enforce and update the model;
- (iii) the autonomous organ had sufficiently supervised the operation of the model; and
- (iv) the perpetrator committed the offence by fraudulently evading the operation of the model.

## *2. Organizational models*

- A company is responsible for designing an organisational model tailored to its business and activities.
- A company may base its model upon a model code drafted by a business association and approved by the Ministry of Justice

## *2. Organizational models*

- If an issue arises, the Court trying the case will ultimately decide whether the organisational model was adequate to prevent the offence that occurred.
- The court would make such a decision by examining both the substance of the organisational model and how it was implemented, for example, whether the independent supervisory body (*organismo di vigilanza*) adequately fulfilled its responsibilities.

## *2. Organizational models*

- At present only one Court decision has found a company's organisational model to be adequate to exclude responsibility.

## *2. Organizational models*

- The court found that the company's organisational model was not only consistent with the general requirements of LD 231/2001, but also included specific measures aimed to reduce or eliminate the risk of the particular offence contested at trial.
- In addition, the model was in line with Confindustria's Guidelines.
- Furthermore, the internal procedures of the model specifically required the “approval” of two or more individuals to perform the activities with a high risk rate.

## *2. Organizational models*

The court also explained that the illegal conduct that formed the basis for trial was not caused by an incorrect organisational model but by abnormal behaviours by high-level management that violated the internal rules of said model.

## *2. Organizational models*

Against this background in one of the two cases that led to the sanction of legal persons for foreign bribery in Italy, the Court of Milan held that, although the organisational model in place in each company was “adequate to prevent crimes like those that occurred” it was “not successfully implemented” nor “properly watched over”.

### 3. *Sanctions*

For legal persons, the amount of a fine that may be imposed for foreign bribery depends on the nature and seriousness of the offence and is determined by a certain number of “quotas.”

### **3. Sanctions**

- Bribery for officials acts (article 318 CC) is punishable by a fine of up to **€ 309.800**. Bribery for acts against official duties (article 319 CC) and aggravated bribery where the offence was committed in favour of or against a party to legal proceedings (article 319-ter CC) are punishable by a fine of **€ 51.600** to **929.400**.
- Where there are aggravating circumstances or where aggravated bribery results in a wrongful conviction or involves the award of public offices, salaries, pensions or contracts with the government, a fine of EUR **77.400** to **1.239.200** applies.

### 3. *Sanctions*

- Around **500** legal persons have been sanctioned in Italy, in Italy since the entry into force of the Law
- Most of them have accepted to go through plea bargain agreements (*patteggiamento*)

### 3. *Sanctions*

- 18 legal persons have been sanctioned for bribery (active or passive) in Italy, including 17 through plea agreements (*patteggiamento*) since the entry into force of LD 231/2001
- Only two cases, until now, have resulted in fines against legal persons for international bribery.

### **3. *Sanctions***

- First, the COGIM case (Oil for Food case) involved the alleged payment of USD 721.000 in bribes to Iraqi public officials in connection with contracts to supply medical equipment to the Iraqi Ministry of Health; the company was fined EUR 90.000.
- Second, the Pirelli/Telecom case involved the alleged payment of approximately EUR 200.000 in bribes to a French public official in order to obtain business authorizations; the two companies involved were fined EUR 400.000 each.

### 3. *Sanctions*

In both cases, the fines were imposed under a *patteggiamento* (“plea bargain”) procedure

*Articles 444 to 448 of the CPC on patteggiamento notably provide that when the defendant and the prosecutors ask the court to apply a substitute fine in a patteggiamento procedure, the fine is “reduced by up to a third.”).*

## **4. *Interdictive sanctions***

**Under LD 231/2001, a legal person may be subject (for at least one year) to:**

- (i) suspension or revocation of authorisations, licenses or concessions instrumental to the commission of the offence;
- (ii) prohibition on contracting with the public administration;
- (iii) denial of facilitations, funding, contributions and subsidies (including those already granted); and
- (iv) prohibition on advertising

#### ***4. Interdictive sanctions***

If a court considers none of these sanctions to be adequate, it may flatly prohibit the offender from conducting business activities

## **4. *Interdictive sanctions***

**Interdictive sanctions are compulsory if:**

- (i) a legal person obtained “considerable profit” from the offence and the offence was committed by an individual in a managerial position or
- (ii) the legal person has committed repeated violations (article 13.1)

#### **4. *Interdictive sanctions***

A court may also impose these interdictive sanctions as preventive or “precautionary” measures, *i.e.*, before a final court decision is handed down.

## **5. *Confiscation***

As concerns legal persons, under article 19.1 of LD 231/2001, “the confiscation of the price or the proceeds of the offence, apart from the portion which may be given back to the damaged person, shall always be ordered against the body”.

## 5. *Confiscation*

- Thus, imposition of confiscation measures for foreign bribery offences is generally mandatory against legal persons.
- One out of the three legal persons that have been sanctioned in Italy up to now was subject to confiscation of € 753.000 as part of a *patteggiamento* procedure.

## *5. Confiscation*

Article 19.2 provides that confiscation of “sums of money” or property of equivalent value (“goods or other advantages”) is possible where the bribe or proceeds themselves may no longer be available so providing the possibility for “value confiscation”

## **5. *Confiscation***

The Italian Supreme Court has confirmed (in 2009) that LD n° 231 provides a legal person's independent (and not any more "ancillary") liability for crimes committed in its interest underlining that confiscation (also of the equivalent value) of proceeds of crimes is always mandatory against the legal person.

## ***6. Statute of limitations***

Regarding legal persons, a prosecutor must conduct an investigation within a limitation period that is different and autonomous from the one that applies to proceedings against a natural person.

## ***6. Statute of limitations***

- Pursuant to article 22 of LD 231/2001, cases are time barred after 5 years, starting the day the offence was committed.
- However, the period of limitation is interrupted by a request for the application of precautionary measures or the notification of the administrative violation related to the offence (article 59).
- While the limitation period applying to individuals is capped within a ultimate period of 7 and a half years, no such ultimate period applies to legal persons.

## **7. *Predicate offences provided for by the Decree no. 231***

Until last November the predicate offences were the following:

- (i) crimes against the Public Administration (i.e. fraud against the State; theft of public funds; fraud; bribery, etc...).
- (ii) crimes concerning the forgery of coins, banknotes , etc.;
- (iii) “*whitecollars*” crimes, as forgery of a prospectus; falseness in statements or communications of the audit company, etc...;

## **7. *Predicate offences provided for by the Decree no. 231***

- (iv) crimes committed with purposes of terrorism and eversion of democratic order;
- (v) crimes against the fundamental rights of freedom (in Italian “*reati contro la personalità individuale*”);
- (vi) “Market Abuse”;
- (vii) crimes against person (manslaughter and negligently causing serious or very serious injuries), committed in violation of safe working practices and the protection of hygiene and health at work;

## **7. *Predicate offences provided for by the Decree no. 231***

- (viii) crimes concerning receiving, recycling and use of money, goods or usefulness of unlawful origin;
- (ix) crimes of organised crime;
- (x) crimes against industry and trade and crimes against infringements of copyright;
- (xi) induction not to make statements or to make false statements to the court.

## ***8. Recent legislative developments***

Law n. 190 of 6<sup>th</sup> November 2012, brings a comprehensive set of new measures aimed to prevent and repress corruption and illegality in the Public Administration

## ***8. Recent legislative developments***

With reference to legal persons, the newly introduced offences of “undue inducement to give or promise money or other benefit” and “corruption among private parties” are now inserted as new predicate offences of liability of legal entities under LD 231 of 2001.

## *Conclusions*

OECD (Phase 3, Dec. 2011) has recommended that Italy take steps to increase the effectiveness of the liability of legal persons in foreign bribery cases.

## *Conclusions*

**Italy should raise awareness among the prosecuting authorities throughout the country, to ensure that the large range of possibilities available in the law to trigger the liability of legal persons for foreign bribery offences is understood and applied consistently and diligently.**

## *Conclusions*

It should be prevented / avoided  
the dismissal of cases based on  
statute of limitations grounds.

## *Conclusions*

Increase the maximum level of administrative fines for legal persons and ensure that the mitigating factors and the reduction of the fine imposed through patteggiamento procedures lead to the imposition of sanctions that are effective, proportionate and dissuasive, including for large companies

