Corporate Criminal Responsibility in Italy: An Inside Look at Legislative Decree 231/2001

Ernesto Gregorio Valenti, Partner, Eleonora d'Avack, Associate, Bruno Andò, Associate, and Raffaele Turco, Legal Assistant, Studio Legale Vassalli, Rome, Italy

The birth of Legislative Decree 231/2001

Prior to the enactment of Legislative Decree number 231 of June 8, 2001 (hereinafter 'Legislative Decree 231/2001'), the Italian legal system did not provide for corporate administrative responsibility for the criminal conduct of employees. Employees were liable individually for their criminal actions; however, corporate entities as a whole were not responsible, except for the reparation of the civil damages caused by the illegal conduct. This new law is inspired by the compliance models that are adopted in the United States, and it has forced Italian corporations to adopt similar models. This article will highlight the main aspects of the law, and present the single most important decision pursuant to said law.

Legislative Decree 231/2001 was created in the heat of the 2001 parliamentary election campaign, as the polls showed that Italy was preparing to welcome Silvio Berlusconi's centre-right party back to power. The centre-left majority was feeling the pressure, hence they were moving hastily to cram their legislative projects into their final days in office. Their political agenda included creating a regulatory framework to punish legal persons and corporations with sanctions deriving from criminal activity of employees. The purpose of Legislative Decree 231/2001 was to bring into force the principles already established by the European Union and, thereafter, by Law number 300 of September 29, 2000, regarding the elimination of separate sanctions for individual entrepreneurs and managers of corporations. In early May 2001, the Government approved Legislative Decree 231/2001 amid the chaos of the election campaign. The introduction of this law represented a small victory for the centre-left majority, because a significant legal innovation was enacted in a very brief period of time. However, the speed with which the law was created and passed has led to an incomplete and ambiguous legal framework for corporate criminal responsibility in Italy.

The European Union had already provided a series of provisions in light of article 31[1] of the Treaty on European Union.[2] Furthermore, by means of

Notes

1 Said article provides:
1. Common action on judicial cooperation in criminal matters shall include: facilitating and accelerating cooperation between competent ministries and judicial or equivalent authorities of the Member States, including, where appropriate, cooperation through Eurojust, in relation to proceedings and the enforcement of decisions;
   (a) facilitating extradition between Member States;
   (b) ensuring compatibility in rules applicable in the Member States, as may be necessary to improve such cooperation;
   (c) preventing conflicts of jurisdiction between Member States;
   (d) progressively adopting measures establishing minimum rules relating to the constituent elements of criminal acts and to penalties in the fields of organized crime, terrorism and illicit drug trafficking.
2. The Council shall encourage cooperation through Eurojust by
   (a) enabling Eurojust to facilitate proper coordination between Member States' national prosecuting authorities;
   (b) promoting support by Eurojust for criminal investigations in cases of serious cross-border crime, particularly in the case of organized crime, taking account, in particular, of analyses carried out by Europol;
   (c) facilitating close cooperation between Eurojust and the European Judicial Network, particularly, in order to facilitate the execution of letters rogatory and the implementation of extradition requests.

2 Several recommendations by the Ministry Committee of the Council of Europe influenced the introduction of public regulation of the responsibility of legal persons: Recommendation number 28/1977, in which Member States were encouraged to modify the general principles of criminal responsibility in order to include legal persons as liable parties; Recommendation number 12/1981, in the battle against financial crimes, and Recommendation number 15/1982, for the purpose of creating a form of criminal protection of consumers' rights. See also: the Convention on the protection of the European Communities' financial interests, signed in Brussels on July 26, 1995, and the First Protocol of September 27,1996, and the European Court Protocol of November 29, 1996; the Treaty on European Union on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union, signed in Brussels on May 26, 1997. The OECD also issued an important treaty titled the Convention on the Fight against the Corruption of Public Officials in International Economic Transactions, signed in Paris on December 17, 1997.

Recommendation number 18 of October 20, 1988, the Council of Europe recommended the introduction of *criminal* liability for legal persons. In light of resistance in countries in which political and economic pressure was (and still is) significant, the Council began to refer to *administrative* liability in its subsequent recommendations.

In light of the above, Law number 300 of September 29, 2000 authorized the President of the Republic to ratify the above-mentioned European Conventions and delegated – in article 11 – the Government to issue a Legislative Decree regarding the regulation of administrative liability of legal persons (as well as associations lacking legal status that do not carry out activities required by the Constitution). This law also set forth criteria that the Government would have to follow in the drafting of the new law.

Approximately nine months later, the Government gave birth to the final text of Legislative Decree 231 that introduces the 'regulation of administrative responsibility of legal persons, companies, and associations lacking legal status.' This law is clearly inspired by the compliance models that were created in the United States, and it establishes a liability system for corporate entities 'for administratively illicit activities arising from a crime' (article 1, paragraph 1).

Paragraph 1 of article 27 of the Italian Constitution explicitly states that 'criminal responsibility is personal.' According to the current prevailing doctrine (confirmed by many Constitutional Court decisions),[3] this means that if a person is to be *criminally* responsible, the illicit activity that is carried out must be tainted by psychologically fraudulent or negligent behavior. Therefore, according to most scholars,[4] true criminal responsibility of legal persons and entities is not admissible in the Italian constitutional system.

Hence, in 2001 the Italian Government faced the evident political and legal necessity to inflict heavy sanctions on fraudulent corporations. However, the legislator was limited by article 27 of the Constitution, which impeded it from establishing criminal responsibility for corporate entities. The outcome was a compromise thereby qualifying legal persons' liability as 'administrative liability arising from a crime.'

Nevertheless, Legislative Decree 231/2001 in practice appears to establish the criminal liability of corporations. First, this type of liability arises from a criminal offence. Second, the corporation appears before a criminal judge in a criminal proceeding. Third, sanctions are based on the existence of a criminal offence, and are not limited to the lack of a compliance model. Moreover, the new provision abides by article 27 of the Constitution. Corporations are personally liable, because their responsibility is not simply determined by criminal offences committed by employees, it is established based on the lack of internal organization, and the fact that the crime was committed in the interest, or to the advantage, of the corporation.

The general principles of Legislative Decree 231 and the liable individuals

Legislative Decree 231/2001 establishes the administrative responsibility of legal persons, which originates from the commission of a crime by a physical person (an individual in an executive position or in a subordinate position).

In light of the close connection between this form of corporate responsibility and the individual criminal responsibility arising from a crime, and based on the suggestions of the European Court of Human Rights – which explicitly state that 'traditional' criminal law guarantees must also be extended to other sanctioning laws – the Government inserted several articles in Legislative Decree 231: the principles of legality and non-retroactivity of criminal laws (article 2) and the regulation of succession of criminal laws through time (article 3).

The inclusion of said criminal law principles is not convincing, because the legislator used them to conceal its apprehension. The legislator was probably aware of the fact that Legislative Decree 231 not only introduces a model for full criminal liability (and therefore contrary to the prevalent interpretation of article 27 of the Constitution), but it also creates a regulatory system that, thanks to a particularly effective sanction system, can potentially justify very insidious interference in corporate life. The legislator attempts to cram this new regulation within a network of guarantees that are intended to protect the individuals subject to the new law from illicit intrusions by the Judicial Authority.

The second paragraph of article 1 of Legislative Decree 231 provides that 'the same ... shall be applied to legal entities and companies and associations without legal status.' Unfortunately, the following paragraph of the same article excludes that the Legislative Decree can be applied to 'the State, to public territorial entities, to other non-economic public entities, as well as to entities that carry out constitutionally-related activities.'

Notes

3 Verdict number 364 of 1988 and verdict number 1085 of 1988.

4 Such as Alberto Alessandri and Vincenzo Manzini.

The indication of corporate entities who are liable under this new regulation fulfills the need to avoid mass criminalization, but could create unjustified protection for certain entities. The reasons behind the inclusion of entities with legal status and the exclusion of the State are evident; however the definition of public entities other than the State and entities lacking legal status is ambiguous. This could lead to unequal treatment of individual entities in different proceedings.

Offences that determine a corporation's administrative liability

During discussions in Parliament regarding the approval of the bill to establish the regulation of legal persons' responsibility, the Senate prepared an elaborate list of offences, which are provided by the Criminal Code and other laws. The *Camera dei Deputati* (the equivalent of the House of Representatives) proposed a reduced list of offences. Both government bodies, however, were striving to avoid rendering legal persons responsible – even from an administrative standpoint – for all crimes that can be committed by physical persons.

Ultimately, the Senate's proposal prevailed: therefore article 11 of Law number 300/2000 included an extensive list of offences, including crimes committed by public officials against the Public Authority (for example fraud against the State, extortion, corruption, and conspiracy in corruption), and various offences against the State's property (fraud against the State and computer fraud committed against the State or other public entities).

Regardless, the Government opted for a reduced number of crimes, originally including only the crimes provided by the cited international conventions[5] (i.e. selected corruption activities, extortion, and fraud). Thereafter, thanks to various additions (articles 25 bis, ter, and quarter of Legislative Decree 231/2001), the number of offences increased.

Initially as of June 2001, legal persons were liable for the following crimes:

- undue receipt of funds, fraud against the State or a public entity or the European Union or for the obtainment of public funds, and computer fraud against the State or a public entity (article 24);
- extortion and corruption (article 25).

The reasoning provided in the Government Report attached to the Bill, which was in favour of a reduction of the applicable offences, focused on the need for a slow and gradual adaptation of corporate policies to principles of legality, and the development of a sound corporate system. However, these arguments may be inadequate. The threat of serious sanctions should induce companies to comply with all regulations, and to adopt suitable corporate governance models, notwithstanding the number of provided offences. Since one of the purposes of the Decree is to avoid the commission of corporate crimes by means of a 'prevention' policy, the Government essentially missed a golden opportunity to establish a definitive structure to battle white collar crime by limiting the number of offences that could entail administrative responsibility.

Subsequent legislative interventions, such as Legislative Decree 61/2002 which extended administrative liability for corporate crimes to collective entities, broadened the category of offences. Currently, the crimes for which legal persons may be punished, in addition to those aforementioned, are:

- falsification of currency, public notes, and revenue stamps (article 25 bis);
- corporate crimes: false financial statements, false prospectus, false reports by independent auditors, obstruction of verifications, fictitious capital formation, undue reimbursement of payments, illicit division of profits and reserves, illicit transactions on the controlling company's shares or stakes, transactions damaging creditors, undue division of corporate property by liquidators, illicit influence on the shareholders' meeting, market manipulation, and obstruction of public authority activities (article 25 ter);
- crimes pertaining to terrorism and against the democratic order (article 25 quarter);
- crimes against individual safety, hence pertinent to slavery and the slave trade and regarding the prostitution of minors, child pornography and the possession of child pornography (article 25 quinquies).

Notes

5 The Convention on the protection of the European Communities' financial interests, signed in Brussels on July 26, 1995, and the First Protocol of September 27, 1996, and the European Court Protocol of November 29, 1996; the Treaty on European Union on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union, signed in Brussels on May 26, 1997. The OECD Convention on the Fight against the Corruption of Public Officials in International Economic Transactions, signed in Paris on December 17, 1997.

Criminally liable physical persons, the organizational and management models, the internal compliance body, and burden of proof

Pursuant to article 5 of the Decree, a corporation is criminally liable in the event that the crime has been committed in its interest or to its benefit:

a) by those persons who are entrusted with the representation, administration or management either of the entity, or of one of its financially and functionally autonomous subsidiaries, as well as by persons who – de facto – act as managers or directors;

b) by those persons who are subject to the authority or control of the individuals indicated sub a).

The entity is not responsible if the aforementioned individuals acted in their own exclusive interest or in the interest of third parties.

Therefore, in order for an entity to be administratively responsible, the manager or employee who commits the underlying crime must do so in the interest or to the advantage of the entity.

Legislative Decree 231 provides two different burdens of proof depending on whether the crime was committed by individuals in executive positions (article 5, paragraph 1a) or by individuals in subordinate positions (article 5, paragraph 1b).

In the event that the crime is committed by managers, article 6 provides that:

the entity is not responsible if it proves that:

a) the management body adopted and efficiently implemented, prior to the commission of the crime, organizational and management models suitable to prevent crimes similar to those committed;
b) the task of overseeing the functioning and observance of the models, and handling its update was entrusted to a body within the entity provided with autonomous initiative and control powers.
c) the individuals committed the crime by fraudulently eluding the organizational and management models;
d) there was not a lack of or insufficient control by the body pursuant to letter b).

In the event that an individual subject to supervision is responsible for the criminal activity, article 7 of the Legislative Decree comes into play: 'the entity is responsible if the commission of the crime was made possible by means of a breach of management or supervision requirements.'

In the case of managers, the burden of proof lies on the company. Therefore, the company must prove that the manager committed the crime in his/her exclusive interest (or advantage), but also that he/she fraudulently eluded the application of the model and voluntarily avoided the supervision of 'a body within the entity provided with autonomous initiative and control powers' (a compliance body) (article 6). Hence, to some extent managers are considered to be equivalent to the company. On the other hand, the burden of proof lies on the Public Prosecutor for crimes committed by subordinates. The Public Prosecutor must prove that the company was negligent. However, if the company proves that the subordinate committed the crime when an effective compliance model was in place, it is exempt from any responsibility pursuant to Legislative Decree 231/2001.

The crucial point of Legislative Decree 231 is that it does not provide an exact definition of the required content of the compliance models. However, in 2002 entrepreneur unions such as *Confindustria* and *ABI* (*Associazione Bancaria Italiana*) provided guidelines as to the recommended content of the models. In particular, *Confindustria* stated that if a foreign company already applies a compliance programme in accordance with its local jurisdiction, it is considered to be compliant with Legislative Decree 231.[6]

Furthermore, the wording of article 6 is ambiguous: paragraph 2 b) states that the body must be internal but it must also hold independent powers. Hence, the company cannot rely on an external body to provide for this control, but it must face the arduous task of establishing an internal body that is self-governing. The law does not indicate who can be a compliance officer, and which position they can hold within the company. These vague indications hinder the creation of the compliance body. One runs the risk that the internal body develops into the managers' puppet (provided that the executives are not members of the internal body pursuant to article 6, paragraph 4, as per small corporations) thereby protecting their interests. Conversely, one risks creating a body that has the undue ability to externally access privileged and confidential information (for example regarding the company's decision-making process). In addition, the company runs the risk that the external representative has little or no knowledge of the company's daily activities, and thereby provides inadequate monitoring.

Based on the 'carrot-and-stick' approach, the entity is required to provide special preventive protocols in

Notes

6 *Linee Guida per la Costruzione di Modelli di Organizzazione, Gestione e Controllo ex D.Lgs. 231/2001*, last update May 24, 2004, Confindustria, ‹http://www.confindustria.it›.

order to impede the commission of crimes. In the event of crimes committed by both managers or subordinates, the corporate entity can be exempted from liability if it adopted and effectively executed management and organizational models suitable to prevent such offences prior to the commission of the crime. However, only as per crimes committed by managers, the profit that the entity gained from the criminal conduct is still subject to confiscation.

This system aids companies that adopt and execute compliance models, and condemns companies that do not utilize them. Emphasis was placed on these models, because if they were effectively adopted and executed, the individual's criminal conduct would be foreseeable and thus avoidable.

The applicable sanctions

Legislative Decree 231/2001 contains a dual sanction system that is based on monetary sanctions, and secondarily on debarment sanctions, which are only applicable to serious cases. In addition, the law also provides for mandatory confiscation, for the purpose of completely eliminating the pecuniary gain deriving from the crime (article 19), and the publication of the conviction.

In order to calculate the fines, the Government adopted a 'quota' system. These quotas are based on 'the seriousness of the crime, the extent of the entity's liability, and the activity executed in order to eliminate or minimize the consequences and prevent the commission of further illicit activity' (article 11, paragraph 1). Thereafter, the judge must quantify the amount of each quota based on the 'the entity's economic and financial conditions' (article 11, paragraph 2).[7]

The introduction of debarment sanctions is of great importance. These sanctions include the debarment of activity, the suspension or revocation of authorizations or licenses, the ban on negotiations with public authorities, the exclusion from tax breaks and supplemental financing, and the prohibition to advertise goods and services. The only case in which the judge must definitively bar the company's activity is when its structure is used 'for the sole or main purpose of allowing for or aiding the commission of crimes for which the company is liable' (article 16, paragraph 3). This represents the typical case of an illicit business, which has no intention of restructuring its activity according to law, hence the only solution is to neutralize it.

The remedies

Article 12 provides for a reduced fine in the event that the author of the crime committed the act mainly in his/her interest or in the interest of third parties and the entity gained little or no profit from it (paragraph 1). Moreover, the sanction is reduced if, prior to the trial, the entity eliminated the damaging or dangerous consequences of the crime, it proceeded to do so, or it adopted and effectively applied an organizational model that is suitable to prevent crimes similar to those committed (paragraph 2).

Furthermore, article 17 provides for remedies for the application of debarment sanctions. These sanctions are not applied to the entity contingent on three conditions prior to the trial. Firstly, similarly to the provisions for monetary sanctions, the entity completely compensates for damages, or it eliminates the damaging or dangerous consequences of the crime or effectively proceeds to do so. Secondly, the entity eliminates the organizational gaps that allowed for the crime to be committed by means of the adoption and execution of an organizational model that is suitable to prevent similar crimes. Finally, the company allows for the confiscation of the gained profits.

Hence the cited articles allow companies to remedy the alleged criminal conduct of their employees. Companies are also given the opportunity to remedy their behavior during the course of the proceeding.

The Siemens verdict

The first major verdict pursuant to Legislative Decree 231/2001 was issued on April 28, 2004. In this case, Siemens AG was convicted because three of its managers were found guilty of bribing Enel, the Italian national energy company, in order to obtain procurement contracts for the provision of gas turbines. The court also sentenced Siemens AG to a one-year ban on contracting with public authorities. The German company, the first foreign multinational sentenced under the new law, was convicted as a legal person, because it allegedly allowed its managers to corrupt the Enel representatives for its benefit.

Siemens AG had already provided EUR 180 million in damage compensation to Enel on December 12, 2003 in order to avoid the debarment sanction; however the judge did not consider it sufficient in light of the damage incurred by the market and Siemens' competitors. Nevertheless the most serious aspect according to the court was the fact that the multinational company had not taken any action to establish 'an organizational model suitable to prevent

Notes

7 Article 11, paragraph 2 provides: 'The amount of the quota is determined based on the economic and financial conditions of the entity for the purpose of ensuring the effectiveness of the sanction.'

similar crimes' (article 17, paragraph 1 b)) after the alleged crimes had become public domain. The German company was convicted along with its employees, because its organizational model was deemed 'deficient and inadequate.'

Moreover, the judge rejected the defence's position, according to which the provision goes beyond the territorial limits of Italian jurisdiction because Siemens AG is a German company, and German law does not provide for debarment sanctions, nor does it require the adoption of precise organizational models. The judge founded his decision by highlighting that the company had adopted a new code of ethics in accordance with United States law for the purpose of a listing on the New York Stock Exchange, hence it was subject to the same provision pursuant to Italian law.

Conclusion

The establishment of serious sanctions, from an economic and organizational standpoint, surely encourages companies to adopt and apply a compliance model. Hence, Legislative Decree 231/2001 could be a great opportunity or a complete failure depending on the reaction of corporations and future verdicts. The legislator failed to clearly define some aspects of this new law; however this can be justified by the complexity of compliance models. The forthcoming application of this new law will provide an indication as to its success. In the meantime, if corporations intend to protect their interests, they should establish suitable compliance models.