

The introduction of corporate "criminal" liability in Italy

Autore: Manduchi Carla

In: Diritto civile e commerciale

1. The legislative decree no. 231/2001 (1) has introduced for the first time in Italy a form of liability for corporations and other legal entities for crimes committed in their interest or to their advantage, thereby opening a fully new system of criminal liability. The new law, in fact, has dramatically changed the Italian traditional way of intending criminal liability, which has always been conceived in terms of individual liability; on the contrary, the new provisions of law have introduced for the first time a direct responsibility of the legal entity for the non-observance of the provisions of criminal law.

2. The acceptance of a criminal corporate liability has been introduced in modern times in common law jurisdictions, whereas in civil law jurisdiction the principle of personal liability tended to oppose such expansion. This has caused problem of harmonization, to which particularly OECD and the European Commission have been increasingly sensitive during the last decade of the twentieth century.

However, the harmonization problem is not limited to civil law countries. Even if the the main common law countries arrived long ago to the concept that the enterprise is criminally liable, this occurred along different paths and viewpoints: the alter ego model (identification theory) adopted by Great Britain and Canada; the respondeat superior model (vicarious liability) adopted by United States; the corporate culture model (organisational liability) specific of Australia (but with clear tendency to be adopted also in other countries).

In civil law countries the issues are more complex due to the strongly individualistic approach of their criminal law provisions, which has caused considerable delay in accepting pure corporate criminal

concepts.

3. The opening of the new perspective arrived in Italy only with the mentioned Legislative Decree no. 231/2001, issued upon the need (stated in the delegating law no. 300/2000) to implement the above cited EC and OECD sets of rules.

The legislative decree, though, conservatively sets forth not a full fledged corporate criminal liability, but rather an administrative corporate liability (which, though, is almost criminal, both for its structure as well as its content, very often consisting to references to the connected crimes, and because ascertained by a judge in a criminal proceeding according to c.p.p. rules). Not only corporations strictly speaking are subject of this administrative, “semi-criminal” liability: but any legal entity, including association without formal legal personality.

4. As a consequence, legal entities may be held liable by being subject - autonomously respect to the individuals committing crimes - to money penalties (from approximately € 26.000,00 to € 1.500.000,00; additionally the corporation is subject to disgorgement of any profit derived from the crime) and/or interdiction (to operate in certain industries, with suspension and withdrawal of licenses; to contract with the public administration; to obtain public funding and contributions; to advertise goods and services; the all for periods among 3 months and 2 years), for any offences committed or any attempts to commit offences - in Italy or abroad - in the interest or to the advantage of the company itself:

- by individuals who are legal representatives, directors or managers of the company or of one of its organizational unit that has financial and functional independence, or by individuals who are responsible for managing or controlling the company (individuals in apical position or “apicals”)

•
by individuals who are managed or supervised by an individual in an apical position (individuals under the command of others or “subordinates”).

Though not any criminal offence of an “apical” or “subordinates” triggers the administrative, semi-criminal liability of a corporation.

5. Relevant crimes are: crimes against the public administration; IT criminal offences; corporate crimes; crimes of manslaughter and accidental injury committed in violation of provisions concerning occupational safety; money laundering.

6. Attempt

Section 26 Legislation decree 231/2001 provides the institution of the Attempt. In special, the company can be consider responsible if the criminal act has been left unended. Anywhere, in this case it is possible to apply the precautionary measures.

7. Interest or advantage for the company.

To allege the company responsibility it's necessary that the crime has been committed in its interest or advantage. Consequently, it is possible not to speak about a company crime if the individual person committed the criminal act to his exclusive advantage or to the advantage of third persons.

Interest and advantage are the two criteria that must be considered to affirm the company responsibility.

They can be present at the same moment or alternative. In fact, it's sufficient the presence of one of them.

The judge ascertains the interest evaluating the conduct of the individual person in regardless of its concrete effects in an advantage point of view. In other terms, the judge evaluate if the crime is made in the interest of the company just looking if that crime - in abstract - produce a positive effect for the company. This kind of ascertainment is called "ex ante evaluating", because first of all judge look if the conduct is able to produce positive effect on the company, because only in this way it is possible to say that such conduct is made in the companies' interest.

On the other hand, the advantage is ascertained through an evaluation called "ex post one", considering the concrete and positive effects that the company takes ahead from the criminal action.

So, with the concept of "advantage" we must understand the concrete economical utility purchased from the company.

8. The interdiction sanctions can be applied from 3 months until 2 years. Their discipline is particularly harsh. It needs to be observed that an interdiction penalty is able to cause the paralysation of the company, with well understood damages for the its business and image.

9. Judicial commissioner

Judge, instead of applying an interdiction sanction, can dispose the prosecution of the company activity

and designate a commissioner, for an equal period with the one calculated in case of interdiction, if one of the following conditions occurs:

1.
the company unrolls a public service or a needed public service which interruption can case a relevant prejudice to the community;

2.
the interruption of the company activity can case, considering its dimensions and the economical conditions of the area where it's located, significant effects on employment.

10. Confiscation.

The decree provides the institute of confiscation of the price or of the profit taken from the crime. When this is not possible, the judge can dispose the confiscation of money amounts, goods or other utilities for an equal value of the price or the profit of the crime. (About the meaning of the “confiscable profit” italian High Court, United Sections, 26654/08).

The judge can, precautionary, dispose the seizure of goods which is allowed the confiscation.

11. Responsibility exclusion.

The legislative decree offers a safe harbour in case the entities adopt a suitable organisation model and activate adequate control bodies: the observance of the organization model enforced by the control body – together with the voluntary disgorgement of any profit derived from the individual crime of an Apical or Subordinate – guarantees the legal entity immunity from the administrative, “semi-criminal” liability (or at least a reduction of the sanctions), both as to money penalties and interdiction sanctions.

In fact company is free from responsibility when:

- the governing body has adopted and implemented an organisational and management model able to avoid crimes of the same type as the one realized; The Civil Court of Milano, with decision n. 1774 of 12 February 2008, has condemned the delegate administrator of an Italian company to recompense the damages to the same company for the amount of the administrative sanction applied, ex legislation decree 231/2001, because of not adopting an organizative model without any motivation;
- has institute an supervisory board which polices on the model correct function, on its observance and constant updating;
- the individual persons has committed the crime fraudulently eluding the organisational and management model (compliance program);
- there hasn't been an omitted or insufficient control from the organism (supervisory board) which

policies on the model correct function, on its observance and constant updating.

1.

The model (compliance program) must contemplate:

- the activities where it is possible to commit crimes - analyze the potential risk areas; mapping risks;
- protocols concerned with planning the training of decisions on risk areas;
- a method for managing financial resources appropriate to prevent the commission of crimes;
- information obligation to the organism which polices on the model correct function, on its observance and constant updating;

- an appropriate disciplinary system able to punish the non compliance of the measures indicated in the model;

A model (compliance program) is appropriate if characterized by:

- concreteness (concrete organization)
- effectiveness (able to prevent the commition of the presupposed crime)
- dynamism (updated in case of organizational changes or new crimes)

1.

The supervisory board should be internal of the company and must have the following requirements:

- autonomy and independence (from the top executive);

- professionalism

- action continuity;

The supervisory board should perform the following tasks:

- watch on the adequacy of the model to the business reality and on its ability to prevent the commission of crimes (control of the potential effectiveness among the objectives);

- watch on the effectiveness of the model (compliance program) (the respect of it and of its rules having also regard to the company's size);
- ensure the model updating: a. presenting adjustment proposals; b. verifying the implementation and functionality of the proposed solutions.

The supervisory board must:

- access to any significant corporate information in order to exercise its control and supervision;
- receive a constant flow of information about all the corporate activities identified as risky ones;
- promote system changes to guarantee its subsistence and its updating

- promote possible sanction procedures;
- ensure the knowledge of the requirements by any person in connection with the company, and the correct and real application of them;
- conduct the internal audit activity;
- be the recipient of a reporting system, non hierarchical, aimed at the communication - by any person - of information about violations of rules or about system malfunction;
- report directly to upper management - annual report.

Avv. Manduchi Carla

1⁽¹⁾ Avv. Carla Manduchi, University “SAPIENZA” of Rome - Law Faculty, Juridical Sciences Department, Section of Criminal Law and Criminal Procedural Law.

(2) Presentation held in Tirana (Albania), on May, 08th 2010 at Hotel Tirana in occasion of the Conference “Challenges of Albania’s integration in European Union” - 07-08 May 2010; event organized by University “SAPIENZA” of Rome, University “MATHER TEREZA” of Tirana, UFO University of Tirana.

<https://www.diritto.it/the-introduction-of-corporate-criminal-liability-in-italy/>