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## CRACKING DOWN ON CORPORATE CRIME IN ITALY

ROSA ANNA RUGGIERO\*

### I. ITALIAN LAW NO LONGER TIED TO THE DOGMA *SOCIETAS DELINQUERE NON POTEST*: LEGISLATIVE DECREE NO. 231, 2001

With the implementation of Legislative Decree No. 231 on June 8th, 2001 (L.D. No. 231/2001), Italy aligned itself with other European countries (France, the United Kingdom, Holland, Denmark, Portugal, Ireland, Sweden, Finland), which already provided for the liability of corporate entities responsible for committing certain crimes.<sup>1</sup> The previous gap in legislation had created serious implications at an international level, especially in light of the objective of fostering cooperation in the AFSJ (Area of Freedom, Security and Justice in the European Union) through, for example, the progressive alignment of Member States' legislation. These implications were amplified by the fact that corporate crime was increasing more rapidly than crimes committed by individuals, with manifestations that often transcended national borders. In this context, Art. 11 of Law No. 300, issued on September 29th, 2000, provided for an explicit delegation to the Government to regulate the administrative responsibility of corporate entities, with the intent to conform Italian legislation to the urgent pleas coming from the European Community.<sup>2</sup>

Resistance to introducing corporate responsibility for crimes committed by managers and employees undoubtedly stemmed from the

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1. See *infra* note 47.

2. *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, Organization for Economic Co-operation and Development, 2011; *Drawing up the Second Protocol of the Convention on the protection of the European Communities' financial interests*, Official Journal of the European Communities, July 19 1997.

traditional dogma, *societas delinquere non potest*, generally regarded to be protected in Italy under Art. 27 of the Constitution, according to which criminal liability is personal. This anthropocentric view led to the conclusion that even when the commission of crimes was facilitated by the organizational structure in which the individuals operated, it was only those individuals who took action.<sup>3</sup> Corporate entities could not be held criminally liable for these crimes, they could only be sued in civil court for the damages suffered as a consequence of the crimes.<sup>4</sup>

The provision of Art. 27 does not, however, necessarily lead to the conclusion that corporate entities should be excluded from criminal liability. The principle that criminal responsibility is personal could be understood as a prohibition against the assumption of responsibility for others.<sup>5</sup> From this perspective, and drawing on the “organic theory,” according to which the actions of a corporation’s officers can be directly attributed to the collective entity, the legal person can be held responsible for the crime itself.<sup>6</sup> In other words, if the corporation can be held responsible for the legal acts of those who carry out work on its behalf, the same should be true for illegal acts.<sup>7</sup> This conclusion is also supported by recent studies on business administration, which, through bestowing the corporation with a more vital image, attribute decisions adopted directly by the corporation and not the individuals who operate within it, thus recognizing that the corporation itself has its own free will.<sup>8</sup>

Nevertheless, for a long time and, in part, still today,<sup>9</sup> Art. 27 has been interpreted, even by the Constitutional Court,<sup>10</sup> as an affirmation of the principle *nulla poena sine culpa*, which leads to excluding the existence of criminal responsibility if a psychological link cannot be proven between

3. See Giulio Battaglini, *Responsabilità penale delle persone giuridiche?*, RIV. IT. DIR. PEN. 661 (1930).

4. Art. 2049 Civil Code (C.C.); Art. 83 Criminal Procedure Code [hereinafter CPC].

5. See Franco Bricola, *Il costo del principio societas delinquere non potest nell’attuale dimensione del fenomeno societario*, in SCRITTI DI DIRITTO PENALE—Vol. II—Tomo II—DIRITTO PENALE DELL’ECONOMIA 3039 (Giuffrè 1997).

6. See Giancarlo De Vero, *La responsabilità penale delle persone giuridiche*, in TRATTATO DI DIRITTO PENALE 40 (Carlo Federico Grosso et al eds, Giuffrè 2008).

7. To conclude otherwise would create a privilege devoid of justification: Domenico Pulitanò, *Responsabilità amministrativa per i reati delle persone giuridiche*, in ENC. DIR.—AGG. VI 956 (Giuffrè 2002).

8. See Paolo Bastia, *Implicazioni organizzative e gestionali della responsabilità amministrativa delle aziende*, in *SOCIETAS PUNIRI POTESIT. LA RESPONSABILITÀ DA REATO DEGLI ENTI COLLETTIVI* 35 (Francesco Palazzo eds., Giappichelli 2003).

9. See Giuseppe Amarelli, *Mito giuridico ed evoluzione della realtà: il crollo del principio societas delinquere non potest*, RIV. TRIM. DIR. PEN. EC. 982 (2003).

10. Corte Costituzionale, 364, 1998; Corte Costituzionale, 1085, 1998.

the agent and the fact.<sup>11</sup> Given that criminal liability does not exist when intent cannot be ascertained, corporations would fall outside the criminally reproachable area since it would be impossible to attribute to them a psychological mind-set equating to intent.<sup>12</sup>

Increasingly, due to the rapid growth in corporate crime, a different interpretation of the constitutional principle provided for by Art. 27 is beginning to take hold; crimes are attributed to the agent (collective and/or individual) who is responsible for the illegal conduct, rather than focusing exclusively on the psychological link between the agent and the fact.<sup>13</sup> Hence, when an individual is the mere executor of illegal behavior made possible because of the company policy, or the corporate organization is unable to oppose or prevent this conduct, the corporation can also be held liable.<sup>14</sup>

Along the road moving away from the dogma *societas delinquere non potest*, however, a further obstacle has been encountered: the same Art. 27, which establishes personhood as a precondition for criminal responsibility, affirms that the sentence issued must have a re-educational purpose.<sup>15</sup> It is outside the scope of this paper to evaluate the practical application of this objective in a nation such as Italy, in which sentences—if and when served—seem to be merely retributive in the majority of cases and offer few chances for the criminal to be rehabilitated. However, many have observed that a rehabilitative purpose only works if the recipient of the sentence is an individual who can embark on a path of reformation, which is impossible for a collective entity.<sup>16</sup> This position is reinforced by the fact that corporations can change their corporate structure over time, and a sentence could be issued many years after the commission of the crime.<sup>17</sup> This hinders the effectiveness of the reformation process, as far as the organization and the management of the entity can significantly change

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11. *Supra* note 5, at 3039.

12. *Id.* Whilst deeming corporate criminal liability compatible with the most basic meaning of personhood established by Art. 27 of the Constitution, considers the problem insurmountable if this article presumes intent.

13. For this interpretation of Art. 27 of the Constitution, *See* Carlo Piergallini, *Societas delinquere et puniri potest: la fine tardiva di un dogma*, RIV. TRIM. DIR. PEN. EC. 582 (2002).

14. *See* the Ministerial Report regarding L.D. No. 231/2001 [hereinafter Ministerial Report], in CODICE DELLA RESPONSABILITÀ “DA REATO” DEGLI ENTI ANNOTATO CON LA GIURISPRUDENZA 422 (Stefano Maria Corso eds., Giappichelli III ed. 2015).

15. Art. 27, § 3, Constitution.

16. *See* Alberto Alessandri, *Note penalistiche sulla nuova responsabilità delle persone giuridiche*, RIV. TRIM. DIR. PEN. EC. 44 (2002).

17. Alberto Alessandri, *DIRITTO PENALE E ATTIVITÀ ECONOMICHE* 212 (Il Mulino, 2010).

from the moment of the decision to that of the concrete application of sanction.

The principle that criminal liability requires personhood undoubtedly gives rise to various considerations. Nevertheless, even this argument, which appears to exclude corporations from criminal liability, can be overcome. In fact, the effect of time passing between the commission of the crime and the delivery of the sentence undermines the objective of reformation even when the recipient of a sentence is an individual who, similarly, could be a completely different person many years after the fact. Paradoxically, even more so for corporations and for all the reasons that will be explained henceforth, the mere prospect of being convicted can push companies onto a virtuous path and be instrumental in bringing them back to the market with a renewed respect for legality.<sup>18</sup>

## II. NATURE OF THE LIABILITY

The trend of moving away from the dogma *societas delinquere non potest*, which previously resulted in excluding corporations from criminal liability, has not received unanimous consensus.<sup>19</sup> When L.D. No. 231 was introduced in 2001, it became necessary to classify corporate liability resulting from crimes committed within the organization or illegal conduct from which the corporation benefited. The Italian Legislature preferred to opt for an ambiguous solution, utilizing the expression *responsabilità degli enti per gli illeciti amministrativi dipendenti da reato* [corporate liability for administrative violations hinging on crime]. In other words, the conduct attributable to the entity is an administrative violation that is derived from crimes committed by individuals who operate within the organization.

The “231” system, therefore, is aimed at tackling corporate crime, which can manifest itself in different forms. There are cases in which corporations are intrinsically illegal insofar as they were created for the purpose of dedicating themselves to crime; others that pursue, not as an exclusive objective, but predominantly, the commission of crimes; and finally, corporations for which criminally illegal conduct is among the

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18. For how the re-educational purpose of the sentence can develop its full potential when the recipient is a corporation, see CRISTINA DE MAGLIE, L'ETICA E IL MERCATO. LA RESPONSABILITÀ PENALE DELLE SOCIETÀ 377 (Giuffrè 2002).

19. Regarding the subsequent stages in the evolution of this school of thought, See Ombretta Di Giovine, *Lineamenti sostanziali del nuovo illecito punitivo*, in REATI E RESPONSABILITÀ DEGLI ENTI. GUIDA AL D. LGS. 8 GIUGNO 2001, N. 231 20 (Giorgio Lattanzi eds., Iid ed. Giuffrè 2010).

risks they are willing to take in order to make a profit.<sup>20</sup> L.D. No. 231/2001 seems to target legal persons that fall into the last category, largely because one of the Legislature's objectives is to bring the entity back into compliance with the law.<sup>21</sup> This is an aim that can be realistically pursued only when corporations have the potential to organize themselves differently. This includes cases in which criminal activity is part of the prevailing company policy, without constituting the corporation's exclusive purpose, and in cases in which the crimes are attributable to an organizational shortcoming or lack of oversight.

Returning to the *vexata quaestio* of the nature of the liability, especially in the aftermath of L.D. No. 231/2001, Italian scholars were divided into two very different positions.<sup>22</sup> Those who supported the criminal nature of the liability<sup>23</sup> were opposed by those who favored complying with the legislative terminology and, therefore, concluded that the liability was inherently administrative.<sup>24</sup> There were also those who claimed that L.D. No. 231/2001 introduced a *tertium genus*<sup>25</sup>: a hybrid between criminal and administrative responsibility.

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20. *Supra* note 14, at 421.

21. *Id.*

22. For an updated and complete review of the different positions and the corresponding arguments, Marco Maria Scoletta, *La responsabilità da reato delle società: principi generali e criteri imputativi nel d. lgs. n. 231/2001*, in DIRITTO PENALE DELLE SOCIETÀ—VOL. I 867 (Giovanni Canzio et al. eds., Cedam 2014).

23. See Giancarlo De Vero, *Struttura e natura giuridica dell'illecito di ente collettivo dipendente da reato. Luci ed ombre nell'attuazione della delega legislativa*, RIV. IT. DIR. PROC. PEN. 1167 (2001); See also Paolo Ferrua, *Le insanabili contraddizioni della criminalità d'impresa*, 29 DIR. GIUST. 8 (2001); Giovanni Fiandaca & Enzo Musco, *Diritto penale—Parte generale* 165 (Zanichelli, eds. VI 2009); Tullio Padovani, *Il nome dei principi e il principio dei nomi: la responsabilità amministrativa delle persone giuridiche*, in LA RESPONSABILITÀ DEGLI ENTI: UN NUOVO ESEMPIO DI GIUSTIZIA PUNITIVA 16 (Giovannangelo De Francesco eds., Giappichelli 2004); Carlo Enrico Paliero, *La responsabilità penale della persona giuridica nell'ordinamento italiano: profili sistematici*, in SOCIETAS PUNIRI POTEST. LA RESPONSABILITÀ DA REATO DEGLI ENTI COLLETTIVI, at 32; Carlo Piergallini, *supra* note 13, at 598. More cautiously, the following Author refers to a "para-criminal" liability: See Antonio Fiorella, *Responsabilità da reato degli enti collettivi*, in DIZIONARIO DI DIRITTO PUBBLICO—vol. V 5101 (Sabino Cassese eds., Giuffrè 2006).

24. Giovanni Cocco, *L'illecito degli enti dipendente da reato e il ruolo dei modelli di prevenzione*, RIV. IT. DIR. PROC. PEN. 116 (2004); Giorgio Marinucci, "Societas puniri potest": uno sguardo sui fenomeni e sulle discipline contemporanee, *ivi*, at 1203 (2002); Mario Romano, *La responsabilità amministrativa degli enti, società o associazioni: profili generali*, RIV. SOC. 410 (2002).

25. *Supra* note 16, at 58; Domenico Pulitanò, *La responsabilità "da reato" degli enti nell'ordinamento italiano*, in *Responsabilità degli enti per i reati commessi nel loro interesse*, CASS. PEN. Suppl. n.6 (2003), at 10 f.; Giovanni Flora, *Le sanzioni punitive nei confronti delle persone giuridiche: un esempio di metamorfosi della sanzione penale*, DIR. PEN. PROC. 1398 (2003); Luigi Stortoni & Davide Tassinari, *La responsabilità degli enti: quale natura? Quali soggetti?*, INDICE PEN. 13 (2006).

The nomenclature did not generate interest purely for speculative reasons. The decision to classify the liability as criminal, administrative or mixed resulted in serious consequences. Only by recognizing the criminal nature of the responsibility can all the protections and guarantees, which characterize the criminal system, be extended to corporations. Otherwise, it is necessary to refer to the principles created for the administrative violation outlined in Law n. 689 introduced on November 24th, 1981, which undoubtedly offers fewer and less stringent safeguards to protect the accused.<sup>26</sup>

It must be noted, however, that what is written in the statute is not always a reliable ally to define the nature of the liability. As the European Court of Human Rights (ECtHR) explains, cases can fall within the area of criminal liability even when they are not classified as such under national law.<sup>27</sup> Member States often categorize illegal acts which are substantially criminal in nature as administrative violations in order to deny the defendant greater safeguards.<sup>28</sup> In these cases, the Court, verifying the applicability of fair trial rights protected by Art. 6 of the European Convention of Human Rights (ECHR), decided it was not bound to the *nomen juris* established by the national Legislature: the ECtHR determined the criminal nature of illegal acts even when they were not categorized as such under national law.<sup>29</sup>

In its evaluation, the ECtHR relies on three criteria: the classification of the illegal act under national law (which nevertheless has only relative value); the nature of the violation or illegal act (general application of the law which defines the offense; importance of the violation);<sup>30</sup> the nature and gravity of the penalty (punitive-deterrent purpose of the punishment;<sup>31</sup> extent to which the penalty is afflictive;<sup>32</sup> extent to which the afflictive

26. The accused can only defend himself by producing documents or requesting to be questioned (Art. 18, L. 689/1981).

27. Giulio Ubertis, *L'autonomia linguistica della Corte di Strasburgo*, ARCH. PEN. 21 (2012).

28. See Various Authors, *La matière pénale au sens de la Convention européenne des droits de l'homme, flou du droit pénal*, by Groupe de recherche droits de l'homme et logiques juridiques-Mirelle Delmas-Marty, dir.), REV. SC. CRIM. D. PEN. COMP. 819 (1987).

29. For a reconstruction of the criteria employed by the ECtHR, see Vladimiro Zagrebelsky, *La Convenzione europea dei diritti umani, la responsabilità delle persone morali e la nozione di pena*, in *Responsabilità degli enti per i reati commessi nel loro interesse*, at 34 f; see also Vittorio Manes, Art. 7, in COMMENTARIO BREVE ALLA CONVENZIONE EUROPEA DEI DIRITTI DELL'UOMO 259 (Sergio Bartole et al. eds., Cedam 2012).

30. Engel v. The Netherlands, 22 Eur. Ct. H.R. § 82 (1976).

31. See Öztürk v. Germany, 73 Eur. Ct. H.R. § 50 (1984).

32. See Bendenoun v. France, 284 Eur. Ct. H.R. § 47 (1994); see also Grande Stevens v. Italy, Eur. Ct. H.R. § 97 (2014).

penalty is appropriate for the type of violation<sup>33</sup>). In light of the above criteria, it seems that corporate liability falls within the *matière pénale* of European matrix: the L.D. No. 231/2001 which provides for corporate liability is applicable for all corporations, except for some isolated and exempted cases. Furthermore, the penalties imposed at the end of the trial (which, as will be further discussed, can inhibit certain activities and/or negatively impact on the corporation's assets)<sup>34</sup> depend on the commission of a crime, serve a preventive function and, at the same time, are undeniably afflictive inasmuch as they can lead (in the most serious cases) to the corporation being forced to leave the market. Even when administrative violations are only punished by imposing a financial penalty, the conclusions do not change: the ECtHR has decided that Art. 6 ECHR applies even in those proceedings that conclude with a sanction that affects a corporation's assets—thereby implicitly affirming their criminal nature.<sup>35</sup>

For the reasons listed above, according to the parameters established by the ECtHR, a corporation's administrative violation arising from crime falls within the criminal sphere, even if, at the moment, no precedents exist to this effect (since no supranational judge has evaluated Italian legislation regarding corporate criminal liability).

There is yet another element that should be highlighted in support of this conclusion: the most persuasive factor indeed stems from the fact that the competence to judge the administrative violation is assigned to the criminal judge within the realm of the criminal proceeding.<sup>36</sup> Furthermore, while introducing a sizeable number of provisions of a substantive and procedural nature, L.D. No. 231/2001 inserted a general clause deferring to the articles contained in the Criminal Procedure Code (CPC), in so far as they are compatible.<sup>37</sup> It established, yet again within the limits of

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33. *Malige v. France*, App. No. 27812/95, 7 Eur. H.R. Rep. § 38 (1998).

34. The sanctions provided for by L.D. No. 231/2001 can be disqualifying and financial. Regarding this point, see *infra* Part V.

35. *Raimondo v. Italy*, 281 Eur. Ct. H.R. § 43 (1994). The ECtHR has recently affirmed that the criminal nature of a proceeding is contingent on the gravity of the sanction (even financial) abstractly applicable rather than the gravity of the sanction actually imposed: *Grande Stevens v. Italy*, § 98, Eur. Ct. H.R. (2014).

36. This choice has led to, among other effects, the adoption of various principles that typically characterize criminal law: first and foremost, the principle of legality in its various forms, including statutory reserve, clarity and prohibition of retroactivity (Art. 2, L.D. No. 231/2001). The corporation, in fact, cannot be held liable for a fact that constitutes a crime if its administrative responsibility and the corresponding sanctions were not explicitly provided for (clarity) by legislation in-force (statutory reserve) before commission of the fact (prohibition of retroactivity). See *Ombretta Di Giovine*, *supra* note 19, at 46.

37. Art. 34, L.D. No. 231/2001.



compatibility, that in the case of corporations, the provisions intended for the defendant will be applied.<sup>38</sup> Selecting criminal proceedings as the setting within which the corporation's administrative violation should be ascertained and equating the corporation to the main subject of criminal proceedings, regardless of how the liability is labeled, can only imply the need to adhere to the rules of these proceedings (such as the articles contained in the CPC as well as those provided for by the Constitution).<sup>39</sup> This is contingent, of course, upon the satisfaction of the requirement of compatibility established by the same L.D. No. 231/2001.

It is, in fact, through verification of the compatibility of certain rules with the general structure of corporate criminal liability, as outlined by L.D. No. 231/2001, that the legislation in question gains credibility. This is true to an even greater extent since compatibility, or rather, lack thereof, has often been called upon as a justification in corporate proceedings not to follow some of the principles established for criminal proceedings against individuals.

### III. SCOPE OF APPLICATION

According to Art. 1, L.D. No. 231/2001, responsibility for administrative violations stemming from criminal offenses can be attributed to all entities—except for the State, local authorities (such as Regions, Provinces and Municipalities), and other non-economic public entities, as well as entities which carry out constitutional functions (such as political parties and trade unions). The case-law shows that “mixed” corporations fall within the subjective area of L.D. No. 231/2001: mixed corporations refer to those entities that, while being formally considered public bodies, are endowed with all the proper characteristics of an incorporated company.<sup>40</sup> The highest court in Italy, the Court of Cassation, maintains that defining an entity as a corporation presumes that it carries out an economic activity with the objective of making profit, which is sufficient to warrant the applicability of L.D. No. 231/2001.

Regarding the objective prerequisites for liability, the administrative violation attributed to the corporation necessitates a complex structure. A corporation, in fact, is directly responsible for the administrative violation

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38. Art. 35, L.D. No. 231/2001.

39. See MARIA LUCIA Di Bitonto, STUDIO SUI FONDAMENTI DELLA PROCEDURA PENALE D'IMPRESA 59 (Editoriale Scientifica 2012).

40. The case in issue involves an interregional hospital structure constituted under the form of a corporation: Cass., sez. II, July 9th 2010, PM in proc. Vielmi, CASS. PEN. (2011), at 1888.

arising from a crime committed in its interest or to its advantage<sup>41</sup> by subjects belonging to its organization.<sup>42</sup> The rationale behind this innovation is that the company's structural arrangement is considered the true instigator, executor, or beneficiary of the criminal conduct. This mechanism was implemented to widen the sphere of those can be subject to criminal proceedings,<sup>43</sup> making all entities responsible for preventing crimes carried out in their interest or to their advantage. A peculiarity of the new system is represented by the autonomy of corporate and individual liability. According to Art. 8, L.D. No. 231/2001, the corporation's responsibility exists even when the author of the crime has not been identified, or when the crime ceases to exist for a cause other than amnesty.<sup>44</sup>

It is essential to note that the legislation does not apply to the commission of any crime. In order to trigger this type of liability, the offense must involve transgressions explicitly contemplated by Art. 24 ff., L.D. No. 231/2001. When the legislation was passed, the Government opted for gradual experimentation. Not all the offenses to which Law No. 300/2000 referred were included because prudence was deemed necessary.<sup>45</sup> Corporate criminal liability proceedings were to be tested for specific and limited categories of transgressions, which represented the most common manifestations of corporate crime at that moment.<sup>46</sup> Over the years, however, the list of offenses has been modified and extended,<sup>47</sup>

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41. The interest is ascertained with an *ex ante* evaluation, putting oneself in the place of the agent at the moment of the commission of the fact; the advantage, however, is verified *ex post*, and could subsist for the corporation, even if the agent did not act with a specific *pro societate* objective. See Ombretta Di Giovine, *supra* note 19, at 70. Nevertheless, if the alleged crime was committed in the exclusive interest of the individual who executed the fact or a third party, the corporation cannot be held liable (Art. 5, § 2, L.D. No. 231/2001).

42. Art. 5, L.D. No. 231/2001.

43. See Carlo Enrico Paliero, *Dieci anni di "corporate liability" nel sistema italiano: il paradigma imputativo nell'evoluzione della legislazione e della prassi*, LE SOCIETÀ. GLI SPECIALI 8 (2011).

44. The principle of autonomy is interpreted to mean that collective responsibility is not tied to individual liability. It is tied, however, to the realization of the alleged crime, the constitutive elements of which must be determined. See Domenico Pulitanò, *supra* note 25, at 23.

45. Environmental crimes and Work health and Safety crimes, already provided for by Law No. 300/2000, at the beginning, were not included in L.D. No. 231/2001 since they are negligent crimes.

46. Improper/undue receipt of funds, fraud against the State or a public entity or to obtain public funds; bribery and corruption.

47. To date, the crimes that can entail corporate liability in the form of an administrative violation are the following: improper/undue receipt of funds, fraud against the State or a public entity or to obtain public funds, computer fraud against the State or a public entity (Art. 24, L.D. No. 231/2001); computer-related crimes and illegal use of personal data (Art. 24-*bis*, L.D. No. 231/2001); offenses related to organized crime (Art. 24-*ter*, L.D. No. 231/2001); bribery, improper incitement to give or promise benefits and corruption (Art. 25, L.D. No. 231/2001); counterfeiting coins, legal

with the addition, for example, of some crimes committed unintentionally. The inclusion of negligent crimes is still widely debated, since the criteria for attributing liability to the corporation seem to presume voluntary and conscious execution by the individual who acts (therefore, requiring a psychological link showing a disposition of intent).<sup>48</sup>

The crime from which the administrative violation stems must have as its author an individual who carries out representation, administration, or management within the corporation, including that of an organizational unit.<sup>49</sup> This definition encompasses individuals who are responsible, even *de facto*, for management and supervision—high-level officers—as well as individuals subject to the management and control of the former—subordinate employees.<sup>50</sup> As previously mentioned, it is necessary for the criminal conduct to be either in the interest, or to the benefit, of the company. This is assumed to be the case even when an individual acts purely for his own personal profit. Understandably, it is the most likely option—at least for crimes classified as intentional—since it is more than plausible that the agent is seeking personal gain when he breaks the law, thereby creating an economic advantage for the organization for which he works. A prime example would be an individual who, in order to obtain economic incentives contingent upon the achievement of certain results, commits bribery. As a result of the offense, the corporation is awarded

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tender, duty stamps, identification instruments and distinctive signs (Art. 25-*bis*, L.D. No. 231/2001); crimes against industry and trade (Art. 25-*bis*.1, L.D. No. 231/2001); corporate crimes (Art. 25-*ter*, L.D. No. 231/2001); offenses with the aim of terrorism and subversion of the democratic order (Art. 25-*quater*, L.D. No. 231/2001); the practice of mutilation of female genital organs (Art. 25-*quater*.1, L.D. No. 231/2001); crimes against the individual (Art. 25-*quinqüies*, L.D. No. 231/2001); market abuse (Art. 25-*sexies*, L.D. No. 231/2001); manslaughter or personal injury caused by a breach of the health and safety at work regulations (Art. 25-*septies*, L.D. No. 231/2001); crimes of receiving stolen goods, money laundering and utilization of money, goods or benefits of unlawful origin (Art. 25-*octies*, L.D. No. 231/2001); offenses related to the violation of copyright laws (Art. 25-*novies*, L.D. No. 231/2001); incitement to not make statements or to make false statements before the judicial authority (Art. 25-*decies*, L.D. No. 231/2001); environmental crimes (Art. 25-*undecies*, L.D. No. 231/2001); employment of illegally staying third-country nationals (Art. 25-*duodecies*, L.D. No. 231/2001). By now the list represents an irrational catalogue of crimes because, for example, the crimes of prostitution or child pornography cannot be considered an expression of corporate crime. See Giorgio Lattanzi, *Introduzione*, in LA RESPONSABILITÀ DA REATO DEGLI ENTI COLLETTIVI: A DIECI ANNI DAL D. LGS. N. 231/2001. PROBLEMI APPLICATIVI E PROSPETTIVE DI RIFORMA 221 (Alfonso Maria Stile et al. eds., Jovene 2013).

48. For the adaptation of the criterion of interest or advantage for negligent offenses (that would seem to assume the psychological element of intent on the part of the subject that executed the alleged fact), Domenico Pulitanò, *Responsabilità degli enti e reati colposi*, in LA RESPONSABILITÀ DA REATO DEGLI ENTI COLLETTIVI: A DIECI ANNI DAL D. LGS. N. 231/2001. PROBLEMI APPLICATIVI E PROSPETTIVE DI RIFORMA, at 246.

49. *Supra* note 14, at 427.

50. Art. 6, § 1, a), L.D. No. 231/2001.

public contracts that otherwise would have been denied (or granted subject to different and less profitable conditions).

From a subjective point of view, the criteria change according to who committed the presumed crime. When company officers are those directly involved, it is sufficient to meet the above-mentioned objective requirements to affirm corporate liability. In this case, the corporation in question could avoid liability by demonstrating that it had both adopted, and effectively implemented, adequate compliance programs *ante delictum* to prevent the type of offense that occurred.<sup>51</sup> There is, however, an additional requirement. The company must prove due diligence relating to monitoring the functioning of, and adherence to, the program. It must show that oversight was entrusted to a Supervisory and Control Body equipped with the power of initiative and control<sup>52</sup> and that there was not a lack of vigilance by the Body.<sup>53</sup> Finally, the corporation must demonstrate that the individual committed the crime by fraudulently circumventing the program.<sup>54</sup>

If, on the other hand, the presumed offense is traced to a subordinate employee, according to the criteria for corporate liability, the company has to respond only as far as the Prosecutor succeeds in proving that the crime is the result of an omission of company's duties. This is an element, however, that the Legislature excludes when adequate compliance programs were effectively implemented *ante factum*.

Inevitably, of the two subjective criteria for bringing charges against the corporation, the first has led to greater perplexity. It seems hard to accept its implementation within a criminal system ruled by the presumption of innocence<sup>55</sup> and in which the burden of proof falls upon the prosecution.<sup>56</sup> According to L.D. No. 231/2001, when the crime is committed by corporate officers, the Prosecutor has to determine whether the illegal conduct corresponds to one of the offenses provided for by L.D. No. 231/2001. Then he has to prove that the offense can be attributed to the administrators and a financial interest or advantage for the corporation

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51. Art. 6, § 1, b), L.D. No. 231/2001.

52. Art. 6, § 1, d), L.D. No. 231/2001.

53. Art. 6, § 1, c), L.D. No. 231/2001.

54. Fraudulent evasion would involve conduct by which the virtuous rules of the organization are bypassed. Giorgio Fidelbo, *L'accertamento dell'idoneità del modello organizzativo in sede giudiziale*, in *LA RESPONSABILITÀ DA REATO DEGLI ENTI COLLETTIVI: A DIECI ANNI DAL D. LGS. N. 231/2001. PROBLEMI APPLICATIVI E PROSPETTIVE DI RIFORMA*, at 190.

55. Art. 27, § 2, Constitution.

56. See Giulio Illuminati, *LA PRESUNZIONE D'INNOCENZA DELL'IMPUTATO* 120 (Zanichelli 1979).

exists. In this scenario, corporate liability is presumed, unless the company proves the existence of conditions excluding its involvement in the matter.

A problem of inconsistency arises only if we assume that the presumption of innocence also prevails in the “231” system. This conclusion implies that this kind of corporate liability is criminal. Nevertheless, the Directive of the European Parliament and of the Council to reinforce the principle of the presumption of innocence excludes corporations from its area of application, affirming: at the current stage of development of national law and of case-law at national and Union level, it is premature to legislate at Union level on the presumption of innocence with regard to legal persons. This Directive should not, therefore, apply to legal persons. This should be without prejudice to the application of the presumption of innocence as laid down, in particular, in the ECHR and as interpreted by the European Court of Human Rights and by Court of Justice, to legal persons.<sup>57</sup> The Directive is difficult to understand, especially given the ECtHR’s clear track record of recognizing the guarantees typical of the criminal system, even for proceedings that have a different *nomen juris*. Moreover, in some European states, corporate liability is explicitly categorized as criminal and in others, such as Italy, the evaluation of this liability is nevertheless assigned to a criminal judge.<sup>58</sup>

However, we must verify whether—at the national level—the presumption of innocence should rule in the “231” regime, as is widely sustained by scholars.<sup>59</sup> The Court of Cassation seems to be on the same page, recognizing that no reversal of the burden of proof is discernible in the law which regulates corporate liability and, hence, the Prosecutor has to demonstrate the commission of a crime, regardless of whether the

57. Whereas n. 14—Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings.

58. For an overview of the criminal liability of legal persons from the perspective of European Union legislation, see Nicola Selvaggi, *Ex crimine liability of legal persons in EU legislation. An Overview of Substantive Criminal Law*, 4 EUR. CRIM. L. REV. 46 (2014).

59. The interpretations are, however, very different from one another. There are those who claim that Art. 6, L.D. No. 231/2001 creates an irreconcilable conflict with the constitutional guarantee: Ennio Amodio, *Prevenzione del rischio penale d’impresa e modelli integrati di responsabilità degli enti*, CASS. PEN. 320, 333, n.49 (2005); Alessandro Bernasconi, *L’elusione fraudolenta del modello*, in MANUALE DELLA RESPONSABILITÀ DEGLI ENTI 174 (Adonella Presutti & Alessandro Bernasconi eds, Giuffrè 2013); there are others who deem it possible to interpret the legislation in such a way congruent with the Constitution. See, e.g., Maria Lucia Di Bitonto, *supra* note 39, at 74; Gianluca Varraso, *IL PROCEDIMENTO PER GLI ILLECITI AMMINISTRATIVI DIPENDENTI DA REATO* 366 (Giuffrè 2012); Paolo Moscarini, *I principi generali del procedimento de societate*, DIR. PEN. PROC. 1275 (2011).

alleged crime was committed by a corporate officer or subordinate employee.<sup>60</sup> This inversion of the onus of proof for the transgressions of company officers will be further analyzed in relation to compliance programs.<sup>61</sup>

#### IV. COMPLIANCE PROGRAMS

An examination of the application criteria for L.D. No. 231/2001 reveals a fundamental element: the importance of compliance programs which, if implemented *ante delictum*, can exclude the corporation from liability. If the compliance programs are adopted *post factum*, they can still result in attenuation of the penalties.<sup>62</sup> The significant effects of these programs during the precautionary procedure will be subsequently discussed.<sup>63</sup>

The “231” system highly regards corporations that are equipped (or willing to equip themselves) with a structure that is able to neutralize the prospect of crimes being committed within the organization. This reflects the special preventive purpose, which is the defining characteristic of the legislation.

Clearly inspired by compliance programs originating in the United States, the “231” system requires corporations to identify areas that represent the highest risk for illegal activity, provide for specific and direct protocols regarding crimes to be prevented, identify procedures to manage financial resources that are adequate to prevent transgressions, define essential information that must be given to an independent organization entrusted with monitoring the operation of, and compliance with, the programs (Supervisory and Control Body), and implement a disciplinary system which adequately punishes those who do not comply with the measures specified in the program.<sup>64</sup>

The law unequivocally established that it is not sufficient for corporations to merely adopt the programs; they must be effectively implemented. In other words, to exclude or mitigate corporate liability, the

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60. See Cass., sez. VI, February 18th 2010, Scarafia, CASS. PEN. 1878 (2011). The burden of proof would be transformed into an onus of evidence. It would, therefore, be sufficient for the corporation to submit its compliance program to the judge: the “evidentiary effort” that must be made by the corporation only consists of demonstrating that a program has been adopted because, as part of standard procedure, it is the judge to ascertain the effectiveness and suitability. See Giorgio Fidelbo, *supra* note 54, at 188.

61. See *infra* Part 8.

62. Art. 12, L.D. No. 231/2001.

63. See *infra* Part VIII.

64. Art. 6, § 2, L.D. No. 231/2001.

programs must shape corporate operations in such a way that corporate activity complies with the behavioral protocols established therein.<sup>65</sup> Furthermore, the corporation must provide for the updating of these programs over time, when there have been changes in the legislation or in corporate structure.

In the aftermath of L.D. No. 231/2001, these compliance programs were greeted very coldly by corporate entities because they were aware that the adoption of such programs would not, in and of itself, protect corporations from liability.<sup>66</sup> The adequacy of these programs was subject to a judge's assessment (a criminal judge who was certainly not accustomed to evaluating notions of a corporate nature). They were concerned, moreover, that the Courts, having to express a decision regarding the adequacy of these programs at the moment in which the crime was committed within the corporation, would only issue a negative judgment to this effect.<sup>67</sup>

This prejudice has been overcome because it has been proven that this assessment is conducted *ex ante* and not *ex post*: the judge, therefore, must place himself at the time in which the crime arose in order to evaluate if, even with the existence of a virtuous compliance program, it still would not have been possible to foresee, and hence avoid, that crime.<sup>68</sup> Furthermore, the judge does not have to express a decision with regard to the adequacy of the program as a whole but only in regard to the area in which the specific crime was committed.<sup>69</sup> Owing to the fears surrounding criminal judges' lack of training in the corporate field, evaluation of the programs is often entrusted to experts who possess the necessary technical expertise to assist the magistrate in this task.<sup>70</sup>

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65. The L.D. No. 231/2001 did not introduce an obligation to adopt (and effectively execute) the programs; rather, it established their adoption as a cause for exclusion from (or attenuation of) liability. Nevertheless, these programs are often required as a prerequisite for establishing, or continuing, contractual relationships with public entities (especially the Regions). For an updated review on the topic, See Piero Magri & Matteo De Paolis, *Modelli di organizzazione ed esenzione di responsabilità: aspetti pratici ed operativi*, in DIRITTO PENALE DELLE SOCIETÀ—VOL I, at 933. Furthermore, judicial precedent has determined that the lack of programs, in the case of conviction according to L.D. No. 231/2001, can result in civil responsibility for the president or the CEO of the corporation, with the consequent obligation to compensate the corporation (Trib. Milano, sez. VIII civile, February 13th 2008, n.1774, LE SOCIETÀ 1507 (2008).

66. Giorgio Fidelbo, *supra* note 54, at 174.

67. *Id.*

68. *Id.* at 182.

69. *See id.* at 179.

70. *See, e.g., Perizia collegiale disposta dal G.I.P. presso il Tribunale di Bari per accertare l'idoneità e l'adeguatezza preventiva dei Modelli di Organizzazione, Gestione e Controllo del rischio reato, adottati da una società farmaceutica, imputata degli illeciti amministrativi da reato di cui agli Artt. 24 e 25 D. Lgs. n.231/2001*, RIV. IT. DIR. PROC. PEN. 1434 (2010).

Various uncertainties remain, however, especially regarding the content of the programs. While Art. 6, L.D. No. 231/2001 supplied some useful recommendations concerning the drafting of the programs, it nevertheless left the task of adapting these indications to each individual corporation based on its unique circumstances.

In these first ten years of experimentation, notwithstanding corporations' significant investment to equip themselves with compliance programs, judges have largely deemed the programs inadequate.<sup>71</sup> For this reason, there was a proposal of introducing a certification process, to be entrusted to highly specialized experts responsible for assessing the adequacy of the programs, issuing, in the event of a positive outcome, a certificate that could be shown during judicial proceedings.<sup>72</sup> Nevertheless, this proposal was discarded<sup>73</sup> because issuing a certification endorsing the suitability of the programs would bind the judge, preventing a different decision. It was unlikely to stand up to constitutional scrutiny.<sup>74</sup> Even if not binding, it would involve an additional element that would have to be taken into account by the judge and oblige him to produce a more detailed ground.<sup>75</sup>

This alternative seems to have been abandoned. The Courts' rulings regarding the matter are being utilized as guidelines when drafting the programs. In these decisions, in fact, it is possible to find the elements deemed indispensable in order to receive a favorable judgment when the adequacy of the compliance programs is scrutinized.<sup>76</sup> Above all, special attention is paid to the protocols by which the areas at risk of crime are regulated: they must not be generic but, rather, must be adapted to suit the

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71. To date, only one Italian corporation's compliance program has passed judicial control at the first level—Tribunale di Milano, Ufficio del Giudice dell'udienza preliminare, November 17th 2009, Impregilo, LE SOCIETÀ 473 (2010) and second level court hearings—Corte app. Milano, sez. II, March 21st 2012, Impregilo, in [www.dirittopenalecontemporaneo](http://www.dirittopenalecontemporaneo). Recently, however, the Cassation expressed a different opinion, annulling the sentence that had excluded the corporation from liability due to the inadequacy of the compliance program. According to the Cassation, the program that regarded the specific area in which the crime was committed had been established to allow the administrators to more easily evade the rules: Cass., sez. V, December 18th 2013, Impregilo, in [www.dirittopenalecontemporaneo](http://www.dirittopenalecontemporaneo).

72. Outline of the bill proposed to amend L.D. No. 231/2001, published in CASS. PEN. 4040 (2010).

73. Giovanni Maria Flick, *Le prospettive di modifica del D. Lgs. n.231/200, in materia di responsabilità amministrativa degli enti: un rimedio peggiore del male?*, CASS. PEN. 4032 (2010).

74. Art. 101, § 2 Constitution provides that judges are only subject to the law.

75. See Giorgio Fidelbo, *supra* note 54, at 193, according to whom the introduction of the certificate in question would require the judge to provide a lengthier explanation when evaluating the programs.

76. Tribunale di Roma, Ufficio del Giudice dell'udienza preliminare, April 4th 2003, Finspa, CASS. PEN. 2807 (2003).



corporation's unique circumstances, providing for effective control mechanisms.<sup>77</sup> One of the ways to achieve effective control is by entrusting the verification of each decision-making procedure to more than one subject.<sup>78</sup> The meaning is clear: the program cannot be a mere façade.<sup>79</sup> Instead, it must express the corporation's true commitment to implement, within the scope of the sensitive areas, suitable mechanisms to prevent the risk of crime.<sup>80</sup> Furthermore, judicial precedent has highlighted the importance of information channels between the corporate officers, employees, and the monitoring system, which must be specifically outlined and respected. Through their rulings, judges have articulated certain guidelines regarding the composition and duties of the Supervisory and Control Bodies, which must be, and appear, independent.<sup>81</sup> They must actually and effectively monitor compliance with protocols—a function that they can only implement if they are constantly informed by the management of the at-risk areas and are entrusted with investigative powers in all sensitive sectors.<sup>82</sup>

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77. Carlo Piergallini, *I modelli organizzativi*, in REATI E RESPONSABILITÀ DEGLI ENTI. GUIDA AL D. LGS. 8 GIUGNO 2001, n.231, at 185.

78. This directive has led to various problems when applied to family-run corporations (even those of a considerable size) that are so widespread in Italy, in which there is a significant concentration of the decisional power at the top—where all the strategic choices for the company are made. For this reason, in the aftermath of the introduction of L.D. No. 231/2001, prestigious representatives of American academia have highlighted the difficulties that continental European countries, such as Italy, will have to effectively execute the legislation because of the notable presence of family-run companies. See John C. Coffee, *A Theory of Corporate Scandals: Why the U.S. and Europe Differ*, 21 OXFORD REV. ECON. POL'Y 198 (2005).

79. Regarding such a risk for the compliance programs that are already part of the American system, See Kimberly D. Krawiec, *F. Hodge O'Neal Corporate and Securities Law Symposium: After the Sarbanes-Oxley Act: The Future Disclosure System: Cosmetic Compliance and the Failure of Negotiated Governance*, 81 WASH. U. L.Q. 487 (2003).

80. The Legislature has provided that corporations must follow the indications supplied by trade associations when drafting the programs. Over the years, useful guidelines have been developed to direct affiliated companies in this complex task. Nevertheless, the programs cannot be a mere copy of these documents, which do not take into account the specific characteristics of each corporation. For helpful indications regarding the drafting of behavioral protocols that constitute an important part of the programs, See Carlo Piergallini, *Paradigmatica dell'autocontrollo penale (dalla funzione alla struttura del "Modello Organizzativo" ex D. Lgs. n.231/2001) (Parte II)*, CASS. PEN. 845 (2013).

81. For these reasons, judicial precedent has established that the Supervisory and Control Body must be characterized by autonomy, independence and professionalism. Therefore, it must be formed by people who possess the expertise to carry out the function and cannot be composed by those who sit on the Board of Directors (since this situation would entail an overlap between the controller and the controlled) or those who belong to the Board of Statutory Auditors (who have among their tasks that of drawing up the financial statements and, hence, operate—even if indirectly—in a potential at-risk area).

82. *Supra* note 76. See also Carlo Piergallini, *Paradigmatica dell'autocontrollo penale (dalla funzione alla struttura del "Modello Organizzativo" ex D. Lgs. n.231/2001) (Parte I)*, CASS. PEN. 389 (2013).

If a corporation lacks a compliance program outright, or has an inadequate model, there are several procedural turning points at which it can manifest its intention to implement a suitable program. The Legislature strongly encourages corporations to make this decision by extending numerous advantages to those that intend to turn over a new leaf, offering them opportunities to collaborate with the authorities throughout the entire course of the proceeding, from the investigative phase to the final ruling.<sup>83</sup> With L.D. No. 231/2001, the Legislature attempted to bring the corporate entity back into compliance with the law. Corporate liability should serve as a deterrent against the commission of illegal acts or, when criminal conduct has already taken place, provide the framework within which the corporation can be brought back to the market with a renewed commitment to legality.

#### V. APPLYING SANCTIONS

In cases where a corporation is found liable, the system for imposing penalties established by L.D. No. 231/2001<sup>84</sup> provides for the exacting of a financial penalty, applied utilizing a quota system.<sup>85</sup> A list of disqualifying penalties has also been introduced, which prohibits the corporation from engaging in certain activities,<sup>86</sup> and can only be imposed on corporations found guilty of certain crimes.<sup>87</sup> Furthermore, the law provides for the confiscation (the “expropriation by the State”<sup>88</sup>) of the price or the profit derived from a crime.<sup>89</sup>

The formula established for calculating the financial penalty is based on a quota system.<sup>90</sup> The judge determines the value of the quota according to the corporation’s financial circumstances. He then decides how many quotas to apply based on indexes that measure the seriousness of the illegal act, taking into account the following: the seriousness of the crime, the degree of responsibility, and the corporation’s commitment to

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83. Regarding collaboration as a central concept in L.D. No. 231/2001, see Rosa Anna Ruggiero, *Le condotte di collaborazione previste nel D. Lgs. n.231 del 2001*, CASS. PEN. 397 (2014).

84. See CARLO Piergallini, *I reati presupposto della responsabilità dell’ente e l’apparato sanzionatorio*, in REATI E RESPONSABILITÀ DEGLI ENTI. GUIDA AL D. LGS. 8 GIUGNO 2001, n.231, at 222.

85. Art. 10, L.D. No. 231/2001.

86. Art. 9, § 2, L.D. No. 231/2001.

87. Art. 13, L.D. No. 231/2001.

88. The definition is from Giovanni Fiandaca & Enzo Musco, *supra* note 23, at 845.

89. Art. 19, L.D. No. 231/2001. Notwithstanding the fact that confiscation is considered to be a patrimonial security measure in the Italian system, L.D. No. 231/2001 utilizes it as a primary sanction.

90. Art. 11, L.D. No. 231/2001.

eliminate, or attenuate, the consequences of the crime as well as its efforts to prevent such illegal conduct in the future. The Legislature has, moreover, fostered virtuous behavior by making the amount of financial penalties dependent on the damages caused by the crime, and also by offering a reward for companies that have done their best to minimize the detrimental effects of their conduct.<sup>91</sup> The financial sanction is reduced by half when it is proven that the agent committed the crime predominantly in his own interests or those of third parties. In these cases, the corporation did not obtain a financial advantage or, at least, the financial advantage was minimal. The same reduction also applies when the damage caused is especially tenuous. On the other hand, the sanction is reduced by a third to half if, before the trial, a corporation compensates for the damage in full, eliminates the detrimental or dangerous consequences of the crime, or makes a concerted effort to this effect. This reduction is—of course—contingent upon the corporation creating and maintaining a compliance program that is adequate to prevent the crime from reoccurring.<sup>92</sup> When both the final conditions listed above are present, the financial penalty is reduced by a half to two thirds.<sup>93</sup>

In addition to the financial sanctions, disqualifying penalties, which also can result in serious financial losses for the corporation, are among the most dreaded penalties.<sup>94</sup> The statute lists these disqualifying sanctions in order of descending severity: disqualification of the corporation's activity; suspension or revocation of authorizations, licenses and concessions utilized in the commission of the crime; prohibition banning negotiations with the public administration; exclusion from tax breaks, financing, grants or subsidies as well as revocation of those already granted; and prohibition banning the publicizing of goods or services.<sup>95</sup>

Disqualifying sanctions can produce very serious consequences. In the most serious cases, the corporation can even be forced out of the market.

91. Art. 12, L.D. No. 231/2001.

92. A defining element of the penalty system is the severity of the sanctions combined with the possibility of attenuation when the corporation decides to change course in order to regain legality. *See* Maria Eugenia Oggero, *Responsabilità delle società e degli enti collettivi (profili sostanziali)*, in *DIG. DISC. PEN.—AGG.*, 808 (Alfredo Gaito eds, Utet 2010). Italy has extensively tested this technique—known as “the carrot and stick”—in organized crime proceedings, first against terrorism and then against the mafia, as a means to induce collaboration with the authorities. *See* Rosa Anna Ruggiero, *L'ATTENDIBILITÀ DELLE DICHIARAZIONI DEI COLLABORATORI DI GIUSTIZIA NELLA CHIAMATA IN CORREITÀ 16* (Giappichelli 2012).

93. Art. 12, § 3, L.D. No. 231/2001.

94. Alessandro Bernasconi, *L'apparato sanzionatorio*, in *MANUALE DELLA RESPONSABILITÀ DEGLI ENTI*, at 186.

95. Art. 9, § 2, L.D. No. 231/2001.

This penalty is only applied for administrative violations stemming from specific, predetermined crimes—those that represent a sub-category of the offenses explicitly listed in the legislation. Furthermore, the implementation of these sanctions depends on two conditions: the corporation must have obtained a sizeable profit, and the illegal act must have been committed by high-level corporate officers (or, if perpetrated by subordinate employees, the offense should have been caused or facilitated by serious organizational shortcomings). These sanctions may also be applied in the case of recidivism. Disqualifying penalties are not imposed if, before the trial, a corporation compensates for the damage in full, eliminating the detrimental or dangerous consequences of the crime, or when it redresses the organizational shortcomings by implementing suitable compliance programs and turning over the profit obtained from the crime to the State.<sup>96</sup> Except for the criterion of turning over the profit obtained from the crime, these are the same conditions that allow for a reduction in the financial penalty as well.

The Legislature specifies that disqualifying sanctions must be aimed at the specific department in which the crime was committed because this division is exactly the area that has to be neutralized.<sup>97</sup> The judge determines the type and duration of the sanctions necessary to prevent the offense from reoccurring.<sup>98</sup> For example, the disqualification banning negotiations with the public administration can be limited to certain contracts, or only apply to predetermined public agencies.<sup>99</sup> Similarly, the judge can suspend or revoke authorizations, licenses or concessions relating to the execution of those specific functions, but only when other sanctions have proven to be inadequate.<sup>100</sup>

In place of disqualifying sanctions, the corporation's administration can be taken over by a commissioner, if continuation of the corporation's activity is crucial to ensuring law and order or employment needs.<sup>101</sup> The judge defines both the duties and the authority of the commissioner, who is mainly responsible for revising the corporation's organizational structure, implementing adequate compliance programs to prevent the crime from reoccurring in the future.<sup>102</sup>

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96. Art. 17, L.D. No. 231/2001.

97. See Ministerial Report, *supra* note 14, at 440.

98. See *id.* at 441.

99. See *id.* at 440.

100. Art. 14, L.D. No. 231/2001.

101. Art. 15, L.D. No. 231/2001.

102. See Ministerial Report, *supra* note 14, at 442.

Disqualifying sanctions can be applied for temporarily or permanently, if the corporation shows absolutely no willingness to comply with the law.<sup>103</sup> In the case of temporary application, the judge does not have any discretion. Once the conditions for imposing these penalties are ascertained, the judge is obligated to levy the appropriate sanctions.<sup>104</sup> On the other hand, for a permanent sanction, the judge must conduct a thorough evaluation to determine whether the application of such sanction is absolutely necessary.<sup>105</sup>

The sanctions are subject to the statute of limitations, and therefore the punitive power of the State cannot be exercised more than five years from the time of the alleged crime. Nevertheless, as soon as the administrative violation is contested to the corporation,<sup>106</sup> the statute of limitations is interrupted until the final ruling. In other words, once the trial against the corporation has begun, the statute of limitations can no longer be invoked.

The mechanism governing the statute of limitations in proceedings against individuals follows distinct rules. For this reason, the proceeding against the individual could stop when the statute of limitations has passed while the trial against the corporation continues.<sup>107</sup> This solution has been criticized for violating the constitutional principle of equality.<sup>108</sup> It could also undermine a fundamental concept of the “231” system: the need for a contextual evaluation of the offense committed by the individual and the administrative violation committed by the corporation.<sup>109</sup> Nevertheless, this provision is a natural extension of the principle of autonomy between corporate and individual liability.<sup>110</sup>

## VI. GENERAL PROVISIONS REGULATING CORPORATE LIABILITY PROCEEDINGS

L.D. No. 231/2001 mainly establishes procedural rules, which are, in fact, greater in number than those that exist in substantive law. It is not,

103. The definitive disqualifying sanction can be inflicted in the event of a sizeable profit and when the corporation has been sentenced, at least three times in the past seven years, to a temporary disqualification prohibiting the corporation from carrying out its activity.

104. See Francesco Mucciarelli, *Le sanzioni interdittive temporanee nel d. lgs. n.231/2001*, in STUDI IN ONORE DI GIORGIO MARINUCCI—VOL III 2507 (Emilio Dolcini et al. eds., Giuffrè 2006).

105. Art. 14, § 4, L.D. No. 231/01.

106. See *infra* Part IX.

107. Art. 22, L.D. No. 231/01.

108. Riccardo Lottini, *Il sistema sanzionatorio*, in Various Authors, RESPONSABILITÀ DEGLI ENTI PER ILLECITI AMMINISTRATIVI DIPENDENTI DA REATO 176 (Giulio Garuti eds., Cedam 2002).

109. Art. 38, L.D. No. 231/01.

110. Art. 8, L.D. No. 231/01.

however, only a question of quantitative predominance: the procedural provisions that shape corporate liability proceedings are of critical importance and represent the foundation for the legislation, as judicial precedent has demonstrated. Judges have always regarded this second part of the L.D. No. 231/2001 as paramount, which—as will be seen shortly—is largely due to the pivotal nature of the precautionary system.<sup>111</sup>

The Legislature decided to assign corporate criminal liability cases to a criminal judge within the context of a criminal proceeding; in fact, Art. 34, L.D. No. 231/2001 provides for the proceeding regarding the administrative violation, the observance of the rules contained in the L.D. No. 231/2001 and, if compatible, the provisions of the CPC. It is first necessary to refer to the rules established by L.D. No. 231/2001. Where there are gaps in the legislation, as a supplementary or secondary means, one can draw upon the CPC.<sup>112</sup> The fact that Art. 34 refers to the CPC only if the rules thereof are compatible with the L.D. No. 231/2001 has understandably led to the conclusion that there is no presumption of compatibility between the CPC and the special legislation.<sup>113</sup>

These observations are also useful interpreting Art. 35, L.D. No. 231/2001, which utilizes the same criteria to confer upon the corporation the same procedural safeguards that apply to the defendant, if compatible. Also in this case, it is not possible to assume that the entire CPC intended for the defendant can be applied when the defendant is a corporation. One must select, among the rules intended for the defendant, those that do not conflict with the rationale of proceedings that involve corporations. From a practical point of view, this examination is rather problematic, as will be discussed in greater detail, especially with regard to the questioning of the corporation's legal representative.<sup>114</sup>

When outlining the main features of the corporate criminal liability proceeding, it is first necessary to identify the cases that must be dismissed immediately. Art. 8, L.D. No. 231/2001, in affirming the principle of autonomy between the liability of the individual and that of the corporation, clearly intends to pursue the corporation independently of what happens to the individual agent. Nevertheless, Art. 37, L.D. No.

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111. The L.D. No. 231/2001 has created a real and proper mini-code: Franco Cordero, *PROCEDURA PENALE* 1327 (Giuffrè IX ed. 2012).

112. Gianluca Varraso, *supra* note 59, at 104. In fact, the procedural regulations contained in L.D. No. 231/2001 prevail over those found in the CPC in accordance with the principle of speciality: Trib. Milano, February 5th 2008, Enipower, *FORO AMBROSIANO* 221 (2008).

113. Massimo Ceresa Gastaldo, *IL "PROCESSO ALLE SOCIETÀ" NEL D. LGS. 8 GIUGNO 2001, n.231* 10 (Giappichelli 2002).

114. *See infra* Part VII.

231/2001 introduces a conspicuous exception to the rule, establishing the non prosecution of the corporation if the criminal prosecution against the individual should not have been initiated or continued because of lack of the procedural requirements necessary to move forward.<sup>115</sup>

The strong connection between proceedings against corporations and those against individuals is further proven by Art. 36, L.D. No. 231/2001 which, in entrusting the corporate liability trial to a criminal judge, specifies that it must be the same judge from whom the administrative violation has arisen. Moreover, the L.D. No. 231/2001 appears to favor the *simultaneous processus*, in which the judge is called upon to ascertain corporate responsibility as well as that of the individual in the same proceeding.<sup>116</sup> The trials will be separated if the proceeding against the individual has been suspended or concluded with special proceedings (i.e. plea bargaining) or when the unification of the two proceedings is precluded by procedural provisions.<sup>117</sup> The Legislature decided to unify the two trials to promote efficacy and consistency, as well as to assure cost effectiveness.<sup>118</sup> In this way, any potential incongruity between the two judgments could be avoided. The fact that the Legislature called for the separation of the trials when adherence to procedural provisions makes it necessary could become an easy expedient to nullify the rule of the unification of the trials.<sup>119</sup>

The corporation participates in the criminal proceeding with its own legal representative,<sup>120</sup> unless the representative is accused of the crime from which the administrative violation has arisen.<sup>121</sup> This rule was established to avoid a conflict of interest. It is an absolute incompatibility<sup>122</sup> which voids any act executed by this representative.<sup>123</sup>

115. In the Italian system, the overwhelming majority of crimes provided for by the criminal code must be prosecuted by the Prosecutor. For other crimes, however, prosecution is contingent on peculiar conditions. The most well-known is certainly the “querela” (complaint). A complaint, in fact, shall be submitted by means of a statement in which the victim requests the prosecution of an act deemed an offense by law.

116. Art. 38, § 1, L.D. No. 231/2001.

117. Art. 38, § 2, L.D. No. 231/2001.

118. See Ministerial Report, *supra* note 14, at 453.

119. Art. 38, § 2, *c*, L.D. No. 231/2001.

120. In order to participate in the trial, the corporation must file a written statement at the Clerk’s Office of the presiding judge. Otherwise, the trial will proceed *in absentia*. Art. 39—41, L.D. No. 231/2001.

121. Art. 39, § 1, L.D. No. 231/2001.

122. See Cass., sez. VI, June 19th 2009, Caporello, CASS. PEN. 1381 (2010).

123. Because of this incompatibility, the representative (who has a conflict of interest) cannot appoint a defense attorney for the corporation: *supra* note 122, at 1382.

In case of conflict of interest, the corporation could decide not to nominate a new legal representative. Nevertheless, by doing so, it would be precluded from participating in the proceeding. It could, on the other hand, nominate a new legal representative or designate one *ad hoc* for the trial.<sup>124</sup>

#### VII. EVIDENCE ACCORDING TO L.D. NO. 231/2001

L.D. No. 231/2001 dedicates only one rule concerning evidence, deeming the provisions contained in the CPC applicable for the rest. The only regulation establishes that the individual accused of the crime from which the administrative violation has arisen, as well as the legal representative who occupied the role at the time the crime was committed, may not be heard as witnesses.<sup>125</sup> Requiring the testimony of the defendant or party whose position could be involved in the trial (the legal representative when the crime was committed) would have violated the right to remain silent that the Italian system guarantees those subject to a criminal proceeding.<sup>126</sup>

Art. 44 does not address the scenario in which a new legal representative, who did not occupy this position when the crime was committed, is appointed to represent the corporation throughout the trial. The legislation by excluding the testimony of the individual accused of the crime, as well as the corporation's legal representative in power when the crime was committed, implicitly affirms that the corporation's "new" representative is a witness and, as such, is obligated to respond.

Nevertheless, the corporation participates in the proceedings through its representative.<sup>127</sup> Therefore, requiring the newly appointed representative to testify when the corporation has opted for a change in leadership violates the corporation's right to remain silent and conflicts with the corporation's right to defend itself. In fact, Art. 39 L.D. No. 231/01 imposes a replacement in the event the legal representative is accused of the crime from which the administrative violation stems and the corporation intends to participate in the proceedings.<sup>128</sup> This raises serious concerns regarding legitimacy since the corporation is guaranteed the procedural safeguards that apply to the defendant, if compatible.<sup>129</sup>

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124. Massimo Ceresa-Gastaldo, *PROCEDURA PENALE DELLE SOCIETÀ* 60 (Giappichelli 2015).

125. Art. 44, § 1, L.D. No. 231/2001.

126. Art. 64 CPC.

127. Art. 39, L.D. No. 231/2001.

128. *See supra* Part VI.

129. Art. 35, L.D. No. 231/2001.



Scholars are divided on the issue. There are those who propose repealing the obligation to testify, given the evident illegitimacy of the right of defense's violation brought by the provision,<sup>130</sup> and others who do not recognize this conflict.<sup>131</sup> The scholars who adhere to the latter view argue that the new representative should testify to the facts and circumstances present when the illegal activity took place because he did not represent the corporation at that time. The new representative would maintain the *status* of the defendant only while he is carrying out the function of representing the corporation.

Neither of these views, however, appears acceptable. The first view should be disregarded because it results in an *abrogatio legis* which must be left to the Legislature and cannot be executed by the hand of the interpreter. The second view is flawed because it requires the legal representative to change roles (witness-defendant) intermittently. This exegesis does not exclude the violation of the right to remain silent but, rather, recognizes it in a certain sense. The new representative—due to the principle of organic identification or “being one and the same with”—is the corporation. Requiring this representative to testify as to what transpired at the time of the transgression could result in self-incrimination. This is a clear contradiction of the fact that the corporation has the same safeguards as the defendant. Paramount among these protections is *nemo tenetur se detegere*.

The Italian criminal system appears to possess a useful antidote. Art. 198, § 2 CPC establishes that a witness cannot be compelled to provide self-incriminating testimony.<sup>132</sup> This rule would also apply in proceedings against a corporation, according to Art. 34, L.D. No. 231/2001 that deems the rules contained in the CPC to be applicable, if compatible with the different proceeding. The evaluation of compatibility, with respect to this rule, would lead to a positive outcome because it would then be possible to protect the right to silence in proceedings against the corporations, albeit with more restricted margin of application.

Art. 198, § 2 CPC could, likewise, be applied with some adjustments for the different context within which it is employed. This would mean

130. Massimo Ceresa Gastaldo, *supra* note 113, at 29; Paolo Ferrua, *Il processo penale contro gli enti: incoerenze e anomalie nelle regole di accertamento*, in *RESPONSABILITÀ DEGLI ENTI PER ILLECITI AMMINISTRATIVI DIPENDENTI DA REATO*, at 234 f.

131. Giorgio Fidelbo, *La testimonianza: casi di incompatibilità*, in *REATI E RESPONSABILITÀ DEGLI ENTI*. GUIDA AL D. LGS. 8 GIUGNO 2001, n.231, at 501. Regarding the right to not respond to questions relating to circumstances of which the representative has become aware due to the role he assumed after the commission of the alleged crime. Gianluca Varraso, *supra* note 59, at 386.

132. Maria Lucia Di Bitonto, *supra* note 39, at 83.

that when the new representative is queried regarding facts that could potentially compromise the corporation, he could not be compelled to respond.

This guarantee could be deemed too modest to adequately protect the representative who personifies the corporation/defendant, since it was intended for the witness who is generally extraneous to the facts being evaluated at trial. Promoting this safeguard would, furthermore, serve as anesthetic for the *vulnus* created by the gap in the legislation<sup>133</sup> and would settle a question that otherwise would merit a *de iure condendo* solution.

These concerns, however, are easily overcome for several reasons. Firstly, based on the actual wording of Art. 44, L.D. No. 231/2001, the new representative is a witness for all legal intents and purposes. Secondly, the safeguard established by Art. 198, § 2 CPC is an extremely elastic regulation that allows for numerous practical applications. According to the degree of the witness's involvement in the circumstances being evaluated, the rule can be applied with greater or less frequency. When a witness, such as the corporation's new representative, is significantly involved in the proceeding, the article serves to neutralize all those questions that could solicit self-incriminating answers.

Adopting this solution implies leaving many decisions to the discretion of the judge presiding over the trial. The judge has the authority to exclude a question or, alternatively, to compel the witness to respond. The answers that should not have been provided (because they would violate a legal prohibition) must be excluded from evidence.<sup>134</sup> One could argue that this safeguard does not represent adequate protection, considering what is at stake. The prejudice that jeopardizes the corporation's right to defend itself is not eliminated (at the most, it is only lessened) if certain knowledge, once acquired, is then excluded from the evidence. Nevertheless, the application of Art. 198, § 2 CPC in the "231" system constitutes the most persuasive solution to guarantee the right to silence, without reforming the legislation.

### VIII. PRECAUTIONARY MEASURES

During the process of evaluating the corporation's liability, a critical role is entrusted to the precautionary procedure, which often represents a decisive junction in the "231" system.

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133. Art. 44, L.D. No. 231/2001.

134. Art. 191 CPC.

The sub-proceeding can constitute the incidental (interlocutory) phase of the criminal proceeding and employs precautionary measures that can attack the corporation's assets, immobilizing them through seizure or temporarily inhibiting the corporation from carrying out certain activities (disqualifying measures). There are two objectives that L.D. No. 231/2001 intends to achieve: to avoid dispersion of the corporate assets that serve as guarantees for the civil obligations derived from the crime and to "paralyze" or reduce the corporation's activity when continuation of such activity would aggravate or extend the consequences of the offence or facilitate the commission of other crimes.<sup>135</sup> The first requirement can be satisfied with a conservative seizure,<sup>136</sup> which will not be discussed in this paper because it mainly refers to civil liability for compensation for damages. The second aim is achieved with a preventive seizure<sup>137</sup> and disqualifying measures.<sup>138</sup>

The precautionary procedure is pivotal because it is the first moment at which the corporation can express its willingness to change course and move towards legality. The attention dedicated to the precautionary measures is also due to the devastating consequences that these measures can have on the corporation. It is not surprising that judicial precedents in these first ten years of experimentation have mainly focused on this procedure. There have been significantly fewer decisions issued during the conclusive stage of the proceeding, in which the Court rules on corporate liability. This phenomenon is largely due to the tremendous impact that precautionary decisions can have on the criminal proceeding, especially if the Cassation confirms them. When the corporation is likely to be found guilty, it has a clear incentive to opt for a special proceeding, as provided for by the CPC.<sup>139</sup> This decision allows the corporation to settle the question more quickly, renouncing many of the safeguards guaranteed by an ordinary proceeding (most important of which is the gathering of evidence through cross-examination) in order to obtain a reduced sentence.

When analyzing the specific precautionary measures outlined in L.D. No. 231/2001, it is appropriate to begin with disqualifying measures (those that preclude the corporation from carrying out some of the activities listed in its business purpose).

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135. Refer to Ministerial Report, *supra* note 14, at 454.

136. Art. 54, L.D. No. 231/2001.

137. Art. 53, L.D. No. 231/2001.

138. Art. 45 f., L.D. No. 231/2001.

139. Book 6, CPC.

The first noteworthy observation is that the disqualifying measures coincide with the disqualifying sanctions imposed during the conclusive phase of the trial when the corporation liability is determined.<sup>140</sup> This peculiarity has raised concerns among legal scholars because it legitimizes the application of precautionary measures with the obvious objective of anticipating the sentence and without a definitive ruling.<sup>141</sup> This scenario has been specifically excluded in the case of precautionary measures applied to individuals because it conflicts with the defendant's right to the presumption of innocence.<sup>142</sup> This principle, notwithstanding some doubts mentioned previously, should also prevail in the proceedings against corporations.<sup>143</sup>

The Ministerial Report tends to play down the importance of the overlap, observing that even if the application of disqualifying measures during the precautionary procedure could appear to be an anticipation of the definitive sentence, it would still be instrumental in guaranteeing the effectiveness of the judicial evaluation.<sup>144</sup> Nevertheless, upon closer examination, the real purpose of the precautionary procedure of the corporate system is special-preventive: the preemptive measures, in other words, serve to minimize the danger of recidivism by bringing those corporations that are inclined to reform back to legality and abandoning those that do not.

In any case, the decision to use the sanctions as a precautionary disqualifying measure leads to a series of necessary observations. Traditionally, in the Italian system, the precautionary procedure cannot disregard potential conclusions that would be reached in the ordinary proceeding. For example, resorting to precautionary measures is precluded if it is presumable—in light of the evidence available—that the trial cannot lead to a guilty decision.<sup>145</sup> Furthermore, during the precautionary phase, the court is not allowed to take measures that cannot be imposed at the end

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140. See *supra* Part V. The prospect of applying revocatory measures (among the disqualifying sanctions) during the precautionary phase presents a significant raises numerous concerns. These measures could entail, for example, revoking financing already allocated or rescinding authorizations, licenses and concessions. Given their definitive nature, revocatory measures are not well-suited to a temporary application. For this reason, scholars tend to exclude them from the precautionary realm, only allowing for suspension of the corresponding activities. See Massimo Ceresa Gastaldo, *supra* note 113, at 42.

141. See Francesco Peroni, *Il sistema delle cautele*, in *RESPONSABILITÀ DEGLI ENTI PER ILLECITI AMMINISTRATIVI DA REATO*, at 244 f.

142. Giulio Illuminati, *Costituzione e processo penale*, *GIUR. IT.* 2 (2008).

143. See *supra* Part III.

144. Ministerial Report, *supra* note 14, at 455.

145. Art. 273, § 2, CPC.

of the trial.<sup>146</sup> These are essential safeguards that are also found in the parallel “231” system.<sup>147</sup> Therefore, if it is already clear during the incidental phase that the trial cannot end with a certain disqualifying sanction, that disqualification cannot be applied during the preemptive phase, either.

This reasoning leads to the first conclusion. As previously mentioned, disqualifying sanctions, unlike financial penalties, can be imposed at the end of the proceeding only if explicitly provided for (as a consequence of the violation attributed to the corporation).<sup>148</sup> The judge can employ the most serious sanctions only for administrative violations stemming from some of the crimes that implicate corporate criminal liability.<sup>149</sup> However, this is not the only prerequisite. It is necessary to prove the existence of a sizeable profit and that the collective entity has already violated the law in the past.<sup>150</sup> Furthermore, application of disqualifying sanctions would nevertheless be precluded when the corporation expressed its commitment to reforming its conduct and regaining legality, as outlined in Art. 17, L.D. No. 231/2001.

The utilization of a precautionary measure must be excluded if, at the time of evaluation, it is already possible to determine that the same sanction could not be applied at the end of the trial. Furthermore, preemptive disqualifying measures cannot be imposed when the proceeding involves an administrative violation stemming from a crime for which the application of disqualifying sanctions is not provided (or the application of that specific disqualifying sanction is not called for).<sup>151</sup> In fact, it is the very nature of the precautionary phase which excludes the possibility that the temporary measure can obtain something more than that which is possible to achieve with a definitive sentence.<sup>152</sup> Moreover,

146. Art. 275 CPC.

147. Massimo Ceresa-Gastaldo, *supra* note 124, at 113.

148. Giorgio Fidelbo, *Le misure cautelari*, in REATI E RESPONSABILITÀ DEGLI ENTI. GUIDA AL D. LGS. 8 GIUGNO 2001, n.231, at 515.

149. Arts. 24–25 *duodecies* D.L. No. 231/01. *Supra* note 87.

150. Art. 13, L.D. No. 231/2001. *See supra* Part V.

151. *See* Cass., Sez. II, March 12th 2007, D’Alessio, 18 GUIDA DIR. 82 (2007). The Cassation’s decision annulled an order with which the Benevento Court had applied a temporary prohibition against carrying out business activity as a precautionary measure during a proceeding in which the alleged crime was aggravated fraud to obtain public funds, for which the corresponding disqualifying sanction is not provided. The decision highlights the more rigorous approach by the Court of Cassation compared to that of a lower court. Adonella Presutti, *Le cautele interdittive nel processo de societate, al vaglio della sperimentazione applicativa*, in STUDI IN ONORE DI MARIO PISANI—vol. I—DIRITTO PROCESSUALE PENALE 708 (Piero Maria Corso et al. eds., La Tribuna 2010)

152. *See* Fidelbo, *supra* note 148, at 514 f. *See also* PAOLO Moscarini, LE CAUTELE INTERDITTIVE NEL PROCEDIMENTO PENALE “DE SOCIETATE” 23 (Aracne 2010).

the disqualifying sanction cannot be imposed if the following conditions exist: the corporation has demonstrated reparative actions and internal reorganization; it has not obtained a substantial profit; or it has not previously violated L.D. No. 231/2001.<sup>153</sup>

After reconstructing the relationship between precautionary measures and disqualifying sanctions, we must address the prerequisites necessary to apply the former. There must be serious indications of the corporation's liability—*fumus commissi delicti*—as well as specific, credible elements supporting the concrete risk of the crimes reoccurring—*periculum in mora*.<sup>154</sup>

According to judicial precedent regarding the precautionary procedure for individuals, the judge presiding over the precautionary phase must put himself in the position of the trial judge and thereby decide if the evidence available would result in an affirmation of liability.<sup>155</sup>

First and foremost, there must be serious indications that the accused is guilty of the alleged crime.<sup>156</sup> In fact, only when this first criterion is satisfied can the judge proceed to examine additional constitutive elements of the administrative violation.<sup>157</sup> It is necessary to verify that for the specific crime, disqualifying sanctions, which correspond to the precautionary measures proposed, can be applied, and if so, that the elements exist for that crime.<sup>158</sup> Once these conditions are met, the judge must then evaluate the administrative violation in its entirety.

On the one hand, verification of the alleged crime is absolutely necessary in order for the judge appointed during the precautionary phase to make a prognostic judgment. On the other hand, when dealing with corporations, the decision during the precautionary procedure cannot stop with the prognostic judgment relating to the alleged crime—as has happened in certain cases.<sup>159</sup> Therefore, a disqualifying measure against a

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153. Art. 13, L.D. No. 231/2001.

154. Art. 45, L.D. No. 231/2001.

155. Cass., Sez. un., April 21st 1995, Costantino, CASS. PEN. 2837 (1995).

156. Art. 45, § 1, L.D. No. 231/01.

157. Fidelbo, *supra* note 148, at 521.

158. In accordance with the principle of autonomy between the responsibility of legal entities and that of individuals (Art. 8, L.D. No. 231/01), in order to affirm corporate liability, it is sufficient that the objective element subsists for the alleged crime; it is irrelevant whether an offender has been identified or, if identified, whether he can be punished.

159. This widespread practice by the lower Courts has been censored by the Court of Cassation. Cass., sez. VI, June 23rd 2006, La Fiorita Soc. coop. A.r.l., CASS. PEN. 87 (2007); Cass., sez. II, June 26th 2008, Morabito ed altro, C.E.D. CASS., n. 240169; Cass., sez. VI, March 5th 2013, Orsi, *ivi*, n. 254719. On this point, See Silvia Renzetti, *Azione cautelare nei confronti della persona fisica e dell'ente: reciproche interferenze*, in [www.dirittopenalecontemporaneo](http://www.dirittopenalecontemporaneo), December 18th 2013, at 9 f.

corporation must be linked to the other prerequisites for an administrative violation: in fact, once the prognostic evaluation has been concluded, the judge must then review the other constitutive elements of the administrative violation. He must determine whether the offense was committed in the interest, or to the advantage, of the corporation, and if it was executed by one of the subjects (corporate officers and subordinate employees) that can create corporate liability.<sup>160</sup>

If the alleged crime is found to have been committed by an employee, the judge will have to confirm the lack of *ante factum* compliance programs in order to impose a disqualifying measure.<sup>161</sup> Whether he has to carry out the same assessment for a crime committed by a corporate officer is debatable.<sup>162</sup> In this scenario, the corporation would have to prove the conditions required to exclude itself from liability (due to the burden of proof apparently being inverted by Art. 6, L.D. No. 231/2001).<sup>163</sup>

Notwithstanding judicial precedents to the contrary, the Court of Cassation has affirmed that corporation can only be required to adopt adequate compliance programs.<sup>164</sup> The evaluation of their adequacy is entrusted to the judge. Furthermore, the judge must examine any fraudulent evasion of the procedures provided for by the programs, and confirm the existence of a Supervisory and Control Body and the effectiveness of its oversight.<sup>165</sup> The judge called to apply the precautionary measures, after having ascertained to which category (corporate officer or employee) the agent of the crime belongs, has to verify that there are no conditions that could exclude the corporation from liability.<sup>166</sup>

Subsequently, due to the required correlation between precautionary measures and disqualifying sanctions, the judge must also ascertain the existence of the other elements that would abstractly allow for the application of a disqualifying penalty, such as a sizeable profit or repetition of the illegal acts.<sup>167</sup>

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By the same author, *See Misure cautelari applicabili agli enti: primi interventi della Cassazione*, CASS. PEN. 4228 (2007).

160. Fidelbo, *supra* note 148, at 521.

161. *Id.* at 524.

162. *Id.*

163. *See supra* Part IV.

164. *See supra* Part IV.

165. Giorgio Fidelbo, *supra* note 148, at 524.

166. *Id.*

167. This conclusion has been embraced by judicial precedents (*See Cass.*, sez. II, December 20th 2005, Jolly Mediterraneo S.r.l., CASS. PEN. 76 (2007); *Cass.*, sez. VI, June 23rd 2006, La Fiorita, *supra*

After concluding that there are serious indications of corporate liability, the judge is then left to examine the other prerequisite to impose preemptive measures: precautionary needs. He must deduce from specific, well-founded elements that there is real danger of the corporation repeating offenses of the same nature in the future.<sup>168</sup> The fact that the Legislature has identified this as the only precautionary need<sup>169</sup> further confirms the special-preventive purpose of the preemptive disqualifying measures that clearly have the aim of reducing recidivism. The danger that the corporation will reoffend can be excluded if, for example, there is an effective change in management or restitution of the profit from the crime.<sup>170</sup>

After the judge has concluded that there are serious indications of liability and a high risk of recidivism, he then selects the most suitable preemptive measure for the case at hand.<sup>171</sup> The measure has to be proportionate to the severity of the offense and to the sanction that abstractly could be applied.<sup>172</sup>

Due to the proportionality principle, the measures cannot be applied together,<sup>173</sup> and disqualification of the corporation's activity is only warranted when other precautionary measures have proven to be inadequate.<sup>174</sup> The Legislature did not specify that the precautionary disqualifying measures must be aimed at the specific department or area within which the crime is assumed to have been committed, like for the homologous sanctions.<sup>175</sup> Nevertheless, it's possible to reach this conclusion by way of interpretation.<sup>176</sup>

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note 57, at 84 f.) and scholars (Massimo Ceresa Gastaldo, *supra* note 113, at 40; Giorgio Fidelbo, *supra* note 148, at 522).

168. Scholars have highlighted that the prerequisites for the *periculum* have not been clearly defined, giving the judge excessive discretion. Giovanni Paolozzi, VADEMECUM PER GLI ENTI SOTTO PROCESSO. ADDEBITI "AMMINISTRATIVI" DA REATO (DAL D.LGS. n.231 DEL 2001 ALLA LEGGE n.146 DEL 2006) 149 (Giappichelli 2006).

169. In the CPC, Art. 274 provides that precautionary measures can be adopted even for the danger of tampering with evidence or a flight risk.

170. Cass., sez. VI, June 22nd 2010, Polistirolo S.r.l. and another, RIV. PEN. 716 (2011).

171. It is useless, in other words, to apply a more onerous measure if the *periculum* can be neutralized by less afflictive means.

172. Art. 46, § 2, L.D. No. 231/01.

173. The prohibition against multiple measures only concerns those that are disqualifying. Therefore, the concurrent application of a preventive disqualifying measure and seizure (preventive or conservative) is allowed. Cass., sez. un., March 27th 2008, Fisia Italimpianti S.p.a., CASS. PEN. 4544 (2008).

174. Art. 46, § 3, L.D. No. 231/01.

175. Art. 14, L.D. No. 231/2001.

176. Cass., sez. VI, January 25th 2010, Impresa Ferrara S.n.c., CASS. PEN. 3535 (2011).



Moreover, we must address the peculiarity of the precautionary phase. The order issued by the judge at the request of the Prosecutor has to be preceded by a hearing in which the corporation has the opportunity to take part.<sup>177</sup> This essentially creates an “early” right to be heard. In the precautionary model for individuals, however, the questioning—the first chance for the defendant to speak on the matter—is subsequent to the application of the precautionary measure.<sup>178</sup>

The hearing can perform various functions. It can provide the first opportunity for the corporation to demonstrate that it has adopted compliance programs *ante delictum*. This condition, if supported by the other circumstances provided for by Articles 6 and 7, L.D. No. 231/2001, should lead the judge to declare the absence of serious indications of culpability. In this case, he must reject the request for precautionary measures. If the corporation proves that it implemented the compliance programs *post factum*, the judge could deem these programs adequate to neutralize the danger of recidivism and, therefore, not apply the precautionary measures for lack of the necessary prerequisites.

If the corporation lacks compliance programs when it has the hearing in chambers, this can be the place to communicate its intention to adopt such programs. The corporation can demonstrate its commitment to reparative conduct that, during the conclusive phase of the trial, would prevent disqualifying sanctions from being applied and attenuate financial penalties (compensation for the damage, elimination of the harmful or dangerous consequences of the crime, restitution of the profit). Art. 49, L.D. No. 231/2001, in fact, provides for the suspension of the preventive measures if the corporation asks for the opportunity to fulfill its reparative obligations. In such cases, the judge who grants the corporation’s request establishes a security deposit or collateral that must be supplied by the corporation.<sup>179</sup> If the reparative conduct or reorganization is nonexistent, incomplete, or not effective, the security deposit will be acquired by the State.<sup>180</sup> In the inverse scenario, the security deposit will be returned to the corporation and the precautionary measure that was temporarily suspended will be completely revoked.<sup>181</sup>

A provision for suspension of the precautionary measures undoubtedly presupposes that the preventive disqualification has already been

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177. Art. 47, §§ 2–3, L.D. No. 231/2001.

178. Art. 294, CPC.

179. Art. 49, § 1, L.D. No. 231/01.

180. Art. 49, § 3, L.D. No. 231/01.

181. Art. 49, § 4, L.D. No. 231/01.

applied.<sup>182</sup> There is no reason, however, why the corporation cannot express its willingness to reform before the judge rules on the precautionary question.<sup>183</sup> In other words, the judge could, upon receiving the request to apply precautionary measures, simultaneously suspend them for the time necessary for the corporation to fulfill the reparative requirement. This would prevent a corporation that intends to cooperate from suffering, even for a short period of time, the serious consequences resulting from the disqualifications.

Finally, the other preemptive measure provided for by the “231” system—preventive seizure<sup>184</sup>—also deserves some consideration. Like disqualifying measures, preventive seizure has the objective of preventing recidivism.<sup>185</sup> It can be applied to the same items for which confiscation would be allowed: price and profit derived from the crime.<sup>186</sup>

In spite of the intentions declared by the Legislature, it does not appear that preventive seizure is intended to prevent other crimes or to preclude the aggravation of the consequences of those offenses presumed to have already been committed. Upon closer examination, if it is true that disqualifying measures and preventive seizure in the “231” system have the same *ratio*, this is because both are forms of an anticipated execution of the sentence. As we have observed, confiscation is an automatic and obligatory sanction when the corporation is found liable. Seizure aims to prevent the dispersion of corporate assets, thereby assuring that other sanctions can be imposed in the future.

The inextricable link between precautionary measures and the final sentence implies that a preventive seizure must be contingent on a positive evaluation—even if merely prognostic—of the conditions that, at the end of the proceeding, would allow for confiscation. Therefore, the judge has to verify the existence of serious indications of liability as well as the existence of profit gained from the crime. Furthermore, he must ascertain the danger of corporate assets being dispersed which could compromise a future confiscation.<sup>187</sup>

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182. See Adonella Presutti, *Le misure cautelari interdittive*, in *MANUALE DELLA RESPONSABILITÀ DEGLI ENTI*, at 281.

183. Tommaso Emilio Epidendio, *Il sistema sanzionatorio e cautelare*, in *ENTI E RESPONSABILITÀ DA REATO. ACCERTAMENTO, SANZIONI E MISURE CAUTELARI 449* (Alessandra Bassi & Tommaso Emilio Epidendio eds., Giuffrè 2006).

184. Art. 53, L.D. No. 231/2001.

185. See *supra* note 135.

186. Art. 19, L.D. No. 231/2001.

187. See Adonella Presutti, *Le misure cautelari reali*, in *MANUALE DELLA RESPONSABILITÀ DEGLI ENTI*, at 300.

Judicial precedent, which at first deemed the mere existence of the illegal act sufficient to warrant preventive seizure, has recently concluded that the prerequisite for the seizure of corporate assets prior to their confiscation must coincide with the prerequisites for preemptive disqualifying measures.<sup>188</sup> This conclusion surrounds the adoption of the real precautionary measure with greater safeguards and, at the same time, further highlights its affinity with the definitive sanction applicable after the corporation is found guilty. The preventive seizure described in L.D. No. 231/2001 tends to deprive the agent of the crime of the associated proceeds. The necessary relationship with the alleged offender must, therefore, orient the judgment towards ascertaining the existence of serious indications of liability—even during the precautionary phase.<sup>189</sup>

#### IX. DYNAMICS OF THE ORDINARY PROCEEDING FROM REGISTRATION OF THE ADMINISTRATIVE VIOLATION TO ISSUING THE FINAL JUDGMENT

The importance of the precautionary system which, as an incidental segment of the trial, takes place during the preliminary investigations, confers on these investigations a decisive role in the “231” system. This represents an inversion of the equilibrium that characterizes proceedings against individuals—at least compared to how these proceedings are regulated by the CPC—in which everything revolves around the trial (the phase in which evidence is gathered through cross-examination).<sup>190</sup> The Prosecutor utilizes the preliminary investigations to decide whether or not to prosecute. Nevertheless, they generally remain unknown to the judge who must convict or absolve the defendant at the end of the trial.<sup>191</sup>

In the “231” system, precautionary measures are the main instruments used to quickly react when faced with the most serious incidences of corporate crime. The balance, therefore, tilts towards the preliminary stage of the proceeding. The corporation subjected to these measures is naturally

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188. In the “231” system, confiscation is a main and obligatory sanction. Therefore, the real preventive measure (seizure) needed to ensure a future confiscation requires a more comprehensive evaluation of the liability serious indications: Cass., sez. VI, 31st May 2012, Codelfa, CASS. PEN. 794 (2013). In order to apply this sanction (that presupposes a complete evaluation), during the investigative phase, elements that concretely demonstrate the consistency of the Prosecutor’s reconstruction and that allow for a favorable prognosis of future conviction, must exist. See Francesca Ruggieri, *Art. 53—Sequestro preventivo*, in *LA RESPONSABILITÀ AMMINISTRATIVA DELLE SOCIETÀ E DEGLI ENTI*. D. LGS. 8 GIUGNO 2001, n.231 1136 (Marco Levis et al. eds., Zanichelli 2014).

189. Guido Todaro, *Il sequestro preventivo, funzionale alla confisca per equivalente, di beni di una persona giuridica: il rebus dei reati tributari*, CASS. PEN. 2831 2832 (2014).

190. See Maria Lucia Di Bitonto, *Le indagini e l’udienza preliminare*, in *REATI E RESPONSABILITÀ DEGLI ENTI*. GUIDA AL D. LGS. 8 GIUGNO 2001, n.231, at 592.

191. Art. 431, CPC.

inclined to take advantage of the mechanisms available to quickly neutralize the detrimental effects of the disqualifications. The first opportunity could arise during the hearing in chambers in which the judge decides whether to accept the Prosecutor's request for precautionary measures. During this hearing, therefore, the parties debate the existence of applicable prerequisites for the measures. If these prerequisites are met, the discussion turns to the corporation's willingness to execute reparative actions in order to obtain suspension of the disqualifying measure.

When subjected to a criminal proceeding, corporations try to find a rapid solution, not only to resolve the precautionary issue but, more generally, to contain the exorbitant costs and losses associated with the pending charges. For this reason, companies tend to manifest their willingness to collaborate immediately (implementing compliance programs, compensating for damages and restoring the *status quo ante*). As we have seen, these reparative actions lead to the suspension of precautionary measures and, when legal requirements have been effectively fulfilled, the eventual revoking of the same. Corporations then have the opportunity to request special proceedings with which they can settle the issue once and for all, which would otherwise be precluded.<sup>192</sup> Hence, the special-preventive nature of the "231" system yet again moves the equilibrium in corporate proceedings back to the preliminary investigations.

Preliminary investigations start when the Prosecutor is informed of the administrative violation and proceeds to the registration, including information identifying the corporation, personal details of its legal representative and *nomen iuris* of the alleged crime.<sup>193</sup> This annotation is entered in the same criminal register in which crimes committed by individuals are logged.<sup>194</sup> As is the case for individuals, the moment of annotation marks the beginning of a six-month period during which it is possible to carry out investigations.<sup>195</sup> At the end of this term, the

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192. The summary trial requested by the defendant that is generally based on investigative acts, and that guarantees a reduction of the final sentence by a third, is precluded when the administrative violation calls for a definitive disqualifying sanction (Art. 62, § 4, L.D. No. 231/2001). Therefore, the corporation can agree upon a sentence with the Prosecutor through plea-bargaining if, among the other conditions, the administrative violation only provides for a financial penalty (Art. 63, § 1, L.D. No. 231/2001). For this reason, the company is generally keen on collaborating. After reparative and compensatory conducted, a disqualifying sanction can no longer be imposed. The preclusion of a disqualifying penalty, in turn, assures the corporation the opportunity to define its position with special proceedings.

193. Art. 55, L.D. No. 231/2001.

194. Art. 55, § 1, L.D. No. 231/01 and Art. 335, CPC.

195. Art. 405, § 3, CPC.

Prosecutor is prohibited from conducting new investigations that, if carried out, would be excluded.<sup>196</sup>

L.D. No. 231/2001 does not actually establish this sanction. The fact, however, that the Legislature established a time limit for the investigations (which is the same for individuals) has led to a general consensus that Art. 407 CPC is applicable. Art. 407, in fact, calls for the exclusion of investigations conducted after the deadline and this provision has been deemed compatible with the corporate criminal liability system.<sup>197</sup>

As is the case for the parallel institution of annotation, it is possible to inform the corporation or its defense attorney of the registration upon their request, unless there are prohibitive conditions that would not allow for communication of the alleged crime to its presumed perpetrator.<sup>198</sup>

Since the corporation could have no knowledge of the pending charges (perhaps it has never requested information regarding possible annotations in its name), a notice of investigation can be sent to the company.<sup>199</sup> This is the provision by which the suspect must be informed of the existence of a proceeding against it when the Prosecutor must carry out an activity for which the defense attorney has the right to be present. To allow for effective execution of the right to a defense, the notice also indicates the legal provisions allegedly violated as well as the time and place in which the criminal act is presumed to have transpired.<sup>200</sup>

Art. 57, L.D. No. 231/2001 only provides that the notice of investigation must contain an invitation to provide or choose an address for service and inform the corporation of the need to file a statement in order to join the proceeding. Also in this case, it is necessary to refer to the above-mentioned CPC in order to identify when the notice has to be sent (when the investigation requires the presence of a defense attorney) and establish additional communications that must be issued and adapted to the peculiarities of corporate proceedings. Considering the complexity of the administrative violation, the notice of investigation will have to not

196. Art. 407, § 3, CPC.

197. Massimo Ceresa Gastaldo, *supra* note 113, at 60; Luca Pistorelli, *Le indagini preliminari e l'udienza preliminare nel procedimento per l'accertamento della responsabilità degli enti giuridici da reato*, in Various Authors, LA RESPONSABILITÀ AMMINISTRATIVA DEGLI ENTI (D. LGS.8 GIUGNO 2001, N. 231) 306 (Ipsa 2002).

198. Art. 55, § 2, L.D. No. 231/2001. Art. 335, §§ 3–4 CPC that prohibits communication of the annotation to the alleged perpetrator of the offense, the victim and their attorneys when the proceeding involves crimes of a particularly serious nature (including those listed in Art. 407, § 2, *a* CPC), such as those associated with the mafia or—even beyond these crimes—when there are specific needs concerning the investigative activity.

199. Art. 57, L.D. No. 231/01.

200. Art. 369 CPC.

only report the legal provision(s) allegedly violated and the time/place of the presumed crime but also the category (corporate officer or employee) to which the presumed agent belongs.<sup>201</sup>

At the end of the investigation, the Prosecutor has two alternatives: proceed with the case or dismiss the charges. In the case of the latter, we find the most significant difference with respect to proceedings against individuals. L.D. No. 231/2001 provides that the Prosecutor can dismiss the charges *de plano*.<sup>202</sup> The CPC, on the other hand, establishes that the Prosecutor only has the authority to request dismissal.<sup>203</sup> The judge, in fact, must authorize the Prosecutor not to bring about the criminal action.<sup>204</sup>

The decision not to prosecute the corporation is, however, not completely devoid of all controls. Dismissal of the charges, in fact, must be communicated to the Attorney General at the Court of Appeals.<sup>205</sup> The Attorney General may carry out verifications and, if necessary, proceed with the charges.

Entrusting the Prosecutor with the decision of whether to bring about criminal action or not was strongly criticized by scholars because it was considered detrimental to the principle of mandatory prosecution established by Art. 112 of the Constitution.<sup>206</sup> Nevertheless, a minority argues that this solution is in line with the constitutional provision since mandatory prosecution would not necessarily be guaranteed by assigning the determination to a judge.<sup>207</sup>

Dismissal can be ordered when the Prosecutor cannot proceed with the charges against the corporation (for example, if the crime is not explicitly provided for by the “231” system), or in the case of having exceeded the statute of limitations<sup>208</sup> or when the administrative violation lacks foundation.<sup>209</sup>

When the case cannot be dropped, the Prosecutor brings charges against the corporation with an act that includes the following: information identifying the corporation, a clear and precise description of the criminal

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201. Alessandro Bernasconi, *Indagini e udienza preliminare*, in MANUALE DELLA RESPONSABILITÀ DEGLI ENTI, at 315.

202. Art. 58, L.D. No. 231/01.

203. Art. 408, CPC.

204. Art. 409, CPC.

205. Art. 58, L.D. No. 231/01.

206. Paolo Ferrua, *Il processo penale contro gli enti*, *supra* note 130, at 225; Luca Pistorelli, *supra* note 197, at 2531.

207. Maria Lucia Di Bitonto, *supra* note 190, at 618.

208. *See supra* Part V.

209. Alessandro Bernasconi, *supra* note 201, at 317.

action from which corporate liability could arise, an indication of the presumed crime, the articles of law allegedly violated as well as sources of evidence.<sup>210</sup> The scrupulous description of the constitutive elements in the formal notice of charges gives the corporation necessary information to effectively defend itself.

The above mentioned act can directly open the trial for minor offenses.<sup>211</sup> More serious crimes must pass through a filter—the preliminary hearing—referred to a judge who responds to the Prosecutor’s request, issuing the decree for committal to trial or declaring the judgment of no grounds to proceed when there is a cause that extinguishes the offense or when it is impossible to prosecute the administrative violation, when the illegal act itself did not occur or the evidence acquired turns out to be insufficient, contradictory or not suitable to sustain the prosecution before the trial judge.<sup>212</sup>

The L.D. No. 231/2001 dedicates little attention to the trial. We can infer that the Legislature deemed it sufficient to defer to the CPC. One could also interpret this decision as further confirmation of the minor importance of this stage compared to the investigative phase. Furthermore, it is significant that section VII L.D. No. 231/2001, which is dedicated to the trial, begins with a provision giving the corporation another opportunity to regain legality. Art. 65, L.D. No. 231/2001, in fact, provides for suspension of the proceedings when the corporation—before the Court of first instance declares the trial open<sup>213</sup>—asks to fulfill the obligations described in Art. 17, L.D. No. 231/2001. Satisfying these obligations, as previously explained, precludes the application of disqualifying sanctions. The corporation must, however, demonstrate that it was not able to fulfill these obligations sooner. Without this caveat, a corporation that has not been subjected to precautionary measures would

210. Art. 59, L.D. No. 231/2001.

211. The Prosecutor prosecutes by means of direct summons for trial in cases of misdemeanours or crimes punishable either with the penalty of imprisonment not exceeding a maximum term of four years or by fine, only or jointly by fine and the aforementioned imprisonment (Art. 550, CPC).

212. Art. 61, § 1, L.D. No. 231/2001. Given the great importance of reparative measures in the “231” system, it would have been opportune to provide for this conduct as an *ad hoc* cause for dismissal during the investigative stage and acquittal in the subsequent phases, Hervé Belluta, *Le indagini e l’udienza preliminare*, in DIRITTO PENALE DELLE SOCIETÀ—VOL. I, at 1376, 1382.

213. This time limit that, in the Italian criminal proceeding, falls between the resolution of any preliminary issues and the trial evidentiary hearing, on the one hand, avoids carrying out evidentiary activity that could be made useless by the reparative conduct and, on the other hand, allows the corporation an adequate *spatium temporis* for the request, especially when moving directly to the trial without a preliminary hearing. See *supra* note 14, at 463.

not have any incentive to quickly adopt the organizational counter-measures (compensation for damages and re-structuring).<sup>214</sup>

The judge who grants the suspension establishes a period of time within which the corporation must fulfill these obligations as well as a security deposit, which serves as a guarantee. This is the same mechanism utilized for the suspension of the precautionary measures.<sup>215</sup> The amount deposited as a guarantee will be returned to the corporation if it does, in fact, fulfill its obligations as promised. In this case, if the judge—upon resuming the trial—recognizes the existence of the prerequisites for the administrative violation, he will only apply a reduced financial sanction. A disqualifying penalty would be precluded. If, on the other hand, the corporation does not fulfill its obligations within the acceptable timeframe, the security deposit will be acquired by the State. If the judge finds the corporation guilty, he will have recourse to the full arsenal of sanctions provided for that specific administrative violation.

The section dedicated to the trial closes with potential judgments that can be issued at the end of the proceeding. The Legislature, proposing the tri-partition typical of the CPC, distinguishes between the following sentences: acquittal, non prosecution and conviction.<sup>216</sup>

The first of these possible judgments presupposes a lack of the constitutive elements of the administrative violation.<sup>217</sup> An analogous decision can be reached when evidence of the administrative violation is missing, insufficient or contradictory.<sup>218</sup> The decision not to prosecute must be made in the following scenarios: the alleged crime was already time-barred before the corporation was accused of the administrative violation or the statute of limitations for the administrative sanction has been exceeded.<sup>219</sup>

If, on the other hand, the judge affirms that the administrative violation has been substantiated, he pronounces a judgment of conviction and, when applying a disqualifying sanction, specifies the activity and structures that will be affected.<sup>220</sup>

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214. See *supra* note 14, at 463. *Contra* Adolfo Scalfati, *Le norme in materia di prova e di giudizio*, in *RESPONSABILITÀ DEGLI ENTI PER ILLECITI AMMINISTRATIVI DIPENDENTI DA REATO*, at 363, according to whom the formula should be interpreted with a certain amount of forbearance.

215. Artt. 65, 49, L.D. No. 231/01.

216. Section VII, L.D. No. 231/01.

217. Art. 66, L.D. No. 231/2001.

218. Art. 66, L.D. No. 231/2001.

219. Art. 67, L.D. No. 231/2001.

220. Art. 69, L.D. No. 231/2001.



The corporation can submit an application for appellate remedy when the sentence applies a disqualifying penalty.<sup>221</sup> If financial sanctions have been imposed, the corporation can only challenge them if the same opportunity has been afforded to the individual who committed the alleged crime—in the cases and with the procedures established for the defendant.<sup>222</sup> The legislation regarding appellate remedies, even if limited, seeks to achieve two objectives. The first aim is to avoid, where possible, conflicting decisions between the judgment issued against the individual and that against the corporation. Secondly, the regulation aims to give the corporation every opportunity to appeal decisions that impose disqualifying sanctions.<sup>223</sup>

The Prosecutor can file the same appeals allowed for the crime upon which the administrative violation is contingent.<sup>224</sup>

Once the proceeding has concluded with a judgment of conviction, the legislation gives the corporation one last chance to collaborate. This is further proof that for L.D. No. 231/2001, it is never too late to get back on the right track and to be rewarded for this decision. If the corporation demonstrates having belatedly implemented reparative measures (within twenty days of the notice of the abstract of the sentence having been served), it can request that the judge convert the disqualifying sanction into a financial penalty. While awaiting the judge's decision, the sanction is suspended as long as the judge does not deem the request blatantly unfounded.<sup>225</sup>

#### X. L.D. No. 231/2001: MORE THAN A DECADE LATER

After more than ten years of L.D. No. 231/2001 having been in force, it is possible to evaluate how it has been applied from a practical perspective.

First of all, it is important to highlight that this special legislation did not “take off” immediately, notwithstanding the fact that by now there are numerous proceedings against corporations in the most important Italian

221. Art. 71, § 2, L.D. No. 231/01.

222. *See supra* note 14, at 463.

223. Ministerial Report, *supra* note 14, at 465.

224. Art. 71, L.D. No. 231/2001. Giorgio Spangher, *Le impugnazioni*, in RESPONSABILITÀ DEGLI ENTI PER ILLECITI AMMINISTRATIVI DIPENDENTI DA REATO, at 373, analyzes the problems that emerge from the inadequate legislation regarding appellate remedies, maintaining that they cannot be easily resolved by applying the rules contained in the CPC.

225. Art. 78, L.D. No. 231/2001. *See* Enrico Gallucci, *L'esecuzione*, in REATI E RESPONSABILITÀ DEGLI ENTI. GUIDA AL D. LGS. 8 GIUGNO 2001, n.231, at 739. For the quantification, the judge takes into account the seriousness of the illegal activity and the reasons for the belated separative conduct.

Courts, such as those in Rome and Milan, which routinely deal with the most serious incidences of corporate crime.<sup>226</sup> This is undoubtedly a byproduct of the reluctance to accept *societas delinquere potest* as well as to address criminal issues of a markedly corporate nature. Furthermore, during a period of financial crisis, like the one we are currently weathering, there has been resistance due to concerns that businesses, especially small to medium-sized companies, would not survive to the enormous costs associated with the proceedings. It is not coincidental that the majority of cases in which the L.D. No. 231/2001 has been applied involve large corporations.<sup>227</sup> This is one of the consequences of the specific offenses targeted by the legislation.

There is another important consideration. The *ante factum* compliance programs evaluated by judges thus far have not passed the assessment of adequacy. This undoubtedly represents a point of great concern for corporations. The only instance in which a company was acquitted due to conformity of its programs has recently been annulled by the Court of Cassation.<sup>228</sup> This trial stage, however, has served to help judges to identify the characteristics of a desirable program and corporations to implement an organizational structure that can effectively protect them from the risk of crime and, consequently, from being subject to a criminal proceeding.

One could nevertheless debate the utility of implementing a compliance program *ante delictum*. The failed experience might encourage corporations to assume the risk of crime and then decide to adopt a suitable program during the proceeding, utilizing the numerous opportunities offered by L.D. No. 231/2001. This may be true in the American system in which the Prosecutor is in charge of the criminal action and, therefore, can decide not to file charges when the corporation expresses its willingness to change. In Italy, on the contrary, the lack of an *ante factum* program forces the Prosecutor (in the presence of the other constitutive elements of the administrative violation) to proceed to the annotation and precludes dismissal (even if the corporation reformed its organizational structure during the investigations). A different conclusion could be reached if the Legislature heeded suggestions from scholars and recognized the implementation of reparative measures (organizational

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226. Marco Onado, *Gli scandali societari italiani*, in Various Authors, *IMPRESA E GIUSTIZIA PENALE: TRA PASSATO E FUTURO* 59 (Giuffrè 2009).

227. As confirmed by case-law, *CODICE DELLA RESPONSABILITÀ "DA REATO" DEGLI ENTI ANNOTATO CON LA GIURISPRUDENZA*, 26 f. (Stefano Maria Corso eds., Giappichelli III ed. 2015).

228. *See supra* note 71.

restructuring along with compensation for damages) as a cause for dismissal.<sup>229</sup>

At present, the lack of a pre-existing program (adopted before the crime) exposes the corporation to the risk of being convicted, even at the outcome of the special proceedings that companies can access more easily when they demonstrate—throughout the trial—a certain collaborative spirit.

Furthermore, one cannot underestimate the fact that implementing a program *post factum* implies a series of obligations that must be fulfilled by the corporation (which would not have to be accounted for in the opposite hypothesis). As explained earlier, the company must compensate the victim for the damage, eliminate the harmful or dangerous consequences of the crime and relinquish the profit derived from the offense. In the case of an *ante delictum* program deemed adequate, even when the individual is convicted, the judgment of acquittal would release the corporation from these commitments.

Furthermore, even though L.D. No. 231/2001 does not obligate companies to organize themselves in such a way as to neutralize the risk of crime, those who have relationships with the corporations (for instance, public administrations) often require it. Hence, if an investment must be made to adopt a model, the corporation might as well make a serious effort and take advantage of the occasion to acquire a structure that effectively guarantees legality.

Companies created as a mere front for organized crime, will clearly not view the “231” system as an opportunity. As previously noted, however, the legislation is principally aimed at “healthy” companies that are nevertheless willing to accept the risk of crimes being committed within their organization in exchange for greater profit.<sup>230</sup> L.D. No. 231/2001 has made this risk uneconomical, not so much due to the financial penalty (even though it represents a cost to the corporation) but, rather, due to the introduction of the disqualifying sanction. It is worth reiterating that the disqualifying sanction can be applied as a precautionary measure and could even force the corporation out of the market. This sanction represents an unknown variable and is, therefore, unacceptable for companies that must survive in a competitive marketplace like Italy. For this reason, the system serves to promote greater legality.

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229. See *supra* note 212.

230. See *supra* note 20.

The purpose of L.D. No. 231/2001 is, moreover, decidedly preventive. Paradoxically, the best indication of success of this legislation is—to a large extent—not found in its application but, rather, in the effects that it can produce simply as a result of having been implemented. In any case, a longer period of observation—more than the first ten years of the legislation being in-force—is needed in order to accurately assess the effectiveness of the “231” system.