

# LIABILITY OF ENTITIES IN ITALY: WAS IT NOT SOCIETAS DELINQUERE NON POTEST?

FABRIZIO CUGIA DI SANT'ORSOLA\*  
and SILVIA GIAMPAOLO\*\*

## ABSTRACT

*The scope of this article is to provide a general overview of the Italian legislation related to administrative liability of legal entities for infringements falling into the list of crimes included in Legislative Decree no. 231 of 8 June 2001. The article introduces the fundamental principles of the newly identified “administrative responsibility” of the entity for crimes committed in its interest by top managers of such entities, and analyses the most relevant case law related to the first applications of the Decree. In addition, the article provides a general analysis of the Organizational Model and the Supervisory Board envisaged by the Decree, and deemed as necessary to avoid the triggering of an automatic administrative responsibility of the entity involved, moving into the major interpretations on how and to what extent responsibility may objectively be avoided. Ultimately, the article defines the current state of interpretations, and the administrative sanctions that may be applied to entities for crimes committed by managers in violation of the provisions set out by the Legislative Decree no. 231 of 8 June 2001.*

**Keywords:** administrative liability; supervisory board; organizational model

## 1. INTRODUCTION

Legislative Decree no. 231 of 8 June 2001, titled “Discipline of the administrative liability of legal persons, companies and associations even not provided with legal personality, pursuant to Article 11 of Law no. 300 of 29 September 2000” (herein after the “Decree”), introduces for the first time in the Italian legal system the concept of

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\* Fabrizio Cugia di Sant’Orsola is partner of Cugia Cuomo & Associati, Rome.

\*\* Silvia Giampaolo is Senior Associate, Cugia Cuomo & Associati.

administrative liability of entities for infringements depending on a crime.<sup>1</sup> The Decree is a significant change, if not a true revolution for the Italian legal system, which was based up to date on the old Roman principle “*societas delinquere non potest*”, according to which no criminal responsibility may be borne by legal entities. Keeping in mind this principle, the legislator avoids to establish the concept of criminal responsibility on entities, but does create an objective link between personal violation by managers of the entity and its administrative responsibility.

The principles which led to and inspired the Decree derive from international treaties, namely Convention of 26 July 1995 on the protection of the financial interests of the European Communities, the Convention on the fight against corruption involving officials of the European Communities or officials of the Member States of the European Union, drawn up by the Council on 26 May 1997 and lastly the OECD Convention of 17 November 1997 on Combating Bribery of Foreign Public Officials in International Business Transactions.

Yet the Decree is more ambitious, aiming at holding entities objectively responsible for crimes committed in their interest or to their advantage by individuals who represent, administer and/or manage such entities, as well as employees reporting to such type of managers (i.e. employees who may have taken action because of a specific request by managers or reporting directly to them). The Decree encourages the adoption of an organisational, management and audit Model, in order to prevent the crimes, as listed by the Decree. In other words, the Decree identifies the type of criminal violations which may trigger the administrative responsibility of entities, yet envisages a possible avoidance of liability in case of adoption of an Organisational Model. In addition, the Decree enhances the development and enforcement of corporate governance systems, encouraging the adoption of a check and balance general measure between corporate bodies under which “companies may be directed, managed and controlled”<sup>2</sup> and prevented in their possibility of violating criminal law, also ensuring sound and accurate financial reporting and deter fraud.<sup>3</sup>

With a good measure of approximation, the Decree, which came into force on 4 July 2001, represents the Italian transposition of the US Sarbanes-Oxley Act of 2002, a.k.a. the ‘Public Company Accounting Reform and Investor Protection Act’, issued by the US Congress in response to high profile business failures, such as Enron, Adelphia Communications, Health South and WorldCom. Yet Sarbanes-Oxley’s scope was clearly to reinforce investment confidence and protect investors by

<sup>1</sup> Benvenuto Leonardo, (2009), *Organi sociali e responsabilità amministrativa da reato degli enti*, *Società*, 2009, 6, 673, 1–21. Retrieved from [www.leggiditaliaprofessionale.it/](http://www.leggiditaliaprofessionale.it/) on 8 November 2010.

<sup>2</sup> Communications from the Commission to the Council and the European parliament- Modernising Company law and enhancing corporate governance in the European Union – Plan to move be forward. *COM/2003/0284 final*. Retrieved from <http://eur-lex.europa.eu/> on 19 November 2010.

<sup>3</sup> Cohen, Jeffrey; Krisnamoorthy, Ganesh; Wright, Arnold M. Corporate Governance and the Audit Process, *Contemporary Accounting Research*, Winter 2002, Vol. 19 Issue 4, p573–594, 22p. Retrieved on 15 November 2010 from EBSCO HOST.

improving the accuracy and reliability of corporate disclosure, such that it mandated a number of reforms to enhance corporate responsibility, enhance financial disclosures and combat corporate and accounting fraud.<sup>4</sup>

Somewhat to the contrary, the provisions of the Decree expand to a series of different types of possible crimes (from labour safety regulation to financial corruption, from privacy to sexual labour discrimination, etc.) and apply to a vast and multifaceted type of corporate entities, both possessing or not possessing legal personality, being applicable also to associations without legal investiture.<sup>5</sup> The Decree's provisions apply to private legal entities, including foundations, and to companies, both those with legal status as well as without legal personality such as public limited liability companies, and in this respect does not modulate its provisions according to the type of entity involved, being it master limited partnership, limited responsibility companies (also with one single equity holder), joint stock companies (whether public, private or with mixed capital), foreign companies with branch offices in Italy, cooperatives, mutual associations, ordinary or general partnerships, mutual funds management companies, and non-recognized associations, including non-profit organizations.

Within the perimeter of the Decree, organizations such as consortia may be included, whether or not set up and incorporated as companies, in which the fiscal autonomy is clearly and specifically regulated by Article 2615 of the Italian civil code<sup>6</sup>, providing that for the obligations incurred on behalf of the consortium by its legal representatives, third parties may assert their rights exclusively on the consortium funding.

It is relevant to note that under the Decree, entities retaining head offices in Italy may be held responsible in relation to crimes committed abroad, provided that the State where the violation occurred has not filed a criminal proceeding against such entity. In this regard, on 1 December 2010 the Supreme Court of Cassation (Decision no. 42701) for the first time in its history stated the principle of possible application of interdictory and provisional measures to entities involved in crimes of international corruption. Such Decision, stemming from a recent case of corruption of Nigerian officials for drilling concessions in Nigeria, states the application of Article 25 par. 5 of the Decree in relation to basic assumptions of corruption (crime pursued under

<sup>4</sup> SARBANES-OXLEY ACT. (2007). In *The A to Z of Corporate Social Responsibility*. Retrieved on 11 November 2010 from [www.credoreference.com.ezproxy.apollolibrary.com/entry/wileyazcsr/sarbanes\\_oxley\\_act.a](http://www.credoreference.com.ezproxy.apollolibrary.com/entry/wileyazcsr/sarbanes_oxley_act.a).

<sup>5</sup> Cerqua Luigi Domenico, (2007), *Profili generali della responsabilità degli enti dipendente da reato*, *Corriere Merito*, 2007, 8-9, 977, 1-33. Retrieved from [www.leggiditaliaprofessionale.it/](http://www.leggiditaliaprofessionale.it/) on 8 November 2010.

<sup>6</sup> Cerqua Luigi Domenico, 2007, p.2.

paragraphs 2 and 3 of the Decree), if in presence and accordance to subjective elements identified under paragraph 4 of the Decree.<sup>7</sup>

The Decree being applicable to all types of economic entities, it may be rightly questioned whether family businesses (Article 230*bis* of Italian Civil code), participation in associations (Article 2549) and/or temporary business associations may fall within its scope, since to all legal extents such organizations may be seen as para-individual structures not yet legally organized as independent entities.<sup>8</sup>

The interpretation is somewhat insecure, due to a landmark precedent of 2004, in which the Court of Milan convicted the company Siemens AG for crimes committed by its top management and applied the interdictory sanction set out by Article 9, paragraph 2 of the Decree, relating to the prohibition from contracting with the public administration for one year, even though Siemens AG did not retain at such moment any permanent establishment in Italy, since this company operated there by means of a temporary business association with Italian companies.<sup>9</sup> The Court of Milan stated that foreign companies operating in Italy may be held liable under the Decree for crimes committed in the territory, under the principle that foreign companies must act in Italy under full compliance with the Italian legal system, regardless of the circumstance that their State of origin may eventually regulate the same matter.<sup>10</sup> Part of the Italian doctrine commented such Decision favourably, as an adequate response to the typical defence measure which on the contrary could be pursued by any foreign company acting in the territory (or, likewise, identifying the type of organization which could be set up by Italian enterprises for the sole purpose of by-passing the Decree), thus mitigating the general applicability of the Decree principles.

It may be said that the Decision states a general principle of compulsory application of the Decree principles for any conduct performed in Italy. In the absence of specific contrary provisions on the matter, the threshold after which the objective responsibility is triggered is the performance of a crime identified by the Decree on Italian territory, pursuant to the territoriality principle set out by Article 4 of the Italian Criminal Code. Wherever the location of the corporate headquarter may be,<sup>11</sup> the objective responsibility stems from the Italian operations of the company. It is worth noting that the Decision of the Court of Milan seems to comply with the principles of OECD

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<sup>7</sup> Supreme Court of Cassation, Decision no. 42701 of 1 December 2010, comment by Giovanni Negri. The Decision has also been commented on [www.ilsole24ore.com/art/norme-e-tributi/2010-12-02/corruzione-senza-confini-102225](http://www.ilsole24ore.com/art/norme-e-tributi/2010-12-02/corruzione-senza-confini-102225) of 2 December 2010.

<sup>8</sup> Cerqua Luigi Domenico, 2007, p.3.

<sup>9</sup> Federico Pernazza, (2004). I modelli di organizzazione ex DLgs 231/2001 e le società estere: il caso Siemens AG. Società, 2004, 10, 1275. Retrieved from [www.leggiditaliaprofessionale.it/](http://www.leggiditaliaprofessionale.it/) on 8 November 2010.

<sup>10</sup> Court of Milan, (2004), Order of 27 April 2004 (Siemens AG Case), Società, 2004, 1281. Retrieved from [www.leggiditaliaprofessionale.it/](http://www.leggiditaliaprofessionale.it/).

<sup>11</sup> Cerqua Luigi Domenico, 2007, p.5 appears to be of the same advice.

Convention of 17 November 1997 on Combating Bribery of Foreign Public Officials in International Business Transactions, ratified and implemented in Italy with Law no 300 of 2000, which appears to have inspired the general provisions of the Decree relating to the liability of legal entities for financial crimes. Article 4, par. 1 of the OECD Convention requires a Member State to take necessary measures to establish in its jurisdiction measures capable of discouraging bribery of foreign public officials, taking also into account where the offence is committed, if in whole or in part within a territory subject to the jurisdiction of an OECD Member.<sup>12</sup>

With respect to the general perimeter of applicability of the Decree, the Italian Supreme Court of Cassation<sup>13</sup> has declared that all non-economic entities, such as States, governmental bodies, local municipalities, constitutional bodies and other non-economic public bodies are not subject to the rules of the Decree, as public institutions not involved in economic business. Conversely, public entities which may perform economic business and commercial companies with public and private stock capital, such as joint companies providing public economic services, fall within the principles of the Decree, and must take into due account the protective measures identified by the Decree in fulfilling their respective businesses, in particular considering the type of activities and responsibilities given to top managers and directors.

## 2. THE EXTENT OF LIABILITIES

The Decree provides that the entity is liable for crimes committed in its interest or to its advantage by top management. The definition of managers includes members of the Board of Directors, Chief Executive Officers, Chief Financial Officers, Directors and managers of different mandates and responsibility, when retaining or exercising representative powers or administrating or managing the entity directly or via referring personnel. The Decree, as seen, applies also to separate organizational units (such as branch offices or commercial desks) possessing financial and functional autonomy, in case of violations committed by people who may exercise, also *de facto*, the management and control thereof in the interest of the entity. The Decree states that the entity is considered liable for crimes committed “*in its interest or to its advantage*” by employees and/or by any people subject to the management or supervision of one of the managers, and in that sense a specific test of the type of powers (for instance extension of proxies) is generally performed.

Several interpretation have been given to the normative expression “*in its interest or in its advantage*” set forth by Article 5, paragraph 1 of the Decree. The Supreme Court of Cassation clarified that it does not refer to any type of repetition of concepts,

<sup>12</sup> Cerqua Luigi Domenico, 2007, p.6.

<sup>13</sup> Court of Cassation, Criminal. Section II (2010). Sentence no. 28699 of 9 July 2010, *Massima redazione*, 2010 from [www.leggiditaliaprofessionale.it/](http://www.leggiditaliaprofessionale.it/).

but rather relates to different legal principles: an “interest” is a result of an unjust enrichment and may be identified as such (yet, perhaps not realized), as a result of the crime or violation pursued. An “advantage” is objectively obtained through the commission of the crime, although eventually not previously envisaged.<sup>14</sup>

As said, under the Decree, the responsibility of the entity is added to the criminal liability of top managers and employees, who have materially committed the crime or violation in the interest or to the advantage of the entity involved. In this regard, the Italian Supreme Court of Cassation pointed out that the administrative liability of entities stems exclusively from the provisions of the Decree, and finds no other source in law, so that the Decree introduces a new concept in Italian law. The new responsibility must also be separated from the responsibility of legal entities set forth by Article 6, paragraph 3 of Law no. 689/1981, which takes into account (for the type of violations sanctioned by such Law) that the crime be committed by employees “*in the exercise of their functions or duties*”, yet does not take into account the eventual possibility that the criminal violation be executed in the interest of the entity.

Yet, to be clear, the Decree provides that the entity’s liability also exists when the author of the violation or of the crime has not been identified, and, likewise, in case where such violator is not chargeable and the crime is extinguished for a cause other than amnesty.

Moreover, the Decree states that the entity is not liable in case the violator acted in its own interest, or in the interest of third parties other than the entity. In this regard, the Supreme Court of Cassation stated that the exemptions of Article 5, paragraph 2 of the Decree refer exclusively to cases in which the crime is committed by top management (or direct subordinated employees) which is not in any way attributable to the entity. In such cases, as the Decree only refers to “direct interest”, the liability of the entity must be excluded due to the final scope of the violation (personal enrichment or advantage, with no interest of the entity), and the same conclusion must be in any case be reached even if the company received an unexpected advantage from the illegal conduct of such authors.<sup>15</sup> Such interest, which is an objective criterion of imputation, is not related to the private intention of the entity involved (in this case, an economical organism...) but concerns the activity that is carried out: the interest must coincide in an hypothetical suitability of the conduct in order to generate or cause a benefit to the entity. The private intention of the offender does not have nor retain legal relevance.<sup>16</sup>

<sup>14</sup> Supreme Court of Cassation, Criminal section II, sentence no.3625, of 20 December 2005, (Jolly Mediterraneo s.r.l. e D’Azzo). *CED Cassation*, 2006, *Riv. Pen.* 2006, 7–8, 814. In [www.leggiditaliaprofessionale.it/](http://www.leggiditaliaprofessionale.it/).

<sup>15</sup> Supreme Court of Cassation, criminal section VI, sentence no. 32627 of 23 June 2006. *Impresa*, 2006, 11, 1665. Retrieved from [www.leggiditaliaprofessionale.it/](http://www.leggiditaliaprofessionale.it/) on 8 November 2010.

<sup>16</sup> Vignoli, *Societas puniri potest: profili critici di un’autonoma responsabilità dell’ente collettivo*, in *Dir. pen. e proc.*, 2004, 908.

Recently, the Italian Supreme Court of Cassation<sup>17</sup> stated that the administrative liability of the entity due to the crimes committed by a person having functions of representation, administration or management of the entity represents a third kind of liability since this person acts as a corporate body in the interest and in the advantage of the entity. In such light, the Decree, which states that only acts committed by a member of a body can be imputed to the entity, is perfectly compatible with Article 27 of the Italian Constitution, which provides for personal criminal responsibility.

### 3. LIMITATIONS AND EXCLUSIONS FROM “OBJECTIVE” LIABILITY OF ENTITIES

According to the current law, it is not proper, to define the administrative liability of entities as an “objective” responsibility, especially for the principles indicated above and for the current distinction under Italian law between responsibility and administrative liability.

For the purposes of providing a general idea of the provisions of the Decree, it may be underlined that the type of measures which entities may adopt<sup>18</sup> vary to a certain extent, and, more than that, the Decree does not provide any type of certainty on their theoretical effectiveness.

In short, the Decree provides specific rules to exempt the entity from liability for crimes committed by its top management and its employees, and states that, if crimes are committed by a person occupying managing positions inside the entity, such entity shall be not liable when capable of proving that, before the crime or violation occurred, it had adopted and effectively implemented organizational and management Models suitable in line of theory to prevent the commitment of crimes listed in the Decree.

Under the principles mentioned above, the Italian Supreme Court of Cassation<sup>19</sup> stated that the administrative liability introduced by the Decree cannot be considered a form of strict liability, since the entity can be exempted from responsibility if capable of demonstrating that top managers have committed the crime in their own interest or advantage. Also, the timely and accurate adoption of Models necessary to introduce corporate governance supervision, triggers liability exemption, only upon demonstrating that the crime occurred in open violation with the Models.

<sup>17</sup> Court of Cassation, criminal section VI°, sentence no. 27735 of 18 February 2010, *Massima redazionale*, 2010. Retrieved from [www.leggiditaliaprofessionale.it/](http://www.leggiditaliaprofessionale.it/) on 8 November 2010.

<sup>18</sup> The law per se does not give a compulsory set of measures in order to avoid administrative liability; in this sense entities are free to disregard completely the Decree, the only consequence being that, should the violation of the listed crimes happen, no protective measure could be evidenced.

<sup>19</sup> Court of Cassation, criminal section VI°, sentence no. 27735 of 18 February 2010, *Massima redazionale*, 2010. Retrieved from [www.leggiditaliaprofessionale.it/](http://www.leggiditaliaprofessionale.it/) on 8 November 2010.

The Board of Directors and Chief Executive/Financial Officers are thus called to a specific duty of compliance, in compliance with the general principles of correct company management and business administration set out by the Italian civil code.<sup>20</sup>

The burden of proof is assigned to the entity, which is required to define, adopt and implement organizational, management and audit Models in order to avoid the commission of crimes by its management and workers. Such proof is permitted under equity and habeas corpus principles and right to defence, borne by Articles 3 and 24 of the Constitution of Italy.

As seen, yet, the Italian Supreme Court of Cassation<sup>21</sup> stated that the adoption of the Organizational Model is in itself not a sufficient condition to avoid administrative liability, for the simple reason that an Organizational Model must be adopted and effectively implemented before the crime occurred. Otherwise, the adoption of the Organizational Model does not in itself exempt the entity from liability but may eventually allow the reduction of administrative sanctions.

In practical cases, as in a 2009 Court of Milan case,<sup>22</sup> it is well possible for a Court to decide that a Model be effectively implemented *ante factum*<sup>23</sup> (Impregilo Case), yet the Chairman of the Board of Directors and Chief Executive Officer be convicted for relevant crimes (in the specific case, insider trading, violation of Article 2337 Civil code).

The Court of Milan exempted Impregilo S.p.A from the administrative liability for crimes committed by its top managers, since it recognized that the Organizational Model appeared to have been prepared according to the guidelines published by *Confindustria* – the leading organization representing the manufacturing and service industries in Italy – of 7 March 2002 and, much more than that, tailored on the specific type of activities, delegation of powers, duties and organizational structure of the entity.

The Court acknowledged the suitability of the Organizational Model of Impregilo S.p.A to theoretically prevent the crimes envisaged by the Decree. The Model was, in fact, defined and implemented by the company in accordance with Article 6 of the Decree and was subject to the supervision of the Supervisory Board, retaining independent powers of initiative and control to supervise its functionality and its observance.

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<sup>20</sup> P. Sfameni, (2007). Responsabilità da reato degli enti e nuovo diritto azionario: appunti in tema di doveri degli amministratori ed organismo di vigilanza. *Rvista Società*, 2007, 177. Retrieved from [www.leggiditaliaprofessionale.it/](http://www.leggiditaliaprofessionale.it/) on 8 November 2010.

<sup>21</sup> Court of Cassation., criminal section VI, sentence no.36083 of 9 July 2009. Retrieved from [www.leggiditaliaprofessionale.it/](http://www.leggiditaliaprofessionale.it/) on 8 November 2010.

<sup>22</sup> Court of Milan, sentence of 17 November 2009. Retrieved from [www.leggiditaliaprofessionale.it/](http://www.leggiditaliaprofessionale.it/) on 8 November 2010.

<sup>23</sup> Lunghini Giacomo e Musso Luca, (2010). I modelli di organizzazione ai sensi dell'art. 6, Dlgs n.231/2001: un caso di assoluzione della società. *Corriere Merito*, 2010, 3, 296. Retrieved from [www.leggiditaliaprofessionale.it/](http://www.leggiditaliaprofessionale.it/) on 8 November 2010.



In such case (which is the sole case of exemption up to now for administrative liability of entities involved in violations under the Decree) the Court stated that the persons who represented, administered and managed the company committed the crime fraudulently eluding the Organizational Models, having selected and falsified unilaterally the financial data of the company, for the purpose of providing such false data to the market.<sup>24</sup>

#### 4. LINKING THE ORGANIZATIONAL MODEL WITH THE DUTIES OF TOP MANAGEMENT

As seen, the Decree does not bind the entity to implement and adopt the Organizational Model. However, it represents an opportunity for the entity to avoid liability in case of infringement a crime, and to develop an efficient internal control system, complying with an adequate management and risk assessment structure.<sup>25</sup> The adoption of the Organizational Model can have other effects, implying the possibility of suspension or the revocation of interdictory measures, the determination of sanctions and their conversion. In this regard, it must be noted that Article 49 of the Decree provides that the applicable precautionary measures can be suspended if the entity asks to adopt and implement the actions necessary for the exclusion of interdictory sanctions under Article 17 of the Decree (refund by the entity of any damage caused by the crimes committed and repair of all the related negative consequences, or strong commitment to such results, adoption of a suitable Organizational Model, refunding of illicit profit earned from crimes). That is valid, of course, also in case the entity had already adopted the measures set of in Article 17.<sup>26</sup> However, the judge is not allowed to order the entity to adopt and implement the Model in order to obtain the revocation of the interdictory measures.<sup>27</sup>

According to the Decree, further to the drafting of an Organizational Model, the entity must also:

- i) identify the risk areas and the activities within the context of which crimes might be committed;
- ii) foresee specific protocols aimed at programming the formation and the carrying out of the entities' decisions in relation to the crimes to be prevented;

<sup>24</sup> Paliero Carlo Enrico. (2009). La società assolta per il reato dei vertici: una sentenza aprioristica. *Società*, 2010, 4, 473. Retrieved from [www.leggiditaliaprofessionale.it/](http://www.leggiditaliaprofessionale.it/) on 8 November 2010.

<sup>25</sup> Angelo Miglietta, Mario Anaclero, Cristina Bettinelli, (2007/Summer). Internal audit risk assessment and legal risk: first evidence in the Italian system. *Corporate ownership & Control*, Volume 4, issue 4. *Corporate Governance in Italy*. Retrieved from [www.virtusinterpress.org](http://www.virtusinterpress.org) on 18 November 2010.

<sup>26</sup> Pernazza, 2004.

<sup>27</sup> Supreme Court of Cassation, criminal section VI. Sentence no. 32627 of 23 June 2006. Retrieved from [www.leggiditaliaprofessionale.it/](http://www.leggiditaliaprofessionale.it/) on 8 November 2010.

- iii) identify ways of managing financial resources so as to prevent the commission of crimes;
- iv) foresee obligations of information for the Supervisory Board;
- v) introduce a suitable disciplinary system to apply sanctions in case of failure to comply with the measures indicated in the Model.

The Organizational Model<sup>28</sup> must be practical, efficient and dynamic and must reflect the economic and business reality of the entity involved. It cannot be just a legal-formal model since it must necessarily take into account the history of the entity to effectively identify the risk factors. The Court of Milan stated that the Organizational Model must identify the crime-risk areas and activities in relation to each specific entity. In particular, in order to identify the activities where crimes and violations may be more likely to be committed, it is necessary to analyse the business reality that might be affected by such potential crimes, and the Organizational Model must be implemented in accordance with the results of the risk assessment of company procedures.<sup>29</sup>

The Organizational Model must be suitable for the prevention of crimes and must thus be effectively implemented, with the adoption of practical instruments (such as the disciplinary system) capable of ensuring a practical and on-going application of its measures. It must take into account the entity structure, its history and its business processes. It must be effective and practical, thus elastic and dynamic.

In light of this, the entity is called also to perform an organizational effort, such as training employees over the company procedures in order to ensure a full understanding and compliance with the Model. Ultimately, being necessarily dynamic, the Model required must be adjustable in accordance with the changes that might occur, and must provide clear evidence of such element.<sup>30</sup>

The Court of Milan stated that the Organization Model must be implemented under consideration also of the method of preparation of financial statements which may differ between companies, giving particular importance to intercompany billing procedures and compliance with accounting standards adopted at group level, for instance on company funds management and distribution.<sup>31</sup>

In 2008, the Court of Milan<sup>32</sup> found a company's CEO liable for the financial losses and damages suffered by his company as a result of the failure to adopt the Model. The Court also stated that the failure to adopt an appropriate Organizational Model pursuant to the Decree may determine the liability of the top managers of the company

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<sup>28</sup> Benvenuto, 2009,.

<sup>29</sup> Court of Milan Order, 20 September 2004. Retrieved from [www.leggiditaliaprofessionale.it/](http://www.leggiditaliaprofessionale.it/) on 8 November 2010.

<sup>30</sup> Court of Rome, 4 April 2003, in *Foro it.*, 2004, II, 317.

<sup>31</sup> Court of Milan Order, 20 September 2004. Retrieved from [www.leggiditaliaprofessionale.it/](http://www.leggiditaliaprofessionale.it/) on 8 November 2010.

<sup>32</sup> Court of Milan, Civil Section VIII, in sentence no 1774 of 13.02.2008. Retrieved from [www.leggiditaliaprofessionale.it/](http://www.leggiditaliaprofessionale.it/) on 8 November 2010.

for misconduct and negligence, under the provisions set forth by Article 2381 of the Italian Civil code. Although the adoption of the Organizational Model is not mandatory under the Decree, the Decision issued by the Court of Milan in 2008 seems, for the first time, to set a general obligation on the management class of the company to ultimately implement the Organizational Model adopted by the company, in order to avoid civil liability in case of financial losses and damages suffered by their companies.

In addition, it should be noted that in 2008, the Region of Calabria issued the Regional Law no. 15 of 21 June 2008<sup>33</sup> providing that companies that operate under agreement with the Calabria Region must adopt and implement the Organizational Model or adapt their Organizational Model to the provisions set out by the Decree by 31 December 2008. Failure to adopt or effectively implement the Model within the period specified by the Regional Law determined the non-renewal of eventual regional agreements, or the failure to conclude new regional agreements.

## 5. THE SUPERVISORY BOARD

The Supervisory Board set out in the Decree to ensure the efficiency of the Model and the compliance with its provisions, needs to be provided with autonomous powers of initiative and control. The Supervisory Board must be self-governing and independent and its activities must be continuous and performed according to the best suitable professional standards.<sup>34</sup>

However, it should be noted that under Article 6 of the Decree, in a small entity, the task of monitoring the operation and compliance of the organizational Model can be carried out directly by the top manager and it is not required to entrust a Supervisory Board. The purpose of the provision is not to discourage the use of Models of organization and management with the imposition of obligations disproportionate to the size of the institution.<sup>35</sup>

The Supervisory Board must be considered exclusively as part of the internal control system<sup>36</sup> of the entity. It cannot represent a new corporate body. This in order to allow the Models to be flexible and adaptable and rationalize the development of controlling body.

The Court of Rome stated that the Supervisory Board must be necessarily endowed with powers of initiative, autonomy and control. In addition, it must not have

<sup>33</sup> [www.portale231.it](http://www.portale231.it).

<sup>34</sup> N. Pisani, 2008, Controlli societari e responsabilità da reato degli enti. *BBTC*, 2008, I, 103; P. Sfameni, *op. cit.*, 189.

<sup>35</sup> Ceccherini Aldo, 2010, l'organo di vigilanza e la piccola impresa nel d.lgs. n. 231/2001, *Società*, 2010, 2, 137 *responsabilità amministrativa delle persone giuridiche*. Retrieved from [www.leggiditaliaprofessionale.it/](http://www.leggiditaliaprofessionale.it/) on 8 November 2010.

<sup>36</sup> P. Sfameni, Responsabilità da reato degli enti e nuovo diritto azionario: appunti in tema di doveri degli amministratori ed organismo di vigilanza, in *Riv. soc.* 2007, 177.

operational functions. Moreover, it can be composed only by persons who are not members of other corporate bodies. It must be a collegial body, requiring an exclusive commitment by its members.<sup>37</sup>

The Court of Milan<sup>38</sup> considered inadequate an Organizational Model in which the integrity requirements of the members of the Supervisory Board limited disqualification to cases where the sentences had become final; the details regarding the training of employees and managers were not specific; the mapping of the offenses was general.

Lately, the Court of Naples considered inappropriate the Supervisory Board not requiring specific professional skills among its components and, thus not being fully independent.<sup>39</sup> It is important to underline that the Supervisory Board does not directly perform the task of preventing the commission of crimes, since that aim is covered by the Model itself. Instead, according to Article 6 of the Decree, the Supervisory Board may be only responsible for the monitoring of the efficiency and compliance with the model. Some specific rules apply to the surveillance of the top management activities. In this regard, not to interfere with the independence of the managers, the obligations of the Supervisory Board simply consist in the monitoring of the managers election and empowering procedures.

The organizational Model must also define the procedures employed by the Supervisory Board itself to perform its activities (Article 6, paragraph 2 of the Decree).<sup>40</sup>

## 6. THE CRIMES LISTED IN THE DECREE

The crimes whose execution may determine the administrative liability of entities are exclusively those listed in the Decree, which is subject every now and then to further enrichment and crime inclusion. In 2009, the Italian Supreme Court of Cassation stated the fundamental principle that if the crime committed in the interest or benefit of the entity does not fall within the list set out in the Decree at the moment of execution, the entity cannot be held responsible, even if the crime committed contains in its structure or absorbs the content of other crimes.<sup>41</sup>

The number of the crimes, which are relevant for the purposes of the Decree, has been increased over time. Currently, the Decree includes the following violations: (i)

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<sup>37</sup> Court of Rome, 4 April 2003, in *Foro it.*, 2004, II, 317.

<sup>38</sup> Court of Milan Order, 20 September 2004. Retrieved from [www.leggiditaliaprofessionale.it/](http://www.leggiditaliaprofessionale.it/) on 8 November 2010.

<sup>39</sup> Court of Napoli, order of 26 June 2007, in [www.reatisocietari.it](http://www.reatisocietari.it).

<sup>40</sup> Ceccherini Aldo, 2010.

<sup>41</sup> Italian Supreme Court of Cassation, criminal section II, sentence no.41488 of 29 September 2009, n. 41488, *CED Cassazione*, 2009. Retrieved from [www.leggiditaliaprofessionale.it/](http://www.leggiditaliaprofessionale.it/) on 22 November 2010.

crimes committed against public administration (Articles 24 and 25 of the Decree); IT crimes and illegal treatment of data (Article 24*bis* of the Decree); crimes related to organised crime (Article 24*ter* of the Decree); crimes concerning the forgery and counterfeiting of money, banknotes and stamps (defined by Article 25*bis* of the Decree); crimes against industry and trade (Article 25*bis* n. 1 of the Decree); corporate crimes (Article 25*ter* of the Decree); crimes concerning the mutilation of females genitals (Article 25*quater*. 1 of the Decree); crimes committed against individuals (Article 25*quinquies* of the Decree); crimes related to market abuse, as introduced by Article 25*sexies* of the Decree; crimes against persons committed in violation of safe working practice and the protection of hygiene and health at work, introduced by Article 25*septies* of the Decree; crimes related to the handling of stolen goods, money laundering and use of money, goods or benefits of illicit origin introduced by Article 28*octies* of the Decree; crimes against copyright (Article 25*novies* of the Decree); crimes introduced by special criminal law no. 146 of 16 March 2006, named “Ratification and implementation of the United Nations Convention and Protocols against Transnational Organised Crime”; crimes related to the Inducement not to make statements or to make false statements to the Court (Article 25*novies* of the Decree) and attempted crimes (Article 26 of the Decree).

However, it is important to point out that the list of crimes set out in the Decree should be extended in the near future, in compliance with the Law Bill of 12 May 2010, and will most probably include in the near future environmental crimes. Moreover, Italy should include in the Decree crimes related to the Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings; Council Framework Decision of 28 May 2001 on combating fraud and counterfeiting of non-cash means of payment; Council Framework Decision of 28 November 2002 on the strengthening of the penal Framework to prevent the facilitation of unauthorised entry, transit and residence; Council Framework Decision 2004/757/JHA of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking.

Further to the crimes mentioned above, it is interesting to point out that in 2010, for the first time in the Italian legal system, a commercial company (Truck Center), was convicted for acts of “manslaughter” and “unintentional injury” committed in violation of the rules on the protection of health and safety at work (Article 589, paragraph 2, Article 590, paragraph 3 of the Italian Criminal code). Those crimes are included in the crimes against persons committed in violation of safe working practice and the protection of hygiene and health at work, introduced by Article 25*septies* of the Decree. In addition, it is relevant to point out that in the same sentence the Court of Molffetta<sup>42</sup> stated that Article 5 of the Legislative Decree no. 231/2001 identifies the responsibility for crimes committed in the interest of the entity. The interest must be

<sup>42</sup> Court of Molffetta of 11 January 2010, Truck Center, Società, 2010, 9, 1116 nota di Scoletta. Retrieved from [www.leggiditaliaprofessionale.it/](http://www.leggiditaliaprofessionale.it/) on 22 November 2010.

concrete and should not be linked directly to the mere intention of the offender and the general motive that prompted him to engage in conduct. The belief to pursue an interest of the entity can determine the responsibility of the same entity, even if the actions performed do not actually result in a profit or advantage for the entity. Finally, the Court of Molfetta stated that the system introduced by the Decree requires companies to adopt an Organizational Model which must be different and additional to the model provided for the prevention of accidents in the workplace, since it is not possible that a simple analysis of risks in the workplace fulfils the purposes of Legislative Decree no. 231/2001. In fact, the Organizational Model must comply with the risks assessment related to the crimes listed in the Decree and it must be structured in order to identify the procedures that avoid the administrative liability for the infringements depending on a crime. In addition, the Organizational Model must define the surveillance system and the powers of the Supervisory Board retaining the powers to control and supervise the application and implementation of the Models.

## 7. SANCTIONS

Further to the infringements dependent on the crimes mentioned above, the Decree lists the administrative sanctions, which may be divided as follows: (i) pecuniary sanctions; (ii) interdictory sanctions; (iii) confiscation; (iv) publication of the Decision.

In particular, interdictory sanctions include: a) debarment from exercising activity; b) suspension or revocation of authorizations, licenses or concessions functional to the commission of the infringement; c) disqualification from contracting with the public administration, except for obtaining the services of a public entity; d) exclusion from reductions, financing, contributions or subsidies and the possible revocation of those already granted; e) disbursement from publicizing goods or services.

For any administrative infringement a pecuniary sanction is always applied. In particular, pecuniary sanctions are applied for quotas between 100 and 1000. Under this system, judges are required to determine the amount of quotas taking into account the gravity of the fact, the degree of responsibility' of the institution as well as the activity performed in order to eliminate or mitigate the consequences of the event and to prevent the commission of further administrative infringements.

The amount of quota is settled on the basis of economic and financial conditions of the entity in order to ensure the effectiveness of the penalty. However, the amount of a quota ranges from a minimum of €250 to a maximum of €1549. Therefore, the sanctions range from a minimum of €25,800.00 to a maximum of €1,549,000. The pecuniary sanction is stated by the judge, who decides the number of quotas allowing for the gravity of the fact, the level of the entity's liability and the activity carried out to eliminate or attenuate the consequences of the fact and to prevent the committing of further infringements. Moreover, the amount of the quota is fixed on the basis of

the entity's economic condition and assets, in order to ensure that the sanction shall be effective.

However, the pecuniary sanction can be reduced to one-half if the perpetrator of the crime has committed the fact mainly in his own interest or in the interest of others and the entity has not obtained any advantage from it or has obtained a minimum advantage there from and the financial harm caused is particularly slight. In addition, the sanction is reduced by one-third to one-half if, prior to the opening of the trial of first instance, the entity has fully recompensed the damages and has eliminated the harmful or dangerous consequences of the crime or has in any case acted effectively in that sense and the organizational model has been adopted and made operative which is suitable to prevent crimes of the same sort as the one committed.

Interdictory sanctions are, instead, applied in relation to the crimes for which they are expressly foreseen, when at least one of the following conditions applies: a) the entity has obtained from the crime a profit of considerable amount and the crime was committed by persons in top positions or by persons subject to supervision by others when, in this case, the commission of the crime has been determined or facilitated by grave organizational shortcomings; b) in the case of reiteration of the infringements. Interdictory sanctions have a length of not less than three months and not more than two years.

Hence, the publication of the conviction may be ordered when an interdictory sanction is applied to the entity. The decision is published once only, in the form of an excerpt or in full, in one or more newspapers indicated by the judge in the sentence and by being affixed in the city where the entity has its head office.

In the conviction, confiscation is always ordered with regard to the price or the profit of the crime, except for the part that may be returned to the damaged party. Rights acquired by third parties in good faith are retained and enforceable.

## 8. CONCLUSIONS

Italian and foreign entities operating in Italy are called to comply with the provisions of the Decree. In case of non-compliance and execution of criminal violations, entities may be held liable for such behaviours if the crimes listed in the Decree are done in their interest or to their advantage, and executed by top management or by their direct subordinates.

The Decree indicates the type of protective measures which the economical entities may adopt, in order to be called exempt from the mentioned "objective" liability stated by the Decree. In such sense, the adoption of an organizational Model is of fundamental importance, and aside possibly ensuring the exemption from sanctions and interdiction measures against the companies, it may well be regarded as a crucial moment of internal organization or re-organization of entities, taking into account the type of specific organizational requests foreseen by the Decree. In addition, the organizational

Model must define the powers of the Supervisory Board, which must control and supervise the application and implementation of the Model.

Although the adoption of the organizational Model is not mandatory, it may represent an opportunity for the entity to avoid severe liability for the crimes envisaged in the Decree and, eventually, to develop an efficient internal control system, which, at the end of the day, is the specific aim of the new law.