



ITALIAN LEGISLATIVE DECREE N. 231/2001 ON ADMINISTRATIVE LIABILITY OF LEGAL PERSONS AND B&HR VIOLATIONS: A BRIEF OVERVIEW¹

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Among the planned measures of the Italian NAP on Business and Human Rights, adopted in December 2016, there is the commitment to “*Conduct a comprehensive study of the Law 231/2001 in order to **evaluate potential extension of the scope and application** of the administrative liability of legal entities²*” in order to assess the scope of its implications in relation to the UNGPs .

The mentioned Decree introduced **corporate criminal liability** for crimes committed in the interest or for the advantage of a company.

In order to avoid incurring in liability, the company shall demonstrate that it has efficiently adopted **compliance programs**. The provision to adopt such programs raised awareness among companies about the idea of preventing eventual HR offences, in accordance with the objectives of HRDD.

In addition, corporate liability under the Decree 231/2001 could be invoked also in relation to **Human Rights abuses committed by Italian multinational enterprises operating abroad**, especially if part of the violation occurred in Italy.

1. Reasoning behind the law.

The very idea behind the law is the principle *societas delinquere potest*: crimes committed within a company are often the result of a well-established corporate policy and the outcome of top management decisions³.

2. Substantial criminal nature of this form of liability.

No matter of the legal definition ('administrative' liability), Legislative Decree n. 231/2001 substantially introduces **criminal liability** for companies and legal entities and the competence to determine the liability of the company lies with the criminal law court which has jurisdiction over the related crimes (Art. 36).

The parent company, may be considered accountable for the crimes committed by other members of the Group it controls, provided that the certain requirements are met, according to the relevant case law.

¹ This work has been drafted by Avv. Maria Francesca Cucchiara and Avv. Giacomo Maria Cremonesi.

² See Italian National Action Plan on Business and Human Rights 2016-2021.

³ The law was initially introduced in order to implement the OECD Anti-Bribery Convention.

Normally the proceedings relating to the liability of the company are joined with criminal proceedings brought against the perpetrator of the related crime (Art. 38), however the company can be considered liable even if the perpetrator of the offence has not been identified or is not prosecutable or the offence is extinguished for a reason other than an amnesty (Art. 8).

3. List of relevant Human Rights related crimes.

The liability of the company arises when one of the crimes listed in Art. 24 and following of the Decree is committed.

Following several amendments, the scope of Legislative Decree n. 231/2001 has been extended and it currently includes specific Human Rights violations (Art. 24 and following). Among the others: mutilation of female genitals, slavery, human trafficking, forced labour, juvenile prostitution and pornography, manslaughter or serious bodily harm committed with breach of laws governing the safeguarding of workplace health and safety, employment of illegally staying Third-Country nationals, environmental crimes (such as environmental disaster, environmental pollution, failure to decontaminate, etc.).

Accordingly, the Decree guarantees access to judicial remedies for victims of the alleged Human Rights offences listed in Art. 24 and following.

4. Legal requirements to be met.

A company may be held criminally liable when the following requirements are met (Arts. 5 to 7):

- a) its **directors, senior managers or employees** who work under the direction of one of the subjects mentioned above commit a crime listed in the Decree;
- b) the crime is committed **in the interest or to the advantage of the company**. Interest and advantage are to be considered alternative requirements. The interest of the company is the expected benefit deriving from the crime (to be evaluated *ex ante*, before the commission of the crime). On the contrary, the advantage is the profit that concretely derived from the commission of the crime (to be evaluated *ex post*).
- c) the company has not previously adopted and effectively implemented a suitable **compliance program** (so called organizational and management model) in order to prevent offences of the type occurring.

Both high fines, including confiscation of the crime profits, and the interruption of business activity are provided in case the company is considered liable (Arts. 9 and 10).

5. Role of the Compliance / Due Diligence programs.

In order to avoid incurring in liability, the company shall demonstrate that:

- a) it has efficiently adopted a **'model of organization, management and control' able to prevent the crime occurred**

- b) and that it has established an **internal body entrusted with monitoring and supervising the compliance with the model.**

The provision raised awareness among companies about the idea of preventing eventual offences, in accordance with the objectives of Human Rights Due Diligence ⁴.

To be considered suitable to prevent crimes, compliance programs should:

- a) identify the activities within which crimes can be committed;
- b) identify effective procedures and financial resources suitable to prevent commission of the crimes;
- c) impose all employees and other subjects in the company to promptly inform the authority assigned to supervise the model application and operation;
- d) introduce a suitable disciplinary system that sanctions failure to comply with the provisions in the model.

6. Rights of victims.

The Decree does not explicitly refer to victims and their right within the proceeding against the company. However, to this regard the provisions of the criminal procedure code are to be applied.

Accordingly, victims are allowed to bring civil action for damages recovery within the criminal proceedings. In this case, they become effectively part of the criminal proceeding and are allowed to submit evidences (e.g. documents, technical consultants and witnesses) as well as to counter-examine witnesses of the defense.

7. Multinational groups and crimes committed by business partners.

The Decree does not expressly refer to **multinational corporations.**

However, according to the relevant case law of the Italian Supreme Court (Corte di Cassazione), any company of the Group, and in particular the parent company, may be considered accountable for the crimes committed by other members of the Group, provided that the following requirements are met:

- a) in the crime participated also a natural person acting on the parent company's behalf (case of aiding), AND
- b) the crime has been committed also in the interests or to the advantage of the parent company.

With regards to the second requirement (b), the Italian Supreme Court clarified that simply **indirect advantage** (such as the economic gain deriving from the corporate links and the incremental profitability of the subsidiary) **is not enough.** On the contrary, a **direct, concrete economic advantage** is necessary to meet this requirement (e.g. in cases of fraud or bribery to obtain a public

⁴ See the report of Professor Olivier De Schutter, Professor Anita Ramasastry, Mark B. Taylor, Robert C. Thompson, *Human Rights Due Diligence: the Role of States*, December 2012, p. 13.

procurement contract for the subsidiary, there is advantage of the parent company if involved as a sub-contractor; in case of environmental crimes or manslaughter or serious bodily harm committed with breach of laws governing the safeguarding of workplace health and safety, there is advantage of the parent company if non-compliance to the relevant regulation resulted in expenditure savings).

8. Extraterritoriality issues: crimes committed abroad.

Corporate liability under Legislative Decree n. 231/2001 could be invoked also in relation to Human Rights abuses committed by Italian enterprises operating **abroad**. To this regard, it is necessary to make a distinction:

- a) **Cases where part of the violation occurred in Italy** (e.g. when the crime is the result of a decision taken in Italy by the parent company). According to the Italian Criminal Code (Art. 6), a crime is considered committed in Italy when part of the criminal action or omission happened within the national territory. In this case, it will be thus possible to take a judicial action in Italy against the foreign company, as well as against the Italian parent company if the involvement of its corporate representative in committing the crime partially abroad will be demonstrated. **No further requirements will be need** to affirm the Italian jurisdiction over the crime.
- b) **Cases where the violation occurred entirely abroad**. In addition, Art. 4 of Legislative Decree n. 231/2001 addresses the case of crimes entirely committed abroad. This provision refers to a more limited number of cases. In particular, it states that in cases falling under Art. 7 to 10 of the Criminal Code⁵, an enterprise may be held accountable also in relation to crimes committed abroad, if: i) it has its headquarter in the State territory; ii) the State where the offence occurred did not yet proceed against it.

In both cases there is no requirement of double criminality.

9. Statute of limitation.

“Administrative” penalties against companies are time-barred five years after the date on which the offence is committed (Art. 22 of the Decree). Indictment against the company and request for application of disqualifying interim measures interrupts the limitation period, which starts from the beginning.

However, when the interruption occurs as a consequence of the indictment of the company, the limitation period does not run until the judgement becomes final.

⁵ This provision establishes universal jurisdiction over a set of serious offences against national interest.