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Cracking Down on Corporate Crime in Italy

Rosa Anna Ruggiero, Prof.

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Cracking down on Corporate Crime in Italy

1. 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 (hereinafter, 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. The previous gap in legislation had serious implications at an international level, especially in light of the objective of fostering cooperation in the 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.¹

Resistance to introducing this type of liability undoubtedly stemmed from the 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 these individuals to act and, therefore, to be held criminally responsible. As far as the corporate entity could not be held criminally liable in itself, it could only be sued in civil court for the damages suffered as a consequence of the crime.

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\(^2\).

From this perspective, and drawing on the “organic theory” according to which the actions of the officers of a corporation can be directly attributed to the collective entity, the legal person can be held responsible for the crime itself. In other words, if the corporation can be attributed with the legal acts of those who carry out work on its behalf, the same should be true for illegal acts\(^3\). This conclusion is also supported by recent studies on the topic of business administration which, through bestowing the corporation with a more vital image, attribute decisions adopted directly to the corporation and not the individuals who operate within it, recognizing that the corporation itself has its own free will\(^4\).

Nevertheless, for a long time and, in part, still today\(^5\), Art. 27 has been interpreted, even by the Constitutional Court\(^6\), as an affirmation of the principle *nulla poena sine culpa*, which would lead to excluding the existence of criminal responsibility if a psychological link cannot be proven between the agent and the fact. Given that criminal liability does not exist as far as intent cannot be ascertained, corporations would abstractly fall outside the criminally reproachable area since it would be impossible to attribute a psychological mind-set equating to intent\(^7\).

Increasingly, however, and largely 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: rather than focusing exclusively on the psychological link between the agent and the fact, there is greater emphasis placed on affirming the orientation for which the crime would be attributed to the agent.

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7 See Franco Bricola, *Il costo del principio «societas delinquere non potest»*, cit., p. 3039 f., whilst deeming corporate criminal liability compatible with the most basic meaning of personality established by Art. 27 of the Constitution, considers the problem insurmountable if this article presumes intent.
(collective and/or individual) who is responsible for the criminally illegal conduct. Hence, when the individual was the mere executor of illegal behavior made possible because of the company policy, or the corporate organization was not able to oppose or prevent this conduct, the corporation would also be held liable.

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 personality as a precondition for criminal responsibility, affirms in the third paragraph that the sentence issued must have a re-educational purpose. It is outside the scope of this paper to evaluate the practical application of this objective in a nation such as Italy, in which the sentence – if and when served – seems to be merely retributive in the majority of cases and offer few chances for the criminal to regain legality. 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 would be impossible for a collective entity. This position would be 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. This would hinder the effectiveness of the reforming process, as far as the organization and the management of the entity can significantly change from the moment of the decision to that of the concrete application of sanction.

The above criticism undoubtedly gives rise to various considerations. Nevertheless, even this argument, which would at first glance appear 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

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8 For this interpretation of Art. 27 of the Constitution, see Carlo Piergallini, Societas delinquere et puniri potest: la fine tardiva di un dogma, in Riv. trim. dir. pen. ec., 2002, p. 582.
10 See Alberto Alessandri, Note penali
cistiche sulla nuova responsabilità delle persone giuridiche, in Riv. trim. dir. pen. ec., 2002, p. 44.
henceforth, the mere prospect of being convicted can trigger the beginning of a virtuous path for companies and is instrumental in bringing them back to the market with a renewed sense of legality.\(^{11}\)

2. 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. 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 Legislator 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 would integrate 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 risks they are willing to take in order to make a profit. L.D. No. 231/2001 seems to target legal persons that fall into the last category,\(^{12}\) largely because one of the Legislator’s objectives is to bring the entity back into compliance with the law. This is an aim that can be realistically pursued only when corporations have the potential to organize themselves differently. This would include cases in which criminal activity is part of the prevailing company

\(^{11}\) 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*, Giuffrè, 2002, p. 377 f.

\(^{12}\) Ministerial Report, cit., p. 421.
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\(^\text{13}\). Those who supported the criminal nature of the liability\(^\text{14}\) were opposed by those who favored complying with the legislative terminology and, therefore, concluded that the liability was inherently administrative\(^\text{15}\). There were also those who claimed that L.D. No. 231/2001 introduced a *tertium genus*\(^\text{16}\): a hybrid between criminal and administrative responsibility.

The nomenclature clearly 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 24\textsuperscript{th}, 1981, which undoubtedly offers fewer and less stringent safeguards to protect the accused.


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 (hereinafter, ECtHR) explains, in fact, cases can fall within the area of criminal liability even when they are not classified as such under national law. Member States often categorize illegal acts which are substantially criminal in nature as administrative violations in order to deny the defendant greater safeguards.

In these cases, the Court, called upon to verify the applicability of fair trial rights protected by Art. 6 of the European Convention of Human Rights (hereinafter, ECHR), decided it was not bound to the nomen juris established by the national Legislator. In fact, the ECtHR determined the criminal nature of illegal acts even when they were not categorized as such under national law.

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 transgression); the nature and gravity of the penalty (punitive-deterrent purpose of the punishment, extent to which the penalty is afflictive, extent to which the afflictive penalty is appropriate for the type of violation). In light of the above criteria, it seems that corporate liability can fall within the matiére 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

\[\text{ECtHR, June 8th 1976, Engel e altri c. Paesi Bassi, § 82 s.}\]


\[\text{ECtHR, February 24th 1994, Bendenoun c. Francia, § 47, in Riv. int. dir. uomo, 1994, p. 111. And, more recently,}\]

\[\text{ECtHR, March 4th 2014, Grande Stevens c. Italia, § 97 s., in Dir. pen. contemporaneo.}\]

\[\text{ECtHR, September 23rd 1998, Malige c. Francia, § 38 s.}\]
activities and/or negatively impact on the corporation’s assets\textsuperscript{24}) depend on the commission of a crime, serve a preventive function and, at the same time, are undeniably afflictive insomuch as they can lead to (in the most serious cases) 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\textsuperscript{25}.

For the reasons listed above, according to the parameters established by the ECtHR, the corporation’s administrative violation arising from crime would fall within the criminal sphere, even if, at the moment, no precedents exist to this effect since the supranational judge has still not 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\textsuperscript{26}. 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 (hereinafter, CPC), «in so far as they are compatible» (Art. 34, L.D. No. 231/2001). It established, yet again within the limits of compatibility, that in the case of corporations, the provisions intended for the defendant will be applied (Art. 35, L.D. No. 231/2001). 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

\textsuperscript{24} The sanctions provided for by L.D. No. 231/2001 can be disqualifying and financial. Regarding this point, see infra, par. 5.

\textsuperscript{25} ECtHR, February 22\textsuperscript{nd} 1994, \textit{Raimondo c. Italia}, § 43, in \textit{Riv. int. dir. uomo}, 1994, p. 101. 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: ECtHR, March 4\textsuperscript{th} 2014, \textit{Grande Stevens c. Italia}, cit.,§ 98).

\textsuperscript{26} 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).
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)\textsuperscript{27}. This is contingent, of course, that they satisfy 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.

3. **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), other non-economic public entities as well as entities which carry out constitutional functions (such as political parties and trade unions). The case-law has recently concluded 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\textsuperscript{28}. The highest court in Italy, the Court of Cassation, maintained that to define an entity as a corporation presumes it carries out an economic activity with the objective of making profit, which would be 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. The corporation, in fact, responds directly for the


\textsuperscript{28} The case in issue involves an interregional hospital structure constituted under the form of a corporation: Cass., sez. II, July 9\textsuperscript{th} 2010, PM in proc. Vielmi, in *Cass. pen.*, 2011, p. 1888.
administrative violation arising from a crime committed in its interest or to its advantage\textsuperscript{29} by subjects belonging to its organization (Art. 5, L.D. No. 231/2001). The rationale behind this innovation is that the company’s structural arrangement is considered the true instigator, executor or beneficiary of the criminal conduct. We are, therefore, in the presence of a mechanism implemented to widen the sphere of those can be subject to criminal proceedings\textsuperscript{30}, 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 subsists even when the author of the crime has not been identified or when the crime ceases to exist for a cause other than amnesty\textsuperscript{31}.

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 one of those 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. 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. Over the years, however, the list of offenses has been modified and extended\textsuperscript{32}, with the addition, for example, of some crimes committed

\textsuperscript{29} The interest is ascertained with an \textit{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 \textit{ex post}, and could subsist for the corporation, even if the agent did not act with a specific \textit{pro societate} objective. See Ombretta Di Giovine, \textit{Lineamenti sostanziali del nuovo illecito punitivo}, in Various authors, \textit{Reati e responsabilità degli enti. Guida al d. lgs. 8 giugno 2001, n. 231}, edited by Giorgio Lattanzi, II ed., Giuffrè, 2010, p. 70 f. 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, paragraph 2, L.D. No. 231/2001).


\textsuperscript{31} 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, \textit{La responsabilità “da reato” degli enti nell’ordinamento italiano}, cit., p. 23.

\textsuperscript{32} 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 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
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)\textsuperscript{33}.

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. 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 – (Art. 5, paragraph 1, L.D. No. 231/2001). 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 an assumption that would be integrated even when the individual acted 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 a corruption. As a result of the offense, the corporation is awarded public contracts which 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. Whether company officers are those directly involved, it would be sufficient to ascertain the mutilation of female genital organs (Art. 25-\textit{quater}.1, L.D. No. 231/2001); crimes against the individual (Art. 25-\textit{quinquies}, L.D. No. 231/2001); market abuse (Art. 25-\textit{sexies}, L.D. No. 231/2001); manslaughter or personal injury caused by a breach of the health and safety at work regulations (Art. 25-\textit{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-\textit{octies}, L.D. No. 231/2001); offenses related to the violation of copyright laws (Art. 25-\textit{novies}, L.D. No. 231/2001); incitement to not make statements or to make false statements before the judicial authority (Art. 25-\textit{decies}, L.D. No. 231/2001); environmental crimes (Art. 25-\textit{undecies}, L.D. No. 231/2001); employment of illegally staying third-country nationals (Art. 25-\textit{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, \textit{Introduzione}, in Various Authors, \textit{La responsabilità da reato degli enti collettivi: a dieci anni dal d. lgs. n. 231/2001. Problemi applicativi e prospettive di riforma}, edited by Alfonso Maria Stile – Vincenzo Mongillo – Giovanni Stile, Jovene editore, 2013, p. 221 f.

\textsuperscript{33} 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, \textit{Responsabilità degli enti e reati colposi}, in Various Authors, \textit{La responsabilità da reato degli enti collettivi: a dieci anni dal d. lgs. n. 231/2001}, cit., p. 246 f.
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. 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 and that there was not a lack of, or insufficient, vigilance by the Body. Finally, the corporation must demonstrate that the individual committed the crime by fraudulently circumventing the program (Art. 6, paragraph 1, L.D. No. 231/2001)\(^ {34} \).

If, on the other hand, the presumed offense is attributable to a subordinate employee, according to the criteria for corporate liability, the company have to respond only as far as the Prosecutor succeeds in proving that the crime is the result of an omission or company’s duties. This is an element, however, that the Legislator 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 (Art. 27, paragraph 2 of the Constitution) and, so forth, where the burden of proof has to fall upon the prosecution\(^ {35} \). According to L.D. No. 231/2001, when the crime is committed by corporate officers and the Prosecutor determines the illegal conduct corresponds to one of the offenses provided for by L.D. No. 231/2001, he has proven the offense can be attributed to the administrators and, hence, the existence of a financial interest or advantage for the corporation. In this scenario, corporate liability is presumed unless the company proves the existence of conditions able to exclude its involvement in the matter.

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\(^{34}\) 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 Various Authors, *La responsabilità da reato degli enti collettivi: a dieci anni dal d. lgs. n. 231/2001*, cit., p. 190.

\(^{35}\) See Giulio Illuminati, *La presunzione d’innocenza dell’imputato*, Zanichelli, 1979, p. 120 f.
A problem of inconsistency arises only if we assume that the presumption of innocence also prevails in the “231” system. This conclusion is undoubtedly preferable for all the reasons previously explained regarding assigning corporate liability cases to the criminal system in accordance with the European matrix. It remains, however, a relevant fact that cannot be underestimated. The latest Proposal for the European directive to reinforce the principle of the presumption of innocence excludes corporations from its area of application, affirming: « Protection of the right of legal persons to be presumed innocent is nevertheless ensured by the existing safeguards of national and Union legislation, as interpreted by national Courts and by the Court of Justice, and by the ECHR as interpreted by the ECtHR» (Art. 2.27)\textsuperscript{36}. The Commission’s decision is difficult to understand, especially in light of the ECTHR’s clear track record of recognizing the guarantees typical of the criminal system, even for proceedings that have a different \textit{nomen juris} (without mentioning that 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)\textsuperscript{37}.

With the hope that the final drafting of the EU directive will also be extended to corporations, we must verify whether – at national level – the presumption of innocence should rule in the “231” regime. Scholars appear to have no doubts as far as this effect is concerned\textsuperscript{38}. 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 alleged crime was committed by


\textsuperscript{38} 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, \textit{Prevenzione del rischio penale d’impresa e modelli integrati di responsabilità degli enti}, in \textit{Cass. pen.}, 2005, p. 333, note n. 49; Alessandro Bernasconi, \textit{L’elusione fraudolenta del modello}, in Adonella Presutti – Alessandro Bernasconi, \textit{Manuale della responsabilità degli enti}, Giuffrè, 2013, p. 174; there are others who deem it possible to interpret the legislation in such a way congruent with the Constitution: Maria Lucia Di Bitonto, \textit{Studio sui fondamenti della procedura penale d’impresa}, cit., p. 74 f.; Gianluca Varraso, \textit{Il procedimento per gli illeciti amministrativi dipendenti da reato}, Giuffrè, 2012, p. 366; Paolo Moscarini, \textit{I principi generali del procedimento de societate}, in \textit{Dir. pen. proc.}, 2011, p. 1275.
a corporate officer or subordinate employee. This inversion of the onus of proof for the transgressions of company officers will be further analyzed in relation to compliance programs.

4. 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. The significant effects of these programs during the precautionary procedure will be subsequently discussed.

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 corporation must identify areas which 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); implement a disciplinary system which adequately punishes those who do not comply with the measures specified in the program (Art. 6, paragraph 2, L.D. No. 231/2001).

39 See Cass., sez. VI, February 18th 2010, Scarafia, in Cass. pen., 2011, p. 1878. 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, L’accertamento dell’idoneità del modello organizzativo in sede giudiziale, cit., p. 188.

40 See infra par. 8.

41 See infra par. 8.
The Legislator has unequivocally established that it is not sufficient for corporations to merely adopt the programs but they must be effectively implemented. In other words, in order to exclude or mitigate corporate liability, the programs have to shape corporate operations in such a way that corporate activity complies with the behavioral protocols established therein. Furthermore, the corporation must provide for the updating of these programs over time, for instance when there have been changes in the legislation (such as inclusion of new types of crimes on the list of those from which corporate liability can arise) or when there have been changes in the corporate structure.

In the aftermath of L.D. No. 231/2001, these compliance programs were welcomed very coldly by corporate entities because they were aware that the adoption of such programs would not, in and of itself, protect the corporation from liability. 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 Court, 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.

This prejudice has been overcome because it has been proven that this assessment is conducted \textit{ex ante} and not \textit{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. Furthermore, the judge does not have to express a decision with regard to the adequacy of the program as a whole but, rather, referring merely to the area in which the specific crime was committed. Despite the fears

\footnote{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, Piero Magri - Matteo De Paolis, \textit{Modelli di organizzazione ed esenzione di responsabilità: aspetti pratici ed operativi}, in Various Authors, \textit{Diritto penale delle società}, tomo I, cit., p. 933 f. 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 13\textsuperscript{th} 2008, n. 1774, in \textit{Le società}, 2008, p. 1507).}

\footnote{See Giorgio Fidelbo, \textit{L’accertamento dell’idoneità del modello organizzativo in sede giudiziale}, cit., p. 179 f.}
surrounding the criminal judge’s lack of training in the corporate field, evaluation of the programs is often entrusted to experts who possess the necessary technical expertise and, hence, support the magistrate in this task.\(^{44}\)

Various uncertainties remain, however, especially regarding the content of the programs, since Art. 6, L.D. No. 231/2001, while supplying some useful recommendations concerning the drafting of the programs, 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 not adequate.\(^{45}\) For this reason, the idea of introducing a certification process began to gather support. This process was 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.\(^{46}\) Nevertheless, this proposal was discarded 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.\(^{48}\) Even if not binding, at the most it would involve an additional element that would have to be taken into account by the judge and if he did not agree, it would oblige him to produce a more detailed ground.\(^{49}\)

\(^{44}\) See, for example, *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*, in *Riv. it. dir. proc. pen.*, 2010, p. 1434 f.

\(^{45}\) To date, only one Italian corporation’s compliance program has passed judicial control at the first and second level court hearings (Tribunale di Milano, Ufficio del Giudice dell’udienza preliminare, November 17\(^{\text{th}}\) 2009, Impregilo, in *Le società*, 2010, p. 473 e Corte app. Milano, sez. II, March 21\(^{\text{st}}\) 2012, Impregilo, in *Dir. pen. contemporaneo*).

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 18\(^{\text{th}}\) 2013, Impregilo, in *Dir. pen. contemporaneo*).


\(^{48}\) Art. 101, paragraph 2 of the Constitution provides that judges are only subject to the law.

\(^{49}\) Giorgio Fidelbo, *L’accertamento dell’idoneità del modello organizzativo in sede giudiziale*, cit., p. 193, according to whom the introduction of the certificate in question would require the judge to provide a lengthier explanation when evaluating the programs.
This alternative seems to have been abandoned. The Courts’ rulings regarding the matter are being utilized as guidelines to be followed 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. 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 corporation’s unique circumstances, providing for effective control mechanisms. One of the ways to achieve effective control is by entrusting the verification of each decision-making procedure to more than one subject. The meaning is clear: the program cannot be a document which serves as a mere facade. Instead, it must express the corporation’s true volition to implement, within the scope of the sensitive areas, suitable mechanisms to prevent the risk of crime. Furthermore, judicial precedent has highlighted the importance of information flows between the corporate officers, employees and the monitoring organism, 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 Body which must be and appear independent; it must actually and effectively monitor compliance with the protocols: a function

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51 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 accademia 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. V. John C. Coffee, *A theory of Corporate scandals: Why the U.S. and Europe differ*, Oxford Review of Economic Policy, vol. 21, n. 2, 2005, p. 198 f.
53 The Legislator 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, *Paradigmatiche dell’autocontrollo penale (dalla funzione alla struttura del “modello organizzativo” ex d. lgs. n. 231/2001 (Parte II)*, in *Cass. pen.*, 2013, p. 845 f.
54 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).
that it can only implement in so far as it is constantly informed of the management of the at-risk areas and it is entrusted with investigative powers in all sensitive sectors.\textsuperscript{55}

If a corporation is lacking a compliance program outright or has an inadequate model, there are several procedural turning points during which it can manifest its intention to implement a suitable program. The Legislator strongly encourages corporations to make this decision by extending numerous advantages to those which 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.\textsuperscript{56} With L.D. No. 231/2001, the Legislator aspired 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 sense of legality.

5. Applying sanctions

In cases in which the corporation is found liable, the system for imposing penalties established by L.D. No. 231/2001\textsuperscript{57} provides for the indefectibility of exacting a financial penalty, applied utilizing a quota system (Art. 10, L.D. No. 231/2001). A list of disqualifying penalties has also been introduced (Art. 9, paragraph 2, L.D. No. 231/2001) which prohibit the corporation from engaging in certain activities, and can only be imposed for corporations found guilty of certain crimes (Art. 13, L.D. No. 231/2001). Furthermore, the law has provided for the confiscation (the «expropriation by the State»)\textsuperscript{58} of the price or the profit derived from the crime (Art. 19, L.D. No. 231/2001).\textsuperscript{59}

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\textsuperscript{57} See Carlo Piergallini, I reati presupposto della responsabilità dell’ente e l’apparato sanzionatorio, in Various Authors, Reati e responsabilità degli enti. Guida al d. lgs. 8 giugno 2001, n. 231, cit., p. 222 f.

\textsuperscript{58} The definition is from Giovanni Fiandaca – Enzo Musco, Diritto penale. Parte generale, cit., p. 845.

\textsuperscript{59} 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.
The formula established for calculating the financial penalty is based on a quota system (Art. 11, L.D. No. 231/2001). 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 which 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 eliminate, or attenuate, the consequences of the crime as well as its efforts to prevent such illegal conduct in the future. The Legislator has, moreover, fostered virtuous behavior by making the amount of financial penalties dependant on the damages caused by the crime and also by offering a reward for the company that has done its best to minimize the detrimental effects of its conduct (Art. 12, L.D. No. 231/2001). The financial sanction is, hence, 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, the corporation either compensates the damage in full or eliminates the detrimental or dangerous consequences of the crime, or when it makes a tangible effort to move in this direction. This is - of course - contingent upon the fact that the corporation is equipped with a compliance program which is adequate to prevent the crime that occurred from happening again in the future. When both the final conditions listed above are present, the financial penalty is reduced by a half to two thirds.

In addition to the financial sanctions, we find those penalties that are classified as disqualifying, which can result in serious financial losses for the corporation and, hence, are among the most dreaded. The list in which they are included identifies them in decreasing order of afflictiveness:

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60 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.*, edited by Alfredo Gaito, Utet, 2010, p. 808. 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 corretta*, Giappichelli, 2012, p. 16 f.
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; prohibition banning the publicizing of goods or services.

Disqualifying sanctions can produce very serious consequences. In the most serious cases, the corporation can even be forced out of the market. This penalty is only applied for administrative violations stemming from specific, predetermined crimes - which represent a sub-category of the offenses explicitly listed in the legislation. Furthermore, its implementation is made dependent upon two conditions: the corporation has obtained a sizeable profit, the illegal act was committed by high-level corporate officers or, if perpetrated by subordinate employees, the offense should have been caused or facilitated by serious organizational shortcomings; or in the case of recidivism. Disqualifying penalties are not imposed when, before the trial, the corporations compensates the damage in full, eliminating the detrimental or dangerous consequences of the crime, or when it makes a real effort to move in this direction, redressing the organizational shortcomings that enabled the commission of the crime through implementation of suitable compliance programs and turning over the profit obtained from the crime to the State (Art. 17, L.D. No. 231/2001). 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 Legislator 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. The judge determines the type and duration of the sanctions necessary to prevent the offense from occurring again in the future. For example, the disqualification banning negotiations with the public administration, can be limited to certain contracts or only apply to predetermined public agencies. Similarly, disqualification of the corporation’s activity calls for suspension or revocation of authorizations, licenses or concessions relating to the execution of those specific
functions. The disqualification of the corporation’s activity, however, is only applied when other sanctions have proven to be inadequate (Art. 14, L.D. No. 231/2001).

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 (Art. 15, L.D. No. 231/2001). 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.

Disqualifying sanctions can be applied for a temporary time period or, in the most serious cases, definitively, if the corporation shows absolutely no willingness to comply with the law. 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 obliged to levy the sanctions. On the other hand, for a definitive application, the judge must conduct a thorough evaluation to determine whether this decision is absolutely necessary.

The sanctions are subject to the statute of limitations, and therefore the punitive power of the State cannot be exercised once a period of five years from the time of the alleged crime has been exceeded. Nevertheless, as soon as the administrative violation is contested to the corporation, 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 evoked.

The mechanism governing the statute of limitations in proceedings against individuals follows other rules. For this reason, the proceeding against the individual could stop when the statute of limitations has been exceeded while the trial against the corporation continues. This solution has

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61 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.


63 See *infra* par. 9.
been criticized for violating the constitutional principle of equality (Art. 3, Cost.)\textsuperscript{64}. 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. Nevertheless, this provision however is a natural extension of the principle of autonomy between the two different kinds of liability.

6. General provisions regulating corporate liability proceedings

L.D. No. 231/2001 is mainly dedicated to the introduction of procedural rules, which are, in fact, undoubtedly superior in number to those pertaining to substantive law. It is not, however, only a question of quantitative predominance: the procedural provisions which shape corporate liability proceedings are of critical importance and represent the foundation for the legislation, as judicial precedent has demonstrated. Judges have, in fact, always regarded this second part of the L.D. No. 231/2001 with paramountacy, which – as will be seen shortly – is largely due to the pivotal nature of the precautionary system\textsuperscript{65}.

The Legislator 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\textsuperscript{66}.

\textsuperscript{64} Riccardo Lottini, \textit{Il sistema sanzionatorio}, in Various Authors, \textit{Responsabilità degli enti per illeciti amministrativi da reato}, cit., p. 176.
\textsuperscript{65} The L.D. No. 231/2001 has created a real and proper «mini-code»: Franco Cordero, \textit{Procedura penale}, Giuffrè, 2012, p. 1327.
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.\(^{67}\)

These observations are also useful to interpret Art. 35, L.D. No. 231/2001 which, utilizing the same criterion, extends the corporation the same procedural safeguards which apply to the defendant, if compatible. Also in this case, it is not possible to assume that the entire L.D. No. 231/2001 apparatus intended for the defendant (an individual) can be applied when it is a corporation subject to the process. 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.\(^{68}\)

When outlining the main features of the corporate criminal liability proceeding, it is first necessary to identify the cases which 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 for the individual agent. Nevertheless, Art. 37, L.D. No. 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.\(^{69}\)

The strong interdependence between the proceedings against the corporation and those against the individual 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 competent to rule on the crime from which the administrative violation has arisen. Moreover, the L.D. No. 231/2001 appears


\(^{68}\) See *infra* par. 7.

\(^{69}\) 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 a act deemed an offense by law.
to favor the *simultaneus processus*, in which the judge is called upon to ascertain corporate responsibility as well as that of the individual in the same proceeding (Art. 38, paragraph 1, L.D. No. 231/2001). 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 (Art. 38, paragraph 2, L.D. No. 231/2001).

The Legislator decided to unify the two trials to promote efficacy, consistency as well as to assure cost effectiveness\(^{70}\). In this way, it seems that any potential incongruity between the two judgments could be avoided. The fact that the Legislator called for the separation of the trials when «adherence to procedural provisions makes it necessary» (Art. 38, paragraph 2, letter c, L.D. No. 231/2001) could become an easy expedient to nullify the rule of the unification of the trials.

The corporation participates in the criminal proceeding with its own legal representative\(^{71}\), unless the representative is accused of the crime from which the administrative violation has arisen (Art. 39, paragraph 1, L.D. No. 231/2001). This rule was established to avoid a clear and insurmountable conflict of interest. It is an absolute incompatibility (*iuris et de iure*) that does not need to be ascertained\(^{72}\) and that if not removed, results in the inefficacy of any act executed by this representative\(^{73}\).

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.

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\(^{70}\) See Ministerial Report, cit., p. 453.

\(^{71}\) 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* (Artt. 39 and 41, L.D. No. 231/2001).


\(^{73}\) Because of this incompatibility, the representative (who has a conflict of interest) cannot appoint a defense attorney for the corporation: Cass., sez. VI, June 19\(^{th}\) 2009, Caporello, cit., p. 1382.
7. Evidence according to L.D. No. 231/2001

L.D. No. 231/2001 dedicates only one rule to the evidence, deeming the provisions contained in the CPC applicable for the rest. The only regulation, in fact, 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 (Art. 44, paragraph 1, L.D. No. 231/2001). 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.

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, in fact, 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 (Art. 39, L.D. No. 231/2001). Therefore, requiring the newly appointed representative to testify, when the corporation has opted for a change in leadership, conflicts with the corporation’s right to defend itself by violating its right to remain silent. In fact, Art. 39 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. This raises serious concerns regarding legitimacy since the corporation is guaranteed the procedural safeguards that apply to the defendant, if compatible (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,

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74 See supra par. 6.
and others who do not recognize this conflict. The scholars who adhere to the latter school of thought 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, invoking the rights of the defendant within the proceeding\textsuperscript{76}.

Neither of these diametrically opposed positions, however, appears acceptable. The first because it equates to an abrogatio legis which must be left to the Legislator and cannot be executed by the hand of the interpreter. The second because it requires, on the side of the legal representative, an intermittently change of roles (witness-defendant) which inevitably risks to become factitious and unbearable. 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 regarding what transpired at the time of the transgression could, in fact, result in self-incrimination. This is a clear contradiction of the fact that the corporation has the same safeguards provided for the defendant. Paramount among these protections is nemo tenetur se detegere.

The Italian criminal system appears to possess a useful antidote. Art. 198, paragraph 2 CPC establishes that a witness cannot be compelled to testify to facts from which his criminal responsibility could emerge\textsuperscript{77}. 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 margins of application.

\textsuperscript{76} Giorgio, Fidelbo, \textit{La testimonianza: casi di incompatibilità}, in Various Authors, \textit{Reati e responsabilità degli enti. Guida al d. lgs. 8 giugno 2001, n. 231}, cit., p. 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, \textit{Il procedimento per gli illeciti amministrativi dipendenti da reato}, cit., p. 386.

\textsuperscript{77} Maria Lucia Di Bitonto, \textit{Studio sui fondamenti della procedura penale d’impresa}, cit., p. 83.
According to the reasoning developed above, Art. 198, paragraph 2 CPC could be applied with some adjustments for the different context within which it is employed. This would mean 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 by the trial. Promoting this safeguard would, furthermore, serve as anesthetic for the *vulnus* created by the gap in the legislation (Art. 44, L.D. No. 231/2001) 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, paragraph 2 CPC is an extremely elastic regulation that allows for numerous practical applications. According to the degree of the witness’s involvement in the facts 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 violate a legal prohibition) must be excluded from evidence (Art. 191 CPC). 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, paragraph 2 CPC in the system introduced by L.D. No. 231/2001
constitutes the most persuasive solution to guarantee the right to silence, without reforming the legislation.

8. 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.

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 with these measures: avoid dispersion of the corporate assets which serve as guarantees for the civil obligations derived from the crime and “paralyze” or reduce the corporation’s activity when continuation of such activity can aggravate or extend the consequences of the offence or facilitate the commission of other crimes\(^\text{78}\). The first requirement can be satisfied with a conservative seizure (Art. 54, L.D. No. 231/2001), 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 (Art. 53, L.D. No. 231/2001) and disqualifying measures (Art. 45 f., L.D. No. 231/2001).

The precautionary procedure is pivotal because it is the first moment in 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 has mainly regarded this procedure. There have been significantly fewer decisions issued during the conclusive stage of the proceeding when the Court rules on corporate liability. This phenomenon is largely due to the tremendous impact that precautionary decisions can produce

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\(^{78}\) Refer to Ministerial Report, cit., p. 454.
in 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. 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).

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 is deemed liable. 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. This scenario has been specifically excluded in the case of precautionary measures applied to individuals because it is argued to conflict with the defendant’s right to the presumption of innocence. This principle, notwithstanding some doubts mentioned previously, should also prevail in the proceedings against corporations.

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 like an anticipation of the definitive sentence, this would still be instrumental in guaranteeing the effectiveness of the judicial evaluation. Nevertheless, upon closer examination, the real purpose of the precautionary procedure of the corporate system is special-preventive: the preemptive

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79 See supra par. 5. 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, Il “processo alle società” nel d. lgs. 8 giugno 2001, n. 231, cit., p. 42.

80 See Francesco Peroni, Il sistema delle cautele, in Various Authors, Responsabilità degli enti per illeciti amministrativi da reato, cit., p. 244 f.

81 See supra par. 3.

82 Ministerial Report, cit., p. 455.
measures, in other words, serve to avoid the danger of recidivism, bringing those corporations that are inclined to reform back to legality and abandoning those that do not to their destiny.

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. Furthermore, during the precautionary phase it is not allowed to take one of those measures that cannot be imposed at the end of the trial. These are essential safeguards that also condition the parallel “231” system. 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 observation leads to the first conclusion. As previously mentioned, disqualifying sanctions, unlike financial penalties, can be imposed at the end of the proceeding only if it is explicitly provided for (as a consequence of the violation attributed to the corporation). The judge can employ the most invasive sanctions only for administrative violations stemming from some of the crimes that can implicate corporate criminal liability. 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 (Art. 13, L.D. No. 231/2001)\(^\text{83}\). 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

\(^{83}\) See *supra* par. 5.
sanctions is not provided (or the application of that specific disqualifying sanction is not called for)\textsuperscript{84}. 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»\textsuperscript{85}. Moreover, 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 (Art. 13, L.D. No. 231/2001).

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 - \textit{fumus comissi delicti} - as well as specific, credible elements supporting the concrete risk of the crimes reoccurring - \textit{periculum in mora} - (Art. 45, L.D. No. 231/2001).

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\textsuperscript{86}.

First and foremost, the serious indications of guilt must pertain to the alleged crime. In fact, only when this first criterion is satisfied can the judge proceed to examine additional constitutive elements of the administrative violation. It is necessary to verify that for the specific crime, disqualifying sanctions, which correspond to the precautionary measures proposed, can be applied

\textsuperscript{84} See Cass., Sez. II, March 12\textsuperscript{th} 2007, D’Alessio, in \textit{Guida dir.}, 2007, n. 18, p. 82. 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, \textit{Le cautele interdittive nel processo de societate, al vaglio della sperimentazione applicativa}, in Various Authors, \textit{Studi in onore di Mario Pisani}, vol. I – Diritto processuale penale, edited by Piero Maria Corso – Francesco Peroni, La Tribuna, 2010, p. 708.


\textsuperscript{86} Cass., Sez. un., April 21\textsuperscript{st} 1995, Costantino, in \textit{Cass. pen.}, 1995, p. 2837.
and if so, that the elements exist for that crime\textsuperscript{87}. 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 an indefectible fact necessary for the judge appointed during the precautionary phase to make a prognostic judgment. On the other hand, when dealing with corporations, the decision during this precautionary procedure cannot stop with the prognosis only relating to the alleged crime - as has happened in certain cases\textsuperscript{88}. Therefore, if the order for a disqualifying measure against the corporation is not extended to the other elements of the administrative violation, it would be void.

Once the prognostic evaluation has been concluded, the judge must then review the other constitutive elements of the administrative violation. He must evaluate if 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 entail corporate liability.

If the alleged crime is deemed to have been committed by an employee, the judge will have to confirm the lack of \textit{ante factum} compliance programs in order to impose a disqualifying measure. Whether he has to carry out the same assessment for a crime committed by a corporate officer is debatable. 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)\textsuperscript{89}.

Notwithstanding some judicial precedents to the contrary, the Court of Cassation affirmed that the corporation would only be required to adopt adequate compliance programs\textsuperscript{90}. The evaluation of their adequacy would be entrusted to the judge, often with the assistance of experts.

\textsuperscript{87} In accordance with the principle of autonomy between the responsibility of legal entities and that of individuals (Art. 8 d. lgs. n. 231, 2001), in order to affirm corporate liability, it is sufficient that the objective element subsists for the alleged crime; it is irrelevant whether a offender has been identified or, if identified, whether he can be punished.

\textsuperscript{88} This widespread practice by the lower Courts has been censored by the Court of Cassation: Cass., sez. VI, June 23\textsuperscript{rd} 2006, La Fiorita Soc. coop. A.r.l., in \textit{Cass. pen.}, 2007, p. 87; Cass., sez. II, June 26\textsuperscript{th} 2008, Morabito ed altro, in \textit{C.e.d. Cass.}, n. 240169; Cass., sez. VI, March 5\textsuperscript{th} 2013, Orsi, \textit{ivi}, n. 254719. On this point, see Silvia Renzetti, \textit{Azione cautelare nei confronti della persona fisica e dell’ente: reciproche interferenze}, in \textit{Dir. pen. contemporaneo}, 18 dicembre 2013, p. 9 s. By the same author, see \textit{Misure cautelari applicabili agli enti: primi interventi della Cassazione}, in \textit{Cass. pen.}, 2007, p. 4228.

\textsuperscript{89} See \textit{supra} par. 4.

\textsuperscript{90} See \textit{supra} par. 4.
Furthermore, the judge must examine any fraudulent evasion of the procedures provided for by the programs, the existence of a Supervisory and Control Body and the effectiveness of its oversight. 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 not conditions which could exclude the corporation from liability.

Subsequently, due to the required correlation between precautionary measures and disqualifying sanctions, the judge must also ascertain the existence of the other elements which would abstractly allow for the application of a disqualifying penalty, including a sizeable profit or repetition of the illegal acts.\(^91\)

After concluding that there are serious indications of corporate liability, the judge is then left to examine the other prerequisite necessary 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.\(^92\) The fact that the Legislator has identified this as the only precautionary need\(^93\), further confirms the special-preventive purpose of the preemptive disqualifying measures that clearly have the aim of neutralizing the danger of recidivism. The dangerousness of the corporation can be excluded if, for example, there is an effective change in management or restitution of the profit from the crime.\(^94\)

If the judge finds serious indications of liability and the danger of recidivism, he evaluates the appropriateness of each preemptive measure relative to the degree of dangerousness of the corporation in order to identify the most suitable measure for the concrete case at hand.\(^95\) The

\(^{91}\) This conclusion has been embraced by judicial precedents (see Cass., sez. II, December 20th 2005, Jolly Mediterraneo S.r.l., in Cass. pen., 2007, p. 76 f.; Cass., sez. VI, June 23rd 2006, La Fiorita, cit., p. 84 f.) and scholars (Massimo Ceresa Gastaldo, *Il “processo alle società” nel d. lgs. 8 giugno 2001, n. 231*, cit., p. 40; Giorgio Fidelbo, *Le misure cautelari*, cit., p. 522 f.).

\(^{92}\) 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)*, Giappichelli, 2006, p. 149 f.

\(^{93}\) In the CPC, Art. 274 provides that precautionary measures can be adopted even for the danger of tampering with evidence or a flight risk.


\(^{95}\) It is useless, in other words, to apply a more onerous measure if the *periculum* can be neutralized by less afflictive means.
measure has to be proportionate to the seriousness of the offense and to the sanction that abstractly could be applied.

Due to the proportionality principle, the measures cannot be applied together\textsuperscript{96} and disqualification of the corporation’s activity is only warranted when other precautionary measures have proven to be inadequate. The legislator 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 (Art. 14, L.D. No. 231/2001). Nevertheless, it’s possible to reach this conclusion by way of interpretation\textsuperscript{97}.

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 (Art. 47, paragraphs 2 and 3, L.D. No. 231/2001). This essentially equates to 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.

The hearing can perform various functions. It can represent the setting in which the corporation demonstrates having adopted the compliance programs \textit{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 \textit{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 is lacking 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

\textsuperscript{96} 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 27\textsuperscript{th} 2008, Fisia Italimpianti S.p.a., in \textit{Cass. pen.}, 2008, p. 4544.

\textsuperscript{97} Cass., sez. VI, January 25\textsuperscript{th} 2010, Impresa Ferrara S.n.c., in \textit{Cass. pen.}, 2011, p. 3535.
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 this case, the judge who grants the corporation’s request establishes a security deposit or collateral that must be supplied by the corporation. If execution of the reparative conduct and reorganization is absent, incomplete or not effective, the security deposit will be acquired by the State. 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.

A provision for suspension of the precautionary measure undoubtedly presupposes the preventive disqualification has already been applied. There is no reason, however, why the corporation cannot express its willingness to reform before the judge rules on the precautionary question. 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 collaborate from suffering, even for a short period of time, the serious consequences resulting from the disqualifications.

Finally, the other type of preemptive measure provided for by the “231” system – preventive seizure (Art. 53, L.D. No. 231/2001) – also deserves some reflection. According to the Ministerial Report, preventive seizure has the same objective as the disqualifying measures: prevention. It can be applied to the same items for which confiscation would be allowed according to Art. 19, L.D. No. 231/2001: price and profit derived from the crime.

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98 See Adonella Presutti, Le misure cautelari interdittive, in Adonella Presutti – Alessandro Bernasconi, Manuale della responsabilità degli enti, cit., p. 281.
100 See supra nota n. 78.
In spite of the intentions declared by the Legislator, it does not appear that preventive seizure has the objective of preventing other crimes or 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 autonomous and obligatory sanction when the corporation is found liable. Hence, seizure aims to prevent the dispersion of corporate assets, thereby assuring the sanction 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 subsistence of serious indications of liability as well as the existence of price or profit from the crime. Furthermore, he must ascertain the danger of corporate assets being dispersed which could compromise a future confiscation.\textsuperscript{101}

Judicial precedent, which at first deemed the mere existence of the illegal act sufficient to warrant preventive seizure, has recently concluded that the prerequisite of the seizure functional to the confiscation must coincide with those required for preemptive disqualifying measures\textsuperscript{102}. 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

\textsuperscript{101} See Adonella Presutti, Le misure cautelari reali, in Adonella Presutti – Alessandro Bernasconi, Manuale della responsabilità degli enti, cit., p. 300.

\textsuperscript{102} 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, May 31\textsuperscript{st} 2012, Codelfa, in Cass. pen., 2013, p. 794. 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 Various Authors, La responsabilità amministrativa delle società e degli enti. D. lgs. 8 giugno 2001, n. 231, edited by Marco Levis – Andrea Perini, Zanichelli, 2014, p. 1136.
offender must, therefore, orient the judgment towards ascertaining the existence of serious indications of liability - even during the precautionary phase\textsuperscript{103}.

9. \textbf{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, statistically has its place during the preliminary investigations, confers these investigations a decisive role in the “231” system. This represents an evident inversion of the equilibrium that characterizes proceedings against individuals - at least compared to how these proceedings are regulated by the CPC\textsuperscript{104} where everything revolves around the trial (the phase in which evidence is gathered through cross-examination). The Prosecutor utilizes the 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.

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 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 regarding the subsistence of applicable prerequisites for the measures. If these preconditions are verified, 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 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\textsuperscript{105}. Hence, the special-preventive nature of the “231” system yet again moves the equilibrium in corporate proceedings back to the preliminary investigations.

Art. 55, L.D. No. 231/2001 provides that 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. This annotation is entered in the same criminal register in which crimes committed by individuals are logged. As is the case for individuals, the moment of the annotation marks the beginning of a six-month period during which it is possible to carry out investigations. According to Art. 407 CPC, at the end of this term, the Prosecutor is prohibited from conducting new investigations that, if carried out, would be excluded.

L.D. No. 231/2001 does not actually establish this sanction. The fact, however, that the Legislator 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

\textsuperscript{105} 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, paragraph 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, paragraph 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.
investigations conducted after the deadline and this prevision has been deemed compatible with the corporate criminal liability system\textsuperscript{106}.

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 (Art. 55, paragraph 2, L.D. No. 231/2001)\textsuperscript{107}.

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. 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 (Art. 369 CPC).

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 only report the legal

\textsuperscript{106} Massimo Ceresa Gastaldo, Il “processo alle società” nel d. lgs. 8 giugno 2001, n. 231, cit., p. 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, cit., p. 306.

\textsuperscript{107} Art. 335, paragraphs 3 and 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, paragraph 2, letter a CPC), such as those associated with the mafia or - even beyond these crimes - when there are specific needs concerning the investigative activity.
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\textsuperscript{108}.

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 \textit{de plano}. The CPC, on the other hand, establishes that the Prosecutor only has the authority to request dismissal. The judge, in fact, must authorize the Prosecutor not to bring about the criminal action.

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. 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\textsuperscript{109}. 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\textsuperscript{110}.

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\textsuperscript{111} or when the administrative violation lacks foundation.

When the case must not be dropped, the Prosecutor shall prosecute by bringing charges against the corporation with an act that includes the following: information identifying the corporation, a

\textsuperscript{108} Alessandro Bernasconi, \textit{Indagini e udienza preliminare}, in Adonella Presutti – Alessandro Bernasconi, \textit{Manuale della responsabilità degli enti}, cit., p. 315.


\textsuperscript{110} Maria Lucia Di Bitonto, \textit{Le indagini e l’udienza preliminare}, cit. p. 618 f.

\textsuperscript{111} See supra par. 5.
clear and precise description of the criminal 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 (Art. 59, L.D. No. 231/2001). 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. 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» (Art. 61, paragraph 1, L.D. No. 231/2001).

The L.D. No. 231/2001 dedicates little attention to the trial. We can infer that the Legislator 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 - 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

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112 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).

113 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 VARIOUS AUTHORS, Diritto penale delle società, a cura di Giovanni Canzio – Luigi Domenico Cerqua – Luca Luparia, tomo II, cit., p. 1376 e 1382.

114 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 Ministerial Report, cit., p. 463.
precautionary measures would not have any incentive to quickly adopt the organizational counter-
measures (compensation for damages and re-structuring).115

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, which is expressly
referenced. 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 subsistence 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 Legislator, proposing the tri-partition typical of the CPC, distinguishes between
the following sentences: acquittal, non prosecution and conviction.

The first of these possible judgments (Art. 66, L.D. No. 231/2001) presupposes a lack of the
constitutive elements of the administrative violation. An analogous decision can be reached when
evidence of the administrative violation is missing, insufficient or contradictory. The decision of not
prosecution must be issued 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 (Art. 67, L.D. No. 231/2001).

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 (Art. 69, L.D. No. 231/2001).

115 See Ministerial Report, cit., p. 463. Contra Adolfo Scalfati, Le norme in materia di prova e di giudizio, in Various
Authors, Responsabilità degli enti per illeciti amministrativi dipendenti da reato, cit., p. 363, according to whom the
formula should be interpreted with a certain amount of forbearance.
The corporation can submit an application for appellate remedy when the sentence applies a disqualifying penalty. In case that financial sanction has been imposed, the corporation can only challenge it 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\textsuperscript{116}. The legislation regarding appellate remedies, even if rather 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.

The Prosecutor can file the same appeals allowed for the crime upon which the administrative violation is contingent (Art. 71, L.D. No. 231/2001)\textsuperscript{117}.

Once the proceeding has concluded with a judgment of conviction, the Legislator 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 (Art. 78, L.D. No. 231/2001)\textsuperscript{118}.

10. 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.

\textsuperscript{116} See Ministerial Report, cit., p. 465.
\textsuperscript{117} Giorgio Spangher, Le impugnazioni, in Various Authors, Responsabilità degli enti per illeciti amministrativi dipendenti da reato, cit., p. 373 f. analyzes the problems that emerge from the inadequate legislation regarding appellative remedies, maintaining that they cannot be easily resolved by applying the rules contained in the CPC.
\textsuperscript{118} See Enrico Gallucci, L’esecuzione, in Various Authors, Reati e responsabilità degli enti. Guida al d. lgs. 8 giugno 2001, n. 231, cit., p. 739. For the quantification, the judge takes into account the seriousness of the illegal activity and the reasons for the belated separative conduct.
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 Courts, such as those in Rome and Milan. This is undoubtedly a bi-product 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. Nevertheless, this proceeding has been predominantly initiated in courts accustomed to dealing with the most serious incidences of corporate crime. 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. 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 would force the Prosecutor (in the presence of the other constitutive elements of the administrative violation) to

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119 See *supra* note n. 45.
proceed to the annotation and would preclude dismissal (even if the corporation reformed its organizational structure during the investigations). A different conclusion could be reached if the Legislator heeded suggestions from scholars and recognized the implementation of reparative measures (organizational restructuring along with compensation for damages) as a cause for dismissal\textsuperscript{120}.

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 \textit{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 \textit{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 dedicated to crime, as their main activity or even only collateral, 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

\textsuperscript{120} See supra note n. 113.
being committed within their organization in exchange for greater profit\textsuperscript{121}. 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, hence, unacceptable for companies that must survive in a competitive marketplace like Italy. For this reason, the system serves to promote greater legality.

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.

\textbf{ROSA ANNA RUGGIERO}

\textit{Professor of Criminal Procedure}

\textit{Tuscia University}

\textsuperscript{121} See \textit{supra} par. 2.