

# Legislative Decree 231/2001 concerning the administrative liability of legal entities, companies and associations with or without legal personality

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## 1. Administrative liability of directors as a consequence of the failure to adopt an organizational, control and management model pursuant to Legislative Decree 231/2001.

A recently published decision of the Court of Milan (VIII Civil Section, sentence no. 1771 dated February 13, 2008) has set forth the civil liability of the directors for bad management (*mala gestio*) towards the company managed by them as a consequence of the failure to adopt an organizational, control and management model (the "**Model**") pursuant to Legislative Decree no. 231 dated June 8, 2001 (the "**Decree**").

In the case examined by the Court, the plaintiff, a company under a proceeding pursuant to the Decree which was admitted to a plea bargaining by means of the payment of a pecuniary sanction, summoned the Chairman of the Board of Directors and Managing Director of the company, pursuant to Article 2392 of the Italian Civil Code, for the purpose of being granted the compensation of the damages suffered as a consequence of the payment of the said pecuniary sanction within the criminal proceeding. With such decision the Court has therefore held the director liable for inadequate management activity, by considering that he should have had the duty to activate the Board of Directors of the company for the purpose to adopt the Model, and has therefore condemned him to pay to the company half of the damages suffered by the latter in connection with the failure to adopt an adequate Model.

The decision, which is innovative for the issues covered, has therefore taken a clear position in relation to the opportunity for the companies to adopt the Model pursuant to the Decree. In fact, despite the Decree does not set forth an obligation to adopt the Model, in the absence of its adoption the company is not prevented from being held liable for the crimes committed in its interest or in its favour by certain categories of persons.

Following the above mentioned decision, it becomes necessary for the directors of a company to carefully evaluate the adoption of the Model by the company that they are managing, in order to avoid being held liable towards the company for the damages deriving from the failure to comply with their duties set forth by the law and the by-laws, it being considered that from such choice depends the possibility for the company to avoid being held liable under the Decree and, consequently, the application of the relevant sanctions.

## 2. Brief introduction on the Decree.

### 2.1 Ambit of application of the Decree.

The Decree - which came into force on July 4, 2001 - has introduced in Italy the concept of administrative liability of the entities, they being considered all entities having legal personality, companies and associations with or without legal personality.

For purposes of simplicity, reference is hereafter limited to the companies, but the considerations made

below also apply to the various entities mentioned in the Decree.

The novelty introduced by the Decree consists in the principle imposing direct administrative liability on companies for the crimes committed in their interest or to their advantage. This liability adds to the liability of the individual who has materially committed the crime.

The crimes for which a company may be held liable fall within the following categories: (i) crimes committed within the relationships with the Public Administration (Articles 24 and 25 of the Decree: among which, without limitation, misappropriation of contributions, fraud to the detriment of the State, extortion and corruption), (ii) computer and illicit data processing crimes (Article 24-*bis* of the Decree), (iii) crimes of forgery of coins, public credit cards and revenue stamps (Article 25-*bis* of the Decree), (iv) corporate crimes (Article 25-*ter* of the Decree), (v) crimes aiming at terrorism or at the subversion of democracy (Article 25-*quater* of the Decree), (vi) crimes against individuals (Article 25-*quinquies* of the Decree), (vii) crimes concerning market abuse (Article 25-*sexies* of the Decree), (viii) crimes consisting of manslaughter or serious or extremely serious accidental injuries, committed in breach of the provisions on health and safety at the workplace (Article 25-*septies* of the Decree), (ix) crimes consisting of receiving stolen goods, money laundering and use, goods or service of an illegal origin (Article 25-*octies* of the Decree), and (x) transnational crimes (Article 10 of Law no. 146 of March 16, 2006: among which, without limitation, criminal conspiracy and mafia associations and crimes concerning the traffic of migrants).

The company shall be held liable if the crimes have been committed by the following individuals (provided that the other requirements set forth by the Decree have also been met):

- i. individuals carrying out representative, administrative or directive duties within the company or within one of its branches granted with financial and functional autonomy or any person who is involved, even as a matter of fact, in the management thereof; and
- ii. individuals in subordinate positions and namely every person supervised by or under the surveillance of a person under (i) above.

## 2.2 Causes of exemption.

As mentioned above, the Decree provides that the company shall be exempted from liability if it proves that:

- it has adopted and effectively implemented, before the commission of the crime, a Model suitable to prevent crimes such as those which have been committed; and
- it has established an internal body (e.g. compliance monitoring function) with independent powers to take action and supervise the operation and the enforcement of the model whilst ensuring its update (in the case of small companies, such duties of supervision and control may be performed directly by the directors).

## 2.3 Sanctions.

The Decree envisages the following sanctions in case the liability of the company is ascertained: (i) pecuniary sanctions, (ii) disqualification sanctions, (iii) confiscation and (iv) publication of the Court's decision.

Disqualification sanctions may have a considerable impact on the company's organization, as they include, among other things, the disqualification from exercise of the activity, the suspension or revocation of authorizations, licences or permits, the prohibition to negotiate with the Public Administration, the exclusion from grants and loans or the revocation of any grant and loan which has already been granted, the prohibition to promote services or goods, and considering that they can be applied also as precautionary measures.

## 2.4 Fundamental changes in the company.

The provisions set forth in the Decree also provide for some important consequences in relation to

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fundamental changes in the company, such as transformations, mergers, spin-offs and transfers or contributions of business. By way of example, it is worth mentioning the joint liability for the payment of the pecuniary sanction inflicted on the transferee/beneficiary of the transferred business and the possible joint consideration, for the purposes of judging the "reiteration of crime", of the crimes committed before and after the merger or the spin-off.

### 2.5 Decree and groups of companies.

The Decree does not expressly provide for its application to any group of companies.

According to current case law decisions, however, in the case of a group of companies it is necessary to identify the entity or the entities in whose interest or to whose advantage the crime has been committed. In case of a group of companies, if the crime has been committed only in the interest or to the advantage of the parent company, this would be the only entity to be held liable pursuant to the Decree. Conversely, if the crime has been committed in the interest or to the advantage of one or more subsidiaries, theoretically the related liability could also be ascribed to the parent company, when the interest or advantage of the subsidiaries somehow also involves (even only indirectly) the parent company.