ITalian Legislative Decree No. 231/2001: A Model for Mandatory Human Rights Due Diligence Legislation?

Avv. Maria Francesca Cucchiara
Lawyer
HRIC Co-Founder
Italian L.D. No. 231/2001

- Corporate responsibility for crimes perpetuated in the interest or to the advantage of a legal entity → *tertium genus* connected to criminal liability.
- Its scope has been *extended* over the years.
- Introduced due diligence process.

Pioneer example of HRDD legislation?
Italian L.D. No. 231/2001 as a pioneer example of HRDD legislation

Included Human Rights violations (Articles 24 and following):

- Slavery
- Human trafficking
- Forced labour
- Juvenile prostitution and pornography
- Female genital mutilation
- Manslaughter and serious bodily harm incurred as the result of the breach of laws governing the safeguarding of workplace health and safety ➔ Thyssenkrupp
- Employment of illegally staying Third-Country nationals,
- Specific environmental crimes (environmental disaster, environmental pollution, failure to decontaminate) ➔ ILVA
- Racism and xenophobia
- Transnational organised crimes - Palermo Convention
“231 Liability” - Legal requirements to be met (Articles 5 – 8)

a) one of the crimes listed in L.D. No. 231/2001 is committed in the **interest** or to the **advantage** of the corporation;

b) the crime has been committed by a **representative of the corporation** → high-level employees / employees “**managed or supervised”** by persons holding senior positions;

c) an “**organisational fault**” within the corporation has been ascertained.
Organisational fault

Failure to adopt and effectively implement “compliance programs” or “organizational models” (so-called “231 Models”) specifically designed to prevent the commission of crimes in the context of corporate activities.

- No legal obligation to adopt the 231 Models, but condition to avoid liability.
- Implies an ongoing due diligence process to identify, prevent, mitigate and account for how the risk of specific crimes are addressed.
- Internal but Independent Supervisory Body (Organismo di Vigilanza)
Access to justice

- Criminal Law and Procedure applies
  - Public Prosecutor’s powers of investigations and access to information

  but

- High burden of proof
- Admissibility of the civil action is controversial

Court of Cassation, Dec. 05.10.2010 vs “ILVA” case (Taranto Assises Court, Ord. 04.10.2016)

“Andria/Corato train wreck” case (Trani Tribunal, Ord. 07.05.2019)
Multinational groups and extraterritorial effects:

a) Foreign companies operating in Italy

*Siemens AG case* (G.i.p. Milano, Ord. 27.04.2004)


a) Crimes committed partially in Italy, partially abroad (Art. 6 of Italian CC)

*Snamprogetti/Saipem case* (Court of Cassation, Dec. 12.02.2016)

“*OPL 245*” case – pending

a) Offences occurred entirely abroad (Art. 4 L.D. No. 231/2001)

Only for a close number of serious offences against the national interest, whether the State where the violation took place has not initiated a prosecution against the corporation.
Comparison with HRDD requirements

<table>
<thead>
<tr>
<th>Strengths</th>
<th>Weaknesses</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Most severe human rights abuses included;</td>
<td>• Some human rights abuses are still not covered</td>
</tr>
<tr>
<td>• Ongoing due diligence process</td>
<td>• Not compulsory adoption of 231 Models</td>
</tr>
<tr>
<td>• Supervisory body</td>
<td>• No requirement for stakeholder engagement</td>
</tr>
<tr>
<td>• Significant sanctions</td>
<td>• Lack of transparency</td>
</tr>
<tr>
<td>• Criminal proceedings</td>
<td>• High burden of proof</td>
</tr>
<tr>
<td>• Extraterritorial effects</td>
<td>• No reference to the admissibility of civil action against the corporation</td>
</tr>
</tbody>
</table>
Link to the Report on Italian L.D. No. 231/2001:

THANK YOU

E-mail: francesca.cucchiara@gmail.com
cucchiara.hric@gmail.com