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ITALIAN LEGISLATIVE DECREE No. 231/2001:

A model for Mandatory Human Rights Due Diligence Legislation?

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1. Introduction

In 2011, the UN Human Rights Council unanimously endorsed the UN Guiding Principles on Business and Human Rights (UNGPs)[1]. The Guiding Principles emphasized, on one hand, the State duty to protect human rights, and, on the other, business enterprises' responsibility to respect them. In order to meet their responsibility to respect human rights, business enterprises should conduct a "human rights due diligence" (HRDD) process aimed at identifying, preventing, mitigating and accounting for negative human rights impacts in their business relationships[2]. Given the high level of consensus around the UNGPs, human rights due diligence has become a fundamental notion in today's Business and Human Rights debate. However, in the last few years, civil society has widely demonstrated and argued that as long as human rights due diligence is left to the discretion of companies, its benefit on human rights protection and abuses prevention are limited[3] while serious questions of coherence in business practices and competition arise. For this reason, some countries (particularly in the EU), pushed by civil society, have adopted or are in the process of adopting mandatory human rights due diligence legislations[4]. Moreover, a binding international treaty that obliges States parties to adopt mandatory human rights due diligence legislation is currently being discussed at the Human Rights Council[5].

Within this framework, Italian Legislative Decree (L.D.) No. 231/2001[6], which introduces a due diligence process that covers both specific human rights violations and specific severe impacts on the environment, can reasonably be considered a pioneer example of mandatory due diligence legislation.

Introduced in 2001 to comply with obligations deriving from EU Law and international conventions[7],

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1. "*Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*", proposed by UN Special Representative on business & human rights John Ruggie and endorsed by the UN Human Rights Council in its Resolution No. 17/4 of 16 June 2011.
2. According to the UNGPs, en*ter*prises are expected to respect human rights by conducting their economic activities both within national borders and abroad so as to prevent and avoid any potential direct or indirect negative human rights impacts. In particular, the UNGPs require companies to set up and implement due diligence processes to identify, assess and prevent any potential human rights risks which could be incurred across their operations and activities (or the operations and activities of business partners and suppliers).
3. FIDH, *Business and human rights: enhancing standards and ensuring redress*, https://www.fidh.org/IMG/pdf/201403_briefing_paper_enhance_standards_ensure_redress_web_version.pdf; FIDH, *Business and Human Rights: Time for Genuine Progress* (submission to the Open-Ended In*ter*governmental Working Group on Transnational Corporations and Other Business En*ter*prises), 22 June 2015, https://www.fidh.org/IMG/pdf/fidh_igwg_submission_22062015-5.pdf; European Coalition for Corporate Justice, In*ter*national Corporate Accountability Roundtable & Human Rights Watch, *The Potential of a Binding Treaty on Business and Human Rights to Address Access to Remedy for Corporate-Related Human Rights Abuses*, 26 September 2017, https://www.hrw.org/news/2017/09/26/potential-binding-treaty-business-and-human-rights-address-access-remedy-corporate; ActionAid In*ter*national and 19 civil society organizations *Citizens demand the EU stops stalling on a treaty to ensure that businesses respect human rights*, 19 July 2019, https://www.business-umanrights.org/sites/default/files/documents/Citizens%20demand%20EU_Revised%20draft%20Treaty_19.07.19%20%28002%29.pdf.
4. For a general overview of the ongoing initiatives, see the website www.bhrinlaw.org
5. In June 2014, the United Nations Human Rights Council adopted Resolution No. 26/9 to establish a working group (the United Nations open-ended in*ter*governmental working group on transnational corporations and other business en*ter*prises with respect to human rights, also known as IGWG) in order to elaborate a "*legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises*". To see the full text of Resolution No. 26/9 (United Nations General Assembly A/HRC/RES/26/9): https://www.ihrb.org/pdf/G1408252.pdf.). All the documents related to the IGWG are available at: https://www.ohchr.org/en/hrbodies/hrc/wgtranscorp/pages/igwgontnc.aspx.
6. Legislative Decree 8 June 2001, no. 231, "*Regulation on administrative responsibility of legal entities, companies and associations, including those not having legal personality, according to art. 11, Law 29 September 2000, no. 300*".
7. Conventions drawn up on the basis of Article K.3 of the Treaty on European Union include: the Convention of 26 July 2995 on the protection of the European Community's financial in*ter*ests (full text: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV:l33019), its Protocol adopted in 1996 as well as its Protocol on the in*ter*pretation, by way of preliminary rulings, by the Court of Justice of the European Community of the Convention on the protection of the European Communities' financial in*ter*ests adopted in 1996; the Convention of 26 May 1997 on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union (full text: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:41997A0625(01)&from=EN); and the OCSE Convention of 17 December 1997 on Combating Bribery of Foreign Public Officials in In*ter*national Business Transactions, with annex (full text: http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf).

L.D. No. 231/2001 established, for the first time in Italy, corporate responsibility for crimes perpetuated in the interest or to the advantage of a legal entity.

In the Roman law tradition, the principle of *societas delinquere non potest* (legal persons cannot commit crimes), has long been established[8]. However, since legal entities are subjects of our modern legal system that enter into contracts and assume rights and obligations, they can obviously also commit offenses. L.D. No. 231/2001 was therefore adopted in order to maintain consistency in the legal system and allow legal persons be sanctioned. Moreover, in introducing the new regime, the Italian legislature formally recognized that crimes committed within companies can be the result of specific management choices[9].

Despite not being specifically directed at protecting human rights, the scope of the law has been extended over the years and currently includes specific human rights violations, such as slavery, human trafficking, forced labour, juvenile prostitution and pornography, female genital mutilation, and environmental crimes.

Moreover, the legal regime introduced by L.D. No. 231/2001 incentivises companies to strengthen their self-regulatory systems and processes to prevent the commission of crimes, in accordance with the objectives of HRDD. Indeed, in order to avoid incurring liability under L.D. No. 231/2001, companies must demonstrate that they have effectively adopted compliance programs called "*models of organisation, management and control*" (here in after "231 Models") with the aim of identifying, preventing and mitigating the risk of commission of crimes in relation to business activities. **Although L.D. No. 231/2001 does not expressly provide for mandatory due diligence process, it creates a strong incentive to the adoption of the so-called "231 Models"** considering that the implementation of an adequate compliance programs can exonerate a company from corporate administrative liability. A draft proposal introducing mandatory organisational, management and control models under L.D. no. 231/2001 for all limited companies with a certain annual profit is currently pending in the Italian Parliament [10].

The compliance system created by L.D. No. 231/2001, together with the rules of corporate liability and sanctions associated with it, make it a valuable example of legislation that can serve as a source of inspiration for the current legislative process at the European level. In addition, the existing 20 years of jurisprudence permits to better understand how judges have progressively interpreted and applied concepts such as the 'vigilance plan' (or "231 Model") and 'due diligence' to corporate behaviour, including in cases of transnational corporations operating abroad.

The aim of this analisys is therefore to clarify the scope of application, the sanctions and the case law relating to L.D. No. 231/2001 in the perspective of contributing to the current debate on mandatory HRDD and to further legislative developments by other European and non-European States.

We are convinced that uniform rules and strong corporate accountability legislation across countries and at the international level are not only crucial for the effective protection of human rights in the context of business activities but also essential for better legal certainty and, ultimately, for effective implementation[11].

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8. According to the Roman law tradition, juridical persons would be incapable of guilt. More specifically, according to the basic principle that liability and penalties must be specific to the offender, criminal sanctions can be applied only to the perpetrator of the crime – necessarily a physical person.

9. On this issue, see D. Pulitanò, *Diritto Penale*, 2017.

10. To this regard see the current proposal in DDL 726/2018 http://www.senato.it/service/PDF/PDFServer/DF/339575.pdf

11. M. Neglia, "*The UNGPs — Five Years on: From Consensus to Divergence in Public Regulation on Business and Human Rights*", in *Netherlands Quarterly of Human Rights* 34(4) (December 2016), pp. 289-317.

2. The Italian Legislative Decree No. 231/2001

L.D. No. 231/2001, introduced the regime of so called '*administrative responsibility of legal entities for crimes committed in their interest or to their advantage*' and created an independent system of liability that supplements the criminal liability of the natural persons who are the physical perpetrators of crime.

The Decree identifies the criteria to be met in order to hold corporations liable (Arts. 5, 6, 7 and 8), defines applicable sanctions (Arts. 9-23), lists the crimes that can give rise to enterprise liability (Art. 24 and following), and establishes relevant procedural rules (Arts. 34-73).

Pursuant to the Decree, "administrative corporate liability" arises when the following requirements are met:

a) one of the crimes listed in the Decree **is committed in the interest or to the advantage of a legal entity[12].** In case of crimes of negligence, where the illegal outcome is not intentional and clearly does not correspond to the interest and/or the benefit of the corporation, interest and benefit are determined with reference to the (omitted) behaviour that gives rise to culpability. For example, in the case of injuries incurred due to violation of workplace health and safety laws, corporate liability arises based on company's failure to maintain its facilities properly with a decision that benefited the company by allowing it to save on costs, even though the injury itself could not have been intended.

b) **the crime has been committed by a representative of the defendant corporation**. In this regard, L.D. No. 231/2001 makes a distinction between persons who hold "*representative, or administrative or managerial positions within the legal entity or in one of its departments, and who have financial and organisational autonomy*" (high-level employees) and employees "*managed or supervised*" by persons holding senior positions (see below)[13].

c) an "**organisational fault**" within the corporation has been ascertained. This is a core concept of the legal regime established by L.D. No. 231/2001 and refers to the failure to adopt and effectively implement "*compliance programs*" or "*organizational models*" (the so-called "231 Models") specifically designed to prevent the commission of crimes in the context of corporate activities. This element – which must be specifically established together with the others, during a criminal process – requires the judge to assess whether the company has effectively adopted and implemented the "231 Model" to prevent the commission of the offense that occurred, as well as whether it put in place an independent supervisory body overseeing the implementation of the model. The judge's positive evaluation may exonerate the company from liability.

2.1. Nature of the responsibility

The international conventions that inspired the Decree[14] left to the discretion of States all decisions regarding the most appropriate means to establish liability for legal persons under their own legal systems. In order to circumvent the theoretical impossibility of convicting a legal entity for criminal behaviour under the Roman tradition (which is, incidentally, reflected in Art. 27 of the Italian

12. L.D. No. 231/2001, art. 5. The in*ter*est is the expected benefit deriving from the crime to be evaluated *ex ante*, before the commission of the crime. The advantage is the profit that concretely derived from the commission of the crime to be evaluated *ex post*.

13. *Ibid.*

14. *Supra* footnote 7.

Constitution, which states that criminal responsibility is personal), the Italian legislature opted for an intermediate system of so-called '*administrative corporate liability*'. This administrative liability is endowed, however, with a clearly punitive nature; for example, it is a criminal judge who ascertains liability under the Decree and applies the administrative sanctions to the company.

The nature of corporate liability under L.D. No. 231/2001 has, therefore, been hotly debated by Italian scholars. Part of the legal doctrine endorsed the thesis of administrative liability, on the basis that this is the term used in the law itself. Others argued that the Decree creates a form of criminal responsibility, relying on the fact that corporate liability arises under the Decree when a crime has been committed and the applicable procedure corresponds to criminal procedure. Others considered the liability established by L.D. No. 231/2001 as a *tertium genus,* a third type of liability which is a hybrid between the criminal and the administrative systems. This last argument is in particular based on the Government Report on the Decree[15], according to which the liability regime is a sort of distinct but closely connected sub-genre of criminal liability.

The Italian Supreme Court has definitively resolved this debate, describing liability under the Decree as a *tertium genus*.

This interpretation was provided as part of the judgment in the *ThyssenKrupp* case[16], which concerned a fire that broke out on the night of 5 December 2007 at a Turin steel mill owned by the German multinational ThyssenKrupp and killed seven workers. The criminal proceedings involved the managing director and five executives of the plant's owner, ThyssenKrup Terni S.p.a., as well as the company itself. ThyssenKrupp was held responsible pursuant to Art. 25-septies of the Decree, which refers to bodily harm due to breach of workplace health and safety laws.

The Supreme Court, taking into account the Government Report on the Decree, affirmed that despite the "administrative" label, L.D. No. 231/2001 introduced a new type of liability, which is connected to criminal responsibility. Due to this close connection, the Court considered it necessary to evaluate whether this type of liability complies with the constitutional principles governing the Italian criminal system and in particular with the principle of personal criminal responsibility as established by Art. 27 of the Italian Constitution. The Court concluded that the Decree does not violate neither the principle of personal responsibility nor the principle of fault, on the basis of the fact that 231 liability is based on "organisational fault"[17].

15. The full text of the Government Report on the Decree is available on the *Associazione dei Componenti degli Organismi di Vigilanza ex D. Lgs. 231/2001* website: https://www.aodv231.it/pagina_sezione.php?id=10.

16. Cass. Penale, Sez. Unite, 24 April 2014, Espenhhahn, ThyssenKrupp Acciai Speciali *Ter*ni S.p.a, n. 38343, in CED Cass., n. 261112. The full text of the ruling is also available at https://www.penalecontemporaneo.it/d/3292-caso-thyssenkrupp-depositate-le-motivazioni-della-sentenza-delle-sezioni-unite-sulla-distinzione-tr.

17. *Ibis,* par. 60.

2.2. Scope

2.2.1. Subjective Scope

According to Article 1 of L.D. No. 231/2001: "*This legislative decree regulates legal entities' liability for unlawful administrative acts relating to offences* (par.1). *The provisions set out therein apply to corporate entities and companies and associations including those which are not corporate bodies* (par.2). *They do not apply to the State, to territorial public entities, to other non-economic public entities or to entities performing constitutionally significant functions* (par.3)"[18].

L.D. No. 231/2001 therefore applies to a wide group of legal entities, including:

a) all kind of companies, including State-owned companies;
b) private legal persons, including foundations;
c) economic public authorities[19];
d) associations, regardless of whether they have legal personality.

L.D. No. 231/2001 does not apply to:

a) the State and the other local authorities (regions and municipalities);
b) non-economic public entities;
c) public entities performing constitutionally significant functions.

2.2.1.1. Presumption of liability

The Decree distinguishes when the offence is committed by a high-level employee (*i*) from the hypothesis in which the violation is perpetrated by an employee "*managed or supervised*" by the persons holding senior positions (*ii*).

i) **Offence committed by a high-level employee**

In this situation, the law establishes a relative presumption of liability, which means that the corporation indicted can be acquitted only if it demonstrates that:

a) before the commission of the crime, **it equipped itself with compliance programs** ("*organisational and management models*") to effectively prevent the commission of the occurred offense. The "231 Model" requirement means that corporations must undergo a due diligence process to identify and prevent potential risks of specific crimes, including environmental crimes and human rights violations. The effectiveness of the model must be measured concretely.
b) it has established a supervisory body in charge of overseeing the implementation of the model, and there is not a lack of vigilance by the body in the specific case.
c) the "231 Model" was **fraudulently evaded** by the perpetrator.

ii) **Offence committed by an employee "*managed or supervised*" by persons holding senior positions**

In this case, there is no presumption of guilt on the part of the corporation, which will be considered liable only if the criminal conduct was made possible by non-compliance with managerial and

18. Translation by UNODC - United Nations Office on Drugs and Crimes: https://sherloc.unodc.org/res/cld/document/legislative-decree-8-6-2001-n-231_html/Legislative_Decree_8-6-2001_n_231_EN.pdf

19. Italian law defines economic public authorities those public entities that directly carry out an economic activity of production of goods or services (such as Ferrovie dello Stato, the Italian main rail company; Poste Italiane, which provides mail and bank services ; ENEL, the main energy provider etc.).

supervisory obligations. Moreover, the Decree applies a negative presumption, exempting the corporation from liability if it had an adequate and effectively implemented "231 Model" before the commission of the crime (see *infra* Section 2.2)[20].

2.2.1.2. Corporate Groups

One interesting aspect of the subjective scope of the law is its application to corporate groups. L.D. No. 231/2001 does not explicitly refer to corporate groups; indeed, from a legal point of view, groups do not have an independent legal capacity, but simply constitute a conjunction of entities with individual and distinct legal personality. Accordingly, a corporate group cannot be directly considered liable under L.D. No. 231/2001, whereas the individual legal entities that form part of the group can be held responsible for crimes committed in the performance of the business activities. Italian criminal law and constitutional principles prevent any automatic assignment of liability under the Decree to companies belonging to the same group[21].

The Italian Supreme Court has addressed this issue, stating that a company (especially a parent company) may be considered accountable for crimes committed by other members of the same corporate group only when *(i)* an employee of that company commits or contributes to the crime and *(ii)* the crime is also committed in the interest or to the direct and concrete economic benefit of the company to which the person belongs.

In the *Tosinvest* judgment[22], the Supreme Court addressed this topic for the first time, concluding that the parent company can be held responsible under L.D. No. 231/2001 for a crime committed within another company of the group, provided that a natural person acting on behalf of the holding company contributed to the crime in order to pursue the interests of the holding company. In this case, as a result of a corrupt agreement between Fitto Raffaele, at the time President of Puglia Region, and Angelucci Gianpaolo, a Roman entrepreneur operating in the health sector, several companies of Angelucci's Tosinvest Group obtained contracts for numerous assisted healthcare residences in Puglia.

2.2.2. Objective Scope

L.D. No. 231/2001 foresees corporate liability for the commission of any of the crime listed in the Decree.

At the time of writing,[23] the scope of L.D. No. 231/2001 includes specific human rights violations, such as slavery, human trafficking, forced labour, juvenile prostitution and pornography, female

20. For the sake of completeness, in both case *i)* and *ii)*, the penalty can be mitigated if the company adopts the "231 Model" *after* the commission of the crime.

21. See G. Amato, *L'attribuzione della responsabilità amministrativa ex D.Lgs. 231/2001 all'interno dei gruppi di imprese, Rivista231* <http://www.rivista231.it/ >. For a study of the implementation of L.D. No. 231/2001 by multinational groups, see AIIA – KPMG Advisory S.p.A, *La compliance al D.Lgs. n. 231/2001 nei Grandi Gruppi* (March 2012), https://www.aodv231.it/images/atti/602-00-120702%20impa%20Grandi%20gruppi_def.pdf.

22. Cass. Penale, Sez. 5, 18 January 2011, no. 24583 (*Tosinvest* case).

23. Although Law No. 300/2000, which provides the legislative delegation granted to the government for the adoption of L.D. 231/2001, explicitly listed environmental crimes, the government initially did not include them in the shortlist of predicate offenses, which was limited to crimes of corruption and fraud against the State.

genitals mutilation, manslaughter and serious bodily harm incurred as a result of the breach of health and safety standards, and employment third-country nationals who are illegally in the country. Law No. 167/2017 also included the criminal offenses of racism and xenophobia.

Another significant innovation was introduced by Law No. 68/2015, which extended the scope of the law to both intentional and unintentional environmental pollution and environmental disaster and to other environmental crimes [24].

In addition, corporations can be held liable also for specific transnational organised crimes covered by the United Nations Convention against Transnational Organized Crime (the so-called Palermo Convention or TOC)[25].

With regard to environmental rights, it is worth mentioning the well-known case against ILVA, the biggest steel company in Italy.

The environmental problems linked to the industrial activity of ILVA's plant in Taranto, Puglia, have been common knowledge for a long time. A number of legal proceedings have been initiated over the years against the Group's managers on charges of pollution, an environmental disaster caused deliberately and with negligence, contamination of food products, deliberate failure to warn employees about workplace injuries, aggravated damage to public goods, discharge and dumping of hazardous substances, and air pollution. In particular, the so-called *Ambiente Svenduto* ("*Environment sold out*") trial, held before the Court of Taranto[26], involved, together with 44 ILVA managers, 3 companies of the group – Riva FIRE s.p.a. (today Partecipazioni industriali s.p.a.), Ilva s.p.a. and Riva Forni Elettrici s.p.a. – which were held liable for environmental crimes and punished under the Decree[27].

In 2012, the public prosecutor's office of Taranto ordered the arrest of a number of ILVA Group's managers and some politicians for having deliberately created high levels of pollution, damaging the environment and the health of Taranto's residents. During the same year, Taranto's preliminary investigation judge (GIP), Patrizia Todisco, ordered ILVA's furnaces shut down on the grounds that "ILVA's past and present managers have knowingly and willingly

24. The Decree also includes offences against the Public Administration (Art. 24), such as data processing crimes and illicit processing of data (Art. 24-bis); organised crime offences (Art. 24-*ter*) such as mafia-type criminal association; extortion, improper inducement to give or promise benefits and corruption (Art. 25); coun*ter*feiting of money and other coun*ter*feits and al*ter*ations of signs and trademarks (Art. 25-*bis*); felonies against industry and commerce (Art. 25-*bis*1) such as infringement of the freedom of commerce or industry, illegal competition with threats or violence, and fraud; administrative and corporate offences regarding en*ter*prises and consortia (Art. 25-*ter*) including false corporate reporting and obstruction of control; offences pertaining to *ter*rorism or subversion of the democratic order (Art. 25-quar*ter*), including the violation of Article 2 of the In*ter*national Convention for the Suppression of the Financing of *Ter*rorism; offences against persons and individual freedom (Art. 25-*quinquies*); offences of unintentional killing (manslaugh*ter*) and of unintentionally causing grievous bodily injury where such offences are committed through violation of workplace health and safety rules (Art. 25-*septies*); offences concerning misuse of privileged information and market rigging (Art. 25-*sexies*); receipt of stolen goods, money-laundering, use of money, goods or assets of illegal origin, and self-laundering (Art. 25-*octies*); offences related to the copyright law (Art. 25-*novies*); inducement not to make or to make false statements to judicial authorities (Art. 25-*decies*); employment of subjects from other countries who are illegal immigrants (Art. 25-*duodecies*); crimes against humanity and war crimes as defined in the Statute of the In*ter*national Criminal Court (Art. 25-*terdecies*); and finally fraud in sports competitions, abusive gaming and betting practices and games of chance exercised by means of prohibited equipment (Art. 25-*quaterdecies*). L.D. No. 231/2001 punishes also attempted crimes (Art. 26).

25. Law No. 146/2006 "*Ratification and implementation of United Nations Convention and Protocols against Transnational Organized Crimes, adopted by the UN General Assembly on 15 November 2000 and 31 May 2001*" also known as the UN Palermo Convention: http://www.parlamento.it/parlam/leggi/06146l.htm.

26. Corte d'assise di Taranto, application No. 938/10.

27. For more information about the ILVA case see also the report "The environmental disaster of the ILVA steel plant in Italy and its Human RIghts Violations" published by FIDH, HRIC, Peacelink and UFDU in 2018 available here: https://www.fidh.org/en/issues/globalisation-human-rights/business-and-human-rights/the-environmental-disaster-of-the-ilva-steel-plant-has-also-violated

continued their polluting activity for the pursuit of profit, thereby infringing the most basic rules of public health and safety"[28] the seizure was ordered on the basis of the L.D. 231/2001. The seizure order was confirmed by the Court of Review. In the wake of the seizure, the Italian government adopted a series of extraordinary laws (Decreto Legge), commonly referred to as the "Save ILVA" decrees, which enable production to continue.

Moreover, the European Court of Human Rights (ECtHR) recently found that Italy had violated Arts. 8 and 13 of the European Convention on Human Rights (ECHR). The ECtHR concluded that the entire population of Taranto is living in an area at risk and that the applicants did not have access to an effective remedy that would enable them to secure decontamination of the relevant areas[29].

2.3. The "231 Model"

One of the conditions for a company to avoid liability under L.D. No. 231/2001 is to have an organizational and managerial model in place.
The "231 Model" must be adequate (1.3.1.) and effectively implemented (1.3.2.).

2.3.1. Adequate "231 Model"

Article 6 of the Decree defines what constitute an *adequate* "231 Model". Models are adequate if they:
- Identify risky activities;
- Provide specific protocols and decision-making processes for the offenses that are to be prevented;
- Establish procedures for managing financial resources in order to prevent the commission of crimes;
- Establish the obligation to disclose information to the supervisory body; and
- Introduce a suitable disciplinary system to punish non-compliance with the model.

In other words, the "231 Model" is considered adequate if it establishes a process of sound and prudent risk assessment, including the provision of related mitigation measures. Such measures are considered adequate when designed in a way that they cannot be bypassed in a non-fraudulent way.

Since Article 6 merely sets forth general principles to construct adequate "231 Models", scholars and legal practitioners deplore the lack of more specific and certain criteria as well as the absence of practical guidelines for conducting a proper risk assessment[30]. However, as also specified by the Government Report on the Decree, law cannot outline in abstract terms all the characteristics for a perfect "231 Model" as an adequate and effective model can only be constructed on the basis of the business reality each company faces.

Pursuant to Art. 6, par. 3 of the Decree, according to which corporations may adopt their own "231 Models" on the basis of codes of conduct drawn by industry associations and declared suitable by the Justice Ministry, Confindustria, the main Italian association representing manufacturing and service companies, provided specific guidelines for the adoption of an adequate compliance

28. Tribunal of Taranto, Office of the Preliminary Investigation Judge, Preventive Seizure Decree, 22 May 2013, in response to Application No. R.G.N.R. 938/2010.

29. Applications Nos. 54414/13 and 54264/15.

30. *See, e.g.*, Mongillo, V., *Il giudizio di idoneità del modello di organizzazione ex d.lgs. n.231/2001: incertezza dei parametri di riferimento e prospettive di soluzione*, in *La responsabilità amministrativa delle società e degli enti*, 3, 2011, p. 69 ss.

model[31]. According to Confindustria Guidelines, anessential element of the "231 Model" is the adoption of a policy commitment on ethical principles relevant to the prevention of 231 offences, that is in line with the features described by UN Guiding Principles (Principle No. 16).[32] However it must be clarified that these guidelines are not compulsory, and their adoption is not a guarantee for avoiding liability. The Italian courts have clarified on several occasions that adoption of a "231 Models" according to the Confindustria guidelines does not, *per se*, exonerate the company from liability because the model needs to be implemented *effectively* in practice[33].

According to the case law, in order to be adequate, the "231 Model" should not merely constitute a generic repetition of the legal provisions, but should be based on a specific and exhaustive risk assessment and should provide for concrete measures to prevent the commission of crimes[34].

In addition, an adequate "231 Model" should also coordinate with workplace health and safety risk management system[35].

2.3.2. Effectively Implemented "231 Model"

In order to benefit from the legal protection of the "231 Model", companies not only have to adopt adequate organisational models, but also have to effectively implement them. According to the case law, the judge has to carry out an *ex ante* evaluation in order to ascertain concretely whether, before the commission of the offence, the involved company had adopted a "231 Model" that could be considered effective to prevent the crime that occurred later[36].

For an effective implementation of "231 Models", Art. 7, par. 4 of the Decree requires periodic evaluations and adjustments as well as a disciplinary system to punish non-compliance.

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31. Confindustria Guidelines are available at https://www.confindustria.it/notizie/dettaglio-notizie/linee-guida-confindustria-231-modelli-organizzativi. In February 2019, a document was published entitled "Principi consolidati per la redazione dei modelli organizzativi e l'attività dell'organismo di vigilanza e prospettive di revisione del d.lgs. 8 giugno 2001, n. 231" establishing new consolidated principles for the drafting of "231 Models". This document was prepared by Consiglio Nazionale dei Dottori Commercialisti e degli Esperti Commercialisti (CNDCEC) with the collaboration of Associazione Bancaria Italiana (ABI), Confindustria and Consiglio Nazionale Forense. Full text available at: https://www.commercialisti.it/documents/20182/323701/allegato+informativa+2_2019_documento+231.pdf.

32. Principle 16, Policy commitment : « As the basis for embedding their responsibility to respect human rights, business enterprises should express their commitment to meet this responsibility through a statement of policy that:
(a) Is approved at the most senior level of the business enterprise;
(b) Is informed by relevant internal and/or external expertise;
(c) Stipulates the enterprise's human rights expectations of personnel, business partners and other parties directly linked to its operations, products or services;
(d) Is publicly available and communicated internally and externally to all personnel, business partners and other relevant parties;
(e) Is reflected in operational policies and procedures necessary to embed it throughout the business enterprise ».

33. Cass. Pen., sez. II, judgement No. 327/2013; Cass. Pen., sez. II, judgement No. 4677/2013; Cass. Pen., sez. II, judgement No. 11209/2016. The Supreme Court stated that even if the corporation adopts "*organisational and management models*" in compliance with ethical codes and Confindustria's Guidelines, it can still incur liability if the model exists only "on paper" and has not been effectively incorporated into the corporate structure.

34. Tribunale di Milano, Ord. 9 November 2004.

35. Legislative Decree 9 April 2008, No. 81, « *Attuazione dell'articolo 1 della legge 3 agosto 2007, n. 123, in materia di tutela della salute e della sicurezza nei luoghi di lavoro* » introduced workplace safety obligations to be implemented by employers and, at the same time, added manslaugh*ter* and serious bodily harm as a result of the breach of health and safety standards to the list of L.D. No. 231/2001 predicate offenses. According to L.D. No. 81/2008, all companies that have at least one employee or one contractor must draft a written "Risk Assessment Document" (*Documento di Valutazione dei Rischi – DVR*). Art. 30 of L.D. No. 81/2008 also lists specific requirements to be met by "231 Models" with regards to workplace safety issues. In addition, Art. 30, par. 5, L.D. No. 81/2008 exempts corporations from 231 liability when their "231 Models" are compliant with the rules on health and safety of workers provided by UNI-INAIL 2001 guidelines or British Standard OH-SAS 18001: 2007. However, even in this case, the release from liability is not automatic, as the independent requirement of *effective* implementation still applies. The adoption of a "231 Model" compliant with the requirements provided by Art. 30, L.D. No. 81/2008 has led to the acquittal in several cases against the Italian rail company, Rete Ferroviaria Italiana RFI (Trib. Catania, IV sez. pen., sent. n.2133 del 14 aprile 2016; Trib. Milano, VI sez. pen, sent. n.7017 del 26 giugno 2014, confirmed by the Court of Appeal).

36. *Ex multis* Trib. di Milano, Giudice per le indagini preliminari, 8 gennaio 2010. For a commentary on the relevant case law, *see* Garofoli, R., *Il contrasto ai reati di impresa nel d.lgs. N. 231 del 2001 e nel d.l. n. 90 del 2014: non solo repressione, ma prevenzione e continuità aziendale*, at https://www.penalecontemporaneo.it/d/4175-il-contrasto-ai-reati-di-impresa--nel-dlgs-n-231-del-2001-e-nel-dl-n-90-del-2014--non-solo-repressi.

On the operational level, in order to be *effective* a "231 Model" must therefore provide specific protocols for planning and implementing the process of decision-making as well as suitable measures to prevent criminal activity and to promptly identify and eliminate risky behaviour. Companies can reduce the risk that a particular activity gives rise a 231 predicate crime by enacting detailed and specific regulations for that activity. In particular, the "231 Model" should exactly identify, with regard to each activity, who is responsible for making decisions, the criteria for decision making, and the precise rules for documenting each decision and its implementation[37].

The case law also emphasises the importance of prompt revisions to the Model in order to adapt to changes in the relevant legislation, internal organizational changes, or the results of any internal or judicial investigation[38].

An internal and independent supervisory body (*Organismo di Vigilanza*) oversees the implementation of the Model, monitors its effectiveness, evaluates compliance, and ensures that the Model is updated. This body must be autonomous and be able to act on its own initiative and conduct monitoring[39]. The supervisory body collects information and proposes sanctions. Company's employees and managers may not interfere with the operations of the supervisory body. Moreover, a fair compensation must be paid to the supervisory body members, who must have relevant specialized knowledge and skills.

In order to help the supervisory body collect information, the Decree was recently amended to introduce a mechanism for whistleblowing. The internal whistle-blowing mechanisms set out in the model protect the reporting of unlawful conducts (Art. 6, par. 2*bis*, introduced by Law No. 179/2017[40]), thus making it easier for the supervisory body to carry out its tasks. The identity of the whistle-blower must be kept confidential, and retaliatory or discriminatory measures are forbidden. If the corporation does not guarantee the protection of the whistle-blower, sanctions are applied.

In addition, Confindustria Guidelines include specific recommendations about the supervisory body, its tasks, its role and its subjective requirements. According to the Guidelines, the supervisory body should be able to activate the company's internal disciplinary system to punish non-compliance with the "231 Model" (which in turn should define procedures and criteria for the application of such sanctions). The organisation of this supervisory function is a central issue in the context of L.D. No. 231/2001, as the Decree's aim is the identification and management of risks, in order to promote a shift in the culture of corporate governance. While the adoption of the "231 Model" is formally a voluntary – i.e. there is no sanction merely for failing to institute a compliance system – the company will be presumed guilty in case a crime is committed by an employee and the company does not have a model in place.

This shift in corporate culture driven by L.D. No. 231/2001 unfortunately does not include the obligation to communicate externally to the stakeholders the identified risks and the measures adopted to prevent them, as required by the UNGPS. The human rights due diligence obligation to communicate how impacts are addressed by a company is only partially addressed by L.D. no. 254/2016 implementing EU Directive 2014/95/EU on non-financial reporting. This Decree requires companies to include in their non-financial statements a description of the "231 Model" eventually adopted. However there is no specific obligation to disclose to stakeholders the content of the "231 Model" and/or the procedures implemented to prevent crimes that are also human rights violations.

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37. Trib. di Napoli, GIP, sez. XXXIII, ord. del 26 June 2007, in *Rivista231,* www.rivista231.it.

38. Tribunale di Milano, Sez. riesame, Ord. 28 October, 2004, within the socalled "*Siemens AG*" case.

39. L.D. 231/2001 art. 6(1)(b).

40. Law November 30 2017, no. 179, on whistle-blowing ("*Disposizioni per la tutela degli autori di segnalazioni di reati o irregolarità di cui siano venuti a conoscenza nell'ambito di un rapporto di lavoro pubblico o privato*",

3. Sanctions and procedural considerations

As explained above, the L.D. 231/2001's requirement of an effective crime prevention model is complemented by a complex system of sanctions and procedural rules that the criminal judge should apply in case of non-compliance. The Decree is therefore a synthesis between preventive and punitive measures and in this respect represents a useful example in the current debate on mandatory HRDD.

3.1. Sanctions

The finely tuned sanctions regime for L.D. No. 231/2001 is sophisticated and it is based on the principles of legality, proportionality and adequacy. Over time, the range of applicable administrative sanctions (which, as described above, are applied by a criminal judge within a criminal proceeding) has become quite broad and diverse, depending on the characteristics of the company receiving the sanction.

The Decree includes different types of sanction from pecuniary fines (Arts. 10-12), disqualification sanctions (Arts. 9, par. 2, 13 - 17, 23), seizure of the proceeds or profit of crime (Art. 19) and the publication of the sentence (Art. 18).

Disqualification sanctions have a serious impact on corporate activities, as they entail the suspension or revocation of authorizations or licenses as well as exclusion from financial benefits and funds. Considering this, the Decree in theory prescribes these sanctions only for the most serious cases that meet certain conditions (Art. 13 of the Decree). Nevertheless, in practice, these sanctions are commonly applied by judges, both as punitive and as precautionary/protective measures (in addition to preservation and preventive seizure).

3.2. The burden of proof

L.D. No. 231/2001 bases the administrative responsibility of legal entities on the concept of organizational fault – i.e. a systemic failure of management and control. As noted above, the Decree establishes two presumptions: a relative presumption of liability of the corporation in the case of a violation committed by a high-level employee; and a negative presumption when the company, prior to the commission of the crime, had adopted and effectively implemented a "231 Model" and the crime is committed by a low-level employee. Correspondingly, the Decree establishes a differential burden of proof depending on the level of responsibility of the employee who commits the crime.

In order to be exonerated from liability when the crime is committed by a high-level employee, **the corporation must prove** that, before the commission of the crime, it had adopted and effectively implemented a compliance program that was capable of preventing crimes similar to the one at issue. Furthermore, the entity must prove that the application of the "231 Model" is subject to supervision by an independent body with autonomous powers of initiative and control and that Model was, in fact, properly supervised sufficiently with no material omission of duty. Finally, the company must prove that the offender employee committed the crime in a fraudulent way, so as to evade detection and control by the "231 Model". Thus, under L.D. No. 231/2001 a company may be liable simply due to its lack of commitment to take the necessary precautions to prevent the crime.

The burden of proof shifts dramatically when the crime is committed by an employee managed or supervised by persons holding senior positions. In this case, **the Public Prosecutor must prove** that the criminal conduct was made possible by the company's non-compliance with managerial and supervisory obligations.

3.3. Admissibility of the civil action and victims' rights

In the Italian legal system, the victims of a crime may directly institute a civil action (*costituzione di parte civile*) against the author of the crime, as part of the criminal proceedings (Art. 24 of the Italian Constitution). This raises the following question: is the *parte civile* mechanism available in a proceeding under L.D. No. 231/2001, whose liability regime is formally a type of administrative responsibility, but which generally applies criminal procedure and unfolds in the course of a criminal proceeding?

The question is controversial because, as noted above, the Italian system formally recognizes criminal responsibility only on the part of physical persons – not legal entities – and the prerequisite for *costituzione di parte civile* is the commission of a crime, not an administrative offence. L.D. No. 231/2001 itself makes no reference to civil actions.

The case law is, in fact mixed on this point. On one hand, the Italian Supreme Court has ruled that civil action against legal entities are inadmissible in L.D. No. 231/2001 proceedings[41].

On the other hand, trial courts have granted victims the right to institute civil actions and claim compensation against corporations under L.D. No. 231/2001. In the *ILVA* case, the Court of Taranto noted that even if the Decree does not specifically address the rights of victims to bring a civil action for damages directly caused by the corporation, pursuant to the general rule set forth in Arts. 34 and 35 of L.D. No. 231/2001, the provisions of the Code of Criminal Procedure concerning defendants also apply to a corporation that is deemed liable under L.D. No. 231/2001[42]. Recently, the Court of Trani applied the same reasoning in the *Andria/Corato train wreck* case, concluding that victims may bring civil actions and claim compensation against corporations within proceedings under the Decree[43].

It is also worth noting that even if civil actions are not authorized, the Decree does take into account the expectation that persons who have suffered damages as a result of corporate crime should be compensated. Specifically, corporations must pay damages in order to avoid disqualification sanctions (Art. 17) and the seizure of the proceeds or profits of crime (Art. 19); such payment is also grounds for a reduction in the fines levied against the company (Art. 12).

3.4. Extraterritorial effects and case law

Corporations and multinational groups that conduct part of their business abroad can also incur liability under L.D. No. 231/2001. The Decree applies the following rules, depending on whether the crime was committed in Italy (in part or in whole) or outside of Italy:

a) In case of **crimes committed in Italy**, **foreign corporations** can be sanctioned pursuant to L.D. No. 231/2001 as well as Italian companies. Italian criminal law applies indeed to any person within Italian territory, irrespective of nationality (Art. 3 of the Italian Criminal

41. Cass., Sez. VI, 5 October 2010, n. 2251

42. Corte di Assise di Taranto, ord. 4 October 2016.

43. Tribunale di Trani, ord. 7 May 2019.

Code). Based on this principle, national courts have stated that foreign companies can be sanctioned pursuant to L.D. No. 231/2001 for offences committed in Italy (see below).

b) According to the principle of territoriality expressed by Art. 6 of the Italian Criminal Code, a crime is considered committed in Italy when **part of the criminal action or omission happened within Italian territory**. Any part of the criminal action or omission that took place in Italy is sufficient to trigger Italian jurisdiction for all involved parties, which means that both foreign companies (for example, foreign subsidiaries of Italian companies) and Italian companies operating abroad can be held responsible for such crimes. No further requirements will be needed to affirm the Italian jurisdiction over the crime.

c) L.D. No. 231/2001 can also apply to certain **offences that occurred entirely abroad** (Art. 4). Corporations whose main place of business is in Italy may be liable under L.D. No. 231/2001 for the crimes listed in Arts. 7 to 10 of the Italian Criminal Code[44], even if they were committed entirely abroad. The Decree applies as long as such crimes were committed by their employees and for their benefit or in their interest, and the State where the violation took place has not initiated a prosecution against the corporation. For crimes or in cases where the law requires the Ministry of Justice to request prosecution, the same requirement applies to proceedings under the Decree.

The best way to understand the extraterritorial effects of L.D. No. 231/2001 is to examine the caselaw.

Foreign companies operating in Italy: the Siemens AG case

The 2004 Siemens AG case[45] – one of the first ever applications of L.D. No. 231/2001 – concerned a bribery scheme in which the Commercial Director for Europe for German multinational Siemens AG, a Sales Manager and a consultant paid several million euros to the managing directors of Enel Produzione and Enel Power, using funds from current bank accounts traceable to Siemens, to ensure that Siemens would be favoured in the awarding of contracts for the installation of gas turbines in Enel Power plants. Siemens, while based in Germany, operated in Italy only through a temporary association of companies. The court ordered precautionary measures against Siemens, prohibiting the company from contracting with public authorities for one year, and concluded that foreign companies can be sanctioned pursuant to L.D. No. 231/2001 for offences committed in Italy by their top managers or subordinates. The court found that foreign companies can be sanctioned under L.D. No. 2001/231, even if their home jurisdictions lack an analogous regulatory regime: "Both foreign natural and legal persons, whenever working in Italy […] have the duty to comply to Italian laws and enforce them and this includes Legislative Decree No. 231 of 2001, L.D. No. 231/2001, regardless of the existence in the country of belonging of rules that regulate the same subject in a similar way".

Despite some criticism of this ruling by some scholars, it was confirmed by the Review Court of Milan[46]. The Review Court reasoned that liability was attached by virtue of the criminal act and the organisational fault, and not the failure to adopt a "231 Model" (which is a means to

44. This provision establishes universal jurisdiction over a set of serious offences against national Int*eres*t, such as coun*ter*feiting currency, crimes for the purposes of *ter*rorism or subversion of democracy or « political » crimes.

45. Tribunale di Milano Giudice per le indagini preliminari, Ord. April 27, 2004.

46. Tribunale di Milano, Sezione del Riesame, Ord. October 28, 2004.

exonerate the company from liability but is not mandatory). Thus it was appropriate to apply 231 sanctions to a foreign company, regardless of whether the laws of the company's home country provide for organisational models or codes of conduct like L.D. No. 231/2001.

This reasoning was recently applied by the Court of Lucca in its judgement arising from the Viareggio train wreck[47]. On the evening of June 29, 2009 a freight train derailed at Viareggio. Two cars carrying Liquefied Petroleum Gas (LPG) exploded, starting a fire that caused 32 deaths at the station of Viareggio and in the surrounding areas. The Court of Lucca convicted 23 people, including the CEO and other managers and officials of Ferrovie dello Stato and other companies of the same Group, as well as managers of the companies that owned, managed, and maintained the rail lines and the train. The Court also held proceedings pursuant to L.D. No. 231/2001 and ultimately found liability on the part of Italian rail company Ferrovie dello Stato, its subsidiary RFI, and the foreign companies that owned the convoy that was derailed and were in charge of its maintenance. These companies were deemed responsible pursuant to Art. 25-septies of the Decree for murder and personal injuries incurred as a consequence of the disregard of workplace health and safety laws by corporate managers. Although the foreign companies did not establish their headquarters in Italy, they operated on Italian territory (either by renting tanker cars to an Italian company, or through maintenance activities), and were thus obliged to comply with the regulations in force in Italy. The decision has been substantially confirmed by the Appeals Court of Florence[48].

Crimes committed partly in in Italy and partly abroad (Art. 6 of the Italian Criminal Code): the Snamprogetti case and the case against Eni and Shell

The Snamprogetti (Saipem) case[49] concerned an international corruption of more than 187 million dollars paid to high-level Nigerian public officials, including Heads of State, members of the Executive, presidents of state-owned Nigerian National Petroleum Corporation and other parties. The bribes were paid by TSKJ – an ad hoc, transnational joint venture created by Technip (France), Snamprogetti S.p.A. (Italy), Kellogg (U.S.) and the Japan Gas Company – to obtain contracts worth 6 billion dollars for the construction of a natural gas liquefaction plant.

In order to avoid any direct connection to the "Nigerian affair" Snamprogetti incorporated a wholly-owned foreign subsidiary, Snamprogetti Netherlands, a fictional smokescreen that served merely to cover up the involvement of the Italian parent company. This gambit failed, though; the trial court found (and the Supreme Court confirmed) that Snamprogetti S.p.A could be held responsible because the offense had been partly committed in Italy pursuant to Art. 6 of the Italian Criminal Code. The Supreme Court took a broad view of the requirement that the crime must occur partly in Italy, holding that "it is sufficient that the mere conception of the crime has occurred in Italy, although the remaining conduct has been implemented abroad". In this case, the judges ascertained that the Dutch subsidiary had been managed from Snamprogetti's headquarters in San Donato Milanese, where all strategic and organizational decisions were taken.

The so-called "OPL 245 case" against Eni and Shell[50], will provide another test of the application of L.D. No. 231/2001 to foreign companies for crimes that occurred only partly in Italy. The case involves corruption surrounding a Nigerian oil block, OPL 245, that is estimated to be

47. Tribunale di Lucca, July 31, 2017, Dec. No. 222.

48. Corte d'appello di Firenze, June 20, 2019, Dec. not published yet.

49. Cass. Pen., Sez. VI, 12 February 2016, Dec. No. 11442.

50. The case is still pending before the Court of Milan.

one of the largest oil fields in Africa and is a centrepiece of new offshore oil development in Nigeria. Shell and Eni acquired the block in 2011 by paying $1.3 billion dollars to the Nigerian government. However, internal Shell emails that were leaked to the press in 2017 reveal that senior executives knew most of the massive payment for OPL 245 would go to the block's previous owner, Malabu Oil, and one of Malabu's significant shareholders, Dan Etete. Etete was Nigeria's former oil minister and had been convicted for money laundering in a separate matter.

The trial, which opened in March 2018, involves, together with their companies, Senior Eni and Shell executives, including Eni's current CEO, Claudio Descalzi, Eni's former CEO, Paolo Scaroni, Eni's Chief Development Operations and Technology Officer, Roberto Casula, Shell's former Executive Director for Upstream International, Malcolm Brinded, and two former MI6 agents employed by Shell to negotiate the transaction. Italian authorities have already frozen a total of some $195 million relating to the deal in the UK and Switzerland. The first substantive hearing on the case took place in June 2018.

4. Strengths and weaknesses of L.D. No. 231/2001 to enhance the regime of responsibility of legal entities in EU

With its almost twenty years of application L.D. 231/2001 can provide interesting elements for an EU legislation on mandatory HRDD. The main strengths and weaknesses in relation to an effective and comprehensive mandatory HRDD legislation are summarized below[51] along with specific proposals of reform.

First of all it is necessary to clarify again that L.D. no. 231/2001 does not expressly provide for a legal obligation to carry out mandatory due diligence process adopting the "231 Model", but it creates a strong incentive to its adoption considering that the implementation of an adequate compliance program is the only mean to exonerate a company from corporate administrative liability[52].

Scope of human rights protected

The crimes listed in L.D. No. 231/2001 cover most of the categories of severe human rights abuses identified by 2016 UN OHCHR guidance (including severe environmental crimes)[53]. The list of the relevant offences has been constantly updated during time. However, this list does not currently cover all human rights abuses that represent criminal offences in International law and for which corporate criminal liability is already included in International treaties.

Content of the due diligence obligations[54]

In order to avoid liability, L.D. No. 231/2001 substantially requires business enterprises to undertake an ongoing due diligence processes to identify, prevent, mitigate and (internally) account for how they address specific crimes that are also severe human rights violations and environmental impacts.

UNGPs require companies to involve a meaningful consultation with relevant stakeholders in order to identify human rights risks[55]. Stakeholders engagement is not expressly required by L.D. No. 231/2001. The Decree was recently amended to introduce a mechanism for whistleblowing allowing internal stakeholder to report unlawful conducts. Further mechanisms to consult with relevant stakeholders should be added to the legislation.

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51. The following analysis is inspired by the key features of mandatory human rights due diligence legislation as identified in the homonymous ECCJ position paper of June 2018, http://corporatejustice.org/eccj-position-paper-mhrdd-final_june2018_3.pdf.

52. A draft proposal introducing mandatory organisational, management and control models under L.D. no. 231/2001 for all limited companies with a certain annual profit is currently pending in the Italian Parliament (see above).

53. The following crimes that are also mentioned in the « *OHCHR Accountability and Remedy Project* » are included in L.D. No. 231/2001:
    - participation in acts amounting to in*ter*national crimes (L.D. No. 231/2001, Art. 25 *quater* includes in particular the crime of *ter*rorism);
    - murder and severe physical assault (even if limited by Art. 25 *octies* of the Decree to non-intentional offences deriving from violations of work-safety rules);
    - use of forced labour (Art. 25 *quinquies*);
    - slavery practices, e.g. human trafficking (Art. 25 *quinquies*),
    - use of child labour (in specific cases under Art. 25 *quinquies*);
    - serious breaches of workplace health and safety laws (Art. 25 *octies*);
    - serious breaches of consumer safety standards (in specific cases under Art. 25 *bis*-1);
    - serious and/or large scale environmental damage (Art. 25 *undecies*).
    - See 2016 OHCHR Accountability and Remedy Project Illustrative Examples for Guidance to Improve Corporate Accountability and Access to Judicial Remedy for Business-related Human Rights Abuse, Companion document to A/HRC/32/19 and A/HRC/32/19/Add.1

54. On the mandatory/voluntary nature of the due diligence obligations related to the adoption of the « 231 Model » see above.

55. UN Guiding Principle No. 18.

UNGPs require companies to account for how they address their human rights impact communicating this also externally to affected stakeholders[56]. To this regard, a major weakness of L.D. No. 231/2001 is the lack of an obligation to communicate externally human rights risks and the measures to prevent them.

Reach of the due diligence obligations

L.D. No. 231/2001 does not explicitly refer to corporate groups and to the entire supply chain. Criminal Law principles prevent any automatic application of the Decree to companies belonging to the same group. However, according to the case-law the parent company may be considered accountable under L.D. No. 231/2001 for crimes committed by other members of the same group or down the supply chain in case of aiding (see above). Moreover, preeminent reference guidelines for the creation and adoption of "231 Models" recommend companies to cover the entire corporate structure, as well as their business relationships.

Liability and access to justice

L.D. No. 231/2001 provides for substantial sanctions of different nature, varying from significant pecuniary fines to disqualification sanctions, as well as seizure of crime profits.

L.D. No. 231/2001 provides for a reversal of the burden of proof in case of offences committed by high-level employees (see above). The Public Prosecutor's powers of investigations allow to overcome the deficiencies related to very limited access to evidence in Italian civil procedural law that are typical of civil law systems. Moreover, when Italian Criminal courts have jurisdiction (see above), Italian Criminal Law and Procedure applies. However, it must be considered that Criminal Law typically requires a high burden of proof. In particular, it might be challenging for the prosecution to satisfy the burden of proof especially with regard to crimes committed abroad or to prove aiding and abetting for crimes committed within a subsidiary or within the supply chain. In addition, with regard to unintentional crimes it might be challenging to prove the causal link.

Admissibility of the civil action against the corporation within the 231 trial is currently controversial. This deficiency may reduce the possibility for victims to obtain adequate compensation directly from the company and to participate with a more active role in the 231 trial (see above).

In light of the above and according to the analysis conducted so far in this document, we consider that L.D. No. 231/200 should be further strengthened in order to become even more compatible with human rights due diligence outlined by the UNGPs.

Recommendations to the Italian government:

- To make the adoption of "231 Models" compulsory for large companies with a certain annual turnover and for small or medium sized enterprises operating in high-risk contexts[57]. This reform may also have the potential to trigger civil liability for non-compliant companies.

- To introduce greater transparency obligations. In particular, companies should be required to fully disclose to potentially affected stakeholders their "231 Models" or at least the

56. UN Guiding Principle No. 21.

57. See Commission Recommendation (EU) 2018/1149 – The European Commission has published their non-binding guidelines for the identification of conflict-affected and high-risk areas and other supply chain risks under Regulation (EU) 2017/821 of the European Parliament and of the Council: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32018H1149

procedures implemented to prevent crimes that are also human rights violations or environmental abuses.

- To extend the list of human rights abuses that can trigger 231 liability by including war crimes, crimes against humanity and genocide, enforced disappearance, extrajudicial execution, intentional murder, the use of child soldiers, forced eviction, forced displacement of people, sexual and gender-based violence.

- To include adequate mechanisms to conduct meaningful consultations with relevant stakeholders.

- To ensure that the law unequivocally recognizes the admissibility of civil action against the corporation for trials under L.D 231.

- To include a more exhaustive definition of the functioning and composition of the supervisory body (*Organismo di Vigilanza*) and more precise criteria of the adequate model in the L.D 231.

Finally, we hope that the analysis provided in this document and the strengths and weaknesses highlighted here with respect to the L.D. 231/01 and its application will substantially contribute to the current debate on a future EU legislation on mandatory Human Rights Due Diligence. We consider that such legislation, that needs to be built on the great experience developed by civil society on the issue, is more necessary than ever at European level to improve accountability for corporate human rights and environmental abuses and to achieve a greater level of policy coherence on this topic among Member States.

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