

ANTI-MAFIA CODE AND 231 MODELS: AN OPPORTUNITY FOR IMPROVEMENT (?)

Vittoria Drosi¹
e-mail: vdrosi@luiss.it

Abstract

The research aims to understand whether, and to what extent, there are currently suitable institutions for the implementation of prevention and restoration of legality in the corporate sphere in the Italian legal system. These, if properly applied, should enable the enterprise to transform a negative event, such as mafia infiltration in its various forms, into an opportunity for improvement itself. More specifically, an attempt will be made to assess the ability of institutions such as judicial administration (Art. 34 of the Anti-Mafia Code - Legislative Decree No. 159/2011), judicial control (Art. 34-bis), voluntary judicial control (Paragraph 6, Art. 34-bis), preventive cooperation (Art. 94-bis), and organizational and management models under Legislative Decree No. 231/2001 (so-called Models 231) adopted ex post facto to put the company back on the correct path of legality.

Keywords: judicial administration (Art. 34 Legislative Decree No. 159/201), judicial control (Art. 34-bis Legislative Decree No. 159/201), Anti-Mafia Code – Legislative Decree No. 159/2011, preventive cooperation (Art. 94-bis Legislative Decree No. 159/201), 231 Models – Legislative Decree No. 231/2001

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Legal and social framework

In the Italian legal system there are many instruments that should have the ability to bring a “deviant” legal entity back into the correct path of legality².

¹ PhD Candidate in Law and Business (criminal law IUS 17), Law degree, Department of Law, Luiss Guido Carli Roma, Rome, Italy

² The core of this work will be focused on the prevention systems provided for, and regulated by, the so-called Anti-Mafia Code (Legislative Decree No. 159/2011, as amended), but there are other institutions that share its logic and purposes.

We refer to the entire system of repression of crimes committed by a person within the legal entity, in the interest or to the advantage of the legal entity itself, regulated by Legislative Decree No. 231/2001.

Specifically, the system incentivizes, on the one hand, from a prevention perspective, the ex-ante adoption of corporate compliance models to obtain exemption from liability, and on

This work will focus on a deviant legal entity³, not because crimes have been committed within it, but because there is a suspect that it is close to Mafia association⁴.

I am not referring to the mafia business hypothesis, because this is intended to be subjected to confiscation⁵.

I am referring, on one hand, to the company subjected to intimidation and subjugation, or otherwise able to facilitate the activity of the mafia association⁶, and on the other hand, to the cases in which this situation is even only occasional⁷.

In either case, it would be unreasonable to expel the company from the economic system, but a way out must be offered: either a chance to recover, or a period to prove that it is not conditioned by the mafia association.

This is an important requirement, especially when it comes to a company that operates in widespread crime settings, and therefore almost no local businesses would be safe.

the other hand, from a restorative perspective, the adoption in progress in order to obtain a reduction in fines, and the non-application of disqualification penalties.

See, for a complete overview of the tools of the corporate criminal liability in Italy Lattanzi, Severino, (a cura di) (2020) and De Vero (2008).

Our legal system knows other institutions of prevention and restoration of legality in the corporate arena, such as the extraordinary measures of management, support and monitoring of companies in the context of the prevention of corruption (Article 32 of Decree-Law No. 90/2014); measures that operate on the reputational level, such as legality protocols and compliance programs; and the company rating regulations Code of Public Contracts.

³ I do not focus in this paper on the preventive measures of the Anti-mafia Code issued against individuals. For a complete analysis of these tools see, also for a literature review, Consulich (2020).

⁴ These cases are dealt with in Chapter V of Title II of the Anti-Mafia Code (Legislative Decree No. 159/2011), entitled “Capital measures other than confiscation”.

⁵ Provided for, and regulated by, Art. 24 of Legislative Decree No. 159/2011, which affects those who cannot justify the legitimate origin of assets, and of which, even by intermediaries, they are found to be the owner, in a value not proportionate to their income or economic activity, as well as assets that are found to be the fruit of illegal activities, or constitute their reuse.

⁶ See Art. 34 Legislative Decree No. 159/2011 entitled “The Judicial Administration of Assets Related to Economic Activities and Companies” provided for cases in which there is sufficient evidence to believe that the free exercise of certain economic activities is directly or indirectly subjected to the conditions of intimidation or subjugation provided for in Art. 416-bis of the Criminal Code, or may facilitate the activities of persons subject to preventive measures, or persons under criminal proceedings for serious crimes.

⁷ See Art. 34- bis Legislative Decree No. 159/2011 entitled “Judicial control of companies” provided for cases in which the facilitation mentioned in Art. 34, Para. I, is only occasional and there are factual circumstances from which the concrete risk of mafia infiltration able of conditioning its activity can be inferred.

But it is equally important even in cases where the company is a victim of the mafia association, and thus has been forced to facilitate it, and in cases where the extent of the proximity to the mafia association is not exactly identified, and in any case there are not the same situations that would have allowed a conviction in a criminal proceedings.

Judicial administration (Art. 34 of the Anti-Mafia Code – Legislative Decree No. 159/2011)

In order to cope with all these situations, the legal system has set up two institutions.

First, the institution of judicial administration has been provided in the case of structural facilitation⁸. This is an invasive instrument as it involves a kind of “dis-possession” of the company⁹.

This tool can be used independently of being subjected to conditions of intimidation or subjugation, i.e., in cases where the company facilitates the activities of persons subject to preventive measures, or persons subject to criminal proceedings for serious crimes¹⁰.

These additional situations that legitimize the application of judicial administration make it a complementary tool to the corporate criminal liability system, and no longer an exclusive tool to fight mafia-type associations (see Vulcano, 2023).

The application of the institute of judicial administration does not require either that the facilitated activity be of illegal nature (it is sufficient that the facilitated person is even only proposed for a preventive measure or subject to criminal proceedings for one of the crimes listed in Art. 34, Legislative Decree No. 159/2011) or that the economic activity having a facilitative character be exercised in an illegal manner.

It is sufficient, in fact, that this activity has provided some support to the above-mentioned subjects.

⁸ It is an institute that was already present in our legal system before 2011, see Art. 3-quater Law No. 575/1965.

⁹ See Art. 34, Para. III, Legislative Decree No. 159/2011, according to which the Tribunal nominates the delegated judge and the judicial administrator, who exercises all the faculties pertaining to the owners of the rights to the property and companies subject to the measure. In the case of enterprises operated in corporate form, the judicial administrator may exercise the powers vested in the administrative bodies and other corporate bodies in the manner determined by the court, taking into account the needs for the continuation of business activity.

¹⁰ Specifically, the crimes under art. 4(b) and (i-bis), anti-mafia code; articles 603-bis, 629, 644, 648-bis and 648-ter of the Italian Criminal Code.

The businessman (the one who carries out the facilitating activity) must be a “third party” to the facilitated person and his assets must actually be within his disposal. If the businessman were a mere “frontman” for the facilitated party, in fact, his assets could be immediately attacked by seizure and subsequent confiscation, which can affect all the assets that the proposed party can directly or indirectly (through fictitious headings) dispose of.

In such a normative framework, the contiguity to criminal interests in terms of facilitation can constitute grounds for censure exclusively on the level of culpable liability, without obviously the manifestation drawing on the profile of full awareness of the facilitating relationship.

The latter case, in fact, is ascribable in the intentional framework of criminal law, to concurring or, at least, facilitating hypotheses.

The need to identify a perimeter of censurability of the conduct of the third-party facilitator depends on a constitutionally oriented reading of the prerequisites of the prevention measure, which tends to compress the right to freedom of enterprise guaranteed by the Constitution (Art. 41 Cost.).

The court, ordering the measure of judicial administration, blames the company for not having prepared those necessary and appropriate preventive measures to affect the risk that its economic activity may facilitate subjects against whom a preventive measure has been proposed or applied and or against whom criminal proceedings are pending against them for a serious crime identified *ope legis* by Art. 34 itself.

The company is liable because the organizational *deficit* allowed, or rather, facilitated, the adoption of the forbidden conduct by a different person.

Familiarity with the legislation regarding corporate criminal liability is evident, which provides for, among other prerequisites, the so-called “organization fault”, intended as a *deficit* of organization (Santoriello, 2023, p. 4).

Judicial control (Art. 34-bis of the Anti-Mafia Code – Legislative Decree No. 159/2011) and 231 Models

Otherwise, on the other hand, if the facilitation is only occasional, the judges can apply the judicial control¹¹. It is a tool for monitoring the company.

¹¹ See Art. 34- bis, Paras. II and III, according to which the Tribunal may:

(a) require communication of the implementation of a series of acts with a value exceeding 7,000 euros;

(b) designate a delegated judge and a judicial administrator, who reports periodically, at least bimonthly, on the results of the control activity to the delegated judge and the prosecutor.

In addition, the tribunal shall determine the duties of the judicial administrator aimed at control activities and may impose the obligation:

Both institutions are nothing more than forms of asset prevention, but different from confiscation, with the aim of implementing a new organization of economic activity moving away from the mafia association, if possible.

With reference to this second situation of occasional facilitation (objectively less serious hypothesis) the legislator itself has made a connection with the corporate compliance system and the so-called 231 organizational models, which are the core of the regulation of the system of corporate criminal liability in Italy (Para. III(d), Art. 34-bis).

In the system of corporate criminal liability, if the company has well attended to the issue of compliance by making the so-called 231 Model, even if a crime has accidentally occurred, it will be exempt from liability, because nothing can be blamed on it, because the risk of commission of crime had been minimized¹². The adoption of the model is the core of the system of corporate criminal liability and the fundamental element in the evaluation of the subjective element of criminal liability (Manacorda, 2017, p. 50).

Implementing a 231 model is a fulfilment that must be carried out with the highest degree of diligence, and therefore requires the company to spend time and resources. The system corporate criminal liability “works” only if the company can really rely on the mechanism of exemption from liability. It is necessary to be able to place “concrete reliance on the fact that full adherence to the rules will result in a ‘reward’ for the healthy corporation [...]” (Severino, 2016, p. 75).

(a) not to make any changes affecting the entity without permission from the delegated judge;

(b) to comply with reporting duties to the judicial administrator;

(c) to inform the judicial administrator in advance about any forms of financing of the company by shareholders or third parties;

(d) to adopt and effectively implement organizational measures pursuant to Legislative Decree No. 231/2001;

(e) to take any other initiative aimed specifically at preventing the risk of mafia infiltration or conditioning attempts.

This institution was not present in the original structure of the Anti-Mafia code, but was introduced by Law No. 161/2017

¹² See Art. 6 Legislative Decree No. 231/2001 according to which, the entity is not liable if it proves that:

(a) it has adopted and effectively implemented, before the act was committed, organization and management models suitable to prevent crimes of the kind committed;

(b) the responsibility of supervising the functioning and observance of the models and taking care of their updating has been assigned to a body with autonomous powers of initiative and control;

(c) the persons committed the crime fraudulently eluding the models;

(d) there has been no omission or insufficient supervision by the supervisory body.

By the way, the 231 model is almost never found to be suitable (Paliero, 2010, p. 480)¹³, and thus does not allow exemption from criminal liability, in the criminal proceedings (Assonime, 2019, p. 31).

In the system of corporate criminal liability, the 231 model, if well-made and implemented, exempts from criminal liability as long as it is adopted before the commission of the criminal act for which the trial is taking place; most often, however, the 231 model will be adopted or improved during the trial in order to obtain a reduction in fines¹⁴, and the non-application of disqualification penalties¹⁵.

The legislator has well noted that the effort made by the company must be valued, not only in the case of criminal proceedings, but also in the case of the application of asset prevention measures applied by the judge, and, as we can see later, also in the case of prevention measures applied by the public administration, specifically the Prefect (Article 84, Paras. III and IV and 4-bis Legislative Decree No. 159/2011).

So, in the case of preventive measures applied by the court, it is required to take action in adopting and implementing the 231 model.

Put in other words, in the prevention system, first the company is affected by the measure, and then, using the 231 model the company tries to “get free” from the measure itself, and avoid more serious measures.

Trying to be more specific, the company was hit by the preventive measure of judicial control because the judge considered that there are occasional attempts of mafia infiltration, and it is the judge himself that requires the company, to avoid the application of stricter instruments such as confiscation, to take action to adopt the 231 model, or implement and improve it.

Forms of administrative prevention in the case of attempted mafia infiltration

There is more: our system also knows forms of administrative prevention in the case of attempted mafia infiltration.

These situations are similar to those that allow the judge to apply property prevention measures other than confiscation.

¹³ The same author, in Paliero (2014, p. 478), which stigmatizes the uncertainty regarding the judgment on the suitability of Models and the excessive onus of proof that remains on entities in the case of offenses committed by top executives, resulting in friction with the real attribution of the principle of culpability.

¹⁴ Under Art. 12, the reduction of financial penalties can be obtained; under Art. 45, the non-application of precautionary measures is allowed; Art. 50 allows them to be cancelled.

¹⁵ Article 17 allows for the non-application of disqualification sanctions.

Specifically, companies can be affected by a prefectural measure called anti-mafia interdiction¹⁶. This is a measure that prevents the company from having any relationship with the public administration, both concession or authorization.

This is a highly feared measure because it can cause the closure of the company.

In this case, it is the company itself that asks for judicial control to be applied to it in order to suspend the effects of the anti-mafia interdiction (Art. 34-bis Para. VI Legislative Decree No. 159/2011), and the company undertakes to prepare a series of actions, including the adoption of the 231 model.

Until 2021 there was only one administrative preventive measure in our system, namely the interdiction order we have just discussed.

The measure of interdiction was applied in very different cases: whether the facilitation of mafia association was structured or occasional.

In 2021¹⁷ the legislator provided an alternative tool to the Prefect: if the facilitation is only occasional, the Prefect must apply the tool of preventive cooperation.

This is an institution that can last between 6 and 12 months, during which the company is required to meet a number of requirements, such as reporting obligations and setting up a dedicated bank account, but also adopting the 231 model¹⁸.

At the end of this period, the Prefect will have the chance to deeply analyse the company and make sure that there is no longer any facilitation, not even occasional.

¹⁶ See, for a complete overview of these tools, Mezzetti, Donati, (2020) and Amarelli, Damiani (2019).

¹⁷ See Decree Law No. 152/2021 converted into Law No. 233/2021, Art. 49, titled Collaborative Prevention, which introduced into the Anti-Mafia Code the Art. 94-bis, entitled “[m]isures of collaborative prevention administration applicable in cases of occasional facilitation”.

¹⁸ When the prefect ascertains that attempts at mafia infiltration are related to occasional facilitation situations, he shall require the company to comply with one or more of the following measures:

- a) adopt and effectively implement organizational measures pursuant to Legislative Decree No. 231/2001, suitable for removing and preventing the causes of occasional facilitation;
- b) communicate a series of acts with a value exceeding 7,000 euros.
- c) communicate any forms of financing from partners or third parties;
- d) communicate concluded partnership contracts;
- e) use a dedicated current account, even on a non-exclusive basis, for the acts referred to in (b), as well as for the financing referred to in (c),

The prefect, in addition, may nominate one or more experts, with the task of carrying out support functions aimed at the implementation of collaborative prevention measures.

Conclusion

In conclusion, Model 231 is currently the *traid d'union* between jurisdictional prevention, administrative prevention, and the system of corporate criminal liability.

It has now been 22 years since the regulation of corporate criminal liability came into force. However, in the area of corporate criminal liability, the desired results have not been achieved.

Almost never the corporation is acquitted. In the few cases in which the action is exercised, the entity is convicted. Luckily, the Prosecutor's Offices do not feel bound by the principle of mandatory prosecution under Article 112 Cost. with regard to the legal entities (Scolletta, 2016, p. 824).

The desired results have not been achieved because the legislator has not been able to define specifically what characteristics the model 231 should have; consequently, how can an organization ever be expected to conform perfectly to such an evanescent parameter?

The desired results have not been achieved perhaps also because of a hostile attitude of the judiciary, which is often based on the consideration that "if the crime was carried out, it means that the model was unsuitable": there are always margins for ex-post review (Colacurci, 2016, p. 74).

Certainly, the climate of uncertainty and this hostile attitude have stopped companies from investing time and money on models, because the chance of being sent off in the criminal trial are too low.

Nevertheless, there are now many experts (lawyers, accountants and other professional figures) who deal with corporate compliance, and that same corporate compliance, which did not satisfy the criminal judges, could, however, satisfy the prevention judges and the prefectures.

Besides, since no crime has been committed, no scapegoats are sought.

The legislator's amendments made in 2017 and 2021 to the Anti-Mafia Code explicitly recognized the great importance of 231 models.

Models 231 have enormous potentiality. They do not allow, only to decrease the chances of the realization of an act of crime, but also to prevent illegal practices and cope with all those situations that do not deserve a criminal conviction, that do not deserve an anti-mafia interdiction, and do not deserve a preventive confiscation, but deserve attention from the State to prevent them from turning into something more serious.

And even if they deserve the application of stricter measures, it is only a matter of granting a short observation period, following which stricter measures can be applied, but in a more conscious manner, while saving all those other companies for which a monitoring and support tool has proven sufficient.

“Necessity and urgency” cannot be a *pass par tout* to legitimize the freezing of every company for any possible attempts at mafia infiltration. In particular, because they are possible, because they are just attempts, and because the definition of mafia infiltration is so evanescent as to allow any interpretation.

The problem of the indeterminacy of anti-mafia interdiction is likely to remain because it is unlikely that the question of constitutional legitimacy will be raised by the regional administrative tribunals and the Council of State. These are the same judicial offices that have almost never cancelled the anti-mafia interdictions.

So the legislator has failed to fix the *deficit* of determinacy, but has, however, attempted a way to mitigate its effects.

It would seem a paradox that this additional valorisation of the 231 model was realized thanks to law-decree No. 152/2021 entitled “Urgent provisions for the implementation of the PNRR and the prevention of mafia infiltration” (Art. 49).

This is not a way to slow down the fight against organized crime.

It is merely the introduction of a tool that will make it possible to reserve the freezing of activity, only for those entities for which restoration of legality is not achievable.

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