



PhD IN LAW AND BUSINESS

XXX CYCLE

**PREVENTING CRIMES
THROUGH ORGANIZATION**

Anti-corruption compliance programs in Europe

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Abstract

The present work investigates the relationships between subjective criteria in attributing criminal liability to collective entities and anti-corruption compliance programs from a comparative perspective.

The starting point is the trend – found in the literature and supported by the analysis of relevant laws – towards a greater relevance of subjective criteria in attributing liability to collective entities. In the European area, even legal systems that are traditionally set on *indirect* or *derivative* models, where the conduct and the culpability of the natural person responsible for the crime are attributed to the collective entity – such as the *identification doctrine* in the United Kingdom and the *par ricochet* theory in France –, have recently showed significant openness towards *different* paradigms.

From this point of view, anti-corruption has proved to be one of the most interesting fields of experimentation for legislators – also with reference to liability of legal persons – and a favoured setting for the comparison among different legal systems, since it is a phenomenon with a transnational dimension, affected by conventions and *soft laws*, within the framework of a global strategy of prevention and repression.

Against this background, the first part of the present research is focused on the most relevant issues of the imputation mechanisms, in order to detect what consideration is given to subjective criteria in some European systems – United Kingdom, France, Spain – identified on the basis of the following features: *i)* criminal nature of corporate liability; *ii)* existence of imputation criteria that are different from the identification one, at least for specific crimes; *iii)* possibility of adopting *compliance programs* with the function of exemption from liability and/or attenuating circumstance.

The *dynamic* analysis of each legal system – throughout the explanation of the criteria that are used for attributing responsibility, considering the case-

law and the scholars' interpretation – highlights that, even in those countries that are the most reluctant to admit a 'personal' connection between the offense and the legal entity, movements in this direction have been identified, and that derivative models of liability have proved ineffective. Even if differences among countries should be considered, the 'lack of organization' appears to be the possible foundation for the attribution of liability *directly* to corporations, without any link to the liability of natural persons; this fits into the context of the growing importance, within organisations, of *compliance* – that is supposed to address and reduce also the crime risk.

In this perspective, the provisions laid down in the Legislative Decree No. 231/2001 – focused on the importance of compliance programs – is a high developed example in which the lack of organization and the compliance program blend together in a modern interpretation of corporate liability. The central part of this research deals with the main characteristics and the structure of the complex mechanism of imputation defined by the Italian legislator in 2001, with the aim of verifying to what extent the *organisational fault* has been accepted and transposed into the Decree. Great attention from both dogmatic and applicative points of view has been focused on the content of Articles 6 and 7 of Legislative Decree No. 231/2001, which are structured in different ways depending on the author of the predicate crime.

The research focuses then on the many functions that the compliance programs can have in the '231 system', directing the analysis towards the features of *anti-corruption compliance programs*. After the reform under Law No. 190/2012, the Italian approach to corruption focuses on two levels of intervention: besides *repression*, the legislator has considerably enhanced *prevention*, establishing the National Anti-corruption Authority (Autorità Nazionale Anticorruzione, ANAC) and a national anti-corruption plan (Piano Nazionale Anticorruzione), and introducing more incisive anti-corruption duties for public authorities, based on three-year anti-corruption plans, adopted by each public organization. The combination of both compliance

programs in the private sector and anti-corruption plans in the public sector represents an advanced and interesting regulatory solution, examined in order to highlight convergences and differences and to introduce the main points of reference for comparison on these topics.

As noted in the final section of this research, other legal systems appear to be moving towards a similar direction. In other words, the examination of the anti-corruption laws adopted in the United Kingdom, with reference to the *Bribery Act 2010*, of the latest reform implemented through the *Loi Sapin II* in 2016 in France, and of the Spanish law, very similar to the Italian one, brings to light the importance of preventive measures and *compliance programs*. The research, as far as the fight against corruption is concerned in both private and public sectors, points out an approximation of widely different legal systems, under the impact of the supranational laws and throughout the ‘dissemination’ of legal models, highlighting the link between culpability of collective entities and lack of organization in the currently prevailing imputation criteria.

In the conclusions, the most relevant data emerging from the comparison between the different legal systems are reported, pointing out how some pre-trial diversion programs developed in the foreign countries examined – in particular, the *deferred prosecution agreements* in the United Kingdom and the *convention judiciaire d’intérêt public* in France –, if properly revised and adapted to a different context, can be taken into consideration in the perspective of the future reform of the Italian system.