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THE ITALIAN REGULATION ABOUT ADMINISTRATIVE RESPONSIBILITY OF ORGANIZATIONS AS DECLINATION OF CORPORATE SOCIAL RESPONSIBILITY

Pietro Pavone 

eCampus University, Italy
Email: dapietro1988@gmail.com

Giuseppe Miceli

Niccolò Cusano University, Italy
Email: giuseppemiceli@live.it

Francesco Zappia

eCampus University, Italy
Email: zappiafrancesco@hotmail.com

Abstract

In a complex system such as the one where the modern enterprise is frequently operating, the search for a balance among tools available at a managerial and organizational level can lead to new paths in order to create valuable assets for the whole stakeholder community. The organizational tools offered by the Italian legislator thanks to D.Lgs. no. 231/2001 are suitable to create the so called "shared value" which is indispensable to support and develop a robust Corporate Social Responsibility over time. The aim of present paper is to trace the theoretical foundations of corporate social responsibility and corporate governance then interpret these concepts within a Management, Organization and Control Model proposed by the above mentioned law. The main variables that affect the development of the cited Model are being analyzed and a correct classification is being suggested within an integrated control system.

Keywords: Corporate Social Responsibility, Administrative Responsibility, Corporate Governance, Control Environment

1. Introduction: the theoretical foundation of social responsibility

The so called Corporate Social Responsibility (CSR)¹ describes the relationship between enterprise and company and is one of the strategic tools apt used to create a more socially

¹ The concept of Corporate Social Responsibility originated in the second half of the twentieth century, in the United States. Bowen, known in literature as the "father of CSR" is credited to be having carried out the first analysis on the subject itself.

cohesive and competitive company². The access to EU agenda was created by Lisbon European Council in March 2000³.

The European Commission itself enacting communication no. 681 of October 25, 2011, re-examined and approved the notion previously expressed and offered a new definition of CSR. According to the European Union, CSR represents a system capable of integrating the satisfaction of the clients' needs with the expectations of all the other stakeholders.

As a result of CSR, it's likely to achieve - beyond regulatory obligations - the best practices that better takes the virtuous enterprise towards the achievement of significant benefits and economic social, environmental and sustainable advantages. The latter are goals and benefits belonging to the whole society that is even more important than the single company. Indeed, from the first studies on social responsibility the inseparable bond that links the social question to the economic one already is getting more and more clear.

Carroll (1979) definitively criticized Friedman's (1962) thesis, which was only partially able to explain the content of the CSR, identified four components of the CSR: the economic, the legal, ethical and discretionary or philanthropic one.

The evolution of CSR concept that has been recorded in the last two decades has been seizing the most authoritative scholars' attention, who have elaborated different approaches: from the theory of integrative social contracts and corporate citizenship (Donaldson, 1982) to the theory of sustainability.

The CSR is based on the application of the following principles:

- sustainability: conscious and efficient use of environmental resources as common goods, ability to enhance human resources and contribute to the development of the local community in which the company operates, the ability to maintain an economic development of the company over time.
- voluntariness: actions carried out beyond legal obligations.
- transparency: listening and dialogue with the various stakeholders about direct and indirect business interest.
- quality: in terms of products and production processes.
- integration: vision and coordinated action of the various activities of each direction and department, on a horizontal and vertical level, on shared objectives and values.

This is an innovative concept that has been getting important in recent years so that a concept based on the principles of Corporate Social Responsibility has emerged: the concept is the one called of "shared value".

Within this scenario, the institution of the administrative responsibility of legal entities pursuant to Legislative Decree no. 231/2001 and the related Organization and Control Model (hereinafter, Model 231).

The value of Model 231 cannot be "reduced" to a mere fulfillment of a regulatory obligations and it neither would be correct to consider it as a "vaccine" against the liability provided for by Legislative Decree 231/2001. The growing tendency of national companies to adopt and effectively implement Model 231 on a spontaneous basis is a clear sign of recognition of this value as a best practice, which is able to characterize the virtues of companies, or bodies that choose this option.

2. The administrative responsibility of organizations

As a result of the entry into force of the legislative decree June 8, 2001, n. 231, the legislator has found configuration, for the first time in Italian legal system, the provision of a personal and

² Friedman (1962), a free market staunch supporter, says that the company's sole social responsibility consists of using its resources and get engaged in activities aimed at increasing its profits as long as it respects the internal rules of the game, which means it is openly and freely competing without resorting to deceit or fraud.

³ In the European Commission Green paper, published in 2001, social responsibility is defined: "The voluntary integration of companies' social and environmental concerns in their commercial operations and relations with involved parties".

direct responsibility of the company or the entity as a consequence of a series of crimes committed by physical persons related to the same one and acting on behalf of or for the benefit of the institution itself.

This is a strong compression of the "societas delinquere non potest" principle. Due to the presence of express provision contained in the law, the institution responds in the first person of the offense committed by the subjects operating in "vertical position" or top managers (directors, general managers, heads of secondary offices, division managers up to the de facto administrators) and by the subordinates to the other direction or supervision (subordinate or equivalent worker, but also the collaborators, as agents, distributors, consultants).

The "heavy" tenor of the sanctioning framework envisaged by Legislative Decree no. 231/2001 is linked to the occurrence of the so-called "fault of the organization" and represents an effective deterrent against the institution in the Italian legal system. Substantially, the entity bears responsibility for the crimes committed in its interest or benefit by the parties that perform functions of representation, administration or management of the body or of an organizational unit with financial and functional autonomy and, on the occurrence of certain conditions, by subjects to the direction or supervision of one of the abovementioned ones.

Therefore, the legislative decree has concrete consequences in organizational terms, affecting organs and procedures within the company. In fact, the configurability of the regime of objective responsibility involves the reversal of the burden of proof, therefore the body will have to prove that everything possible to prevent the aforementioned subjects from committing crimes. A crucial role in this judgment is played by the whole organizational and business management structure.

The institution is exempt from liability if it proves that:

- the governing body has adopted and effectively implemented, before the commission of the fact, organizational and managerial models (Models 231) suitable to preventing crimes similar to the ones already occurred;
- the supervision of the Model has been entrusted to a body of the entity with autonomous powers of initiative and control;
- people have committed crimes by fraudulently evading the organization and managerial models;
- there was no omission or insufficient supervision by the body responsible for monitoring the efficiency and validity of the Model.

Technically, such circumstances will have to be carefully considered during the drafting of the Model which will have to present the features of a "fraud proof" document.

3. Corporate Governance and Model 231: tools for responsible management

Starting from Cadbury's (1992) definition of corporate governance ("the way companies are governed and controlled"), it can be said corporate governance is the set of rules whose aim is to improve the governance and control enterprise and at the same time increase its performance.

Studies on corporate governance are a relatively recent phenomenon; they have experienced a great development in the last decades of the twentieth century: the companies' dimensional growth has generated such a managerial complexity that leads the owners of capital to delegate the management activity. Thus, the separation between shareholders and managers, the one between ownership and management, taking place throughout 60s and the birth and development of the so-called managerial theories have become established: according to the abovementioned theories, shareholders choose managers; the market, assesses the performance of the companies, rewards the best choices (market for corporate control).

Subsequently 3 topics were studied in the 70s:

- the USA were focused on the composition and functioning of the board of directors;
- in Europe the process of harmonization of company law got started;
- in academic circles around the world, the concept of corporate social responsibility was begun to be studied.

This third phenomenon, which generated a debate at international level, had primarily the role of large multinational corporations. According to liberalist principles, companies had to create value for shareholders because, by doing so, they contributed to be fostering the community economic and social development. By overcoming this vision, companies should not simply create value for shareholders but also strive to understand all company stakeholders' expectations.

At the end of the 80s, the financial scandals swept away large companies and banks, the excessive influence of the top management and the managing directors on the decisions taken by the board of directors was highlighted, reaffirming the need to create control mechanisms.

Although corporate crises are caused by several factors, some of which are beyond the control of the company itself, almost all cases of bankruptcy are at least partially caused by internal mismanagement. Therefore, business risks are likely to be reduced to acceptable levels by promoting appropriate management practices within individual companies: encouraging practices of good corporate governance is a crucial element to achieving this goal (Jensen, 2005).

Corporate governance can be seen in a double way. One is the transparency of the entrepreneurial function, thus protecting the interest of shareholders-investors (linked to the problem developed by the agency costs' theory), while a second dimension is therefore creating a sound risk management system (Babatunde *et al.* 2017). This approach opens up to a double interpretation of the same responsibility as well (Syakhroza, 2005):

- in a restrictive sense: corporate governance bodies must report on their actions to shareholders only;
- in a pervasive sense: the corporate governance bodies must give an account of their work to different categories of stakeholders.

In order for the corporate social responsibility not to remain a theoretical model, balanced managerial tools of prudent management are needed more and more. In the governance of corporate social responsibility, there are two main approaches to be followed:

- an internal one, consisting of the identification of organizational processes, procedural protocols and managerial practices (e.g. the company ethical code);
- one outside aimed at creating value for all stakeholders involved in company dynamics (e.g. social balance and other forms of social reporting).

Indeed, corporate social responsibility is essentially an extended governance model with the ultimate goal of conferring maximum sustainable value on the organizations activity. The Italian experience highlights a real division of responsibility on behalf of different subjects within the organization, with the effect of generating some conflicts in the relationships between the actors of the intra-company control.

The Model 231, because of the abovementioned characteristics, represents a valid and effective tool available to management to mitigate these contrasts, approaching an integrated governance model and looking forward to Enterprise Risk Management. Indeed, these principles, according to the most recent best practices, represent the main tool to face risks and uncertainties within modern companies.

An Integrated Model 231 can be summarized as follows (Figure 1):

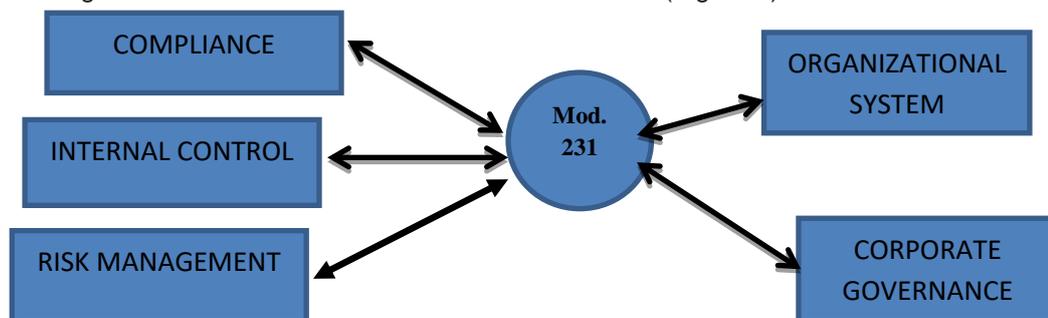


Figure 1. Relationship between Model 231 and internal systems

Management's strategic decisions, taken by filtering of a structured control network, are more likely to lead to a valuable creation for all the stakeholders, constantly balancing growth, profitability and risk over time.

Several studies have investigated, at a theoretical and empirical level, the relationships between corporate performance and the Enterprise Risk Management Approach. The relationship between Model 231 and internal systems is a consequence of this (Figure 1).

Some authors (Manacorda, 2006; Pasculli, 2010) have highlighted the issue that the preventive push offered by the monitoring and control mechanisms referred to Legislative Decree 231/2001 can inspire a corporate behavior to ethical and moral action. On this matter, Stefanini *et al.* (2008) highlighted three possible governance models:

- managerial oligarchy model: in this case there is no third and independent control because of the fragility of the management body made up of managers that only carry out passive acts of concrete management;
- a state-controlled model, where the role of the Board of Directors is totally diminished, due to the financing state which is the sole guarantor of widespread corporate interests;
- a balanced model, a synthesis between the two already mentioned ones, of enlarged governance, where the right balance between the interests of the various stakeholders is achieved in order to create a value that is as widely shared as possible.

Model 231 is the key to get a management and desirable control model. However, it is not a matter of understanding the Model as an instrument limited to the prevention of criminal liability of directors, but it is needed to highlight an economic-corporate approach, penal-preventive, of managing the overall social responsibility by promoting a different philosophy in doing business, sensitizing to a pervasive and consolidated corporate culture. Model 231 does not only mean prevention but, being itself a mechanism of control and corporate governance, it can act as an opportunity to strengthen overall corporate governance.

According to this perspective, the real effectiveness of the model should be assessed regardless the contribution of the individual subject when preventing an offense, whose risk is already objectively and mechanically averted from the characteristics of the company's structure (Mazzotta and D'Avirro, 2006). In other words, it is a matter of entrusting the Model 231, conceived according to a broader vision of governance, with the mother function of avoiding the same risk of wrongdoing to be happening again according to "self-regulating mechanisms" (Bastia, 2002).

The following definition of the Organization, Management and Control Model can be given as Legislative Decree 231 of 2001:

A set of rules, instruments and behaviors designed to provide the company with an effective organizational and management system apt to identify and prevent the the company's criminal activities or by those involved in its direction or surveillance.

The adoption of an organizational and management model that responds to this definition depends essentially on three variables: the level of dissemination of the corporate culture in matters of business ethics (a); the type of training of the team responsible for building the Model in question (b); and the pre-existing organizational structure (c). These relationships can be expressed by using the following mathematical function:

$$\text{Mod. 231} = f(a, b, c)$$

The model is therefore a function made up of at least three factors inspired by the principles and rules contained in the Company Ethical Code. This essentially derives from the impossibility of guaranteeing all the stakeholders' interests with real juridical norms, from which the imperfect coincidence between use of the Code of Ethics for the Legislative Decree n. 231 and use of the Code of Ethics for corporate social responsibility have been derived.

The first variable (a) states the condition of company's life is not reduced to a mere contractual fiction on the basis of Coase's (1937) Agency Costs Theory but turns into a vital organism capable of expressing its own culture and tradition of values, only minimally dependent on the underlying strategic orientation, which represents the authentic peculiarity of

every company. The ethical issue of corporate culture therefore has a role in the effective adoption of compliance programs: Decree 231 merely provides a legal capacity to the company's responsibility that has its roots in the nature of the company itself (Monesi, 2005).

As for the factor b (the training course of the ones responsible who are building up the Model) the following assumption is required: the attention of criminal law to the phenomenal realities of the company control systems comes at a later stage respecting the international scientific development and Italian corporate doctrine regarding the widening of the various spheres of responsibility and their "explicit insertion in the framework of the formal planning of corporate strategies" (Coda, 1988). It is therefore considered that mingling skills and experience of MEPs is a fundamental step, also considering the sensitivity of decisions to be taken on issues (internal control and risk monitoring) often so called hybrid, to horse between legal and economic tradition. Thus, it will be clearly understandable that if the drafting of the Model is entrusted to a criminal lawyer, it is very probable that the risk of crime is minimized but, at the same time, an excessive penalization of the organizational forms could be an obstacle to ordinary business activities.

It is clear that the implementation of specific and precise rules of conduct suitable to mitigate variegated compliance needs (Carna, 2015) can only start from the already existing organizational structure within the company (variable c). The path must necessarily start from a certain degree of perception and risk propensity of the examined company, as resulting from the pre-existing internal control system. To develop a new scheme in the network of the already consolidated ones, it is required an active collaboration between the subjects differently responsible for compliance and with roles of responsibility in the general process of risk management. The Internal Audit role, as we shall see, appears to be the most suitable and open up to dialogue with the responsible Managers of 231 Model in order to achieve the correct placement of the Supervisory Body in an internal control system that is thoroughly and penetratingly internal organization of the company.

4. The adoption of the 231 Model and the impact on the intra-company control system

The design of the Model 231 involves, a commitment of the structured approach of the company that intends to use it - a formal and substantial one at the same time - and that does not prescind from the existing company procedures, previously adopted whose functioning is now being consolidated by the same company.

The starting point, therefore, is always the corporate operating structure that certainly, due to the constant and progressive proliferation of rules and regulations on the matter over the years, has incorporated internal control systems adequate to needs and regulatory objectives, but they are not often very homogeneous and rather fragmented. In addition to the fragmentation and inhomogeneity of the corporate control systems, it is possible to identify further weaknesses that often make up the company's general framework:

- multiplicity of misaligned projects; situation made difficult by the difficulty and / or inefficiency of the communication and information flows implemented by the subjects appointed for this purpose;
- dichotomy and asynchrony between corporate projects, corporate performance and overall strategy;
- inefficiency of the control structure and ineffectiveness of the same policies and techniques adopted in order to get an internal monitoring.

As shown in the picture, the consequences are:

- overlapping of roles within the control functions; loss of functional homogeneity, consequent inefficiency and diseconomy due to high operating costs;
- inhomogeneities among individual procedures.

Montalenti (2006) has seen positive effects within the multiple requests for control, because the virtuous process that should be activated would be useful to prevent the risk that the activation of one or more subjects responsible for control can be attributed to the negligence of a competing body.

The intra-company control experience, however, testifies the redundancy of control, especially in the absence of specific well-framed and regulated procedures, seizing attention to information interconnection stages between the different parties responsible for control. The main risk that has been identified in the enlarged audience made by subjects responsible for the control, in the sense of a dangerous fragmentation, diversification and confusion of the respective attributions (Centonze, 2009).

Moreover, a shareable opinion was widely generated (Montalenti, 2006; Centonze, 2009) according to which the "massive" attribution of responsibility of each individual holding the control functions would make it impossible to identify the subjects who are actually responsible consequently producing a de-contributing to all the organs. Furthermore, though the legislator has been trying, over the years, to scan the duties of collaboration between the subjects of systemic and systematic control, it should be clarified that each body will be able to perform its specific tasks only if there is an effective cooperation between them. Thanks to the activation of adequate inter-organizational information flows. In other words, a model of corporate governance of a widespread nature that hinges on the adequate planning and implementation of Model 231 is needed.

Some general steps can be identified in a widespread corporate governance development functional to the correct adoption of the Model itself. A prerequisite is the constant relationship between the supervisory body and the internal audit body, in order to identify administrative and accounting processes, and then proceed with the revision and implementation of the same one correctly. Furthermore, it is necessary to define the control functions and phases perform the compliance test and take care of updating the Model (Andreis and Tonani, 2006; Servato, 2008).

In order to get a correct adoption of the Model, it is therefore essential to activate a first cognitive phase of the company that will allow the individuals to deepen and appreciate the corporate culture in order to retain risk propensity, thereby managing outline internal and external the structural, functional and interpersonal characteristics of the company. The knowledge of the company dynamics will be performed by identifying the subjects that the law identifies as "sensitive" along with the functions and business processes in which the possibility of committing crimes is potentially hidden.

The consequent assessment is seen as a fundamental phase that will find its core in the following scheme: gross risk minus control devices equals to residual acceptable risk.

That is to say that, for the correct implementation of the Model 231, it will be useful to influence the control centers already in place in order a risk acceptance judgment to be reached as a result of the suggested equation.

It is also necessary that the internal auditing services required and compliant with the legislation pursuant to Legislative Decree 231/2001 are not duplicated or overlapped along with the existing audit function.

The implementation of the 231 Model within the company needs a greater involvement of two branches of the audit that should not be left behind:

- the Operational Audit, whose function is to monitor and evaluate the organization of the measures responsible for preventing the offenses referred to in Decree n. 231;
- Compliance Audit that certifies compliance with the regulations and procedures contained in the Management, Organization and Control Model Based.

On the specific desire of the Supervisory Body, and with the presence of more structured and complex cases, the involvement of fraud auditing and fraud investigation procedures is not to be excluded: further audits that must be implemented, adapted and integrated in synergy with the other types of pre-existing checks. Mongillo (2015) supports the thesis that the specific function of internal auditing can be incorporated in the role of the Supervisory Body, getting rid of the problem of the functions overlapping and with a clear cost saving. Indeed the internal audit performing the typical functions of observation and monitoring of risk control and management mechanisms, represents, especially in the case of unlisted companies, a body in which the characteristics of third party, independence and autonomy are operating within the Supervisory Body. This is because the internal audit does not include, among its typical functions, the operational and management ones; moreover, it is itself an

independent promoter and actuator of the audit plan with initiative and intervention of independent powers.

5. Conclusions

The present study wants to insert legal rule (Legislative Decree No. 231/2001) in a strictly business context. Indeed, the attribution of an administrative responsibility, according to a legal point of view linked to legal entities is an unsurprising event for the company: the tradition of business studies in Italy, in fact, has always interpreted the company as an independent body linked to the subjects that make it different (management, property, employees, etc.). It is therefore understandable, from this point of view, the admissibility of the organization's fault, in addition to the ones that belong to natural persons. This study about Legislative Decree n. 231/2001, after highlighting the main consequences in terms of organization, has underlined what the law has decided not to define the Model of Organization, Management and Control, allowing the burdensome task of self-regulation mechanisms to the Authority/Company itself. The final results, inspired by the practice of major Italian companies, highlights the growing importance of some variables on others regarding the creation and development of the already mentioned Model that will mainly depend on the pre-existing culture, the training carried out by the ones in charge of building the Model and the pre-existing organizational structure. The latter is a relevant aspect too. The present paper has thus described the logical process to be followed in order to identify any fault in the structure to get the residual risk judgment of acceptability.

Eventually, a parallel between the Internal Audit function and the Supervisory Body required by Legislative Decree no. 231/2001 had concluded that the specific function of internal auditing can incorporate the role of the Supervisory Body in the event that the Model is implemented inside an integrated system of extended governance capable of creating a shared value among the internal and external company stakeholders.

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