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THE CONNECTION BETWEEN "CORPORATE STRUCTURES" AND "ORGANISATION AND MANAGEMENT MODELS" PURSUANT TO LEG. DECREE 231/2001

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The connection between “corporate structures” and “organisation and management models” pursuant to Leg. Decree 231/2001

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The author examines the analogies, differences and connection between the obligation for companies to adopt “appropriate corporate structures” as envisaged by arts. 2381-2403 of the Italian Civil Code, and the obligation to implement suitable “organisation and management models”, pursuant to Leg. Decree 231/01.
This analysis starts from the observation that, in terms of the goals pursued by individual regulatory systems, the operational context addressed by the creation of “appropriate corporate structures” also embraces the context addressed by organisation and management models because, while the purpose of the former is to guarantee overall effective corporate management, the purpose of the latter is only to prevent the entity’s administrative liability should one of the crimes contemplated by Leg. Decree 231/01 be committed. On the other hand, it is evident that the obligations that regard appropriate corporate structures address a smaller number of companies and entities than the obligation to adopt organisation and management models. The author also analyses both the characteristics that these corporate structures must have in order to be considered “appropriate”, and those that organisation and management models must have to be considered “suitable” to meet the goals set by the respective regulations. He dedicates particular attention to an examination of the parties that must adopt corporate structures and organisation and management models and of those responsible for their appropriateness and suitability.
Results and conclusions: The final part of the study considers whether, and to what extent, based on an examination of the various disciplines, it is possible to establish that, in the context of modern company law, corporate structures and models constitute two sides of the same coin: a mainstay of correct governance and a benchmark by which to judge the diligence of the management and control bodies.

keywords: company, governance, corporate structures, administrative liability of entities
JEL Classification: K290

1 Introduction

1.1 Novelties in the obligation to create appropriate corporate structures

The obligation, introduced for common law joint-stock companies by the reform of company law in arts. 2381 and 2403 of the Civil Code, to adopt appropriate organisational, administrative and accounting structures is “the ‘newest’ novelty of the recent reform of joint-stock companies, which will have the effect (…) of modifying the ‘fundamentals’ of the issue of corporate liability and to a certain extent the personal liability of the managers of a business” (Buonocore, 2006).

The duty to adopt appropriate structures highlights the emergence in a juridical context of consolidated conventions borrowed from business sciences (Irrera, 2005). For some time now, company doctrine (Bianchi, 2016) has underlined the essential, or at least strategic, importance of the corporate organisation for the success of a company’s operations: management control, the standardisation of procedures governing the various stages of its activities, integrated processes and risk management are the various elements that make up a company’s corporate organisation. The novelty lies in the fact that

the creation of adequate structures is now a legal requirement and no longer simply good managerial practice.

1.2 General principles of organisation and management models pursuant to Leg. Decree 231/2001

Leg. Decree 231/2001 was passed almost simultaneously with the reform of company law. This Decree introduced into Italian law the liability of legal entities, companies and associations for administrative offences resulting from a crime: the administrative liability of the entities is summed to the liability of the individual committing the crime. Members of entities, company stockholders and members of associations are no longer unconnected – at least from an economic standpoint – with any criminal proceedings regarding crimes committed for the company's benefit or in its interest. And this circumstance clearly triggers considerable interest among stakeholders regarding the control of the regularity and legality of the organisation's activities.

Art. 6 of Leg. Decree 231/2001 introduces a form of exemption from corporate liability if, in the course of criminal proceedings against the individuals who have committed a crime, the company is able to demonstrate that it has "adopted and effectively implemented organisation and management models aimed at preventing the alleged criminal offence from being committed."

The law does not oblige the entity to adopt the models in question, but it is essential for the entity to have them in order to be exempted in the case of crimes included among those contemplated, which are committed for the company's benefit or in its interest. Failure to adopt the models therefore does not expose the entity to any sanction, but it does expose it from the standpoint of administrative liability for any offences performed by its directors and employees. In other words, the presence of suitable models is basically necessary in order to obtain exemption.

The characteristic elements of these models are described in art. 6, para. 2 of Leg. Decree 231/2001; they seem to incorporate a classic example of what is known as a risk management system in economic and corporate jargon. This basically breaks down into two main stages: first, identification of the risks, and second, the creation of specific protocols or procedures capable of holding the risk at an acceptable level. The former refers to the process of concretely identifying the areas of the company and any activities that might be at risk (in other words the crimes that entail corporate liability) and the means by which these crimes might be committed; the latter regards the design of a control system that is able to prevent the threatened risk with a good degree of reliability.

The system contained in Leg. Decree 231/2001 is inspired by British and American experience. In 1991 the United States approved the U.S. Sentencing Commission, a radical reform based on a 'carrot and stick' approach, which envisages very high fines (the stick) while simultaneously envisaging their reduction (the carrot), by as much as 80%, for companies that have implemented self-regulation processes (so-called compliance programs), that aim to introduce conduct based on high individual ethical standards into the company.

The essential benchmarks in this regard are the Federal Sentencing Guidelines drawn up for legal entities. They were issued in 1991 and they are based, as mentioned above, on a prevention-reward system: "North American experience reveals that, if it is to perform an effective preventative function in relation to the crimes that can be committed by the legal entity, criminal law must enter the company, spreading through its internal control structures and conditioning their preparation and character" (De Maglie, 2002).

The uncompromising assumption of the guilt of the legal entity in U.S. law lies primarily in so-called business crime: in other words, an organisational failure that made it possible for the crime to be committed; "the legal entity is (…) guilty if it can be proved that its managers have omitted to adopt

precautionary measures aimed at preventing crime, or have adopted measures that have proved insufficient to prevent crime" (De Maglie, 2002).

1.3 Organisational structures and models: the need for comparison

At first sight, the two regulatory systems (the "corporate structure" on one hand and the "organisation and management model" on the other) appear distinct, with no express legislative link between the two. In fact, both systems respect the same logic, in other words the standardisation of a company's procedures, and the creation of a system of controls based on the identification and management of any risk; they both – first and foremost – represent the emergence in a juridical context of conventions borrowed from business sciences.

A closer, more cogent comparison between the two regulatory systems therefore seems useful, for a more profound analysis and understanding of the system of corporate governance that law-makers intended to achieve with these important keys: the corporate structure and the organisation and management model (Abriani, 2009)

2 Purpose and parties addressed

2.1 The areas affected by the duty to adopt corporate structures and organisation and management models respectively

The areas covered by organisational structures and models are not identical; organisation and management models are designed with the limited intent of preventing specific crimes from being committed, and in the event that they are committed nonetheless, with the goal of avoiding the administrative (capital) liability of the entity.

The catalogue of alleged crimes contained in arts. 24-25 *duodecies* of Leg. Decree 231/2001 has grown considerably over the years, embracing a varied and not always entirely consistent range of criminal and even culpable offences. They range from corporate crime to market abuse, from crimes against industry and commerce to those related to copyright violations, from environmental crimes to specific serious culpable crimes committed by violating laws to protect health and safety in the workplace, from computer crime to various crimes against the public authorities; for example, even employing illegal immigrants from non-EU countries is an alleged crime. There are also types of offences that presuppose forms of organised crime: criminal associations similar to the mafia, money laundering, receiving of stolen goods, the use of money, goods and assets of illegal origin, and self-laundering.

And finally there are certain crimes that it is complicated to imagine being committed by commercial companies in operational terms: the practice of female genital mutilation, enslavement, paedophilia and pornography, people trafficking and the purchase and sale of slaves.

We get the clear sensation that law-makers, driven by contingent demands, have created a container, into which they have placed, and continue to place, a number of very diverse offences.

Be that as it may, the area covered by organisation and management models has to regard the alleged crimes which, even when they are extended to include activities traditionally performed by so-called illicit business, still remain fairly limited in scope.

On the other hand, the scope of corporate structures is certainly vaster, because, as mentioned earlier, these represent the vanguard (Cavalli, 2002) of correct corporate management. Corporate structures address all aspects of the company's activities and not only those that might represent the precondition for one of the crimes in the catalogue contemplated by Leg. Decree 231/2001.

The largest area, but also the one whose boundaries are less certain, because it refers to a general concept like that of correct administration (Montalenti, 2016), is the area of the corporate structures whose job it is to "cover" all aspects of corporate management, while the space covered by the organisation and management models is more limited, because it refers to offences that are numerous but specific, such as criminal offences.

In other words, the models focus on specific conduct that is able to prevent certain crimes: on the other hand, the corporate structures are an expression of the more general duty of correct administration.

2.2 Parties obliged to prepare corporate structures and organisation and management models

The link between the two systems is inverted where the type of party addressed is concerned: corporate structures are envisaged in a number of sectors (banks, insurance companies, financial brokers, listed companies) and, following the reform of company law, even for common law joint-stock companies, while organisation and management models involve a much larger universe: entities with a legal personality, and companies and associations even without a legal personality, while the State, territorial public bodies, other non-economic public entities and other organisations that perform functions of constitutional importance are all excluded.

The requirement for a corporate structure can be extended even to limited companies, according to authorities on the matter (Cagnasso, 2016), in view of the fact that the principles of correct administration, expressed by corporate structures, are a general concept that underpins all joint-stock companies at least.

In spite of this extension of the parties that must have a corporate structure, there can be no doubt that the scope of the organisation and management models is even broader, because it also includes partnerships and above all entities with or without a legal personality that are regulated by the *First Book* of the Italian Civil Code.

3 Content

In terms of their content, the two regulatory systems are completely different: one is richly endowed with information and instructions, while the other is paradoxically silent.

Where organisation and management models are concerned, Leg. Decree 231/2001 identifies a number of characteristics, which the law-maker describes as "requirements" which the models must comply with. In particular, they must be able to identify the activities in the context of which crimes can be committed; they must envisage specific protocols designed to programme the development and implementation of an entity's decisions regarding the crimes to be prevented; they must indicate how financial resources are to be managed in order to prevent crime being committed; they must establish how information is to be provided to the body responsible for supervising the operation and observance of the models; they must introduce a system of penalties to punish failure to respect the measures indicated in the model.

In other words the law-makers uses the list of the requirements that must be met to indirectly outline the minimum content of the model whose cornerstones appear to be – as expected – a risk management system, a system to manage financial resources and, finally, a system of penalties for the violation of the measures envisaged.

On the contrary, in terms of their content, the organisational, administrative and accounting structures are without a precise regulatory element: this is explained by law-makers' customary reluctance to immediately take on board, in a juridical context, conventions borrowed from economics

and business science. Law-makers have already proved prudent in the past, as if they were reluctant to extensively absorb conventions of technical origin. The evolution of the discipline regulating financial statements is paradigmatic in this regard; the Italian commercial law of 1882 dedicated just one article (no. 176) to the function and content of financial statements, and even this article only went so far as to attribute to the financial statements the role of "demonstrating with clarity and correctness the profits achieved and the losses sustained", and to require a clear distinction to be made in the financial statements between "actual stock capital" and the "sum of contributions made and those outstanding". It was only with the Civil Code of 1942, and above all with the implementation of the IV EC Directive of 1991, that the financial statements really acquired significance in terms of their content, which is indicated directly and expressly by lawmakers.

It is also comprehensible that for a lawyer the formula "organisational, administrative and accounting structures" may be difficult to represent because it derives from material borrowed and consolidated from economics and business science. However, this does not legitimate the fact that reflections in a context of commercial law may often regard the principle of the appropriateness of the structures and not the structures themselves first and foremost, something that occurs today. It is a form of blindness; like disputing the general concept of clarity in the absence of standards regulating the structure and content of financial statements, or discussing truth and correctness without standards that establish evaluation criteria for the various items in the financial statements.

In other terms it is essential to question the content of the structures (Irrera, 2011). In this regard, we can reasonably maintain that the first, essential element underpinning a corporate structure is a clear, graphically expressed "Organisation chart", from which the roles and functions of the various parties emerge. This document must be combined with another that is generally defined as "Duties and responsibilities", which describes the main areas of competence of the various corporate functions. The document, which was traditionally known as a job graph or, more recently, as a function chart, has to illustrate, as analytically as possible, the responsibilities of each functional area, identifying in each one the party responsible and any additional hierarchy. This description of the duties and responsibilities is all the more opportune because it allows any functional deficiencies, or even any inefficient overlaps to be identified. Then there is a third document, generally known as "Delegation and Powers" in which the attribution of any powers outside the various functions is outlined. This document must be consistent with the powers delegated and the powers of attorney filed with the company register, and able to clearly represent which parties are vested with the power of signature and what is the scope of the signature.

The "Company organisation chart", "Duties and Responsibilities", "Delegation and Powers" are three documents which (over and above their individual level of complexity, which is directly proportional to the company's nature and size) represent the *minimum* corporate structure. Still in the context of the corporate structure, there are also procedures: preparing "structures" means, specifically and generally, standardising the corporate procedures. In more concrete terms, the individual procedures are used to regulate in detail the various stages of a company's operations; even the complexity and quantity of the various processes is closely linked to the company's nature and size. There may be situations in which (here we refer to small/medium enterprises) there are no standardised processes, or where these only regard certain elements; the company's growth is reflected in a parallel and necessary increase in the number of procedures. There may (and must) also be processes that describe all the individual stages or sub-stages of operations.

To sum up, the procedures make it possible to establish who does what, starting from each individual company process. And obviously, standardising procedures makes it possible to carry out more efficient checks on "alignment" and regularity.

The administrative and accounting structure focuses on the adoption of suitable instruments that enable a correct, comprehensive, timely and above all reliable record of accounting transactions to be

made; the accounting systems must be able to prepare budgets and forecasts, with reference to both ordinary company operations and to the possible outcomes of consistent investment.

And finally, the financial aspects must not be overlooked, in other words the company's ability to implement suitable monetary flows in order to sustain and guarantee the company's continuation.

Based on the above considerations, we cannot overlook the fact that the concrete content of the structures can be deduced from the content of the organisational models, at least in terms of the reference framework.

4 The roles

Where the roles are concerned, the link between the corporate structures and the organisational models is inverted.

Leg. Decree 231/2001 only establishes that responsibility for creating the organisation and management models, and for their effective implementation, lies with the *executive body*, while a specific body (the *internal supervisory committee*) is responsible for monitoring observance of the model (Balzarini, 2016).

Arts. 2381 and 2403 of the Civil Code in turn envisage that the organs responsible should *supervise* the corporate structures, that the board of directors should *assess* them and that the board of auditors should *monitor* their correct functioning: this regulatory element is more comprehensive than in relation to the models.

The most controversial issue – where the corporate structures are concerned – regards the fact that the delegated bodies are legally obliged to supervise the structures. This issue becomes particularly important in the event of a special delegation of powers or a limited delegation of powers by the board of directors to the delegated bodies. Taking into consideration the fact that the corporate structures are contained in a combination of different documents (organisation charts, function charts, etc.) and procedures, whose "construction" demands a unitary approach, one mind, an obligation that must be fulfilled with a single voice and never as the sum of partial decisions from different parties, we must consider that the obligation to create the structures is lies with the persons delegated, even in the case of a limited delegation of powers.

Another issue is the link between the board of auditors which is responsible for "monitoring" the corporate structures, and the board of directors which is responsible for "assessing" them. What appears to differentiate the activities of the board of directors in this regard from that of the board of auditors is the ability of the former to formulate directives and therefore to guide the construction of the structures. On the other hand, the supervision performed by the auditors seems to focus in particular on verifying the day by day efficiency of the structures, in the context of individual companies (Policaro, 2016). This is borne out by the specific requirement – only for the board of auditors and not for the board of directors – to monitor the "concrete functioning of the structures". This obviously does not exclude the fact that the assessment of its suitability performed by the board of directors could also regard the way in which the procedures are implemented, for example. This assessment is an activity that seems to be characterised by discontinuity and by the particular attitude that the time element acquires. In other words it is a task that presupposes an overall judgement, carried out as a one-off on the basis of information progressively received, as well as being retrospective, i.e. referred to a "construction" that is already in place. Monitoring on the other hand, seems to refer more specifically to an uninterrupted activity that continues seamlessly, which must be performed during and not after the event. To sum up, we can assume that the board of directors' activity, regarding the corporate structures, must be directed above all at identifying an overall strategy, while the activity of the board of auditors must be directed more specifically at the various aspects of their functioning and therefore their efficiency (Irrera, 2005).

Going back to the organisation and management models, we can assume that the expression "executive body", which is anomalous if we relate it to the company system, identifies the directors because they are in the best possible position to assess the company's overall organisation and, as a result, the risks that it faces. In fact, the generic formula is probably necessary in view of the fact that the regulation has a very vast universe, because it addresses not only companies but also entities with a legal personality, as well as associations without a legal personality, in which the managers could, on occasions, have different titles. Still on the subject of organisation and management models, we must point out that lawmakers introduced a significant novelty in the context of Leg. Decree 231/2001: paragraph 4 *bis* was added to art. 6, and it expressly contemplates that "in joint-stock companies the board of auditors, the supervisory board and the management control committee can perform the functions of the supervisory body". As noted above, the board of auditors has a similar supervisory role regarding the appropriateness of the structures. As a result, when the solution expressly permitted by legislators in 2011 is adopted, the board of auditors, in addition to performing its traditional role as established by the Civil Code, will now also have the additional duty to monitor the models created pursuant to Leg. Decree 231/2001. On one hand this confirms the pivotal role of the board of auditors in the internal control system; on the other hand, where there is contiguity between the roles, attributing the functions of the supervisory body to the auditors makes it possible to avoid the risk of the duplication or overlapping in the supervisory activities, curbing costs but without losing any of the effectiveness or efficiency of the corporate management and organisation models (Laghi, 2016).

From this last perspective, in order for the system to be increasingly efficient in concrete terms, it is necessary to observe that there are corporate activities whose risks are not easily ponderable or monitored by the auditors whose professional competence is closely restricted to economic and legal matters, and who rarely have the same competence in other fields, such as those of environmental crime or those linked to health activities. In this sense, the gradual expansion of the categories of crimes contemplated under Leg. Decree 231/2001 can complicate the identification of the two roles in a single subject, i.e. the board of auditors.

5 The characteristics: appropriateness and suitability

With reference to the characteristics that the corporate structures on one hand and the organisation models on the other must have, lawmakers use the expression "suitable models" and "appropriate structures", which appear equivalent, "suitability" being synonymous with "appropriateness". In addition to which, the body responsible for monitoring the structures, oversees its "concrete functioning", and where the models are concerned it "supervises "their functioning and monitors their updating"; even from this perspective it seems that the formulae continue to be equivalent.

Appropriateness appears to have become a general concept and the criterion for the assessment of qualified compliance, a generally applicable principle of correct compliance (Meruzzi, 2016), but also, as we have mentioned, one of the legal characteristics of the organisation and management models, together with their suitability and effectiveness, which is therefore a means of integration of the content expressed by the models (Berti, 2012).

The National Board of Book-keepers and Accountants recently commented on the issue of the appropriateness of corporate structures in a sort of programmed document about the standards of conduct of the Board of Auditors, identifying a number of characteristic elements. In particular, it noted that the concept of appropriateness implies the creation of a structure that is compatible with the size of the company but also with its nature and the way it achieves its corporate purpose, focusing particular attention on the "separation and counterbalance of responsibility in the roles and functions, the clear

definition of the powers delegated and the powers of each function, as well as the constant verification by each manager of the work performed by his collaborators".

In general, and taking as given that art. 2381 of the Civil Code is limited to envisaging corporate structures that reflect the company's nature and size, it is evident that universally valid structures are not conceivable; on the other hand, we can infer from Leg. Decree 231/2001 that a model is suitable if it meets a number of requirements identified by art. 6 which, in turn, entail the introduction of operating procedures and systems to monitor the risk of crime, and related case law has decreed that a model is not suitable when the rules it contains have been formulated generically, in other words if they are not formulated to reflect the characteristics of the entity (Irrera, 2009).[1]

6 Conclusions: an integrated system?

The investigation undertaken has revealed discord, but also interference between the two regulatory systems, which appear to permit mutual integration.

A highly abnormal element emerges from the first perspective: organisation and management models are identified better by legislators, who are silent regarding corporate structures, however the structures have a decidedly broader range of action, and in fact the models translate into structures that are part of the company's overall organisation (Galletti, 2006).

On the other hand, a synoptic study of the conventions reveals intense interaction between the two systems, first and foremost, the strengthening of the link between the corporate and entrepreneurial elements and the legally valid application of criteria and rules elaborated in the context of business sciences, which emerge from the standardisation of procedures governing each stage of operations and from the appreciation of the company as an organisational phenomenon. This common corporate ground, founded on an analysis of the processes and the related risks, onto which the models and the structures are grafted, represents the principal "cement" that persuades the analyst to assess them with a unitary approach.

The common corporate inspiration, and the common structure determine a tendency for the framework and the content of the two systems to converge: they both have to adopt integrated and coordinated internal operating procedures that can improve the efficiency of management, reducing discretionality in the various stages of the process under way. This pattern presupposes that the entire corporate organisation, in all its stages, should be sanctioned by a process which, in turn, can become the subject of a preventive assessment of its appropriateness and suitability, as well as constant monitoring of its concrete functioning and updating.

And finally, the models and corporate structures seem to integrate elements of a single phenomenon: the mainstay of correct governance in joint-stock companies and the reference parameter to assess the diligence/responsibility of the management and control bodies. In this context, appropriate structures, like organisation and management models, in other words the presence of a functioning system that allows a preventive assessment of the efficiency, effectiveness and even legitimacy of management decisions to be performed, can play a decisive role in the identification of a solid criterion to which the responsibility of the corporate organs must be anchored.

The decision-making process appears very significant for the attribution of responsibility. In other words, management decisions that may have damaged a company's equity will raise the question of the liability of its directors if the decision-making process proves to be "defective"; if, on the other hand, it can be proved that appropriate structures and models are present and functioning, directors will be exempt from both civil and criminal liability (Abriani, 2009; Galletti, 2006).[2]

In other words, and to conclude, we feel that we can state with reasonable certainty that even in our legal system "the due care standard in corporate law is applied to the decision-making process and

not to its result. Even though a decision made or a result reached is not that of the hypothetical ordinarily prudent person, non-liability will attach as long as the decision-making process meets the standard" (Hansen, 1986).

Endnotes

[1]On this subject, we refer you to Milan Court, 20 September 2004, in *www.rivista231.it* in which the rules of the model did not differentiate the training for employees working in sectors at risk; Bari Court, 18 April 2005, in *www.rivista231.it*, in which the models blindly copied those of other companies in the group and were therefore not suited to the specific characteristics of the company they referred to. The suitability of the models must be assessed retroactively with the so-called criterion of posthumous prognosis, ideally positioned in the context of the company at the moment that the crime was committed; see App. Milan, 28 June 2012, in *www.rivista231.it*.
[2]In this regard, see Milan Court, 13 February 2008, in *Giur. comm.* 2009, II, 177, and in *Nuovo dir. soc.* 2009, no. 2, 10, with a note by Irrera who condemned the director of a joint-stock company without a model pursuant to Leg. Decree 231/2001, to pay damages for the sum that the company itself had to pay in the form of a monetary fine related to liability due to an administrative offence resulting from a crime.

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