

## DISMISSAL ORDER AGAINST THE COMPANY: THE RELEVANCE OF THE ADOPTION OF THE COMPLIANCE PROGRAM PURSUANT THE LEGISLATIVE DECREE NO. 231/2001 AND THE ROLE OF THE SUPERVISORY BODY

On 29 January 2020, despite the conviction of the individuals involved, the Public Prosecutor of Como issued a dismissal order pursuant to Article 58 of Legislative Decree no. 231/2001 against a company involved in a criminal investigation for allegations of administrative offence referred to in Article 25 paragraph 2 of Legislative Decree no. 231/2001 in relation to certain bribery acts committed by the top management.

### 1. FACTS

First, the company's accountants and the Director of the Como Tax Revenue Office were arrested and, subsequently, the Chairman and the Managing Director of the company spontaneously admitted before the Public Prosecutor their liability for bribery acts. The company's top management were thus convicted of corruption pursuant to articles 318, 319 and 321 of the Italian Criminal Code. The Public Prosecutor was able to reconstruct and assess that the company could not be considered a liable entity pursuant Legislative Decree no. 231/2001 in the disputed case.

### 2. THE COMPLIANCE PROGRAM PURSUANTE THE LEGISLATIVE DECREE NO. 231/2001

Reading the Order of dismissal (the "**Dismissal Order**") makes it possible to appreciate the actual relevance in terms of legal reasoning of the evidence on the effectiveness of the Compliance Program pursuant the Legislative Decree no. 231/2001 (the "**Compliance Program**") on the operational level, which had rarely happened in the past in the case-law regarding administrative liability of corporate entities.

In fact, the central role in the decision-making process of the Public Prosecutor was played not only by the mere adoption but also by the presence of the following conditions: (i) the effective implementation of the Compliance Program by the company under investigation; (ii) the suitability of the

#### Key issues

- Facts
- The Compliance Program pursuant the Legislative Decree no. 231/2001
- The importance of the Supervisory Body (*Organismo di Vigilanza*) operations: correct exercise of supervisory and control activities
- Fraudulent circumventing
- Final considerations

Compliance Program's structure to prevent offences of the same nature as those committed through the provision of specific operating practices, procedures and control protocols; (iii) the effective supervisory activity carried out by the Supervisory Body (*Organismo di Vigilanza*) appointed pursuant legislative Decree no. 231/2001 (the "**Supervisory Body**"); and (iv) the fraudulent circumvention of existing controls. This clearly emerges from the grounds explained in the Dismissal Order, where it is stated that the company cannot be held liable for the facts committed by its manager, as "*the company has a suitable and effective compliance program [...] which, in the special part, provides for specific practices, procedures and operational protocols with reference to offences against the public administration. In particular, it is forbidden:*

- *«to give or promise money, goods or other benefits of any kind to representatives of the Public Administration and/or third parties indicated by them or people who have direct or indirect relations of any kind and/or family link or affinity with them»;*
- *«the payment of an increased fee to lawyers in contact with judicial bodies, so that they may favourably influence the outcome of a trial against the company»".*

### **3. THE IMPORTANCE OF THE SUPERVISORY BODY OPERATIONS: CORRECT EXERCISE OF SUPERVISORY AND CONTROL ACTIVITIES**

The importance of the Dismissal Order can also be found in the effort made by the Public Prosecutor to value the function and activities of the Supervisory Body, assessing the effectiveness of its action through acquisition and analysis of its documents and the assessment of what is documented therein.

The activities of the Supervisory Body have been valued above all with regard to the suitability of its supervisory and control activities in relation to the facts underlying the matter and, in particular, giving value to audit activities, collection of information flows and periodical supervisory and control activities as documented in the minutes of the Supervisory Body's meetings.

It was found that the statements made by the convicts had been acquired by the Supervisory Body during the internal audit and, from this, it became clear that the corruptive event had been implemented through the directors' circumventing of internal company protocols and procedures.

The Dismissal Order also states that the outcomes of the professional activity "*have been communicated to the company and, in particular, to the Audit Board ("Collegio Sindacale"), as well as to the Supervisory Body: to this end, a report of the Supervisory Body dated 9 October 2018 is attached, which represents that...*".

Finally, the Supervisory Body, as soon as it received news of the investigations in progress, formally requested information from the administrative management, now dismissed, thus acquiring clarifications and interrogation minutes.

### **4. FRAUDULENT CIRCUMVENTING**

Moreover, it appears that the controls required by Legislative Decree no. 231/2001 and underlying the surveillance activities have been circumvented

and eluded by the former directors, who committed the offence in total autonomy, using their own tools and those outside the company organisation.

In fact, the Dismissal Order represents that "*the pro tempore directors have completely bypassed the internal company controls and procedures, carrying out multiple meetings - at times and in ways completely unknown to the corporate bodies - with the intermediary of the corruptive agreement and making the required payments from their own financial resources*". It goes on to point out that "*nothing could have been verified by the corporate bodies - which, moreover, had thoroughly investigated and verified the situation, obtaining encouraging feedback - and, therefore, nothing can be charged to the company from the point of view of the abstractly relevant «lack of control»*".

## **5. FINAL CONSIDERATIONS**

The Public Prosecutor of Como has concluded that there are no gaps in the Compliance Program, having assessed and demonstrated that the conditions laid down in Article 6 of Legislative Decree no. 231/2001 are fulfilled, such as the effective adoption of a Compliance Program suitable for preventing offences of the type that has occurred, since the company has a Supervisory Body with autonomous powers of initiative and control and, lastly, the commission of the offence is deemed to be the result of fraudulent circumvention by the company's top management. This evidence has therefore led to the dismissal of the company and, through this, the proper relevance was given to the effective implementation of the Compliance Program and the prompt and correct activity of the Supervisory Body.

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