SILVIA MASSI - ANNA SALVINA VALENZANO

Compliance Programs and Legal Entity's Safeguards in Criminal Proceedings*

The essay deals with the legal entity's safeguards in criminal proceedings, with special reference to its rights of defense.
The topic of the entity's 'exposure' to liability risk and to the prejudice of its rights of defense emerges with reference to the 'risk mapping' in drafting the model, also in relation to the information flows among which are the news received through the so-called '*whistleblowing*'.
We conclude that both the legal entity's sensitive documents and the whistleblower report should be used to improve the preventive model, with the related guarantee measures in order to exclude that their virtuous use by the same entity could damage itself in the criminal trial.

Il saggio approfondisce l'analisi delle garanzie dell'ente nel procedimento penale, con particolare riferimento ai diritti di difesa.
Il tema dell'"esposizione' dell'ente al rischio di responsabilità, con pregiudizio dei diritti di difesa, emerge con riguardo alla 'mappatura del rischio' nell'elaborazione del modello organizzativo, anche in relazione ai flussi informativi tra i quali le notizie pervenute per il tramite del c.d. 'whistleblowing'.
La conclusione è nel senso che sia i documenti sensibili dell'ente, sia la denuncia del 'whistleblower', dovrebbero essere utilizzati per migliorare il modello preventivo, escludendo che il loro uso virtuoso da parte dell'ente medesimo gli si ritorca contro nel processo penale, con relative misure di garanzia.

1. The procedural safeguards of the legal entity. Introduction

The topic we address in this contribution relates to legal entity's rights in criminal proceedings, with special reference to the rights of defense for the legal entity. In this regard, several aspects can be considered, which pertain to the formation of evidence in the criminal process, since it is always a question of determining whether the guarantees normally recognized to the physical person can be also recognized to the legal person. We should deem that, when the European Court of Human Rights (ECHR) considers the guarantees provided for by article 6 of the Convention, they should apply both for natural and legal persons. For example, this happens with reference to the right to an

independent and impartial tribunal[1], the right to an oral and public hearing[2], the right to the equality of the instruments (fair trial)[3] and the right to be judged in reasonable time. In our opinion, in any case, the procedural guarantees should be considered effective for the legal entity as a rule, where it is part of the criminal trial. The procedural safeguards should apply even if it is a collective entity without legal personality.

2. The right of defense and reversal of the burden of *proof* in Italian law

Among the different aspects that require analysis of the regulation's appropriateness with regard to the recognition of the legal entity's right of defense, it should be considered that the right of defense of the corporate body[4] would be unavoidably compromised by the burden of 'exposure' ascribed to the legal entity. It is based on a procedural anomaly, which in the Italian system has for a long time led to recognize a reversed burden of proof against the entity, required to demonstrate its extraneousness to the crime committed by a person in an 'apical' position (article 6 Legislative Decree No. 231/2001). This reversed burden of proof has been first admitted when the offender holds one of the highest offices within the legal entity, playing 'functions of representation, administration or direction of the same entity or of an organizational unit with financial and functional autonomy', or carrying out 'even *de facto*, the management and control of the same'[5].

In the perspective of the reversal of the burden of proof, the extraneousness to the crime committed by a subject in 'top' position must be proven by the legal entity by demonstrating the 'suitability' of its organizational model to prevent a crime of the same kind as the one committed by a person in a leading position. More precisely, article 6 Legislative Decree No. 231/2001, which establishes corporate liability for offences committed by a person in an apical position, was initially interpreted as if it started from the idea of a sort of 'or-

---

* The essay will be published in a special issue of the *Revue Internationale de Droit Pénal*, I/2018, entitled *The Role of Corporation in Criminal Justice*, which will collect the proceedings of the 5th AIDP Symposium for Young Penalist on *The Role of Corporations in Criminal Proceedings*. The Symposium took place at the *Max-Planck-Institut für ausländisches und internationales Strafrecht* in Freiburg i. Br. (Germany) on 22-23 June 2018.

[1] *San Leonardi Band Club v Malta* App No. 77562/01 (ECHR, 29 July 2004).

[2] *Coorpland-Jenni GmbH and Hascic v Austria* No. 10523/02 (ECHR, 27 July 2006).

[3] *Dombo Beheer B.V. v The Netherlands* No. 14448/88 (ECHR, 27 October 1993).

[4] For the definition of the sphere of legal entities addressee of the Italian regulation, also in a comparative perspective, See MASSI, *'Veste formale' e 'corpo organizzativo' nella definizione del soggetto responsabile per l'illecito da reato*, Naples, 2012, 25 ff.

[5] This according to the combined provisions of article 6, paragraph 1, and article 5, paragraph 1, letter a) of the Italian L.D. No. 231/2001.

ganic identification' between the subject in top position and the entity. From this identification, the conclusion of the automatic attribution to the entity of the apical criminal conduct was drawn, with a 'presumption' that could be overcome only by proving otherwise, that is, by demonstrating the 'suitability' of its organizational model to prevent the offence. If this were the correct interpretation of the aforementioned article 6, it would have also derived a form of 'strict liability' for the legal entity, at least in the sense of a responsibility ascribed to the corporate body solely because of the lack of proof to the contrary – even if the public prosecutor would have never proved the entity's liability. Therefore, it would have resulted in an accusation without proof.

In any case, the reversal of the burden of proof, in itself considered, has generated serious doubts about the compatibility of this model with the principles established by the Italian Constitution and the ECHR for the non-recognition of fundamental rights of defense in the criminal process[6]. The fundamental reason is that, in the perspective of criminal law, a 'guilty liability' cannot be based on the scheme of the so-called 'organic identification' between the entity and its apical, which, according to the 'identification principle', automatically identifies the corporate body with its representative, in a perspective that, more correctly, belongs to civil law. An entity's criminal (or para-penal) liability must instead be based on the 'culpability' of the same legal entity, which has to be ascertained with regard to the specific offence committed by the apical[7].

In response to these doubts, Italian case law questioned whether it indeed constituted a reversal of the burden of proof: the prosecutor still needs to prove that the offence has been committed by a person in a leading position, in the interest or to the advantage of the entity.[8] Thus, it may not be a 'reversing mechanism' (of the burden of proof), but more properly a different mechanism to entrust the entity with the completion of the evidence in crimi-

[6] Among those who have made critical comments about the reversal of the burden of proof, see BERNASCONI, *Sub art. 6*, in *La responsabilità degli enti*, edited by Presutti, Bernasconi, Fiorio, Padua, 2008, 148 ff.; CERQUA, *Sub art. 6*, in *Enti e responsabilità da reato*, edited by Cadoppi, Garuti, Veneziani, Turin, 2010, 137 f.; FIORELLA, *Principi generali e criteri di imputazione all'ente della responsabilità amministrativa*, in Fiorella, Lancellotti, *La responsabilità dell'impresa per i fatti di reato*, Turin, 2004, 13 f.; PAOLOZZI, *Vademecum per gli enti sotto processo*, Turin, 2006, 195 ff.

[7] In this sense, see FIORELLA, *From 'macro-antrophos' to 'multi-person organisation'. Logic and structure of compliance programs in the corporate criminal liability*, in *Corporate criminal liability and compliance programs*, edited by Fiorella, Naples, 2012, vol. II, 373 ff., especially 416 ff., where the author deems that it is necessary to establish actual 'dominability' and 'reproachability' of the same legal entity with regard to the specific offence committed.

[8] See, for example, Cass. pen., Sez. II, 30.1.2006, n. 3615, in *Riv. pen.*, 2006, 814.

nal proceedings, and therefore a constitutionally legitimate mechanism[9]. However, this exception cannot be accepted since the proof, for the attribution of criminal (or para-penal) responsibility, lies entirely with the prosecution, with regard to each and every one of the elements of the unlawful act[10].
The first position – in favor of the reversal of the burden of proof – was overcome after the criticism raised by Italian legal doctrine and the Supreme Court's jurisprudence, which recognized that the burden of proof lies with the public prosecutor, who has also the burden of proving that the preventive models are inadequate, thus ascribing the 'organizational guilt' to the entity. The same Joint Sections of the Supreme Court, in the *Esphenhan* judgment, have reached the latter conclusion, thus overcoming the idea of a reversal of the burden of proof in case an offence has been committed by a person in apical position[11].
Unlike the aforementioned article 6, article 7, in regulating corporate liability for offences committed by subordinates[12], does not use the formula 'the entity is not liable if it proves that' it has adopted and effectively implemented a preventive model before the offence was committed. Therefore, with regard to this hypothesis, a problem of inversion of the burden of proof has never been raised by the interpreters, thus returning the proof to the general mechanism for which the public prosecutor will have to ascertain all the conditions for the entity's liability, among which the inadequacy of the preventive model.

3. Can compliance programs be considered as a defense instrument or as a means of prosecution of the legal entity?

A different and important profile of the problem we deal with lies in the analysis of the instruments guaranteed to *the legal entity that wants to defend itself in advance without being accused* (before a crime is committed by one of its members), in the framework of logic and regulation of the formation of proof, according to the well-known principle of *nemo tenetur se detegere*. The right against self-incrimination does not find explicit recognition in the

[9] See, Cass. pen., Sez. VI, 18.2.2010, n. 27735, in *Cass. pen.*, 2011, 5, 1876; Cass. pen., Sez. VI, 9.7.2009, n. 36083, in *Cass. pen.*, 2010, 1938.
[10] As known, it is derived from the fundamental principle of the 'presumption of innocence' established by art 27 para 2 of the Italian Constitution.
[11] See, Cass. pen., S.U., 18.9.2014, n. 38343, in *Cass. pen.*, 2015, 2, 426.
[12] On the relevance of the functional sphere of the subordinate, or better, of the 'para-apical' subject, in the system of *ex crimine* corporate liability, also in a comparative perspective, see VALENZANO, *'Triggering Persons' in 'Ex Crimine' Liability of Legal Entities*, in *Regulating Corporate Criminal Liability,* edited by Brodowski, Espinoza de los Monteros de la Parra, Tiedemann, Vogel, Springer, 2014, 95 ff.

jurisprudence of the ECtHR[13]. And, more generally, it emerges that European national legal systems recognize a right against self-incrimination only to natural persons and not to legal persons, with the exception of the United Kingdom[14] (within the EU countries) and New Zealand[15] (outside the EU), where a right against self-incrimination is also recognized for legal persons. In practice, this can pose several problems, including the question whether and which legal representatives of the entity may exercise the right to remain silent on behalf of the corporation.

In this paper, we will discuss a particular aspect within the framework of the legal entity's rights to defense in the criminal trial, which concerns important practical problems related to the preparation of organizational models. In the Italian legal system (as in other similar legal systems) liability *'ex crimine'* of legal entities is based on the idea of a so-called *'organizational fault'*[16], which emerges where there is an organizational defect in the preventive model, that is an inadequate setting (adoption or implementation) of the model required by law to prevent the risk of commission of crimes. The assessment of liability in criminal proceedings is therefore based on the organizational model, which is inspired by American *'compliance programs'*, and may carry with it the risk of a breach with regard to the legal entity's rights of defense.

In this context, the dual nature of the preventive model, substantive and procedural, needs to be emphasized. From the substantive point of view, the organizational model, if adequate, can have an effect of exemption from the entity's liability, as an element that highlights the correct behavior of the entity, therefore as a cause of exclusion of the legal entity's 'culpability', or it may work as a mitigating factor.

From the procedural point of view, the organizational model can be useful to provide the proof of the entity's innocence ('not guilty'). Under this second profile, on the one hand, the interest of the same entity emerges to follow a procedure for recognizing the risks of crime and at the same time developing

[13] With reference to the jurisprudence of the Court of Justice of the European Union, it should be noted that, already in the Orkem case of 1989 (Case 374/87 *Orkem v Commission*), the Court itself recognized a broad right against self-incrimination for the legal person, including the right to remain silent and not to cooperate, and only if accepted a right to deny an open confession.

[14] In particular, in the United Kingdom the right against self-incrimination for the legal entity was recognized already in the case *Triplex Safety Glass Co. v Lancegaye Safety Glass Ltd* [1934] and then followed by the subsequent jurisprudence. Unlike in the United States, the Supreme Court denied the legal person protection against self-incrimination, based on the fifth amendment of the Constitution.

[15] In the New Zealand, see article 60 of Evidence Act 2006 on "Privilege against self-incrimination".

[16] On the relevance of the 'organizational fault' in the Italian legal system, also in a comparative perspective, see FIORELLA, VALENZANO, *Colpa dell'ente e accertamento. Sviluppi attuali in una prospettiva di diritto comparato*, Rome, 2016, 53 ff.

the organizational models, thus preparing the related preventive safeguards. But, on the other hand, in the absence of legal recognition of its rights of defense, the entity's interest may emerge to implement some operating procedures that do not reveal any materially emerged or current criticalities, although that would be required in a process of effective correction. This interest reflects that otherwise the entity's procedural position could be compromised in imminent or future proceedings. It therefore can be seen as managing the organizational phase to prepare the premises for its own acquittal.
In other words, from the perspective of the legal entity's defense in criminal proceedings, the procedure for drafting the model represents a very delicate activity, where the sensitive elements emerged have the natural consequence of exposing the entity to possible incriminating exceptions. Since in carrying out the so-called *'risk mapping'* (i.e. the preliminary examination of its concrete activities involving the risk of commission of crimes), sensitive data about its internal activities, from which an organizational gap emerges (even though it is being overcome), could be made public.
We must consider that a correct and effective regulation, which guarantees the realization of the goals of legality, should consider, in favor of the proof of the legal entity's 'not -guilty', exactly the fact that it collects and transmits information that, in pointing out any organizational gaps, pursue the purpose of overcoming them; in short, it is an expression of a *virtuous corporate policy* based on transparency and therefore on the proper business ethics.

4. Risk assessment and 'sensitive' information

Thus arises the issue of rising tension at the time the preventive model is built or whenever it is updated to determine whether all critical issues that have emerged in the concrete functioning of the organizational procedures have to be considered. The reference is, in particular, to those internal documents – also related to the relations between the audit and the internal supervisory body[17] – which may indicate risks or criticalities, and which could, for reasons of convenience, be hidden or not taken into account by the legal entity.
In the preparation of the model (the first stage), risk mapping reveals operational criticalities in certain areas with regard to certain crimes. In the application of the model (the second stage), through the information flows to the supervisory body, which can also lead to the updating of the model, critical is-

[17] For the role of the supervisory body on the organizational model in the Italian system of *ex crimine* corporate liability, see VALENZANO, *Control over Organizational Models in the Italian Legal System*, in *Penal Policy of the State and Liability of Legal Entities*, edited by Turayová, Čentéš, Bratislava, 2013, 1100 ff.

sues may emerge in practice, that the entity may have an interest in hiding to avoid providing evidence in criminal proceedings, even if it is actually useful data to improve the preventive model.
It should be noted that in the practical application of the principles expressed by Legislative Decree No. 231/2001, for the correct processing of the organizational model, the legal entity should not limit itself to detect criticalities that in abstract result from the organization. Instead, an overall assessment should be aimed for, where it may be helpful to look at what normally happens for organizations of the same type. It should start from precise procedures set by its organization, also checking the way they are actually implemented in practice. In this perspective, the mapping of risks resulting from the way in which the legal entity operates in practice should be defined, also taking into account the division of powers through its delegation system. It should be established if even concrete behaviors, resulting in practice, may integrate new procedures, which are actually applied by the entity in the daily practice.
The only correct way to prevent the risk of crimes requires us to observe that in the specific situation, and with regard to specific members of the entity, there might be some mechanisms or some behaviors that could get out of any control of legality and proper action by the entity. Needless to say that under this profile the risk mapping should become more precise and concrete, in order to be able to detect specific and concrete anomalies that, when documented in control procedures usable against the entity in criminal proceedings, would produce serious risks of establishing corporate criminal liability. With the consequence of discouraging actions aimed at making transparent an appreciable and virtuous path of reparation of the procedural gaps of the specific organization.

5. The use of 'risky' information and incentives for the legal entity

To prevent such distortion, and in any case to avoid the loss of an important tool for the improvement of the model, it could be useful to set a system that exploits such alerts, in accordance with the principle of correct conduct 'legally owed'. From this point of view, the law should facilitate a positive evolution of the preventive model, excluding that any sensitive information emerged in the operational phase of the drafting or virtuous update of the procedures could be used against the legal entity.
In this regard, from the substantive point of view, an exemption from *ex crimine* liability for the entity that has taken account of sensitive information which revealed criticalities, with a view to improving the model, could be provided. This would be a sort of 'restorative conduct', according to the schemes

that under Italian law are already provided for in Legislative Decree No. 231/2001, for example by articles 12, 17 and 78, which promote the so-called *'repaired model'* (or '*post factum*' model), even if such provisions establish only an effect of simple mitigation of the penalty and no exemption from liability.

As known, articles 12 and articles 17 provide for cases of mitigation of the penalty, respectively with reference to the pecuniary sanction and the disqualification, where, prior to the opening statement of the trial of the first instance, the legal entity has 'adopted and implemented' an adequate organizational model, thus eliminating the organizational deficiencies that led to the offence[18]. Article 78, on the other hand, provides for the hypothesis in which the conduct referred to in article 17 has been carried out belatedly, since it has been accomplished after the irrevocable sentence of conviction. In any case, the 'restorative conducts' presuppose the commission of the predicate offense, thus limiting the scope of the restorative conduct to a mitigating effect of the sanctioning treatment in favor of the entity[19].

The hypothesis that we want to develop here is instead that of a 'restoration' (i.e. a revision) of the organizational model as a result of the gaps that emerged from documents that also represent the evidence of a predicate offense. To encourage the entity to use such evidence in order to improve the preventive model, it does not seem enough to recognize a mere effect of mitigating the sanction, while a full exemption from liability appears more appropriate.

The same effect of exoneration from liability should be recognized even where the legal entity has already taken action to 'repair' the model, and in the meantime an offence has been committed. When the entity, rather than

[18] In particular, article 12 provides for a mitigation of the pecuniary penalty from one third to one half if, before the opening statement of the trial of the first instance, the legal entity has, among other possible obligations, 'adopted and made operational an organizational model suitable to prevent crimes of the same kind as the one occurred'. The same content is found in article 17, entitled 'Repairing the consequences of the offence', which provides for the exclusion of the disqualification penalty as a result of this fulfillment. In particular, it excludes this kind of sanction where, prior to the opening statement of the trial of the first instance, the legal entity has fully refunded the damage, eliminating the harmful or dangerous consequences of the offence and has eliminated the organizational deficiencies that led to the offence by adopting and implementing organizational models suitable to prevent crimes of the type that occurred; as well as having provided any profits achieved for purposes of confiscation. On the structure of the sanctioning system against the legal entity, also with reference to the scope of articles 12 and 17, see PIERGALLINI, *I reati presupposto della responsabilità dell'ente e l'apparato sanzionatorio*, in *Reati e responsabilità degli enti*, edited by Lattanzi, Milano, 2010, 222 ff.

[19] See, on this topic, GALLUCCI, *L'esecuzione*, in *Reati e responsabilità degli enti*, edited by Lattanzi, Milano, 2010, 738 ff.

hiding this circumstance, uses it to repair the model, it should still produce an exemption effect, having to consider that a different conduct on the part of the same legal person could not be required, as the entity cannot do more than 'batten down the hatches', through the revision of the preventive model[20].
In this perspective, the exemption from liability could appear both as a cause of exclusion of culpability and as a cause of exclusion of mere punishment, however always in a perspective of substantive law. If the exclusion of sanction were recognized by law, the entity would have a strong interest in revealing those sensitive and 'risky' documents, which, however, promoted the elimination of organizational deficiencies, within the framework of a virtuous attitude of the entity, which would, however, bring out a divergence between the entity's will and that of the author of the predicate offense.
The proposal could in this regard harmonize with the figure of the so-called '*reactive corporate fault*', which was elaborated by the Australian doctrine[21], as a new conception of the guilt referred to the system of the *'accountability model'*, allowing 'self-management and self-control mechanisms internal to the legal person'[22]. In particular, using the *accountability agreements*, internal investigations to the legal entity could be initiated, while new future initiatives could be promoted through *accountability assurances*[23]. It would therefore be a system of 'private justice' from the phase of the investigation to that of the implementation of remedies internal to the entity.
This different conception of the culpability of the legal person looks both to the entity's behavior prior to the offence and to its subsequent behavior. The latter may have a compensatory value, but also be of value for the improvement of the model. The so-called *reactive fault*, better defined as fault for non-virtuous reaction of the legal entity, could be a useful frame of reference right in the direction of confirming the correctness of a dynamic approach to the model and to the entity's 'culpability'. It is useful to point out that the lack of entity's 'fault' can indeed result from the entity's overall behavior (antecedent, concurrent or subsequent to the fact attributable to it), which is such as to

[20] See, on this subject, FIORELLA, SELVAGGI, *Dall' 'utile' al 'giusto'. Il futuro dell'illecito dell'ente da reato nello 'spazio globale'*, Turin, 2018, 216 ff.
[21] We refer, in this regard, to the contribution of the Australian doctrine and in particular of FISSE, BRAITHWAITE, *The allocation of responsibility for corporate crime: individualism, collectivism and accountability*, 11 Sydney L. Rev., March 1988, 468 ff., and, more recently, FISSE, BRAITHWAITE, *Corporations, crime and accountability*, Cambridge University Press, 1994, as a contribution that, as noted by DE MAGLIE, *L'etica e il mercato*, Milan, 2002, 163 ff., would be considered in the tendency of Australian doctrine to abandon traditional approaches and practice innovative choices.
[22] See, DE MAGLIE, *L'etica e il mercato*, Milan, 2002, 166 f.
[23] On this point, more widely, see DE MAGLIE, *L'etica e il mercato*, Milan, 2002, 170 f.

demonstrate a significant behavior that as a whole indicates a constant path towards legality.
From a different perspective, an instrument of procedural nature could be set, providing for a sort of 'non-usability' (by the courts) of sensitive acts discovered by the entity against the same corporate body, regardless of whether these acts were deemed 'secretive' or not. This 'non-usability' would refer to the sole legal entity and not also to the possible responsibility of natural persons.

6. Insights from the system in a reform perspective

An inspiration in this sense can be derived from new regulations in the Italian legal system in the field of health risks within hospitals, with profiles of individual and collective responsibility. We are referring to the paragraph 539 article 1 of the Law of 28 December 2015, No. 208, which provides for the 'non-usability' in criminal proceedings of 'organizational acts for recognition of health risks'.
The rule, which refers in general to the proof of any responsibility profiles, also partially concerns the entity's liability. In any case, this rule introduces into the system a principle of non-usability of the said evidence, concerning critical issues encountered in the organization and reported by the bodies responsible for 'repairing' an imperfect model; a principle that, from a reform perspective, could be expanded with a general effect in defining the regime of proof of *ex crimine* corporate liability. In this way, it would be possible to relieve the entity from the risk of self-denunciation (i.e., self-incrimination), naturally only with regard to the entity's liability and not also to the individual's responsibility, which must be confirmed.
We have to reaffirm that this kind of measure is part of a system that promotes virtuous actions, which may push the entity itself to bring out critical issues in order to improve the organizational model.
To reform the legal system, this measure is a possible instrument that might be provided for by the national legislators, more in general, to give to the legal entity a chance to 'react virtuously', according to the dynamic approach of the organizational model and also to guarantee the legal entity's right against self-incrimination in the criminal proceedings.

7. '*Whistleblowing*': a mere tool of complaint or a system to review the preventive model?

The topic of the entity's 'exposure' to liability risk and to the prejudice of its

rights of defense also emerges with reference to the new institute of *'whistle-blowing'*, laid down by the recent Italian law No. 179/2017 to provide evidence of corporate's infringement also in private corporations (for public entities it was introduced by Law No. 190 of 2012[24]). The reform law has amended the article 6 of Legislative Decree No. 231/2001, which now provides for the possibility for the apical and subordinate persons to report 'illicit conducts' through dedicated channels, immune from retaliatory actions and dismissal.

This institute, which was already provided for by other European and non-European legal systems, has now found further extension with the recent 'Proposal for an EU Directive, concerning the protection of those who report violations of EU law in particular matters' of 23 April 2018[25].

Despite the popularity of such institute, there are still strong doubts regarding the validity and implementation of this mechanism. First of all, for the subjective limitations, the new article 6 refers only to persons in top position and subordinates, who are internal to the corporation, and not also to third parties external to it, who can report facts they have come to know on the basis of the employment relationship.

The choice to incardinate such mechanism in the systematic of the organizational model makes it optional and not properly in accordance with the purpose of the model, that is to prevent crimes and not to report misconduct or irregularities already carried out. But above all, it should be clarified whether 'whistleblowing' is a mere tool of complaint or it can be understood in a 'constructive' perspective with a view to stimulating the review of the preventive model, without any further procedural consequences.

Bearing in mind that, as noted in the Confindustria's explanatory note of January 2018[26], the legal framework appear to protect the reporting agent and not the subject reported; thus Confindustria advocates a system that avoids 'excessive imbalances in the application stage'. In this regard, it should be stressed that the need to protect the confidentiality of the identity of the reporting person should be reconciled with that of safeguarding the rights of defense of the subject reported, especially if the reporting is not founded. It is in fact evident

[24] In particular, the Law No. 190 of 2012 in its single article, at paragraph 51, provides for the insertion of a paragraph 54 bis, entitled 'Protection of the public employee who reports illicit', in the law on public employment, Law No. 165 of 2001.

[25] Reference is to the recent *Proposal for a Directive of the European Parliament and of the Council on the protection of persons reporting on breaches of Union law*, 23 April 2018.

[26] See Confindustria, *La disciplina in materia di Whistleblowing. Nota illustrativa*, January 2018, in *https://www.confindustria.it*.

that the rights of defense of the reported can be fully exercised only after having clarified the identity of the complainant and ascertained the possible abusive nature of the report. Needless to say that, pending the definition of the judgment, the position of the reported subject is likely to be compromised, at least on the reputational level. These aspects will therefore have to be examined in relation to the concrete applicative experiences that will emerge.
It should be kept in mind that the 'whistleblowing' institute, with all its implementation limits, aims anyway to overcome a system of opacity in the entity's organization and thus to encourage the emergence of criticalities in a system that does not seem to be able to react by itself. In practice, this institute could still pose problems in terms of company management and interpersonal relationships. From this point of view, the same remarks already expressed with reference to the use of sensitive documents in criminal proceedings, apply to the whistleblowing institute. They should be treated in the same way as useful tools, which could be used virtuously by the legal entity, but only with a view to revising and improving the preventive model, while their use as a possible instrument of prosecution in the criminal trial against the same entity should remain excluded.

8. Conclusive remarks

In conclusion, it must be considered that one of the goals that inspire the Italian regulation on *ex crimine* corporate liability is the need for a continuous updating of the preventive model, also with a view to its improvement. That is to say that the changes can be particularly effective where, in addition to an update that takes into account the regulatory changes, the entity tries to overcome the critical issues that may emerge in the concrete application of the organizational procedures. In particular, it is not possible to ignore the risk of criminal proceedings in which the entity could incur for the 'boomerang effect' of the disclosure by the same of sensitive and 'compromising' data, made in order to improve its organization.
In our opinion, to avoid that the entity, to overcome this risk, may hide data useful for the improvement of its preventive model, a mechanism to incentivize the same entity to 'expose itself' should be provided for. In this regard, in a substantive perspective, a 'cause of exclusion of punishment' for the legal entity that uses sensitive documents for virtuous purposes might be provided for, or, in a procedural perspective, the 'non-usability' of the documents in question by the courts, during the criminal trial, might be provided for. This 'non-usability' should refer to the sole legal entity and not also to the possible responsibility of natural persons.

The issue of the information to be used for the improvement of the preventive model, and of the consequent need to protect the legal entity, could also emerge from the 'blow' of the whistleblower. The legal system, in addition to protecting the complainant, should also be better developed in the perspective of safeguarding the rights of defense, also with a view to protecting the person reported. This at least in the sense that, beyond the ascertainment of the responsibilities of the natural person, the whistleblower report could contribute to the improvement of the organizational model. Therefore, if it were used in this sense, it should be recognized a merit for the legal entity, with consequent benefits, taking into account the instruments previously proposed both in the substantive and in the procedural perspective.