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Private Orders and Corporate Criminal Liability: A Sketch of the Relationship Between Duality and Antinomy

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ABSTRACT

The paper outlines the relevance of orders in private relationships, traditionally excluded from the provisions of Article 51 of the Criminal Code concerning orders in matters of public policy and within organisations characterised by hierarchical relationships. Reference is made to the proposed specific defence for subordinates regarding orders in private relationships, contained in the 1992 Pagliaro Draft Delegated Law for a new criminal code. The distribution of organisational levels within companies in the system of criminal liability under Legislative Decree 231/2001 is therefore examined, focusing on the relationship between the basis of the company's liability and that of its top management, and the defence available to subordinates. Finally, a possible link is suggested between the issue of the relevance of private orders in corporate entities and the forms of prevention of corporate offences entrusted to internal compliance, through organisational and management models and codes of ethics.

KEYWORDS

Order in private relationships; Corporate criminal liability; Exclusion of subordinate guilt; Internal compliance prevention tools in corporate entities.

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SUMMARY: 1. Introduction: an overlooked aspect of the problem of responsible obedience – 2. The traditional significance of the defence of orders in public law and within hierarchical organisations – 3. The proposition as a defence within the context of enhancing the category to advance the principle of culpability in criminal theory – 4. The structural analogy with the relevance of the organisation in entities with a complex structure: the basis of the entity's liability and the possible exclusion of individual culpability of subordinates – 5. The delimitation of the exculpatory effect and the possible preventive efficacy on the entity's liability.

1. Introduction: an overlooked aspect of the problem of responsible obedience

At first glance, the issue of the relevance in private relationships of the exclusion of liability for orders issued by individuals with authoritative powers appears, upon initial assessment, to lie far from the focus of the research dedicated to *'Rule of law and the problem of responsible obedience*', as well as from the in-depth examination of this topic at the meeting on 'obedience and liability', for which these notes were prepared and which, in the organisers' intentions, essentially aimed to explore so-called 'crimes of obedience' in relation to the military legal system.

The decision to consider the significance of hierarchy in a sphere that is not only distinct from that of military authority-subordination relationships, but also goes beyond the more traditional sphere in which at least one of the parties holds a public office – a sphere governed by the provisions of Article 51 of the Criminal Code – stems, however, from a focus on a fundamental premise that identifies a common element shared by these otherwise distinct spheres: even in private relationships there is an organisation comprising a plurality of individuals, differentiated according to a division of positions, roles, authority and also responsibility. From the family to associations, as well as in corporate entities: the most varied social contexts are united by a plurality of individuals with distinct

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spheres of competence who contribute to achieving the aims of their respective groups and who operate in accordance with the instructions of an authority[2] .

If we narrow the scope to consider specifically the business sector, the organisational factor becomes a constitutive and defining feature in the very definition provided by the Civil Code in Article 2082. When referring to economic activity organised for the purpose of the production and exchange of goods and services, a necessary component of the organisational element – obviously excluding cases of individual business operation – is the internal structure of relationships between the parties, which in turn implies a regulation of their respective spheres of action with consequent responsibilities. Despite the variety of current organisational models in companies, the different structural arrangements distribute the roles of authority/control and subordination of the various internal parties across multiple levels, to which the corresponding powers and responsibilities are attached.

This is, moreover, an organisational reality that finds precise reflection in the guiding principles of the entire system of criminal liability of legal entities, as defined in our legal system. Legislative Decree 231/2001 bases the crucial link between the criminal act of a natural person and the offence of the corporate entity on a relationship between these two elements that differentiates the various structural/functional positions within the organisation of the entity according to an organisational model that is both multi-tiered and fundamentally hierarchical: senior (or top-level) / subordinate individuals, defining different criteria for attribution respectively (Art. 5(1)(*a*) and Art. 6; Art. 5(1)(*b*) and Art. 7)[3] .

The significance attributed to this division of roles provides a useful link to an issue traditionally associated with the topic of the criminal law relevance of responsible obedience, namely that of the private law sphere of operation; yet, on closer inspection, this is set in a context different from its original and, indeed, more general terrain: the aim is to ascertain whether the relationship between private individuals within the entity, which may contribute to establishing the entity's liability, can

[2] For a general study of social relations based on authority, see C. McMahon, *Authority and Democracy: A General Theory of Government and Management*, Princeton Univ. Press, 1994.

[3] The explanatory memorandum to Legislative Decree No. 231 of 8 June 2001, after attributing a central role to these provisions for the entire system (para. 3.2.: 'The *heart* of the general part of the new system is represented by Articles 5 and 6'), expressly acknowledges the plurality of organisational models in the 'current corporate landscape', although the consideration of 'situations in which *management* does not develop according to a top-down model, but rather extends across a (broad) horizontal base, with the consequent fragmentation of the entity's decision-making powers' (para. 3.4.) serves to tailor the attribution of liability to the entity for the acts of a natural person holding senior management functions, but does not affect the generalised presence of relationships of subordination even in non-top-down *management* models.

also serve as a limiting factor on the liability of at least one of those private individuals. In other words, it is necessary to investigate whether the internal relationships within the organisation of the entity, which may present themselves as elements of a necessary pairing with the entity's criminal liability insofar as they represent elements establishing its liability, operate in certain cases in the opposite direction, that is to say, to highlight a contradiction between the classification of the facts in relation to the entity and its senior management, and the position of the subordinate who, if and insofar as they have acted in accordance with the directives issued by senior management, may invoke the relationship of subordination to exclude or at least limit their personal liability.

Nor would it be valid to object to such an investigative approach on the grounds of the logical fallacy of seeking to derive, from a criterion serving to establish the entity's liability (the structural/functional relationship between the various levels of the internal organisation), elements that instead operate in favour of the opposite exclusion of liability for one of the natural persons involved: as the debate on culpability—both as an element of the offence and as a criterion for determining the sentence—has long taught us, there is a profound evaluative link between the basis and the limit of criminal liability.

To address this issue, we must start from the traditional significance of the defence of the execution of orders in the public law sphere and within organisations characterised by hierarchical relationships between the various levels of the entities involved. Therefore, to reconsider the scope of relevance of this defence in private relationships, we shall refer to the interesting, albeit dated, conception that sees it as an excuse, as part of an effort to develop the category aimed at advancing the principle of culpability in criminal theory. At this point, we may examine the structural analogy with the relevance of the organisation in entities with complex structures, and clarify the terms of the link between the basis of the entity's liability and that of its senior management, and the exclusion of individual culpability on the part of subordinates. Finally, it seems appropriate to mention the possible link between this limiting effect of private order liability in collective entities and the liability system built on internal *compliance*.

2. The traditional significance of the defence of orders in the public sphere and within hierarchically structured organisations

The refusal to recognise the exculpatory relevance of orders outside public-law authority relationships has, in fact, deep-rooted origins and has been consistently reaffirmed over time up to

the current legal framework, in which the exculpatory effect of private orders is unanimously excluded by legal doctrine and case law.

As early as the Italian Sardinian Code of 1859, the various situations in which the special part of the code accorded significance to orders—to recognise or even exclude an exculpatory effect from punishment—were expressly linked to relationships between public officials and their respective superiors (Articles 191, 205, 231, 237), except in the case of death or injury, the lawfulness of which was generally admitted, but subject to the dual condition that they be 'prescribed by law and ordered by the authorities'.

To understand the still rather narrow meaning attributed to this reference to an unspecified authority, it may be noted that the aforementioned wording faithfully reproduced the tradition of the French codes, both that of 1791 following the French Revolution (Part 2, Title 2, Section 1, Article 4) as well as that of 1810 (*the* so-called *Code Napoléon,* specifically Article 337): in the preparatory work for the latter provision, the relevant cases of 'lawful homicide' were illustrated by situations in which the authority must defend itself against 'opponents' who 'attack it' and who are therefore 'in a state of rebellion'[4] . It is therefore an authority that defends the power of the State against external aggression and is thus typically expressive of the public nature of the latter.

The Zanardelli Code follows this line of continuity, although it introduces an exemption no longer restricted to specific situations or particular crimes, but one of general scope and thus placed in the first book of the code: Article 49(1)(1) provides for the non-punishability of a person who commits the act 'by virtue of a provision of law or by an order, which they were obliged to carry out, from the competent authority'. The narrow scope of the inter-subjective relationships considered by the provision is, however, immediately clarified by the provision itself, which, in the second paragraph, by distinguishing between the positions of the person carrying out the act and the person issuing the order, limits its application to relationships involving a public official, thereby precluding any possible extension of the scope of the defence to relationships between private individuals. It was thus easy to observe that the express mention of public officials makes it 'beyond dispute that the exculpatory subordination within the meaning of Article 49(1) is solely hierarchical'; and, continuing in a consistent manner, albeit within the lexical and value framework of a century ago: 'domestic subordination, the reverential attitude of children towards parents, of a wife towards her husband, of a servant towards his master, have no exculpatory value'[5] .

[4] For these references to the Legislative Commission's report, see J.M. DUFOUR, *Code criminel avec instructions. Deuxième partie: Code pénal*, Tome II, Paris 1811, p. 114 ff.

[5] L. MAJNO, *Commento al codice penale italiano*, vol. I, 3rd ed., UTET, Turin 1924, p. 131.

Times change, codes evolve—including semantic ones—but the substance of that line of reasoning has remained and become established, eventually rising to the status of an express legal provision: Article 51 of the current Criminal Code specifies the public nature of the Authority issuing the order from which the perpetrator's non-punishability may arise. Within this framework, the interpretative conclusion on this point is now well-established: To cite just a few examples, the order governed by Article 51 of the current Criminal Code 'in order to have exculpatory effect, […] must constitute an expression of will issued within the context of a relationship of subordination under public law; an order issued by private individuals, even if endowed with "authority" that is otherwise legally recognised, is in no way relevant'[6] . Similarly: 'a private order, i.e. one arising from a relationship of subordination under private law (e.g. a child or employee carrying out a criminal order from a parent or employer), does not constitute a defence, as only the public interest underlying the power to issue orders, and not the private interest, can prevail over the public interest protected by criminal law'[7] . And to the extent of considering the conclusion self-evident: 'justification clearly derives solely from the presence of an order from a public authority, to the exclusion of those forms of decision-making superiority of a private-law nature (e.g. an employer) or of a family nature'[8] .

Full continuity on this point is also found in case law: to limit ourselves to just two examples far apart in time, the inapplicability of the defence in question to orders issued not by a public authority but by a private employer to its employees is made explicit in a decision of the Court of

[6] C. FIORE, S. FIORE, *Diritto penale. Parte generale*, 6th ed., UTET, Turin 2020, p. 354.

[7] F. MANTOVANI, G. FLORA, *Diritto penale. Parte generale*, 13th ed., CEDAM, Milan 2025, p. 220, whilst acknowledging a possible lack of culpability if the perpetrator could not 'realise the unlawfulness of the act'.

[8] C.E. PALIERO (ed.), *Il sistema penale*, Giappichelli, Turin 2024, p. 333.

Similarly, see also G. DELITALA, *Adempimento di un dovere*, in *Enciclopedia del diritto*, vol. I, Giuffrè, Milan 1958, p. 570; M. ROMANO, *Commentario sistematico al codice penale*, Giuffrè, Milan 1987, Art. 51/23-24, p. 468 ff.; T. PADOVANI, *Diritto penale*, 12th ed., Lefebvre Giuffrè, Milan 2019, p. 204 ff.; D. PULITANÒ, *Esercizio di un diritto e adempimento di un dovere,* in *Digesto delle discipline penalistiche*, vol. V, UTET, Turin 1990, p. 327 ff.; ID., *Diritto penale*, 11th ed., Giappichelli, Turin 2025, p. 162. However, these last two authors also leave room for differing conclusions regarding the exclusion of culpability.

Cassation in the early 1970s[9] ; and is found in almost identical terms almost half a century later[10] , following repeated rulings fully in line with this[11] .

This traditional and long-standing approach certainly lacks no internal consistency, and in turn produces very precise consequences regarding its place within the system. The origin of the concept in situations where the public authority must counter violence by opponents leads to grounding the reasons for the exclusion of liability in the realm of the prerogatives of sovereignty: the public interest objectified in the criminal protection of a single legal interest can, and indeed must, yield only in the face of a higher reason that serves to guarantee not a particular need, but what might ultimately be described as the very essence of the state's legal system. That is to say, its ability to effectively utilise the tools to defend itself and ensure its own survival. For this reason, in the conflict between norms arising between the individual criminalisation and that which imposes a course of conduct—even when the latter is embodied in an order meeting certain requirements of legitimacy—precedence must be given to the latter, at least insofar as its *rationale* is attributable to an interest which, precisely because of its public nature, can be considered to take precedence over the private interest, albeit within certain limits.

In terms of systemic consequences, such a foundation is linked to the principle of unity and non-contradiction of the legal system. This is used to classify, among the grounds for justification,

[9] Court of Cassation, Section 6, 22 October 1971: 'Orders […] as is evident from the precise and clear wording of the law, must be issued by a public authority, which means that the relationships of subordination taken into consideration are exclusively those provided for by public law. In private law relationships, which include those between private employers and their employees, the above-mentioned ground for justification is not applicable, because there is no legally recognised superior authority of the employer'.

[10] Court of Cassation, Section 3, 13 October 2016: 'The defence provided for in Article 51 of the Criminal Code applies exclusively to employment relationships governed by public law and not to those governed by private law, so that a private-sector employee who receives any operational instruction from their employer is required to verify its compliance with the law in accordance with the ordinary standards of diligence and, should they find it unlawful, must refuse to carry it out, without it otherwise being possible to argue that it is impossible to disobey the order, which would preclude the punishability of the conduct'.

[11] Court of Cassation, 11 May 1993, in 'Diritto e pratica del lavoro', 1993, 2532; Court of Cassation, 6 December 1990, RV. 191801; Court of Cassation, 26 June 1990, in 'Cassazione penale', 1991, I, 744; Court of Cassation,19 June 1990, in 'Rivista penale', 1991, 875; Court of Cassation, 28 May 1984, in 'Cassazione penale', 1986, 48; Court of Cassation, 4 November 1982, in 'Rivista penale', 1984, 184.

the criterion for resolving legal antinomies codified in Article 51 for the fulfilment of the duty imposed by a legal rule or by an order of the public authority[12] .

Yet within such a well-oiled mechanism, some friction is discernible: firstly, at the level of the theoretical basis itself, which presents an aspect that cannot be reduced, at least not entirely, to the purely objective plane of the relationship between norms; secondly, and consequently, the positive law provisions in our code themselves reveal a difficulty in entirely excluding consideration of subjective elements in the application of the ground for exclusion of liability. In this regard, it cannot be overlooked that any legal antinomy produces a conflict of duties within the individual called upon to act; as such, it therefore has significance not only at the level of the relationship between legal rules – which, being objective, can also be described as abstract and impersonal – but also in terms of conflicts of conscience within the individual, that is to say, a level which, in contrast to the former, appears subjective, and therefore concrete and linked to the person required to act.

In this regard, the provision in Article 51(4) of the Criminal Code regarding the non-punishability of a person required to carry out an unlawful order – where they are unable to question its unlawfulness – is significant[13] . This provision has the understandable aim of not undermining the coercive effectiveness of public authorities, yet it retains a fundamental lack of clarity regarding the rationale for the non-punishability of the person carrying out the order. The execution of the order in the external world is not free from a connotation of wrongfulness, which is, moreover, reflected in

[12] See, e.g., G. MARINUCCI, E. DOLCINI, G. GATTA, *Manuale di diritto penale. Parte generale*, 14th ed., Lefebvre Giuffrè, Milan 2025, p. 346 ff. The reference to the situations referred to in Article 51 is, however, absent from the otherwise thorough discussion of legal antinomies and conflicts of duty in F. VIGANÒ, *Stato di necessità e conflitto di doveri*, Giuffrè, Milan 2000, p. 475 ff. It is, however, addressed – in order to criticise the dogma of the coherence of the legal system (albeit with regard to the aspect of the right rather than the obligation to act as the content of the order, but with arguments that seem to apply to both concepts) – in A. SPENA, *Diritti e responsabilità penale*, Giuffrè, Milan 2009, p. 43 ff., 48 ff.

[13] In the case of hierarchically structured bodies, it is preferred to attribute liability to the superior who issued the order, rather than allow the person required to carry it out to delay for fear of exposing themselves to the criminal consequences of the act committed in the performance of their duty. This choice nevertheless applies with an implicit limitation, linked to the very premises of the duty of obedience incumbent upon the executor: although the law provides for the absence of *any* power to question the legitimacy of the order, even in cases where the hierarchical bond is particularly rigid (such as in the military), the subordinate must nevertheless refuse in cases of formal illegality (lack of authority to issue or execute that type of order, failure to comply with the prescribed form) or manifest criminality in the content of the order itself. See G. MARINUCCI, E. DOLCINI, G. GATTA, *Manuale*, cit., p. 350 ff.; D. PULITANÒ, *Esercizio di un diritto e adempimento di un dovere,* cit., p. 328 ff. In case law, e.g. Cass. 9 July 2021 RV. 282221-01; Supreme Court 28 September 1984 in 'Giustizia penale', 1986, II, 450; Supreme Court 21 April 1983, in 'Rivista penale', 1984, 55.

the very contextual assertion of liability on the part of the person who issued the criminal order. The hierarchical bond does not remove this connotation of unlawfulness from the concrete execution of the criminal order; rather, it is the position of the person obliged to carry it out that prevents them, at least ordinarily, from verifying its lawfulness. For this reason, with regard to the current Article 51(4), there has been precise reference to a 'complex positioning, between the plane of justification and that of culpability'[14] . The legal system provides the tools to ensure the effectiveness of public orders, but at the same time resolves the conflict between the obligations of execution and a thorough verification of the lawfulness of the order's content, opting in favour of the former.

The shift in the grounds for excluding a subordinate's non-punishability from the objective dimension of the antinomy to the subjective dimension of the possibility of demanding a certain behaviour from the individual finds a very significant echo in the provision for such a situation amongst the subjective grounds for exclusion of liability inthe now long-standing Pagliaro Commission Draft published in 1992, which contained a draft enabling act for a new Criminal Code and inaugurated the prolonged period of attempts at criminal recodification in our legal system at the turn of the century[15] . Even more significant for the purposes of the present discussion is the fact that, once this perspective was adopted in that Draft, the way was opened for a scope of application no longer limited to the sphere of public and hierarchical relationships, but also extending to private relationships (Art. 17(2)). This fundamental approach was then taken up again over a decade later in the Nordio Draft, with few changes (Art. 38)[16] .

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[14] See D. PULITANÒ, *Esercizio di un diritto*, cit., p. 328. T. PADOVANI also takes a critical view of the classification of the provision in question as a justification, in *Teoria della colpevolezza e scopi della pena*, in 'Rivista italiana di diritto e procedura penale', 1987, p. 815. P. VENEZIANI, *Motivi e colpevolezza*, Giappichelli, Turin 2000, p. 295 ff., favours classifying it as an excuse.

In Germany, in the absence of a provision in the Criminal Code analogous to our Article 51, an act committed in execution of a binding unlawful order oscillates between being classified as a ground for justification (see, for example, H.-H. JESCHECK, T. WEIGEND, *Lehrbuch des Strafrechts. A.T.*, Berlin 1996, 5th ed., p. 394) or, alternatively, as an excuse (e.g. C. KÜPER, *Grundsatzfragen der 'Differenzierung' zwischen Rechtfertigungs- und Entschuldigungsgründe*, in *Juristische Schulung*, 1987, p. 92).

[15] On the significance of this concept within the innovative category in the 1992 Draft, see E. VENAFRO, *Scusanti*, Giappichelli, Turin 2002, p. 176 ff. See also G. FORNASARI, *Le cause soggettive di esclusione della responsabilità nello schema di delega per un nuovo codice penale*, in 'Indice penale', 1994, p. 369 ff.; A. CAVALIERE, *'Riflessioni dogmatiche e politiche criminali sulle cause soggettive di esclusione della responsabilità nello schema di delega legislativa per la riforma del codice penale*, in 'Rivista italiana di diritto e procedura penale', 1994, p. 1478 ff.

[16] On this point, SEE V. MASARONE, *Il problema delle scusanti*, in C. FIORE et al. (eds.), *'Quale riforma del codice penale? Riflessioni sui progetti Nordio e Pisapia*', Edizioni Scientifiche Italiane, Naples 2009, pp. 149 ff., 169 ff.

3. The prospect of exculpation within the context of enhancing the category to advance the principle of culpability in criminal theory

While it is hardly surprising that, at a time when, in our legal system, Constitutional Court judgment no. 364/88 had marked a triumph of the normative conception of culpability, an effort was made to articulate its consequences in various aspects of the theory of crime, the very recognition of the private orders as an excuse represented one of the most significant contributions, not least due to its innovative nature compared to the traditional framework initially outlined. In fact, it overcame the preclusion regarding the possibility that an order originating not from a public authority but from a qualified private individual might, under certain conditions, create a similar situation of conflicting duties that prevents the formation of culpability against the perpetrator.

Such an excuse, moreover, had origins of the utmost importance, because the case law that opened the debate in Germany on *Unzumutbarkeit* (non-exigibility of a lawful conduct) as a general limit to criminal liability and on the grounds for excluding culpability was linked precisely to a private order: this is the case of the horse which the coachman had been ordered by his master to harness to the carriage, despite being aware of the animal's extremely skittish nature (the so-called *Leinenfängerfall*)[17] .

Once the exculpatory approach to characterising the position of the person under a duty has been abandoned, there is no longer any need to identify an overriding objective interest that justifies the actual infringement of a criminally protected interest. To establish the exclusion of liability, there remains the filter of culpability, which looks to the subjective position of the individual who finds themselves in a situation of conflicting duties, and this regardless of the public or private nature of the purpose that is the cause of the antinomic situation. In the shift from the objective perspective, which forms the basis of justification, to the subjective perspective, characteristic of culpability, it thus becomes possible and consistent to include private orders amongst the situations that may bind a person to the commission of a materially unlawful act.

[17] The case was heard by *the Reichsgericht* in 1897 and took on primary importance in the debate on the normative conception of culpability, from Franck to Freudenthal and on to Engisch. See, for example, M. MAIWALD, *'Die Unzumutbarkeit – Strafbarkeitsbegrenzendes Prinzip bei den Fahrlässigkeitsdelikten?*', in P.A. ALBRECHT et al. (eds.), *Festschrift für Horst Schüler-Springorum*, Heymanns, Cologne 1993, pp. 475 ff., 485. In Italy, G. FORNASARI, *Il principio di inesigibilità*, CEDAM, Padua 1990, pp. 54, 86, 96.

This does not imply an absolute equivalence between the execution of a public order and that connected to a private order: in the aforementioned 1992 Draft, the two causes were distinctly provided for and regulated with different requirements. For a private order, it was specified that the person issuing it must hold a position recognised by law as possessing particular authority (the most typical example being the employer's power over subordinates); furthermore, the order in question must fall within the scope of matters pertaining to the employment relationship (if they were unrelated, the obligation to carry out the order would cease to apply); finally, it was required that the person carrying out the order have a 'reasonable belief' in its lawfulness.

The first two elements, relating to the authority of the source and the instrumental nature of the order, may be considered common to both exculpatory situations, and indeed also to the execution of a lawful order as a ground for justification. These are, in fact, requirements deemed necessary also for the applicability of the current Article 51 of the Criminal Code[18] . The distinctive feature of the excuse for those carrying out a private order, however, emerges in the final requirement set out in the provision under consideration in the 1992 Draft, with reference to the subjective aspect that the situation must have for the agent. Unlike in the case of carrying out an unlawful order from a public authority, it was not sufficient that the criminal nature of the order was not manifest or otherwise known to the person required to carry it out; rather, a positive, reasonable belief on their part regarding the lawfulness of the order was required. As regards the scope of this subjective requirement, lawfulness did not appear to be limited solely to the aspects of the order's competence and form, but rather extended to whether or not the order entailed criminally unlawful acts. The provision did not, in fact, refer to legitimacy (which could be limited to purely formal aspects), but to lawfulness, that is, to non-contradiction with the legal system and therefore also with criminal law. In other words, according to that legislative proposal, a person carrying out an order issued by a private authority legally recognised as competent to issue it, and falling within matters pertaining to the relationship of subordination, would have been excused for the offence thus committed only if they had mistakenly believed that compliance would not entail any offence.

The proposed solution therefore differs from attempts to resolve the issue of private orders not on the basis of grounds for exclusion of the offence and defences, but on that of negligence itself. Without denying the limitation of Article 51 of the Criminal Code to orders of a public nature, it has been astutely noted that the execution of private orders may nevertheless remain exempt from criminal liability on two conditions: that such orders do not have a directly criminal content and that

[18] See in this regard Cass. 27 Jan. 1987 in 'Rivista penale', 1988, 88; Cass. 10 June 1982, in 'Cassazione penale', 1983, 882.

the consequent occurrence of offences against criminally protected interests is not due to contributory negligence on the part of the executor[19] . In fact, since the relationship of subordination underlying the obligation to carry out the order is based on the private authority's power to direct the activities actually carried out by subordinate persons, in principle, it is not part of the executor's duty of care to prevent the order's contents from being carried out, because, except in cases of manifest criminality, the individual should be able to rely on compliance with criminal law by those who direct and coordinate their activities[20] . However, such a solution is not absolute, as the conclusion will differ where the executor acts as a guarantor of particular interests involved in the activity or is otherwise aware of the dangerous nature of the order.

The exculpatory solution proposed by the 1992 Draft, on the other hand, generally favoured the position of the person carrying out the act: if they had considered the order lawful, they would have been exempt from liability for the consequences of what was, for them, nothing more than a duty. It would indeed appear that such a solution entails a risk of undermining the protection of criminally protected interests that may be affected in the course of private activities, in that, particularly in the case of guarantors situated at intermediate levels of a work organisation, the excuse could acquit such individuals of responsibility for a vigilant intervention.

Such concerns can be allayed if the requirement in question is understood in its precise sense: in particular, it must be borne in mind that 'reasonably relying on the lawfulness of the order' leaves open the possibility of considering the scenario in which the person carrying out the order, based on their own ability to assess the situation, ought to have recognised the dangerous nature of the act ordered of them. Any reproach for such a failure to recognise the dangerous nature of the act could not, however, in itself alone form the basis for a finding of culpability for complicity in the commission of the offence, but would merely serve to preclude recourse to the proposed subjective ground for exclusion of liability.

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[19] See T. PADOVANI, *'Osservazioni sulla rilevanza penale dell'ordine privato*', in 'Massimario di giurisprudenza del lavoro', 1977, 464 ff.; D. PULITANÒ, *Esercizio di un diritto*, cit., 328. See also Cass. 28 November 1975, in 'Massimario di giurisprudenza del lavoro', 1977, 464 ff.

[20] This constitutes an application of the general principle of reliance, which serves to limit liability for negligence: on this point, see F. ALBEGGIANI, *I reati di agevolazione colposa*, Giuffrè, Milan 1984, 147 ff.; F. MANTOVANI, G. FLORA, *Diritto penale*, cit., p. 324 ff.; A. PAGLIARO, *Principi di diritto penale*, P.G., 9th ed., Lefebvre Giuffrè, Milan 2020, p. 334.

4. The structural analogy with the relevance of organisation in entities with a complex structure: the basis of the entity's liability and the possible exclusion of individual culpability of subordinates

Given that the 1992 Draft, like the others that followed it, remained just that, the opportunity to highlight the significance of the order in private relationships may not be lost if one reflects on its potential, in particular by establishing – as initially mentioned – a link with the field of criminal liability of entities *under* Legislative Decree 231/2001.

In particular, the structure of the objective criterion for attributing the offence to the entity presupposes a fundamental relationship of subordination, albeit not hierarchical, between the natural persons acting on behalf of the entity. It has already been noted that, pursuant to Article 5(1)(*a*) and (*b)* of Legislative Decree 231/2001, the liability arising from acts committed by senior management is alongside that arising from acts committed by subordinates. In the latter case, pursuant to Article 7(1) of the same Legislative Decree 231/2001, in order to attribute liability to the entity for the offence committed, it is necessary, however, to verify the simultaneous presence of a failure to fulfil duties of control and supervision, which logically can only be attributed to senior management[21] .

This implies that the entity's liability in cases of offences committed by subordinates is limited to instances where the offence is the result of an initiative by such individuals that is not only autonomous but also remained outside, or in any case escaped, the exercise of supervisory powers by senior management[22] .

It is therefore legitimate to ask what the consequences are in a situation where the offence committed by a natural person in a subordinate position within the organisation is not only not unknown to senior management, but is instead committed on the basis of specific instructions from the latter. Without the involvement of middle management and the workers themselves—who are, of

[21] In the sense, however, that failure to comply with the obligations set out in Article 7(1) does not refer to senior management, but to the entity as a whole: G. DE VERO, *La responsabilità penale delle persone giuridiche*, in C.F. GROSSO, T. PADOVANI, A. PAGLIARO (eds.), *Trattato di diritto penale*, Giuffrè, Milan 2008, pp. 156, 192: the lack of an explicit reference to senior management regarding the failure to comply with the supervisory obligations referred to in the first paragraph of Article 7 does not detract from the fact that the opening words of the second paragraph contain a formulation ('In any case, failure to comply with management or supervisory obligations is excluded if the entity …') which does not contradict the ordinary attribution to senior management of the obligation to comply with the aforementioned duties, but which excludes any failure to comply in the presence of the organisational models provided for in the aforementioned Article 7.

[22] See, *inter alia*, R. BARTOLI, *Il criterio di imputazione*, in G. LATTANZI, P. SEVERINO (eds.), *Responsabilità da reato degli enti*, vol. I, Giappichelli, Turin 2020, pp. 177 ff., 182 ff.; A. ORSINA, *La responsabilità da reato dell'ente fra colpa di organizzazione e colpa di reazione*, Giappichelli, Turin 2024, pp. 45 ff., 58 ff.

course, identified in various ways depending on the nature of the decisions made by senior management—such decisions could not be carried out and, consequently, the associated criminal effects would not occur. The simplest answer is to rely on the principles of joint criminal liability, possibly (in cases of specific offences) in the form provided for by the provision on the participation of an external party (the subordinate) in the offence committed by a senior figure (director, general manager, etc.) (Article 117 of the Italian Criminal Code). However, if one considers the political and criminal law reasons that have led to the now widespread recognition across legal systems of the most varied legal traditions of specific systems of liability for offences committed by corporate bodies[23] , it is legitimate to ask whether the traditional response, in its linear theoretical simplicity, is the result of a view that no longer aligns with the increased complexity of the factors at play.

If one moves from purely attributive models of liability to the entity – in which the latter is held liable by virtue of a connection with a natural person deemed legally relevant – and seeks to ground the entity's liability on its own conduct, one cannot avoid noting the inadequacy of the liability systems for natural persons: the difficulty is essentially linked to identifying the individuals within complex organisations who are the actual perpetrators of unlawful conduct; this is the case, at least, if one takes care to remain within the scope of forms of attribution that respect the individual nature of criminal liability. This is precisely where the concept of the entity's culpability for internal organisational failings comes into play: the lack of transparency in the precise allocation of roles and responsibilities makes it possible to conceal the true lines of accountability for the decisions leading up to any criminally relevant offences committed within the scope of the collective entity's activities.

5. The scope of the exculpatory effect and its potential preventive impact on the entity's liability

Once it is recognised that such organisational complexity requires the adoption of adequate countermeasures, the absence of which contributes to establishing the entity's liability, in order to overcome the restriction on the non-punishability of orders linked to the original authoritative matrix—which, as noted, limits this to public and, in particular, hierarchical relationships and frames it in objective and impersonal terms— it is useful to consider the implication that, in relationships between multiple parties, a directive issued by a party holding power over others entails an obligation to ensure its execution; that is to say, the imposition of a constraint on the choice to act upon those subject to another's authoritative power.

[23] On this point, for a summary, please see V. MILITELLO*, Corporate Criminal Liability,* in P. CAEIRO, et al. (eds.)*, Elgar Encyclopedia of Crime and Criminal Justice,* ELGAR, Cheltenham 2023.

This is a constraint designed to ensure compliance with the instruction given: without it, any goal-oriented organisation would be unable to carry out its social activities and would therefore fail in its purpose. But whilst it is true that the binding force of the directive to act operates differently depending on the context – namely hierarchical (as in the military and, in any case, the police force) and private (as in employment relationships within a corporate) – in all cases a fundamental limitation on the subordinate's choice of action must be recognised.

This may even give rise to a conflict of conscience in the subordinate when the instruction – an order in the public sphere, a directive in the private sphere – which is issued to them and which they are required to carry out implies, or at least may entail, the commission of a criminal offence. This is not a matter of attributing any significance to the shifting assessments of the subjective morality of the individual called upon to act, which would risk undermining the effective implementation of the decisions made by those responsible for taking them in order to achieve the aims of the organisation to which they belong. Instead, the reference to the criminal nature of the act anchors the subordinate's individual conflict of conscience to an objective order of values recognised and formally shared by the state legal system, which therefore takes precedence over the operational interests of the organisation to which they belong, as understood by those who hold decision-making roles within their respective organisations.

Recognising, in such cases, the significance of the particular state of mind in which the subordinate acts when carrying out orders from the organisation's senior management is consistent with an assessment of criminal liability that takes account of the individual circumstances in which the person is acting; it would therefore represent a step forward in affirming the principle of culpability as a means of holding the individual accountable for their choices. On the other hand, this recognition does not expose itself to the traditional objection that excuses create gaps in protection: in light of the particular triadic nature of the subjective relationship found in such cases (collective entity, senior figure, subordinate), it is necessary here to consider both the continued liability of the person who issued the order constituting the offence and – specifically in the context of orders in the private sector – the possible simultaneous emergence of the independent liability of the collective entity to which the offence committed by senior managers is attributed, even if carried out by subordinates.

The criminal nature of the action required of the subordinate, however, calls for further examination of how this element is reflected in the degree of awareness of the individual in question. On the assumption that the subordinate's awareness of the criminal relevance of the action required of them precludes the recognition of an exculpatory effect in their state of mind – having nonetheless

chosen to act by giving priority to the unlawful act – it remains to be defined in which situations the subordinate lacks full awareness of the unlawful nature of the conduct they are required to perform.

In such situations of doubt, so as not to undermine the operational efficiency requirements of the various organisations—which, though present in different ways across their diverse and complex types—it is not possible to impose on the individual an obligation to carry out a thorough check on the possible unlawful implications of the content of the instructed task on every occasion. It is sufficient, however, that the conduct required of the subordinate falls within the scope of their competence and originates from higher levels of the organisation, to recognise that, in carrying out the order, the individual has given precedence to the obligation to act associated with their position within the company's organisation, except, as mentioned, in cases where they have acquired awareness of the criminal nature of the conduct.

The scope of the exclusion of liability due to a conflict of conscience induced by the private directive is therefore defined, on the one hand, by the individual's awareness of the obligation to comply with the directive, and thus of the negative consequences for them in the event of refusal to carry it out, and, on the other hand, by their perception of the criminal nature of the conduct they are required to perform. As noted, in fact, where there is actual awareness of such a nature, the subordinate's contribution to the commission of the offence would imply joint liability with, for example, the company's senior management who issued the directive.

Moreover, this awareness should not be determined according to objective and abstract parameters (such as the manifestly criminal nature of the order), which risk making the assessment too rigid by applying a fixed and immutable standard that is ill-suited to the subjective nature of the conflict of conscience, which we have identified as the root and *rationale* for a possible recognition of the subordinate's non-punishability. Rather, a more flexible criterion seems preferable, in which the individual is required not to carry out the requested action when it entails an unreasonable risk of a criminal offence, assessed on the basis of the circumstances of the overall context of the action. Nor should this criterion lead to the conclusion that the subordinate's non-punishability must therefore be based on the exclusion of their culpability in the commission of the offence: it should in fact be borne in mind that these may be provisions covering both intentional and negligent offences, and that the reference to conflicts of conscience arising from orders issued by private individuals allows for solutions not limited solely to the latter.

The space thus delimited for private ordering within the system of corporate liability does not merely serve to affirm a renewed role for the principle of culpability, through the further recognition of an excuse that contributes to a clearer delineation of its defining features. Even if only as a brief concluding remark on the notes developed here, the system of corporate criminal liability, through

the introduction of preventive measures when adopting specific organisational and management models, seems to offer a useful point of reference for recognizing such an exclusion of liability. In particular, one could incorporate into organisational and management models designed to prevent offences by the corporation a contribution from subordinates to this activity: within the context of an organisational model based on a 'responsible' type of leadership, in which employee participation is an element that is adequately valued[24] , significance could be attributed to even a limited verification by the latter of the operational instructions they receive, in accordance with their roles and contexts. This is to ensure that compliance with such instructions does not entail an unreasonable risk of constituting criminal offences, in accordance with the criterion previously indicated for recognising the criminal nature of the instructions received.

Even if such a filter were to be incorporated not into organisational and management models to assess their suitability for the purpose of preventing corporate offences, but only into companies' codes of ethics aimed at outlining best practices in participatory decision-making processes within their respective organisations, it would nonetheless represent a significant step towards corporate social responsibility and a better personalisation of the liability of the individual persons participating in various capacities and with different roles in these areas. A more in-depth examination of the potential and limitations of such an approach therefore appears desirable, not only because it fits well with the cooperation between private prevention systems and forms of public protection established by the *compliance* systems introduced into our legal system by Legislative Decree 231/2001, but also because, more generally, it would confirm in updated terms that an advancement of the principle of culpability marks progress both in terms of the foundation and the limits of criminal liability.

[24] On this concept of organisational theory, see T. MAAK, N. M. PLESS, *Responsible leadership in a stakeholder society – a relational* perspective, in 'Journal of Business Ethics', 2006, p. 99 ff.; and, with regard to relations between senior management and employees, A.M. LÄMSÄ, A. KERÄNEN**,** *Responsible Leadership in the Manager - Employee Relationship,* in 'South Asian Journal of Business and Management Cases', 2020, p. 422 ff.