

PROSECUTORIAL DISCRETION VS. MANDATORY PROSECUTION. THE ITALIAN CASE OF CORPORATE CRIMES

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1. The title “Prosecutorial discretion vs. mandatory prosecution” is deliberately paradoxical. Understandably, one might not expect an Italian scholar that has to write on her juridical system to speak about “prosecutorial discretion” since it is well-known that in the Italian system, prosecution is mandatory. So, I’d like to clarify what the title means. After that, I’d like to explain when the Prosecutor has to prosecute a corporation and, before prosecution, when it is that the Prosecutor has to initiate investigations against corporations. Then I’ll discuss why the Prosecutor often decides not to investigate corporations, and I’ll describe, on the one hand, how the Prosecutor may dismiss the case after investigations, and on the other what happens when the Prosecutor decides to prosecute a corporation. Finally, I’ll outline some possible solutions.

As some may know, mandatory prosecution is a fundamental principle enshrined in the Italian Constitution intended to ensure equality of treatment among citizens and the independence of the Public Prosecutor. However, it must be said that mandatory prosecution is a “conventional lie”, as a leading Italian scholar has observed (R.E. KOSTORIS, *Obbligatorietà dell’azione penale, esigenze di deflazione e «irrelevanza del fatto»*, in AA.VV., *I nuovi binari del processo penale: tra giurisprudenza costituzionale e riforme*, Atti del Convegno dell’Associazione tra gli studiosi del processo penale, Caserta-Napoli, 8-10 dicembre 1995, Giuffrè, 1996, p. 207). The huge number of offences provided for by the Italian criminal code and the subsequent plethora of criminal proceedings the prosecutors have to manage makes it impossible to prosecute every crime which may deserve to be prosecuted. Nonetheless, the overall

number of criminal proceedings for corporate crimes is still very high, while that of proceedings involving corporations as defendants is surprisingly low. In other words, there is a significant number of proceedings against individuals for corporate crimes, yet very few against corporations. It is striking because in both cases prosecution should be mandatory.

It is crucial to observe when the Prosecutor must prosecute individuals and when he or she must prosecute corporations. In the proceedings against individuals, the Prosecutor must only verify if there are grounds for prosecution. In the proceedings against corporations, the Prosecutor must ascertain if the offence is included in the list of crimes for which corporations can be prosecuted and if there are grounds for prosecution; whether the author is a senior manager or a simple employee; whether the corporation benefits from the crime; and whether the corporation has an adequate *ante-factum* compliance programme or not. In our legislation, adequate compliance programmes can exclude the corporation from liability if implemented *ante delictum*. If adequate compliance programmes are adopted *post factum*, they can still result in an attenuation of penalties.

So, corporations are not responsible for all the crimes for which individuals belonging to an organisation can be held responsible. There is a selection of crimes for which corporations can be held responsible: for instance, improper/undue receipt of funds, fraud against the State or a public entity or to obtain public funds, computer fraud against the State or a public entity; bribery, improper incitement to give or promise benefits, and misconduct in public office.

2. In Italy there is no general culture of gathering empirical data, but a few courts have started to collect and publish their statistics. And currently a group of scholars, part of which I'm a member, has promoted a research project which intends to study criminal proceedings against corporations from an empirical viewpoint.

I examined data published by the Milan Public Prosecutor's Office (https://www.procura.milano.giustizia.it/files/BRS_Procura_19-20.pdf). I chose Milan because it is the only published data available but its data is also significant because Milan is the financial centre in Italy and so enjoys a privileged vantage point. In 2020 there were 6 proceedings against corporations for fraud and 24 for bribery and other misconduct in public office. We know the number of proceedings against corporations; however, the number of proceedings against corporate managers and employees for the same crimes have never been reported (more specifically, the total number of proceedings against individuals for corporate crimes is known, but we don't know the exact number of proceedings against individuals which correlate with the same crimes for which corporations can be held criminally responsible). Nonetheless, since 2013 Milan's Public Prosecutor has highlighted the huge number of proceedings for corporate crimes and admitted that there is a significant gap between proceedings against individuals and those against cor-

porations for the same crimes (<https://www.procura.milano.giustizia.it/files/BRS-2013-definitivo-17-dic.pdf>).

Some might observe that the Prosecutor must prosecute corporations only if he or she ascertains that the corporation benefited from the crime or that the crime was committed for the corporation's interest. Individuals might commit a crime for his/her personal advantage. Others may point out that corporations might have adequate compliance programmes and in that case, as I've observed before, they would not be held responsible. Nonetheless, what is interesting is that these statistics concern proceedings at the stage of preliminary investigations and when Prosecutors initiate investigations against corporations, it is only possible to verify if the crime is listed amongst those provided for under corporate responsibility and if the person who is alleged to have committed the crime works for that company. It is the investigations that will have to prove the corporation's interest or advantage and whether compliance programmes exist and are adequate.

So, why is there such a low number of proceedings involving corporations as defendants? Why do Prosecutors prefer not to initiate investigations against corporations? If the prosecution is mandatory, then surely the preliminary investigations are mandatory as well.

Possible answers:

a) Prosecutors don't want to deal with the added complications that criminal proceedings against corporations imply. If Prosecutors must prove corporate interest or advantage and, moreover, if they have to verify whether the compliance programme is adequate, the proceeding will take longer and will be more complex, also because Prosecutors often don't have specialised business knowledge. Consequently, they will need to appoint technical consultants.

b) Prosecutors want to protect corporations from bankruptcy: the length of trials can determine significant loss of business, e.g. restricted access to public contracts, and damage to business reputations. Especially in times of financial crisis, it could be fatal. As Brandon Garrett explained in his book, corporations are too big to jail, and to fail (B.L. GARRETT, *Too Big to Jail. How Prosecutors Compromise with Corporations*, Harvard University Press, 2014).

c) There is still another possible explanation, which has a completely different reason. For some offences for which corporations can be criminally liable (for instance, fraud against the State or a public entity or to obtain public funds), Prosecutors can obtain the same results using preventive measures; which they can ask the judge for without a criminal proceeding and therefore without the guarantees of criminal proceedings. In Italy preventive measures can be applied without involving criminal proceedings, in the so-called "prevention proceeding", when the judge verifies that the defendant is simply "dangerous". There are criteria to ascertain if someone is dangerous, but they are very general and, as I anticipated, the defendant doesn't have the same guarantees that exist in criminal proceedings. I'd like to explain this point

with an example. For instance, in a leading Italian case-law, at the end of a prevention proceeding, a senior manager chosen by the Court of Milan was appointed in order to administer the company and make management reforms, because the corporation was found to be dangerous (<https://www.penalcontemporaneo.it/upload/4688-decretotribmilano27012017.pdf>). Indeed, the corporation's administration can be taken over by a commissioner, if the continuation of activity is crucial to ensuring law and order or employment needs. This is a preventive measure and at the same time, this is a typical sanction that the judge can apply at the end of a regular (and time-consuming) criminal trial. Why would the Prosecutor choose criminal proceedings if he/she can achieve the same result with the simpler prevention proceeding?

These are the possible reasons which may explain the low number of Italian criminal proceedings against corporations.

3. As already mentioned, there are other indicators of prosecutorial discretion, besides the decision not to investigate corporations. When the Prosecutor brings proceedings against a corporation, at the end of the investigations he or she has two alternatives: to ask for a trial or to dismiss the charges. In the latter case, we have the most significant difference compared to proceedings against individuals. In the proceedings against individuals, the Prosecutor can request dismissal and the judge must authorise it. In the proceedings against corporations, Prosecutors can dismiss the charges *de plano*, without judicial control. Consequently, he or she is the only *dominus* regarding the decision to prosecute.

There is still more. If on the one hand Prosecutors often decide not to initiate investigations against corporations, on the other it is worth noting that in all cases in which corporations were prosecuted, at the end of the trial they were found guilty because compliance programmes had been found inadequate. As I said before, adequate *ante factum* compliance programmes can exclude corporate liability. To date, courts have never evaluated *ante-factum* corporate compliance programmes as adequate. This is the reason why in the majority of cases for which corporations are prosecuted, they ask for a plea-bargain. As we know, in the plea-bargain the Prosecutor is the main actor because he or she can decide if the corporation can conclude the agreement and under what conditions. In Italy the corporation can conclude the agreement only if the Prosecutor decides that in that case only financial penalties (and not disqualifying ones) must be imposed. The judge holds what is usually a very brief hearing to evaluate the plea-bargaining and, generally it is approved. In addition, in Italy we don't have a register of plea-agreements and the hearing to evaluate the agreement is not public.

In conclusion, we can observe to what extent the prosecutorial discretionary powers characterise proceedings against corporations.

I think that one possible solution to limit prosecutorial discretion is to increase the judge's powers and to enhance transparency, by providing for a judicial control over the decision not to prosecute. In addition, my proposal

is to introduce probation for corporations under judicial control too, only for the first offence, only if the corporation presents a plan to modify its organization and to compensate for damages, and only if the judge evaluates it as adequate (R.A. RUGGIERO, *Scelte discrezionali del pubblico ministero e ruolo dei modelli organizzativi nell'azione contro gli enti*, Giappichelli, 2018, p. 171). In this case it is up to the judge to check if the corporation has done what it was asked to do. At the same time, the new special proceeding is likely to be more attractive than the plea-bargaining for corporations under prosecution, since probation doesn't end up in sanctions being imposed.

I realize these proposals don't solve all the problems I've mentioned. Even if we increase judicial powers, Prosecutors can continue, without any judicial control, to decide not to initiate investigations against corporations at all. Consequently, maybe the time has come to accept this discretionary prosecution *de facto* in criminal proceedings against corporations and to regulate it: the decision not to initiate investigations against corporations is a political one and so it might be right in such cases to provide for some form of accountability of prosecutors, who at present, under the Italian Constitution, are independent of any other power.

