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The Italian Response to Corporate Criminal Liability: a new challenge for artificial intelligence.

La risposta italiana alla responsabilità penale delle imprese: una nuova sfida per l'intelligenza artificiale.

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Abstract

The Italian legal system predisposed a specific discipline against organized crime phenomena through legal entities, both when the corporate shield is an opportunity to commit crimes, and when it is created far that sole purpose.
By examining these issues, the paper aims to verify, also in a *de jure condendo* perspective, whether an administrative model of corporate criminal liability (instead of a criminal one) would lead to much more coherent solutions, and, above all, how the using of A.I. can play an important role in preventing and contrasting that type of crimes.

L'ordinamento giuridico italiano ha predisposto una specifica disciplina contro i fenomeni di criminalità organizzata realizzati per il tramite di persone giuridiche, sia quando lo scudo societario costituisce occasione per la commissione di reati, sia quando è realizzato a tale unico scopo.
Esaminando tali questioni, il contributo si propone di verificare, anche in un'ottica *de jure condendo*, se un modello amministrativo di responsabilità possa condurre a soluzioni molto più coerenti. Nonché, infine, il ruolo che l'utilizzo dell'intelligenza artificiale può rivestire nella lotta a questo tipo di criminalità.

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Keywords: organized crime; legal entities; corporate liability.

Summary: Introduction: object, objective and method of the investigation. – 1. The relation between the crime and the legal person. – 2. Problematic issues concerning the Italian discipline on 'corporate criminal liability'. – 3. The juridical nature of corporate crime liability. – 4. The negligent conduct of the juridical person. – 5. Corporate crime liability of the foreign legal person for crimes committed in Italy. – 6. The administrative nature of the legal person illicit activity. – 7. Conclusions: which role for artificial intelligence.

Introduction: object, objective and method of the investigation.

The Italian legal system, like others in Europe and beyond, intended to enact a specific discipline to combat criminal phenomena attributable to the action of legal persons.[1] This can occur both when the crime represents an isolated moment in the life of the entity, functional to overcome a difficult situation or to consolidate its position on the market, and when the legal person becomes the instrument used for carrying out illicit activities, for the sole purpose of which it is constituted.

With respect to the subjective extent of application of the above-mentioned discipline, clarifications to be made would be many. However, in the current investigation, we will only refer to the 'figures', all-embracing, of legal person or corporate body.

These notions, as a matter of fact, are able to comprehend the whole phenomenon of non-human legal subjects, although at the cost of a less accurate description of the legal phenomenon. It should be considered, however, that the exact individuation of the single typology of legal entity, such as associations (recognised or not), companies, or even public legal bodies operating on the market, to whom the responsibility for the crime should be addressed, is the consequence of a choice made by national legislators, which does not affect, if not marginally, the individuation of the legal problems concerning natures and characteristics of such responsibility.

This brief explanation, indeed, is useful to clarify the objective of the proposed study: moving from the description of the main legal issues concerning provisions on corporate crime liability, we will try to verify, also in a *de jure condendo* perspective, to which extent an administrative sanction (instead of a criminal one) could be a more practicable solution in order to prevent corporate criminal activities, not only in terms of effectiveness, but also to overcome legal problems emerging from the criminal nature of the sanction.

[1] It is a decision also taken to comply with the lines coming from the European legal system. Art. 3 of the «Second Protocol of the Convention on the protection of the European Communities' financial interests» (97/C 221/02) states: «Each Member State shall take the necessary measures to ensure that legal persons can be held liable for fraud, active corruption and money laundering committed for their benefit by any person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person, based on — a power of representation of the legal person, or — an authority to take decisions on behalf of the legal person, or — an authority to exercise control within the legal person, as well as for involvement as accessories or instigators in such fraud, active corruption or money laundering or the attempted commission of such fraud. (par. 1); and «Liability of a legal person under paragraphs 1 and 2 shall not exclude criminal proceedings against natural persons who are perpetrators, instigators or accessories in the fraud, active corruption or money laundering» (par. 3).

It is, obviously, an issue that could be imagined to be suitable for every single legal order, although different could be the legal options that each one of them could decide to assume. The adopted approach, then, could allow us to use the discipline set by the Italian legislator as a useful example to point out the more relevant issues that a system of criminal responsibility extended to legal bodies presents.

Clarified the objective, it is now necessary to describe what methodology will be used to pursue it, which will combine induction and deduction: moving from the analysis of living law,[2] which will be framed, inductively, from the rulings of the judges, we will try to verify, deductively, whether the conclusions to which they arrive can be considered compatible with the *general theory of Law*, the *legal rationale* and the basic *principles* and *values* of the legal system.[3]

1. The relation between the crime and the legal person.

There is no doubt that the Italian legislator, when called to set a specific legislation on the consequences of crimes connected to legal persons activities, has found himself in the difficult condition to reason over notions that, in the legal tradition of civil law countries, were always related to human beings.

As a matter of fact, regardless of the legal order, notions such as the reproach of action *contra ius*, the type of punishment, and its consequences, when referred to legal persons, must necessarily be redefined in order to accord them to processes of will, and action, that are the result of internal dynamics of complex multisubjective structures.

This said, it can be argued that the main issues that can emerge concern, mainly: a) the relation between the crime and the legal person, and, as a consequence, b) the juridical nature of the related responsibility; c) the role of the negligent conduct of the legal person; d) limitations to the possibility to punish that legal person for crimes committed in the territory of another country.

These are, indeed, issues that are not easy to solve, concerning which each country has adopted different approaches, depending on the amplitude and the gravity of the phenomenom, on the constitutional framework to which obey, and on the sensibility of the legislator with regards to this particular typology of criminal activity.

Indeed, each one these issues could be the object of a single and accurate study. This, however, would far trespass the scope of these brief thoughts, which are directed to reason on the effectiveness and sufficiency – in order to effectively combat a phenomenon which is particularly sneaky and aggressive such as corporate criminal activities – of administrative sanctions instead of criminal ones.

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[2] Here we intend to accept the notion of living law proposed by L Mengoni, *Diritto vivente*, *Digesto delle discipline privatistiche – Sezione civile* (IV edn, 1990), vol VI, 445, accordind to which «il diritto vivente è una formula che sintetizza il complesso problema della partecipazione del giudice alla formazione del diritto (posto che egli trae la regola di decisione non solo dalle norme legali, ma anche dai dati extratestuali della realtà sociale determinata dalla norma come proprio ambito di applicazione) e del controllo delle valutazioni da lui compiute» [living law is a formula that summarizes the complex problem of the participation of the Courts in the formation of law (given that they draw the rule of decision not only from the legal norms, but also from the extra-textual data of the social reality determined by the norm as its own field of application) and of the control of the assessments made by them].

[3] G Clemente di San Luca, 'The Role of the Legal Scholar in the Process of Modernization of the Public Administration' (2016) 3 Dir. pubbl. 1019, 1029 (emphasis added).

2. Problematic issues concerning the Italian discipline on 'corporate criminal liability'.

It is quite evident that the first 'dogma' to abandon, in order to set a criminal liability for legal persons as a consequence of the commission of a crime, is the one according to which *societas delinquere non potest*. The basic idea is that the application of the punishment, as a consequence of the criminal action, represents a *malum passionis quod infligitur ob malum actionis*,[4] or, in other words, an evil action which is perceived as so, and this, in a general way, still represents the foundation of every criminal legal order built around detention sanctions, assuming the physicality of those who receive it.[5]

Certainly, there is nothing that precludes the legislator from extending criminal provisions to legal persons. Under this perspective, indeed, we can recall the saying that Parliaments can do everything «except change a man into a woman». Nevertheless, the idea of a highly anthropomorphic criminal legal order, still present in many national legal systems – for sure the Italian one –, has brought to extend to legal bodies the responsibility for crimes committed in their interest by people which are related to that legal person by a qualified legal relationship.

Although the object of this investigation does not immediately relate to the issues concerning the nature of legal persons subject to this type of legislation, nor to the relationship between these legal persons and the human being who has committed the crime, it seems, however, useful, a brief mention of the rules introduced by D. Lgs. n. 231/2001, at least to the extent to which this appears necessary to frame the juridical nature of corporate crime liability in the context of the Italian legal system.

In this sense, it must be pointed out that the Italian legislator has introduced a specific discipline in order to regulate administrative responsibility[6] of legal persons for crimes committed in their (also non-exclusive) interest, by designing two different hypothesis: one of the so called 'illicit business', and the other one for crimes which are only occasionally committed in the legal person's interest.

These two cases, although presenting a common element in the material author of the crime, are quite different one from another with regards to both the preconditions of the crime and the applicable punishment.

Highly peculiar, indeed, is the case of the illicit business, which occurs when the legal person is created with the sole purpose of allowing the commission of criminal activities. To make an example, this happens when a financial company is created with the only intention of money laundering and/or contracting usuring loans. If this is the case, the blame on the legal person must be reconstructed as wilful misconduct (and not negli-

[4] Grozio, De iure belli ac pacis, lib. II, cap. XX, § 1,1.

[5] S. Manacorda, 'Limiti spaziali della responsabilità degli enti e criteri d'imputazione' (2012), 1 Riv.it. dir. proc. pen. 91, 93; Giulia Ceccacci, 'Limiti di spazio della responsabilità da reato degli enti: il reato commesso in Italia nell'interesse o a vantaggio di società avente sede all'estero' (2020), 12 Cass. pen. 4715, 4731.

[6] Decreto Legislativo 8/6/2001 n. 231, s 1, «Principi generali e criteri di attribuzione della responsabilità amministrativa» [General principles and criteria for attributing administrative responsibility].

gent facilitation of the crime committed by its employee), and the correspondent sanction is represented by the immediate interdiction of the legal person, which is furtherly directed to its elimination from the legal world.

In the different and more recurrent hypotheses of a crime committed by a human being inserted (in a directive position as well as a simple employee) in the organisational structure of the legal person, instead, the legislator has subordinated the verification of corporate crime liability to two different and cumulative conditions.

From an objective perspective, the legal person can be considered responsible only for those crimes strictly defined by the law, committed in its interest or from which the legal person has taken advantage;[7] from a subjective perspective, instead, criminal liability is subordinated to the fact that the legal person has omitted the preparation of an appropriate organisational model in order to prevent the commission of a crime by the *intraneous* in the interest of the company.[8]

Therefore, in this second case, it looks like liability is based on negligence, descending from the fact that the legal person has not taken the suitable actions in order to prevent the commission of the crime.

It is precisely this last condition, however, that presents the major issues when trying to reason on the elements that could be able to exclude corporate criminal liability. It is necessary to ask ourselves, in particular, to which point it is possible to request to a legal person an organisational effort in order to prevent the commission of crimes in its interest. Indeed, if it is true that it can be difficult to typify a duty of diligence, especially one of organisational nature, it is also true that *ad impossibilia nemo tenetur*.

Such reasoning is able, indeed, to shift the focus to the title of the conference in which this study finds its roots: "Too big to convict".

If the reference is to the dimension of Multinational Enterprises, which, by crossing boundaries of individual legal systems, could by this obtain a (more or less) wide immunity from state sanctioning (including criminal) law – despite the performance of high-impact criminal phenomena socio-economic –, obviously it would be difficult to agree with such conclusion.[9]

If, instead, as it seems quite plausible to believe, the attention is to the multifaceted organization of these bodies, which makes it difficult to identify the existence of a complicity and/or of a facilitating conduct in a criminal offence, especially in the presence of internal procedures with a high rate of complexity; or to the fact that the relevant damage to ascertain the existence of the crime occurs at such a significant spatial and chronological distance, if compared with the organizational disfunction attributable to the entity, to make it difficult to identify who to charge for the unlawful conduct, or to distinguish which is the injurious conduct to be causally connected to the crime, evidently the title of the meeting has hit the mark.

These issues emerge in all their evidence starting from the really first moment in which the legislator must choose the regulative policy direction, when he has to describe, in the criminal provision, the typologies of illicit conducts. This operation, indeed, cannot be considered easy, due to the fact that legal persons to which these provisions

[7] Decreto Legislativo 8.6.2001 n. 231, para 5.
[8] Decreto Legislativo 8.6.2001 n. 231, para 6.
[9] See B.L. Garrett, Too Big to Jail: How Prosecutors Compromise With Corporations (Harvard University Press, 2014).

are addressed act in multiple legal systems, each one of them characterised by its own and autonomous rules, which are usually quite different one from another.

This situation, in particular, is not difficult to be found with regards to the individuation of the list of crimes able – at the recurrence of the above mentioned subjective and objective conditions – to trigger corporate liability, and also with regards to the individuation of organisational arrangements sufficient to exclude the responsibility of the legal person.

To this extent, it is must be pointed out that – at least in the Italian legal system – the legal person is not called to respond, not even potentially, for every crime committed in its interest, but only for those crimes which are strictly identified by the law.[10] As a consequence, in order to be compliant with the law, the legal person which has its headquarter and/or operates in Italy can legitimately provide an organisational structure sufficient to avoid the occurrence of these specific crimes, although at the risk of exposing itself to liability for further crimes committed by its agents (either directors or simple employees) in another legal system.

It must be also considered that these problems, which surely affect the legislator activity, are not the only ones which can occur.

Continuing to reason on the extent of the organisational arrangements able to exclude corporate liability, we could also ask ourselves to which point it is possible (also for the legislator) to demand the adoption of models suitable to prevent the commission of a list of crimes which has become, in the last decades, every day more widespread and heterogeneous.

This clearly emerges when a particular compliance implies, as a consequence, a consistent (or even only appreciable) loss of business productivity. This eventuality, as a matter of fact, clearly shows that every provision concerning this specific aspect involves two different values: on one hand, the necessities of production, strictly connected to freedom of economic initiative (protected also in the ECHR); on the other hand, the interests protected by the criminal provisions.[11]

This conflict, in absence of, if not precise, at least not incomplete, provisions set by national legislators, can risk to always end in favour of those interests which are protected by criminal provisions.

It is true, however, that making any hypothesis on the way to solve the above mentioned conflict would end, inevitably, in moving the investigation to the field of legal policy, trespassing the scope of this study. We cannot deny, though, the slippery slope on which all legislators are called to operate, as an excessive enlargement in the demand of organisational arrangements, by influencing the earning capacity of the legal person, can result in a lack of competitiveness of national companies.

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[10] It is easy to observe how the legislator, to adapt the punitive response, increased the range of offences attributable to entities, without verifying whether or not this increase was compatible with the general rules on legal persons liability.

[11] See O Di Giovine, 'Il criterio di imputazione soggettiva' in G. Lattanzi and P. Severino (eds), *La responsabilità da reato degli enti* (Giappichelli 2020) I, 235, acconrding to which «ove l'ente volesse impegnarsi in una compliance a 360^0, effettiva e non cosmetica, dovrebbe impegnare risorse (economiche, di personale e di tempo) probabilmente proibitive anche per imprese dotate di notevoli capacità economico-patrimoniali» [if the entity wished to commit to compliance 360 degree, effective and non-apparent, it would have to use resources (economic, of personnel and time) that are probably prohibitive even for companies with the highest economic and financial capacity]. See even James Reason, Human error (Cambridge University Press 1990) 233.

What must be pointed out, however, is the abdication by States in confronting themselves with this sneaky task. Indeed, considering the particular challenge of entering in the internal dynamics of complex corporate structures, States have preferred to refer to legal persons the individuation of the organisational arrangements suitable to guarantee the prevention of such crimes. In particular, it looks like States have limited themselves (not always in a linear way) in intervening on the catalogue of crimes related to legal persons, by this assigning to judges the verification of the suitability on the organisational measures concretely put in place by companies in order to be exempted from any form of liability.

This choice which, at least at a first glance, could seem particularly wise, because it exempts the legislator from confronting with the functioning of a great variety of internal decisional procedures, appears, however, to present a fundamental flaw.

As a matter of fact, what this choice seems to confuse, if not even to redefine, is the role that legal systems acknowledge to legal persons which – although with a certain amount of approximation – operate in the production of goods and services. These subjects are, indeed, economic operators whose ultimate scope should be to maximise profits and minimise losses. By assuming this legislative choice, instead, these legal persons are transformed into 'private gendarms', to which States, under the threat of a sanction, refer the function of controlling the compliance with laws concerning their activity. A function that is, or at least should be, of public nature.

This observation cannot be considered a pure scientific speculation, as it cannot be denied that only in the delimitation of these functions referred to legal persons it is possible to define the standard of diligence that can be legitimately be requested in order to exclude corporate crime liability.

Nonetheless, as another ancient latin maxim says, *dum Romae consulitur, Saguntum expugnatur*, this meaning that while the existence of unclear provisions on the point animates a fruitful debate among legal scholars, it is truly to judges that most legal systems remit the task of trying to solve the complex issues arising around corporate crime liability.

3. The juridical nature of corporate crime liability.

To reason upon the nature of corporate crime liability, the analysis must necessarily begin from the letter of the law, which is significantly entitled «Discipline of the administrative responsibility of legal persons».

The express reference to the administrative nature of legal persons' responsibility, which is furtherly repeated in the first section of Decree n. 231, evanishes in the prosecution of the text of law, where the term responsibility is used without any qualification.

Despite the letter of the law, the necessary relationship with the commission of a presupposed crime has reinforced the idea that rules concerning corporate crime liability are to be assigned to the sphere of criminal law.[12] This interpretation, however, not

[12] S Manacorda, 'Limiti spaziali della responsabilità degli enti e criteri d'imputazione' (2012), 1 Riv.it. dir. proc. pen. 91, 93, according to which «siamo dinanzi ad uno specifico 'tipo d'autore' caratterizzato da potenzialità criminose straordinarie ma pur sempre da ricondursi entro gli schemi formali delle categorie del diritto e del processo penale»

only mortifies the letter of the law – which should be considered expression of a precise choice made by the legislator –, but also paves the way to a great variety of possible interpretations, leading to conclusions which frequently lack of coherence.

As an example, it can be underlined that even when the matter concerning the nature of corporate crime liability is, at least apparently, left on the background of judiciary decisions, as it is considered irrelevant for the definition of the case, judges are more keen on enforcing criminal law provisions whenever the discipline concerning legal persons responsibility presents some flaws. The analysis of jurisprudence is, in this sense, quite significant.

Even though there are some isolated rulings which expressly recognise corporate crime liability as a criminal responsibility[13] – and this despite the express qualification made by the legislator of that same responsibility as an administrative responsibility as a consequence of a crime –, what emerges from the majority of the rulings is that, even though judges do not arrive to the same conclusion, they always try to extend to the legal person the crime committed in its interest. This means that, in presence of two different conducts, and more precisely the one of the human being (the material author of the crime) and the one of the legal person (for not preventing the action of his agent), there is truly only one offence concerning which both are called to respond.

Such conclusion is explained by the jurisprudence in two alternative ways.

According to a first interpretation, to which also many legal scholars seem to agree,[14] corporate crime liability should be framed as a negligent participation in the crime committed by the legal person's agent. Under this perspective, to which the United Sections of the Supreme Court seem to convey,[15] the legal person's conduct can be framed in the «criminal paradigm of the participation in the crime, conveying with those scholars who had classified it as a multiparty case of special part, which has typified a new hypothesis of necessary participation of physical and legal persons in the same crime».[16]

Another judicial interpretation, instead, follows a different path.

According to this interpretation, which was also recently agreed on by the Supreme Court, the crime committed by the agent is extended to the legal person as a consequence of the relationship among them, which is defined, in the Italian legal order, as

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[we find ourselves in front of a specific 'type of perpetrator' characterized by extraordinary criminal potential but still to be reduced to the formal schemes of the criminal law and trial]. G. Ceccacci cit., 4716, «In breve, a fronte di chi fa leva sul dato letterale, secondo una diversa opinione si tratterebbe, al contrario, di responsabilità penale celata dietro una palese "frode delle etichette"» [Briefly, on the contrary of those who rely on literal data, according to a different opinion, it would be criminal responsibility hidden behind a clear "label fraud"].

[13] Tribunale di Torino [2013] www.dejure.it.

[14] CE Paliero, 'Art. 7, soggetti sottoposti all'altrui direzione e modelli di organizzazione dell'ente' in M Levis, A. Perini (eds), *La responsabilità amministrativa delle società e degli enti: d.lgs. 8 giugno 2001, n. 231* (Zanichelli 2014).

[15] Cassazione penale SS.UU. [2008] Riv. pen. 10, [2008] 1000, «V'è quindi una convergenza di responsabilità nel senso che il fatto della persona fisica, cui è riconnessa la responsabilità della persona giuridica, dev'essere considerato "fatto" di entrambe, per entrambe antigiuridico e colpevole, con l'effetto che l'assoggettamento a sanzione sia della persona fisica che di quella giuridica si inquadra nel paradigma della responsabilità concorsuale» [There is therefore a convergence of responsibility in the sense that the fact of the natural person, to which the responsibility of the legal person is reconnected, must be considered a "fact" of both, anti-juridical and guilty, with the effect to subject both the natural and the legal person to the sanction following the scheme of contributory liability].

[16] Tribunale Lucca [2017] www.giurisprudenzapenale.com, [2017] n. 222 (decision confirmed by the ruling of Corte d'Appello di Firenze [2019] www.giurisprudenzapenale.com). See also Cassazione penale [2009] Guida al diritto 26, [2009] 82.

'*organic identification*'. Under this perspective, those who act on behalf of the legal person, because they are inserted in the company structure, are considered as acting as an organ of the legal entity. In this way, the crime which eventually occurs must be charged directly to the legal person.[17]

This last reconstruction, in particular, appears to be recalled in one of the most recent rulings of the Supreme Court, which – although declaring the administrative nature of corporate crime liability –, when referring to the event of the offence committed in the interest of the legal person, states that that same legal body must respond, as everyone else, for the effects of its conduct, by this implying to believe that the crime committed by the human being must be charged directly to the legal person.[18]

The analysis of the jurisprudence, then, surely reveals how the juridical reconstruction of corporate crime liability suffers of an extreme tension between, on one hand, its attraction to criminal law, and on the other hand, the express qualification by the legislator in terms of administrative responsibility.

This difficult tension surely emerges immediately in the extension of the crime committed by the agent to the legal person, as well as in the tendency shown by judges to use criminal law rules whenever the specific discipline set for corporate crime liability is incomplete. This tendency, indeed, appears to be furtherly encouraged from the fact that the judge who has the task to decide whether an illicit has happened or not is the same who is called to verify the subsistence of the crime committed by the agent, as the legislator has decided to match the legal criteria in order to identify the jurisdictional competence on both matters.[19]

On the contrary, although the administrative nature of corporate crime liability can be found as stated in a huge amount of judiciary rulings, it appears that these statements are usually misapplied when brought to their concrete consequences. This fundamental flaw in the reconstruction of corporate crime liability, in particular, clearly emerges when judges are called to question themselves about the possible extension of negligent offences of the agent to the legal person, as well as in the case of crimes committed in the Italian territory in the interest of legal entities which have their headquarters in a foreign State.

4. The negligent conduct of the juridical person.

The problem concerning the individuation of the legal person's negligence arises when the legislator, broadening the catalogue of the crimes which may trigger corporate

[17] Cassazione penale [2010] Le Società, [2010] 1241. Tribunale di Trani [2010] Dir. proc. pen. 7, [2010] 848.

[18] Cassazione penale [2020] Cass. pen. 12, [2020] n. 4706. Different opinion is expressed by Cassazione penale SS.UU. [2014] Cass. pen. 2 [2015] n. 38343, acconding to which «Il Collegio considera che, senza dubbio, il sistema di cui si discute costituisce un corpus normativo di peculiare impronta, un tertium genus, se si vuole. Colgono nel segno, del resto le considerazioni della Relazione che accompagna la normativa in esame quando descrivono un sistema che coniuga i tratti dell'ordinamento penale e di quello amministrativo nel tentativo di contemperare le ragioni dell'efficienza preventiva con quelle, ancor più ineludibili, della massima garanzia» [The Court considered that the system constitutes a normative corpus with a peculiar character, a tertium genus. The considerations contained in the Report that accompanies this legislation hit the mark when they describe a model that combines the pattern of criminal and administrative system to join the preventive efficiency with the highest level of guarantee].

[19] Decreto Legislativo 8.6.2001 n. 231, para 36. See Stefano Manacorda (n 5), cit. 96.

liability, includes in this list negligent crimes of event.

Without lingering too much on the peculiar structure of such crimes, it seems difficult to overcome the systemic incongruence descending from the fact that in a negligent misconduct, the event is not wanted by its author. As a matter of fact, if the legal person is called to respond for the conducts of its agents (in a directive as well as in a subordinate position) when the crime is committed in its interest, it is quite difficult to imagine this same self-interest whenever the consequences of the misconduct are not wanted by the author of the crime.[20]

Therefore, since it is not conceivable that the above mentioned extension is the consequence of a legislator's mistake, it is necessary to question ourselves on two different issues: a) the compatibility of a negligent crime (of event) with corporate liability; b) the verification of a negligent conduct by the legal person.

In order to ascribe to the responsibility of the legal body also the hypothesis of the negligent crime of event, judges verify the existence of the interest (or advantage) that the legal entity gains from the crime of its agent exclusively with regards to the violation of the precautionary rules from which the crime has derived. By doing this, the judge does not ask himself if the harmful event – which, standing to its same definition, is not wanted by the author of the crime – was committed in the interest of the legal body, but only if such interest was (or was not) behind the violation of the precautionary rules that brought to the harmful event.[21]

As proof of this, in a case concerning the violation of rules on workplace safety, the Court stated that «established case-law (although only by courts of first degree) sets that the condition of the interest or advantage must be related not to the whole offence, comprehensive of the harmful event, but only to the misconduct of workplace safety rules».[22]

This interpretation, which is quite well established, does not only overshadow the exam of the legal person's conduct, but also carries negative effects with regards to the evaluation of the negligence of the legal entity.

As it was often recalled, the legal person, in which interest the crime (also a negligent one) has been committed, can avoid the conviction by demonstrating that it has taken al the organisational arrangements suitable to prevent that specific crime.

However, the particular attention dedicated to the conduct of the agent in the presupposed crime in the interest of the company, and the assimilation of the disfunctional organisation to negligence intended as violation of precautionary rules, induced judges to believe that the absence (or non application) of a valid organisational model does not matter as an element of the sanctioning case against the legal entity, but as a subjective

[20] A Alessandri, 'Reati colposi e modelli di organizzazione e gestione', in N. Abriani, G Meo, G Presti (eds), 'Società e modello "231": ma che colpa abbiamo noi?' (2009) 2 AGE 342, «immaginare che un fatto (illecito) non voluto dall'autore si possa dire commesso nell'interesse di qualcun altro appare una contraddizione in termini» [to imagine that an illicit unwanted by the author can be said to be committed in the interest of someone else appears to be a contradiction in terms].

[21] MN Masullo, Colpa penale e precauzione nel segno della complessità (Edizioni Scientifiche Italiane 2012) 77, according to which the Court shall «estrapolare dal "reato" quell'unica parte del fatto tipico, la condotta, compatibile con il dover essere commessa nell'interesse o a vantaggio» [extrapolate from the "crime" the only part of the fact, the conduct, compatible with having to be committed in the interest or to the advantage].

[22] Tribunale Torino [2013] www.dejure.it [2013] n. 91211. Decision reinforced by Cassazione penale, Sezioni Unite [2014] www.giurisprudenzapenale.com [2014] n. 38343.

requirement of imputability. In this sense, the presence of a valid business compliance can be evaluated as an objective cause of exclusion of guilt.[23]

This interpretation has turned into the constant statement, made by judges, that «it is true that there is no obligation to set a specific organisational model, but this difference does not appear fundamental because, in the Italian legal order, the adoption of such organisational models is identified as a cause of exclusion of responsibility».[24]

Such a thesis was recently repeated by the Supreme Court, which, once focused the attention on the structure of the crime committed by the agent, confines the organisational negligence as a simple criterium for imputation, essential in order to charge the legal person for that same crime committed in its interest (or advantage).[25]

This reasoning, although considered inevitable by judges «in order to permit to the legal provision to find enforcement even in case of negligent crimes of event, because if the interest or advantage should be related also to the negligent event, it would be obvious that such profiles would never occur»,[26] carries along many problems.

It can be easily objected, indeed, that this interpretation betrays the letter of the law, and also the *ratio*, of the discipline set in artt. 5 and 6 of decree n. 231/2001. In this sense, it is possible to observe that, on one hand, art. 5 relates the double criteria of the interest and the advantage to the whole criminal offence of the agent, and not only to the sole element of his conduct; on the other hand, the setting of an organisational model suitable to prevent criminal activities represents an element that seems to pertain to the fact constituting an offence of the legal person, and should therefore not be considered an objective cause of exclusion of guilt.

5. Corporate crime liability of the foreign legal person for crimes committed in Italy.

There is no doubt that the problem of corporate criminal liability for crimes committed, in its interest or advantage, in a foreign country – different from the one in which the legal person has its headquarter – is quite marginal in those legal orders in which this case has been expressly regulated by the law, while it can become particularly sneaky when legislators has not intervened on the matter.

In this second hypothesis, it seems necessary to verify if, and to which extent, the principle of territoriality of criminal law can find enforcement.[27]

The answer to this question, obviously, seems to depend on the reconstruction of relationship that, in the considered legal order, links the crime of the agent with the legal person's responsibility. The attraction of corporate crime liability to criminal law, and the recognition of the responsibility of the legal person for the crime committed in

[23] S. Dovere, 'La responsabilità amministrativa degli enti di diritto straniero per reati commessi in Italia' (2021) 4 Riv. 231 9, 17.
[24] Corte d'Appello Firenze [2019] www.giurisprudenzapenale.com [2019] n. 3733.
[25] Cassazione penale Sez. IV [2020] Cass. Pen 12, [2020] 4706.
[26] Tribunale Torino [2013] www.dejure.it [2013] n. 91211.
[27] S. Manacorda (n. 5) cit., 91. See also, A. Fiorella, 'Principi generali e criteri di imputazione all'ente della responsabilità amministrativa' in G Lancellotti (eds), *La responsabilità della società per il reato dell'amministratore* (Giappichelli 2003), 102.

its interest (or advantage), reinforce the belief that it is the State in which the crime of the agent has been committed that has jurisdiction, not being relevant where the organisational disfunction has happened.

The Supreme Court arrives to this conclusion, which is widely agreed on in jurisprudence, basing this opinion on two main considerations.

First of all, what is important, in the reasoning of the Court, is that corporate crime liability is necessarily derived from the criminal responsibility of the physical person. Consequently, jurisdiction must be recognised with regards to the agent's crime, not being relevant that the organisational malfunction (which has facilitated or it has not prevented the crime) has happened in a foreign country.

Secondly, but as a consequence of the first, the Supreme Court observes that there are no valid reasons to differentiate the treatment reserved to the legal person from the one of the physical one. Therefore, also legal entities are subject to the principles of obligatoriness and territoriality of criminal law, and are called to respond of corporate crime liability, no matter their nationality and the place where they have their headquarters.

Finally, the Court expresses the principle according to which the legal persons can always be charged for corporate crime liability by Italian judges as long as these do have jurisdiction for the related crime committed by their agents.[28]

Other judges, in the past, already clarified that, by agreeing on a different interpretation – excluding corporate crime liability for foreign legal persons –, the result would be an unequal treatment with respect to the one accorded to foreign legal entities with offices in the Italian territory. In particular, in this way the economic activity of the first would be facilitated, this appearing in contrast not only with the Italian Constitution, but also with the European principle of non-discrimination in the freedom of establishment.[29]

With these reasonings, judges are able to close a flaw in the Italian law on corporate crime liability, emphasizing the relationship of dependency to the crime committed by the agent. In this way, Italian judges are able to charge foreign legal persons all the times they have jurisdiction on the presupposed crime.

To add coherence to the above mentioned reconstruction, there is also the reconduction of the organisational malfunction of the legal body to the figure of the exemption, as a cause that excludes guiltiness. By doing this, it becomes irrelevant either the choice, taken in a foreign country, to not adopt a certain model of compliance, and the place where the criminal intent arised.

Furthermore, in deciding on the jurisdiction of the national judge, it is not important that the sanctions charged on the legal body should be considered as criminal ones according to the Engel's criteria. The enforcement of such criteria, as a matter of fact, affects only the extent of the guaranties of the trial, and not the identification of the jurisdiction, as rules on this matter are still in the domain of the national legal order.

[28] Cassazione penale [2020] Cass. pen. 12, [2020] 4706.

[29] Corte d'Appello di Firenze [2019] www.giurisprudenzapenale.com [2019] n. 3733. See also: Tribunale Lucca [2017] www.giurisprudenzapenale.com [2017] n. 222; G.i.p. Milano [2004] Riv. trim. dir. pen. econ. 3-4, [2004] 989.

6. The administrative nature of the legal person illicit activity.

The present investigation has so on shown that the reconduction of corporate crime liability to the sphere of criminal law truly raises many concerns.

What we will now try to verify is if, by attracting corporate crime liability in the sphere of the administrative sanction, we could reach, with no prejudice in the efficiency of the punitive response, much more coherent solutions.[30]

Firstly, it cannot be doubted that the preference for the administrative sanction model has the merit of fully respecting the juridical qualification given by the legislator to this particular type of responsibility.

Furthermore, this choice does not imply that the sanctionary response of the State would be assisted by a minor degree of effectiveness and afflictiveness with respect to a criminal one. On the contrary, it is well agreed by legal scholars that the administrative sanction, both in a general and in a special-preventive perspective, represents, with respect to financial crimes, a much more efficient deterrent – also in terms of proportionality – than the criminal one.

The organs of criminal jurisdiction, as a matter of fact, are only rarely able to convict those who are at the top of criminal organisations, this meaning that these subjects normally continue to benefit of the incomes of their criminal activities.[31] Even more, it is necessary to highlight that it is quite difficult for national judges to attack considerable assets and/or incomes of criminal activities.[32]

There is no doubt, then, that the reaction of the legal system against this type of criminal activities would be more efficient if it would be directed against economic assets instead of the physical person's freedom, as what seems to guide (or inhibit) motivation to commit such crimes is the hope for income much more than the fear of a detenctive sanction.[33]

These issues, therefore, can truly justify the legislative preference for the administrative sanction.

Once reconducted the illicit of legal persons in the *genus* of administrative sanction, perhaps, it is evident that much more coherent solutions can be found with regards to issues concerning the relationship with the crime of the physical person, the role of the organisational disfunction that has facilitated (or not prevented) the commission of the

[30] On the other hand, the stigma typical of the criminal sanction does not seem an indispensable element to guarantee the afflictivity of the sanction to be imposed on the legal person.

[31] FJ McKenna, K Egan, 'Ireland: The Multi-Disciplinary Approach to Proceeds of Crime' in Young, NM Simon (eds), *Civil Forfeiture of Criminal Property* (Edward Elgar Publishing, 2009) 52, 56, according to which «it was legitimate to take account of the international phenomenon of organized crime and the characteristic ability of those in the higher echelons of criminal organization to evade the arm of the law».

[32] Working Group on Confiscation, Third Report: Criminal Assets (London, Home Office 1998) para 4.13, as well as the subsequent Report, Recovering the Proceeds of Crime (London, Cabinet Office 2000) 38, where are recalled the word of Willie Hofmeyr, Head of the Asset Forfeiture Unit, South Africa, according to which «[Offenders] smiled when they got a 15 or 20-year jail sentence, which they regard as an occupational hazard I suppose, but they literally burst into tears when they lost their favorite Rolls-Royce, the family home, the kids' private education and the wife's luxurious lifestyle. Police have started seeing forfeiture as a way of hurting and getting at these guys».

[33] HM Advocate v. McIntosh (United Kingdom Privy Council), in http://uniset.ca/other/cs4/20031AC1078.html, «it is desirable to deprive traffickers of their illgotten gains, so that the hope of profit is heavily outweighed by the fear of punishment». See also Thomas Jaggar – Mark Sutherland Williams 'Civil recovery: then and now' [2010] 2 CBQ 5, 6: «recovery of the proceeds of crime through the civil courts looked to be an expedient method of appropriating criminals' ill-gotten gains when compared to the 118 clumsy and expensive unpredictability of the full criminal trial».

presupposed crime, and, finally, ones concerning the identification of the jurisdiction in cases of crimes committed in Italy in the interest (or with advantage) of a foreign legal person.

With regards to the first, by recognising the administrative nature of the legal persons' illicit, there would be a definitive cut of the (inseparable) connection – that criminal liability inevitably presupposes – from the crime committed by the physical person, confining the latter (and the related event) to the role of simple element of the sanctioning case. In other words, the legal person will no longer be charged for the crime committed in its interest (or in its advantage), which will continue to represent only a condition for the configuration of corporate crime liability.

In this way, the legal person will be charged only with the failure to provide a system of controls on the activity of its employees and administrators, which has allowed (or even only facilitated) the commission of a crime in its own interest.

Therefore, moving the analysis to the doubt concerning the role of the organisational misfunction in the structure of the illicit, it would necessarily be a consequence to consider a suitable business compliance not as a cause of exclusion of guiltiness, but as a negative element of the fact constituting an offence.

This means that the adoption by the legal person of internal arrangements which are suitable, at least in abstract, to prevent the commission of a crime in its interest, would imply the impossibility to charge the sanction because the (administrative) illicit is not conceivable, and not because it is not possible to ascribe a to the legal entity a reproach in terms of guiltiness.

Finally, once separated corporate crime liability from the responsibility of the *intraneus*, it becomes easier to reason on the individuation of the competent jurisdiction, in the hypothesis of a crime committed (in Italy) with benefit of a foreign legal person.

From the previous analysis of the jurisprudence, what has emerged is that the criminal nature of corporate crime liability has been used by judges to state national jurisdiction also when the sole event related to the crime has occurred in Italy (or even when only a part of the criminal conduct has happened in the Italian territory), not being relevant that the legal person does not have its headquarters in the Italian territory, and should therefore not be considered subjected to the organisational arrangements requested by the domestic legal system in order to avoid the enforcement sanctions.

On the contrary, once that corporate crime liability has been reconducted in the administrative sphere, the reasoning must necessarily be different, and needs, consequently, some clarification, able to avoid any misunderstanding.

What needs to be clarified is that the administrative nature of the sanction does not absolutely imply to exclude, priorly, corporate crime liability for legal persons, which have their headquarters in a foreign country, for crimes committed in their advantage by physical persons who have, with that same legal person, a qualified relationship (either a director or an employee). This conclusion, indeed, would lead to unjustifiable results, since it could undermine the whole enforcement of corporate crime liability provisions, not only facilitating elusive conducts of the considered legislation, but also risking to imply a minor effort in the prevention of crimes when committed outside the country in which the legal person has its headquarters.

On the contrary, however, also the opposite opinion – agreed on by the jurisprudence

– seems to bring some issues to the table. By believing that the sanctioning discipline is enforceable for the sole fact the presupposed crime has happened in the Italian territory, it seems that this opinion undervalues excessively the (still relevant) link with the legal system in which the legal person has its hesdquarters.

Once separated the conduct and the event of the physical person (that operates for the legal entity) from the ones of the legal person, indeed, it seems absolutely necessary to find a link between the Italian legal order and the legal person, in order to configure the obligation for the latter to respect Italian legislation, and to justify the subjection to Italian jurisdiction in case of violation of national law.

What can be argued, then, is the necessity to find at least a minimal (or occasional) connection between the legal person and the legal system in which the crime, or the criminal conduct, of the physical person has occurred. Perhaps, only the existence of such a connection, in accordance to the principle of territoriality of sanctioning provisions often stated in jurisprudence, could imply the obligation to enforce Italian legal provisions on organisational arrangements by the legal entity.

For this to happen, however, it would be sufficient that the foreign legal person operates, with or even without a stable secondary branch, in the Italian territory, in which the presupposed crime of the physical person has been committed. What would become relevant, then, would not be the location of the legal person's headquarters, but the performance of commercial activities in the national territory.

In this sense, it is not possible to agree with the thesis according to which it should be possible to extend the Italian sanctioning discipline even to those legal persons that not only do not operate in Italy, but also take advantage from a crime committed in Italy only in a foreign country. As a matter of fact, if the *ratio* of the discipline is to not discriminate companies operating in Italy, this must be considered as respected if the enforcement of national rules on corporate crime liability is excluded for legal persons which operate only in other States.

Furthermore, it must be considered that only in this way it would be possible to ensure to legislation on corporate crime liability a true deterrent effect. As an example, it would be very difficult to find any practical effect to a sanction, especially one of interdiction or compulsory administration, directed to a legal person which has its headquarters, and operates exclusively, in Brazil or in the Philippines.

7. Conclusions: which role for artificial intelligence.

At the end of the investigation, it is possible to argue that the exclusion of corporate crime liability from the sphere of criminal law leads, without doubts, to more linear and coherent solutions.

By avoiding an artificial overlap between the crime of the agent and the illicit of the legal person, indeed, it becomes possible not only to restore to corporate crime liability the level of autonomy stated in the letter of the law, but also to exclude legal solutions that should be considered at least at the limits of reasonableness, as it happens when the legal system expects to sanction – for presupposed crimes committed in Italy – a

legal person which does not have any branch nor performs any kind of activity in the Italian territory.

There is no doubt that the criminal perspective is facilitated by legal provisions which assign the competence on corporate crime liability to the criminal judge. Nonetheless, it appears difficult to imply univocal indications concerning the nature of corporate crime liability from a provision which has the sole purpose of guaranteeing the *simultaneous processus* of both the presupposed crime of the agent and the dependant illicit of the legal entity, and this even more when we consider that the letter of the law explicitly defines this illicit as one of administrative nature.

In a *de jure condendo* perspective, it then seems more preferable, also in the light of the jurisprudence, to remit to Public Administration the infliction of sanctions concerning the (administrative) illicit of the legal person, by this resolving any possible doubt on the (administrative) nature of corporate crime liability legislation. This would represent a model not entirely new in the Italian legal order, which, though needing some inevitable arrangements to coordinate it with the criminal prosecution of the physical person, is already put in place with regards to financial illicits, where, for the same illegal conducts sanctioned by criminal provisions, the Consob has quite incisive sanctioning powers.

What should be also considered is that, following the proposed solution, the creation of a specific Agency, with the same independency accorded to Consob, could not only guarantee the impartiality of the sanctioning procedure, but also the possession of that degree of knowledge which, due to the complexity and the mutability of business corporation's dynamics, could be lacked in comparison by the judge.

An important role in preventing and contrasting that type of crimes could come from the artificial intelligence.

A fact can be considered clear: economic crime is organized and evolves very quickly. Using increasingly sophisticated technologies, companies can develop organizational models, to simulate their functioning even before adopting them, in such a way as to hide the traces of their crimes behind particularly complex organizational and management mechanisms. Thus, making the activity of the investigative bodies particularly slow and, at the same time, devoid of substantial effectiveness.

In fact, where the reaction to a crime is not fast, the idea arises in the company that it has found the right way to evade the application of the law, and in the victims the conviction that justice can do nothing in the face of the giants of the market. In short, they are too big to convict.

Now, even if it is true that artificial intelligence is not able to replace the work of the judge and the public prosecution, there are excellent reasons for imagining that the same technology, which companies increasingly use massively, can be used, this time to discover their wrongdoings more easily.

The creation of databases that contain the most followed schemes to evade the laws, in the hands of highly efficient processing systems may be able to warn the public prosecutor, in the presence of anomalous situations, before they can come into effect.

Not only this, often for the prosecutor the biggest difficulty is to find the evidence of a crime within thousands, if not millions, of pages of documents. Also in this case, an artificial intelligence system could select, among the thousands of pages, those which,

due to their content (in alphanumerical terms), most likely constitute evidence of the crime. With great saving of resources and time, guaranteeing a rapid and therefore particularly effective punitive response.

Modern artificial intelligence systems are now capable of recognizing an organizational model at risk of criticality, of collecting and grouping information also in relation to their object, of reconstructing the phases of a given criminal action in time.

It is a tool that seems, by now, indispensable in order to establish an equality of arms in a conflict that, at the moment, seems clearly unbalanced in favor of those who work to violate the laws.