Corporate Criminal Liability in Italy: Criteria for Ascribing "Actus Reus" and Unintentional Crimes

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Abstract This chapter examines the Italian legal framework of corporate criminal liability, with specific regard to the issues raised by the introduction of unintentional crimes in the ever-expanding list of offences covered under the regulation. Legislative decree No. 231/2001, implementing the framework statute enacted by the Parliament, has introduced in Italy a new system of liability for corporations and other legal entities for crimes committed in their interest or to their advantage. The original framework statute foresaw a detailed list of both intentional and unintentional crimes, but the Government, drafting the Legislative decree, adopted a mechanism for attributing the *actus reus* to the corporation that is modeled on the scheme of intentional crimes only. As a result, the introduction in 2007 of the offence of corporate manslaughter has posed serious practical problems. In fact, the criteria for ascribing criminal liability to corporations and other legal entities require that the offence be committed "in the interest or to the advantage" of the legal entity (Art. 5 D.Lgs. 231/2001) whereas corporate manslaughter can never logically meet this criteria. Finally, this chapter examines different approaches to the interpretation of the mechanism for ascribing criminal responsibility to corporations with respect to unintentional crimes, with a particular focus on corporate manslaughter and the solution given by the recent case law.

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1 Introduction

In 2001, a specific statute, the Legislative Decree n. 231 of June 8th ("the Decree"), introduced for the first time in the Italian legal system the direct "administrative" liability of legal entities, they being considered all entities having juridical personality, companies and associations with or without legal personality (Article 1 of the Decree).

Such "administrative" (but for most "criminal" in nature) liability is foreseen for crimes committed in the "interest" or to the "advantage" of the legal entity by certain individuals (*see below*) and it adds to the liability of the individual who has materially committed the criminal offence, given that the crimes entailing corporate liability are specifically listed in Articles 24 and 25 of the Decree.

Following the Decree's liability structure, companies and other legal entities are directly liable for crimes committed by: individuals carrying out representative, administrative or directive duties within the entity or within its branches granted with financial and functional autonomy or any person who is involved, even as a matter of fact, in the management thereof [Article 5, Paragraph 1 (a) of the Decree]; and individuals in subordinate positions and namely every person supervised by or under the surveillance of a person under letter a) above [Article 5, Paragraph 1 (b) of the Decree].

The Decree establishes two different criteria for the attribution of the "*actus reus*" to the legal entity depending on the role that the agent has in the organisational chart of the company. When the physical person is "an individual in subordinate positions" the attribution of responsibility is structured on the idea of organizational culpability and the burden of proof is on the prosecution (Article 7 of the Decree). On the other hand, when the author of the criminal offence carries out "representative, administrative or directive duties" the responsibility of the company is structured more similarly to the identification principle (or *alter ego doctrine*), with a strict liability mechanism. There is, then, a reversed burden of proof (Article 6 of the Decree).

The legal entity is exempted from liability if the agent(s) responsible for the crime acted in his (their) own exclusive interest or in the exclusive interest of third parties unrelated to the entity (Article 5, Paragraph 2). Moreover, the company is exempted from liability if:

- the company's managing body has adopted and implemented, before the commission of the crime, a compliance program ("*Modello di organizzazione, gestione e controllo*") apt for preventing the misconducts sanctioned by the Decree, when the crime has been committed by "an individual in subordinate positions" as described by Article 5, Paragraph 1 (b) (Article 7 of the Decree), and;
- in addition to the above mentioned requirement, the company has appointed an *ad hoc* internal body ("*Organismo di vigilanza*"), for the supervision, the implementation and the updating of the company's compliance program, the individual(s) has committed the crime fraudulently eluding the compliance

program and there has been not omitted or insufficient supervision by the above mentioned internal body, when the crime has been committed by the senior management as described by Article 5, paragraph 1 (a) (Article 6 of the Decree).

In any case, the criminal responsibility of legal entities foresees a connection between the offence committed by the physical person and the legal entity: in this sense, it is required that the illicit fact is ascribable to the legal entity from both an objective and a subjective point of view.

In particular, the objective criterion represents the link through which an illicit fact can be attributed to a juridical person, whereas the subjective criterion ties the responsibility of the entity to a particular type of *mens rea* (called "statutory *mens rea*"), consisting in the breach by the entity of relevant dispositions apt to prevent the commission of the criminal offence.

The present contribution intends to analyze the above mentioned objective criterion that is outlined in Article 5 of the Decree, with particular reference to the criteria requiring that the entity is liable for criminal offences committed in its "interest" or to its "advantage". The said disposition provides for the interpreter with the guidelines through which to establish in which cases a criminal activity, perpetrated by agents acting on behalf of the company, entails the responsibility of the legal entity.

2 The "Interest and the Advantage Test" and Unintentional Criminal Offences

As said, the "interest" and the "advantage" represent the link between the criminal offence and the entity and have to be understood, according to an applicable executive brief, as two different concepts: in particular, it is possible to distinguish the occurrence of an interest in the absence of any achieved enrichment, from the situation in which an advantage has been objectively achieved, even when not expected or planned for *ex ante*.[1]

Both instances show how the interest and the advantage are distinct and mutually autonomous requirements that may or may not concur.[2] In fact, the "interest" of the company, concurrent with that of the author of the criminal offence, characterizes the conduct in a markedly subjective way, and therefore needs to be assessed from an *ex ante* perspective; on the contrary, the "advantage" has an objective connotation which requires an *ex post* examination. The "advantage" refers to the actual economical gain enjoyed by the legal entity, while an "interest" only entails the aiming of the criminal offence towards a hypothetical advantageous purpose.[3]

[1] Relazione Governativa al d.lgs. 8 giugno 2001 n. 231 2001, p. 16.

[2] Astrologo (2003), p. 656; Di Giovine (2005), p. 69.

[3] Pecorella (2002), p. 83.

Some have considered how, from a systematic reading of the law, the statute's phrasing "in its interest and to its advantage", is a linguistic overlap and that the essential parameter is that of the "interest", to be interpreted as an activity planned in view of a corporate benefit.[4] This interpretation, is claimed, would better explain the letter of Article 5, Paragraph 2 of the Decree, which states that the entity is not liable if the agents who committed the criminal offence acted in their own exclusive interest or in the interest of third parties unrelated to the company. The "interest" and "advantage" couple therefore would state a unique concept: the idea that the illicit offence is the product of an activity which, regardless of what the agent may have personally foreseen, has produced a utility for the entity that was objectively foreseeable on the basis of the agent's conduct.

On the other side, the difference between the two figures is given relevance by the letter of the Decree's Article 12, Paragraph 1, where the legislator disciplines the mitigating circumstances. In the latter it is stated that the sanctions are susceptible of being reduced: when the damage is particularly low [Article 12, Paragraph 1 (b)] or where the author of the criminal offence has acted in his own or a third party's prevalent interest and the legal entity gained no or little advantage as a consequence of the agent's actions (Article 12, Paragraph 1 (a)]. Form this provision it emerges that "interest" and "advantage" are not, from the lawmaker point of view, the same thing.[5]

However, the latter case shows how the fact that the "advantage" criterion tends to dissolve in favour of the "interest" should not be disregarded. In fact, in the case outlined by Article 12, Paragraph 1 (a), the entity's liability can be affirmed, notwithstanding the "advantage" for the company is missing, on the base of the proof that the legal entity had an "interest" of its own, though minimal, in the pursuit of the advantages aimed at by the agent.[6]

There would be no entity's liability in a reversed scenario, that is, when advantage for the legal entity results from a conduct but no interest on its behalf subsists. Typically in other words, a fortuitous advantage, arisen from the illicit activity of any of the agents of the predicate offence, does not entail the entity's responsibility.

Given the ambiguity of the statutory expressions under analysis, it should be noted that the interpretation of the "interest and advantage test" becomes particularly problematic with reference to the criminal offences requiring negligence or recklessness ("*reati colposi*"). Clearly, the "interest" and "advantage" criteria can work with reference to intentional crimes but it poses serious difficulties of interpretation in respect of unintentional offences such as manslaughter or environmental crimes (introduced in 2011 among the criminal offences of the Decree).

In fact, although it has been claimed that the lawmaker foresaw, in 2000, the introduction of both intentional and unintentional criminal offences, the fact that

[4] De Maglie (2002), p. 331.

[5] For a more detailed analysis see: De Simone (2005), p. 657; Selvaggi (2006), p. 23.

[6] Vinciguerra et al. (2004), p. 37.

the Decree did not itself introduce any offence by negligence or recklessness ("*reati colposi*") among the list of its predicate offences should also be noted. It would be hard to claim that the responsibility scheme outlined in the Decree was given birth with an eye to unintentional crimes.

The initial exclusion of the measures regarding "manslaughter and personal injuries with violation of health and safety at work" from the Decree's own list of offences long represented a gap in the aforementioned statute, especially given that the omission left most white collar crimes outside the scope of the corporate criminal liability discipline.[7]

The parliamentary *iter* that led to the addition of the health and safety at work criminal offences' in the structure of the Decree may be briefly summarized: Article 9 of regulation no. 123 of the 3rd of August 2007 added to the Decree Article 25 *septies*, through which juridical persons are given accountability for cases of manslaughter and serious and very serious bodily injuries committed in violation of safety regulation on the protection of health and safety at work; later, said Article 25 *septies* was modified substantially by Article 300 of Legislative Decree no. 81/2008 (a.k.a. the "Safety Regulation Code for the Protection of Health and Safety on the Workplace"), a law containing a variety of provisions also regulating the aforementioned Compliance Program (Article 30, Legislative Decree no. 81/2008); the entry into force of the Legislative Decree no. 106/2009, introducing complementary and amending measures to the abovementioned Code further affected the corporate liability premises bringing further changes on the Compliance Programs discipline[8] and altering some provisions to whom Article 25 *septies* refers (Article 55, Legislative Decree no. 81/2008).[9]

However, Law no. 123/2007, which introduced for the first time the offences of manslaughter and grievous personal injuries with violation of "health and safety at work", failed to intervene on the "interest and advantage test" by amending the inefficiencies that resulted from the introduction of unintentional criminal offences.

The main critical aspect regarding the application of "the interest and advantage test" as outlined by Article 5 of the Decree to unintentional crimes as the ones provided for in Article 25 *septies* is the lack of the creation of a connected system of dispositions between the Decree and the criminal provisions in the domain of workplace health and safety.

The challenging coordination between the new wording of Article 25 *septies* and the objective criteria of attribution of *actus reus* through the "interest and advantage test" is a hotly topic debated both in jurisprudence and legal theory.

[7] Such a gap has been filled, at least with reference to unintentional offences, thanks to the subsequent statutory amendments, made directly and indirectly in 2007–2009, see Santoriello (2008), p. 160.

[8] Through the introduction of: Paragraph 5 bis in Article 30, amendment of Paragraph 3 and introduction of Paragraph 3 bis by Article 16 of Legislative Decree no. 81/2008.

[9] Castronuovo (2009), p. 312.

The fact remains that, it is difficult to imagine how a wrongdoing resulted from a negligent conduct could be committed in the legal entity's "interest": either the illicit conduct is perpetrated with intent, that is with the aim of creating a benefit for the legal entity, or the conduct is unintentional, that is without the possibility to find the interest outside a benefit fortuitously generated for the entity.[10]

To begin with, two distinct questions should be addressed. First of all, the statutory wording of Article 5 would seem to refer to the purpose of the agent's behaviour in a way that is inconsistent with the lack of intention, typical of the unintentional offences. The category of unintentional offences is therefore at odds with a system—the one shaped by the Decree—that seems "*modelled on a form of individual and intentional liability*".[11] Secondly, given that the "interest" and "advantage" elements must refer to the consequence of crime, it might be problematic, when the criminal offences as the ones foreseen by Article 25 *septies* result in death or injuries, envisaging the damage to the physical integrity or the life of an employee as a benefit for the legal entity. The "interest and advantage" criteria appears for these reasons once again unsuitable with respect to the particular case of manslaughter and personal injuries, as the events foreseen in such offences "*far from determining a capital gain for the entity or a saving in terms of costs, generate a different type of damage*".[12]

With reference to the two points, it should be remarked that the problem arises whenever a criminal offence (whether or not intentional) entailing corporate liability requires the verification of an outcome that is not of economic nature (and therefore is not susceptible to evaluation in terms of benefits for the legal entity). An issue related to the suitability of the "interest and advantage test", set out by Article 5 of the Decree, therefore arises for any criminal offence (whether intentional or unintentional) that is not directly ascribable to a profit-making purpose. For example, in the case of criminal offences related to the environment (foreseen by Article 25 *undecies* of the Decree), neither the interest nor the advantage relate to the detriment of the environmental health but instead have to be evaluated in relation to savings on waste processing costs. Similarly, with reference to the offences of manslaughter and work related injuries and diseases, eminent legal doctrine has stated that "*the entity's interest and advantage, which cannot be referred to the damaging outcome of the offence, will have to be interpreted with reference to the illicit conduct (*'actus reus'*)*" and "*it could consists in a saving of costs on safety measures*".[13]

In fact, the bill in parliament presented by the Commission led by Prof. Grosso provided for different criteria for intentional and unintentional crimes, respectively:

[10] Astrologo (2003), p. 656.

[11] Yet, before the introduction of Article 25 septies, Mereu (2006), p. 60.

[12] Dovere (2008), p. 332 where the author highlights the absurd statement for which the outcome of the criminal offence as death or personal injuries may be seen as an advantage or be of any interest for the company.

[13] Pulitanò (2013), p. 635; Rossi and Gerino (2009), p. 22.

the "interest" criterion for the sole intentional crimes and the criterion of the perpetration of the criminal offences while carrying out entity's activities with breach of the relevant dispositions, for unintentional crimes.[14] In the first draft of the Decree (that of the 3rd of March, 2001), also, the interest and advantage were not linked to the criminal offence but rather to the broader activity within which the illicit conduct was perpetrated; the norm literally read "*the entity is liable for those criminal offences which are perpetrated while carrying out activities that are in its interest or to its advantage*".[15] Certainly, one of these liability structures would have been more suitable in respect of unintentional crimes and, moreover, in line with the liability structure given in other countries for unintentional offences as manslaughter. For instance, for the Corporate Manslaughter and Corporate Homicide Act 2007, enforced in England and Wales, the company is liable "*if the way in which its activities are managed or organised (a) causes a person's death, and; (b) amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased*" (Section 1, Paragraph 1),[16] a totally different liability structure to compare with the *alter ego doctrine* applicable to other type of offences.[17] Different criteria of attribution of corporate liability depending on the types of criminal offences are also foreseen by the German and Austrian laws.[18]

However, the bill in parliament of the Grosso Commission was not approved and the first version of the Decree was amended by the present text of Article 5, Paragraph 1, thus suggesting that the lawmaker in fact meant precisely to refer the interest/advantage figure to the criminal offence in itself (made by both the conduct and the consequence of crime) and not, instead, to the activity in the wider context of which the criminal offence occurred.

The possibility to refer the interest/advantage to the activity of the legal entity, it has been claimed, may go beyond "*the mere broad interpretation of the law to result in an* 'analogia *in malam partem*'",[19] which is against the principle of legality, affirmed in the Constitution with reference to criminal law (for somebody here applicable for the claimed "criminal nature" of the corporate liability outlined in the Decree), and, in any case, foreseen by Article 2 of the Decree. Moreover, it has been noted, following such line of reasoning, the entity would be considered liable because the agent violated a relevant preventive rule instead of being responsible for the damaging consequence of the offence, thus giving to Article 5 a different content from the one devised by the lawmaker.[20] Also, this interpretation would bring the risk of finding the corporation liable even when the offence is the result of an agent's mere sloppiness (and not instead of an intentional violation

[14] Article 121, Paragraph 1 (b). See De Simone (2012), p. 42.

[15] Article 5, Paragraph 1, first Draft of the Decree of 3rd March, 2001.

[16] Wells (2011), p. 91.

[17] Wells (2001), p. 93.

[18] De Simone (2012), p. 33.

[19] Aldovrandi (2007), p. 574.

[20] Aldovrandi (2007), p. 575.

of the preventive rules applicable to the sector concerned, aiming at favouring the entity by, for instance, reducing costs) not generating any advantage nor being of any interest for the legal entity.[21] In the academic world it has also been underlined the risk to come to an interpretation establishing an automatism between the violation of the preventive measures and corporate liability, since in most cases it is possible to find an advantage for the legal entity as a consequence of the violation of preventive measures, in the form of saving costs for the company (the interest and the advantage, in other words, risks to be found *in re ipsa*, that is in the failing or the inadequate arrangement of the preventive measure).[22]

As a consequence, some have urged the lawmaker to re-draft the criteria for attributing the responsibility to legal entities foreseen by Article 5 of the Decree.[23]

Yet others have suggested interpreting the criteria of Article 5 (thanks also to the broad margin allowed for by its generic wording) so to render it adaptable to the unintentional nature of the newly introduced offences: in order to render "the interest and advantage test" adaptable to unintentional offences, two different interpretations have been suggested.[24] The first interpretative solution is to intend the requirement of the "interest" as marking the agent's conduct in a strictly subjective sense and therefore to apply to unintentional crimes one sole requirement: that of the "advantage", to be interpreted objectively and *ex post*. Another possible interpretation is to intend the "interest" requirement in an objective sense, as the conduct's ability to produce a benefit for the entity, with, as a consequence, no problem of compatibility with the unintentional nature of criminal offences.[25]

Regarding the latter formulation, shared by the jurisprudence, it has to be pointed out that for criminal offences of an unintentional kind the non-intention of the conduct is their very structural element; in this case, it will not be possible to claim that the author of the offence acted in the interest of the entity, nor will it be

[21] Aldovrandi (2008), p. 488.

[22] Dovere (2008), p. 332. To such remark it has been objected that the automatism (violation of the precautionary rules = interest/advantage for the entity) would not work in case of expensive precautionary system although totally inefficient in its preventive capacity.

[23] They suggest to rethink the criteria of the interest/advantage; Vitarelli (2009), p. 708 says that "it appears urgent and imperative an amendment of Article 5, so that to render suitable the objective criterion of attribution of the criminal offence to the entity for the new disposition". The author suggests two possible routes to take: 1. to rephrase the interest requirement referring it not to the criminal offence as a whole, but to the conduct, more precisely acting against the legal entity when the conduct is able to get a benefit for the latter; 2 or to eliminate it, requiring uniquely that the criminal offence is committed in the exercise of the typical dangerous activity of the entity, and that it has been caused by the non compliance with the preventive measures prescribed by the law regulating that activity.

[24] Ielo (2008), p. 60.

[25] Have a propensity for an objective interpretation of the "interest", to be understood as a "centre of interests" of the legal entity: Rossi and Gerino (2009), p. 21.

possible to claim that he acted in his own exclusive interest or in the exclusive interest of third parties: in effect he did not pursue anybody's interest.[26]

However the majority of jurisprudence seems to have adopted such interpretation with reference to unintentional crimes, considering necessary to articulate criminal offences in two separate parts: the *actus reus* on the one side and its outcome in terms of consequence of crime on the other. In such a way, the evaluation of the entity's interest/advantage, for unintentional offences, is made with reference to the agent's *actus reus* as characterized by the violation of the relevant provisions instead of with reference to the consequence of crime, in the abovementioned objective sense.

3 Case Law Development

Among the first few rulings pronounced by first and second instance courts (no Article 25 *septies* proceedings have so far reached the Italian Supreme Court, or Corte di Cassazione), the first conviction of a company for breach of Article 25 *septies* should be mentioned.

It is interesting to highlight the *iter* of the arguments laid out in such instance by the first instance court of Molfetta, Sez. distaccata di Trani,[27] that in the case stood firmly convinced in relation to the application of Article 5 "interest and advantage test", expressly excluding any obstacle thereto. The court posited in this case that the two figures should be understood as alternative, and not equivalent: this conclusion was drawn from the existence of the conjunction "or" standing between the two as well as from a comparison of the statutory wording at hand with the text of Article 12 of the Decree, that links the mitigation of the applicable sanctions to the circumstance that the author of the criminal offence acted in his own exclusive

[26] Vitarelli (2009), p. 706 for whom there could be a case where the conduct (unintentional) of the physical agent is in effect perpetrated in the interest (in subjective sense) of the entity. This is when the omission of the work-related preventive measure is the outcome of a conscious choice aimed at saving costs for the corporation. It is the case of "colpa cosciente" (literally "conscious unintentional" that is a type of mens rea similar to a certain form of recklessness). However, the distinction between "colpa cosciente" and "colpa inconsciente", if it could seem virtually adequate, it does not appears so in practice as "in case law [...] the hypothesis of "colpa inconsciente" are statistically infrequent; in most cases it is charged the "colpa incosciente", disregarding [...] the reference to the effective mental coefficient". Moreover it is interesting the analysis of Muscatiello (2008) p. 1452, according to whom the conscious choice of adopting a cheaper preventive system it would appear nearer to the "dolo eventuale" than to the "colpa cosciente": more it is underlined the acceptance of risk, more it emerges the voluntary corporate policy based on lack of safety, more the unintentional element of mens rea gets nearer to the intentional element of mens rea ("dolo eventuale"), more the corporate liability vanishes, being limited to unintentional conducts and not extended to intentional ones".

[27] Tribunale di Trani, Sez. distaccata di Molfetta, 26.10.2009 (dep. 11.1.2010), Est. Gadaleta, Imp. Truck Center S.a.s.

interest or in the exclusive interest of third parties, and given that the legal entity gain no or minimal advantage from the criminal offence in question.

It should be added that in this case the interest and advantage, which can be of a non-patrimonial nature, were interpreted by the court as possessing an important objective connotation: the interest was not in fact referred to the author's will and his possible aim, but it was linked to the pursuit of goals set by corporate policies.

That being said, the application of such criteria of attribution of responsibility to the legal entity would not in the judge's opinion bring any problem with reference to unintentional crimes. The court reached this conclusion through the "division" of the offence in two different elements: the conduct on one side, and on the other its outcome—consisting in death or serious and very serious personal injuries. The requirement of the interest or in any case the advantage gained by the legal entity as a result of the illicit conduct has to be linked than only to the agent's unintentional conduct.

In a subsequent ruling,[28] a different court affirmed, in line with the mentioned approach of the court of Molfetta, that is possible to extend the application of Article 5 of the Decree to manslaughter and personal injuries (foreseen by Article 25 *septies* of the same Decree) as the interest and advantage in such cases should not be referred to the criminal outcome but rather to the conduct perpetrated by the agent in violation of those preventive measures that rendered possible the completion of the criminal offence. However, according to the judgment, the interest and advantage cannot be automatically spotted whenever the criminal offence takes place during the execution of the corporate activities, but should always be verified in practice by means of ascertaining the actual subsistence of all ground assumptions supporting it.

A third ruling seemed, at least partially, of a different opinion.[29] In said case, the court declined to proceed against an oil company, by cleverly facing the issue presented by Articles 25 *septies* and 5 of the Decree. The judgment begins by observing that the general structure of the Decree was shaped along the structure of intentional crimes, as is most clear from the text of Article 5, Paragraph 1 and 2, as well as Articles 6 (c) and 12 (a) of the Decree. As a consequence, Article 5, Paragraph 2[30] of the Decree is deemed not applicable to unintentional offences as it is difficult, if not impossible, to prove the agent's exclusive interest or the interest of third parties with reference to an unintentional conduct. Moreover, the judge found it clear, given the use of the adverb "fraudulently" in the text of Article 6, -Section (c) of the Decree that the norm strictly refers to intentional offences. As noted in the ruling: "*willingness to deceive that is difficult to see compatible with*

[28] Tribunale di Novara, 1.10.2010.

[29] Tribunale di Cagliari, Ufficio G.I.P./G.U.P., 4.7.2011, available at http://www.penalecontemporaneo.it/ (12.2.2014).

[30] Article 5, Paragraph 2 of the Decree: "The legal entity is exempted from liability if the agent (s) responsible for the crime acted in his (their) own exclusive interest or in the exclusive interest of third parties unrelated to the company".

unintentional responsibility, is implied".[31] An alternative therefore presents itself between considering inapplicable the exemption condition (the only one applicable to offences committed by individuals occupying senior positions) or to giving Article 5, Paragraph 1, a different content, for instance by imagining that the organization and management model needs to be "*intentionally overstepped by the offender*".[32] The same problem has to be faced in relation to Article 12 (a) of the Decree, so that "*either the applicability of the disposition is to be exclude, or the norm must be adapted arbitrarily, for instance by ignoring the first term (referring to the interest and to the conduct) and applying instead the mitigating circumstance only to cases where the entity has gained a minimum or a null advantage*".[33]

Neither the judge accepted the interpretation given to Article 5 of the Decree in other cases, referring the "interest" criterion not to the consequence of crime but to the illicit conduct which violated the relevant preventive measures, so deeming surmountable the hermeneutical problem.[34] The "advantage" criterion also, has to be referred to the consequence of crime, even when caused by an unintentional conduct. Thus, the issuing judge specified that the interest of the legal entity is to be linked to a conscious and intentional action or omission (excluding the cases of lack of skill) and that the intentional action "*does not have to originate by a simple underestimation of risks or by a wrongful evaluation of the necessary preventive measures, but has to objectively reveal a deliberate attempt to cut the corporation's costs, irrespectively of the fact that such objective can or cannot be effectively reached*".[35]

Moreover, the conflict between the offences listed by Article 25 *septies* and the mentioned dispositions, according to the judge, is by no means suitable to be resolved through mere interpretation, given that any possible result of this operation would be questionable, as these are "*hermeneutical operations having a broad subjectivity margin, so that any result is so questionable to be, more than a point of balance, a walk along a tightrope*".[36] In conclusion, the judge here also expressed serious doubts as to the legitimacy of Article 25 *septies* in light of Article 2, Paragraph 2 of the Italian Constitution, even though he did not address any further such issue. The question therefore remains unanswered.

A later judgment of the court of Turin[37] regarding an industrial accident of a company's employee, acquitted of charge the company on ground of lack of both interest and advantage of the company in the perpetration of the agent's offence.

[31] Tribunale di Cagliari, op. cit., at 122.

[32] Tribunale di Cagliari, op. cit., at 122.

[33] Tribunale di Cagliari, op. cit., at 123.

[34] As, for instance: G.u.p. presso Tribunale di Novara, op. cit.; G.u.p. presso Tribunale di Pinerolo, 23.9.2010.

[35] Tribunale di Cagliari, op. cit., at 120.

[36] Tribunale di Cagliari, op. cit., at 123.

[37] Tribunale di Torino, 10.4.2013 (ud. 10.1.2013), MW Italia s.p.a., available at http://www.penalecontemporaneo.it/ (12.2.2014).

The lack of any company "interest" was found by the judge because the illicit conduct of the supervisor of the line of production was not a deliberate violation of the safety measures aimed at the benefit of the company; the lack of any "advantage" was affirmed as the line of production was in any case at standstill the day of the accident. With this ruling, on the one side, the judge confirmed case law considering that the "interest" and "advantage" criteria have to be considered separately and referred, for unintentional crimes, to the agent's illicit conduct and not to the whole criminal structure (comprising the consequence of crime). On the other side, the judge followed an interpretation of the "interest" as existent whenever it is proved a deliberate effort by the agent to favour the legal entity, on the basis of an *ex-ante* evaluation, that is one carried out at the time of the violation of the applicable preventive measures.

Finally, a recent judgment, the Thyssen-Krupp ruling, warrants particular attention.[38] In such case, Turin's Court of Appeal ultimately held the company liable for the administrative offence listed by Article 25 *septies* aside the conviction for homicide of 7 employees perpetrated through an industrial accident against the management of the company. The judgment, on the point of our interest, besides confirming the interpretation given in the previous case law on the necessity to refer the interest to the sole conduct of the offence and not to its outcome, underlines once again the possibility to refer the "interest" criterion to unintentional offences as manslaughter, linking its inquiry with the aims moving the agent's illicit conduct.

To conclude with, brilliant academics and judges confronted themselves with the hermeneutical problems posed by Article 5 of the Decree with reference to unintentional crimes. However, there is still a fragmented and uncertain application of such criteria for ascribing corporate responsibility and it seems that none hermeneutical solution may solve the problem without forcing the rules of statutory interpretation. Moreover, uncertainty increases costs of litigation and, above all, creates confusion for virtuous companies desiring to be compliant with the Decree. For all these reason our conclusion cannot be different from urging the legislator to redraft the text of Article 5 of the Decree with a separate and specific criteria for ascribing the responsibility to the company in case of unintentional crimes.

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