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# Indice-Sommario

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## Commenti e Note

# LEGAL PERSONS AND CROSS-BORDER CRIMES IN THE EU: CURRENT ISSUES AND PROSPECTS

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## 1. Introduction

One of the main aims of the European Community (later the European Union) was to create the conditions to increase the mobility of natural and legal persons between EU countries.

This also led to the less desirable outcomes in terms of crime waves and threats to national security; thus, Member States have felt the necessity of an increased collaboration in criminal matters, but they have been cautious in transferring legislative powers to decide on crime and punishment: these matters are still perceived as important features of sovereignty, linked to national legal traditions. For this reason, there are still considerable differences in Member States' criminal legal systems. An outstanding example is given by the liability of legal persons for offences: many states do not agree on the theoretical acceptability of corporate criminal liability, in accordance with the well-known *adagium societas delinquere non potest*.

Even though many EU legal instruments have asked Member States to impose "effective, proportionate and dissuasive" sanctions on legal persons involved in the

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commission of a crime, the EU legislator has shown to take into account national differences in this matter: these instruments do not entail an obligation for Member States to introduce criminal liability of legal persons, therefore every liability regime is compatible with the EU policy.

As a result, national legal systems differ with regard to the offences legal persons can be held liable for, as well as the imputation mechanisms and the theory underlying the liability of legal entities. This can cause several issues when it comes to crimes of a transnational nature, with respect to possible violations of the *ne bis in idem* principle and the enforceability of judgments given in another Member State.

In a recent decision, the Italian Supreme Court has stated that a foreign company can be held liable for crimes committed in the national territory, even if it does not have its registered or secondary offices in Italy. This case provides an opportunity to reflect on some of the potential issues which can arise from the lack of homogeneity in the EU concerning the corporate liability for offences; the analysis is focused on how the *ne bis in idem* principle, as enshrined in Art. 50 CFR, could be applied to legal persons involved in the commission of cross-border crimes (section II). Section III deals with the enforcement of judicial decisions within the EU, with particular reference to the extension of the MR principle to the specific sanctions imposed on legal entities; section IV sets out our conclusions.

## 2. Corporate criminal liability and transnational *ne bis in idem*

### 2.1. The Italian case

On 11 February 2020 the Italian Supreme Court issued a judgment stating that a foreign legal entity can be held liable for crimes committed in Italy by its authorised representatives or by people subject to its direction or supervision, regardless of the location of its registered office[1].

The Italian Court interpreted the provisions of the Legislative Decree No. 231 of 2001 – which regulates the "administrative" liability of legal persons for offences – by defining the scope of national law with regard to crimes committed in Italy by a foreign legal entity. As is known, with Legislative Decree 231 the Italian legislator opted for a quasi-criminal liability for legal persons, which can be described as "a *sui generis* regime of administrative liability with some characteristics of criminal liability"[2]. Essentially, in order to hold legal entities liable for crimes it is required that the offence is committed in the interests of or for the benefit of the legal person by natural persons acting on behalf of the company. In particular, if the crime is perpetrated by a person holding a position

[1] Italian Supreme Court, Sixth Division, judgment of 7 April 2020, no. 11626.

[2] V. FRANSSEN, *European Sentencing Principles for Corporations*, doctoral dissertation, Leuven, 2013, p. 5. This has actually been classified as a *tertium genus* of liability: even if it does not follow a criminal construct, it is governed by the strong guarantees of criminal proceedings; see C. DE MAGLIE, *Models of Corporate Criminal Liability in Comparative Law*, in *Washington University Global Studies Law Review*, 2005, n. 4, p. 562.

of authority within the entity, the legal person is deemed liable unless it can be proved that the entity had a compliance program in place to prevent crimes from being perpetrated[3].

The case brought before the Italian Supreme Court concerned charges of bribery in judicial proceedings: the legal advisor in the bankruptcy proceedings of a company was accused of having received a large amount of money from people who acted on behalf of two Dutch corporations, as consideration for the performance of acts contrary to the duties of the advisor's office. More precisely, the advisor carried out acts aimed at favouring the foreign companies in the acquisition, at advantageous conditions and with preference over other potential purchasers, of assets of the bankrupt company.

In this case, proceedings were brought against both the natural persons and the legal entities involved; the latter were in fact charged, pursuant to Article 25 of Legislative Decree no. 231 of 8 June 2001, with the offence committed in their interests, despite not having their headquarters or offices in Italy[4].

According to the Dutch companies' defence, the Decree 231 could not be applied to legal persons that do not have their operational offices in Italy and that merely carried out occasional activities within the national territory. The defence argued that the administrative offence attributed to legal persons according to the Italian legislation is an autonomous construct, even if it is related to the perpetration of a crime; for this reason, the jurisdiction should not be determined by reference to the place where the crime was committed, as it is necessary to consider the place where the legal person's headquarters are located, *i.e.* the place where the "organisational fault" occurred.

The Italian Supreme Court opted for a different solution, by highlighting that Article 1 of Decree 231/2001 defines the legal persons that fall under the Decree's scope of application, without making any distinction between Italian and foreign entities[5]. The Court then affirmed that the aim of Decree 231 is to ensure that all companies adopt appropriate organisational measures to prevent people acting on their behalf from infringing Italian criminal law. Thus, foreign legal persons who operate in Italy, the same as foreign natural persons, must comply with Italian law and be subject to the Italian jurisdiction, regardless of the location of their offices.

[3] When the offender is an employee, the company is liable if the commission of the offence has been possible due to the lack of supervision by managers and directors, but only if the company has not adopted an effective compliance program. For further insight see C. DE MAGLIE, *Societas Delinquere Potest? The Italian Solution*, in M. PIETH, R. IVORY (eds.), *Corporate Criminal Liability: Emergence, Convergence, and Risk*, New York, 2011, p. 255.

[4] Article 25 of Decree 231 concerns the crimes of extortion, undue inducement to give or to promise benefits, bribery and corruption.

[5] Article 1 of Decree 231 provides that "1. This legislative decree governs corporate liability for administrative offences resulting from crimes. 2. The provisions contained herein apply to companies with and without legal personality and to unincorporated associations. 3. The provisions do not apply to the State, to territorial public bodies, to other non-economic public bodies or to entities that perform functions of constitutional importance".

Aside from other relevant issues addressed by the Italian Court in its ruling[6], this case provides an opportunity to reflect on the possible consequences of the prosecution and punishment of a foreign legal entity outside its territory, in terms of the potential overlapping of proceedings and sanctions.

In fact, it is the first time that the Italian Supreme Court has extended the scope of application of Decree 231 also to foreign entities that have committed crimes in Italy.

The implications of the judgment with respect to potential duplications of proceedings and sanctions are determined by the Court's adherence to a principle of "universal territoriality" [7], which can be traced back to the theory of ubiquity, codified for natural persons in Article 6 of the Italian Criminal Code. Indeed, the Court ruled that jurisdiction must be assessed in relation to the place where the offence was perpetrated; in previous judgments, however, the Court had broadened the interpretation of the territoriality principle enshrined in the Criminal Code considerably, deeming it sufficient that the offence was planned in Italy[8].

In view of these rulings, the potential risk for a foreign entity to fall within the scope of Legislative Decree no. 231/2001 goes well beyond the case at hand, in which the crime attributable to the legal persons was committed entirely within the territory of the Italian State: in fact, it is sufficient that a part of the offence is committed on the national territory to establish Italian jurisdiction.

At the same time, the legal persons' nationality could have led to the prosecution of the foreign companies in their home country: as anticipated, the legal persons involved in the commission of the crime had their registered office in the Netherlands, and they could have been prosecuted and punished also in the Netherlands for the crime committed in Italy, pursuant to the Dutch Criminal Code (DPC).

In fact, the criminal law of the Netherlands is applicable to any person who commits a crime on Dutch territory (Art. 2 DPC)[9]. The DPC has also conferred jurisdiction on Dutch courts based on the Dutch nationality of the offender, according to the active personality principle (Art. 7 DPC)[10], and the Dutch Supreme Court ruled that this

[6] The Court has in fact considered whether the liability of the foreign entity resulting from the failure to adopt organisational models compliant with Decree 231 could lead to a discriminatory treatment contrary to the freedom of establishment; in this respect, see G. FABRI, V. S. ZILIA BONAMINI PEPOLI, *The liability of legal persons for offences and the freedom of establishment in the view of the Italian Supreme Court*, in *Eurojus*, 2020, n. 4, p. 297.

[7] See M. M. SCOLETTA, *Enti stranieri e "territorialità universale" della legge penale italiana: vincoli e limiti applicativi del D.Lgs. n. 231/2001*, in *Le Società*, 2020, n. 5, p. 621.

[8] Italian Supreme Court, Sixth Division, judgment of 17 March 2016, no. 11442; for further insight on this case law, see footnote 40.

[9] On the interpretation given to this provision by the Dutch judiciary, see A. S. MASSA, *Jurisdiction in England and Wales and the Netherlands: a comparative appraisal with a European touch*, in A. KLIP (ed.), *Substantive Criminal Law of the European Union*, Antwerpen, 2011, p. 108.

[10] Such jurisdiction is premised on a double criminality condition, except for a list of specific offences which do not require punishment of the conduct under the law of the State on whose territory the crime is committed (B.F. KEULEN, E. GRITTER, *Corporate Criminal Liability in the Netherlands*, in *Electronic Journal of Comparative Law*, 2010). It has to be noted that pursuant to Art. 68 DPC criminal proceedings are precluded in the Netherlands after a final judgement has been rendered by a foreign court in case of (i) acquittal or dismissal of the charges and (ii) in case of conviction, if punishment has been imposed, followed

principle also applies to legal persons[11], whose nationality is established on the basis of the statutory seat of the corporation.

In this context, it is also worth noting that the Instruction on the Investigation and Prosecution of Foreign Corruption for the Dutch Public Prosecution Service expressly highlights the opportunity of prosecuting and punishing the bribery of a foreign official committed by a Dutch citizen or company, since it seriously affects citizens' trust in governments and trust between states, while undermining international competition[12]. Foreign bribery is then a punishable offence in the Netherlands, also when committed by legal persons; any Dutch legal person bribing a foreign official abroad can be prosecuted in the Netherlands, even if their activity does not take place on the Dutch territory[13].

## 2.2. Corporate "criminal" liability in the EU

The case examined by the Italian Supreme Court raises questions about the possible initiation of multiple proceedings against the legal entity involved in the commission of transnational crimes: in fact, the consequence of every state unilaterally establishing their own criteria regarding jurisdiction is the risk of double jeopardy, which occurs when criminal provisions of more than one state can be applied to the same case, ending up with a double (or, even, multiple) punitive response.

It seems particularly useful to examine this scenario, especially considering that many EU legal instruments have asked Member States to impose "effective, proportionate and dissuasive" sanctions on legal persons involved in the commission of crimes; since the introduction in the Amsterdam Treaty of the possibility to approximate the definition of criminal offences and sanctions, a significant number of framework decisions – and, since the Lisbon Treaty, directives – has in fact been adopted[14].

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by complete enforcement, pardon, or lapse of time. Even though the regulation of transnational *ne bis in idem* lacks constitutional status, the Dutch criminal law system takes into account foreign *res judicata*, offering a wide measure of protection against double jeopardy (A. KLIP, H. VAN DER WILT, *The Netherlands non bis in idem*, in *Revue internationale de droit penal*, 2002, p. 1100).

[11] HR 11 December 1990, NJ 1991, 466.

[12] See "*Aanwijzing opsporing en vervolging buitenlandse corruptie*", Stcrt. 2020, n. 50178.

[13] In this respect, it has to be noted that the Council Act, *drawing up, on the basis of Article K.3 (2) (c) of the Treaty on European Union, the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union*, of 26 May 1997, contains a specific *ne bis in idem clause* (Art. 10), which, nevertheless, allows Member States to introduce significant exceptions to the principle.

[14] These legal instruments have dealt with numerous matters, such as fraud and counterfeiting of non-cash means of payment, the fight against terrorism, trafficking in human beings, the facilitation of unauthorized entry, transit and residence within the EU, corruption in the private sector, the sexual exploitation of children and child pornography, illicit drug trafficking. Just to mention a few examples, the Directive on the protection of the environment through criminal law required Member States to ensure that legal persons can be held liable for serious environmental offences committed for their benefit by persons having a leading position within the legal entity or by people subject to their direction or supervision, whenever the commission of the offence was possible due to a lack of supervision or control; the same was set forth by the Directive on attacks against information systems and, more recently, by the Directive on the fight against fraud to the Union's financial interests by means of criminal law. For an overview, see G.

These instruments do not entail an obligation for Member States to introduce criminal liability of legal persons: the wording of the approximation provisions implies that every liability regime – be it criminal, administrative or civil – is compatible with the EU policy, as long as the legal person can be held liable for the crime. Thus, the EU legislator has shown to have taken into account national differences in this matter: in fact, some Member States are reluctant to accept the criminal liability of legal persons, given that these entities act through their organs and are therefore unable to have criminal intent (*societas delinquere non potest*)[15]. Other states, such as the Netherlands, admit the possibility to attribute criminal liability to legal persons due to their increasingly central role in modern society, which requires them to be punished for their wrongdoings.

As a result, in the EU "the landscape is shattered"[16]: the very same conduct could lead to the application of a criminal sanction in Spain, while it could be classified as an administrative violation under German law.

The actual nature of such liability and the national character of the rules on jurisdiction raise the question whether the prosecution and punishment of the legal person in more than one Member State in relation to the same conduct would determine the violation of the *ne bis in idem* principle enshrined in Art. 50 of the EU Charter of Fundamental Rights (CFR)[17].

### 2.3. The application of the *ne bis in idem* principle to legal entities

The nature of the liability of legal persons for offences is a relevant issue in Member States – such as Italy – which did not opt for "pure" criminal liability; in actual fact, failing to acknowledge the criminal nature of these liability regimes could result in the inapplicability of Art. 50 CFR – which only refers to criminal proceedings – and therefore in the application of a double sanction for legal persons involved in the commission of cross-border crimes.

Art. 50 CFR enshrines the *ne bis in idem* principle, which prevents a person from being prosecuted more than once for the same conduct; even though this principle is also recognised at the national level, the EU has developed it from a domestic into a transnational legal principle and fundamental right. This was necessary to avoid the

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VERMEULEN, W. DE BONDT, C. RYCKMAN, *Liability of legal persons for offences in the EU*, Antwerpen, 2012, p. 92.

[15] *E.g.*, Bulgaria, Germany, Greece, Latvia and Sweden have opted for the introduction of administrative liability of legal persons for offences in their national legal systems (see G. VERMEULEN, W. DE BONDT, C. RYCKMAN, *op. cit.*, p. 33).

[16] G. VERMEULEN, W. DE BONDT, C. RYCKMAN, *op. cit.*, p. 23. It has to be underlined that for many Member States which apply criminal liability to legal persons, this concept is relatively recent: in the Czech Republic the criminal liability of legal persons entered into force in 2012; in Spain, this form of liability was introduced in 2010; in Portugal, in 2007; in France in 1994.

[17] For the sake of simplicity, we will focus on Art. 50 CFR, even though it coexists with other *ne bis in idem* clauses, such as Art. 54 CISA. For a thorough analysis on this subject, see J.A.E. VERVAELE, *Ne Bis In Idem: Towards a Transnational Constitutional Principle in the EU?*, in *Utrecht Law Review*, 2013, p. 211.

overlapping of criminal jurisdictions which can occur from exercising the right to freedom of establishment, and the subsequent risk of parallel proceedings for the same fact on the basis of its transnational nature.

For this reason, a transnational *ne bis in idem* rule was first set out in 1990 in Articles 54 to 58 of the Convention Implementing the Schengen Agreement (CISA)[18]. It represented an important innovation, as it was the first time that the right not to be prosecuted and punished twice was recognised beyond the national sphere.

The incorporation of the prohibition on double jeopardy into the framework of EU law enabled the CJEU to ensure a consistent application of the principle in all Member States[19]. In fact, the Court affirmed an intrinsic link between Article 54 CISA and the free movement of persons, underlining that this fundamental freedom could be undermined if individuals had to face several prosecutions for the same conduct within the EU. It held that the *ne bis in idem* principle has in fact to be regarded as an essential part of the area of freedom, security and justice.

The Court also clarified that Articles 54-58 CISA are based on the concept of mutual recognition: in its landmark ruling on the cases *Gözütok* and *Brügge*[20], it referred to the "necessary implication that Member States have mutual trust in their criminal justice systems and that each of them recognises the criminal law in force in other Member States"; thus, the Court held that if further prosecution is barred according to the national law of a Member State where a decision is taken, this rule will apply throughout the EU.

Later on, this transnational principle was embedded in Article 50 CFR, which stipulates: "No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law". With the Lisbon Treaty, the EU Charter of Fundamental Rights became a binding text, and the *ne bis in idem* provision of Article 50 CFR became a "binding fundamental right with a transnational reach in the EU"[21].

Compared to Art. 54 CISA, the wording of Art. 50 CFR is more concise, and its scope appears significantly broader, since it is not possible to derogate from it[22]. Since its enshrinement in the Charter, the *ne bis in idem* principle has been regarded as a general

[18] The Convention Implementing the Schengen Agreement was originally concluded as an international law instrument among some EU Member States; it was later integrated into the framework of EU law by means of the Protocol integrating the Schengen *acquis* into the Framework of the European Union, annexed to the Treaty of Amsterdam. Articles 54 to 58 CISA are now binding and applicable throughout the EU. For a more detailed analysis see R. LÖÖF, *54 CISA and the principles of ne bis in idem*, in *European journal of crime*, 2007, n. 15, p. 309.

[19] See also M. WASMEIER, *The principle of ne bis in idem*, in *Revue internationale de droit pénal*, 2006, n. 77, pp. 121.

[20] Court of Justice, judgment of 11 February 2003, *Gözütok* and *Brügge*, Joined Cases C-187/01 and C-385/01.

[21] J.A.E. VERVAELE, *cit.*, p. 220.

[22] A. IERMANO, *Il diritto di non essere giudicato o punito due volte per lo stesso reato ex art. 50 della carta dei diritti fondamentali*, in A. DI STASI (ed.), *Spazio europeo e diritti di giustizia. Il capo VI della carta dei diritti fondamentali nell'applicazione giurisprudenziale*, Lavis, 2014, p. 309.

principle of European Union law which provides a solution to the proliferation of parallel proceedings in the developing European judicial area[23].

It is worth underlining that there has been a wide debate recently in Europe on the prohibition of double jeopardy: the European Courts, as well as national judges, have made an effort to progressively define the scope of the *ne bis in idem* principle.

Limiting the analysis to the most recent CJEU decisions, it has to be underlined that the Court of Luxembourg opted for a high level of protection with regard to the notion of *idem*, by defining it as a set of facts which are inextricably linked together, and which resulted in the final acquittal or conviction of the person concerned[24]. This means that "the legal classification, under national law, of the facts and the legal interest protected are not relevant for the purposes of establishing the existence of the same offence, in so far as the scope of the protection conferred by Article 50 of the Charter cannot vary from one Member State to another"[25].

Furthermore, the CJEU extended the material scope of the *ne bis in idem* principle also to include administrative punitive proceedings with a criminal nature; this means that an administrative penalty which can be said to be falling within the scope of criminal law triggers the prohibition of *bis in idem*[26].

At the same time, the Court of Luxembourg stated – also dealing with transnational cases involving natural persons[27] – that at the UE level, the right not to be prosecuted or punished twice under Art. 50 CFR can be limited in accordance with Art. 52 CFR: thus, limitations shall be provided for by law and respect the essence of the right. They must also be necessary in light of the proportionality principle, and genuinely meet the objectives of general interest recognised by the Union, or the need to protect the rights and freedoms of others.

Indeed, in three recent cases – *Menci*, *Garlsson* and *Di Puma and Zecca*[28] – concerning the national double-track enforcement regimes in the fields of tax law and market abuse, the CJEU has explicitly acknowledged double-track systems as a limitation to the *ne bis in idem* principle, as long as Member States introduce these measures in

[23] See A. DI STASI, *Spazio europeo di libertà, sicurezza e giustizia e cooperazione giudiziaria in materia penale: il rispetto dei diritti fondamentali e della diversità tra ordinamenti nazionali e tradizioni giuridiche*, in L. KALB (ed.), *"Spazio europeo di giustizia" e procedimento penale italiano*, Torino, 2012, pp. 44-46.
[24] Court of Justice, Second Chamber, judgment of 9 March 2006, *Van Esbroeck*, Case C-436/04. It should be pointed out that despite the wording of Art. 50, which refers to an "offence" (unlike Art. 54, which refers to "same acts"), the Court of Justice upheld its previous case law with regard to the definition of *idem factum* (A. ORIOLO, *Il diritto di non essere giudicato o punito due volte per lo stesso reato nell'art. 50 della Carta dei diritti fondamentali dell'UE*, in A. DI STASI (ed.), *Tutela dei diritti fondamentali e spazio europeo di giustizia. L'applicazione giurisprudenziale del Titolo VI della Carta*, Napoli, 2019, p. 351).
[25] Court of Justice, Grand Chamber, judgment of 20 March 2018, *Garlsson Real Estate SA*, Case C-537/16, par. 38.
[26] Court of Justice, Grand Chamber, judgment of 26 February 2013, *Åkerberg Fransson*, Case C-617/10.
[27] Court of Justice, Grand Chamber, judgment of 27 May 2014, *Spasic*, Case C-129/14.
[28] Court of Justice, Grand Chamber, judgment of 20 March 2018, *Garlsson Real Estate SA*, Case C-537/16; Court of Justice, Grand Chamber, judgment of 20 March 2018, *Menci*, Case C-524/15; Court of Justice, Grand Chamber, judgment of 20 March 2018, *Di Puma e Zecca*, Joined Cases C-596/16 and C-597/16.

order to pursue "objective, complementary aims relating, as the case may be, to different aspects of the same unlawful conduct at issue"[29].

Even though these three 2018 decisions were criticised, because the CJEU did not provide for an explicit – and therefore clearly foreseeable – rule on how to deal with national double-track systems[30], it can be concluded that the Court of Luxembourg has had a relevant role in shaping the *ne bis in idem* principle with regard to natural persons.

As far as legal persons are concerned, there seems to be a long way to go: as it has been highlighted, the EU's position remains unchanged from the one expressed in the 1990s, when the CJEU ruled in the *Vandevenne* case that "neither Article 5 of the EEC Treaty nor Article 17(1) of Regulation No 3820/85 requires a Member State to introduce into its national law the principle of criminal liability of legal persons"[31].

The same statement can be found in a more recent decision, concerning the Framework Decision on the standing of victims in criminal proceedings and its applicability in the field of corporate liability for offences[32]: based on the assumption that there is no obligation for Member States to provide that legal persons are to be liable in criminal law, the Court held that the "administrative" offence regarded by Legislative Decree No. 231/2001 is "a separate offence which has no direct causal link with the harm that was caused by the criminal act committed by a natural person and is the subject of a claim for compensation"[33].

As some authors have authoritatively pointed out, the CJEU has avoided affirming the criminal nature of the Italian corporate liability for offences – even for the purpose of granting the right to compensation to the victims – in order not to raise concerns in those Member States which reject the admissibility of criminal liability of legal persons[34]. The cautious approach adopted by the CJEU has left unanswered the question of the real nature of the legal persons' "administrative" liability for offences.

Thus, it is still doubtful whether or not the fundamental guarantees established by national constitutions and international charters of human rights – such as the ECHR and the CFR – in the field of criminal law must be extended also to the liability of legal persons.

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[29] Court of Justice, Grand Chamber, judgment of 20 March 2018, *Garlsson Real Estate SA*, Case C-537/16, par. 46.

[30] As it has been highlighted, the definition of coordination rules, as well as their relationship with the proportionality of the sanction imposed, appear problematic in terms of fairness and foreseeability. See G. LASAGNI, S. MIRANDOLA, *The European ne bis in idem at the Crossroads of Administrative and Criminal Law*, in *Eurocrim*, 2019, n. 2, p. 130.

[31] Court of Justice, First Chamber, judgment of 2 October 1991, *Vandevenne*, Case C-7/90. In this respect, see V. FRANSSEN, *The EU's Fight Against Corporate Financial Crime: State of Affairs and Future Potential*, *cit.*, p. 1230.

[32] Framework Decision 2001/220/JHA of the Council, *on the standing of victims in criminal proceedings*, of 15 March 2001.

[33] Court of Justice, Second Chamber, judgment of 12 July 2012, *Giovanardi*, Case C-79/11.

[34] A. VALSECCHI, F. VIGANÒ, *Secondo la Corte di Giustizia UE, l'inammissibilità della costituzione di parte civile contro l'ente imputato ex d.lgs. 231/01 non è in contrasto col diritto dell'Unione*, in *Diritto Penale Contemporaneo*, 2012.

Among these guarantees, the principle of *ne bis in idem* enshrined in Art. 50 CFR should definitely apply to legal persons, since they enjoy fundamental rights in the internal market[35]. In this respect, it must be noted that the same CJEU has affirmed that "the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by European Union law"[36]: this statement should then dispel the doubts concerning the application of Art. 50 CFR to legal persons, at least when their liability is imposed by EU legal instruments.

A clarification is therefore needed on the actual nature of corporate liability: some scholars have underlined that "even if a Member State decides to label the corporate liability regime as administrative or civil, the basic characteristics of this liability may still be essentially 'criminal' in nature"[37], in the light of the *Engel* criteria developed by the European Court of Human Rights and applied by the CJEU in its *Bonda* case law[38]. If this is the case, Art. 50 CFR could certainly come into consideration, since it applies to criminal proceedings and the principles laid down by the CJEU in its recent judgments concerning double-track systems could then serve as a guidance to avoid duplications of proceedings and sanctions also when it comes to cross-border crimes committed by legal persons. Among these principles, special importance should be attributed to the proportionality of penalties, which ensures that the severity of the sum of all of the penalties imposed on the legal entity does not exceed the seriousness of the offence.

However, the notion of "*idem factum*" still appears to be problematic: as a matter of fact, legal entities act through their organs at different times and in different places; this implies that every national Court could choose to give relevance to a specific element of the misconduct (the place where the crime was committed, the place where the company is headquartered, etc.), leading to a proliferation of punitive responses.

For this reason, it seems necessary to agree on how the notion of "*idem factum*" must be regarded when legal persons are involved; as it has been suggested, the above mentioned "set of facts which are inextricably linked together" should be interpreted differently when applied to legal persons, by adopting the objective viewpoint of the corporation[39].

In this sense, it may be possible to attach importance to the "benefit" effectively or potentially obtained by the legal person as a consequence of the criminal conduct[40]. On

[35] H. SATZGER, *Application Problems Relating to "Ne bis in idem" as Guaranteed under Art. 50 CFR/Art. 54 CISA and Art. 4 Prot. No. 7 ECHR*, in *Eucrim*, 2020, n. 3, p. 216.
[36] Court of Justice, Grand Chamber, judgment of 26 February 2013, *Åkerberg Fransson*, Case C-617/10, par. 19.
[37] V. FRANSSEN, *The EU's Fight Against Corporate Financial Crime: State of Affairs and Future Potential*, *cit.*, p. 1222.
[38] Court of Justice, Grand Chamber, judgment of 5 June 2012, *Bonda*, Case C-489/10. The CJEU held that the concept of "criminal proceedings" must be interpreted in the light of three criteria: the first criterion is the legal classification of the offence under national law, the second is the very nature of the offence, and the third is the nature and degree of severity of the penalty that the person concerned is liable to incur.
[39] H. SATZGER, *op. cit.*
[40] An example may help explain the usefulness of the reference to the benefit in order to avoid the violation of the *ne bis in idem* principle: pursuant to Art. 4 of the Italian Decree 231, legal entities having their head office in Italy shall be liable in relation to offences committed abroad, provided that the State of the place

the one hand, this specific element allows one to distinguish the crime of the natural person from the misconduct attributed to the legal person; at the same time, the "benefit" for the legal entity is relevant in most of the Member States' legal frameworks – regardless of the model of criminal corporate liability adopted – and it is expressly required by every European instrument which has imposed to national legislators the introduction of this kind of liability[41].

## 3. Sanctioning a company: the enforcement of judicial decisions within the EU

### 3.1. The principle of mutual recognition. The Regulation on the mutual recognition of freezing orders and confiscation orders

Cooperation between states is essential to enforce decisions given by the court of one Member State outside its territory.

The free movement of decisions is ensured through the principle of mutual recognition, which has been defined as "the principle that decisions of criminal courts and other competent authorities of one Member State are to be accepted by the courts and competent authorities of the other Member States and enforced on the same terms as their own"[42].

As a matter of fact, mutual recognition represents an essential tool of judicial cooperation[43].

where the offence was committed does not proceed against them. Nonetheless, the Italian Supreme Court have considerably broadened the scope of this provision: according to the Court, the offence cannot be said to have been committed "entirely" abroad when part of the conduct has taken place in Italy. As a consequence, the Court have stated that the legal person can be prosecuted in Italy for the crime committed abroad, even if it has already been judged by a foreign court, whenever the strategic and organisational decisions – *i.e.*, part of the criminal conduct – were made in the Italian head office (Italian Supreme Court, Sixth Division, judgment of 17 March 2016, no. 11442). Even if this judgment refers to a case of international corruption involving a non-EU country, it still may be useful to highlight that the benefit for the corporations – deriving from the commission of the crime – had already been considered by the foreign court in a previous judgment, thus from the legal entity's perspective this could be regarded as an *idem*.

[41] E.g., Article 8 of the Directive 2014/57/EU of the European Parliament and of the Council, *on criminal sanctions for market abuse*, of 16 April 2014, as well as Article 6 of the Directive 2017/1371 of the European Parliament and of the Council, *on the fight against fraud to the Union's financial interests by means of criminal law*, of 5 July 2017.

[42] J. R. SPENCER, *The principle of mutual recognition*, in R. E. KOSTORIS (ed.), *Handbook of European Criminal Procedure*, Cham, 2018, p. 281.

[43] The issue of mutual recognition in criminal matters was raised at the Cardiff European Council in 1998. It was at the Tampere European Council in October 1999 that the principle was recognised as the cornerstone of judicial cooperation in both civil and criminal matters within the EU. For an overview of the evolution of the principle, see A. SUOMINEN, *The Principle of Mutual Recognition in Cooperation in Criminal Matters. A study of the principle in four framework decisions and in the implementation legislation in the Nordic Member States*, Antwerp, 2011, p. 43.

In January 2001 a programme of measures was adopted in order to implement the principle[44]; however, these measures were mainly drawn up from the perspective of ensuring the recognition of sentences imposed on natural persons[45].

Although in a very limited way, the programme also took into consideration legal persons: measure 18 was aimed at the preparation of an instrument enabling the State of residence to levy fines imposed by a final decision on a natural or legal person by another Member State.

However, it has to be noted that even at the present time instruments concerning the mutual recognition of decisions are primarily focused on sanctions imposed on natural persons; a legal basis for the execution of decisions regarding legal entities is provided only with respect to financial penalties (which are included as mandatory sanctions in the approximation instruments) and confiscation (sometimes included as a suggested sanction in the approximation instruments).

In these instruments it has been clarified that when legal entities are at stake diversity is not accepted as grounds for refusal: even if a Member State does not recognise the principle of criminal liability of legal persons it is obliged to enforce a foreign judgment by imposing sanctions on them[46].

The same is provided for by Art. 23 of the new Regulation on the mutual recognition of freezing orders and confiscation orders[47], which has replaced the provisions of Framework Decision 2003/577/JHA and Framework Decision 2006/783/JHA as of December 2020: thus, a freezing order or confiscation order issued against a legal person shall be executed even where the executing State does not recognise the principle of criminal liability of legal persons.

Limiting the analysis to this recent instrument, it is worth underlining that it is the first time the EU legislator has adopted a Regulation instead of a Directive to regulate

[44] Programme of measures to implement the principle of mutual recognition of decisions in criminal Matters (2001/C 12/02).

[45] In the preamble of the programme, it is specified that "Mutual recognition is designed to strengthen cooperation between Member States but also to enhance the protection of individual rights. It can ease the process of rehabilitating offenders… In addition, the main purpose of transferring sentenced persons as provided for in the Council of Europe Convention of 21 March 1983 is to help towards their rehabilitation and stems from humanitarian considerations".

[46] See Article 9 of the Framework Decision 2005/214/JHA of the Council, *on the application of the principle of mutual recognition to financial penalties*, of 24 February 2005, as well as Article 12 of the Framework Decision 2006/783/JHA of the Council, *on the application of the principle of mutual recognition to confiscation orders*, of 6 October 2006. With regard to financial penalties, the CJEU has underlined the binding character of the Framework Decision; as a consequence, Member States must enforce the financial penalty, even if national law does not recognise the principle of criminal liability of legal persons. See Court of Justice, First Chamber, judgment of 4 March 2020, *Bank BGŻ BNP Paribas S.A.*, Case C-183/18. At the national level, the Italian Supreme Court has clarified that for the purpose of the recognition of a decision imposing a fine on the legal representative of a legal person, issued by the judicial or administrative authority of a European Union Member State, the conditions and limits provided for by Legislative Decree no. 231 of 8 June 2001 must be disregarded (Italian Supreme Court, Sixth Division, judgment of 18 May 2018, no. 22334).

[47] Regulation 2018/1805 of the European Parliament and of the Council, *on the mutual recognition of freezing orders and confiscation orders*, of 14 November 2018.

cooperation in the enforcement of Member States' orders[48]; this means that Member States should abstain from implementing the Regulation into their legal orders, as its provisions are directly applicable.

The main aim of the Regulation is to facilitate the freezing and confiscation of criminal assets across the EU, in order to fight transnational crimes more effectively. The scope has been formulated broadly, since it is clarified that the new instrument should cover freezing orders and confiscation orders related to criminal offences covered by Directive 2014/42/EU[49], as well as freezing orders and confiscation orders related to other criminal offences; in fact, Recital 14 stipulates that the criminal offences covered by the Regulation should not be limited to particularly serious crimes that have a cross-border dimension, as Article 82 of the TFEU does not require such a limitation for measures aimed at ensuring the mutual recognition of judgments in criminal matters.

It is also specified that the freezing order or confiscation order can be issued against both natural and legal persons.

For the purpose of this work, two main aspects deserve special attention: first of all, the Regulation expressly applies to "proceedings in criminal matters"; it must be underlined that this expression differs from the one used in the Framework Decision 2003/577/JHA, which only referred to "criminal proceedings"[50].

In this respect, Recital 13 of the Regulation specifies that "proceeding in criminal matters" is "an autonomous concept of Union law interpreted by the Court of Justice of the European Union, notwithstanding the case law of the European Court of Human Rights", and it covers all types of freezing orders and confiscation orders "issued following proceedings in relation to a criminal offence"; it also applies to other types of orders issued without a final conviction. This implies that such orders must be executed even if they do not exist in the legal system of the executing State.

The reference to "proceedings in criminal matters", along with the provision of Art. 23, could reasonably lead to the conclusion that the new Regulation applies also to the "criminal" liability of legal persons – regardless of the liability regime chosen by every single state – since the order would be issued "following proceedings in relation to a criminal offence".

Another relevant aspect of the new Regulation is the grounds for non-recognition and non-execution, which are provided for in Art. 8 and Art. 19, for freezing orders and confiscation orders respectively. In particular, as already set out in the previous legal

[48] The decision to adopt a Regulation instead of a Directive was taken despite the opposition of several Member States; for this reason, Recital 53 of the Regulation specifies that "the legal form of this act should not constitute a precedent for future legal acts of the Union in the field of mutual recognition of judgments and judicial decisions in criminal matters". See T. WAHL, *Regulation on Freezing and Confiscation Orders*, in *Eucrim*, 2018, n. 4, p. 201.

[49] Directive 2014/42/EU of the European Parliament and of the Council, *on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union*, of 3 April 2014.

[50] For further analysis see A. M. MAUGERI, *Il regolamento (UE) 2018/1805 per il reciproco riconoscimento dei provvedimenti di congelamento e di confisca*, in *Diritto Penale Contemporaneo*, 2019, n. 1, p. 34. See also L. CAPRIELLO, *Sequestri e confische. Criticità applicative e rimedi processuali*, Santarcangelo di Romagna, 2021, p. 42.

framework, the executing State may decide not to execute an order where it would be contrary to the principle of *ne bis in idem*. This means that if a legal person has been judged in one MS for the same misconduct, the new decision issued by another MS cannot be recognised and executed.

It is also specified that before deciding not to recognise or execute the order, the executing authority shall consult the issuing authority and, where appropriate, shall request that it supply any necessary information. Even if it represents a relevant tool to avoid duplications with regard to freezing and confiscation of assets, this kind of cooperation is still "delayed", as it does not prevent two states from initiating – and even concluding – two parallel proceedings for the same facts, with all that this implies in terms of the wasting of time and resources and duplication of work.

### 3.2. The extension of the MR principle to other sanctions imposed against legal entities

In judgment No.11626/2020 the Italian Supreme Court upheld the financial sanction imposed on the legal entities involved in the perpetration of the crime; the type of sanction applied in this case provides an opportunity to reflect on the extension of the mutual recognition policy to other sanctions imposed against legal entities.

Pursuant to Art. 25 of the Decree 231/2001, the commission of the crime of bribery in judicial proceedings can lead to the application not only of a financial sanction, but also of a range of other measures, such as the disqualification from the exercise of the activity and the exclusion from facilitations, loans, grants or subsidies.

In fact, when introducing the liability of legal persons for offences the Italian legislator decided to take into account the specificity of legal persons by providing for particular sanctions aimed at affecting the activity of these entities.

As it has been already pointed out, there are significant differences among Member States in the legal frameworks surrounding corporate criminal liability; such differences concern the typology of legal persons that can be held liable, the offences legal persons can be held liable for, as well as the imputation mechanism and the theory underlying the liability of legal entities.

Major differences between Member States can also be found in the field of the sanctions that can be imposed on legal persons.

Given that corporations differ from natural persons in structure and nature, the applicable sanctions differ as well: deprivation of liberty is clearly not an option when it comes to crimes attributed to or committed by a legal entity[51].

Nonetheless, Member States have not always decided to introduce new types of sanctions specifically aimed at targeting legal persons: some States have not changed their

[51] On this subject see C. WELLS, *Corporations and Criminal Responsibility*, Oxford, 2001. See also A. MENTOVICH, M. CERF, *A Psychological Perspective on Punishing Corporate Entities*, in D. BRODOWSKI ET AL. (eds.), *Regulating Corporate Criminal Liability*, New York, 2014, p. 33.

sanction arsenal, whilst others have introduced a conversion mechanism to transform inoperable sanctions into sanctions that can be applied to legal persons. Some other States have relabelled pre-existing penalties aimed at targeting the legal persons, by classifying them as criminal sanctions[52].

Many Member States have chosen to include more particular sanctions, which could specifically affect the activity of the legal entity, such as: the closure of branches of the activity; the loss of legal personality; the public pronouncement of the conviction; prohibition from participating in public tenders; prohibition from advertising goods or services.

It is precisely these types of sanctions which can be imposed on a legal entity which immediately disclose the difficulties which can rise from the necessity of enforcing a decision given by the court of one Member State outside its territory.

The problem is anything but irrelevant: to ensure that an imposed sanction is enforced is key for deterrence. And this problem is certainly felt by national courts, whenever they have to choose the sanction to be applied to legal entities involved in the commission of a crime: in this regard, the Italian Supreme Court has underlined that the disqualifying sanctions provided for by Art. 9 of Decree 231 cannot be imposed to companies in cases where this would require the involvement of foreign public bodies, since the national judge would be unable to effectively monitor the compliance of the company with the sanction[53].

Thus, although abstractly applicable, the disqualifying sanctions set out in Legislative Decree no. 231/2001 encounter operational limits when it comes to cross-border crimes; they may be imposed on the entity only after the judge has ascertained their applicability through a case-by-case evaluation.

As it is evident, this situation could determine a significant discrimination, since disqualifying sanctions can be applied only to national cases, nudging courts to opt for financial sanctions when it comes to crimes of a transnational nature.

The situation appears to be even more peculiar considering that EU approximation instruments have encouraged Member States to adopt other sanctions in addition to criminal or non-criminal fines[54], such as: exclusion from entitlement to public benefits or aid, temporary or permanent disqualification from the practice of commercial activities, judicial supervision and judicial winding-up[55].

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[52] See G. VERMEULEN, W. DE BONDT, C. RYCKMAN, *op. cit.*, p. 87

[53] Italian Supreme Court, Sixth Division, judgment of 1 December 2010, no. 42701. See V. ALTARE, *Sull'applicabilità delle sanzioni interdittive agli enti beneficianti di corruzione internazionale*, in *Giurisprudenza Italiana*, 2011, p. 1622.

[54] As far as legal persons are concerned, fines could not have a deterrent effect: to the extent that they may be calculated in advance, fines may simply be treated as a business cost. On this subject, see V. FRANSSEN, *The EU's Fight Against Corporate Financial Crime: State of Affairs and Future Potential*, *cit.*, p. 1242.

[55] *E.g.*, Article 9 of the Directive 2014/57/EU of the European Parliament and of the Council, *on criminal sanctions for market abuse*, of 16 April 2014, as well as Article 9 of the Directive 2017/1371 of the European Parliament and of the Council, *on the fight against fraud to the Union's financial interests by means of criminal law*, of 5 July 2017.

For this reason, many argue that the EU should focus accordingly on improving enforcement among Member States[56], by extending the mutual recognition policy to include the kind of sanctions typically imposed on legal persons[57].

Several objections have been made to the application (and further expansion) of the mutual recognition principle in criminal matters; one of these objections concerns the legitimacy of criminal law at the national level[58]: criminal law is a fundamental feature of sovereignty, and it contains rules shaping the relationship between the individual and the State; this field of law, more than others, draws its legitimacy from the democratic process, and from the agreement on which behaviours are deemed unacceptable.

Mutual recognition challenges this assumption, as Member States are expected to enforce decisions issued in another legal framework regardless of the differences existing among national legal systems; as opposed to harmonisation, which involves a negotiation at the EU level and the agreement on a set of standards, the free movement of decisions implies "a journey into the unknown"[59], since individuals of the executing Member State are not fully aware of the development of the issuing state's legal framework. Hence, the enjoyment of the freedoms guaranteed by EU law can expose individuals to a proliferation of enforcement actions aimed at the protection of interests identified at the national level.

As it has been noted, the efficiency pursued in the enforcement stage only could result in a prejudice for the guarantees of the criminal law of Member States: to some extent, the rights of individuals involved in the cooperation relationship could be affected by judicial cooperation in criminal proceedings[60].

Another criticism of mutual recognition in criminal justice involves the lack of regulation with regard to jurisdiction: in actual fact, when this principle was introduced in the civil field in 1968 by the Brussels Convention, the main purpose was to establish of clear set of rules determining the jurisdiction of national courts over cross-border matters. In the criminal context, this was not the case: when drafting instruments aimed at harmonising substantive criminal law, the EU legislator has essentially underlined that the mobility of perpetrators in the EU territory make it possible for criminal conducts and their effects to extend beyond the borders of the States; however, it was just required that all Member States establish extraterritorial jurisdiction over criminal offences. As a consequence, more than one Member State could claim jurisdiction over the same matter, and this unsatisfactory situation has led to the call for a global approach in the fight against crime at the EU level, through the adoption of clear rules on jurisdiction[61].

More specific criticisms have been made to the extension of the mutual recognition principle to disqualifications as sanction measures: although the above-mentioned

[56] K. NUOTIO, *A legitimacy-based approach to EU criminal law: Maybe we are getting there, after all*, in *New Journal of European Criminal Law*, 2020, p. 20.
[57] G. VERMEULEN, W. DE BONDT, C. RYCKMAN, *op. cit.*, p. 107.
[58] See V. MITSILEGAS, *EU Criminal Law*, Oxford, 2009, p. 123.
[59] V. MITSILEGAS, *op. cit*. p. 124.
[60] D. N. CASCINI, *Il conflitto di giurisdizione tra Stati Membri dell'Unione Europea*, in *Archivio Penale*, 2018, n. 3, p. 18.
[61] J. R. SPENCER, *op. cit.*, p. 294.

"Programme of Measures to implement the principle of mutual recognition" referred to the gradual extension of the effects of disqualifications throughout the European Union, it has been highlighted that there are a number of difficulties related to the cross-border enforcement of disqualifications[62]. First, there is no accepted definition of disqualifications, due to the significant differences existing between the Member States' criminal justice systems: the term can be used to refer to sanctions imposed in criminal, civil, administrative, or even disciplinary proceedings, by a wide range of authorities. Moreover, these measures can qualify as principal sanctions, as well as additional or alternative sanctions.

Another issue is related to the different concept underlying the cross-border effect of disqualifications, when compared to the existing mutual recognition instruments: in the matter at hand, the mutual recognition does not simply refer to the need of transferring the execution of the sanction to another MS, but rather to the necessity of extending the execution to other Member States: the "traditional" mutual recognition effect is to transfer the entire competence to execute a decision from the issuing MS to another state, on the grounds that the issuing state is not the best place for execution; with regard to disqualifications the aim is not to transfer the execution of the decision to another state, but to have the decision recognised abroad while maintaining its effect also in the issuing state. This means that the disqualified legal person would not be able to perform the activity both in the issuing and in the executing state[63].

On the other hand, the current absence of mutual recognition instruments covering the entire range of sanctions that can be imposed on legal persons allows the perpetrator to avoid the negative effects of these sanctions by simply leaving the territory of the issuing state. This is particularly detrimental in cases – such as the one examined by the Italian Supreme Court in 2020 – where the person has no link with the state on whose territory the crime is committed. As it has already been pointed out, this also leads national courts to opt for the application of financial sanctions when it comes to cross-border crimes; considering the seriousness of the crime and the characteristics of the legal persons involved, this is not always the best solution to ensure deterrence.

Furthermore, if the MR principle operates selectively the risk of *bis in idem* is significant: for example, a legal person could be sentenced with disqualification in one MS and with confiscation in another and EU law would not be able to prevent double punishment. The resulting cumulation of penalties could be inconsistent with the principle of *ne bis in idem*, as it may be disproportionate in the light of the most recent CJEU case law.

Also, the need for further development of the principle of mutual recognition follows from the EU approximation instruments which have encouraged Member States to

[62] G. VERMEULEN, W. DE BONDT, C. RYCKMAN, *Rethinking international cooperation in criminal matters in the EU. Moving beyond actors, bringing logic back, footed in reality*, Antwerp, 2012, p. 503; this work offers a detailed review of the body of instruments of the JHA *acquis*, revealing that references to disqualifications appear both in approximation instruments as well as in instruments regulating international cooperation in criminal matters.

[63] G. VERMEULEN, W. DE BONDT, C. RYCKMAN, *Rethinking international cooperation, op. cit.*, p. 528.

introduce particular sanctions, other than criminal and non-criminal fines, which could specifically affect the activity of the legal entity; in fact, mutual recognition and harmonisation are to be considered complementary in the field of cooperation in criminal matters: "since mutual recognition presupposes mutual trust and this trust is facilitated through harmonisation, mutual recognition and harmonisation are inextricably linked"[64].

For this reason, the EU legislator should extend the mutual recognition policy to be consistent with the policy lines set out in the approximation instruments, in order to provide directions for mutual recognition of (at least) the suggested sanctions[65].

## 4. Final remarks

In ruling No.11626/2020 the Italian Supreme Court held that the liability of legal persons for crimes committed in the national territory must be affirmed regardless of the location of their registered offices. The principle of law stated by the Court confirms that also foreign companies can be responsible under Decree 231/2001 and be subject to the Italian jurisdiction.

This case, brought before a national court, made it possible to underline some of the issues which can arise from the current lack of homogeneity in the EU concerning the liability of legal persons for offences.

Firstly, it has been underlined that corporations are conducting their activities in an international environment – also due to the freedoms provided by the European integration – and this has significantly increased the risk of commission of cross-borders crimes.

As a consequence, different national courts could initiate parallel proceedings on the same cases, by giving relevance to a specific element of the misconduct; on the one hand, it must be noted that parallel proceedings can be beneficial for combating cross-border crime in the European Union more effectively, in order to avoid the risk of impunity for the legal persons involved, as they can help to "get the overall picture of complex cases, to collect and exchange information and evidence, to clarify links between different parts of the investigations and to facilitate subsequent decisions on which jurisdiction should prosecute"[66].

On the other hand, the absence of binding rules on the resolution of conflicts of law can significantly affect the guarantee of *ne bis in idem*, as corporations are exposed to a proliferation of punitive responses[67]; parallel proceedings can in fact be helpful provided that coordination between the Member States involved is ensured.

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[64] A. SUOMINEN, *op. cit.*, p. 363.
[65] G. VERMEULEN, W. DE BONDT, C. RYCKMAN, *Rethinking international cooperation, op. cit*., p. 108.
[66] See Eurojust, *Report on Eurojust's casework in the field of prevention and resolution of conflicts of jurisdiction*, 2018.
[67] In order to establish which jurisdiction should prosecute, a number of criteria has been elaborated by scholars in order to determine the jurisdiction with regard to cross-border crime; in this respect, it has been suggested to take into consideration: the places of action of all persons involved in the organisational

In the EU legal framework the issue of coordination between Member States in criminal proceedings has been only partially addressed by Framework Decision 2009/948/JHA, adopted under the former third pillar; this instrument only provides for an obligation for the authorities of the Member States to exchange information and, when the existence of parallel proceedings is detected, to initiate consultations, in order to come to an agreement on which jurisdiction is better placed to prosecute.

The issue of parallel criminal proceedings remains therefore open, and linked to a series of negative consequences, such as overdeterrence, waste of resources in the states involved, competitive distortions[68].

In the absence of clear rules on conflicts of jurisdiction, it is necessary to refer to the *ne bis in idem* principle in order to establish whether a second judgment is admissible[69]. This guarantee has a double aim: in fact, it provides legal certainty within the EU, by protecting the "integrity" of the first ruling on a given matter[70], but it has also developed into a fundamental right, preventing the defendant from being prosecuted a second time.

Nonetheless, it has not been clarified yet whether the *ne bis in idem* guarantee applies to legal persons. Also, not every Member State has chosen to expressly label as "criminal" the liability of corporations for crime, and this could hinder the application of Art. 50 CFR, which only applies to criminal proceedings.

Moreover, it is not clear what the notion of "*idem*" refers to as long as legal persons are involved: since they act through all their representatives, their activity could actually take place at different times and in different places.

Lastly, it has been pointed out that the current EU legal framework does not fully take into account the features of the sanctioning system of the corporate liability for offences, and the existing differences in the legal classification of this form of liability could easily lead to the application of different types of sanctions in relation to cross-border crimes at the national level.

Looking at the possible solutions, it has been underlined that the principle of *ne bis in idem* enshrined in Art. 50 CFR should apply to corporate liability for offences, since they enjoy fundamental rights in the internal market. With regard to the actual nature of corporate liability, its basic characteristics allow to consider it as essentially "criminal" in nature, in the light of the Engel criteria developed by the European Court of Human Rights; thus, Art. 50 CFR could come into consideration, as it is applicable to criminal proceedings.

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failure; the place of registration; the place of organization, *i.e.* the place where the company's main activities are carried out. In this respect, see A. SCHNEIDER, *Corporate Criminal Liability and Conflicts of Jurisdiction*, in D. BRODOWSKI ET AL. (eds.), *Regulating Corporate Criminal Liability*, New York, 2014, p. 249.

[68] V. MONGILLO, *La repressione della corruzione internazionale: costanti criminologiche e questioni applicative*, in *Diritto Penale e Processo*, 2016, n. 10, p. 1330.

[69] H. SATZGER, *cit.*, p. 213.

[70] M. LUCHTMAN, *The ECJ's recent case law on ne bis in idem: implications for law enforcement in a shared legal order*, in *Common Market Law Review*, 2018, n. 55, p. 1721.

In this respect, a useful indication can also be drawn from the recent Regulation on the mutual recognition of freezing orders and confiscation orders, which applies to "proceedings in criminal matters"; this notion must be regarded as an autonomous concept of EU law interpreted by the Court of Justice of the European Union, notwithstanding the case law of the European Court of Human Rights. At the same time, the Regulation includes the *ne bis in idem* principle among the grounds for refusal, also in relation to the enforcement of sanctions imposed on legal persons.

This autonomous concept of EU law could then be referred to the whole area of punitive law, in the light of the *Engel* criteria, and it could offer an interpretative solution to the issue related to the different nature of corporate "criminal" liability at the EU level: this confirms that the legal classification of the liability under national law should not preclude the application of Art. 50 CFR to legal entities.

With regard to the notion of "*idem factum*" in the field of corporate criminal liability, the "set of facts which are inextricably linked together" should be interpreted by adopting the objective viewpoint of the corporation: it may be possible to attach importance to the "benefit" effectively or potentially obtained by the legal person as a consequence of the criminal conduct.

Finally, it has been highlighted that some states have chosen to include in their arsenal sanctions that could affect the activity of the legal person – such as the closure of branches of the activity and prohibition from participating in public tenders – as it was also suggested by many EU approximation instruments. However, the current lack of mutual recognition instruments covering the entire range of sanctions that can be imposed on legal persons has a series of negative effects when it comes to ensure effective deterrence; thus, the mutual recognition policy should be extended in order to be consistent with the approximation provisions.

ABSTRACT: In a recent judgment, the Italian Supreme Court has stated that a foreign company can be held liable for crimes committed in the national territory, regardless of the location of its registered offices. This ruling provides an opportunity to reflect on some of the issues which can arise from the current lack of homogeneity in the EU concerning the liability of legal persons for offences, in terms of potential overlapping of proceedings and sanctions, as well as with regard to the enforcement of judicial decisions given in another Member State.

KEYWORDS: Liability of legal persons for offences – Jurisdiction – *Ne bis in idem* – Transnational enforcement – Mutual recognition.