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The liability of legal persons for offences and the freedom of establishment in the view of the Italian Supreme Court

GIULIA FABRI* AND VITTORIA SVEVA ZILIA BONAMINI PEPOLI**

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I. Introduction

The European Union represents the most advanced form of peaceful economic integration between sovereign States[1].

Since the very beginning, the European Community (and, then, the European Union) has been strongly committed to the creation of the conditions to increase mobility across borders; in particular, the freedom of establishment constitutes a source of European rights concerning the free movement of persons, securing the free movement of self-employed persons who choose to exercise their profession outside their country of origin and of legal persons through

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* Giulia Fabri - PhD Student in Law and Business at LUISS Guido Carli University. Her main areas of interest and research include Criminal Law, Environmental Criminal Law and European Criminal Law.

** Vittoria Sveva Zilia Bonamini Pepoli is graduated in law - International and European law - at Luiss Guido Carli University (Rome). She did post-graduated studies in Cybercrime and forensic informatics. Now she is a lawyer and a PhD student in European Union Law at Luiss Guido Carli University.

[1] A. ARENA, F. BESTAGNO, G. ROSSOLILLO, *Mercato unico e libertà di circolazione nell'Unione Europea*, Torino, 2016.

the establishment of a company outside national borders. As is known, the freedom of establishment guarantees mobility of businesses within the EU, thus allowing legal persons that operate in one Member State to carry out an economic activity in a stable and continuous way in another Member State.

This situation has also led to the less desirable outcomes, consisting of crime waves and threats to national security; a wide range of measures aiming at harmonizing national law have been adopted in order to avoid that the free movement within the EU could lead to the exploitation of loopholes and heterogeneity in national legal systems.

As far as legal persons are concerned, the increase in cross-borders criminal activities carried out by these entities mainly in the economic field, has led the EU legislator to expressly regulate the liability *ex crimine* of corporations: in fact, many EU legal instruments have asked Member States to impose «effective, proportionate and dissuasive» sanctions on legal persons involved in the commission of a crime. Nonetheless, 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.

This has resulted in significant differences among Member States, with regard to the nature and scope of this type of liability, as well as to the imputation mechanisms and to the sanctions applicable to corporations.

Against this background, it is worth examining a recent judgment of the Italian Supreme Court, which has ruled on the liability of foreign companies for offences committed on the national territory; in particular, the Italian Court has 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 the national law with regard to crimes committed in Italy by a foreign legal entity.

This article is structured as follows: Section II analyses the freedom of establishment and the liability of legal persons under the Italian Legislative Decree 231. In particular, it focuses on the Italian Supreme Court ruling No. 11626/2020. Section III deals with the possible consequences of this ruling and the subsequent restrictions that criminal law could have on freedom of establishment. Finally, Section IV sets out our conclusions.

II. The freedom of establishment and the liability of legal persons for offences within the EU

As is known, the right of establishment is provided for in Title IV, Chapter 2 of the TFEU[2].

As far as legal persons are concerned, Articles 49, 50 and 54 of the TFEU are related to the freedom of establishment, extending the legal treatment recognised to self-employed persons also to companies.

In order to apply the provisions regarding the freedom of establishment, companies incorporated in accordance with the legislation of a Member State which have their registered

[2] At the core of the freedom of establishment there is the principle of non-discrimination, which has a significant meaning in the field of the EU company law.

offices, central administration or principal place of business within the EU are treated as natural persons who are nationals of the Member States.

It should be noted that Article 54 TFEU remits the definition of a company to national law. In this regard, in the *Daily Mail*[3] judgment the Court of Justice of the European Union (CJEU) specified that companies exist only by virtue of national laws governing their constitution and functioning. Furthermore, the TFEU and the CJEU have not taken a definite position regarding the definition of a company's establishment, specifying only three criteria: its registered office; central administration or its principal place of business. Consequently, the definition of the conditions under which a firm may be established and therefore benefit of the freedom of establishment is left to the Member State[4].

Finally, Article 50 TFEU affirms that in order to attain freedom of establishment, the European Parliament and the Council adopt measures to eliminate the limits imposed by Member States on the freedom of establishment. These measures will be taken throughout directives so as to achieve harmonisation and standardisation in the context of EU company law.

The CJEU interpreted Articles 49-54 TFEU by identifying two expressions of freedom of establishment: the primary and secondary establishment rights.

The CJEU has adopted a restrictive approach in applying the freedom of primary establishment. As known, in the *Daily Mail* ruling the Court held that national law restricting or preventing the cross-border transfer of its companies is compatible with the principles of the TFEU and specified that the TFEU's rules do not confer on a company incorporated under the legislation of a Member State with its registered office there, the right to transfer its central management and control to another State and continue to maintain the legal personality and the company *status* in its country of origin.

As to the freedom of secondary establishment, in the *Denkavit Internationaal BV and Denkavit France SARL*[5] ruling the CJEU stated that national provisions which, through discriminatory tax treatments, hinder the decision of a company to set up branches or agencies in other Member States that violate EU law and the freedom of establishment. At the same time, the Court affirmed that EU law is breached when the provisions of a Member State discriminate the establishment of companies' branches that come from other Member States which are duly incorporated there.

Against this background, it is necessary to examine whether and when legal persons are responsible for offences within the EU. This issue will be discussed in the following section on the Italian Supreme Court's jurisprudence on the applicability of Legislative Decree No. 231 of 2001 to foreign companies that do not have offices in Italy.

II A. The liability of legal persons within the EU in the Italian case law: an overview

[3] Judgment of the Court of 27 September 1988, C-81/87, *The Queen v H. M. Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust plc.*, ECLI:EU:C:1988:456.

[4] G. BENACCHIO, *Diritto privato dell'Unione Europea, Fonti modelli e regole*, 2016, VII ed.

[5] Judgment of the Court (First Chamber) of 14 December 2006, C-170/05, *Denkavit Internationaal BV and Denkavit France SARL v Ministre de l'Économie, des Finances et de l'Industrie*, ECLI:EU:C:2006:783.

The controversial issue of whether or not to recognise the applicability of Decree 231 to a company, with its headquarters outside Italy, for offences committed in Italy depends entirely on the legal relationship between a crime committed by a natural person in the interest or advantage of the company and the correlated liability of a legal person.

In this regard, two approaches can be identified: the so-called minimalist and maximalist doctrines.

According to the minimalist approach, the offence from which the legal person's liability arises and the crime form an inseparable whole, determining the company's *locus commissi delicti* depending on the crime committed by the natural person[6].

Other authors support a diametrically opposed thesis: the maximalist approach.

According to this view, the administrative offence has a composite nature and the individual conduct is a mere precondition in order to recognise a legal person's liability. Indeed, the company's liability would be based on an objective circumstance and on a subjective imputation, the so-called fault for the organisation, independent from the crime. Therefore, the jurisdiction will take place where its decision-making centre is based and where the organizational gap occurred[7].

This approach considers the liability of a legal person as being autonomous, due to any lack of compliance in the organisational structure of the company itself. In the maximalist approach, it is argued that if the company violates the supervisory and management obligations outside the Italian territory[8], the jurisdiction of the Italian criminal judge for the assessment of the administrative liability has to be excluded, even though the administrative offence depends on the crime committed in Italy for the benefit of the legal person.

In their case law, Italian Courts have adhered to the minimalist approach.

The full applicability of Decree 231 to foreign companies, for a crime committed by their agents in the national territory, regardless of whether they have an establishment or a secondary centre on the national territory, was originally affirmed in the *Siemens AG* case[9].

In the *Siemens AG* case, the proceeding authority applied to the company, with its main office abroad and operating in the national territory through a Temporary Joint Venture, the interdictive measure of the prohibition to contract with the Public Administration (except to obtain the provision of a public service) for one year[10].

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[6] C. E. PALIERO, *La responsabilità penale della persona giuridica nell'ordinamento italiano: profili sistematici*, in F. PALAZZO (a cura di), Societas puniri potest. *La responsabilità da reato degli enti collettivi. Atti del Convegno organizzato dalla Facoltà di Giurisprudenza e dal Dipartimento di diritto comparato e penale dell'Università di Firenze* (15-16 marzo 2002), Padova, 2003, 24 ss.

[7] G. BAFFA, F. CECCHINI, *Limiti spaziali di validità della responsabilità "da reato" degli enti: applicabilità del d.lgs. n. 231/2001 all'ente "italiano" per reato commesso all'estero e all'ente "straniero" per reato commesso in Italia*, in *Giurisprudenza Penale*, 2018, p. 16.

[8] In the place where the company has its registered office, central administration or principal place of business.

[9] Court of Milan, Judge's Office of Preliminary Investigations, ordinance of 27 April 2004 (confirmed by the Milan Court, XI Criminal Division, ordinance of October 28, 2004).

[10] In the ordinance of 27 April 2004, the Judge of Preliminary Investigations affirmed that the *Siemens AG* liability for administrative offence dependent on the corruption crime committed in Italy by a consultant and two employees of the same company. In the ordinance, the Italian judge stated that both natural and foreign legal persons operating in Italy (also through a Temporary Joint Venture) have the duty to observe and respect the Italian law and, also, the Decree 231/2001. The foreign legal persons have to respect the national law regardless of the existence or not in the country of origin of rules that regulate the same matter in a similar way.

In this case the Court of Milan adhered to the minimalist approach, recognising the central role of the crime with regards to the liability of the legal person. At the same time, they affirmed that the jurisdiction was to be established in the same place where the natural person's crime occurred.

In support of the minimalist approach there is, also, Article 36, par. 1 of Decree 231/01 which states that the competence to know the entity administrative offences belongs to the criminal judge with jurisdiction for the crimes on which they depend. The legal provision recognises the competence to know the offence of the legal person in a "reflected" way with respect to that of the crime. The *locus commissi delicti* of the predicate crime will determine the competence to establish the liability of the firm, regardless of the location of its main office and in consideration that Article 1 of Decree 231/01, referring to the scope of applicability of the Decree, makes no distinction between Italian and foreign entities.

Also the Court of Milan, in its judgment No. 13976 of 19 December 2012[11] followed this minimalist approach. In its ruling the Court held that the criminal judge, competent in respect of a crime, has also the jurisdiction as to the administrative offence of the legal person.

In this respect, the competence to assess the administrative liability is based on where the crime has occurred has taken place, the judge has jurisdiction to determine whether or not the administrative liability of the entity exists.

Finally, from the above, it is clear that when a company with its head office abroad decides to operate in Italy, it has the duty to conform with Italian legislation. Otherwise, a legal person would be exempt from the liability derived from a crime committed by people who act on its behalf, in contrast with the principles referred to in Articles 3 and 6 of the Italian Criminal Code.

In a recent case, known as the "disaster of Viareggio"[12], the Court of Lucca examined the minimalist and the maximalist approaches reaffirming the applicability of Decree 231 to the foreign companies for crimes committed in Italy[13]. In this way, the Court highlighted to comply with the opinion, widely followed in the Italian jurisprudence, that considers Decree 231 also applicable to foreign firms, regardless of whether they have a secondary office or an establishment in the national territory or the place where the organisational gap occurred.

The Court of Lucca reaffirmed that the choice to unify the jurisdiction by territory, both for the assessment of the crime committed by the top managers and for the consequent

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Referring to the same case, the Court of Milan, with in its decision on 28 October 2004 confirmed that also a foreign company has to observe Italian law when operating in Italy. Indeed, in the Siemens AG case the contract was entered into in Italy and the administrative offence was contested by the company in relation to the crime committed in Milan. The consequence was the recognition of the Italian jurisdiction both with regard to the assessment of the conditions to apply the law in force in Italy and with regard to the application of sanctions or interdictive measures.

[11] Court of Milan, IV Criminal Division, 19 December 2012, judgment No. 13976.
The Italian judge condemned the employees of four foreign banks for grand larceny against the City of Milan. Furthermore, the judge recognised the liability of the four banks (Deutsche Bank AG, DE. Bank PLC, Ubs Limited and Jp Morgan Chase Bank N.A.) which were charged according to the Decree 231 on the administrative liability of the entities.

[12] Court of Lucca, 31 July 2017, no. 222.

[13] In particular, the offence referred to Article 25-*septies* of Decree 231 was challenged to foreign companies, without registered nor secondary offices in Italy. The Article 25-*septies* Decree 231 refers to crimes of manslaughter and serious personal injuries, committed in violation of the rules on the protection of health and safety in the workplace.

administrative liability, aims to avoid conflicts of evaluation. In the light of this, the Court stated that the *locus commissi delicti* and the *tempus commissi delicti* of the company can only depend on those of the natural person. However, the inapplicability of the Italian law to foreign companies would breach the freedom of competition, as it would allow legal persons based abroad to continue to operate in Italy, circumventing the discipline provided for by Decree No. 231/01[14].

As seen, in their judgments the Italian courts have mainly supported the minimalist approach. Indeed, the courts have recognised the offence from which the legal person's liability arises and the crime as being an inseparable whole, thereby establishing the jurisdiction for a company's liability as being in the same place as where the crime was committed by a natural person. In this respect, a foreign company, even if it does not have its registered or secondary offices in Italy, could be liable under Decree 231 and be subject to the Italian jurisdiction, regardless of its nationality and the location of its offices and regardless of whether laws govern the same matter in a similar way in the State of origin.

II B. The territorial scope of national law according to the Italian Supreme Court

On 11 February 2020 the Italian Supreme Court ruled on the applicability of Legislative Decree No. 231 of 2001 to foreign companies[15]. In this case, the Court expressed its view on the long-standing issue of the applicability of Decree 231 to companies that do not have offices in Italy.

As it has been pointed out, the Legislative Decree 231/2001 provides for the liability of legal persons for crimes committed in favour of the company itself.

The case concerned charges of bribery in court proceedings. The charges were brought against a legal consultant to a company's bankruptcy receiver. The consultant had received a large amount of money from people who acted on behalf of two companies under foreign law in exchange for deeds in their favour contrary to the duties of the consultant's office. The foreign companies were charged with the corresponding administrative offence under Article 25 of Decree 231[16].

The foreign companies' defence argued that 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 activity within the national territory. In particular, the defence stressed that an administrative offence, although correlated to the commission of a crime, is independent from it and must take into account where the "organisational fault" occurred. Therefore, if the offence is imputable to a company that has its management centre and headquarters abroad, the illegal conduct cannot be considered as committed in Italy. Finally, the defence argued that the competent jurisdiction was not that of the Member State in which the contested conduct was committed

[14] See M. RICCARDI, *L'internazionalizzazione della responsabilità "231" nel processo sulla strage di Viareggio: gli enti con sede all'estero rispondono per l'illecito da reato-presupposto "nazionale"*, in *Giurisprudenza Penale,* 2018. pp. 1-12.

[15] Italian Supreme Court, Sixth Division, 11 February 2020, decision No. 11626 filed on 7 April 2020.

[16] Article 25 of the Decree 231 concerns the crimes of extortion, undue inducement to give or to promise value items, bribery and corruption. The legal asset protected is the impartiality and proper management of the Public Administration.

but where the company's decision-making centre was located. Consequently, in the defence's opinion the Italian courts had no jurisdiction over the matter.

The Italian Supreme Court's judgment overlooked the arguments of the foreign companies' defence considering: the wording of Decree No. 231 of 2001, the rationale of Decree 231's framework and the freedom of establishment and non-discrimination principle in the field of competition law.

The Supreme Court affirmed that Article 1, Decree 231/2001[17] defines the legal persons that fall under the Decree's scope of application without making any distinction between Italian and foreign entities. Furthermore, when needed the Decree makes an explicit reference to the location of the company offices, as it does in Article 4, which regulates crimes committed abroad. Conversely, Article 36 provides that a criminal judge who has jurisdiction over a crime has authority to decide on the liability of the legal person and places no importance as to where a company's headquarters is located or where the organisational deficiencies occurred, providing that, both the crime and the administrative liability deriving from it are dealt with in the same trial.

Concerning the rationale of the Decree 231 the Italian Supreme Court highlighted that the aim of Decree 231 is to ensure that all companies, operating in Italy, adopt appropriate precautions and organisational measures to prevent those people acting on their behalf from infringing Italian criminal law. Therefore, foreign legal persons which operate in Italy, like foreign natural persons, must comply with Italian law in accordance with the principles of mandatory prosecution and territoriality under Articles 3 and 6 of the Italian Criminal Code[18]. In its ruling, the Italian Supreme Court referred also to the freedom of establishment and non-discrimination principle. In fact, the Italian Court considered whether by recognising the subjection of the foreign entity to the administrative offence resulting from the failure to prepare the organisational models compliant with Decree 231 could lead to a discriminatory treatment contrary to the freedom of establishment.

The Italian judges excluded this possibility by recalling the principles of compulsory and territoriality of the criminal law, observing that precisely the exemption from the administrative liability of foreign companies would violate the principle of free competition to the detriment of national firms. Indeed, while the Italian companies or the foreign firms based in Italy are obliged to bear the costs of the implementation and improvement of organisational models consistent with the provisions of Decree 231, foreign companies whose headquarters were outside in Italy, could operate within the national territory without being subject to these same costs. This would lead to a distortion of competition and would be a clear violation of the European principle of non-discrimination.

[17] Article 1 of Decree 231 affirms 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».

[18] Indeed Italian criminal law applies to any person within Italian territory, irrespective of nationality (Art. 3 of the Italian Criminal Code). Based on this principle, foreign companies can be sanctioned pursuant to Decree 231/2001 for offences committed in Italy. At the same time, according to the principle of territoriality (Art. 6 of the Italian Criminal Code) a crime is considered committed in Italy when part of the criminal action or omission happened within Italian territory, or it caused effects in Italy. So, any part of the criminal action or omission that occurred in Italy is sufficient to trigger the national jurisdiction.

Moreover, the Court affirmed that the absence of conflicts between the chosen interpretative vision and the European system is highlighted by a further consideration: the wording of Article 97-*bis*, paragraph 5, Legislative Decree 385/1993[19]. This Article recognises the liability for an administrative offence dependent on a crime 'to the Italian branches of EU or non-EU banks', favouring the aspect of the operativity on the national territory rather than the nationality and the location of the registered office or the central administration of the foreign entity.

In the light of the above, the Italian Supreme Court affirmed that a legal entity can be held liable for any crime committed in Italy by its authorised representatives or by people subject to its direction or supervision, regardless of its nationality and the location of its registered office and regardless of whether laws govern the same matter in a similar way in the State of origin. The principle of law stated by the Court confirms that a foreign company, with its registered office outside of Italy could be held responsible under Decree 231 and be subject to Italian jurisdiction. Subsequently, foreign companies must adopt adequate compliance programmes, at least for their operations in Italy, to prevent the risk of their managers and subordinates from committing crimes that would give rise to corporate administrative liability.

III. *Ex crimine* liability of legal persons in Italy: an obstacle to the freedom of establishment?

The need of a common solution to the issue of the applicability of Legislative Decree 231/01 to foreign companies is important to avoid the risk that the rules are evaded by foreign companies operating in Italy.

Within the European Union, the issue carries particular relevance due to the freedom of establishment and the principle of non-discrimination. However, the duty to comply with the Italian Decree 231 would be expensive for foreign companies.

In the light of the freedom of establishment and the provisions laid down in Decree 231 it is important to understand whether foreign companies must comply with the provisions stated in Decree 231, in order to operate in Italy. In fact, on the one hand there would be the duty to all companies operating in Italy to respect and comply with Decree 231, in order to avoid a distortion of competition and possible discrimination with Italian companies (or the foreign firms with offices in Italy) and the foreign legal persons that do not have offices, but operate in Italy. On the other, the possible liability, under Decree 231, to foreign companies would discourage them from operating in Italy and could be seen as a restriction to the freedom of establishment[20].

Concerning this issue under the minimalist and the maximalist approach, there are some loose ends. Indeed, the minimalist approach favours the applicability of Decree 231 also to foreign companies, that do not have offices in Italy. Then, when the legal person, with its head office abroad, decides to operate in Italy, it has the duty to conform with national legislation.

[19] The Decree 385/1993 was issued in implementation of Directive 2001/24/EC.

[20] The risk of administrative liability, consequent to the crime, could be seen as an impediment to the freedom of establishment and, as thus, would interfere with Art. 49 TFEU.
See A. SCHNEIDER, *Corporate Criminal Liability and Conflicts of Jurisdiction*, in D. BRODOWSKI et al. (edited by), *Regulating Corporate Criminal Liability*, Cham, 2014.

For this reason, some authors have raised the objection that such a provision would be in clear contrast with the freedom of establishment.

There is no doubt that the approach that extends the *lex loci* of a crime to the procedure to assess the liability of the foreign company, would imply the strong obligation for the company itself to adopt an organisational, management and control system referred to in Articles 6 and 7 of Legislative Decree No. 231/01, in addition (maybe) to those adopted in compliance with the *lex loci constitutionis*[21]. The Italian legislator would substantially oblige the foreign company, in order to avoid incurring liability, to implement its prevention models, affecting both the activity carried out by the body in Italy, and the internal organisation of the firm.

However, looking at the concrete outcome of the minimalist approach, the Italian legislative provision of Decree 231 would be justified by reasons of public order and security and, in particular, by the need to prevent serious crimes. This purpose could be justified, under Article 52 TFEU and in respect of the principle of proportionality, a restriction of European freedoms.

Moreover, the non-application of Decree 231 to foreign companies, that do not have offices in Italy, would lead to an unjustified violation of the principle of non-discrimination.
Instead, under the maximalist approach, some authors have held that would be excessively expensive and in conflict with the freedom of establishment to impose on a foreign company that wants to operate within the Italian market, to adopt an *ad hoc* organisational structure according to the models referred to in Articles 6 and 7 of Decree 231, also considering that these organisational models appear particularly rigid and without a universalistic nature.

In our view, since there is not a shared *consensus* it could be suggested a European and constitutionally oriented interpretation of the Decree 231/01 be adopted.

Indeed, considering that the Decree 231 is not expressly addressed to foreign legal persons, but neither excludes them, we would focus on the possibility to adopt suitable measures to manage the risk of crime committed by the foreign companies. The question would be if the adoption of these measures, even if not outsourced to written organisational and management models, would exclude the configuration of the subjective element of the offence dependent on a crime. At the same time, the issue would be if the adoption of efficient measures, but different from those provided for in Article 6 and 7 Decree 231/2001, could have an excepting effect from the liability provided for in Decree 231.

In our view, in order to respect the European freedom of establishment and the principle of non-discrimination, strong emphasis should be given on the effectivity of the measures taken by the entity to prevent the commission of crimes, in any way structured or named. The suitability and adequacy of the measures adopted by the foreign legal persons should be assessed in order to recognise or not the liability of a company operating in Italy, focusing on the effective implementation of a suitable model to prevent the commission of crimes.

The legal person, with its head office abroad, which operates in Italy and commits a crime therein, should be exempt from liability if it can prove it has put in place suitable, specific and concrete measures that can prevent crimes from occurring. The company should be exempt when it proves to have adopted an efficient organisation to prevent the risk of crime and that

[21] *Ibidem* footnote 7 p. 20.

this organisation could not have prevented the commission of the crime, in respect of the criminal law principles relating to causality of guilt[22].

This solution is also compliant with the principle of equality, enshrined in Article 3 of the Italian Constitution. In fact, the difference in treatment between the companies with headquarters abroad and those based in the national territory comply with the core of the principle of equality. In the light of the constitutional principle identical situations are treated identically, while the same cannot be invoked when they are involved intrinsically heterogeneous situations, such as those considered here[23].

Therefore, the judge will decide case-by-case if the concrete measures adopted by the foreign company are abstractly suitable to prevent the crimes that have occurred. On one hand, this approach would let foreign companies operate in Italy and respect the freedom of establishment. On the other, the Italian legislation would be respected, also by those companies, operating in Italy, but without registered or secondary offices therein.

IV. Conclusion

In ruling No.11626/2020 the Italian Supreme Court confirmed the position of the national case law regarding the liability of a company for any administrative offence arising from a crime committed in Italy by people who act on its behalf.

The Court highlighted that the aim of Decree 231 is to ensure that all companies, operating in Italy, adopt appropriate precautions and organisational measures to prevent those people acting on their behalf from infringing Italian criminal law. Foreign legal persons which operate in Italy, just like foreign natural persons, must comply with Italian law; consequently, foreign companies have to adopt adequate compliance programmes, at least for their operations in Italy, in order to prevent their managers and subordinates from committing crimes that would give rise to corporate administrative liability.

According to the Italian Court, liability must be affirmed regardless of the company's nationality and the location of its registered office and regardless of whether there are laws governing the same matter in a similar way in the State of origin. The principle of law Stated by the Court confirms that also foreign companies that do not have their registered offices in Italy can be responsible under Decree 231 and be subject to the Italian jurisdiction.

The interpretation given by the Court implies that legal entities willing to operate even occasionally in Italy should bear the costs related to the implementation of organisational models consistent with the provisions of Decree 231; this does not seem compatible with the freedom of establishment and could ultimately discourage foreign entities from operating in Italy.

In order to find a balance between the Italian legislation, as interpreted by national judges, and the respect of the freedom of establishment, the solution could be found in the adoption of concrete measures suitable to prevent the commission of crimes. These measures, even if not

[22] See E. STAMPACCHIA, *La responsabilità "amministrativa" degli enti con sede all'estero*, in *Dir. pen. cont.*, 2013, p. 20.
[23] *Ibidem*, footnote 22.

laid down in written organisational and management models, would exclude the attribution of the predicate crime to the legal person.

In the light of the above, national judges should do a case-by-case evaluation in order to assess whether the model adopted by the company would have prevented the commission of the crime.