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Corporate Criminal Blameworthiness And Risks Arising from Scientific-Technological Progress

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Abstract

This paper concerns corporate criminal liability in the contexts of *criminal law of risk*, *i.e.* in those areas where companies, which are engaged in cutting-edge production activities, have to manage risks arising from scientific-technological progress. In these contexts, on the one hand the need to resort to the instrument of corporate criminal liability arises in light of both the difficulties in identifying the individual offender within modern business organisations and the fact that individuals do not generally have the cognitive and operational resources which are necessary to manage risks related to scientific-technological progress; on the other hand, an excessive extension of the corporate duty to manage such risks should be avoided, considering the irrelevance of the precautionary principle in criminal law (according to this principle anyone carrying out a dangerous act has to prevent all the risks posed by that act, including those risks not yet identified with scientific certainty). On this matter, the comparison between the Italian Legislative Decree no. 231/2001 and the UK's Corporate Manslaughter and Corporate Homicide Act 2007 is worth to be developed, as they were conceived as the first corporate accountability systems innovatively projected towards the logic of the organisational fault in the European landscape.

Keywords: Corporate criminal liability, precautionary principle, scientific-technological progress, comparative criminal law

1. Introduction

The present paper examines the subject of corporate criminal liability for negligence in the contexts of *criminal law of risk*.[2]

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[2] The formula "criminal law of risk" is linked to that of "risk society". The latter was coined by the sociologist, Ulrich Beck, who maintained that the fundamental social problem of our time is represented by the great risks which are connected to uncontrolled technical-scientific progress, and which, due to their global dimension, threaten the survival of humanity; Beck, U. (1986). Risikogesellschaft. Auf dem Weg in eine andere Moderne. Frankfurt am Main: Suhrkamp. In turn, the formula "criminal law of risk" arose to indicate the controversial adaptation of criminal law to the needs of protection emerging from the new sociological horizon. In fact, the irruption of the notion of risk in the general theory of criminal offence has determined a radical change in the identity of criminal law, the central function of which is no longer only the repression of damage or the prevention of dangers but also the management of risks. This phenomenon is highly problematic as the category of risk clashes with the needs of certainty that are at the basis of the application of criminal sanctions: in case of danger, factors have to be faced the offensive nature of which is well known; whereas in case of risk, a structural uncertainty emerges about the offensive potential to be managed. In this paper, it is not possible to recall the heated debate on this matter; see Perini, C. (2010). Il concetto di rischio nel diritto penale moderno. Milano: Giuffré; Morgante, G. (2016). Criminal law and risk management: from tradition to innovation. Global Jurist, 16 (3), p. 315 et seq.; Militello, V. (2017). Diritto penale del rischio e rischi del diritto penale fra scienza e società. In C.d. Spinellis, N. Theodorakis Emmanouil Billis, & G. Papadimitrakopoulos (Eds.), Europe in crisis: crime, criminal justice, and the way forward. Essays in honour of Nestor Courakis. Athens: Ant. N. Sakkoulas, p. 223 et seq. However, it is precisely this phenomenon in question, which provides the background of the present article, the aim of which is to reflect upon the enhancing the instrument of corporate liability in the contexts of criminal law of risk.

Criminal law of risk refers to those areas where companies, who are engaged in cutting-edge production activities, have to assess and manage risks arising from scientific-technological progress: some of the fields involved in such a subject are environmental criminal protection, food safety, the production and commercialization of GMOs (Genetically Modified Organisms) and pharmaceuticals with potential side effects,[3] the safeguarding of employees and of the rest of the population from exposure to potentially pathogenic agents in production processes as well as from exposure to electromagnetic waves.

These contexts prove difficult to regulate given the existence of two opposing needs.

On the one side, the need arises to resort to the instrument of corporate criminal liability. Generally speaking, corporate criminal liability is an essential tool in the fight against corporate crimes due to the difficulties in identifying the individual offender within modern business organisations.

Furthermore, within contexts of criminal law of risk, corporations, as complex organisations, can usually manage the sources of risk related to scientific and technological progress better than individuals.

On the other side, given the irrelevance of the precautionary principle in criminal law, an excessive extension of the corporate duty to evaluate and manage such risks must be avoided.

Indeed, the areas of criminal law of risk are exposed to the influence of the precautionary principle which is established in European Union law and states that in contexts characterised by scientific-technological progress anyone carrying out a dangerous act is obliged to set up measures to prevent all the risks posed by that act, including those risks not yet identified with scientific certainty. However, the principle in question should not be called upon as basis of criminal liability; otherwise, fundamental criminal guarantees would be frustrated.

Within the aforementioned problematic framework of the contexts of criminal law of risk, this paper will reflect upon the arrangement of an efficient model of corporate criminal liability for negligence, both generally speaking, and also with regard to the harmful events connected to scientific-technological progress.

In pursuing such an aim, a comparison of the legal systems of Italy and the United Kingdom will be provided.

With regard to the Italian legal system in particular, Legislative Decree no. 231/2001 will be taken into consideration. This Decree introduced a form of corporate liability that is generally considered criminal (even if formally labelled as administrative liability hinging on criminal offences committed by individuals) and is referred to a selected catalogue of offences including manslaughter and personal injuries resulting from the violation of the legislation on health and safety at work (under Article 25 *septies*, added to the original catalogue in 2007).

In relation to the UK system, the offence of corporate manslaughter introduced by the Corporate Manslaughter and Corporate Homicide Act 2007 (CMCHA) will be analysed. According to this Act, adopted when the UK was still a Member State of the UE, the corporation is responsible for death resulting from the violation of health and safety legislation, in particular, *par excellence*, the legislation on health and safety at work.

The decision to compare the aforesaid legislations is justified on the basis of their welcome reception within the European landscape at the time of their entry into force. At this time, they were perceived as innovatively projected towards the logic of the *organisational fault* as *corporate blameworthiness*.

Indeed, the Italian legislator implemented – for the first time in Europe – the logic of compliance programs (this was inaugurated in the United States of America through the 1991 Federal Sentencing Guidelines): under the Decree no. 231 the corporation can avoid responsibility for the offences committed within it by fulfilling its duty of adequate preventive organisation. In turn, the UK legislator has based the offence of corporate manslaughter on the element of management failure, whereby, when the management and organisation of corporate activities amount to a gross breach of a duty of care owed by the corporation, corporate liability can be declared for the event of death caused by that breach.

The aim of this paper is to verify whether these legislations, after their many years of implementation, have successfully revealed themselves to be efficient models of corporate liability, providing for food for thoughts in the perspective of the harmonization of the national laws within the EU.

[3] The issue of the potential side effects related to Covid-19 vaccines, which are being used in a context of partial scientific uncertainty, makes an in-depth analysis of corporate criminal liability in contexts of scientific-technological progress particularly urgent.

Indeed over the years many EU legal instruments have been adopted to push Member States towards the implementation of effective, proportionate and dissuasive sanctions against corporations (*e.g.*, *par excellence*, the Second Protocol to the Convention on the protection of European Communities' financial interests, the well-known P.I.F. Convention, which represents the underpinning of the majority of national laws on this matter); and this approach was also confirmed after the Treaty of Lisbon.[4] As a result, a common trend emerged, consisting in the fact that many Member States have adopted sanctioning systems addressed to corporations.

Nevertheless, there are huge differences among domestic laws about the regime of *ex crimine* liability of corporations so that harmonization is quite urgent within the EU.[5] In particular, a fundamental question remains open: which structure of the *ex crimine* corporate liability to adopt and how to regulate its relationship with individual liability.

In brief, on this matter two approaches are basically possible: an "anthropomorphic" approach, according to which corporate liability can be declared only in case of involvement in the commission of the offence of an individual linked to the legal entity by a qualified relationship; an "holistic perspective", according to which the liability of the legal entity should be based on the autonomous identity of the corporation, by recognizing an autonomous corporate blameworthiness regardless of the mediation of the individual liability.[6] National systems swing between these two perspectives in search of the most effective accountability model to prevent and punish corporate crimes.

Keeping in mind the aforementioned context, in the present paper we compare the legal systems of the UK and Italy focusing the attention on corporate liability for negligence, generally speaking and in the particular area of criminal law of risk.

The research will be articulated in two sections.

In the first, the general framework of the subsequent comparative analysis will be described. The problematic dimension of the contexts of criminal law of risk will be highlighted by referring to the two aforementioned opposing needs: firstly, the necessity to primarily burden corporations (rather than individuals) with the duty to assess and manage risks resulting from scientific and technological progress; and secondly, the need to avoid the application of the precautionary principle which could cause an excessive extension of corporate liability.

Additionally, it is crucial to take into account the different approaches that are generally adopted in Italy and in the UK for regulating the contexts of risks emerging from scientific-technological progress. In this regard, the matter of exposure to pathogenic agents that are potentially dangerous for human health and the environment will be mentioned as an example. Worth noting here is that, even if in the UK an extremely residual use of criminal law is generally recorded in comparison to Italy, the need emerges in both legal systems to resort to the instrument of corporate criminal liability to attribute blame in serious cases of inadequate risk assessment and management.

In the second section of the paper, the comparison between Decree no. 231 and the CMCHA will be developed through two lines of research: the applicative scope of these accountability models and their structure.

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[4] In general, EU legislative acts only indicate that Member States shall take measures to introduce corporate responsibility, regardless of the nature of such liability. As a recent example, see the Directive (EU) 2018/1673 of the European Parliament and of the Council of 23 october 2018 on combating money laundering by criminal law (adopted on the basis of art. 83 (1) of the TFEU), with which Member States had to comply by 3 December 2020. According to this legal instrument Member States shall provide for "effective, proportionate and dissuasive sanctions, which shall include criminal or non-criminal fines and may include other sanctions". However, most domestic laws provide for a proper corporate criminal liability or a para-criminal liability, meanwhile few exceptions still have only an administrative sanctioning system.

[5] Mongillo, V. (2012). The nature of corporate liability for criminal offences: theoretical models and EU Member State laws. In A. Fiorella (Ed.), Corporate Criminal Liability and Compliance Programs, Vol. II, Towards a common model in the European Union. Napoli: Jovene, p. 55 et seq.; Mongillo, V. (2012). The allocation of responsibility for criminal offences between individuals and legal entities in Europe. In A. Fiorella (Ed.), Corporate Criminal Liability and Compliance Programs. Vol. II. Towards a common model in the European Union. Napoli: Jovene, p. 121 et seq.

[6] On the level of the EU law the "anthropomorphic" approach is privileged as the EU legal instruments generally require that the individual offender plays either a leading position in the corporation (being entitled with powers of representation, decision or control) or a subordinate position (in this second case the failure of supervision by the leading individuals is also required). See Selvaggi, N. (2014). *Ex crimine* liability of legal persons in EU legislation. An overview of substantive criminal law. European Criminal Law Review, 4 (1), p. 46 et seq.

With regard to the applicative scope, the CMCHA can be appreciated more positively than the regime in force in Italy. Indeed, it has a wider scope than Decree no. 231 as it potentially encompasses all the typical fields of criminal law of risk. However, in relation to their structure, both accountability models are substantially hinged on the commission of an offence by the individual. In this way, the operational potentialities of the punitive instrument of corporate responsibility are heavily compressed.

Generally speaking, the principle of the cumulative responsibilities of the corporation and of the individual for the same fact is appropriate, since the provision of an exclusive and autonomous form of corporate liability would ultimately lead to individuals being unduly freed from any responsibility.

Nonetheless, in such problematic contexts as those of criminal law of risk individuals generally cannot be considered liable in case of inadequate assessment and management of risk because of the limited cognitive and operative resources at their disposal. Therefore, corporate liability reveals itself to be a blunt weapon if it is structured as a responsibility which is substantial accessory to that of the individual.

Indeed, this is what happens in the two legal systems in question. The outcome of the current investigation will be the recognition that the accountability models in force in Italy and in the UK, despite the positive reception in the European landscape following their entry into force, still struggle to be applied in practice, and of more interest here, they are unable to work in the contexts of criminal law of risk, *i.e.*, in such cases where the punitive instrument of corporate liability would particularly be needed to guarantee an adequate level of protection from the risks related to business activities for workers, consumers, and more generally, communities.

This is a direct consequence of the fact that these models are not fully projected into the meta-individual logic of the organisational fault, as they are structured as always being dependent on the individual liability.

In conclusion, an unavoidable passage for the future of scientific reflection and the EU criminal policy on the matter of corporate criminal liability is the elaboration of a model of autonomous corporate liability by way of which systemic fault can be stigmatised independently of individual fault. Only in this way can the regulatory potential of corporate liability be enhanced to address the complex phenomenon of *widespread responsibility* or *organised irresponsibility*, which typically concerns the hypotheses of negligent causation of harmful events within productive activities related to scientific-technological progress.

2. The problematic dimension of the contexts of risks related to scientific-technological progress

As already stated, the formula *criminal law of risk* refers to those areas where large companies conduct pioneering industrial activities using advanced technologies in conditions of scientific uncertainty.

Take, for example, the production and marketing of GMOs, the human health and environmental effects of which still lie at the centre of much debate within the international scientific community; or the production of pharmaceutical products, which may cause harmful side effects not yet known with any scientific certainty. And even more generally, industrial activities which may involve sources of risks such as pathogenic agents or electromagnetic waves, the environmental and human health impact of which, whether it be only for workers or even the rest of the population, has not yet been assessed with any scientific certainty.

In these contexts, the identification of the subject to be held liable when an injurious event occurs may emerge as particularly problematic.

Imagine a case in which a worker, exposed during the production process to a substance about which there is no scientific certainty of danger, contracts a disease that only in retrospect, following the development of scientific knowledge, can be demonstrated to be linked to that pathogenic substance. Or, alternatively, the case of a consumer who suffers ill-health after consuming a food product made with GMOs, the potential risks of which are not yet supported with scientific certainty. Or finally, the case of a patient who sustains damages after taking a newly-developed drug (the issue of the potential side effects related to Covid-19 vaccines, which are being used in a context of partial scientific uncertainty, makes this example particularly topical).

In order to rule on such cases, two opposing needs have to be balanced, and each of these will now be highlighted in detail.

2.1 In search of a balance between: the enhancement of the corporate duty of risk assessment and management…

In the contexts in question, the need emerges to make corporate criminal responsibility autonomous from the individual one.

It is often difficult to identify the individual offender within modern business organisations. Companies are characterised by the fragmentation of decisional and executive functions as well as by the decentralization of related roles, so that when an offence is committed within the company, the causal chain is often opaque and the guilt of the individual dissolves into the anonymity of organisational complexity.

Furthermore, in the contexts of criminal law of risk, the corporation is likely to have cognitive, technical, and operational resources superior to those available to individual, and thus, is in a position – unlike the individual – to cope with scientific progress and related technological innovations.

This suggests that the corporation should be made the primary addressee of the duty of risk assessment and management and consequently, an autonomous form of corporate liability should be provided for, *i.e.*, a form of accountability which, even if postulating the commission of a physical fact by a natural person, does not require the ascertainment of individual criminal responsibility for a criminal offence.

More precisely, the following must be noted.

Generally speaking, the principle by which both the corporation and the individual are held liable for the same fact is necessary in order to pursue the aim of the prevention of corporate offences. Indeed, negligent corporate offences have often a complex origin that is ascribable to both individual negligence and to the general disorganization of the corporation. If corporate liability were generally structured as autonomous, there would be the risk of making the corporation a scapegoat for individual negligence, which would then free the individual from any responsibility.

Nevertheless, there are problematic contexts, such as the paradigmatic area of criminal law of risk, whereby the regulative potential of corporate liability would remain considerably compressed, if it were structured as a cumulative and not autonomous form of accountability.

In these contexts, it is hardly possible to declare individual criminal liability as the individual does not generally have the means to manage adequately the sources of risk arising from scientific-technological uncertainty. In turn, the issue of assessment and management of risks related to scientific-technological progress basically concerns large companies which are mainly structured in the form of commercial businesses and which have the organisational resources and financial means to carry out cutting-edge productive activities.

Therefore, in order to enhance the instrument of corporate criminal liability and to primarily burden corporations (rather than individuals) with the duty to carry out a proper assessment and management of risk, it is essential to structure corporate accountability as independent from the individual accountability, in order that the difficulties in ascertaining individual responsibilities do not compromise the possibility of stigmatizing the organizational fault.

2.2 …and the irrelevance of the precautionary principle in criminal law

At the same time, the corporate duty of diligence with reference to upgrading production systems in line with advancements in science and technological innovations cannot be expanded to such an extent as to give relevance to the precautionary principle in criminal law.

As previously stated, the precautionary principle (first appearing in Germany with the name, *Vorsorgeprinzip*) is established in EU law. It is referred to in article 191 (2) TFEU - Treaty on the Functioning of the European Union with specific regard to environmental protection and is defined in the Communication (COM(2000) 1final) issued by the European Commission.

According to this document, the principle at issue operates in contexts where phenomena, products or processes may have dangerous effects on the environment or (human, animal or plant) health, and about these effects there are insufficient scientific indications. In these situations, in order to balance the freedoms of individuals, industry and organisations with the need to protect the primary interests of the environment and health, this principle states that anyone carrying out a dangerous act is obliged to set up measures to prevent all the risks posed by that act, including those risks not yet identified with scientific certainty.

However, this principle cannot be relevant in criminal law.[7] Indeed, a corporation could not be declared liable for harmful events that – happened in conditions of huge scientific uncertainty – only thanks to the

[7] More precisely, a significant question arises as to whether the precautionary principle, which represents a government policy for public authorities to rule risk contexts, can also play a role in assessing criminal liability of those, who carrying out authorized (or anyway licit) activities in conditions of scientific uncertainty may produce risks for the environment and human health. The answer to this question should be negative as this principle reveals itself to be antithetical to the guarantees of

following development of scientific knowledge can be demonstrated to be linked to the source of risk that the corporation managed inadequately.

Otherwise it would be overlooked that the scientific knowledge and technical equipment available at the time of the fact to assess and manage the risk were partial and temporary. In other words, a conviction based on the precautionary principle would result in the violation of classical guarantees, including the legality principle and its corollary of non-retroactivity.

It thus follows, that even if it is reasonable to burden the corporation with a high standard of diligence, other branches of the legal system, different from criminal law, should be called upon when the conditions of uncertainty on the sources of risk to be managed are such that the affirmation of criminal liability would fully undermine the classical guarantees.

3. Italy and the United Kingdom: alternative strategies for regulating risk contexts

It is now necessary to refer in general terms to the different approaches adopted in Italy and the UK to regulate the risk contexts in question. The aim of this brief digression is to contextualize the following comparative research, which specifically concerns the regimes of corporate criminal liability in force in the two legal systems under consideration.

The subsequent two data have to be called upon. Firstly, in the UK, the criminal relevance of the category of negligence is generally limited to the hypothesis of gross negligence; whereas, traditionally in Italy, the degree of negligence can be relevant only on the level of the *quantum* of responsibility but not also on that of the *an* of responsibility, *i.e.*, negligence leads to criminal liability even when it is not gross (in this last case the sanction can simply be reduced).[8]

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legality and certainty which should always characterize the resort to criminal law. Nevertheless, in the two legal systems compared in this paper, Italy and the UK, different experiences are recorded. In Italy, some judges evoke the precautionary principle to declare criminal liability, giving rise to a wide debate that is witnessed by a vast scientific literature: see, *ex multis*, Castronuovo, D. (2012). Principio di precauzione e diritto penale. Paradigmi dell'incertezza nella struttura del reato. Roma: Aracne; Consorte, F. (2013). Tutela penale e principio di precauzione. Profili attuali, problematicità, possibili sviluppi. Torino: Giappichelli; Corn, E. (2013). Il principio di precauzione nel diritto penale. Studio sui limiti all'anticipazione della tutela penale. Torino: Giappichelli; Masullo, M.N. (2012). Colpa penale e precauzione nel segno della complessità. Teoria e prassi nella responsabilità dell'individuo e dell'ente. Napoli: Edizioni Scientifiche Italiane; Perini (fn. 2); Piergallini, C. (2004). Danno da prodotto e responsabilità penale. Profili dommatici e politico-criminali. Milano: Giuffré. Contrastingly, in the UK, the precautionary principle does not seem to have been applied in criminal cases, which explains the limited literature on its problematic implications in criminal law. For a reflection on this subject see Lees, E. (2015). Interpreting environmental offences. The need for certainty. Oxford: Hart Publishing; for a more general analysis, see Jordan, A. (1994). The precautionary principle in the European Union. In T. O'Riordan, J. Cameron, & A. Jordan (Eds.), Reinterpreting the precautionary principle. London: Earthscan, p. 143 et seq.; Haigh, N. (1994). The introduction of the precautionary principle into the UK. In T. O'Riordan, J. Cameron, & A. Jordan (Eds.), Reinterpreting the precautionary principle. London: Earthscan, p. 229 et seq. For an interesting reflection on the problematic use of the precautionary principle in criminal law in another common law system, the Canadian one, see Pardy, B. (2002). Applying the precautionary principle to private persons: should it affect civil and criminal liability?. Les Cahiers de Droit, 43 (1), p. 63 et seq. A more detailed reference to the different relevance of the precautionary principle in Italy and the UK is developed in the present paper, with specific reference to the matter of exposure to potentially pathogenic agents in § 3.

[8] Indeed in the UK, it has often been questioned if negligence can be considered as belonging to the category of *mens rea*: see, *ex multis*, Allen, M. (2013). Textbook on criminal law. Oxford: Oxford University Press, p. 105 et seq.; Baker, D.J. (2012). Textbook of criminal law. London: Sweet & Maxwell, p. 126 et seq.; Horder, J. (1997). Gross negligence and criminal culpability. University of Toronto Law Journal, p. 95 et seq.; Padfield, N. (2014). Criminal law. Oxford: Oxford University Press, p. 64 et seq.; Simester, A. (Ed.). (2005). Appraising strict liability. Oxford: Oxford University Press. On this matter see, in the Italian literature, Cadoppi, A. (1993). Mens rea. Digesto delle Discipline Penalistiche, VII, p. 629 et seq. However, the fact that the relevance of negligence in criminal law is more limited in the UK in comparison to Italy should not be emphasized. In fact, it is not entirely true that the resort to criminal law in the UK is always kept within the boundaries of the canon of *extrema ratio*. First of all, in the UK the category of criminal negligence is rather vague: see Spencer, J., & Brajeux, M. (2010). Criminal liability for negligence – A lesson from across the channel?. International and Comparative Law Quarterly, 59(1), p. 1 et seq., who highlight the difficulty of defining which negligence is gross and, more generally, stress how complex and confuse criminal liability for negligently causing death or injury in English law is. Furthermore, the Italian category of negligence overlaps partly with the UK *mens rea* of recklessness: see Curi, F. (2003). Tertium datur. Dal Common Law al Civil Law per una scomposizione tripartita dell'elemento soggettivo del reato, Milano: Giuffré. Moreover, the UK is full of strict liability offences, which in Italy would be illegitimate in the light of the principles of culpability and presumption of innocence (art. 27, §§ 1-2 of the Italian Constitution): see Ashworth, A. (1998). Grunderfordernisse des Allgemeinen Teils für ein europäisches Sanktionenrecht. Landesbericht England. Zeitschrift für die Gesamte Strafrechtswissenschaft, 110 (2), p. 461.

Secondly, the Italian legal system is not provided with that robust and well-tested set of administrative agencies, which in the UK assist the private subject in complex risk assessment and management activities. Take, for example, the *Health and Safety Executive*, which in the UK systematically and structurally supports the employer in the enforcement of legislation on health and safety at work.[9]

The combination of these two factors implies that in the UK criminal law plays a very marginal role in dealing with the problematic contexts in question; in Italy, in contrast, the strategy of the legal system is based on the use of criminal law, which is applied essentially to individuals (rather than to corporations).

To exemplify the radical difference between these regulatory choices, it is useful to refer to the matter of exposure to pathogenic agents, which are potentially dangerous for human health and the environment.

With regard to Italy, the matter of occupational exposure to asbestos will be put forth as emblematic of a trend within the Italian legal system to consider criminal law as a privileged tool to regulate the contexts in question. With regard to the UK, the reference concerns the experience in the area of land contamination resulting from historical pollution; this is presented as emblematic of the opposed trend of this legal system to conceive criminal law as *extrema ratio*.

3.1 The experience of Italy in the matter of occupational exposure to asbestos

In Italy, the issue of the employer's responsibility for diseases acquired by workers as a consequence of exposure to asbestos is at the centre of an extensive ongoing debate between scholars and jurisprudence.[10] The difficulties in assessing criminal liability arise from the fact that cancer pathologies occurring today are due to the use of asbestos in production processes at a time when full awareness of the harmful effect of asbestos was still lacking. Indeed, only thanks to scientific progress – recorded between the time of the exposure and the time of judgment – can the carcinogenicity of this substance be declared with scientific certainty.

In such cases, most judges generally hold the individual-employer criminally responsible for the harmful events suffered by the workers, burdening said individual with such a wide duty of diligence as to encompass the need to protect employees even from risks not known with scientific certainty at the time of the fact.[11] On the contrary, most scholars generally deny the legitimacy of such a declaration of liability because the risk of these events was scientifically uncertain at the time of the fact.[12]

The aforesaid experience of criminal trials in the matter of occupational exposure to asbestos exemplifies the fact that, in Italy, the question of regulating risk contexts is often resolved by resorting to criminal law against individuals.

However, such a political-criminal option produces the following effects: firstly, a violation of classical guarantees, for in the light of the precautionary principle the liability is affirmed even though there was scientific uncertainty at the time of the fact; and secondly, ineffective regulation, given that the imposition of the criminal sanction concerns the allocation of liability for the past but it is not helpful to remediate the present harmful or dangerous situation.

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[9] In the UK, enforcement agencies play a central role also in environmental law: see Sneddon, S. (2013). Environmental Law. London: Pearson, p. 52 et seq. The aforementioned difference between Italy and the UK is highlighted by Centonze, F. (2004). La normalità dei disastri tecnologici. Giuffré: Milano, p. 375 et seq.; D'Alessandro, F. (2012). Pericolo astratto e limiti soglia. Le promesse non mantenute del diritto penale. Milano: Giuffré, p. 381 et seq.; Stella, F. (2003). Giustizia e modernità. La protezione dell'innocente e la tutela delle vittime. Milano: Giuffrè, p. 96 et seq., 154 et seq., p. 387 et seq. However, it should be also taken in consideration that in the last decades the emergence of liberalism and the financial crisis have led to a progressive cut of economic resources for enforcement agencies in the UK as well as to the growing privatization of regulatory services. Emerging from this arises the complaint of lack of effective enforcement of the regulations related to the exercise of productive and industrial activities: see Fidderman, H. (2016). Health and safety: The state of play. Health and Safety Bulletin, 453, p. 13; Tombs, S. 'Better Regulation': Better for whom?, [Online] Available: https://www.crimeandjustice.org.uk/publications/better-regulation-better-whom (April 2016); Tombs, S. (2017). The UK's corporate killing law: Un/fit for purpose?. Criminology & Criminal Justice, 18(4), p. 488 et seq.

[10] May it be allowed to quote Orsina, A. (2015). Rischio da incertezza scientifica e modelli di tutela penale. Il Tusl come laboratorio di soluzioni al problema dell'esposizione professionale ad agenti patogeni, Torino: Giappichelli; see also Zirulia, S. (2018). Esposizione a sostanze tossiche e responsabilità penale. Milano: Giuffré.

[11] The extension of the category of negligence in application of the precautionary principle was formalized in the decision of the famous case of Porto Marghera: Cass., sez. IV, 17.05.2006, n. 4675, Cassazione Penale, 2009, 7-8, p. 2838 et seq. More recently see, for example, Trib. Bologna, n. 2457/2017.

[12] See *infra* fn. 13.

For these reasons, the voices of those proposing to resort to the instrument of corporate criminal liability is growing. Considering the difficulties in assessing the requirements of predictability and avoidability of the harmful events by individuals, many scholars propose to enhance the instrument of corporate criminal liability calling upon Decree no. 231, and in particular art. 25 *septies*, with reference to the deaths and injuries deriving from the negligent violation of legislation on health and safety at work.[13]

In this way, it would be possible to satisfy the emerging punitive demands, whilst at the same time avoiding the violations of the criminal guarantees otherwise resulting from the declaration of individual liability.

The specific case of asbestos liability exemplifies clearly the opportunity to use the tool of corporate responsibility when dealing with contexts in which the issue of assessment and management of risk related to scientific-technological progress arises. In these contexts, the instrument of corporate criminal accountability should be enhanced given that corporations, thanks to the financial and organisational resources available, are in a position to better tackle the problem of assessment and management of risk than individuals.

Consequently, the second section of this current research will investigate whether the scholarly proposal concerning the strengthening of corporate criminal liability have been satisfied in practice. On this point, it can be already anticipated that, in truth, Decree no. 231 has not been successful in practice until now, both generally speaking and with particular regard to the problematic contexts at issue.[14]

3.2 The experience of the United Kingdom in the matter of historical pollution

The UK does not seem to have experienced the aforementioned distorted effects which the almost exclusive application of criminal law to individuals produces in Italy. A concrete example of the different approach can be found in the matter of historical pollution, *i.e.*, the phenomena of contamination of sites and natural resources deriving from past polluting activities.

As in the field of asbestos liability, the issue arises of a polluting practice, which was lawful and in any case not suspected of particular danger at the time of the fact, and which has subsequently produced harmful effects on the environment and human health that have only appeared a long time after the practice was carried out. Unlike Italy, such cases in the UK are dealt with through branches of the legal system other than criminal law.[15]

In most cases, the voluntary clean-up *via* the planning system is resorted to in order to remedy the contamination of sites. In a smaller number of cases, the administrative system of clean-up procedures provided in the "Contaminated land regime" under the Environmental Protection Act 1990 is applied. Tort law is rarely used owing to the difficulties inherent in proving the causal link between the pollution and death or injury, meaning that individuals can rarely be awarded damages.

Criminal law has never been called upon. None of the criminal environmental offences provided by the legal system has been used in cases of historical pollution, and the only criminal offence provided by the contaminated land regime, that being the failure of the operator to comply with the remediation notice, has also not been applied since the system relies rather on informal and formal warnings as means of putting pressure on the wrongdoers instead of setting criminal sanctions.

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[13] See *ex multis* Amarelli, G. (2013). I criteri oggettivi di ascrizione del reato all'ente collettivo ed i reati in materia di sicurezza sul lavoro. Dalla teorica incompatibilità alla forzata convivenza. Diritto Penale Contemporaneo. [Online] Available: https://archiviodpc.dirittopenaleuomo.org/d/2238-i-criteri-oggettivi-di-ascrizione-del-reato-all-ente-collettivo-ed-i-reati-in-materia-di-sicurezza (April 19, 2013), 42; Castronuovo, D. (2009). La colpa penale. Milano: Giuffré, pp. 332 and 424; Centonze (fn. 9) pp. 385 and 421; D'Alessandro (fn. 9) pp. 363 and 380; De Maglie, C. (2002). L'etica e il mercato. La responsabilità penale delle società. Milano: Giuffré, p. 291; Manna, A. (2011). Il diritto penale del lavoro tra istanze pre-moderne e prospettive post-moderne. Archivio Penale, 2. [Online] Available: https://archiviopenale.it/fascicolo-n-2--maggio-agosto-2011-(web)/fascicoli-archivio/128 (May-August 2011); Marinucci, G. (2005). Innovazioni tecnologiche e scoperte scientifiche: costi e tempi di adeguamento delle regole di diligenza. Rivista Italiana di Diritto e Procedura Penale, 48 (1), p. 56; Palazzo, F. (2011). Morti da amianto e colpa penale - Nota a Cass. pen., Sez. IV, (10 giugno 2010) 4 novembre 2010, n. 38991. Diritto Penale e Processo, pp. 185 and 187; Pulitanò, D. (2006). Gestione del rischio da esposizioni professionali. Cassazione Penale, 46(2), p. 796; Stella (fn. 9) p. 593.

[14] See *infra* § 4.3.

[15] Mitsilegas V., & Fasoli, E. (2017). Historical pollution in the UK (England and Wales): the residual role played by criminal law. In F. Centonze, & S. Manacorda (Eds.), Historical pollution. Comparative Legal Responses to Environmental Crimes. Berlin: Springer, p. 225 et seq. See also Lees (fn. 7) p. 85 et seq.

The logic behind this regulation is that the use of criminal law to address the long-term consequences of past polluting activities would lead to an unfair retrospective liability, since these activities were not considered dangerous at the time they were carried out. Consequently, the legal system is much more interested in requiring the remediation of the effects of the pollution from the offender rather than in assessing the responsibility for those effects.

From this brief reference to the experience of the UK on the matter of historical pollution, the following point can be inferred: in tackling the complex subject of criminal liability for negligence in contexts of scientific-technological progress, criminal law needs to be balanced with other branches of the legal system in order to keep its application within the limits imposed by the classical guarantees.

However, with regard to corporations, it should be emphasized once more that although the precautionary principle should not have any relevance in criminal law, it is reasonable to burden corporations with a duty of diligence more rigorous than the one which is addressed to individuals, and additionally, to even stigmatize the violation of such a duty with criminal sanctions, given that corporations can foresee and avoid what is not foreseeable and avoidable by individuals.

It follows that even when remaining within the limits imposed by classical principles, the instrument of corporate criminal liability could be properly enhanced in the problematic contexts in question.

From this perspective, it is possible, within the UK context, to interpret the position of the doctrine that puts forward the possible application of the offence of corporate manslaughter in case of death deriving from occupational exposure to pathogens.[16] Indeed, this hope brings to mind the one formulated by Italian scholars with reference to the regulatory potential of art. 25 *septies*, of Decree no. 231.[17] The offence of corporate manslaughter could be usefully applied in relation to lethal events resulting from exposures to potentially pathogenic agents that occurred after the entry into force of CMCHA, and more generally, to regulate other contexts where the issue of assessment and management of risk related to scientific-technological progress arises.

Thus, like with regard to the Italian Decree no. 231, the following section of this research will investigate if the regulatory potential of the CMCHA has been enhanced in practice. The same conclusion will be formulated: even in the UK, the appeal for the use of corporate criminal liability has so far been substantially disregarded to such an extent that the issue of elaborating an efficient model of corporate liability for negligence remains open.

4. Corporate criminal liability in Italy: Legislative Decree no. 231/2001

Within the current framework discussion, it is now possible to move to the second section of the present research: the development of a comparison between Italy and the UK on the specific matter of corporate criminal liability. At first, the law currently in force in Italy will be considered.

Unlike the UK, where the process of affirmation of corporate criminal liability started in the nineteenth century, Italy remained anchored to the traditional canon, *societasdelinquere non potest*, until 2001, when, with the entry into force of Decree no. 231, a form of liability was introduced which is generally considered substantially criminal (even if it is formally labelled as administrative liability hinging on criminal offences committed by individuals).

In contrast to common law systems, in which corporations can be held accountable for any offence provided for by the legal system, Decree no. 231 stipulates that the corporation can only be declared liable for a selected catalogue of offences, including the aforementioned offence under art. 25 *septies*, (added to the original catalogue by Law no. 123/2007), which provides for corporate liability for manslaughter and personal injury committed by negligent violation of health and safety at work legislation.

Furthermore, unlike the UK in which some ascription criteria are in force, in Italy, Decree no. 231 provides for a uniform regulation of corporate criminal responsibility, the constituent elements of which will be described in the next paragraphs. Following this description, attention will be focused on the enforceability of such legislation in the contexts of criminal law of risk.

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[16] Roper, V. (2018). The corporate manslaughter and corporate homicide act 2007 – A 10-year review. Journal of Criminal Law, 82 (I), pp. 63-64; Woodley, M. (2013). Bargaining over Corporate Manslaughter – What price a life. Journal of Criminal Law, 77 (1), p. 39*;* see also House of Commons - Home Affairs and Work and Pensions Committees, Draft Corporate Manslaughter Bill. First Joint Report of Session 2005–06 Volume I: Report, §§ 82-84, which, with regard to the bill that would later become law, underlined the fact that the scope of corporate manslaughter encompasses both deaths caused by immediate injury and long-term fatal damage to health.

[17] See *supra* fn. 13.

4.1 The constituent elements of corporate liability under Decree no. 231

Following its entry into force, the Decree under consideration was welcomed within the European landscape as one of the most advanced regimes of corporate criminal liability, as it provided for a very articulated regulation of this form of responsibility.[18]

Significantly, the Decree establishes that when an offence is committed within the corporation, corporate liability can be declared if the following requirements are satisfied. On the objective level, it is necessary that: the offence committed within the corporation is included in the aforementioned catalogue selected by the legislator; the offence was committed in the interest or to the benefit of the corporation; the offender is one of its top managers or subordinate employees (Article 5).

On the subjective level, an organisational deficit is required (Articles 6 and 7). This requirement stipulates that the corporation is liable, if, at the time of the fact, it did not adopt (and effectively implement) adequate organisational models to prevent the type of the offence that was committed. The element of the organisational deficit is regulated differently according to the role played by the individual offender.

If the offence is committed by a top manager (Article 6), the prosecutor has to prove the constituent elements of corporate liability on the objective side. The corporation, in turn, could avoid the declaration of liability if it proves the absence of its organisational fault, *i.e.*, if it proves the adoption of an organisational model suitable for preventing the type of the offence that was committed. Additionally, the corporation must also prove that the individual fraudulently eluded the compliance model and that the supervisory body (appointed by the corporation itself for the purpose of supervising the effective functioning of the organisational model) performed its task properly.[19]

If the offence is committed by a subordinate (Article 7), the *onus probandi* rests entirely on the prosecutor, who has to prove not only the objective level but also the subjective level of corporate liability, *i.e.* the organisational inadequacy of the corporation.

This different regulation is justified by the fact that top managers, unlike their subordinates, generally express and represent the corporate policy. Therefore, when an offence is committed by a top manager, there is a presumption of corporate responsibility, which can nevertheless be overturned by the corporation *via* the aforementioned reversal of the burden of proof. Contrastingly, when an offence is committed by a subordinate, the probative regime typical of criminal trials is applied, such that the burden of proof of all the constituent elements of corporate responsibility rests on the prosecutor.

Of final note, Decree no. 231 also provides a system of sanctions which consists of pecuniary and interdictory penalties as well as confiscation and publication of the conviction.

4.2 A hybrid ascription paradigm: between organic identification and corporate blameworthiness

In the case of Decree no. 231 a particular combination of two different accountability models has been implemented, namely: the theory of the organic identification, which is embodied by the objective ascription criteria under art. 5; and organizational fault theory,

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[18] De Maglie (fn. 13) p. 327; De Simone, G. (2012). Persone giuridiche e responsabilità da reato. Profili storici, dogmatici e comparatistici. Pisa: Edizioni ETS, p. 311; De Vero, G. (2008). La responsabilità penale delle persone giuridiche. In C.F. Grosso, T. Padovani, & A. Pagliaro (Eds.), Trattato di diritto penale. Parte Generale, Milano: Giuffré, p. 115. See also Gobert, J., & Mugnai, E., Coping with corporate criminality – Some lessons from Italy, Criminal Law Review, 2002, p. 619 et seq.; Gobert, J., & Punch, M. (2003). Rethinking corporate crime. Cambridge: Cambridge University Press, p. 108 et seq.; Nieto Martín, A. (2008). La responsabilidad penal de las personas jurídicas: un modelo legislativo. Madrid: Iustel, pp. 19, 194 et seq. The Decree no. 231 also inspired the Spanish Ley Orgánica 1/2015, de 30 de marzo, and the Chilean la Ley 20.393, 2.12.2009. For a brief description of the contents of the Decree no. 231 see Ruggiero, R.A. (2016). Cracking Down on Corporate Crime in Italy. Washington University Global Studies Law Review, 15 (3), p. 403 et seq.

[19] In Italy, in light of the principle of presumption of innocence (art. 27, § 2 of the Constitution), the burden of proof urdens the public prosecutor (indeed, the Italian legal system does not know the model of hybrid offences, which is provided for in the UK and which implies the reversal of the burden of proof on the defendant by a due diligence defence); therefore the inversion of the *onus probandi* under art. 6 of the Decree no. 231 seems to be a violation of the aforementioned principle. However, in the case law the interpretation of this article has been proposed, by way of which the prosecutor has to prove the organizational deficiencies whereas the corporation can prove the opposite to free itself from responsibility; see Cass. pen., Sez. VI, 18.02.2010 – 16.07.2010, n. 27735; Trib. Milano, 3.11.2010 – 3.1.2011, G.u.p. D'Arcangelo; Cass. S.U. (Italian Supreme Court), 24.04.2014 – 18.09.2014**,** n. 38343.

Which is referred to in the subjective criteria codified in art. 6 and 7. This combination is established by the legislator to overcome two fundamental objections to the recognition of corporate criminal responsibility: the inability to act and the inability to be blameworthy.

On the one hand, it was traditionally held that corporations could not be found criminally liable as they were not considered capable of action. In order to overcome this argument, the legislator has called upon the theory of organic identification, which hinges corporate liability on the relationship between the corporation and the individual (*i.e.*, the individual offender must be a top manager or a subordinate), as well as on the criterion of the interest/advantage.

On the other hand, a further objection to corporate criminal liability was that corporations, as artificial subjects, could not be culpable. In order to overcome this obstacle, the legislator has evoked the theory of organizational fault, by stating that a corporation can be considered blameworthy when it fails to adopt compliance programs, which are adequate to prevent offences within it.[20]

In particular, in introducing the logic of compliance programs, the Italian legislator drew inspiration from the legal system of the United States of America, whilst at the same time going beyond the experience in this context by attributing a far more significant role to organisational fault than is the case in the USA. In the USA, according to the 1991 Federal Sentencing Guidelines, the adoption of compliance models by the corporation is relevant only when determining the *quantum* of sanctions; whereas, under Decree no. 231, the adoption of organisational models is relevant on the level of the *an* of responsibility by bolstering corporate blameworthiness.

Nevertheless, it is exactly this aforementioned specific mechanism of hybridization, one which combines the theory of the organic identification and the theory of organizational fault, which reveals itself to be problematic in the sense that a coexistence of these two accountability models is difficult to put into practice.

The theory of the organic identification is a "derivative" liability model according to which the corporation acts by its officers and consequently can be held liable for the fact committed by them; whilst the theory of organisational fault represents an "holistic" liability model according to which the corporation is responsible for its own fact, which even if presupposing the fact of the individual, is distinct from it.

Such a problematic coexistence between the liability models in question is particularly apparent in the hypothesis *ex* art. 6 with reference to the commission of an offence by a top manager.

For the sake of clarity, it is better to recall once more what the provision at issue stipulates. In case of commission of an offence by a top subject, corporate liability can be declared if the prosecutor proves the existence of its objective elements (those established in art. 5). Nevertheless, the corporation can resort to a mechanism of exclusion of liability by proving four requirements (art. 6, §1); namely, *a*) that it has adopted and effectively implemented an organisational model in order to prevent the type of the offence that was committed; *b*)that it has appointed a supervisory body accredited with autonomous powers of initiative and control and which has the duty of supervising the effective functioning of the compliance model including its update; *c*) that the individual offender has fraudulently eluded the compliance model; and finally, *d*) that the supervisory body has not failed in the performance of its surveillance task.

This exemption mechanism is problematic on two levels; procedural and substantial. From the procedural point of view, the burden of proof for criminal trials in Italy rests, in view of the principle of presumption of innocence (art. 27, §2 of the Constitution), on the public prosecution, and consequently, given the essentially criminal nature of the responsibility provided for in Decree no. 231, the reversal clause provided in art. 6 represents a patent deviation from the aforementioned principle.

From the substantial point of view, each of the four elements making up the exemption mechanism is characterized by its own complexity and coordinating them all consistently is difficult. In particular, it is difficult to match the requirement of absence of the organizational deficit (lett. *a*) with that of fraudulent elusion (lett. *c*), as each element seems inspired by two opposite logics.

The element concerning the absence of organizational flaw recalls the theory of organizational fault. On the basis of this element, corporate blameworthiness is autonomous from individual culpability, in that it is possible for the corporation to prove that the commission of the offence was an autonomous choice of the individual.

[20] Relazione al D. Lgs. 8 giugno 2001, no. 231, §§ 3.2 and 3.3 (Report attached to the Decree no. 231). In the case law see Cass. S.U., n. 38343/2014 (fn. 19).

In turn, fraudulent elusion of the compliance model by the individual offender seems to refer to the logic of organic identification and thus denies the autonomous value of organizational fault. Indeed, the meaning of this requirement seems to be that the corporation is always liable for the offences committed by its "organs", except for the completely residual (and therefore symbolic) hypothesis of the commission of the offence by eluding fraudulently the organizational model.

Therefore, the difficulty emerges in conciliating, generally speaking, the two approaches of organizational fault and organic identification, and in particular, the two aforementioned requirements of the exemption mechanism *ex* art. 6. Indeed, it is this difficulty which has fuelled an ongoing debate.

According to an interpretative approach, corporate liability is grounded only on the criterions *ex* art. 5 and on the related logic of organic identification, whilst organisational fault does not rise to the level of a constituent element, meaning that the adoption of an adequate organisational model is simply a clause of exclusion of culpability[21] or exclusion of punishability[22]. From this perspective, it is argued that the exemption mechanism provided for in art. 6 cannot be concretely applied, which means that when an offence is committed by a top manager, the corporation is liable without any concrete possibility to prove its non-involvement in the commission of the offence.[23]

On the contrary, according to another approach, organizational fault has to be recognized as an actual constituent element, which means that it becomes possible to recognise corporate blameworthiness that is distinct from that of the natural person. More precisely, this criterion is ruled differently depending on the role played by the individual within the corporation. If the individual offender is a subordinate (art. 7), the non-fulfilment of the duty of adequate organisation represents a constitutive element of corporate liability to be proved by the prosecutor; whereas, if the individual offender is a top-subject, the organizational fault plays an eventual role of second degree, in the sense that only by the reversal of the burden of proof is the corporation given the possibility to prove its non-involvement in the individual offence.[24]

In this last perspective, the exemption mechanism provided for in art. 6 should be interpreted in a unitary way, which means that the element *ex* lett. *a*) concerning the adoption (and effective implementation) of compliance models by the corporation plays a central role, and each of the other requirements of the exemption mechanism, which are all equally fundamental, is to be read in the logic of the enhancement of the organizational fault.[25] In particular, the element of fraudulent elusion can be interpreted in a coherent way with the logic of organizational fault if it is assumed as the parameter according to which the qualitative standard of the compliance model has to be assessed. In this way, the compliance model can be considered adequate to prevent the commission of the corporate offences if it is suitable to avoid those forms of individual elusion that are not fraudulent and therefore are controllable.[26]

This last approach is to be preferred as it renders a conciliation of the two logics of organizational fault and organic identification possible, and as it corresponds to the philosophy of "prevention through organization", which is at the basis of the Decree no. 231. In this perspective, it becomes possible to enhance the values of organizational fault theory, both from the point of view of the prevention of corporate offences, as the corporation is engaged to neutralize the risk of commission of offences within it, and additionally, from the point of view of the culpability principle, as the liability of the corporation is grounded on its own culpability for an organizational flaw and not on the culpability of the individual to be automatically transferred on the corporation.

Nevertheless, the organizational fault approach is far from being satisfactorily implemented within the concrete application of Decree no. 231, even if, in theory at least, it represents the most innovative and qualifying aspect of the 2001 reform.

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[21] De Vero (fn. 18) p. 180.

[22] Pulitanò, D. (2002). La responsabilità da reato degli enti: i criteri d'imputazione. Rivista Italiana di Diritto e Procedura Penale, 45 (2), p. 430.

[23] De Vero, G. (2011). Prospettive evolutive della responsabilità da reato degli enti collettivi. Responsabilità Amministrativa delle Società e degli Enti, 4, p. 10.

[24] Paliero, C.E., & Piergallini, C. (2006). La colpa di organizzazione. Responsabilità Amministrativa delle Società e degli Enti, 3, p. 167 et seq.

[25] See, *ex multis*, Pelissero, M. (2003). La responsabilizzazione degli enti alla ricerca di un difficile equilibrio tra modelli "punitivi" e prospettive di efficienza. Legislazione Penale, 2, p. 368.

[26] Piergallini, C. (2011). Paradigmatica dell'autocontrollo penale (dalla funzione alla struttura del "modello organizzativo" *ex* D.lgs. 231/2001). In M. Bertolino, L. Eusebi, & G. Forti (Eds.), Studi in onore di Mario Romano. Napoli: Jovene, pp. 2080 and 2088.

In the jurisprudence, a trend of limiting the judgment of corporate responsibility to the objective ascription criteria *ex* art. 5 has emerged. The corporation is generally considered liable only on the basis of the fact that one of the triggering offences enlisted by the legislator was committed by a top manager or a subordinate in the interest/to the advantage of the corporation, with the assessment of organizational deficit omitted in the majority of cases. [27]

Contributing significantly to the aforementioned devaluation of organisational fault is that the legislator has delegated to the corporation the "prevention trough organization", without fixing suitable criteria that could usefully guide the corporation in fulfilling its duty of adequate organisation.

In this regard, it has to be stressed that in consideration of the extreme variety of all possible business realities, it is not feasible for the legislator to set a mandatory list of requirements which the ideal compliance model must present in order to be evaluated as suitable. Only the corporation is in the position to arrange the compliance model such that it is more suitable to its concrete business reality. Nevertheless, the legislator should provide certain guidelines in order to orient the corporation in organizing itself adequately.

In practice, however, the corporation is left alone in its preparation of appropriate organisational models, and as a consequence of the lack of clear rules of conduct, it remains exposed to the discretion of the judges, who in turn often presume the inadequacy of the organisational model from the offence being committed by the individual.[28]

4.3 Problematic adaptation of Decree no. 231 to contexts of criminal law of risk

The problematic dimension that generally characterises the liability regime under Decree no. 231 increases further when considering the enforceability of the regulation within contexts of criminal law of risk.

As already stated, the voices of those proposing to resort to the instrument of corporate criminal liability in order to address industrial sectors characterised by scientific-technological progress are growing. In essence, by applying this form of accountability it would be possible to avoid the distorted effects deriving from an exclusive application of criminal law to individuals, as evidenced by the case of asbestos liability.[29]

Nevertheless, in spite of this appeal, the instrument of corporate liability struggles to be implemented by judges, so much so that the number of judgments on the merits in which Decree no. 231 was applied remains, until now, limited. Furthermore, the Decree, when applied, was not used to regulate particularly problematic contexts such as those of criminal law of risk.

This excessively limited use of the instrument of corporate liability is due in main to the following structural inadequacies: the reduced scope of application of the regulation in question along with its basically accessory nature.

4.3.1 Limited scope of application

First of all, an obstacle to the use of Decree no. 231 in the contexts of criminal law of risk is found in its reduced scope of application. As previously mentioned, the regime of corporate liability in question is applied only to the offences selected by the legislator. Although the catalogue of these offences has been gradually extended, the choice made by the 2001 legislator to limit the offences which can trigger corporate liability to a predefined list, produces gaps of protection that significantly frustrate the regulative potential of Decree no. 231.

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[27] See, *ex multis*, Cass. pen., Sez. V, 18.12.2013 – 30.01.2014, n. 4677, ric. Impregilo Spa. With regard to the fact that in the case law the compliance programs are almost always judged as inadeguate see Assonime, *Prevenzione e governo del rischio di reato: La disciplina 231/2001 e le politiche di contrasto dell'illegalità nell'attività d'impresa* - Note e Studi, 5/2019, in http://www.assonime.it/_layouts/15/Assonime.CustomAction/GetPdfToUrl.aspx?PathPdf=http://www.assonime.it/attivita-editoriale/studi/Documents/Note%20e%20Studi%205-2019.pdf, p. 21. On the contrary, among the few decisions of acquittal of the corporation for lack of organisation fault, see Trib. Catania, sez. IV, 14.04.2016, n. 2133; for a comment of this decision see Orsina, A. (2017). Il caso Rete Ferroviaria Italiana S.p.a.: un'esperienza positiva in tema di colpa di organizzazione. Diritto Penale Contemporaneo, 1, p. 27 et seq.

[28] Actually in art. 6, § 2 of the Decree no. 231, the legislator provides for only some directives with such a general scope that they cannot be considered as minimum requisites of suitability and effectiveness of the models (*e.g.*, it is stated that in the compliance model the corporate activities, in which there is the risk of the commission of offences, have to be individuated and specific protocols have to be established to plan the formation and the implementation of the corporate decisions with regard to the offences to be prevented).

[29] See *supra* § 3.1.

With specific reference to the matter of health and safety at work, corporate liability is not provided for with regard to the endangerment offences under Decree no. 81/2008, *i.e.*, those offences that sanction the violation by the employer of the rules of conduct aimed at safeguarding the health and safety of his employees.[30] As a result of the lack of these offences in the catalogue under consideration, corporate responsibility can, paradoxically, only be affirmed under art. 25 *septies*, if the violation of the aforesaid rules of conduct leads to the event of death or personal injuries.

Furthermore, in matters concerning environmental criminal law, the legislator has stipulated corporate liability for several environmental offences according to art. 25 *undecies*, which was added to the original catalogue of Decree no. 231 by Decree no. 121/2011, and then again reformed by Law no. 68/2015. Nevertheless, there remain a number of unreasonable gaps such as the offence of, "Death or injury as a result of the offence of environmental pollution", which is provided for by art. 452 *ter* of the criminal code with regard to individuals, but which is not encompassed in the list of the offences that can trigger corporate liability.[31]

Furthermore, certain areas, such as product liability and food safety, which are significant for accountability of corporations, are still substantially excluded. Recently, a bill has been proposed in the field of food safety, which is aimed at extending corporate responsibility to agri-food offences (at the moment only some of them are included in the catalogue); however, as yet, this proposal has not become law.[32]

In any case, regardless of its limited scope of application, the difficulty of implementing Decree no. 231 in the contexts of criminal law of risk is due, above all, (and as shall be elucidated in the following discussion) to the structural ambiguity of this form of liability, which – as already stated – lies in the combination of the two different accountability models of organisational fault and organic identification.

4.3.2 Substantially accessory structure

Under Article 8, entitled, "Autonomy of corporate liability", the corporation can be held liable for the offence committed within it even in the following cases: *a*) both when the individual offender cannot be identified and when a charge is not possible because the offender is unfit to plead (for example as he is mentally ill or underage); and *b*) when the offence ceases to exist for a cause other than amnesty.

In the current paper, attention will be focused on case *a*), although it must also be specified that, when considering the two hypotheses mentioned in this provision, the case of non-identification of the individual offender has far greater relevance in practice than the case of a non-chargeable offender who is unfit to plead.

By reason of this provision it seems possible to enhance fully organisational fault: the legislator seems to make corporate responsibility independent of individual liability by providing that the corporation can be declared responsible even in the two aforementioned hypotheses. Nonetheless, such a message emerging from the text of the provision is in contradiction with the overall regulation under Decree no. 231. More precisely, the two following problematic aspects require highlighting.

First, a huge inconsistency emerges between art. 8 and the ascription mechanism under art. 5, 6 and 7, inasmuch as it is difficult to apply the aforementioned mechanism to declare the autonomous corporate responsibility in the two cases which are expressly mentioned in art. 8, lett. *a*)(*i.e.*, the hypothesis in which the individual offender is not identified or is unfit to plead).

Second, it does not seem possible to deduce from art. 8 a general principle of autonomy which has relevance beyond the two aforementioned cases. In other words, it is not possible to base the general recognition of the autonomous nature of corporate liability on art. 8, as this provision limits the principle of autonomy to the explicitly mentioned hypotheses.

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[30] The equivalent of the Italian Decree no. 81/2008 in the UK is the Health and Safety at Work Act 1974 (HSWA), that will be recalled below.

[31] Amarelli, G. (2016). I nuovi reati ambientali e la responsabilità degli enti collettivi: una grande aspettativa parzialmente delusa. Cassazione Penale, 1, p. 405 et seq. See also Manna, A. (2017). Le norme penali come argine all'alterazione irreversibile dell'ecosistema. Archivio Penale, 2, p. 674; Beltrani, S. (2018). Nuovi reato presupposto della responsabilità degli enti. Responsabilità Amministrativa delle Società e degli Enti, 1, p. 141 et seq.

[32] Disegno di legge n. 2427 recante Nuove norme in materia di illeciti agroalimentari (Ddl A.C. 2427). [Online] Available: https://documenti.camera.it/leg18/pdl/pdf/leg.18.pdl.camera.2427.18PDL0098690.pdf (March 6, 2020).

Taking into consideration the first aspect – *i.e.*, the difficult affirmation of an autonomous corporate liability in the cases expressly mentioned in art. 8,and in particular, in the case of failure to identify the individual offender– it must be noted that according to the report attached to the Decree, art. 8 aims at making corporate liability operational even when, as typically happens in cases of negligent liability, the individual offender remains unknown due to fragmentation of competences and of the decision-making process.

However, according to the ascription mechanism under art. 5, 6 and 7, a precondition for corporate liability is an offence committed, in the interest/to the advantage of the corporation, by an individual whose role is one of top manager or a subordinate.

Therefore, art. 8 seems to be inconsistent with the aforementioned regulation. Indeed, when the individual offender cannot be identified, the problem arises of assessing the underlying individual offence, which should consist of not only the material fact but also the *mens rea* of the offender. In order to assess culpability an individual is needed to whom the psychological coefficient can be referred. And in actuality, if the natural person cannot be identified, then it is not known with respect to whom the culpability can be assessed.[33]

Added to this, a further difficulty involves establishing whether the underlying offence was committed by a senior manager or by a subordinate. Such an uncertainty weighs heavily on the practical operation of Decree no. 231, for if the qualification held by the offender cannot be defined, a significant doubt then arises concerning which of the two different probative regimes provided for by art. 6 and 7 should be applied.

In order to remedy the incoherence of Article 8, with respect to the ascription mechanism upon which Decree no. 231 is grafted, several interpretations of this provision have been put forward.

A restrictive interpretation has been proposed, by way of which art. 8 can only be applied when uncertainty about the registry identity of the offender exists.[34] Given this, the said offender should still belong to a narrow circle of easily identifiable subjects who might have committed the offence separately or jointly.

According to an authoritative but isolated opinion, and one which stands juxtaposed to the aforementioned, this provision affirms a direct corporate responsibility.[35] In this perspective, in the hypothesis ruled by art. 8 organisational fault rises to a "pure" ascription criterion of corporate liability which is independent of any link with the individual.

According to another interpretation, the possibility to safeguard an area of application of art. 8 which is compatible with the rest of the regulation may rest on the following idea: in the particular hypothesis regulated by art. 8 the notion of the underlying offence (to which Articles 5, 6 and 7 generally anchor corporate liability) could be interpreted as an offence which only contemplates an objective level and not a subjective level as well.[36] Indeed, in relation to a person whose identity is unknown, the culpability cannot be assessed but it is still possible to ascertain the material fact.[37] Furthermore, to establish which of the two probative regimes under art. 6 and 7 should be applied, it is not necessary to assess the specific identity (top or subordinate) of the individual offender, but it would be sufficient to identify the presumed category to which the individual belongs.

In light of the aforementioned brief reference to the varied panorama of interpretative options, the complexity the question posed by art. 8 becomes apparent.

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[33] Musco, E. (2001). Le imprese a scuola di responsabilità tra pene pecuniarie e misure interdittive. Diritto e Giustizia, 23, p. 9.

[34] De Vero (fn. 18) p. 208. Nevertheless, this Author recognizes that an autonomous corporate liability can be affirmed in the limited case of art. 25 *septies* (p. 281).

[35] Paliero, C.E. (2008). La società punita: del come, del perché, e del per cosa. Rivista Italiana di Diritto e Procedura Penale, 4, p. 1544 (this position is recalled also by De Vero (fn. 18) p. 281).

[36] See Cass. Pen., Sez. VI, 10.11.2015 - 7.07.2016, n. 28299; for a comment on this decision see Orsina, A. (2017). L'autonomia della responsabilità degli enti tra pragmatismo e garanzie. Diritto Penale e Processo, 7, p. 934 et seq.

[37] For a partially different opinion, see: D'Arcangelo, F. (2017). La responsabilità dell'ente per reato commesso da autore ignoto. Responsabilità Amministrativa delle Società e degli Enti, 4, pp. 27-28; De Simone, G. (2011). Il «fatto di connessione» tra responsabilità individuale e responsabilità corporativa. Rivista Trimestrale di Diritto Penale dell'Economia, 1-2, pp. 92-93; Mongillo, V. (2018). La responsabilità penale tra individuo ed ente collettivo. Torino: Giappichelli, p. 349; Scoletta, M.M. (2016). La disciplina della responsabilità da reato degli enti collettivi: teoria e prassi giurisprudenziale. In G. Canzio, L.D. Cerqua, & L. Lupária (Eds.), Diritto penale delle società. Padova: Cedam, pp. 871-872. According to these scholars, when the individual offender is not identified, even if individual culpability cannot be ascertained, it is necessary to assess that dimension of the subjective element which already permeates the material fact (*i.e.* the final direction of the act in case of *dolus* and the objective violation of the rule of conduct in case of negligence).

Moving on to the second problematic aspect of art. 8, it is clear that it is not possible to resort to art. 8 outside of the two cases which are expressly stated in the article itself, *i.e.*, when the individual offender cannot be identified or is unfit to plead.[38] As the legislator mentions only the two hypotheses in question, it does not seem possible to consider this provision as the basis of a generalized principle of autonomy of corporate responsibility.

In particular, it does not seem possible to affirm the responsibility of the corporation when the individual has been identified and yet he cannot be held responsible for lack of culpability (except in the case in which this lack of culpability is due precisely to the fact that the subject is unfit to plead, whereby the second hypothesis provided for by art. 8 occurs). In this way, the potential of corporate liability is significantly frustrated in contexts of criminal law of risk.

In the hypothesis of damaging events stemming from sources of risk related to scientific-technological progress, it well may be that the individual offender, the one who materially caused the harmful event, is identified and yet cannot be considered guilty because of limited cognitive and operational resources. Contrastingly, the corporation could be held guilty for such an event on the grounds of its greater capacity for predictability and avoidability.

Nevertheless, according to art. 8, corporate responsibility cannot be affirmed because, in the case of identification of the offender, the affirmation of corporate liability is independent of the assessment of the individual responsibility only when the natural person is unfit to plead.

To sum up, because of the two aspects so far described – the difficult enforcement of art. 8 in the two hypotheses expressly mentioned in the article itself, along with the impossibility of deducing a general principle of autonomy of corporate responsibility from this provision – the accountability model adopted in Decree no. 231 seems to lack real autonomy, in spite of the assertion of autonomy under art. 8.

The theoretical contradictions and applicative difficulties of the regulation in question have led Italian scholars to look to foreign experiences in search of ideas to improve the regulation. On this basis, favourable opinions were expressed in relation to the CMCHA.[39] In this light, the offence of corporate manslaughter will now be taken into account in order to verify if inspiration can be drawn from this legislature for the improvement of the regulation currently in force in Italy, and more generally, for the construction of an ideal model of corporate liability for negligence.

5. Corporate criminal liability in the United Kingdom: The Corporate Manslaughter and Corporate Homicide Act 2007

The UK has traditionally based corporate criminal liability on two ascription models:[40] firstly, under vicarious liability, which is used as an ascription paradigm of the strict liability offences, whereby a corporation is liable for the offences committed by their employees or agents within the activities of the firm, regardless of the particular role covered by them in the organisation; and secondly, under the principle of identification, which is elaborated for the charge of *mens rea* offences,

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[38] Masullo (fn. 7) p. 234.

[39] See *infra* § 5.3.3.

[40] See, e*x multis* Ashworth, A., & Horder, J. (2016). Principles of criminal law. Oxford: Oxford University Press, p. 295; Baker (fn. 8) p. 1319; Clarkson, CMV., Keating, H.M.S., & Cunnigham., R. (2010). Clarkson and Keating's Criminal Law. London: Sweet and Maxwell; Dine, J., Gobert, J., & Wilson, W. (2011). Cases and materials on criminal law. Oxford: Oxford University Press, p. 236; Herring, J. (2017). Criminal Law. Basingstoke: Palgrave. p. 81; Jefferson, M. (2013). Criminal Law. London: Pearson, p. 218; Loveless, J. (2016). Complete Criminal law. Text, cases and materials. Oxford: Oxford University Press, p. 173; Ormerod, D., & Laird, K. (2017). Smith and Hogan's Text. Cases and Materials on Criminal Law, Oxford: Oxford University Press, p. 746; Matthews, R. (2008). Blackstone's Guide to the Corporate Manslaughter and Corporate Homicide Act 2007. Oxford: Oxford University Press; Norrie, A. (2014). Crime, reason and history. A critical introduction to criminal law. Cambridge: Cambridge University Press, p. 117 et seq.; Simester, A.P., Spencer, J.R., Sullivan, G.R., & Vigo, G.J. (2013). Simester and Sullivan's Criminal Law. Theory and Doctrine. London: Hurt Publishing; Wells, C. (2001). Corporations and criminal responsibility. Oxford: Oxford University Press; Wells, C., & Quick, O. (2010). Reconstructing criminal law. Cambridge: Cambridge University Press, p. 673; Wells, C. (2011). Corporate Criminal Liability in England and Wales: Past, Present, and Future. In M. Pieth, & R. Ivory (Eds.), Corporate Criminal Liability. Dordrecht: Springer, p. 91 et seq.; Wilson, W. (2017). Criminal Law. London: Pearson, p. 170. For Italian literature about corporate criminal liability in the UK see, *ex multis*, Gentile, G. (2009). L'illecito colposo dell'ente collettivo. Riflessioni alla luce del Corporate Manslaughter. Torino: Giappichelli; Guerrini, R. (2008). Profili comparatistici della responsabilità da reato degli enti. Studi Senesi, I, p. 50 et seq.; Lottini, R. (2005). La responsabilità delle persone giuridiche nel diritto inglese, Milano: Giuffré; A. Fiorella (Ed.). (2012). Corporate Criminal Liability and Compliance Programs, Vol. I, Liability 'ex crimine' of legal entities in member states. Napoli: Jovene.

Whereby the corporation is directly responsible for the offences committed by individuals who, when playing the role of senior or controlling officers, are an *alter ego* of the corporation.[41]

Both these criteria are relatively rudimentary. The vicarious liability criterion is an oversimplified ascription mechanism that leads to the declaration of liability on a purely objective basis. In turn, the identification principle makes it possible to charge a legal person with full liability not only on the objective but also on the subjective level; this is achieved by identifying the state of mind of the corporation with that of its leaders. However, such a principle faces great difficulty in its application, considering that it is often hard to prove the involvement in the offence of an individual who can be identified as the directing mind and will of the corporation.

In order to overcome the inadequacies of the aforementioned traditional system, in 2007 the legislator has provided the UK with the new offence of corporate manslaughter by the CMCHA and has established for this offence an autonomous ascription criterion which, inasmuch as it is focused on the element of the organisational flaw, is inspired by the conception of corporate blameworthiness as organisational fault.[42]

Under this law, a corporation may be declared liable for the event of death when the way in which its activities are organised and managed is causally relevant to the production of that event and consists of a gross breach of one of its duties of care.

5.1 The constituent elements of Corporate Manslaughter

The regulation of the liability model under the CMCHA is essentially the same in all the three legal systems that make up the UK (section 28),[43] even if termed corporate manslaughter in England, Wales and in Northern Ireland, and corporate homicide in Scotland (section 1). In order to attribute this offence, firstly, the legal person must be encompassed in one of the general categories of organisations listed in the Act.

A second requirement is represented by the duty of care of the corporation towards the victim (section 1(1b) - section 2). The way in which the corporation's activities are organised by its senior management must result in a gross breach of the aforementioned duty of care (section 1 (1b) – section 1 (3)).The assessment of the existence of a corporate duty of care, as a question of law, falls within the competence of the judge (section 2 (5)); whilst the assessment of the serious violation of this duty, as a question of fact, falls within the competence of the jury (section 8 (1b)). The nexus of causality between the breach of the duty of care and the event of death is also required (section 1 (1a)).

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[41] Some scholars recognise a third form of corporate liability, *i.e.*, the direct responsibility of the corporation for the breach of its own statutory duties; see Card, R. (2016). Card, Cross and Jones Criminal Law. Oxford: Oxford University Press, p. 794 et seq.

[42] This criterion does not have a general applicative area and concerns only the corporate manslaughter (which replaced the common law offence of gross negligence manslaughter with regard to corporations).
Alongside the "management failure model" codified in the CMCHA, a further ascription paradigm, the "failure to prevent model", was introduced by the s. 7 of the Bribery Act 2010 (which provides the "Failure of commercial organizations to prevent bribery") and extended to the field of tax offences by the ss. 45 and 46 of the Criminal Finances Act 2017. On the basis of the "failure to prevent model", the corporation can avoid the declaration of responsibility for the offence committed by one of its officers if it proves to have adopted adequate prevention procedures; this liability model is a kind of hybrid offence in light of the aforementioned reversal of the burden of proof: see Wells, C. (2010). Corporate crime: opening the eyes of the sentry. Legal Studies, 30 (3), p. 388; Wells, C. (2012). Who's afraid of the Bribery Act 2010. Journal of Business Law, 5, p. 421; Wells, C. (2014). Corporate responsibility and compliance programs in the United Kingdom. In S. Manacorda, F. Centonze, & G. Forti (Eds.), Preventing Corporate Corruption. The Anti-Bribery Compliance Model. Berlin: Springer, p. 508; Wells, C. (2017). Corporate failure to prevent economic crime – A proposal. Criminal Law Review, 6, p. 426. Differently from the liability model codified in the CMCHA, the "failure to prevent model" introduced by the Bribery Act 2010 has been relatively successful and the proposal to extend it to further economic offences is under discussion; see Ministry of Justice. Corporate liability for economic crimes: call for evidence. (2017). [Online] Available: https://consult.justice.gov.uk (13 January 2017); Corporate Liability for Economic Crime. Call for Evidence: Government Response. (2020). [Online] Available: https://consult.justice.gov.uk/digital-communications/corporate-liability-for-economic-crime (3 November 2020).
However, at the moment, except for the two aforementioned ascription models that have been introduced by the CMCHA and the Bribery Act and recall the organizational fault, the charge of all the other offences provided by the legal system is still ruled by the two criteria of vicarious liability and identification principle. Furthermore, in the matter of corporate criminal liability the institute of the Deferred Prosecutions Agreements, introduced by the Crime and Courts Act 2013, is gaining a growing relevance but this subject remains out of the topic of the present paper.

[43] UK Ministry of Justice, Guide to the Corporate Manslaughter and Corporate Homicide Act 2007. (2007) [Online] Available: www.justice.gov.uk (October 2007), p. 4.

A penalty system is provided which consists of a fine, and according to a discretionary choice of the judge, a remedial order and a publicity order.

Therefore, in general terms, in order to verify if corporate manslaughter can be usefully applied to the particularly problematic fields of criminal law of risk, this research will now focus – in the same way as the Italian Decree no. 231 was dealt with – on the two aspects of applicative scope of the offence and its structure.

5.2 The scope of application of Corporate Manslaughter

In order to define the scope of Corporate Manslaughter, the emphasis must be placed on the fact that within this offence two different levels of duty of diligence are relevant: firstly, the duties of care, the breach of which, if gross, may be attributed to the corporation when such a breach is the cause of the death; and secondly, the duties of diligence as codified in the health and safety legislation, the violation of which has to be taken into consideration in assessing the seriousness of the breach of the duty of care.

In our opinion the combination of the two aforementioned precautionary levels, even if some ambiguities emerge from them, renders the applicative scope of the offence potentially very wide by attributing relevance to all the fields that are typical of criminal law of risk. Therefore, it is necessary to focus on each of the two precautionary levels in order to highlight the aforementioned positive effect arising from their interconnection.

In addition, in order to complete the definition of the scope of the offence, the relationship between statutory offences and corporate manslaughter will be called upon. Statutory offences are codified in the health and safety legislation and sanction dangerous acts performed in violation of this legislation, whilst the offence of corporate manslaughter sanctions the violation of the health and safety legislation when such a transgression (which makes the failure of the duty of care gross) has causally contributed to death.

5.2.1 The general categories of duty of care

Within the offence of corporate manslaughter, a first precautionary level is represented by the notion of duty of care. In essence, to affirm corporate liability for the death, it is necessary that this event was caused by the failure to comply with a duty of care.

Section 2 of the CMCHA, in defining the contents of the duties of care, identifies four relevant categories: the duties towards the corporation's employees; those duties owed by the corporation as occupier of premises; those duties imposed on the corporation in connection with a series of activities described in very general terms (such as the supply of goods or services); and those duties arising from subjecting a person to custody or detention.

It is also affirmed here that the duties of care have their source in the civil law of negligence (including both case law and statutory law), which means that the regulation contained in the CMCHA does not create new duties but incorporates those already provided for by the civil branch of the legal system.

With regard the legislator's choice to focus the structure of the offence on the civil law notion of duty of care, it has been critically observed that this has allowed an improper mixture between civil and criminal law to be put in place.[44] The imputation of corporate manslaughter is made dependent on the violation of a rule of conduct, the description of which derives from the law of negligence. Consequently, criminal responsibility risks being subordinated to the criteria of another branch of the legal system.

Nonetheless, beyond this problematic aspect, the positive effect of such a regulatory choice must be highlighted as it broadens the scope of corporate manslaughter and consequently, strengthens this punitive instrument. Indeed, the four aforementioned categories of relevant duties of care are formulated in such a general way that the contexts of criminal law of risk can be considered as included in the scope of the offence.

Consider the first category defined with the formula, that of "duties towards the corporation's employees". Given such a general wording, the field of health and safety at work seems, in its widest extent, to fall within the remit of corporate manslaughter, whereby the corporation can be held liable for deaths at work even when such events derive from sources of risks related to scientific and technological progress.

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[44] Gobert, J. (2008). The Corporate Manslaughter and Corporate Homicide Act 2007 – Thirteen years in the making but was it worth the wait?. Modern Law Review, 71 (3), p. 416; Clarkson, C.M.V. (2005). Corporate Manslaughter: yet more government proposals. Criminal Law Review, 9, p. 683.

Additionally, the reference to the category of the duties of care imposed on the corporation in connection with "the supply of goods or services" could make the CMCHA enforceable with respect to product-related deaths of consumers, and thus, the offence of corporate manslaughter could also be applied in the matter of product liability, which is one of the main areas of criminal law of risk.

Even more general is the provision that gives relevance to the duties of care arising from "the carrying on by the organisation of any other activity on a commercial basis". This all-encompassing formula could be invoked to hold the corporation liable for events of death related in various ways to the activities of the company.

Such an extensive interpretation of the scope of corporate manslaughter can be additionally based on the consideration of the second level of duty of diligence, *i.e.*, the rules of conduct codified in the health and safety legislation.

5.2.2 The central role of the health and safety legislation

As already stated, the failure of the aforementioned duty of care must, pursuant to section 1 (1b), be of a serious nature. This section defines the conduct to be attributed to the corporation as a "gross breach of a relevant duty of care owed by the organisation to the deceased", and section 1 (4b) additionally qualifies the breach of the duty of care as gross, "if the conduct alleged to amount to a breach of that duty falls far below what can reasonably be expected of the organisation in the circumstances".

Section 8, "Factors for jury", which identifies the judgment factors relevant to assessing the gravity of the non-fulfilment of the duty of care, recognises a central relief to the notion of health and safety legislation.

In particular, under section 8 (2), the jury must check "whether the evidence shows that the organisation failed to comply with any health and safety legislation related to the alleged breach", *i.e.*, it must evaluate whether there was non-compliance by the corporation with any provision contained in the health and safety legislation (assessing particularly the gravity of the infringement of that legislation and the degree of risk of death posed by that conduct).

Under section 8 (3) the jury can consider "the extent to which the evidence shows that there were attitudes, policies, systems or accepted practices within the organisation that were likely to have encouraged any such failure or to have produced tolerance of it". In other words, the jury can assess whether the company's culture was likely to encourage or condone the non-compliance with the health and safety legislation. The jury may also take into account "any health and safety guidance that relates to the alleged breach", *i.e.*, any guide issued by public authorities to direct the concrete enforcement of the legislation in question.[45]

In summary, the reference to the health and safety legislation plays a central role in assessing the seriousness of the failure of the duty of care. In this assessment, the violation of the health and safety legislation is a factor that the jury is obliged to take into account, whereas the culture developed within the firm around compliance with that legislation, as well as the guidelines issued by the public authority in relation to its application, are factors whose consideration is optional for the jury.

In the light of the function performed by the health and safety regulation within the CMCHA, the legislator has defined this notion as "any statutory provision dealing with health and safety matters, including in particular provision contained in the Health and Safety at Work etc. Act 1974 [HSWA]" (section 25).This definition gives the formula in question a particularly broad meaning so that it is substantially evocative of all the regulations designed to protect the primary legal interests of the health and safety of the persons.

The aforementioned provision expressly mentions the HSWA (*i.e.* the main legislative *corpus* on health and safety at work) as a legal act falling within the notion of "health and safety legislation". By this explicit reference, the matter of health and safety at work is given a primary place within the scope of the CMCHA.

Nevertheless, this specific field does not represent the whole scope of the category of the health and safety legislation, which additionally encompasses – as can be inferred from the definition above – all the regulations involving health and safety. Corporations can therefore be declared liable for the deaths of workers, consumers of products, and in general, of any other subjects who may be exposed to the company's activity.

[45] Gobert (fn. 44) p. 417 underlines that the reference to the health and safety legislation is aimed at addressing the problem of the definition of the "gross breach".

Notably, the fields in which the need for protection of health and safety arises represent the typical areas of the criminal law of risk; for example, in addition to health and safety at work, various fields such as product liability, food safety and criminal environmental law come to mind.

Therefore, the reference to health and safety legislation determines the expansion of the liability model of the CMCHA to all fields where risks arise from scientific-technological progress, and on the basis of this element, it becomes possible, through corporate manslaughter, to ascribe to corporations the negligent assessment and management of the sources of risk that threaten individual and collective interests exposed to technologically complex production systems.

To sum up, the offence of corporate manslaughter consists of two levels of duties of diligence.

The first is represented by the duties of care, *i.e.*, the duties of diligence provided for by the civil law of negligence, the violation of which, if causing the event of death, can be ascribed by way of corporate manslaughter.

The second consists of the additional rules of conduct set in the health and safety legislation, the violation of which represents for the jury a factor of judgment in assessing the gravity of the breach of the duty of care.

The combination of these two levels connects corporate manslaughter with the category of "risk". Both the general formulation of the duties of care and the linking reference to the health and safety legislation connected to the primary interests of the health and safety, provide the offence in question with a huge scope in the sense that it is ideally projected towards all fields that are typical of the criminal law of risk.

5.2.3 The synergy with the health and safety statutory offences

In order to correctly define the applicative scope of the CMCHA, the relationship between corporate manslaughter (in which the notion of health and safety legislation fulfils the role just described) and the statutory offences established by the health and safety legislation must also be outlined.

Under section 19, it is possible to charge a corporation (in addition to corporate manslaughter) with one of the statutory offences contained in the legislation on health and safety matters. The ascription of the act performed in violation of these laws is not absorbed by the charge of the event of death under the CMCHA.

In other words, the breach by the corporation of the laws encompassed in the health and safety legislation remains punishable through health and safety offences; whereas the event of death caused by the aforementioned conduct is punishable by way of corporate manslaughter (provided, as already noted, that the violation of the health and safety legislation makes gross the failure of one of the statutory duties of care imposed on the corporation).

An example of the practical operation of this regulatory system can be found in the matter of health and safety at work, which – as already seen – is one of the main fields of application of the CMCHA. In this area, it is possible to first charge the corporation with the infringement of the HSWA in application of the statutory offence provided in its section 33. Indeed, corporations, like individuals, are directly burdened with the obligations established in sections 2 and 3 of the HSWA with general reference to the employer, which means corporations are punishable with the criminal sanctions provided in section 33 in cases involving violation of those obligations.

Second, if the death occurs because of the failure of these obligations, it is possible to impute to the corporation the event through corporate manslaughter, provided that the breach of a duty of care is ascertained.

In actuality, this cross reference to various sources of law could produce interpretative ambiguities. The HSWA and the CMCHA provide for different burdens of proof. Under the HSWA, the employer has to prove to have done everything reasonably expected to protect the health and safety of his employees according to the balance of probabilities standard. Under the CMCHA, the prosecution has to prove the gross negligence of the employer beyond any reasonable doubt.[46]

Furthermore, the *ne bis in idem* principle could be violated in that the failure to fulfil health and safety legislation may be punishable by way of both the health and safety statutory offences and, if followed by the event of death, by way of corporate manslaughter.[47]

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[46] Wells, C. (2014). Corporate Criminal Liability: A Ten Year Review. Criminal Law Review, 12, p. 857.

[47] Ormerod, D. & Taylor, R. (2008). The Corporate Manslaughter and Corporate Homicide Act 2007. Criminal Law Review, p. 595. However, it may be observed that, at least in theory, such a violation of *ne bis in idem* should be denied because the core of corporate manslaughter is represented by the infringement of the duties of care settled in the civil law of negligence

In any case, beyond the uncertainties arising from the plethora of charges possible under section 19, it is important to stress that compliance with the health and safety legislation is guaranteed on the levels of the ascription of both the conduct and the event.

With specific reference to the matter of health and safety at work, corporations can be charged with both the infringement of the HSWA in application of the statutory offences provided for under this Act, and with the event of death by way of corporate manslaughter. More generally speaking, in the typical areas of the criminal law of risk, the relationship between corporate manslaughter and the statutory offences codified in the health and safety legislation provides, within the UK context, for an overall liability of corporations, which encompasses the attribution of both the conduct and the event.

5.2.4 The overall liability of corporations in contexts typical of criminal law of risk

By way of summing up all considerations expressed so far concerning the scope of corporate manslaughter, the following final remark is warranted: the perspective endorsed by the UK in relation to corporate liability appears substantially inverted when compared to that adopted by the Italian legislator.

In Italy, corporate liability under Decree no. 231 is limited to a selected catalogue of offences. In particular, the only ways through which corporate liability may become operational in the contexts of criminal law of risk are the two offences under Articles 25 *septies*, and 25 *undecies*, concerning, respectively, the responsibility for death and personal injuries occurring in violation of the health and safety at work legislation and the liability for environmental offences. This means that corporations play a significant role in relation to the assessment and management of risks emerging from scientific-technological progress only in the specific fields of health and safety at work and of criminal protection of the environment.

Moreover, there are further limits to corporate liability in these two areas. In the first case, liability is only provided on the side of the attribution of the event, since Article 25 *septies*, only provides for punishment of manslaughter and personal injuries but not simple violations of the precautionary rules of conduct which did not cause a damaging event. In the second case, even if liability under Article 25 *undecies* encompasses the most serious environmental offences, there are still a number of unreasonable gaps.[48]

Contrastingly, in the UK, corporate liability in the areas of criminal law of risk appears to be as broad as possible in terms of both applicative scope and title of responsibility. Owing to the combination of the two aforementioned levels of duty of diligence and to the relationship between the CMCHA and the regulatory offences provided for in the health and safety legislation, corporations can be punished in all areas in which health and safety are exposed to risks deriving from scientific-technological progress. And this may occur in terms of the attribution of both the event and of the conduct.

In truth, however, the CMCHA can only be applied to charge the corporation with the event of death and it cannot be invoked in all cases in which the damaging event is limited to injury. Nevertheless, leaving aside this aspect, it has to be emphasized that on the basis of the synergy between the CMCHA and health and safety legislation, the system of corporate criminal liability in the UK appears more evolved than the Italian system, because – at least in theory – it is devoid of those gaps in the protection of health and safety, which, contrastingly, characterise Decree no. 231.

5.3 The structure of Corporate manslaughter

Turning to the consideration of the structure of corporate manslaughter, it must be highlighted that the responsibility of corporations in the UK has been historically focused on the binary logic of "vicarious liability-identification principle", but that in 2007, corporate criminal liability was projected into the dimension of corporate blameworthiness as organisational fault by the CMCHA, since corporate manslaughter has its pivot in the organisational deficit.

Nonetheless, the offence contains an ambiguous reference to the notion of "senior management" that could frustrate the legislator's innovative choice to adopt an evolved holistic concept of corporate liability.

Attention will now be focused on these two incoherent aspects of the regulation, and through reference to concrete practice, it will be stressed that this inconsistency has, until now, hampered the regulatory potential of the CMCHA.

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and not by the health and safety failings (indeed, such failings are only relevant to assess the seriousness of the infringement of the duty of care).

[48] See *supra* § 4.3.1.

5.3.1 The enhancement of the organisational fault

The crucial importance of the element of organisational defect in the structure of the offence emerges from the first provisions of the CMCHA. In its first subsection, Section 1 states that the corporation is responsible for corporate manslaughter if "the way in which its activities are managed or organised" represents a serious breach of a duty of care causally relevant to the production of the event of death. Additionally, subsection 3 requires that the method of organisation and management of the corporate activities constitutes "a substantial element" of that breach of the duty of care.

These provisions, in spite of their redundant formulation, make the organisational defect the fulcrum of the offence by formalising a link between the organisation of the corporation's activities and the violation of the duty of care. Thus, it is possible to impute to the corporation the lethal event only if its organisation turns out to be inadequate in the violation of the duty of care.

Indeed, an explicit mention of the notion of organisational fault is lacking as is any reference to compliance programs that the corporation should adopt not to be considered blameworthy. Nevertheless, in light of the provisions mentioned above corporate manslaughter is clearly inscribed in the logic of organisational fault.

Confirmation of the accuracy of this interpretation can be inferred from the *Explanatory Notes* to the CMCHA, in which the notion of "management failure" is explicitly invoked. In this document, it is stated that since the violation of the duty of care must consist of the way in which the corporation's activities are managed and organised, the test aimed at ascertaining the management failure has to be connected, not merely to a particular organisational level, but to the organisation of the corporation as a whole.

To sum up, the CMCHA is inscribed in the logic of organizational fault as the culpability of the corporation is substantiated with reference to the inadequate management of its activities and structures.[49]

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[49] Therefore, both in the UK under the CMCHA and in Italy under the Decree no. 231 corporate liability is inscribed in the logic of organizational fault, so that corporate blameworthiness is recognized as autonomous from the individual one.
However, it has to be kept in mind that the category of corporate culpability is perceived in the UK differently from Italy.
In the UK the organizational fault is often assimilated to the corporate culture theory. The criterion of corporate culture was defined for the first time in the 1995 Australian Criminal Code Act according to which the corporation is liable when "a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance with the relevant provision" or "the body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision" (section 12.3, § 2, lett. *c* and *d*). In particular, corporate culture is defined as "an attitude, policy, rule, course of conduct or practice existing within the body corporate, generally, or in the part of the body corporate in which the relevant activities take place" (section 12.3, § 6).
In the UK the concept of organizational fault is perceived as a synonym of the aforementioned corporate culture. See, for example, Horder, J. (2012). Homicide and the politics of law reform. Oxford: Oxford University Press, p. 129, who speaks of "the notion of corporate or organizational culture" so that the two concepts overlap (more generally p. 124 et seq.); Wells, C. & Quick, O. (fn. 40) p. 690, who also interpret the notion of the management failure under the CMCHA as an expression of the corporate culture theory.
On the contrary, in Italy organizational fault and corporate culture are perceived as two radically different versions of corporate blameworthiness with the first one being preferred; see Fiorella, A., & Selvaggi, N. (2018). Dall'«utile» al «giusto». Il futuro dell'illecito dell'ente da reato nello 'spazio globale'. Torino: Giappichelli; Paliero (fn. 35) pp. 1522-1523. Corporate culture refers to the general *modus vivendi* of the corporation, which is too vague to be assumed as the ground of corporate criminal liability; indeed, according to this approach, a corporation should be considered dangerous (and consequently, punished for all the offences committed within it) if it has a generic attitude of non-compliance with the laws. On the contrary, in the light of the organizational fault theory corporate liability has to be based on a specific organizational flaw for which the corporation is blameworthy, so that an offence committed within the corporation can be imputed to the corporation itself only if it has not adopted organizational models that would have been suitable to prevent offences of the same type as that one which was committed. Only in this way, according to this approach, corporate liability can be affirmed in full obedience of the legality and culpability principles.
Now, the legislator of the CMCHA in drafting the offence of corporate manslaughter has drew inspiration from the concept of corporate culture: the requirement of the management failure, expressed by the formula "the way in which its activities are managed or organised" (s. 1), is probably to be interpreted according to the corporate culture theory rather than to the organizational fault category as intended in Italy. This can be inferred from the following elements. As already noted, in the Explanatory Notes to the CMCHA, it is stated that the test aimed at ascertaining the management failure "is not linked to a particular level of management but considers how an activity was managed within the organisation as a whole". Furthermore, the category of corporate culture is explicitly evoked in the section 8, pursuing to which the jury, in assessing the seriousness of the breach of the duty of care, may take into account "attitudes, policies, systems or accepted practices" developed within the firm in relation to health and safety legislation (see Gobert, J. (2011). Country report: UK. In J. Gobert, & A.M. Pascal (Eds.), European Developments in Corporate Criminal Liability. London: Routledge).

However, the recognition of an authentic corporate culpability by the legislator of the CMCHA is questioned on the basis of a structural ambiguity which seems to "contaminate" corporate manslaughter with the logic of the identification principle. The key element at issue, here, is the reference to "senior management".

5.3.2 The ambiguity of the senior management test

The concept of "senior management" is first mentioned in section 1 (3), at which point, the legislator, requiring that the method of management and organisation of the corporate activities represents a substantial element of the breach of the duty of care, employs the expression, "the way in which its activities are managed or organised by its senior management". Senior management is then specifically defined by section 1 (4c) referring to "the persons who play significant roles in - (i) the making of decisions about how the whole or a substantial part of its activities are to be managed or organised, or (ii) the actual managing or organising of the whole or a substantial part of those activities".

Actually, the final version of the wording of the offence has departed from the bill drafted by the Law Commission, which, by intentionally not mentioning individuals in top positions, made the impersonal notion of management failure the focus of the structure of the offence.[50] Thus, the aforesaid provisions give rise to doubt as to whether, in the final version of the CMCHA, the legislator intended to require a substantial involvement of the top management in the violation of the duty of care by the corporation.

The reference to senior management is justified by the legislator in light of the intention to target with corporate manslaughter, only those serious gaps emerging in the strategic management of the corporation, and to contrastingly exclude from the CMCHA's scope, the organisational deficits attributable to the sphere of competences of junior managers or of other subjects with mere supervisory or purely executive tasks.[51] This explanation has, however, failed to convince a range of scholars who are strongly critical of this aspect of the law.

By denying the autonomous configuration of the accountability model formulated in the original project of the Law Commission, the legislator draws within the structure of corporate manslaughter the same applicative limits typical of the identification theory, which requires the involvement in the offence of at least one subject in top position.[52]

In particular, two problems arise: firstly, the identification of individuals belonging to the category of senior management remains unclear given the section 1 (4c) which only provides that these subjects play "significant roles" in the organisation of corporate activities; and secondly, the legislator has not explicated the cases in which the way of organising and managing the activities by these subjects represents (as required in section 1 (3)) a "substantial element" of the breach of duty of care.[53]

A further critical aspect can be found in the contradiction between the aforementioned senior management test and section 18, according to which, "An individual cannot be guilty of aiding, abetting, counselling or procuring the commission of an offence of corporate manslaughter".

However, despite this difference between the two legal traditions (that one in the UK, according to which organizational fault has to be intended in the light of the category of corporate culture; the Italian one, which anchors the corporate liability to a specific organizational deficit causally linked to the specific offence which was committed by the individual) it must be highlighted that both in the offence of corporate manslaughter under the CMCHA and in the regime of corporate liability under the Decree no. 231 there is an effort by the legislator to recognize the corporate blameworthiness as autonomous from the individual one in an "holistic" perspective.

[50] Gobert, J. (2002). Corporate killing at home and abroad – Reflections on the Government's proposals. Law Quarterly Review, 118, p. 72 et seq.

[51] Home Office. Corporate Manslaughter: The government's draft bill for reform, p. 12, § 28. See also the Guidance on Corporate Manslaughter issued by the Crown Prosecution Service. [Online] Available: https://www.cps.gov.uk/legal-guidance/corporate-manslaughter.

[52] See, *ex multis*, Cavanagh, N. (2011). Corporate criminal liability: An assessment of the models of fault. Journal of Criminal Law, 75(5), pp. 423-425; Clarkson, C.M.V. (2008). Corporate manslaughter: need for a special offence?. In C.M.V. Clarkson, & S. Cunningham (Eds.), Criminal liability for non-aggressive death. London: Routledge, p. 93 et seq. It is worth noting that some maintain that the senior management test evokes the aggregation theory: see Ormerod, D. & Taylor, R. (2008). The Corporate Manslaughter and Corporate Homicide Act 2007. Criminal Law Review, 8, p. 589 et seq.; Horder (fn. 49) p. 127; see also The Law Commission. Consultation Paper No 195. Criminal liability in regulatory contexts. [Online] Available: http://lawcom.gov.uk/app/uploads/2015/06/cp195_Criminal_Liability_consultation.pdf, p. 107.

[53] Clarkson (fn. 44) p. 683; Wells(fn. 46) p. 853; Griffin, S. (2007). Corporate manslaughter: a radical reform?. Journal of Criminal Law, 71(2), p. 151 et seq.

On the one hand, it is necessary to verify that the conduct of senior management plays a substantial role in management failure; on the other, it is stated that corporate manslaughter cannot be committed by an individual, who could be held liable for the event of death only by way of the common law offence of gross negligence manslaughter.[54]

However, the regulation in question has received positive comments from the Italian doctrine. As will be explored more fully in the following paragraph, several Italian scholars have noted that, even if corporate manslaughter may not constitute a truly autonomous offence when it is taken in the light of the aforementioned interpretative uncertainties arising from the senior management test, the 'holistic' component of this liability model is still much more pronounced than that connoting the accountability model in force in Italy.

5.3.3 The positive judgment of Italian scholars

At the moment of the entry into force of the CMCHA, Italian scholars qualified this accountability paradigm as the most progressive and interesting innovation in the entire European criminal landscape. This positive judgment was initially expressed with regard to the proposal of the Law Commission,[55] which (as already noted) provided an impersonal concept of the management failure of the corporation by referring to "the way in which its activities are managed or organised".

The same appreciation was subsequently repeated in relation to the final wording of the offence,[56] which refers to the way in which corporate activities "are managed or organised by its senior management" (s. 1 (3)). It has been noted that the CMCHA refers to the senior management and not to the senior managers, and from this it has been inferred that the liability for corporate manslaughter is not hinged on the culpable deficiencies of individuals but on the existence of an organisational failure due to decisions taken at the top level.

Actually, a fear has been voiced that this reference to senior management failure could lead the CMCHA to the same applicative difficulties as the identification theory; nevertheless, this doctrine also sees the CMCHA as being characterized by a more pronounced affirmation of organisational blameworthiness in comparison to the regulation in force in Italy.[57]

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[54] Clarkson (fn. 44) pp. 687-688; Gobert, J. (2012). Corporate criminal liability – What is it? How does it work in the UK?. In A. Fiorella, & A.M. Stile (Eds.), Corporate criminal liability and compliance programs. First Colloquium, pp. 212 and 222; Griffin (fn. 53) p. 163; Menis, S. (2017). The fiction of the criminalisation of Corporate Killing. Journal of Criminal Law, 81 (6), pp. 476-477; Whyte, D. (2018). The autonomous corporation: the acceptable mask of capitalism. King's Law Journal, 29(1), p. 104.

[55] Centonze (fn. 9) p. 450.

[56] Amarelli (fn. 13) p. 20; Castronuovo (fn. 13) p. 434 et seq.; De Simone (fn. 18) p. 398 et seq.; Id. (2017). La colpevolezza dei soggetti metaindividuali: una questione tuttora aperta. Cassazione penale, 2, p. 911, fn. 2; Id. (2020). Profili di diritto comparato. In G. Lattanzi, & P. Severino (Eds.), Responsabilità da reato degli enti, Vol. I, Diritto sostanziale. Torino: Giappichelli, p. 10; Fiorella, A., & Valenzano, A.S. (2016). Colpa dell'ente e accertamento. Sviluppi attuali in una prospettiva di diritto comparato. Roma: Sapienza Università Editrice, pp. 23 and 31; Gargani, A. Prospetto riassuntivo delle misure a tutela penale della sicurezza e salute del lavoro nell'ordinamento inglese. [Online] Available: https://www.aipdp.it/ottavo_gruppo/, p. 5; Gentile (fn. 40), pp. 248-249; Manna (fn. 13) p. 14 (but the same Author has expressed a negative opinion on the liability model *ex* CMCHA in Manna, A. (2018). La responsabilità dell'ente da reato tra sistema penale e sistema amministrativo. In A. Fiorella, A. Gaito, & A.S. Valenzano (Eds.), La responsabilità dell'ente da reato nel sistema generale degli illeciti e delle sanzioni. Roma: Sapienza University Press, p. 33, where it is observed that the provision of the exclusive liability of corporations would risk to make freed individuals from any responsibility); Plantamura, V. (2007). Diritto penale e tutela dell'ambiente: tra responsabilità individuali e degli enti. Bari: Cacucci, pp. 101-102. The form of corporate liability provided for by the CMCHA has also fuelled a debate in other legal systems, for example in the Australian one; in this regard see Taylor, D., & Mackenzie, G. (2013). Staying focused on the big picture: should Australia legislate for corporate manslaughter based on the UK model?. Criminal Law Journal, 37(2), p. 99 et seq.; Bronitt, S., & McSherry, B. (2017). Principles of criminal law. Pyrmont: Thomson Reuters, pp. 523-524; Schloenhardt, A. (2018). Queensland criminal law, South Melbourne-Victoria: Oxford University Press, p. 196 et seq. For a positive judgment on the CMCHA see also Nieto Martín, A. (2008). La responsabilidad penal de las personas jurídicas: Un modelo legislative. Madrid: Iustel, p. 129.

[57] Torre, V. (2013). La "privatizzazione" delle fonti di diritto penale. Un'analisi comparata dei modelli di responsabilità penale nell'esercizio dell'attività di impresa. Bologna: Bonomia University Press, pp. 167, 257 et seq. See also Mongillo (fn. 37) p. 420, who explains the senior management test of the CMCHA in the light of the impossibility of elaborating a model of corporate responsibility in which the individual dissolves completely in the organization; see also Id., New statutory tests of corporate criminal liability in the UK: the Corporate Manslaughter Act 2007 and the Bribery Act 2010. (2012). In A. Fiorella (Ed.), Corporate criminal liability and compliance programs. Vol. I. Liability 'ex crimine' of legal entities in Member States. Napoli: Jovene, p. 273 et seq.

The latter, in spite of Article 8, seems to recall an "anthropomorphic" approach as it postulates an offence committed by an individual who has a qualified relationship with the corporation, and who acts in the interest of and/or to the advantage of the corporation. The CMCHA, in contrast, makes ascribing the event of death to the corporation possible on the basis of the defective corporate organisation without requiring an underlying offence to be committed by an individual.

Therefore, although such mention of senior management could represent a step backwards, when compared to the draft of the Law Commission, in the European landscape this liability model represents the closest model to an authentic "holistic" perspective. At this point, it has to be considered whether the CMCHA has met the expectations of those who felt it was an efficient paradigm of regulation of corporate liability.

5.3.4 The practical ineffectiveness of Corporate Manslaughter

The logic of organisational fault encounters difficulty in terms of being successfully applied: more than ten years after its entry into force, the degree of the practical effectiveness of the CMCHA is rather disappointing.[58]

With regard to this, it has to be noted that since 1992 (when, for the first time, a corporation was charged with the common law offence of gross negligence manslaughter – to be later replaced by the CMCHA), there have been only seven successful prosecutions, all concerning small companies. The CMCHA does not seem to represent a turning point, given the fact that the first conviction for corporate manslaughter goes back to 2011, and a limited number of convictions have been counted so far.[59]

Moreover, the Act has been applied mostly to companies that would have also been successfully convicted under the common law negligence manslaughter through the identification principle. In this regard, it is worth considering the first case of application of corporate manslaughter, which concerned the death of an employee upon whom an unsupported pit collapsed. The defendant was a micro-corporation with eight employees and one director, who was "in total control of the way in which his affairs were managed and in which the work was organised". There was also a macroscopic case of a violation of health and safety at work legislation, given that "it was plainly foreseeable that the way in which the company carried out its operations could produce not only serious injury but death". On this occasion, the conviction of the corporation was clearly facilitated by the fact that a senior individual could be said to embody the company in his actions and decisions.[60]

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[58] Field, S. (2015). The Corporate Manslaughter and Corporate Homicide Act 2007 and the Sentencing Guidelines for Corporate Manslaughter: more bark than bite?. The Company Lawyer, 36 (11), p. 3 et seq.; Field, S., & Jones, L. (2015). Is the net of corporate criminal liability under the Corporate Homicide and Corporate Manslaughter Act 2007 expanding?. Business Law Review, 36 (6), p. 216 et seq.; Field, S., & Jones, L. (2014). Are directors getting away with manslaughter? Emerging trends in prosecutions for corporate manslaughter. Business Law Review, 35(5), p. 158 et seq.; Parsons, S. (2018). The corporate manslaughter and corporate homicide Act 2007 ten years on: fit for purpose?. Journal of Criminal Law, 82(4), p. 305 et seq.; Tombs (fn. 9). See also the Assessment of the Health and Safety Offences, Corporate Manslaughter and Food Safety and Hygiene Offences' Guidelines issued by the Sentencing Council, [Online] Available: https://www.sentencingcouncil.org.uk/publications/item/health-and-safety-offences-assessment-of-guideline (April 4, 2019).

[59] According to the Regulatory Impact Assessment on the Government's Bill issued by the Home Office the enactment of the CMCHA would have lead to an additional 10-13 corporate manslaughter prosecution per year but this did not happen (www.homeoffice.gov.uk). See Summary of corporate manslaughter cases. (2017). [Online] Available: http://readinglists.northumbria.ac.uk/page/summary-of-corporate-manslaughter-cases-april-2017.html (April 2017); Corporate Manslaughter. (November 2017). Workplace Report, 162, p. 14; Field, S. (2019). The Corporate Manslaughter and Corporate Homicide Act 2007 and human rights: Part 1 – has universal protection of the right to life been advanced?. International Company and Commercial Law Review, 30(7), p. 369 et seq.; Hebert, J., Bittle, S., & Tombs, S. (2019). Obscuring corporate violence: Corporate Manslaughter in action. Howard Journal of Crime and Justice, p. 554 et seq.; Roper, V. (2019). Grenfell Tower: criminal charges delayed, but that doesn't mean there won't be justice. [Online] Available: https://theconversation.com/grenfell-tower-criminal-charges-delayed-but-that-doesnt-mean-there-wont-be-justice-113215 (March 12, 2019); Tingle, S. (2020). Is the corporate manslaughter regime now redundant?. [Online] Available: https://www.britsafe.org/publications/safety-management-magazine/safety-management-magazine/2020/is-the-corporate-manslaughter-regime-now-redundant/ (March 25, 2020). See also https://www.healthandsafetyatwork.com/companies-convicted-corporate-manslaughter-act. Among the most recent case law see R. v Wood Treatment Ltd Court of Appeal (Criminal Division), 28 April 2021, [2021] EWCA Crim 618; [2021] 4 WLUK 459, where the judge found that there was no case to answer in respect of manslaughter charges against a company and its managing director as the Crown Prosecution Service had failed in proving a negligent conduct of the defendants which were causally linked to the death of the victims. In this paper see also *infra* fn. 64.

[60] R *v Cotswold Geotechnical Holdings Ltd*[2012] 1 Cr. App. R. (S.) 26 [3] – [33] (*Crown Court*).

Further subsequent cases have basically confirmed the same trend: the prosecution of large corporate defendants remains substantially elusive, with corporate defendants representing micro, small, or at most, medium companies, which could have been prosecuted already with pre-CMCHA regulation.[61]

In two-thirds of the cases of convictions, the corporate defendant was not convicted at the end of a full trial but pleaded guilty, thereby obtaining benefits such as the reduction of the penalty or the dropping of the charges for the statutory offences related to the CMCHA. Furthermore, charges against individual directors have also been generally dropped in exchange for a guilty plea of the company.

In the majority of cases, judges, concerned about not putting the firm out of business by imposing too high fines, have set penalties below the minimum threshold indicated by the 2010 Sentencing Guidelines.[62] The publicity order was only applied in less than a third of the cases and the remedial order was never meted out.

Nevertheless, there have been recent signs which might be interpreted in the direction of a revival of the offence of corporate manslaughter.[63] These include a new sentencing guideline, adopted in 2015, which links the level of the fines to the turnover of the firm and should result in stricter penalties for large companies[64]; more severe penalties meted out towards corporations for health, safety and environmental offences; the first conviction for corporate manslaughter of a medium-large company (R. v. CAV Aerospace Ltd)[65]; and lastly, the first prosecution against a public body (Health and Safety Executive v. Maidstone and Tunbridge Wells NHS Trust).

This last case is of particular interest, even if ending in an early dismissal of the charges, as on this occasion, corporate liability was denied after a careful investigation of the existence of any organisational deficit. Following the death of a woman after giving birth to her child in a hospital for which the Trust was responsible, the CPS claimed that the event was chargeable to the gross negligence of the woman's doctors as well as that of the Trust, which failed to meet its duty of clinical governance by employing someone who was not suitably qualified for the role.

Rejecting this approach, the judge concluded, however, that there was no systemic failure of organisation and management activities. Any error in the appointment process as well as in the general supervision of the staff should have been put into connection with negligent failures committed by specific employees:"That was a one-off failure: it was not a deficiency in the Trust's management and organisation of its activities. It was not systemic".[66]

In our opinion, such a way of thinking seems to exemplify the fact that the introduction of the CMCHA has triggered a slow transformation of the legal culture in the UK, with signs of a new approach to establishing corporate liability for manslaughter beginning to appear. The courts, themselves, have started to move away from the anthropomorphic perspective and to look at management systems across the organisation.

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[61] See, for example, also *R v JMW Farms Limited* [2012] NICC 17 [4] – [20] (*Crown Court of Northern Ireland*). [Online] Available: http://www.courtsni.gov.uk; R v Pyranha Mouldings Ltd and Peter Mackereth (Sentencing remarks) [2015] Lexis Citation 38, [2015] All ER (D) 292 (Mar) (*Liverpool Crown Court*); *R. v Lion Steel Equipment Ltd* [2012] [22] (*Manchester Crown Court*). [Online] Available: https://www.judiciary.gov.uk. But see also Roper (fn. 16) pp. 58-59, who explains the lack of prosecutions of large companies in the light of the fact that in the UK there are mainly small and medium-sized companies.

[62] Davies, N. (2010). Sentencing Guidance: corporate manslaughter and health and safety offences causing death – Maintaining the *status quo*?. Criminal Law Review, 5, p.402; Slapper, G. (2010). Corporate punishment. Journal of Criminal Law, 74(3), p. 181.

[63] Field, S. (2016). Criminal liability under the Corporate Homicide and Corporate Manslaughter At 2007: a changing landscape. International Company and Commercial Law Review, p. 229.

[64]Health and Safety Offences, Corporate Manslaughter and Food Safety and Hygiene Offences'Guidelines. (2015). [Online] Available: www.sentencingcouncil.org.uk. But see the Assessment of these Guidelines published by the Sentencing Council from which the ««extremely low volume» of corporations sentenced under the CMCHA emerges. [Online] Available: https://www.sentencingcouncil.org.uk/publications/item/health-and-safety-offences-assessment-of-guideline (April 4, 2019).

[65] Fidderman, H. (2015). Corporate manslaughter: The most important case to date. Health and Safety Bulletin, 442, p. 9.

[66]R *v Cornish and Maidstone&Tunbridge Wells NHS Trust* (2015) EWHC 2967 at Para 99. [Online] Available: <http://www.manslaughterandhealthcare.org.uk>.

Nevertheless, the liability model under the CMCHA has not yet proven itself successful in practice. Of particular note is that the majority of cases concern the deaths of employees – except for a few prosecutions regarding non-workplace deaths – and that the charges have mainly concerned single events of death rather than incidents with multiple deaths. These have thus involved one-off incidents while no cases have been recorded with regard to industrial disasters.[67]

In other words, up until now, the CMCHA has been essentially applied to health and safety at work matters, and within this field, to classical cases such as the death of a worker falling from the roof which he was repairing, or a worker who became entangled in the gears of the machinery used in the production process.

The CMCHA has not been applied in relation to more complex cases of liability for negligence, such as those related to the exposure of workers to potentially pathogenic agents or in other matters – different from health and safety at work – which, in the light of their interference with the interests of health and safety,

could fall within the remit of corporate manslaughter, such as product safety, consumer health protection and environmental pollution.[68]

6. Conclusions: in search of an efficient model of corporate criminal liability for negligence

Through a comparative analysis of the systems of corporate criminal liability in force in Italy and the UK, the following key points have been revealed.

The Italian legislator had the merit of having imported the logic of compliance programs in the European landscape for the first time, and of assuming the adoption of organisational models as the subjective ascription criterion of corporate liability. Nonetheless, the choice to limit the application of Decree no. 231/2001 to specific selected fields has led to inevitable gaps of protection including, most notably, important areas which are typical of criminal law of risk, but which are excluded from the scope of the Decree.

From a structural point of view, this form of responsibility, even though formally qualified as autonomous, requires an underlying offence to be committed in the interest or to the advantage of the corporation by an individual who has a qualified relationship with the corporation.

Corporate manslaughter, in turn, has a much broader scope than Decree no. 231.Moreover, this accountability model appears to be more autonomous than the Italian one, as it is centred on senior management failure. This element, in theory, is different from the underlying offence to which the Italian legislator anchors corporate responsibility, as it refers to a management failure at the strategic level in the light of which the event of death can be directly charged to the corporation. Nonetheless, the practical difficulties associated with the doctrine of organic identification have re-emerged in the concrete application of the CMCHA.

A consequence emerging from the substantially accessory structure of these accountability models is the fact that they cannot be fully applied in such problematic cases as those typical of criminal law of risk, in which individual liability is difficult to be ascertained but organizational fault should be equally sanctioned.

Indeed, generally speaking, the provision of cumulative individual and corporate responsibilities is appropriate given that negligent corporate offences can be the result of both individual and organizational fault. Nonetheless, there are cases in which corporate liability, if it is structured as hinged on the responsibility of the individual, becomes a blunt weapon.

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[67]A test for the CMCHA could be represented by the case of the tragic burning of the Grenfell Tower, which happened in June 2017 causing the death of 80 people. See https://www.grenfelltowerinquiry.org.uk/; Roper, V. (2019). Grenfell charge delays understandable, but where have all the corporate manslaughter prosecutions gone?. The Company Lawyer, 40 (8), p. 265 et seq.

[68]In this sense see also Roper (fn. 16) p. 75, who states that "The type of prosecutions being brought under the Act is fairly narrow in respect of the type of organization, victim and injury" which could be encompassed in the full potential of the CMCHA; Woodley (fn. 16) p. 39 who, with regard to the chronic obstructive pulmonary diseases due to past occupational exposure to fumes, chemicals and dust, states that even after the entry into force of the CMCHA "deaths from fatal diseases apparently do not even come across the radar of the prosecuting authorities". So it came true what Griffin (fn. 53) p. 166, predicted: "It is likely that prosecutions will be reserved for the most obvious and blatant examples of neglect". More in general, about the risk of a merely symbolic value of the CMCHA see Gobert (fn. 44) p. 414; Wells (fn. 46) *passim*. In June 2021 the inadequacy of the CMCHA led to the presentation of a Corporate Homicide Bill, the text of which is not available yet as it is at the first stages of the debate in the House of Commons: see https://bills.parliament.uk/bills/2928/news.

First, as already stated, in modern corporations it is often difficult to identify the individual offender because of the fragmentation of the production system and the corresponding effect on the roles and related responsibilities within the organisation. Second, in contexts of risk from scientific and technological progress, individual culpability may not arise, since natural persons, unlike corporations, do not have the necessary financial and organisational resources to deal with the sources of risk.

Therefore, both the regimes of responsibility at issue, although they undoubtedly represent steps forward, cannot solve the problem of the elaboration of an efficient model of corporate liability for negligence, and in particular, of corporate liability in contexts of criminal law of risk, as they are always substantially dependent on an offence being committed by an individual.

In particular, bringing to mind the problematic cases mentioned as examples of contexts of criminal law of risk at the beginning of this paper, it is barely possible to ascribe to corporations, using the regulations in question, the damage from occupational exposure to potentially pathogenic agents as well as the events of land contamination deriving from historical pollution.

Emerging from such a context, therefore, is the necessity of a crucial passage for the future of scientific reflection as well as that of the EU criminal policy in the matter of corporate criminal liability. Specifically, this requires the elaboration of a model of autonomous corporate liability, which will make it possible to stigmatise the systemic fault regardless of the individual fault.

Only in this way, can the regulatory potential of corporate criminal liability be enhanced to address the complex phenomena of widespread responsibility, or organised irresponsibility, which typically concerns the hypotheses of negligent causation of harmful events within productive activities related to scientific-technological progress.

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