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The Role of Corporations in Criminal Justice

(5th AIDP Symposium for Young Penalists,
Freiburg, Germany, 22nd–23rd June 2018)

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Edited by

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THE EFFECT-ORIENTED APPROACH IN CRIMINAL PROCEEDINGS AGAINST CORPORATIONS

By Martina Galli[*]

Abstract

One of the main issues about prosecuting corporations is the risk of detrimental collateral effects. In order to avoid such negative social and economic consequences, enforcement authorities are encouraged to reach an agreement with the company (or in any case not to apply the expected interdictory sanctions), whenever this corresponds to the 'public interest'. This 'effect-oriented approach' is becoming widely employed in both practices and legislation of different systems, such as in the US, UK, France and Italy. However, this approach raises some criticism, especially with reference to the principle of equality of all persons before the law. It also seems to put a strain on the principle of the separation of powers. This criticism might be mitigated by both enhancing the concept of 'public interest' and better defining the role of the different penal authorities (the legislator, the prosecutor and the judge) charged with balancing the different interests at stake.

1 Introduction

The metaphoric image of Justice-as-a-Woman, with a sword in one hand and the scales in the other, usually includes a blindfold on the divinity's eyes as a symbol of impartiality and equality.[1] But wearing a blindfold while swinging a sword may lead to unwanted or excessive outcomes. Quite unavoidably, the criminal law enforcement action, and in particular the application of the criminal sanction, is accompanied by collateral effects.

The present work aims to scrutinise the opportunity of adopting an *effect-oriented approach* in criminal proceedings against corporations. After having defined this approach as a particular perspective in which public authorities are called to ground their decisions on the potential of social and economic harm that may follow the company's condemnation or even indictment (2), the analysis will try to explore its penetration in both practices and legislations of different systems, notably in the US, UK, France and Italy (3). Consequently, the attention will be focused on some blind spots of this approach, concerning the *why*, the *when*, the *how* and the *who* (4). Here, some considerations will be made about major critical aspects of this approach, especially regarding the principle of equality of all persons before the law. The *public interest* underlying the choice to renounce prosecution may offer legitimacy to different treatment reserved to companies of certain nature and size. Nevertheless, this concept deserves to be subjected to further reflections by scholars and to

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[1] Mario Sbriccoli, 'La benda della Giustizia. Iconografia, diritto e leggi penali dal Medioevo all'età moderna' in Mario Sbriccoli (ed), *Ordo iuris: storia e forme dell'esperienza giuridica* (Giuffré 2003) 41-95; Adriano Prosperi, *Giustizia bendata. Percorsi storici di un'immagine* (1st edn Einaudi 2008).

a more accurate definition by legislators, in order to both find a theoretical basis to the approach and to orientate the action of the enforcement authorities.

2 The effect-oriented approach: a preliminary definition

Distinguished scholars closely examined the problem of collateral consequences over the years, in particular with regard to natural persons. In the individual context, collateral consequences have been meant mainly in terms of *legal* disabilities imposed by legislatures on the basis of past conviction, but not as part of a criminal sentence (such as loss or restriction of a professional license, ineligibility, loss of voting rights, deportation for immigrants).[2] Nonetheless, the notion of collateral consequences may be intended in a more general sense. Indeed, it indicates all sorts of repercussions that might follow a criminal proceeding or conviction, including social costs stemming from the response to the crime as a *matter of fact* (e.g. social marginalisation, family problems, homelessness, personal sufferance).[3] All these consequences, even though directly touching the person subjected to a criminal charge, may also affect innocent persons whose life is linked to the person convicted, in particular his or her family members[4] or, when the person is a company's individual director, his or her employees.[5] In reality, the problem of social costs, deriving from the conviction of an individual, hardly influences the development of the trial. It rather finds a partial translation in the individualisation of the penalty,[6] the enforcement of the sentence and in possible re-entry educational programs.[7] On the contrary, in the context of legal entities this problem has had a great influence in the development of the trial, as long as both prosecutors and judges are obligated to warn about collateral consequences upon

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[2] Michel Pinard, 'An Integrated Perspective on the Collateral Consequences of Criminal Convictions and Reentry Issues Faced by Formerly Incarcerated Individuals' (2006) 86 B U L Rev 624 (note 1) and 634; Margaret C Love, 'Collateral consequences after Padilla v. Kentucky: From punishment to regulation' (2011) 31 St Louis U Pub L Rev 87; Sandra G Mayson, 'Collateral Consequences and the Preventive State' (2015) 91 Notre Dame L Rev 302; Gabriel J Chin, 'Collateral consequences of criminal conviction' (2017) 18 Criminology, Crim Just L & Soc'y 1.

[3] Mirjan Damaska, 'Adverse Legal Consequences of Conviction and Their Removal: A Comparative Study' (1968) 59 J Crim L C & P S 347 (defining the social consequences of criminal convictions as 'those that attach "on account of societal disapprobation" such as ostracism or refusal to employ individuals with criminal convictions'); Kathleen M Olivares and others, 'The collateral consequences of a felony conviction: A national study of state legal codes 10 years later' (1996) 60 Fed Probation 10; George P Fletcher, 'Disenfranchisement as Punishment: Reflections on the Racial Uses of Infamia' (1999) 46 Ucla L Rev 1895.

[4] Barbara Mulé and Michael Yavinsky, 'Saving One's Home: Collateral Consequences For Innocent Family Members' (2006) 30 NYU Rev L & Soc Change 689; James P Lynch and William J Sabol, 'Assessing the Effects of Mass Incarceration on Informal Social Control in Communities' (2004) 3 Criminology and Public Policy 267–294; Dina R Rose and Todd R Clear, 'Incarceration, Reentry and Social Capital: Social Networks in the Balance' in Jeremy Travis and Michelle Waul (eds), *Prisoners once removed: the impact of incarceration and reentry on children, families and communities* (Urban Institute Press 2003) 313–341.

[5] Mick Woodley, 'Bargaining over Corporate Manslaughter – What Price a Life?' (2013) 77 J Crim L 35.

[6] Andrew Ashworth, *Sentencing and Criminal Justice* (5th edn, Cambridge University Press 2010), 184-185 (presenting arguments against the relevance of the collateral consequences of conviction as mitigating factor).

[7] Pinard (n 2) 649.

the choice to prosecute or not to prosecute a corporation. Criminal justice is called then to take off its blindfold in order to better ponder the effects of a strict application of the law.

By *effect-oriented approach,* we actually refer to a particular perspective in which public authorities are called to ground their decisions in criminal proceedings against corporations on the potential of social and economic harm that may follow the company's condemnation or even indictment. Dealing with companies of a certain size, punitive response hardly remains limited to its principal target or to its inner circle, but ends up having repercussions on a broad public of innocent third parties, like shareholders, workers and the entire community and, in the final analysis, it could have a great economic impact. Not unlike what happens with natural persons[8], collateral effects may result both from *de iure* and *de facto* reactions to misconducts. *De iure* reactions include court-imposed penalties and other punitive measures that may automatically result from a criminal conviction, such as suspensions or debarments from government contracts as a consequence of a condemnation. For some industries, this may make the difference between bankruptcy and survival.[9] The *de facto* collateral effects may accompany the law enforcement action as a practical matter. They include significant costs for the trial and, more importantly, reputational penalties imposed by the market.[10] On the basis of the stigma that derives from prosecution, the market may organise its own punitive response to the crime, for example throughout disinvestment movements or boycotting actions.

The simplest answer to the concern for collateral effects would be declining prosecution. However, criminal justice cannot completely renounce to reaffirm the social values breached by the company's conduct. At the same time, when the community turns from a beneficiary to a victim of law-enforcement, the function of criminal justice goes into crisis. The criminal justice system seems here to be at an *impasse.* Agreements offer a more sustainable solution to this. As long as an agreement normally neither entails condemnation[11] nor compels the company to admit guilt,[12] the corporation avoids debarments and license forfeitures, meanwhile the probability of a market-based reaction is by far mitigated. Besides, even if deferral involves indictment, the indictment is accompanied by the government's assurance

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[8] Sharon E Foster, 'Too big to prosecute: collateral consequences, systemic institutions and the rule of law' (2015) 34 Rev Banking & Fin L 663–664.

[9] Benjamin M Greenblum, 'What Happens to a Prosecution Deferred – Judicial Oversight of Corporate Deferred Prosecution Agreements' (2005) 105 Colum L Rev 1886.

[10] Reputational penalties consist in losses of cash flow that occur when customers and other related parties stop dealing with the offending corporation or change their willingness to pay for the offender's product. Cindy R Alexander, 'On the Nature of the Reputational Penalty for Corporate Crime: Evidence' (1999) 42 JLE 490–491.

[11] Under the U.S. Sentencing Guidelines, a past deferred prosecution will not count toward a defendant's criminal history if there was no finding of guilt by a court and the defendant did not plead guilty or otherwise admit guilt in open court: see U.S.S.G., para 4A1.2 (f) (2016).

[12] Unlike a guilty plea, DPAs and NPAs do not require an admission of responsibility as a necessary procedural step. The acknowledgement of the alleged facts is normally just a potential (even if recommended) content of the agreement. See U.S.S.G., para 4A1.1(c) (2016); Crime and Courts Act 2013, Schedule 17, Part 1, 5 (1). In any case, the acknowledgement of wrongdoing will never be as harsh as a criminal record.

that the firm is cooperating and making amends.[13] Meanwhile, the state gives up punishing and blaming, but may obtain a certain degree of compensation for the violation, reparation to the victims and the company's *compliance* for the future.

3 The expansion of the effect-oriented approach

A balancing exercise between factors for and against prosecution lies at the basis of these agreements and collateral consequences are one of the loads on the scales. An overview of the regulations of some countries allows us to demonstrate this allegation.

In the U.S., the *effect-oriented approach* dominates the literature under the name of 'Arthur Andersen effect'.[14] This expression refers to the negative effects, notably the severe job losses, which resulted from Arthur Andersen's conviction and consequent collapse.[15] By extension it indicates the potential of massive social and economic harm that the prosecution of corporations may cause and it has been indicated as the main reason for lack of prosecution after the financial crisis of 2008.[16] This policy has proponents[17] and detractors,[18] but its impact in practice is undeniable. From Holder's Memorandum for prosecutors of 1999,[19]

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[13] Greenblum (n 9) 1886.

[14] Peter J Henning, 'The Organizational Guidelines: R.I.P.?' (2007) 116 Yale L J Pocket Part 314.

[15] The case is notorious. In 2002, Arthur Andersen was convicted (United States v. Arthur Andersen, No. 02-121 - S.D. Tex. June 15, 2002) for obstruction of justice in connection with its destruction of documents relating to its accounting work for Enron Corporation. Arthur Andersen actively attempted to reach an agreement with the DOJ but refused to admit wrongdoings as a company. In return, the DOJ refused the company's settlement proposal and brought an indictment. Andersen was convicted at trial and was sentenced to pay $ 500,000, on top of the $ 7 million already paid to the SEC. The real punishment, however, was the company's prohibition from auditing public companies, which had devastating consequences. About 28,000 U.S. employees lost their jobs when Arthur Andersen went out of business, and the company's shareholders suffered major losses. See e.g. E Ainslie, 'Indicting Corporations Revisited: Lessons of the Arthur Andersen Prosecution' (2006) 43 Am Crim L Rev 110.

[16] Court E Golumbic and Albert D Lichy, 'The "Too Big to Jail" Effect and the Impact on the Justice Department's Corporate Charging Policy' (2014) 65 Hastings L J 1295; Jake A Nasar, 'In Defense of Deferred Prosecution Agreements' (2017) 11 NYU JL & Liberty 838; Foster (n 8) 656–657; Who Is Too Big to Fail: Are Large Financial Institutions Immune From Federal Prosecution?: Hearing Before the Subcomm. on Oversight & Investigations of the H. Comm. on Fin. Servs., 113th Cong. 6 (2013) <https://www.gpo.gov/fdsys/pkg/CHRG-113hhrg81760/pdf/CHRG-113hhrg81760.pdf> accessed 20 December 2018; Jed S Rakoff, 'The Financial Crisis: Why Have No High-Level Executives Been Prosecuted?', NY Rev of Books B (9 Janunary 2014); Lanny A Breuer, Assistant Att'y Gen., Dep't of Justice, Remarks at the New York City Bar Association (13 September 2012) <https://www.justice.gov/opa/speech/assistant-attorney-general-lanny-breuer-speaks-new-york-city-bar-association> accessed 20 December 2018.

[17] Nasar (n 16) 881; Greenblum (n 9) 1896.

[18] Gabriel Markoff 'Arthur Andersen and the Myth of the Corporate Death Penalty: Corporate Criminal Convictions in the Twenty-First Century' (2013) 15 U Pa J Bus L 797; Russel Morkhiber, Crime without conviction: The Rise of Deferred and Non Prosecution Agreements. A Report Released by Corporate Crime Reporter (2005) 20 (1) Corporate Crime Reporter 1; Golumbic and Lichy (n 16) 1322; Foster (n 8) 685.

[19] Memorandum from Eric H. Holder, Deputy Att'y Gen., to All Component Heads & U.S. Att'ys (16 June 1999).

collateral consequences have been included amongst factors that should generally drive prosecutors in choosing whether to charge or not charge a corporation.

Nonetheless, former Memoranda until Filip's Memorandum of 2008,[20] did not recognise deferral as an option to avoid collateral effects. They simply pointed out that, facing serious and organised violations, declining prosecution could not be the choice even in the presence of collateral harm.[21] The weight of collateral effects changed in the perspective of deferred and non-prosecution agreements, skyrocketing from the year 2004, and which appears fatally linked to the Andersen's effect.[22] The current version of the *Principles of Federal Prosecution of Business Organisation*, as incorporated in the U.S. Attorney's Manual,[23] explicitly recognises the legitimacy of the effect-oriented approach regarding DPA's and NPA's. Here it is suggested that 'when collateral consequences would be *significant*, it may be appropriate to consider a non-prosecution or a deferred-prosecution agreement' as a third way between indictment and declination, with conditions designed to promote compliance with applicable law and to prevent recidivism. Therefore, the present written policy of prosecution assigns to collateral consequences an important weight in the balancing exercise.[24]

However, the question of when collateral consequences become relevant and thus deserve to be put on the scale is left to the discretion of the single prosecutor. The Principles merely speak about *disproportionate* harm (to shareholders, pension holders, employees, and others not proven personally culpable) and say that the consequences should be *significant* with respect to the size and nature of the corporation, but do not determine what *disproportionate* or *significant* means.[25] The uncertainty of the balancing exercise is exacerbated by the fact

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[20] Memorandum from Mark Filip, Deputy Att'y Gen., to All Component Heads & U.S. Att'ys (28 August 2008).

[21] Prosecutors' Memorandums changed throughout the years. However, the Holder, Thomas, and McNulty memoranda sections on collateral consequences remained substantially the same. It was the Filip's Memorandum that widened provisions on collateral consequences by explicit reference to the opportunity to enter a DPA or NPA.

[22] Brandon L Garrett, *Too Big to Jail: How Prosecutors Compromise with Corporations* (Belknap Press 2014) 41, 44, 55.

[23] Dep't Components and U.S. Attorneys, U.S.A.M. paras 9-28.1100 B (2015).

[24] In the HSBC's case, collateral consequences seem to have been the dispositive factor in the DOJ's decision not to charge HSBC. At a press conference announcing the settlement, the Assistant Attorney General Breuer explained that, in case of prosecution, HSBC 'would almost certainly have lost its banking license in the U.S., the future of the institution would have been under threat and the entire banking system would have been destabilized'. Instead, 'our goal is not to bring HSBC down, (not to cause a systemic effect on the economy, it's not for people to lose thousands of jobs'. See U.S. Dep't of Justice, Press Release, HSBC Holdings Plc. and HSBC Bank USA N.A. Admit to Anti-Money Laundering and Sanctions Violations, Forfeit $1.256 Billion in Deferred Prosecution Agreement (11 December 2012) <http://www.justice.gov/opa/pr/2012/December/12-crm-1478.html> accessed 20 December 2018; Golumbic and Lichy (n 16) 1318–1321.

[25] Besides, the Principles of Federal Prosecution of Business Organisation state that in evaluating the relevance of collateral consequences, others factors should be considered in determining the weight to be given to collateral consequences: see Dep't Components and U.S. Attorneys, U.S.A.M. paras 9-28.1100 B (2015).

that judicial supervision over DPA is traditionally non-existent.[26] Indeed, all evaluations lie in the prosecutor's hands, both regarding the choice of the procedure and the conditions of the agreement. In fact, despite some openness to a wider oversight,[27] judges essentially continue to rubber stamp agreements and only ensure that they are in line with the Speedy Trial Act[28]. However, some commentators have recently suggested that judges become guarantors of the minimization of corporate criminal liability's negative externalities, in order to ensure that the interest of justice is best served.[29]

In the UK, the *effect-oriented approach* has not yet had the same resonance. However, following the American model, collateral effects find their place in the *DPA's Code* of 2013. They are mentioned amongst the additional public interest factors' list in last place.[30] Unlike the American Memorandums, the Code does not even make reference to a level of significance or relevance of the collateral effects. Moreover, DPA's Code does not provide any indication about the weight this factor may have in the balancing exercise. Nonetheless, despite the marginal position assigned to collateral consequences, it is always quite possible that this factor ends up orientating the balance in favour of negotiating, even when all the others factors (for example, the seriousness of the offence and the absence of collaboration) tend to be in favour of prosecution.[31] The Code leaves open this option when corresponding to the interest of justice. As is well-known, in the U.K. it is always for the judge to say if a DPA is the appropriate course of action in relation to the circumstances of the case, thereby safeguarding the public interest.[32]

Negotiations between corporations and prosecutors are spreading also in civil law countries. In France, thanks to the new *convention judiciaire d'intérêt public*, introduced in 2016, [33] the company which enters an agreement at the prosecutor's conditions is able to avoid condemnation and inscription in bulletin n° 1 of the criminal record. Since this inscription

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[26] The Speedy Trial Act does not specify the terms of the court's approval. Therefore, judges tends to rubber stamp requests, approving the agreements the same day they are presented for approval. See Mike Koehler, 'Measuring the Impact of Non-Prosecution and Deferred Prosecution Agreements on Foreign Corrupt Practices Act Enforcement' (2015) 49 UC Davis L Rev 505; Brandon L Garrett, 'Structural Reform Prosecution' (2007) 93 Va L Rev 893.

[27] Patricia Jo, 'The "Rakoff Effect": The Growing Trend of Heightened Judicial Scrutiny of Government Settlements with Corporate Defendants' 7, <http://socialaw.com/docs/default-source/judge-william-g.-young/patricia-jo--spring-2013-paper.pdf?sfvrsn=4> accessed 20 December 2018; --, Criminal Law – Separation of Powers – D.C. Circuit Holds That Courts May Not Reject Deferred Prosecution Agreements Based on the Inadequacy of Charging Decisions or Agreement Conditions, (2017) 130 Harv L Rev 1048.

[28] Mary Miller, 'More Than Just a Potted Plant: A Court's Authority to Review Deferred Prosecution Agreements Under the Speedy Trial Act and Under Its Inherent Supervisory Power' (2016) 115 Mich L Rev 135.

[29] Greenblum (n 9) 1901 (2005); Nasar (n 16) 884; Golumbic and Lichy (n 16) 1344.

[30] Deferred Prosecution Agreements Code of Practice. Crime and Courts Act 2013 (DPA's Code) section 2 para 2.8.2 (vii).

[31] DPA's Code, section 2 para 2.6 (vii).

[32] Crime and Courts Act 2013 Schedule 17 paras 7-8.

[33] The convention judiciaire d'intérêt public (CJIP) was introduced in art 41-1-2 of the French code of criminal procedure (CPP) by the article 22 of the law of 9th December 2016, n. 2016-1691, better known as 'Sapin II law'.

normally results in debarment from public contracts,[34] the conclusion of a *convention* may mean side-stepping the company's death. The law provides that the judge must validate the agreement to the condition that corresponds to public interest.[35] However, quite surprisingly, the law does not define the criteria that may orientate the prosecutors' choice and neither the *public interest* that the judge should verify. The weight of collateral consequences in the balancing exercise remains thus substantially undetermined.[36] Nevertheless, practice suggests a certain valorisation of this factor. In the *conventions* concluded in the last months by some big corporations, many factors would have suggested to prosecute them,[37] as long as the offences were serious and there was very little (or any) cooperation. However, these negative factors where finally considered only with respect to the amount of penalty (the '*amende d'intérêt public*') and did not prevent the conclusion of the *convention*. The reading of the agreements – where reference is made to the corporations' dimension and the number of employees – suggests that collateral consequences, such as serious job losses, played an important role both in the conclusion and validation of the *convention*.

The Italian situation is quite exceptional since the mandatory prosecution principle applies (article 112 Italian Constitution)[38] and the effect-oriented approach finds quite a narrow window of application in the field of negotiated justice[39]. Nonetheless, it finds a precise legislative recognition in connection with both the moment of the penalty individualisation

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[34] Art 45, ordonnance n° 2015-899, 23 juillet 2015.

[35] Art 41-1-2, II, al. 2, CPP.

[36] Antoine Garapon, 'État du debat actuel en France: à propos de la loi Sapin-II' in Camilla Beria d'Argentine (ed), '*Criminalità d'impresa e giustizia negoziata*' (Giuffré 2017), 117; Martina Galli, 'Une justice propre aux personnes morales. Reflexions sur la convention judiciaire d'intérêt public' (2018) 2 RSC 359; Martina Galli, 'Giudicare l'avvenire. Uno studio a partire dalla convention judiciaire d' «intérêt public»' (2018) 3 Riv it dir proc pen 1285; Etienne Vergès, 'La procédure pénale hybride' (2017) 3 RSC 579.

[37] All the conventions concluded by HSCB Private Bank (Suisse), Sas Kaefer Wanner, Sas Set Environnement, Societé Générale SA are published on the official site of the Agence française anticorruption (AFA), <https://www.economie.gouv.fr/afa> accessed 20 December 2018.

[38] According to art 112 of the Italian Constitution, '*[t]he public prosecutor has the obligation to institute criminal proceedings*'. The principle of mandatory prosecution represents a theoretical obstacle to the introduction of agreements on the model of DPAs and NPAs (see Vittore D'Acquarone and Riccardo Roscini-Vitali, 'Sistemi di diversione processuale e d.lgs. 231/2001: spunti comparativi' (2018) 2 Resp soc amm enti 123–146). Nonetheless, informal settlements are becoming widely used. In particular, they take place either before the entity's indictment or the formal dismissal of a charge. In the absence of precise legislative conditions for dismissal and in the lack of any judicial oversight, prosecutors exert their power with broad discretionality. See Rosa Anna Ruggiero, *Scelte discrezionali del pubblico ministero e ruolo dei modelli organizzativi nell'azione contro gli enti* (Giappichelli 2018).

[39] The impact of this approach in the field of negotiated justice is instead unclear. Some recent studies (see Francesca Ruggieri, 'Reati nell'attività imprenditoriale e logica negoziale. Procedimenti per reati d'impresa a carico di persone ed enti tra sinergie e conflitti' (2017) 3 Riv it dir proc pen 921–945) have enlightened that the concern for collateral effects' seems to influence, on the one hand, the implementation of formal negotiated justice tools (in particular, the '*patteggiamento*'), and, on the other hand, the development of informal settlements between prosecutors and corporations. However, since this subject remains broadly unregulated and the decisions concerning discharges are not accessible, it is difficult to objectively estimate the influence of the harmful effect problem on the pragmatic choices of prosecutors.

and the adoption of a precautionary measure. Indeed, this approach can be clearly traced within the field of 'alternative sanctions' against corporations, and in particular in articles 15 and 45 of legislative decree n. 231/2001 on the '*commissariamento giudiziale*'. [40] Here the law asks the judge not to adopt a disqualification measure giving rise to interruption of the corporate's activity if this may cause *relevant* consequences on occupational levels or a *serious* prejudice to the community, considering the company's dimension, the local economic conditions and the nature of the company's activity. *In lieu* of the interdictory sanction (or precautionary measure) application, the judge orders the entity's activity to continue and to be run by a temporary receiver for a period amounting to the duration of the disqualification. Therefore, the law provides that the interest in avoiding collateral consequences must always prevail over punishing, even if it is always the task of the judge that determines whether a consequence is relevant or a prejudice is serious. This approach implies the respect of the general principle of proportionality and gradualism in the choice of both penal sanctions and preventive measures, on the basis of its repercussions on public social and economic interests. In this respect, the approach also permeates other provisions dealing with the choice of the best preventive measure to apply to corporations involved in criminal activity (see e.g. the new 'controllo giudiziario' provided in the new article 34bis of the 'Codice Antimafia', which guarantees the business integrity of the company)[41].

4 The *why*, the *when*, the *how* and the *who* of the approach

The effect-oriented approach has penetrated both practices and legislations of different systems. The evaluation of collateral effects influences public authorities' decisions against corporations. However, much uncertainty affects this approach. Quite apart from the risk of a criminogenic result and the problem of ensuring the effective compliance with the law, four issues in particular should be scrutinised: the *why*, the *when*, the *how* and the *who*.

As for the *why*, we have said that the pursuit of big corporations might have important collateral consequences. However, as the American memorandums point out, almost every conviction of a corporation, as well as almost every conviction of an individual, might have an impact on innocent third parties.[42] The mere impact on third parties may not function as legitimacy for the different treatment reserved to companies of certain nature and size, which has nonetheless implications on individuals whose life is somehow related to the corporation's activity. The necessity to ground such different treatment between different categories of persons on more solid foundations arises. The presence of a *public interest* in avoiding side-effects of the penalty – as the *ratio* underlying the effects-oriented approach – seems capable of covering this role and mitigating major criticism raised by the 'too big to jail' attitude.

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[40] Carlo Piergallini, 'I reati presupposto della responsabilità dell'ente e l'apparato sanzionatorio' in Giorgio Lattanzi (ed), *Reati e responsabilità degli enti* (2nd edn Giuffré 2010) 233; Giorgio Fidelbo and Fabio Lattanzi, 'Le misure cautelari' in Giorgio Lattanzi (ed), *Reati e responsabilità degli enti* (2nd edn, Giuffré 2010) 562.

[41] Teresa Bene, 'Dallo spossessamento gestorio agli obiettivi di stabilità macroeconomica' (2018) Arch Pen - Speciale Riforme 383.

[42] Foster (n 8) 710–711.

Nevertheless, the concept of *public interest* lies quite undetermined. In our view, it marks a turning point where collateral consequences are not only unfair and unjust, but also *unsustainable* as they negatively affect the future development of an entire community. Thus, the different treatment does not stem only from the extent of the social harm, which may reach a systemic dimension, but also from its duration, corresponding to the time that a certain community (that could be local, national or even global) needs to recover and re-establish previous levels of wealth and employment. But these are all just some preliminary thoughts and we hope that future studies by legal scholars will be able to unravel the meaning and significance of this approach to further results.

The *why* opens the question of *when* collateral consequences should be taken into account when assessing whether and how to prosecute a corporation. None of the regulations analysed adopts a system of thresholds in order to orientate public authorities' activities, and does not even limit the effects-oriented approach to public-interest entities as outlined in legislations.[43] The impact of collateral effects and the necessity to avoid them cannot but being evaluated on a case-by-case basis, and hence major evaluations should be left to the enforcement authorities. A general reference framework provided by the legislator or by governmental authorities may help penal actors to orientate their decisions and to ensure a consistent application of the law. Sometimes, like in the US and in Italy, an evaluation framework is given. However, the criteria adopted remain rather generic, given that legislations make reference at most to wide concepts like the *relevance* or *seriousness* of the collateral effects, to be assessed on the basis of the company's dimension, the local economic conditions and the nature of the activity. If we agree that this approach is geared towards a problem of *sustainability* of the criminal sanction, the parameter of the evaluation should include, in addition to the extension and the weight of collateral consequences, also the time that the system should invest in order to reabsorb the collateral effects.

The question of *how* follows right after. When collateral consequences cover a public interest, it remains uncertain *how* they should factor into the balancing exercise. Are they just one of the weights on the scales or can they counterbalance on their own the interest in prosecuting and punishing? The problem arises in particular in the field of negotiated justice. In our opinion, collateral consequences should be the key factor when assessing whether or not to enter an agreement, while other factors (i.e. co-operation, the existence of a proactive compliance programme, a lack of history of a similar conduct) should influence the terms of the agreement, in particular regarding the payment of a financial penalty and the prosecutors' cost.

The final issue addresses the *who*, namely which actor is the best qualified to determine how and when collateral effects should have a bearing on criminal proceedings. Potential concerns about separation of powers thus emerge. Major worries raised in legal scholarship regard the transformation of corporate justice system into a regulatory regime run by

[43] In the EU, the Public Interest Entities (PIEs) are defined by article 2(13) of the Directive 2006/43/EC, 2006 OJ L157/ 87–107.

prosecutors' discretion.[44] The risk that collateral consequences may be used as a sort of bugbear to neutralize judicial control is tangible. A judicial control over prosecutors' choices seems instead to be desirable: the judge should be in the position to check whether the prosecutor and corporate defendant's fear of collateral consequences is well-founded, in order to guarantee that the different treatment finds a rational justification. Taken to the extreme, this line of reasoning would lead not only to assign the judge the role to ensure that the deferral mechanism is not abused[45] (and thus the power to reject an agreement when unfounded or to change its conditions when unfair), but also to stop the trial when catastrophic consequences might follow.

The separation of powers concern applies also the other way round. Indeed, the judge runs in a sensitive area, where his or her activity is likely to interfere with the prosecutor's charging decision or with the evaluations made by the legislator. Therefore, the judicial discretion deserves to be properly limited. That being said, it is difficult to articulate the precise contours of the court's authority. One possible solution could be to restrict the exercise of judicial discretion to the estimation of the *significance/relevance/seriousness* of the harm to the public[46]. In so doing, the judge, actually excluded from the proper balancing exercise, would be charged only to verify that the probability, the extension and the duration of collateral consequences warrant the renunciation to punishment. However, we are aware that this is only a partial solution to the problem, as long as it does not prevent the judicial power from trespassing its functions and attributions. In any case, the concern of the separation of powers seems to be inextricably linked to the definition of the concept of *public interest.*

5 Conclusions

The comparative analysis shows the emergence of a particular approach, which leads to the interruption of the ordinary 'criminal sequence'[47] (commission of a crime–prosecution–sanction) when entailing non-sustainable effects, in terms of social and economic losses. Some may describe the effect-oriented approach as a victory of the market and the economic prerogatives upon criminal justice and the rule of law, and the absence of such an approach in the individual context may confirm that view. However, from another angle, this approach could be regarded as the attempt of the criminal justice system to counteract the

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[44] Jennifer Arlen, 'Prosecuting Beyond the Rule of Law: Corporate Mandates Imposed Through Deferred Prosecution Agreements' (2016) 8 J Legal Analysis 192, concluding that DPAs are 'inconsistent with the rule of law'; Wulf A Kaal and Timothy A Lacine, 'The Effect of Deferred and Non-Prosecution Agreements on Corporate Governance: Evidence from 1993–2013' (2014) 70 Bus Law 1.

[45] Greenblum (n 9) 1901.

[46] Judges are thus free to determine the criteria to fulfil these standards of relevance; however, they should commit themselves to justify the choice in the light of the requirement of 'universalizability' of judicial decisions. See Michele Taruffo, 'La giustificazione delle decisioni fondate su standards' in Paolo Comanducci and Riccardo Guastini (eds), *L'analisi del ragionamento giuridico. Materiali ad uso degli studenti,* Volume II (Giappichelli 1989) 340; Neil MacCormick, 'Universalisation and Induction in Law' in Chiara Faralli and Enrico Pattaro (eds), *Reason in Law: Proceedings of the Conference Held in Bologna,* 12-15 December 1984, Vol I (Giuffré 1987).

[47] Alberto Di Martino, *La sequenza infranta. Profili della dissociazione tra reato e pena* (Giuffré 1998).

market's autonomous sanctioning capacity, when the latter interferes with objectives of justice. By preventing a disproportionate reaction to the crime, which might lead to excessive social costs, criminal justice appears to reveal a human side; a human side that the market seems instead incapable to show, by continuing to punish blindly and brutally.

Furthermore, whilst this approach leads to the waiver of the penalty intended in the classic sense (the pronunciation of a condemnation and the imposition of a criminal sanction for the committed crime, in order to guarantee retribution and deterrence), it does not imply the renunciation to the criminal law's mission of orienting social behaviours and protecting society from the crime, even through a different method of positive exemplarity and compliance. In this sense, it discloses and reassembles the original ambivalence with the idea of a criminal liability consisting in the fact that corporations are aggregates of innocent stakeholders who unfairly suffer from a criminal investigation, indictment, and conviction, but serious consequences must result from corporate deviance[48].

Nonetheless, while being desirable in its purposes and results, the effect-oriented approach entails some crucial concerns. The basic issue is to find solid legitimacy to the breach of the principle of equality of all persons before the law. The concept of *public interest* seems to be a good candidate to act as legitimacy, but it deserves to be subjected to further in-depth analysis by legal scholars and to more accurate definition by the legislators[49], in order to assure that Justice, bandage off, continues to act in respect of its fundamental principles.

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[48] William S Laufer, *Corporate bodies and guilty minds: the failure of corporate criminal liability* (The University of Chicago Press 2006) 7.

[49] Brandon L Garrett, *'The Public Interest in Corporate Settlements'* (2017) 58 BCL Rev 1483.

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