

DE FACTO OFFICE-HOLDER IN CORPORATIONS AND THE EXTENSION OF CRIMINAL LIABILITY

Apstrakt

The paper addresses the concept and identifying criteria of the de facto office-holder in Italian corporate criminal law, analyzing the evolution of the formal, functional, and mixed theories developed to determine when the actual exercise of managerial functions may give rise to criminal liability. It then explores the relationship between the extension of subjective qualifications and the constitutional principle of legality. While Article 2639 of the Italian Civil Code specifically equates de jure and de facto office-holders in corporate offences, Italian courts have extended its application to insolvency offences despite the absence of an explicit statutory provision. The paper argues that this judicial approach, although aimed at ensuring effective protection against corporate misconduct, risks conflicting with the prohibition of analogia in malam partem and the constitutional guarantees of legality. It also examines the recent reform proposal, which sought to specially regulate de facto office-holders in insolvency offences, arguing that legislative intervention would represent a reasonable solution to reconcile effective enforcement with the principle of legality in Criminal law.

Key words: *De facto office-holder, special offenses, corporations crime, insolvency crimes, principle of legality*

1. De Facto Office-Holder and the Judicial Extension of Criminal Liability: Criteria Developed by Italian Scholars and Judiciary

Within the Italian criminal justice system, criminal laws are, in certain cases, addressed only to specific categories of individuals. Offences committed in these cases are commonly referred to as *special offences*. This category presupposes a particular relationship between the class of persons to whom the criminal law is addressed and the legal interests protected by the relevant

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provision. More specifically, such individuals must be entrusted with functional duties in relation to the protected legal interest¹⁾.

For the purpose of identifying the subjects bound by criminal provisions establishing *special offences*, Italian law sometimes refers to legal roles derived from branches of law outside the criminal sphere, while in other cases it relies on the factual performance of particular functions. Under this second approach, the actual exercise of a given role is treated as equivalent to the formal holding of the corresponding legal position and its related powers. Consequently, where all the constituent elements of a criminal offence are satisfied, the individual assumes both criminal liability and the corresponding civil obligations arising from the offence.

One of the areas in which personal qualifications are particularly significant is that of corporate criminal offences and insolvency offences. The latter were originally governed by the former Italian Bankruptcy Law and have now been incorporated into the Italian Code of Business Crisis and Insolvency.

The need to anchor criminal liability to clear and well-defined criteria, consistent with the constitutional principles of legality²⁾ has led both legal scholarship and the Italian courts to develop a number of theories aimed at identifying the constitutive elements of an “office-holder position”³⁾. On the one hand, these theories seek to prevent the imposition of criminal liability based solely on the formal holding of an office or status. On the other hand, they aim to identify the substantive characteristics of the functions actually performed, thereby addressing situations in which the formal holder of a legal position does not, in reality, exercise the powers attached to that office, while such powers are effectively exercised by another individual.

The most significant interpretative difficulties have arisen in relation to corporate criminal offences. Corporate governance frequently involves a plurality of actors and, particularly in large companies, management powers are formally vested in a collegiate body. Consequently, the allocation of criminal responsibility requires determining whether liability should follow the formal allocation of corporate offices or the actual exercise of managerial functions⁴⁾.

According to the first approach, commonly referred to as the formal theory, the identification of the qualified subject must necessarily be based on the legal criteria established by the Italian Civil Code.

1) On the definition of *special offences* in corporate criminal law, see A. Alessandri, S. Seminara, *Diritto penale commerciale*, Giappichelli, Torino, 2018, 43 ff.

2) Art. 25 (2) of the Italian Constitution: «No one may be punished except pursuant to a law that was in force before the offence was committed».

3) Recently, Cassazione Penale, Sec. III, 14 November 2024, n.41891, Cassazione penale, 4/2025, 1324-1326.

4) For a comprehensive analysis of the *de facto* director, see R. Bricchetti, L. Pistorelli, *La bancarotta e gli altri reati fallimentari*, Giuffrè, Milano, 2017, 18 ff.

According to this approach, the person who bears criminal responsibility is exclusively the individual who holds the specific qualification expressly identified by the criminal provision. In this way, it is argued that the requirements of legal certainty and the strict interpretation of criminal rules are satisfied, in full compliance with the principle of legality enshrined in Article 25(2) of the Italian Constitution.

Under this perspective, criminal liability must be attributed solely to those individuals who are formally vested with the functions to which the criminal provision refers. Therefore, attributing a criminally unlawful act to persons other than those who have formally been entrusted with specific functions and the related powers would amount to an analogy *in malam partem*, which is prohibited in criminal law by Article 25(2) of the Italian Constitution, as further affirmed at the statutory level by Article 1 of the Italian Criminal Code and Article 14 of the Preliminary Provisions to the Civil Code⁵⁾.

The formal theory is grounded on the imperative need to comply with the principle of legality. Nevertheless, its application may produce outcomes inconsistent with the principle of personal criminal responsibility whenever the formal attribution of a specific function is not accompanied by the actual exercise of the powers inherent to that function, which are instead performed by third parties. In such circumstances, the application of the formal approach may result in a violation of the principle of culpability, even in its minimum and fundamental dimension, namely the prohibition of liability for another person's conduct.

In the field of corporate criminal offences, the identification of criminally liable individuals, although necessarily based on the prior determination of the specific qualifications established by the legislature within the relevant non-criminal legal framework, cannot exempt the interpreter from the rigorous application of the principles set forth in the landmark judgments of the Italian Constitutional Court N. 364/1988⁶⁾ and 1085/1988⁷⁾. These decisions established that the existence of the psychological element of the offence (*mens rea*) constitutes an indispensable requirement of criminal liability, particularly with regard to the most significant elements of the offence upon which the wrongfulness of the conduct is centered, in light of the prohibition of strict liability in criminal law.

The formal theory is therefore opposed by the substantive-functional theory, according to which the person bearing criminal responsibility is not necessarily the individual who formally holds the qualification provided for by the criminal provision, but also the person who, in practice, performs the typical functions associated with that qualification and exercises the corre-

5) Article 14 of the Implementing Provisions to the Italian Civil Code **establishes the general admissibility of** analogical interpretation within the Italian legal system, with the exception of criminal law and so-called exceptional statutes: "*Criminal laws and those which constitute exceptions to general rules or to other laws shall not apply beyond the cases and circumstances expressly provided therein.*"

6) Italian Constitutional Court, No. 364/1988, in www.giurcort.org.

7) Ibidem.

sponding powers and duties. According to this approach, therefore, an office-holder position may reveal itself to be *de facto* in relation to an individual who, although lacking formal investiture, effectively performs the functions and exercises the powers characterizing that legal position. Since such individuals perform the functions associated with that position, they become the recipients of duties whose breach is criminally relevant because it either causes harm (*offences of result*) or is capable of causing harm (*offences of danger*) to the legal interests protected by the criminal provision⁸⁾.

Adopting this interpretative approach makes it possible to avoid imputations based on “positional liability”, namely forms of responsibility that are fundamentally incompatible with the constitutional principle of culpability. Where the elements of a criminal offence are objectively fulfilled, the mere fact that an individual holds a role cannot, by itself, justify criminal liability. Otherwise, the risk would be to impose criminal blame not for conduct personally committed by the individual, and therefore not for “one’s own act”, but merely because of the role assumed within the corporation.

The substantive-functional theory is therefore based on overcoming a purely formal and legalistic approach – criminal responsibility is founded on the actual performance by the agent of the functions associated with the relevant qualification, on the assumption that, in the context of *special offences*, substantive reality should prevail over a merely formal designation⁹⁾. Accordingly, criminal liability may arise only where the “qualified” subject actually and concretely exercises the powers and duties that the relevant non-criminal legal provisions confer upon that position and to which the qualification is attached¹⁰⁾.

Finally, an intermediate position between the two theories is represented by the mixed theory, according to which both the normative element and the substantive element must be taken into account. According to this view, while the substantive-functional dimension plays a fundamental role, it must be combined with the formal legal element, thereby avoiding presumptions of criminal liability while ensuring compliance with the principle of culpability.

8) A. Rossi, *Illeciti penali e amministrativi in materia societaria*, in: *Trattato di diritto penale. Parte speciale* (eds. C.F. Grosso, T. Padovani, A. Pagliaro), Giuffrè, Milano, 2012, 30 ff, 56,57.

9) The concept of the ‘sphere of competence’ within which the individual operates therefore comes into play, as it both defines and limits the scope of the individual’s criminal liability. On this issue, see S. Canestrari, L. Cornacchia, G. De Simone, *Manuale di diritto penale. Parte generale*, Il Mulino, Bologna, 2017, 195 ff.; E. Amati-L. Baron, *I soggetti attivi*, in: *Diritto penale dell’economia*, II (eds. A. Cadoppi, S. Canestrari, A. Manna, M. Papa, UTET, Torino, 2017, 1665 ff.

10) A. Pagliaro, *Problemi generali del diritto penale dell’impresa*, *Indice penale*, 1985, 17.

2. The Express Recognition of De Facto Criminal Liability in Corporate Offences: Article 2639 of the Italian Civil Code

Today, this debate may be considered definitively resolved following the introduction of Article 2639 of the Italian Civil Code by Legislative Decree No. 61 of 2002, entitled “Extension of Subjective Qualifications”. This provision expressly equated the criminal liability of individuals formally vested with a specific qualification with that of persons who, despite lacking such formal status, continuously and significantly perform the same functions. The Italian Civil Code thus enshrines the principles of the *functional* theory by providing that a person who, in practice, performs the functions typically associated with the office of director is to be treated as equivalent to a formally appointed director, even in the absence of a valid formal appointment.

However, this provision expressly refers only to the offences set forth in Title XI of Book V of the Italian Civil Code, thereby excluding insolvency offences from the scope of application of the relevant rule¹¹⁾. Nevertheless, Italian case law has traditionally adopted a liberal interpretation of the provision, applying it to bankruptcy offences as well. Upon closer examination, such a liberal interpretation represents one of the areas of criminal law in which the so-called “crisis of legality” becomes particularly evident, resulting from *in malam partem* interpretative approaches adopted by the judiciary, whose function has increasingly assumed a “supplementary” character in relation to the legislative role exclusively attributed to the lawmaker¹²⁾.

The provision establishes an equivalence between the criminal liability of de jure and de facto office-holders, thereby putting an end to a situation characterized by profound uncertainty and by the opposition between two conflicting approaches. On the one hand, Italian scholars had traditionally relied on the prohibition of analogy *in malam partem* in criminal law and denied legal relevance to the factual performance of corporate functions for the purpose of attributing criminal responsibility. On the other hand, case law had tended to equate the actual exercise of corporate functions with formal appointment¹³⁾.

The Civil Code therefore codifies the principles underlying the functional theory, providing that the qualification of a person formally appointed

11) Art. 2639(1) of the Italian Civil Code: “«For the offences provided for in this Title, any person who is formally vested with the relevant status or who holds the function provided for by civil law shall be treated as equivalent to both (I) any person who is required to perform the same function under a different legal designation and (II) any person who continuously and significantly exercises the typical powers associated with such status or function».

12) E.g., on the crisis of the principle of legality in criminal law, see G. Fiandaca, *Legalità penale e democrazia*, *Quad. Fior.* 2007, 1251 ss.; D. Pulitanò, *Crisi della legalità e confronto con la giurisprudenza*, *Riv. it. dir. proc. pen.* 2015, 29 ff.; F. Palazzo, *Legalità penale: considerazioni su trasformazione e complessità di un “principio fondamentale”*, *Quad. Fior.* 2007, 1279 ff.

13) Cass. pen., Sez. III, 8 maggio 1964, in *Cass. pen. Mass. Ann.*, 1965, 131; Cass. pen., Sez. III, 16 novembre 1994, in *Riv. trim. Dir.Pen.Ec.*, 1996, 689.

as director is equivalent to the situation in which the actual exercise of the functions typically associated with that qualification follows a formal and valid appointment. The relevant provision is contained in the first paragraph, according to which the “person formally vested with the qualification or holder of the function provided for by civil law is equated both with the person required to perform the same function under a different qualification and with the person who continuously and significantly exercises the typical powers inherent in that qualification or function.”

The provision applies to the offences established under Title XI of Book V of the Italian Civil Code, explicitly referring to the “offences provided for in this Title.”

In judicial practice, however, the explicit reference solely to the figure of the director has not prevented the application of the provision also to de facto office-holder doctrine such as those of statutory auditor, the official responsible for preparing corporate accounting documents, and statutory audit firm or auditor, with the aim of avoiding impunity for conduct carried out by such individuals despite the absence of a formal appointment.

Therefore, while linking the criminal liability of “de facto subjects” to criteria specifically identified by the reforming legislature ensures greater legal certainty and a stricter compliance with the principle of legality—particularly when compared with the interpretative uncertainty existing prior to the reform—the adoption of “flexible” interpretations by the judiciary therefore make a further legislative intervention desirable, with the aim of regulating also the de facto exercise of the aforementioned functions. Only through such intervention can a rigorous compliance with the principle of legality and its corollaries—namely the principle of strict interpretation of criminal provisions and the prohibition of analogy—be ensured. These principles are intended to safeguard individual freedoms even before the requirement of legal certainty.

It should nevertheless be noted that the assumption of de facto roles by statutory auditors, statutory auditors responsible for the legal audit of accounts, and officers responsible for preparing corporate accounting documents in relation to offences under company and insolvency law is less frequent than the case of the de facto director. Moreover, such situations arise only in specific circumstances, namely where there are irregularities or invalidities affecting the appointment, or where the individual has subsequently forfeited the relevant office. Unlike the figure of the de facto director, who exercises managerial powers and whose existence may therefore be inferred precisely from the actual performance of functions associated with the relevant qualification, the aforementioned positions involve activities that can hardly be undertaken in the absence of a formal appointment.

Two indispensable requirements must characterize the de facto exercise of managerial functions in order for an individual to be held responsible for conduct attributed to them despite not formally holding the corresponding legal qualification: the “continuity” and the “significance” of the exercise of

the typical powers inherent in the relevant function or qualification. These two requirements must be jointly satisfied¹⁴⁾.

“Continuity” constitutes a quantitative and temporal criterion and requires that the exercise of functions is not merely episodic or occasional, but is instead repeatedly carried out over time, even if limited to only some of the functions typically associated with the relevant qualification. “Significance”, on the other hand, has a qualitative dimension and concerns the nature of the functions actually performed. Such functions must reflect the typical powers inherent in the relevant office—or at least part of them—and must not consist of merely executive tasks, activities of marginal importance, or purely ancillary duties.

Among the powers considered “significant” is the power to represent the company vis-à-vis third parties, which entails the external manifestation of the company’s will. Such powers are typical of senior corporate positions and managerial functions and constitute the criterion distinguishing them from acts of mere interference, which do not fall within the scope of Article 2639 of the Italian Civil Code.

For the purpose of identifying a de facto office-holder, however, “exclusivity” of the function performed does not constitute an essential requirement. Therefore, a de facto subject cannot avoid liability merely because other individuals also perform functions typical of the corresponding legal position, even where, within the corporate structure, there are de jure individuals who simultaneously perform the corresponding functions deriving from their formal appointment.

From an evidentiary perspective, proof of the actual exercise of corporate management activities must be rigorous. The court must ascertain the existence of “indicative elements” that are not merely circumstantial, but rather demonstrate the organic integration of the individual within the corporate structure in a managerial capacity, taking into account the relationships established with employees, suppliers, and customers in any sector of business management. Such assessment is not subject to review before the Supreme Court provided that it is supported by adequate and logically consistent reasoning.

The regulatory framework established by this provision therefore makes it possible to precisely identify the individuals criminally liable for corporate offences regardless of the existence of a formal appointment, including cases involving an invalid, irregular, or ineffective appointment due to the expiration of the relevant mandate. Moreover, with specific regard to the regulation of the de facto office-holder, this framework is consistent with the constitutional principle of culpability.

The principle of personal criminal responsibility requires that criminal blame be based on “personal culpable responsibility for one’s own conduct”, as established by the landmark decision of the Italian Constitutional Court

14) Among the others, see M. Gambardella, *Condotta economiche e responsabilità penale*, Giappichelli, Torino, 2020, 53 ff.

No. 364/1988. This principle does not merely prohibit liability for another person's act; rather, it requires that criminal attribution—whether based on intent or negligence—presupposes conduct resulting from the individual's own autonomous choices and that the harmful or dangerous event is both causally and subjectively attributable to the conduct performed by that individual.

3. The Extension of Subjective Qualifications under Article 2639 of the Italian Civil Code to Insolvency Offences

A further area in which Article 2639 of the Italian Civil Code has been subject to judicial interpretations extending beyond its literal wording concerns the criminal provisions contained in the former Bankruptcy Law prior to the entry into force of the Italian Code of Business Crisis and Insolvency (*Codice della Crisi d'Impresa e dell'Insolvenza*).

In particular, the relevant offences concern personal bankruptcy (*bancarotta propria*) committed by the entrepreneur “declared bankrupt” pursuant to Article 216(1) of the Bankruptcy Law (now Article 322(1)(a) of the Code of Business Crisis and Insolvency), as well as corporate bankruptcy (*bancarotta impropria*) under Article 223(1) of the Bankruptcy Law (now Article 329(1) of the Code of Business Crisis and Insolvency), namely offences committed by individuals other than the entrepreneur, such as directors, general managers, statutory auditors, and adjusters of companies.

Indeed, not only has the provision been extended in relation to corporate offences in which the active subjects are different from those performing managerial functions, but, according to a well-established line of case law based on the need to avoid gaps in legal protection, the provision was also applied to insolvency offences¹⁵). Thus, while acknowledging the autonomy of insolvency criminal law from corporate criminal law, the Italian Supreme Court (*Corte di Cassazione*) considered the exclusion of the criminal liability of the de facto director for insolvency offences to be “unreasonable”, on the assumption that equivalent liability had been established on purpose for corporate offences.

In some decisions, the courts further stated that such interpretative reasoning was consistent with the incorporation of previous judicial developments of the legislative reform, since the new wording of Article 2639 of the Italian Civil Code did nothing more than specifically codify a practice already consolidated by case law, which had consistently applied bankruptcy offen-

¹⁵*Ex multis*, Cass. pen., Sez. V, 20 giugno 2012, n. 39535, in *C.E.D. Cass.*, n. 253363; Cass. pen., Sez. V, 22 novembre 2007, n. 46962, *ivi*, n. 238893; Cass. pen., Sez. V, 6 febbraio 2020, n. 12912. In the aftermath of the reform, the issue arose as to whether the provision could be extended to bankruptcy offences. A. Lanzi, *Il nuovo reato di bancarotta impropria societaria*, *Il Fisco*, II, 2002, 7393 ff.

ces to the de facto entrepreneur even before the legislative amendment was introduced¹⁶⁾.

Indeed, this body of case law, which legitimizes the expansion of subjective qualifications through judicial interpretation rather than legislative intervention, reflects a broader and widespread judicial approach according to which “creative” interpretations—namely those departing from the statutory text by extending the boundaries of criminal liability—should not be regarded as analogous interpretations, but merely as liberal interpretations, justified by the same *ratio legis* underlying the provision¹⁷⁾.

By legitimizing interpretative approaches that, even before the reform, extended the criminal relevance of subjective qualifications to the de facto exercise of the powers connected with those qualifications, and by “justifying” the application of Article 2639 of the Italian Civil Code to insolvency offences precisely in light of what appears to be the lawmaker’s implicit “recognition” of a judicial trend established prior to the amendment, this approach has expanded the scope of criminal provisions through judicial development.

Nevertheless, although the advantages of such a “flexible” interpretation cannot be disregarded—since it enhances the effectiveness of criminal provisions and makes it possible to punish conduct that can nevertheless be traced back to the types of behavior described by the statutory provision¹⁸⁾—it is difficult to deny that going beyond what the lawmaker has explicitly provided is in tension with a strict observance of the constitutional guarantees en-

16) Cass. pen., Sez. V, n. 36630: «In the wording introduced by Article 1 of Legislative Decree No. 61 of 11 April 2002, far from departing from the previous well-established case law according to which the de facto director of a bankrupt company could also incur liability for the fraudulent bankruptcy offences under Article 223 of the Bankruptcy Law, it expressly confirms that approach».

17) Critically on this point, it has been argued that the approach taken by the case law in applying Article 2639 of the Italian Civil Code to bankruptcy offences effectively amounts to a violation of the prohibition of analogy in criminal law, rather than to a mere broad interpretation of the provision. A. Manna, *Corso di diritto penale dell'impresa*, CEDAM, Padova, 2010, 24. See also F. Giunta- G. Carcaterra- O. Di Giovine- N. Mazzacupa- V. Velluzzi, Tra analogia e interpretazione estensiva. A proposito di alcuni casi problematici tratti dalla recente giurisprudenza, *Criminalia*, 2010, 347 ff.. They argue that, even if one were to embrace the more recent approaches to statutory interpretation, according to which the relevant distinction should not be between analogy and extensive interpretation, but rather between internal analogy (which remains within the boundaries set by the statutory text and is therefore permissible) and external analogy (which exceeds the meaning of the provision and conflicts with the principle of strict legality), the extension of Article 2639 of the Italian Civil Code would nonetheless amount to a form of analogy *in malam partem*.

18) The reference to the ‘exercise’ of functions, rather than merely to their formal attribution, ensures the punishability of conduct that is ‘substantially’ consistent with the statutory model but does not explicitly fall within its scope, for instance where the ‘front man’ arrangement is used, whereby the individual who effectively directs the company’s affairs through managerial acts does not officially appear in the corporate structure. On this aspect, see A. Alessandri, Parte generale, in: *Manuale di diritto penale dell'impresa* (eds. C. Pedrazzi, A. Alessandri, L. Foffani, S. Seminara, G. Spagnolo, Monduzzi, 1998, 54-55. 66.

shrined in Article 25(2) of the Italian Constitution, which safeguards individual freedoms, and ultimately results, in practice, in an analogy *in malam partem*¹⁹⁾.

4. Towards Restoring Compliance with the Principle of Legality in the Identification of De Facto Subjective Qualifications: The Reform Proposal of the Italian Bricchetti Commission

From this perspective, a significant reform initiative was the proposal advanced by the Bricchetti Commission²⁰⁾ before the end of the previous legislature, which, in certain respects, demonstrates a greater legislative awareness of the need to ensure compliance with the principle of legality in criminal matters.

The proposal concerned the revision of the criminal provisions of the Bankruptcy Law (*Legge Fallimentare*), which had remained the “major unfinished reform” following the radical transformation of the civil-law provisions introduced by the Code of Business Crisis and Insolvency. The draft provided that the active subject of corporate bankruptcy offences should be “any person who, in the exercise—even de facto—of functions of management, direction, control, or liquidation within a company or consortium,” engages in one of the conducts expressly described by the relevant criminal provisions.

The explanatory report accompanying the draft proposal clearly shows that the “criminalization” and express inclusion of the aforementioned de facto functions within the bankruptcy offences framework responded to the need to incorporate into the new regulatory structure established by the Code of Business Crisis and Insolvency the legal mechanism provided for by Article 2639 of the Italian Civil Code. This provision, specifically applicable to corporate offences, had been extended by case law also to insolvency offences.

The accompanying report further specifies that the new provision refers to functions “in the broad sense of managerial functions” (*funzioni lato sensu gestorie*), which are not limited to those characterized by the requirements of “continuity” and “significance” explicitly required by Article 2639 of the Italian Civil Code. According to the report, these requirements, in practical application, do not allow all possible manifestations of the phenomenon to be included within the relevant legal framework.

Nevertheless, it must be observed that, in the absence of such parameters, the proposed provision—if enacted—would risk producing an excessive expansion of criminal liability. At present, these reform efforts have been suspended following the establishment of the new legislature.

19) Conversely, it has been argued that there is no reason why the statutory provision should not be extended to bankruptcy offences, E. D’Avirro-A. De Martino, *I reati di bancarotta societaria. Distrazione, infedeltà e operazioni dolose*, Giuffrè, Milano, 2013, 17; U. Giuliani Balestrino, *La bancarotta e gli altri reati concorsuali*, Giuffrè, Milano, 2006.

20) The full text of the draft provisions and the final report is available at the following address: www.giustizia.it.

With regard to insolvency offences as defined by Royal Decree No. 267/1942 (*Regio Decreto del 1942*), therefore, according to the prevailing judicial approach, Article 2639 of the Italian Civil Code would have an interpretative function (*rilevanza esegetica*), meaning that it would be applicable across the legal system. Based on the alleged identity of the underlying rationale concerning the protection of corporate creditors in both corporate and insolvency offences, attributing bankruptcy-related conduct also to the de facto office-holder appears to be entirely accepted in judicial practice.

However, a rigorous respect for the principle of legality would make it advisable to introduce an ad hoc provision explicitly recognizing the figure of the de facto entrepreneur, de facto director, and other de facto corporate positions among the active subjects of bankruptcy offences. Such a provision could take the form of a general clause similar to that contained in Article 2639 of the Italian Civil Code, but placed within the Code of Business Crisis and Insolvency. Alternatively, according to another approach, the lawmaker should distinguish, within each individual criminal provision of the Bankruptcy Law—and now of the Code of Business Crisis and Insolvency—the subjective qualifications that may be extended to de facto holders of such positions.

Although an authoritative strand of legal scholarship supports the extension of subjective qualifications in offences provided for by the Bankruptcy Law, on the assumption that Article 2639 of the Italian Civil Code would operate, in this respect, as a sort of general clause “for the purposes of criminal law”²¹⁾, a strict interpretation of the principle of legality should lead to the conclusion that applying this provision to areas other than corporate offences constitutes, as previously noted, an impermissible analogy *in malam partem*²²⁾.

Only by specifically introducing the criminal relevance of additional de facto functions within insolvency offences—or, at least alternatively, by removing the phrase “offences provided for in this Title” contained in Article 2639 of the Italian Civil Code—could the objection be overcome according to which the explicit reference to offences included in Title XI of Book V reflects a clear legislative intention to limit the criminal relevance of de facto function to the offences explicitly identified therein.

Alternatively, the reformulation of bankruptcy offences proposed by the recent Bricchetti Commission draft reform, if adopted, would achieve the

21) P. Veneziani, in A. Lanzi- A. Cadoppi (edited by), *I reati societari. Commentario aggiornato alla legge 28 dicembre 2005*, n. 262 *sulla tutela del risparmio*, CEDAM, Padova, 2007, 311; E.M. Ambrosetti-E. Mezzetti-M. Ronco, *Diritto penale dell'impresa*, Zanichelli, Bologna, 2016, 32 ff.

22) F. GIUNTA, *Lineamenti di diritto penale dell'economia*, Giappichelli, Torino, 2004, II, 239; A. Manna, *Corso di diritto penale dell'impresa*, CEDAM, Padova, 24, noting that the opening clause of Article 2639 of the Italian Civil Code is considerably more precise than the formula referring to the ‘purposes of criminal law’, as found, for example, in Art. 357 of the Italian Penal Code.

same objective of ensuring stricter compliance with the principle of legality, insofar as it would specifically introduce the figure of the de facto subject into the Code of Business Crisis and Insolvency.

On the other hand, the new formulations would leave the judiciary excessively “free” to determine the requirements necessary for identifying such a position. In the current regulatory gap, extending the scope of bankruptcy offences through judicial interpretation means crossing the boundary into unfavorable analogical interpretations against the defendant and circumventing the constitutional guarantees deriving from the principle of legality in criminal law.

Such an approach would ultimately encroach upon an area—namely, the determination of which conducts are criminally relevant and, consequently, the adoption of criminal policy choices—that is exclusively reserved to the lawmaker²³).

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N. Mazzacupa-E. Amati, *Diritto penale dell'economia*, Wolters Kluwer, Milano, 2020, 3.

23) This aspect is connected to the broader issue of the ‘supplementary’ function performed by case law in the absence of legislative intervention. On this topic, among the others, see G. FIANDACA, Crisi della riserva di legge e disagio della democrazia rappresentativa nell'età del protagonismo giurisdizionale, *Criminalia*, 2011, 79 ff.

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DE FAKTO FUNKCIONER U KORPORACIJAMA I PROŠIRENJE KRIVIČNE ODGOVORNOSTI

Apstrakt:

Rad se bavi konceptom i kriterijumima za identifikaciju de facto nosioca funkcije u italijanskom korporativnom krivičnom pravu, analizirajući evoluciju formalnih, funkcionalnih i mešovutih teorija razvijenih da bi se utvrdilo kada stvarno vršenje upravljačkih funkcija može dovesti do krivične odgovornosti. Zatim se istražuje odnos između proširenja subjektivnih kvalifikacija i ustavnog principa zakonitosti. Iako član 2639 italijanskog građanskog zakonika posebno izjednačava de jure i de facto nosioce funkcija u korporativnim prestupima, italijanski sudovi su proširili njegovu primenu na prestupe iz oblasti insolventnosti uprkos odsustvu eksplicitne zakonske odredbe. U radu se tvrdi da ovaj sudski pristup, iako usmeren na obezbeđivanje efikasne zaštite od korporativnog nedoličnog ponašanja, rizikuje sukob sa zabranom analogije in malam partem i ustavnim garancijama zakonitosti. Takođe se ispituje nedavni predlog reforme, koji je nastojao da posebno reguliše de facto nosioce funkcija u delima stečaja, tvrdeći da bi zakonodavna intervencija pre-dstavljala razumno rešenje za usklađivanje efikasne primene sa principom zakonitosti u krivičnom pravu.

Ključne reči: *De facto funkcioner, posebna krivična dela, korporativni kriminal, krivična dela protiv insolventcije, princip zakonitosti.*