


# The Belt and Road Initiative (BRI) on the “Stress-Test” of the Corporate Criminal Liability in Europe

Emanuele C. Francia<sup>1\*</sup> , Luca Di Stefano<sup>2</sup>

<sup>1</sup>Department of Economics and Management, CAU China Agricultural University, Beijing, China

<sup>2</sup>Law Firm DI STEFANO, 20122 MILANO-CORSO MONFORTE, N. 2 (PIAZZA SAN BABILA), Milano, Italy

Email: \*Ecf76italy@hotmail.com, luca.distefano@studiolegaledistefano.eu

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## Abstract

There are different levels of involvement a company may undertake in its international activity, from low efforts trade and indirect participation partnering with local importers and distributors to high commitment FDI (Foreign Direct Investment). In general, any foreign enterprise operating overseas intuitively knows they must comply with local regulations. However, not all businesses working from abroad know that, regardless the commitment level chosen, companies and associations may be held directly liable for crimes of subjective intent committed on behalf or for the benefit of a company by a class of persons who have operational authority and are therefore liable on behalf of the company<sup>1</sup>. We explore the case of Europe as a target market as its legislatures set landmark principles on the topic. China expeditious international business and BRI plans are seen as an opportunity for increasing connectivity among countries. However, the same time, it may go throughout potential hassles. Recent scandals of alleged fraud on COVID-19 masks supplied to Italy might be seen as a red flag as a fraudulent intermediary may not exclude an unaware manufacturing company responsibility. This may advise Chinese as well as any foreign business to maximize efforts to structure themselves properly while growing business overseas.

## Keywords

Corporate Governance, Corporate Criminal Liability, Supervisory Board, Model, MOGC, 231/2001 Decree

<sup>1</sup><https://www.globalcompliance.com/white-collar-crime/corporate-liability-in-italy/#:~:text=According%20to%20Legislative%20Decree%20No.%20231%2C%20dated%208.are%20therefore%20liable%20on%20behalf%20of%20the%20company>

*Societas delinquere non potest*  
(Legal entities cannot commit crimes)  
(Franz von Liszt, 1881)

## 1. Introduction

The facts: in 2020 millions of Covid masks produced in China are imported in Italy and seized by the local authorities on the claim they are not properly certified and do not meet safety and quality requirements<sup>2</sup>.

The acts carry alleged crimes such as commercial fraud and marketing of products that do not comply with the essential safety requirements. Although it is not exactly clear what happened in this specific case, involvement and relative responsibilities, it is assumed that along the supply chain, one of the middle-man companies which took care of the logistics of the goods altered the certificate of suitability. Might under these circumstances the producer in China which operates directly or indirectly in Europe be in trouble and face liability charge? What can international business do while working worldwide and in particular in the European market to prevent or minimize the risk of burdensome consequences?

The provisions of criminal liability on the part of companies are now widespread at international level, and particularly across the legal systems in Europe (Lattanzi & Severino, 2020).

Such trend is likely due to globalization and the internationalization of economic flows, in the context of which corporate crime is increasingly stepping in. Such phenomenon has called most countries to enact adequate law enforcement countermeasures. In Europe we observe multiple initiatives of legal cooperation, characterized by the introduction by the Member States of administrative/criminal liability for business entities, given the fact that criminal conducts are everyday increasingly sophisticated.

## 2. Globalization and Internationalization Influence on the Legal Systems Advances

We are observing an everyday more interconnected economy and worldwide society. Internationalization and globalization are similar concepts, and often used interchangeably, however different in scope.

Internationalization refers mainly to the economic purpose and impact of business activities developing overseas while globalization implies a broader scope and involves more aspects that can be studied from the lens of multiple disciplines such as economy, sociology, anthropology, philosophy, psychology and so forth. Therefore, it is first of all useful to discuss the wider concept and later narrow down to its impact on the legal systems developments. “Globalization refers to the shift towards a more integrated and interdependent world economy” (Hill-Chou-Hou Wee-Udayasankar, 2016) and includes demand and

<sup>2</sup>[https://www.corriere.it/politica/20\\_aprile\\_25/mascherine-cinesi-importate-irene-pivetti-sequestro-milionario-lei-regole-cambiate-corsa-colpita-il-mio-cognome-dcf6e5b4-8700-11ea-9b77-4fc0668b38e0.shtml](https://www.corriere.it/politica/20_aprile_25/mascherine-cinesi-importate-irene-pivetti-sequestro-milionario-lei-regole-cambiate-corsa-colpita-il-mio-cognome-dcf6e5b4-8700-11ea-9b77-4fc0668b38e0.shtml)

supply, “globalization of markets and production”<sup>3</sup>. Technology advances and the opening-up of numerous economies (including China) boosted such phenomenon. More in general, we are nowadays assisting to an overall globalization. Globalization in fact for centuries was primarily represented by exportation of goods. Many countries had little real interaction but intensive products exchanges, e.g. the East India Company<sup>4</sup>. Later, since the beginning of the nineteenth century with a pace acceleration in the 1980s, the quantity and type of interactions increased dramatically especially thanks to “technological change, particularly the dramatic development in recent years in communication, information processing, and transportation technologies” and the “decline in barriers to the free flow of goods, services and capital” (Hill-Chou-Hou Wee-Udayasankar, 2016) of the last few decades. It worth mentioning here another important element of today’s globalization: the international flow of people, knowledge and ideas. A specific part of such wide fashion is specific to business and it is more properly called Internationalization.

As per Globalization, from multiple sources we constantly hear comments describing it as either a bundle of threats v opportunities. Globalization refers to both and involves several different aspects. As introduced by Higgott and Reich (1998) and explored by Reich (1988)<sup>5</sup> “Globalization is a term in heavy current usage but one whose meaning remains obscure, often even among those who invoke it. Indeed, Jan Aart Scholte states that globalization stands out for quite a large public spread across the world as one of the defining terms of late twentieth century social consciousness”. The term is often distinguished more by what it is not, rather than what it is. James Rosenau recognizes such a tendency when he states that “Globalization is not the same as globalism, which points to aspirations for an end state of affairs wherein values are shared by or pertinent to all the world’s five billion people, their environment, their roles as citizens, consumers or producers with an interest in collective action designed to solve common problems. Nor is it universalism—values which embrace all humanity, hypothetically or actually”.

The Nobel laureate Stiglitz (2002) argued that Globalization is often being a manipulation attack of rich economies and international institutions against under-developed countries with the attempt to impose the Adam Smith invisible hand free market approach. The idea of developed economies was to take advantage of low labor and overall production costs in poor economies in order to increase manufacturing competitiveness. In addition, bringing jobs to those countries and increasing average local conditions, there would be the creation of

<sup>3</sup>“The globalization of markets refers to merging of historically distinct and separate national markets into a huge global marketplace” while “The globalization of production refers to sourcing of goods and services from locations around the globe to take advantage of national differences in the cost and quality of factors of production (such as labor, energy, land and capital)” (Hill-Chou-Hou Wee-Udayasankar, 2016).

<sup>4</sup><https://www.southampton.ac.uk/schools-colleges/subject-specific-talks/humanities-arts/the-east-in-dia-company.page>

<sup>5</sup><https://wikieducator.org/images/4/45/Globalization5.pdf>

new classes of customers and new markets.

As we have seen in the last two decades, however, the result has been quite different. Emerging economies such as China and India developed fast and got most of the gain from the globalization phenomenon. China (nominal) GDP<sup>6</sup> for example, based on the World Bank data, reached surpassed that of Italy in 2000, France in 2005, the United Kingdom in 2006 and that of Germany in 2007, before overtaking Japan in 2009, making China the world's second largest economy after the United States. At the same time, according to McKinsey reports, in China a new "urban" class of approximately 300 million people emerged with standard of living comparable with developed countries middle class. They are expected to be over a billion within 10 years<sup>7</sup>.

Narrowing down the analysis to deeply consider the overall phenomenon in relation to the Internationalization of business. *International business*, despite difficult to univocally define (Bogunovic<sup>8</sup>, 2006), usually refers to any activity a firm is running outside its national borders. It is usually split into international trade and FDI (Foreign Direct investment)<sup>9</sup>. There are different theories trying to explain why there are international business activities and the reason why, according to the situation, each of them is adopted. As per our article here, it is interesting to notice that increasing international business brings opportunities as well as new hassles, contract validity and enforceability, logistics tracking, sometime opaque supply chain management<sup>10</sup>. Some approaches to international business imply lower company efforts, some a real engagement. Counter intuitively though, regardless the transaction structure, they all bear legal implica-

<sup>6</sup>GDP: Gross Domestic Product, an index often used to determine the wealth of a nation and its economy. The term was first used by William Petty but its modern adoption is attributed to Simon Kuznets for a US Congress report in 1934. The OECD defines GDP as "an aggregate measure of production equal to the sum of the gross values added of all resident and institutional units engaged in production (plus any taxes, and minus any subsidies, on products not included in the value of their outputs)." An IMF publication states that "GDP measures the monetary value of final goods and services, that is, those that are bought by the final user, produced in a country in a given period of time."

<sup>7</sup><https://www.mckinsey.com/featured-insights/urbanization/preparing-for-chinas-urban-billion>

<sup>8</sup>"The term 'internationalization' is interpreted in many different ways and thus, measured by different parameters (Chetty and Campbell Hunt, 2000). Welch and Luostarinen (1988, p. 36) define internationalization as 'the process of increasing involvement in international operations'. Such definition approaches internationalization from the macro/micro economic aspect and takes into account parameters that influence companies spreading in other countries. These parameters are usually asset structure of the company, labour force, revenue/profit analysis and management knowledge (Hadjikhani, 1997.). Alternatively, internationalization is sometimes defined in different context, i.e. as the process of adaptation of products and services for foreign markets. Accordingly, Beamish and Calof (1995, p.116) define it as 'the process of adapting firms' operations (strategy, structure, resources, etc.) to international environments'. This definition approaches internationalization from the consumer's point of view and is not as often represented in business research literature. In these cases, term 'globalization' has the meaning that internationalization has in business literature" (Bogunovic, 2006).

<sup>9</sup>Later International trade and FDI will be deeply analyzed. For now it is sufficient to say that "International trade occurs when a firm exports goods or services to consumers in another country" while "Foreign Direct Investment (FDI) occurs when a firm invests resources in business activities outside its home country" (Hill-Chou-Hou Wee-Udayasankar, 2016).

<sup>10</sup>[https://www.princeton.edu/~dixitak/home/Dixit\\_TradeSec\\_Final.pdf](https://www.princeton.edu/~dixitak/home/Dixit_TradeSec_Final.pdf)

tions. As a matter of fact, operating overseas implies knowing the local legal framework and comply with local regulations. The European legislation, in particular in some countries, provides a paradigm for leading foreign companies to how to structure themselves to legally operate in those markets and protect their business.

### 3. China and Europe Tying Relationship. A Particular Case: Italy

It is worth mentioning here that the acceleration of globalization sees China and Europe as main figures only slightly affected by covid-19. And despite the bad case mentioned above, the business between China and Italy is successful and flourishing. For instance, the trade balance reached 54 billion euro (2021), and similarly to Germany and France, Italy represents for China one of the main commercial partners for both import and export<sup>11</sup>.

As shown in **Figure 1**, more than 1300 are registered in Mainland China and Hongkong for an exceeding 20 billion euros business. As regards the inbound investments, Italy is one of the best 10 destination for foreign companies in the world. There are currently more than 300 Chinese legal entities registered in Italy for a value of more than 1 billion<sup>12</sup> to which we should add relevant share participations in some of the most prominent Italian firms spanning throughout different industries, from fashion and design to food, energy and utilities<sup>13</sup>. Furthermore, on March 23, 2019, Italy signed a Memorandum of Understanding with China to officially become a member of the Belt and Road Initiative (BRI). “Italy and China followed up to their commitments by signing a total of 29 trade and political agreements (19 institutional agreements and 10 commercial agreements) worth about 2.5 billion euros (US\$2.8 billion)”<sup>14</sup>. Despite such ambitious plan has been slowed down by the recent pandemic, China confirmed its goal of fully deploying the project<sup>15</sup>. Such a comprehensive platform includes not only transportation and infrastructure but also digital connectivity, financial connectivity, scientific operations, and culture exchange. It has been already embraced by several countries in Europe, and Italy in particular has been one of the first signatory members.

Once briefly shown the profound interconnection between China and Europe, it is therefore even more relevant here to discuss the matter that Chinese companies

<sup>11</sup>China Customs, <http://english.customs.gov.cn/newsroom/news> and ISTAT <https://www.istat.it/en/>

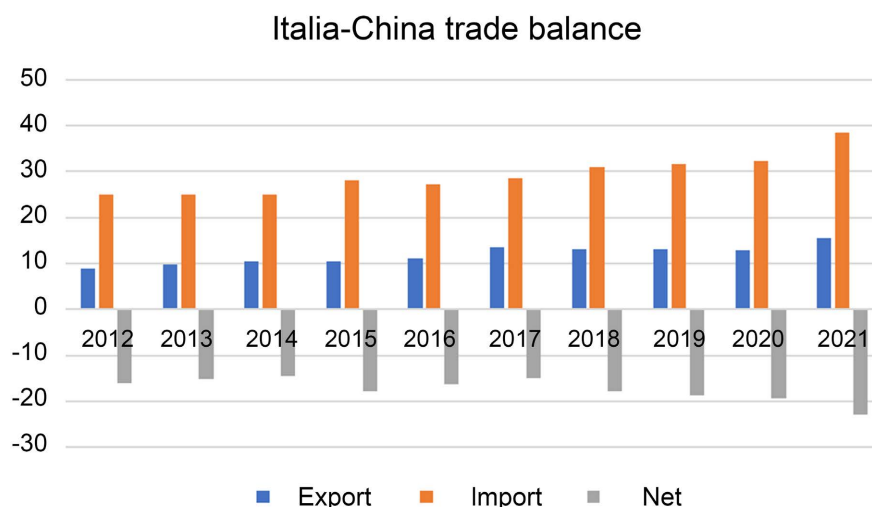
<sup>12</sup><https://www.istat.it/>

<sup>13</sup>Italian Trade and Investment Agency ICE.

[https://www.ice.it/sites/default/files/inline-files/192\\_SCHEDA%20PAESE%20CINA%20%20aggiornamento%20aprile%202020.pdf](https://www.ice.it/sites/default/files/inline-files/192_SCHEDA%20PAESE%20CINA%20%20aggiornamento%20aprile%202020.pdf)

<sup>14</sup>Over a year ago, on March 23, 2019, Italy signed a Memorandum of Understanding with China to officially become a member of the Belt and Road Initiative (BRI), also known as the “One Belt One Road” (OBOR). Italy and China followed up to their commitments by signing a total of 29 trade and political agreements (19 institutional agreements and 10 commercial agreements) worth about 2.5 billion euros (US\$2.8 billion) to implement the so-called New Silk Road Project.

<sup>15</sup><https://www.bruegel.org/event/bri-20-how-has-pandemic-influenced-chinas-landmark-belt-and-road-initiative>



**Figure 1.** Italy-China trade balance 2012-2021.

operating in Italy as well as most countries in Europe, are subject to criminal liability in any of those jurisdictions where they operate: counter intuitively it does not matter whether they are incorporated and have their registered office in the country or work indirectly from abroad.

## 4. Companies Liabilities in Major European Jurisdictions

### 4.1. A Comparative Overview: Spain, France and Germany

It is interesting to note that legal principles at stake are often different and, in each country, foresees different legal consequences. For instance, in Spain, the liability of companies is criminal in nature and was introduced with the Ley Orgánica n. 5 of 22 June 2010 (since 2012 it has also been extended to political parties and trade unions). The discipline (mainly introduced in Article 31bis) provides that companies are called to criminally account for crimes committed by their legal representatives or by those who are subordinate to their authority, “in the exercise of social activities and on behalf of and for the direct or indirect benefit of the legal person”. In Spain, the adoption and effective implementation of an adequate Organizational Model (OM) is, however, a cause of exclusion of criminal liability for the company. For the correct application of the Organizational Model, a Supervisory Body is established. In terms of sanctions inflicted, the Spanish legal system entails both disqualifications and monetary penalties (Lattanzi & Severino, 2020; Stea, 2017).

The liability of entities in the French system is regulated in the Criminal Code (Article 121-2) and is expressly qualified as criminal liability (since 1994), having always supported the compelling necessity of applying criminal sanctions to companies. In France as well the acts must be committed by those who are invested with the representation of the company and the personal responsibility of the person who commits the crime is not excluded. The sanction system implies the introduction of a compliant frame and procedures in order to avoid the like-

likelihood of a future commission of similar crimes. The adoption of such a program, be it precautionary or subsequent to a (criminal) offence, hasn't instead any exemption, nor mitigating circumstance, validity, in relation to the legal entity's accountability. Within the company there must not be a Supervisory Body, but a control system, with internal reporting and tracking with adequate management procedures (Lattanzi & Severino, 2020).

A different approach is taken by relevant jurisdictions, e.g. Germany. As far as German law is concerned, there is no provision providing for genuinely criminal liability of business entities, as corporations are considered incapable of committing crimes, due to the lack of 1) the capacity to act, 2) negligence and 3) straight actionability of the entity's sanctions. In many cases, however, it has been introduced a different degree and characterization of liability (qualified as administrative offence or offence) of legal entity or associations (within the legislative frame of the 1968 Ordnungswidrigkeitengesetz) if such illegitimate conduct has been committed by one of its authorities, its director, or a legal representative, whenever the company has taken advantage of it or should have benefited from it. The main and solely sanction applicable is monetary in nature may include, where the conditions are met, seizure. Finally, there is no duty to adopt an Organizational Model. Nevertheless, in Germany the legislative power is nowadays discussing the possibility of introducing a specific criminal liability for corporations (Lattanzi & Severino, 2020).

#### **4.2. The Italian Legal Paradigm. Overcoming the Constitution: Criminal Responsibility Is (Still) Personal?**

The Italian legal system has adopted the same legal principle “societas delinquere (et puniri) non potest”<sup>16</sup> in use in Germany and based on the Latin legal basis for which only human beings can put in place criminal conducts. Corporations as a legal fiction, cannot have a “guilty mind” (mens rea) required to allot criminal liability. In sum, according to that principle, the criminal offence and the punitive penalty were constructed exclusively on the individual/natural person capable of thinking and acting criminally. Today, however, companies tend to be ineluctably considered an autonomous center of interests and legal relationships. Italy has then adopted a specific law as administrative liability deriving from the crime of entities and companies with Legislative Decree no. 231 of 2001 (Pelissero, 2014; Presutti & Bernasconi, 2013; Zanalda & Barcellona, 2002).

It is based on the rule in question is based on the possibility of responsibility attribution to the Entities of the so-called “organizational negligence”, where certain crimes are committed by their top management, or subordinates, strictly listed within the so-called “catalog” of the alleged crimes (Assuma & Lei, 2014). In Italy the reconciliation of diverging principles has been found throughout the theory of the so-called “Identification theory” allows, therefore, that the fact constituting a crime committed by the individual/natural person (belonging to the corporate structure) is also attributable to the Entity/legal person, in accor-

<sup>16</sup>Paraphrasing: corporations cannot commit a crime and (for that) being punished.



dance with the principle of personality of criminal responsibility enshrined in Article 27 of the Constitution [Lattanzi & Severino, 2020](#); [Presutti & Bernasconi, 2013](#)).

For instance, should we consider the case of a manager or corporate executive who commits the crime of aggravated fraud against the state or a public institution to obtain financing or contributions in the interest or for the benefit of the company itself.

In this situation, the offence caused by the individual/natural person is automatically attributed to the company as well by reason of “Identification theory”. Thus, the company would be directly charged of the crime committed by the individual/natural person and will be held accountable together with the perpetrator of the offense.

Among the main crimes provided for by the legislation we can mention the crimes of corruption, crimes against public property, corporate crimes, tax and smuggling offenses, crimes against the environment and the health and safety of workers.

One important remark is that the entity is liable when the aforementioned crimes, committed by the company through its managers or employees, have been carried out exclusively in the interest or for the benefit, i.e., generating profit for the company ([Presutti & Bernasconi, 2013](#)). In the specific case the following conditions are met, i.e. 1) the commission of certain alleged offences provided for in the aforementioned catalogue, 2) by top management or employees of the institution, 3) in the interest or for the benefit of the company, it is interesting to notice the scope and potential impact of such liability, i.e. the company will cope with all its assets.

For the reasons mentioned above all businesses operating must be structured appropriately and in full compliance with the legislation aforementioned. For example, in order to prevent the risks of incurring in liability arising from a crime, which affects both individuals and institutions, companies must adopt an Organizational Management and Control Model (so-referred to as MOGC) and appoint a Supervisory Body. Although the reach is not univocal across Europe, it is essential, on the one hand, to have a valid and effective Organizational Model and, on the other hand, to correctly outline the role and functions of the Supervisory Body, in a way that might absolve from administrative liability for crime ([Adotti & Bozzolan, 2020](#); [Strazzeri, 2014](#)).

In order to plan a proper OM, it is crucial to overall analyze the business model and management system, mapping decision-making and organizational processes and risk management (so-called risk assessment). The Organizational Model must therefore be tailor-made on the company and its specific business operations ([Lombardi, 2020](#)).

Furthermore, a possible erroneous and misleading approach is that once prepared such OM it is enough. On the contrary it is fundamental to notice that such frame must then be constantly updated by the company. Such dynamic and fine-tuning approach related to both legislative developments (for example in



the face of the introduction of “new” crimes taxonomy, such as, recently, tax offenses) and continuous adaptation in the face of changes of an organizational nature or activity (for integration or expansion of the corporate purpose, or by extension of the plants or local units). The Supervisory Body must then guarantee the correct, actual and effective application of the aforementioned OM. Its task is to verify the correct correspondence between the activities carried out by the company with respect to the features, procedures and in general to the provisions contained in the OM in order to prevent the commission of the various crimes provided for, as specified, by the law. For that purpose, the Body must be autonomous, independent, with the appropriate experience and professionalism in the sectors under consideration, maintaining constant information flows with the top management, and above all operate with continuity of action, that is, focusing its attention on the correct application of the OM and its necessary updating (Pesenato & Pesenato, 2015; Arena, 2015).

## 5. Conclusion

International business requires an adequate organizational structure and corporate governance. The BRI will surely represent a powerful international business accelerator. Together with increasing interdependence among countries we envisage a boost of business opportunities as well as hassles. Foreign business entity operating in Italy and in Europe should therefore most likely increase investments and efforts in compliance. For instance, related to our initial example of a Chinese producer operating overseas, in multiple jurisdictions in Europe a proper structuring would require to adopt (although with variations) an Organizational

	SPAIN	FRANCE	GERMANY	ITALY
<b>Code v Special law</b>	Code	Code	Special law	Special law
<b>Criminal liability v Administrative liability</b>	Criminal	Criminal	Administrative	Criminal
<b>Organizational Management and Control Model (M.o.G.C.)</b>	Present	Absent	Present	Present
<b>Supervisory Body</b>	Present	Absent	Absent	Present
<b>Sanction System</b>	Present	Present	Present	Present

**Figure 2.** Comparative sum-up of the company criminal liability discipline.

Management and Control Model (so-referred to as MoGC) and appoint a Supervisory Body. The validity of the model will be tested both *ex ante* and *ex post*. For instance, subjected to a possible scrutiny from the criminal judicial authority in the context of the same criminal proceedings in which managers and employees of the company will also be judged. In case of positive response to that “*stress-test*”, it is foreseen a liability exemption or, at least, a lessening of heavy criminal penalties, with regards to both disqualification and financial sanctions (Centonze, 2009) (Figure 2).

## Conflicts of Interest

The authors declare no conflicts of interest regarding the publication of this paper.

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