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À Católica

À Clássica

Às duas pessoas coletivas que me formaram.

Às duas pessoas coletivas que me marcaram.

Contents

I. Introduction

In this dissertation, we address the problem of allocation of the criminal liability arising from the actions of the managers and material leaders of the legal persons incorporated as commercial companies practiced in their name and collective interest.

Generally, the liability of the company in such cases is either deemed autonomous by reference to the liability of such individuals, sustained by the idea that the crime is a result of mismanagement of the company (with mismanagement being deemed to be the reason for the criminal practice to be imputed to the legal person), or it is deemed to be derived from the liability of such an individual (or group of individuals) who perpetrated the relevant criminal offence.

While under the first approach the link between the concrete committed crime and the company itself is lost, which ultimately leads to the so-called "administrativization" of the liability of companies, already in place in some jurisdictions, the liability by representation models tend to rely on the individuals who practiced the act. This approach, on its turn, implies the need to detach and distinguish the intellectual and will elements of the individuals in their private domain from those of the corporate body they are representing and, ultimately, of the company itself. Due to the inner psychological nature of these concepts, this task poses considerable challenges to the doctrine as the companies do not have physical existence.

Beyond the practical difficulties that arise in the application of each of these generic approaches, none of them takes into account the role of shareholders. We understand that the fines imposed on the companies, which are the only penal measure available in their respect[1] are ultimately borne by the shareholders.

For these reasons, we understand that a more coherent approach for the matter of criminal liability of the legal persons incorporated as commercial companies, consistent with the nature of criminal law, requires a referral to those areas of activity and operation of the companies that structurally remain within the domain of their shareholders. In order to establish such a referral, we start from the current legal separation of the domains of control within a commercial company between its shareholders and management and analyze the relationship that is established between

[1] With the exception of dissolution, applicable in some extreme cases, and that in practical terms will also entail the total loss in share value borne by the shareholders.

the shareholders and the managers and material leaders of a company and ascertain in which cases this relationship implies that the criminal liability for a certain criminal offence shall be allocated to the company and under which circumstances this shall not be the case and the application of an administrative sanction will be deemed a more appropriate and coherent measure.

In order to trace such a distinction, we address the relationship that exists between the shareholders and the directors/ leaders of an organization in the following way:

(i) Firstly, in light of considerations derived from the Principal-Agent problem (as defined and studied by Economics), we question whether the shareholders established the contractual relationship in a way that appropriately mitigates this problem, that is to say, whether the incentives between the shareholders and the material leaders are appropriately aligned by means of contractual design of their relationship;

(ii) Secondly, we analyze whether the incentives of managers are aligned with those of shareholders up to an acceptable level of diligence, taking a closer look at whether the misbehavior is due to individual psychological deviations from the lawful pattern of behavior or whether the committed crime is due to group dynamics that arised within the organization and induced the criminal misbehavior by the managers and material leaders, with the organization being liable for the concrete committed criminal offence in this last case, as we understand that the control of group dynamics falls within the shareholders' domain of control.

We conclude our exposition with a legislative proposal that would allow for these considerations to be taken into account by the courts in the context of dealing with the allocation of criminal liability to legal persons incorporated as commercial companies.

II. *Modus operandi* of legal persons as agents in the modern risk society

Collective persons are, first and foremost, a legal reality existing in legislative terms and without physical existence. It corresponds to a cluster of human interests, an

autonomous center of collective human interests that has its own individuality in the social context[2].

It is up to the law to give existence to this aggregate, endowing it with legal personality and regulating how this legal personality emerges and relates to the other protagonists in the society, namely the natural persons.

For the purpose of interaction with other agents within society, legal persons are endowed with statutory bodies that allow them to act and express their will, with this will being derived from the acts practiced by the individuals who are in charge of these bodies. In the case of legal persons incorporated as commercial companies, the law also expressly addresses the separation between the ownership and the management, defining the domains of corporations' activity that are dealt with by managers and those pertaining to the owners' domain.

To this extent, there is no real will in the psychological sense of the word, but rather a link to the individual will of the people who hold the relevant positions in the corporate bodies, limited by the scope of the functions performed[3]. Thus, the "collective will" is understood as the will expressed by the statutory bodies of the legal person[4].

In the context of the modern society, corporate and especially commercial profit-oriented entities are the ones that pose the greatest risks to the society in which they are integrated. This is due, on the one hand, to their strong presence in our daily life through permanent economic interaction with natural persons, that have an impact on their quality of life and personal fulfillment[5]. On the other hand, companies act in order to maximize their profit, driven by the benefit / loss balance rather than the fair / unfair

[2] Domingues de Andrade, M. A. (1960), *Teoria Geral da Relação Jurídica, I*, Coimbra: Coimbra Editora, pp. 49 ff.; Cunha, P. (1961), *Teoria Geral do Direito Civil, I*, Lisboa: FDUL, p. 173. *apud* Marques de Silva, G. (2009) *Responsabilidade Penal das Sociedades e dos seus Administradores e Representantes*, 1st edn. Lisboa: Editorial Verbo pp. 132-133.

[3] Carvalho Fernandes, L. (2012), *Teoria Geral do direito Civil, I*, 6th edn., Lisboa: Universidade Católica Editora, 2012, p. 517; Brito Correia, L. (1993), *Os Administradores de Sociedades Anónimas*, Coimbra: Coimbra Editora, pp. 175-176 *apud* Marques de Silva, G. *op. cit.*, p. 133.

[4] Cunha, P. (1961), *op. cit.*, p. 174. *apud* Marques de Silva, G. *op. cit.*, p. 133.

[5] Several authors highlight the existence of a social responsibility of corporations, that goes beyond the mere compliance of their activity with the existing legal provisions (Terziev, V. (2019), 'The Role of Business in Society', *IJASOS- International E-Journal of Advances in Social Sciences*, Vol. V, Issue 14, August 2019, pp. 68-71 [online]. Available at SSRN: https://ssrn.com/abstract=3449900 or http://dx.doi.org/10.2139/ssrn.3449900; Preston, L. E. (1986), *Social Issues in Public Policy in Business and. Management: Retrospect and Prospect*, College Park: University of Maryland College of Business and Management, pp. 3-4; Davis, Keith and Frederick, William C. (1984), *Business in Society*, 5th ed., New York: McGraw Hill, p. 27).

balance[6], which may contribute to potentiate the risks of illegal behavior. These risks shall be addressed accordingly, namely by an adequate intervention of the criminal law so as to deter the riskier behaviors, taking into account the specificities of companies as perpetrators of such behaviors with potential criminal relevance.

Given their importance and the concerns we addressed above, our analysis will focus on corporate legal persons, mostly incorporated as commercial companies[7].

From a historical perspective, the admissibility of the criminal liability of communities and collective entities had a cyclical evolution throughout history. Under the Roman law, the general rule was that of non-liability of collective entities and communities, according to the principle *societas delinquere non potest*, based on the inability to act and the absence of will of those entities[8].

Already in the Middle Ages, the idea was to match a certain community with all of its members. Thus, the will and the actions of a given community were seen as the will and the actions of all and each one of its members and, therefore, the infractions of the members of that community were seen as the infractions of the community itself. In the beginning, for a certain infraction to be considered of a collective nature, this approach required the commitment of such an infraction to be attributable to the totality of the members of the community by means of a sort of collective resolution to act in that specific direction. Later, this requisite had been waived, with a simple evidence of action of the majority of the group members considered to be sufficient for the purpose, and even the acts perpetrated by the community's leaders only could suffice, with their action also being attributable to the totality of the members of a given community[9]. However, a proper dogmatic basis for such a solution was missing at the time, with

[6] Quintela de Brito, T. (2018) 'Compliance, Cultura Corporativa e Culpa Penal da Pessoa Jurídica', in *Estudos sobre Law Enforcement, Compliance e Direito Penal*, 1st edition, Lisboa: Almedina, p. 65.
[7] For ease of exposition, and once the problems we will address are potentiated by company's dimension (meaning that the greater dimension of the firm, the greater is the magnitude of the behavioral dynamics addressed herein), we will assume the legal form of incorporation as a public limited liability company in what concerns the use of terminology, namely in what refers to the holders of the share capital (shareholders) and to the format of the share capital (shares).
[8] Castro e Sousa, J. (1985), *As pessoas colectivas em face do Direito Criminal e do chamado «Direito de Mera Ordenação Social»*,Coimbra: Coimbra Editora, p. 27 *apud* Reis Bravo, J., *op. cit.*, p. 34.
[9] Reis Bravo, J., *op. cit.*, pp. 35-36.

criminal liability of communities[10] emerging as a practical necessity of the State and of the ecclesiastical life[11].

The French Revolution, with its individualistic and anti-corporative ideas, contributed to the departure from this paradigm[12]. In particular, with the arrival of the liberal criminal law, the principle of personal liability had been enshrined into the law so that each person could only be sanctioned for his own acts. The individualistic philosophical conceptions of the time – mainly the retributionism of Kant and Hegel - contributed to building of the concept of liability on premises centered on the human person[13].

These influences had impact on the Portuguese legislative framework during the XIXth and XXth centuries, developing and consolidating the principles of non-transferability and the individual nature of penalties. As a result, the collective entities have been removed from criminal law custody.

However, after the second world war in the XXth century and throughout the XXIst century the awareness of the need to punish legal persons due to the magnitude of the many criminally relevant threats generated and leveraged due to the use and mobilization of corporate entities had spread throughout the world. Both in the Anglo-American legal systems, pioneers in the idea of acceptance of the criminal liability of legal persons, and in the context of continental Europe, there emerges a notorious political, criminal and doctrinal movement towards the establishment of the criminal liability of legal persons[14].

Portugal was not an exception, with authors like Figueiredo Dias and Faria Costa being responsible for the most prominent first attempts of a dogmatic construction aiming to establish the grounds for an acceptance of such an admissibility, firstly within the domain of economic criminal law, extended to the criminal law in general in the aftermath[15].

[10] That we regard as primitive forms of collective entities in light of a historical perspective.
[11] Bacigalupo S. (1998), *La responsabilidade penal de las personas jurídicas*, Barcelona: Bosch, p. 53 *apud* Reis Bravo, J., *op. cit.*, p. 37.
[12] Reis Bravo, J., *op. cit.*, p. 39.
[13] Marques de Silva, G., *op. cit.*, p. 131.
[14] Reis Bravo, J., *op. cit.*, p. 44.
[15] *Idem*, pp. 44-46.

Therefore, even prior to the express introduction of the criminal liability of the legal persons in the Portuguese criminal code a relatively broad scope of authors[16] has accepted, as a consensual principle, the criminal liability of legal persons within the segments of the "secondary" criminal law, where it was already in force, and subsequently did not oppose its extension to the scope of criminal law[17].

This doctrinal dogmatic evolution had been officially recognized in law in 2007, when the Criminal Code expressly acknowledged the legal responsibility for legal person, even though for a limited range of crimes[18].

III. The criminal liability of legal persons in the light of risk theories / modern theories of objective imputation

A. The causality in Criminal law: A historical perspective

The causality has always been a central issue for criminalists functioning as a guidance to decide whether one shall be held liable for a certain criminal misbehavior. The causality itself may be defined as a naturalistic relationship between the action and the result[19]. For a long time, it was believed that to appropriately address the causality link it would be sufficient to consider the action (cause) that originates a certain event or result, using various theories of causality for the purpose, namely the theory of adequate causality. Today it is believed to be insufficient, with various authors appealing to the so called objective imputation[20].

Historically the doctrine of the first half of the XXth century attributed the criminal liability on the basis of a simple causality link[21]. However, the scope of situations falling under such a criterion of attribution of the criminal liability proved to be too vast - as under this approach causing something means to be *condictio sine qua non* of its

[16] As mentioned by Reis Bravo (2009, p. 46), beyond Figueredo Dias, authors like Costa Andrade, Manuel António Lopes Rocha, Faria e Costa, Alberto Esteves Remédio e Luís Duarte D'Almeida also adhered to this approach.
[17] Marques de Silva, G., *op. cit.*, p. 46.
[18] In accordance with article 11 of the Portuguese Criminal Code.
[19] Miguez Garcia, M. (2012), *O Risco de Comer uma Sopa e Outros Casos de Direito Penal*, 2nd edition, Lisboa: Almedina, p. 206.
[20] *Idem*, p. 204.
[21] Greco, L. (2009), *Um panorama da Teoria da Imputação Objectiva*, Lisboa: Associação Académica da Faculdade de Direito de Lisboa, p. 15.

occurrence, every action *condictio sine qua non* of a certain criminal outcome would be seen as a criminal offence. Therefore, the proponents of this approach demanded the presence of malice (*dolo*) or guilt (*culpa*) implicit in the action. Accordingly, when following this approach, one should not be seen as criminally liable if his action had been a cause of a certain criminal outcome, as long as he couldn't preview such an outcome (element necessary for malice) and was not capable of previewing such an outcome (element necessary for guilt). By way of summarising, in this case the agent was objectively held liable, but his action was regarded as excusable[22].

These considerations addressing the need to figure out the adequate scope of situations where one shall be held criminally liable further motivated the evolution of the primitive forms of the causality theory that followed, with the appearance of the theory of adequate causality. Under this approach the delimitation of the acts that are objectively imputable is operated by referral to the capacity of the agent to conduct and control the causal process. This approach appeared in the late XIXth century as developed by v. Kries and it is actually the criteria currently established under the Portuguese legal regime once, in accordance with article 563 of the Portuguese Civil Code, the legal fact which is a condition for the damage should not be regarded as an adequate cause of the damage only if, from the standpoint of the common experience, it is irrelevant for the final result.[23]

A finality approach that developed after the Second World War proposed a similar twist to the simple causality link in order to ascertain adequate criteria for the selection of the situations where the agent should be holden objectively liable for his actions. While the previous theory regarded the imputation as a question of causality only, with other aspects being delegated to the subjective domain of malice and guilt, here the authors proposed to include, already at the stage of imputation of a certain action, the concept of finality, regarding it as the element that allows to distinguish between the mere naturalistic causation processes and those causation processes originated by human action, being the last the ones relevant from the criminal liability standpoint. For the defenders of this theory the human action incorporates the concept of finality in itself, in a sense that the man acts because he anticipates the consequences of the acts to be

[22] *Idem*, pp. 16-17

[23] Supreme Court of Justice (STJ) decision of 2 december 2008

executed, and because he can make use of the knowledge he has about causal courses to direct them in the direction he intends. If the previous approaches kept the imputation of liability limited to the objective dimension, for finality the objective causality by itself is not sufficient to impute a certain behavior, being it necessary to address the subjective elements of one's behavior, which would be formed by one's purpose in a given action. The finalists therefore added a subjective element to the process of objective imputation of intentional crimes. Nevertheless, the approach under the objective imputation remained untouched and still corresponded to causality.

B. "Arrival" of the modern theory of objective imputation/ risk theory

The further evolution of the legal reasoning in this domain evolved to what can be considered the final stage of evolution of the causality theories. In the words of Roxin, the objective imputation or risk theory sets out a set of generic assumptions that make causation objectively relevant from the standpoint of criminal liability[24].

This theory relegates the subjective dimension (*mens rea*) and the finality to a secondary position and brings the objective imputation back to the forefront[25]. However, the objective imputation cannot be based on a mere estimation of an outcome - something more is needed to make this causation correspond to objective imputation. These additional assumptions are the creation of a legally disapproved risk and the materialisation of this risk in the criminal outcome[26].

The basic content of the theory can be summarized in one single idea: objective imputation sets out a set of generic assumptions that have to be fulfilled in order for the causation to be relevant from the standpoint of criminal liability[27]. In particular, an injurious outcome caused by the agent should only be attributable to him from an objective standpoint when the agent's behavior created a non-permitted risk to the legal

[24] Roxin, C. (2002), *Funcionalismo e Imputação Objetiva no Direito Penal*, translated from German by L. Greco, Rio de Janeiro: Renovar, p. 308; Greco, L. (2002), 'Imputação Objetiva: uma Introdução', in Roxin, C. *op. cit.*, p. 7.
[25] Roxin, C. (2002), 'A Teoria da Imputação Objetiva', translated from German by L. Greco, in *Revista Brasileira de Ciências Criminais*, volume 38, pp. 11-20 *apud* Greco L, *op. cit.*, p. 17.
[26] Greco, L., (2002), 'Imputação Objetiva: uma Introdução', in Roxin, C., *Funcionalismo e Imputação Objetiva no Direito Penal*, translated from German by L. Greco, Rio de Janeiro: Renovar, p. 3.
[27] Roxin, C. (2002) *Funcionalismo e Imputação Objetiva no Direito Penal*, translated from German by L. Greco, Rio de Janeiro: Renovar p. 308; Greco, L. (2002), 'Imputação Objetiva: uma Introdução', in Roxin, C. *op. cit.*, p. 7.

asset reached by his action, and this risk subsequently materialised in an injurious outcome[28].

It is important to bear in mind that the created risk shall be relevant, i.e., capable of creating a real peril for a certain legal asset, in order to ensure that the proposed solution is compatible with the *ultima ratio* nature of criminal law. This capability of damaging a certain legal asset shall be ascertained by means of the so called "posthumous prognosis" that is done after the occurrence of the fact. The term prognosis is employed once it corresponds to a judgment formulated from an *ex ante* perspective, taking into account only the information known at the time the relevant action took place. This prognosis has to be necessarily objective, because it is based on information known by an objective observer, by a prudent and diligent man, a standard which shall remain above that of an average man[29], which is explained by the *ultimate ratio* nature of the criminal law. It shall be also posthumous once, although it takes into consideration only the facts known by the prudent man at the time of the practice of the action, the prognosis is carried out by the judge and it takes place after the performance of the act. Also, whenever the author of the crime possesses some specific knowledge, not accessible for anybody, and that may determine that the action can have a harmful output on the legal asset, this knowledge shall be taken into account[30].

All these elements remain within the domain of objective imputation and their purpose can be generally seen as ascertaining the scope of the control of the legal person over such risk that materialized in a criminal outcome. Even when, with the analysis of these elements, the scope of dangerous actions is ascertained, not all of them shall be prohibited. As we have seen above, only dangerous actions (i.e., the ones that create a relevant risk as addressed above), but not all the dangerous actions shall be prohibited[31]. Within the relevant risks one shall reduce the scope of criminal liability by excluding the ones that are deemed acceptable. Under the generally accepted approach, the extent to which the risk is considered acceptable is measured by reference to the risks that life in society and the current level of civilizational development entails[32]. In concrete

[28] Sousa Mendes, P. (2007), *Sobre a Capacidade de Rendimento da Ideia de Diminuição do Risco*, Lisboa: Associação Académica da Faculdade de Direito de Lisboa, p. 33.
[29] Greco, L. (2009), *Um panorama da Teoria da Imputação Objectiva*, Lisboa: Associação Académica da Faculdade de Direito de Lisboa, p. 28.
[30] *Idem*, p. 29.
[31] *Idem*, p. 38.
[32] As defined by Figueiredo Dias, in *Direito Penal, Parte Geral, Tomo I*, 2.ª edição, Coimbra: Coimbra Editora, 2007, p. 333: *"This criterion is related to the fact (...) that social life carries an ineliminable*

terms, it means that the identification of the non-acceptable risks is based on the idea of balancing of the protection of legal assets against the freedom in general. This weighting shall not only take into account the absolute value of the assets that are exposed to danger, but rather to confront their "intensity" or relevance on the one hand and the social interest behind the practice of such dangerous action on the other. The efficiency and suitability of the available measures of care, the existence and costs of less risky alternatives shall also be taken into account, in line with considerations regarding the principle of proportionality[33].

C. *Mens rea* under the theory of objective imputation/ risk theory

In accordance with the risk theory, after verifying that the set of requirements for a given action to be objectively imputable to the agent is fulfilled, one shall address the subjective dimension (*mens rea*) in order to determine whether the agent shall be held liable for such an action.

Similarly to what we have seen concerning the evolution of causation theories, the subjective dimension that was introduced and used already by those theories in order to limit the scope of situations falling under the criminal liability is also relevant under the risk theory approach. Once it is possible to conclude that a certain behavior did create a non-approved risk and that this risk materialised in a criminal outcome, it would be necessary to address the intellectual and will dimensions of such a behavior to ascertain whether the agent was conscious of his action and willing to perform it. In particular, in order to be considered relevant from criminal liability standpoint, such a behavior shall bring with itself a subjective contradiction with a certain duty.[34] This contradiction shall be determined by reference to the intent that determines the direction and the ultimate aim of the action. To that extent it forms the general characteristic of the subjective dimension and the basis for the subjective imputation of the criminal offence[35].

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multitude of risks and dangers tolerated by society itself, since they are associated with civilizational achievements and development models that society cannot and does not wish to live without". The same idea is further developed by Hans Welzel (1969), *Das Deutsche Strafrecht . Eine Systematische Darstekkung*, 11th edition, Berlin / New York: Walter de Gruyter *apud* Sousa Mendes, P., *op. cit.*, pp. 45-46.

[33] Figueiredo Dias, J., *op. cit.*, pp. 332-335.

[34] Miguez Garcia, M., *op. cit.*, p. 259.

[35] *Idem*, p. 260.

Without a will oriented towards the practice of the action, either directly or indirectly, there can be no crime once the legal fact is not then considered to be a man's deed - it is not a result of his will. The formats of will guiding the action relevant to criminal law would then be malice (intent) and negligence[36].

These considerations have been incorporated under the Portuguese legal regime, as the will of the agent is recognized as an essential element of the crime, in accordance with article 13 of the Penal Code. This article states that an act that is not intentional or negligent[37] cannot constitute a criminal act, and therefore it is not considered to be a relevant act for criminal law.[38]

D. *Mens rea* under the theory of objective imputation/ risk theory in the context of a legal person.

Under the structural approach of imputation of a certain behavior to natural persons we have seen in the previous chapter the main practical difficulties arise in defining the likelihood of occurrence of a criminal outcome as envisaged by the perpetrator of the crime (when evaluating the awareness by the agent of the finality of his behavior), and the detachment of the inner conscience of a given action from the intellectual representation of the consequences of such an action[39], when determining the willingness associated to this behavior. These two concepts of will and consciousness (this last one corresponding to the above mentioned intellectual element) always appear interlinked, once the underlying idea is that the specific form of will corresponding to intent requires a certain level of awareness or knowledge of the action being perpetrated and also a certain affective or emotional positioning in relation to that action[40].

On the other hand, once we turn our looks to legal persons, it is the very existence of these two concepts that is questioned when this approach is implemented in practice. In this respect, it is important to bear in mind that the concept of liability has its foundations anchored to a conceptual view of imputation based on the freedom of action

[36] Marques de Silva, G. (2012), *Direito Penal Português – Teoria do Crime*, Lisboa: Universidade Católica Editora, pp. 94-95.
[37] Under the Portuguese legal regime, the negligent crimes are only relevant, and therefore punishable, when there is a specific reference to this fact in the applicable legal provision.
[38] *Idem* to footnote 36.
[39] Garcia, M. Miguez, *op. cit.*, pp. 264-265.
[40] Fernanda Palma, M. (2015), *Direito Penal Parte Geral – A Teoria Geral da Infracção como Teoria da Decisão Penal*, Lisboa: AAFDL Editora, pp. 97-105.

possessed by an individual. This concept of freedom is based on philosophical and sociological concepts, with the proposed solutions on the imputation of the liability attempting to provide a sociological explanation for such a freedom, with these attempts being largely based on the psychology of a human person as an individual, although taking into consideration its social condition and the fact that the individual acts while integrated into society[41].

Therefore, the question that arises is whether these intellectual and will elements are transposable to the context of legal persons and how one shall apprehend the will and knowledge of a legal person. Taking into account the organizational structures that govern the legal persons (and the corporations in particular), it seems logical that the intentionality (the will) and the awareness of illegality (the consciousness or the intellectual element), the two structuring elements of malice, shall be evaluated by reference to the activity of corporate bodies that represent the legal person and execute the relevant acts on its behalf, as opposed to the individual actions of the natural persons who are in charge of these corporate bodies. In other words, the business activity is seen within a given social context existing inside the organization, forming the so-called corporate culture, revealing through this way the will of the corporate body that binds the legal person and it does not correspond to the particular wills of each of the members of that body[42].

In any case, a strictly formalistic approach shall not be followed in this domain. As Quintela de Brito states it: (i) the punishable act rarely consists of a mere resolution of the Board of Directors, and (ii) it may be practiced by representatives in a leading position and by persons with authority to exercise control over the activity, without this act being supported by any resolution of the body representing the legal entity[43].

Therefore, the authors generally seek material references in addressing this issue. In particular, Carlos Gómez-Jara Diez sustains that in order to proceed with the subjective imputation of a relevant act to a certain agent – being it a natural or a legal person - the existence of certain evidence is relevant - the evidence or clues that shall allow to assign

[41] Marques de Silva, G. (2012), *Direito Penal Português – Teoria do Crime,* Lisboa: Universidade Católica Editora, p. 210
[42] Marques de Silva, G. (2009) *Responsabilidade Penal das Sociedades e dos seus Administradores e Representantes*, 1st edition. Lisboa: Editorial Verbo, pp. 194-196
[43] Quintela de Brito, T. (2012), *Domínio da Organização para a execução do facto: responsabilidade de entes coletivos,* doctoral thesis, Lisboa: Universidade de Lisboa, p. 1051, footnote 2370

to the organization a certain knowledge considered relevant at a given moment in time for a given act to be imputable to the agent from a subjective perspective[44]. On its turn, Maria Fernanda Palma sustains that malice does not depend so much on an act of conscious will of the agent but rather on an objective attribution of a certain meaning to a given context of action, based on the so called "social language of intentionality" and the different formats it may take. For this reason, Maria Fernanda Palma admits that common experience criteria – when duly identified - shall be used to demonstrate that the behavior of the agent, in those concrete circumstances, corresponded to a material deliberation to practice the criminally relevant act (going in this sense beyond the mere formal deliberation passed by a corporate body)[45].

As to the approach suggested by Teresa Quintela de Brito, the subjective imputation of a criminal act to a legal person is two-fold and shall be the result of:

(i) on the one hand, the valuation of knowledge (both formal and informal) accumulated at the level of the business sectors in which the offence took place (in a way that may be proved by evidence), as well as at the level of the management of the legal person;

(ii) on the other hand, the interpretation of the objective circumstances in the context of the community/ organization where the criminal offence took place in the light of the implicit "social language".

By way of conclusion, we may summarize these reasonings as addressed above by stating that the relevant elements in ascertaining the consciousness and the will elements in the context of a legal person are:

(i) Valuation of the formal and informal knowledge accumulated in the sector(s) within organization in which the criminal offence took place, and also within the leadership of the legal person[46]. This knowledge, held by centers of leadership and corporate bodies shall be considered from a global perspective and not limited to a specific historical moment, rather taking into account the

[44] Gómez-Jara Diez, C. (2009), 'La atenuación de la responsabilidad penal empresarial en el Anteproyecto de CP de 2008: los compliance programs y la colaboración con la administration de justicia', *El Anteproyecto de modificación del Código Penal de 2008. Algunos aspectos*, Bilbao: Universidad de Deusto, p. 247 and footnote 92 *apud* Quintela de Brito, T., *op. cit.*, p. 1051

[45] Voting declaration to Constitutional Court Decision 250/2006 *apud* Almeida Semedo, M.J. (2016), 'Imputação Subjetiva: Como se constrói e prova o dolo?', *Revista de Concorrência e Regulação*, Volume 27-28 (July-December 2016) , p. 314

[46] Quintela de Brito, T., *op. cit.*, pp. 1053-1054

modus operandi of the organization as it evolved through the time[47], in what can be defined as *corporate knowledge*; and

(ii) Interpretation of the objective circumstances of the perpetrated crime in light of the social language ascertained within the organization[48], in what can be defined as *corporate conscience*. For the purpose, duly identified in advance common experience criteria shall be used[49].

The application of the risk theory in such a way as proposed above avoids a total objectivization of intent and allows not to incur in the risk of establishing an objective criminal liability for legal persons, by requiring to resort to the individual knowledge of those natural persons who contributed to the criminal offence[50]. Nevertheless, this aggregation of individual knowledge is not addressed at a static perspective by reference to pre-determined group of people at a certain moment in time, as it happens in the case of natural persons, but it rather encompasses the accumulated individual knowledge at the level of the organization during a certain period of time, capable of defining its *modus operandi* throughout the time[51].

E. The capacity of action and capacity of guilt in the context of a legal person

In order to impute the criminal liability to the legal persons it won't be enough to ensure that the intellectual and will elements can be identified within the organization as discussed in the previous chapter. Beyond these elements, even if treated under the structures described in the previous chapter, a number of dogmatic issues is raised that need to be addressed. In particular, it is discussed whether the legal person have the capacity of action and the capacity of guilt.

At first glance it may seem that legal persons do not have the capacity to act[52], and could never have it. In fact, legal persons, like all other legal entities, lack a physical

[47] Martins, A.C. (2016), 'Imputação Subjetiva: Como se constrói e se prova o dolo da pessoa coletiva?', *Revista de Concorrência e Regulação,* Volume 27-28 (July-December 2016) , p.299.
[48] Quintela de Brito, Teresa, *op. cit*., p. 1054
[49] Martins, A. C., *op. cit.*, p. 299.
[50] Martins, A. C., *op. cit.*, p. 299.
[51] Quintela de Brito, T., *op.cit.*, p. 1065.
[52] Correia, E. (2015), *Direito Criminal I*, Lisboa: Almedina, p. 234 *apud* Marques de Silva, G. (2009) *Responsabilidade Penal das Sociedades e dos seus Administradores e Representantes*, 1st edition. Lisboa: Editorial Verbo, p. 160

and psychical organism and can only act through natural persons, whose acts will be projected into the legal sphere of the legal person. Therefore, legal entities, not being able to act themselves, but only through individuals, would necessarily be deprived of such a capacity[53].

This vision is essentially based on the fact that traditionally, in accordance with the so called "theory of action", only natural persons were recognized as capable of action. It was understood that only men could interfere with the casual chains under their own volition and intellectual appraisal, unlike the changes in the causal chain that arise due to a physical or a natural fact. For the theory of action, only the first type of intervention was relevant from the point of view of criminal imputability.

Reis Bravo, calling attention to the mega-risks that the activity of legal entities brings to society, defends a total acceptance of the capacity of action of the legal entities[54], in line with the position of authors such as Faria Costa[55] and Schünemann[56]. This acceptance is based on analogy, attributing to the collective entity the capacity of action and guilt to the extent that the legal persons appear as creations of men and, to this extent, creations of men's freedom, that fact that allows this solution to adhere to the principle of the identity of freedom announced by Max Müller[57].

As regards the capacity for guilt, as mentioned above, authors take the same route, grounding its admissibility on the freedom of men and on the fact that legal persons themselves are men's creations. Nevertheless, some particularities arise under this analogy due to the way this issue has been addressed by some of the authors. In particular, it is suggested that the guilt is regarded as the consciousness of the agent, necessarily linked to the capacity of processing the information retrieving the knowledge – the capacity only possessed by a human mind. Therefore, it is deemed impossible to create a concept of collective consciousness or the consciousness of a legal person[58].

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[53] Alberto da Mota Pinto, C. (2005), *Teoria Geral do Direito Civil*, 4th edition, Coimbra: Coimbra Editora, p. 313 *apud* Germano, *op. cit.*, p. 160
[54] Reis Bravo, J., *op. cit.*, p. 68
[55] Faria Costa, J. (1992), 'A Responsabilidade Jurídico-Penal da Empresa e dos seus Órgãos', *Revista Portuguesa de Ciência Criminal*, volume 4 (October - December 1992), p. 544
[56] Schünemann, B. (1995), 'La responsabilidad jurídico penal de la empresa', *Fundamentos de un Sistema Europeo del Derecho Penal*, Barcelona: Bosch, pp. 425-446 *apud* Marques da Silva, G., *op. cit.*, p. 171
[57] Reis Bravo, *op. cit.*, p. 68
[58] Reis Bravo, J., *op. cit.*, p. 70.

However, in the words of Larenz[59], the legal person is a unitary reality that acts through its corporate bodies. The "collective will" therefore corresponds to a legal concept that is analogous to the human will, but it is not a psychological concept. Nevertheless, it corresponds to a spiritual and social reality. Therefore, the acts of the corporate bodies are the acts of the legal person that shall also be analogically addressed, and so it will not be necessary to ascertain the existence of the consciousness of the legal person as a psychological reality in order for the capacity for guilt to be recognized as a capacity attributable to a legal person.

F. The mainstream models for criminal liability under the risk theory in the context of a legal person.

The treatment of the will and intellectual elements within the context of a legal person and the general admissibility of the capacity to act and the capacity for guilt of the legal persons we have addressed in the previous chapters do not by themselves give a clear guidance on how the criminal liability for a relevant criminal act shall be construed and allocated. The authors have proposed different approaches to establish the link between the action of natural persons as individuals acting within an organization with the action ascertained by reference to the legal person.

a. Direct liability models

The first approach corresponds to an idea of an autonomous behavior and an autonomous concept of guilt, resting essentially on the so called "organisational deficit" – it is based on the construction of K. Tiedemann - according to which the "organisational guilt" of the legal person is detached from the criminal liability of the individual agents who practiced the relevant criminal offences within the organization. Under this approach, the criminal liability is attributed to legal persons on the basis of inability to organise themselves in order to avoid the commitment of offences[60].

Other authors proposed some derivations of this idea. For instance, Heine defends an autonomous theory of culpability for conducting the business activity. For this author, the relationship between the objective condition of punishability and defective

[59] Lorenz, K. (1967), *Allgemeiner Teil des Deutschen Bürgerlichen Rechts*, München: Beck, p. 105 *apud* Marques de Silva, G., *op. cit.*, p. 170
[60] Reis Bravo, J., *op. cit.*, p. 71

management is not established on the basis of a strict causal relationship, but rather on the basis of the increase of the specific risk of the business activity, with this risk being regarded as the basis for imputation of a certain relevant offence. On the other hand, Lampe understands that ethical-social censorship can be made both to an individual and to a social system (organization), since the organisation as a human or social institution must accept and fulfill ethical obligations and therefore the company's culpability is based on the creation and maintenance of the criminogenic philosophy. However, and opposing Heine's perspective, in order to substantiate criminal liability under this approach it is still necessary for such a philosophy to be evidenced externally by a committed offence. Therefore, under this approach, whenever a criminal offence takes place in this context, in addition to the individual responsibility of the individual perpetrating the infraction, the individuals responsible for the corporate philosophy and organization must also be held responsible: everyone involved in this manner shall deemed liable, which would also be the practical outcome of the Heine's approach, whenever an offence is committed[61]. The difference is that under this first approach a separate condemnation of the legal person, even in the absence of a concrete committed offence, may be admitted, as the "organizational deficit" is regarded is a truly autonomous crime.

b. Liability models by representation

According to this approach, liability of legal persons arises from the actions of the natural persons acting on their behalf. This approach appears as a result of further development of civil law theories on the non-contractual civil liability of companies and other collective entities[62]. When following this approach, one starts by determining the agents that may hold the company liable, acting on its behalf in what can be regarded as a two steps procedure: firstly, identifying the action and the guilt of the individual who perpetrated the crime; secondly, proceeding with the imputation of this offence to the company.

[61] Marques de Silva, G., *op. cit.*, p. 186

[62] Coffee Jr., John C. (1995), 'Corporate Criminal Responsibility', in L. Orland, *Corporate and White Collar Crime: an Anthology*, Ohio: Anderson Publishing, p. 166 *apud* Marques de Silva, G., *op. cit.*, p. 152.

In going through the second step in this procedure, there are two modalities that can be identified, according to the individuals that are considered capable of "passing" to the company the liability for the offences committed by them[63]:

(i) They are either the members of corporate bodies, acting in such a capacity (*managerial mens rea*) – under this modality, only those individuals in charge of high executive positions in the company may hold the company liable, once they are the ones capable of defining the politics of the company and, therefore, to define the corporate "will"; or

(ii) Any company officers or employees, as long as they act for the benefit of the company (*composite mens rea*) – under this modality, it is understood that the behavior of the subordinated officers corresponds to the execution of the will of the leaders, expressed either by action or by omission, and embedded in the orientation they provide to the corporate activity.

The main practical problems of this approach relate to the situations where it is not possible to identify the concrete individual who perpetrated the crime, which may ultimately lead to leaving the legal person unpunished. Whether one attempts to introduce the liability independent of identification of the concrete individual who perpetrated the offence, on the grounds of an idea that the lack of discovery is itself due to organizational deficiencies, the outcome would be a purely objective liability. In addition to this, it is not clear how one shall deal with the actions of company's officers that go beyond their attributions as corporate body's members[64].

Still within this approach, Jorge dos Reis Bravo creates an autonomous model of corporate bodies guilt, where the domain of corporate liability is limited to formal expression of will of the corporate bodies, that had been formed regularly and under the applicable legal form (for instance, through corporate resolutions). However, as the author himself recognizes, this approach is too narrow and also does not seem to configure a feasible practical solution, facing the same limitation as addressed above: it will ultimately lead to even more cases where the corporations remain unpunished, as one is aware that multiple crimes perpetrated within corporations are not formally deliberated by corporate bodies, and nevertheless consented by them[65].

[63] Without prejudice to their individual liability.
[64] Marques de Silva, G., *op. cit.*, pp. 182-183
[65] Reis Bravo, J., *op. cit.*, p. 72-74

c. Mainstream models: what is left behind

When one tends to approach the reality through the liability by representation models, the main difficulties arise from the fact that we stay too close to volitive and intellectual elements of the physical person who perpetrated the crime, who is not always easily identifiable and may not be a single person but rather be configured as a confluence of individual initiatives. The attempts to distance ourselves from these elements, for instance by basing the corporate liability on the lack of organization (as the reason that led to the impossibility of discovering the material perpetrator), lead us to solutions of pure objective liability.

On the other hand, whenever we try to follow the path of the direct liability models, approaching the same idea of lack of organization in a more direct way, we lose the link to the concrete criminal offence that had been perpetrated, which is not a desirable result, as in this case the solutions offered will remain within the administrative law domain and they will not have a truly criminal law nature, as we will address further in the following sections.

In addition to that, the concepts of corporate culture and corporate knowledge as proposed by some authors we referred herein are not easily identifiable in practice and remain rather vague, in the absence of a more scientific guidance and approach, namely the one that can be offered by psychology and related sciences that analyze the human behavior within the context of organizations.

IV. Proposal for an alternative approach for criminal liability of legal persons

A. The risk perspective in the traditional approaches

As we have already seen, the central issue concerning the criminal liability of legal persons may be summarized as the discovery of whether the criminal offences materially committed[66] by managers/ directors acting within an organization shall be attributed to the legal person, and in which way. In addition to what we have seen so far throughout the previous chapters concerning the dogmatic problems that arise in this respect and the different proposals to overcome those limitations as proposed by

[66] By creating a risk that materialised in a criminal outcome, injuring legal interests and/ or assets.

different authors, the configuration of this problem may be summarized in the following way:

(i) The legal persons, mostly in the form of corporations and commercial companies, are increasingly becoming the most important agents in the market[67];

(ii) Once the companies act in the domains where significant risks are posed to the legal interests/ legal assets[68], their actions pose a number of risks to other agents in the market, namely the natural persons. Thus, we may regard the companies as a source of danger;

(iii) The legal person assumes the role of guarantor in relation to these risks. In particular, this role is attributed to the leaders of the legal persons, the once who have the functional domain of the sector of organization where the criminal offence took place[69].

(iv) The criminal offences committed by natural persons are attributable to the legal persons once it can be proved that there had existed an infringement of the role of guarantor by the leaders of the organization, and thus, once it is verified that there hadn't been a due level of the control of the risk through management tools[70].

While under this approach, that summarises the contributions of different authors, the imputation of criminal liability is based on the risk and the control of such risk through the functional domain of the legal person by its leaders[71], our proposal is based on a closer look at how the legal person acts and the interactions between the natural persons behind the organization (managers and shareholders) underlying this activity. We do not pretend to deny the risk perspective itself, but rather to liaise the control of the risks perspective with the way the legal person functions in its daily business, .

[67] Mascarenhas de Carvalho, J. (2016), *Do Contributo Individual de Autor do Líder à Responsabilidade Colectiva em Direito Penal: O Domínio da Organização para a Execução do Facto como Critério de Autoria do Dirigente,* master dissertation, Universidade Católica Portuguesa, Faculdade de Direito, p. 18.
[68] Marques da Silva, G., *op. cit.*, p. 112.
[69] Quintela de Brito, T., *Domínio da organização para a execução do facto: responsabilidade penal de entes colectivos, dos seus dirigentes e "actuação em lugar de outrem"*, doctorate dissertation, Universidade de Lisboa, Faculdade de Direito, pp. 28-29.
[70] Quintela de Brito, T., *op. cit.*, p. 360, Marques da Silva, G., *op. cit.*, p. 252.
[71] Quintela de Brito, T., *op. cit.*, p. 31.

B. Separation between ownership and management under the current legal framework

The traditional perspectives, while focusing on the control of the risks originated by legal persons' activities in the market, concentrate their attention on the figure of material leaders of an organization, to whom they attribute the role of guarantors[72]. The concepts of corporate knowledge and corporate conscience also seem to rely on the individuals directly involved in daily management of the firm. Thus, the actions or omissions of such leaders will determine whether the legal persons shall be held liable for certain offences.

However, it is important to bear in mind that even the leaders in a large corporation will normally be hired by contract and appointed by shareholders, especially by the major ones. Moreover, from the standpoint of the material burden (and not the legal imputation) the shareholders, rather than the leaders, will also be the ones to bear the fines imposed on the corporations, once the fines will have an immediate effect on the profits of the company, and thus on its share value[73]. The impact on the leaders will be limited to that part of their variable remuneration that is dependent on the share value of the company (if existing), which tends to be relatively small in comparison to the total remuneration that is defined by contract and is not directly linked to the share value of the company. On the contrary, all the wealth of the shareholders is given by the value of the shares they own only.

Undoubtedly, the imposition of a fine, as a form of criminal punishment, has to be justified under proper legal grounds – in particular, it has to be preventive by its nature, rather than repressive. Therefore, we understand that one shall be able to understand whether the *ultimate ratio* characteristic of the Criminal Law is respected by reference to the shareholders, if we include them into analysis, verifying whether a purely repressive effect can be avoided. This is the reason why we find it necessary to extend the scope of our analysis in order to include the shareholders and their role in the functioning of a legal person/ corporation.

[72]Quintela de Brito, T., *op. cit.*, pp. 28-29.

[73]The most common methods of firm valuation base the share value of a given company on the expectations towards its future profits, and thus any impact, either already materialized or just likely to affect the profits of the company, will have an immediate effect on the share value of the company.

However, the managers' and shareholders' contributions to the practice of the criminally relevant offences by the organization are not identical and shall not be confused, insofar as:

(i) On the one hand, the manager as a natural person is responsible for the concrete crime that he committed in its capacity as the corporate leader and on behalf of the company, either by action or by omission, in accordance with the guarantor's role assumed by him, and the penal provision to be applied to him shall be defined in accordance with this specific crime;

(ii) On the other hand, the conduct of the legal person is also linked to the action of its shareholders who elect and monitor the managers - natural persons in charge of the corporate governing bodies. This action arises at the level of organizational structure, with failures in this structure, especially the ones relative to the appointment and monitoring of the managers, being liable for triggering the commitment of the concrete offence performed by the manager and/or leader of the legal person.

Accordingly, we understand that it is not correct to match the conduct of the legal person only with the acts performed by its managers (acting as the leaders of the organization), since in most cases there is no coincidence between who controls the legal person (its strategic goals, statutory provisions and, in a broader sense, its "strategic will"), and who takes the daily management decisions, which may include the commission of a crime.

In fact, the portuguese legal regime distinguishes between the strategic decision making attributable to shareholders[74] and the day-to-day management attributable to managers[75], following the material trend of separation between ownership and management recently accentuated by an increase of the dimension of corporations, transforming their management into a truly professional activity[76], with the hired directors being experts in the daily management, which is no longer directly observable to shareholders (contrary to what typically happens within the family business paradigm), for two reasons:

[74] Olavo Cunha, P. (2012), *Direito das Sociedades Comerciais*, 5th edition, Lisboa: Almedina, pp. 483; 705-706.
[75] Olavo Cunha, P., *op. cit.*, pp. 484; 705-706.
[76] Olavo Cunha, P., *op. cit.*, pp. 800-801.

(i) Firstly, the professional nature of the activity derives from the greater technical complexity in the conduct of business, which may not be immediately perceived by shareholders, who may not have the necessary technical knowledge.

(ii) In addition to this, the number of tasks regularly performed by managers and their level of detail do not allow for a permanent monitoring of all their actions[77].

This differentiation between strategic decision making attributable to shareholders and the powers of day-to-day guidance attributable to managers creates a two layer will element in the case of corporations, differently from the will of a natural person. While a natural person controls and takes all sorts of decisions, since the strategic ones and up to the most simplistic daily actions, the will of a legal person acting in the market is necessarily a result of cooperation between the strategic view of its owners and the daily conduct of its managers, with distinct spheres of activity and control, a reality that shall also entail different spheres of liability. Therefore, the concepts of the *corporate knowledge* and the *corporate conscience* shall then rely on this interaction between the shareholders and managers, rather then to be construed exclusively on the basis of the behavior of the leaders and managers of a corporation.

Notwithstanding the legal separation between the domain of control attributable to managers and that attributable to the shareholders, it does not provide us with a clear guidance concerning the imputation of the criminal liability to the legal persons. In order to ascertain when the shareholders shall be liable together with the managers of companies, we shall further address the way the strategic orientation and the daily management of business interact in practice, relying on the analysis of the behavior of the persons assuming those roles, which we will address in the following chapters.

[77] One of the domains where such complexity is notable, besides the technical advances, is the regulatory environment the major companies have to deal with. It is becoming increasingly more vast and complex, imposing greater liabilities on the managers acting as leaders of the company This is especially true for some activity sectors, such as the financial sector, where the recent financial crisis triggered a vast domain of more densified obligations to comply with in the various aspects of the activity.

C. Principal-Agent problem as a basis for separate liability domains

As we have discussed in the previous chapter, the professionalism of the managers and the separation between ownership and management of a company is today's reality that has been reflected in the current legal framework for commercial corporations[78]. Thus, it is worth understanding what the material impacts of such a configuration of a legal person's daily activity on the domain of the concrete actions operated in the market in the name and on behalf of the legal person may be.

It is undeniable that the ultimate goal of any shareholder is to obtain the profit that results from the difference between the revenues and the costs of pursuing the business. To the extent that the applied fine represents a cost to the company, it is understood that this form of punishment of legal persons enables the preventive effect necessary to achieve an effective prevention effect against corporate criminality[79].

It is further noted that the repressive purpose of criminal law implies that this punishment shall go beyond the simple cancellation of the obtained profits[80], and consequently the cost imposed on the society by means of a criminal fine shall exceed the profits obtained with the crime, achieving in this way a truly repressive effect on the shareholder.

However, going beyond the merely compensatory and reparatory nature of the burden imposed on the company and, consequently, on its shareholders, entails additional considerations. In particular, it is important to determine, strictly from the point of view of criminal protection, differentiating from considerations under the Civil Law perspective, when does it make sense to punish the shareholders of a company and whether it would be sufficient, for this liability to be triggered, to prove that a particular unlawful act has been committed for the benefit and on behalf of the company?

In order to answer this question, we will take a look at the findings of the economic science that has long addressed the analysis of the behavior of different agents in the markets, with corporations being one of these agents. In particular, the analysis of interactions between the owners and the managers of a certain business gave rise to the

[78] It is worth mentioning that the vast majority of legal persons operating in the market in Portugal are incorporated under the Commercial Companies Code and thus are subject to this legal framework where this division of competences between shareholders and managers is foreseen.
[79] Reis Bravo, J., *op. cit.*, pp. 64-67.
[80] Marques da Silva, G., *op. cit.*, pp. 119-120.

so called Principal-Agent theory, an issue studied and further developed by the economic science. In accordance with the findings of this theory, the separation of capital ownership from business administration gives rise to the problem of asymmetric information[81].

The owners of the firm are the shareholders, and with a disperse ownership many of them will tend to have a small proportion of the total equity of the company, as normally the shareholders are the investors who are interested in diversifying their shareholdings across a number of companies, reducing the risk of their portfolio. As a consequence, shareholders will tend to take a limited interest in the running of any one company[82].

On the other hand, the managers of a firm are the stewards for the shareholders, overseeing the operations of the company on their behalf. In practice, boards of directors are usually dominated by the senior executives. It is them, rather than the shareholders, who effectively control the company (subject to the organizational problems which they themselves may have in ensuring that their decisions are actually implemented)[83].

At the same time, the information itself that is observable and constitutes the basis for decision-making by directors and managers does not necessarily perform the same function in relation to shareholders, due to a number of reasons, such as the amount of information to be considered, its technical complexity[84] and the fact that the control of availability of such information is usually dominated by managers, as they are the ones ultimately in charge, as detailed above.

This problem arises in the context of mismatch of incentives between the principal (shareholders) and the agent (the managers hired by the shareholders). For instance, the managers may prioritize short-term results and engage in wrongdoing instead of taking into consideration the sustainability of the long-term pursue of the activity. Also the danger of a reputational damage may not have an impact of the same magnitude on the managers and on the shareholders.

[81] Gravelle, H. and Rees, R. (2004), *Microeconomics*, 3rd edition, New Jersey: Prentice Hall, pp.556-557.
[82] *Idem, pp.* 555-556.
[83] *Idem*, pp. 556.
[84] Armour, J., Hansmann, H. and Kraakman R. (2009), *Agency Problems, Legal Strategies and Enforcement*, Discussion Paper No. 644, John M. Olin Center for Law, Economics, and Business, p.2

For demonstration purposes, and in accordance with the common practice in economic modelling[85] of the Principal-Agent theory, we may represent both the shareholders and the managers as the agents who seek to maximize their utility with their conduct. In abstract terms, it is possible to imagine that each of them pursues this aim in accordance with a certain utility function, that can be represented as a relationship between a series of variables (such as income, reputation, potential fines and the probability of conviction, etc.), all of each contribute to the utility of the agent in a certain way that can be mathematically expressed[86]. Thus, the considerations we have made above about the mismatch in incentives may be integrated in the design of the utility functions through consideration of different intensity with which different elements bring utility to the agents (managers and shareholders)[87]. While the profit of the firm may be the central masterpiece in the utility function of the shareholders, it may not have the same importance in the utility function of the managers, who are more interested in their personal income, comprising both monetary and non-monetary components[88].

From the standpoint of criminal protection, different utility functions imply that any imposed fine does not have the same deterrent effect on the manager and on the shareholder, once the loss in company's profit will not have the same weight in their utility functions. With utility functions being different across the agents, *"if both parties to the relationship are utility maximizers there is good reason to believe that the agent will not always act in the best interests of the principal"*[89]. The most common sources of divergence between the utility functions are different risk profiles and different valuations of utility obtained over time. Consequently, even if the shareholders and the managers would have access to exactly the same information, the decision taken by ones and others would not necessarily be the same[90].

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[85] For instance, Varian Hal, R. (1990), *Intermediate Micrcoeconomics, A modern Approach*, 2nd edition, London: Prentice Hall, pp. 592-599; Gravelle, H. and Rees, R., *op. cit.*, pp. 557-567; Laffont, J.J. and Martimort, D. (2011), *The Theory of Incentives: The Principal-Agent Model*, New Jersey, pp. 32-39.
[86] For instance, consider the basic model *in* Laffont, J.J. and Martimort, D., *op. cit.*, pp. 32-39.
[87] Gravelle, H. and Rees, R., *op. cit.*, pp. 456-459.
[88] For a more detailed analysis of the behavior of a manager when he owns 100 percent of the residual claims on a firm with his behavior when he sell off a portion of those claims to outsiders, we refer to Jensen, M. C. and Meckling, W. H. (1976), *Theory of the firm: Managerial Behavior, Agency Costs and Ownership Structure*, Journal of Financial Economics, Volume 3 (Issue 4, October 1976), pp. 312-313.
[89] Jensen, M. C. and Meckling, W. H., *op. cit.*, p. 308.
[90] There is a vast domain of principal agent models with different levels of complexity, but even the basic ones with no asymmetric information consider a maximization approach with different utility function (For instance, consider the already ,mentioned above basic model *in* Laffont, J.J. and Martimort, D., *op. cit.*, pp. 32-39). In fact, Michael Jensen and William Meckling expressly state that *"In most agency*

These considerations lead us to the conclusion that tackling the asymmetric information problem only would not be a sufficient response to address this issue. In addition to having access to the information, the shareholders shall implement mechanisms in order for managers to respect the utility function of shareholders[91] in the analysis of information and the decision-making process. This is usually done by implementing appropriate incentive schemes[92] that can go beyond the material domain[93]. Chester Barnard emphasized the need for the inducement of appropriate effort levels from agents to be complemented with authority relationships within the organization to deal with the necessary incompleteness of incentive contracts[94].

The incentive schemes will generally be embedded into the contracts celebrated between the shareholders and the agents with remuneration strategies that are associated to these contracts[95]. The different remuneration schemes of directors / managers, with a linkage of remuneration to the performance of the company itself (by granting shares and / or debt instruments and subordinated debt instruments of the corporation as part of remuneration), and a deferral of a part of the variable remuneration over time, have been used in practice[96]. It is worth mentioning that, as well as the entire analysis of the principal agent utility maximization problem relies on the assumption of the rationality of the parties involved[97], the same happens with these incentive alignment mechanisms, that mostly rely on the Principal-Agent conflict analysis as addressed above.

D. Cognitive deviations as a basis for separate domains

We have just shown that managers' preferences, incorporated into their utility function, tend to differ from shareholders' preferences, which means that the commitment of criminal offences by managers, even when committed on behalf and in the name of the

relationships the (...) there will be some divergence between the agent's decisions and those decisions which would maximize the welfare of the principal".

[91] Which would mean, in practice, to act in accordance with shareholders' preferences and purposes.

[92] Jenson, M. C. and Meckling, W. H., *op. cit,*, p. 308.

[93] Laffont, J. J. and Martimort, D., *op. cit.*, pp. 11-14.

[94] Barnard, C. (1938), *The Functions of the Executive*, Cambridge, *apud* Laffont, J.-J. and Martimort, D., *op. cit.*, p. 13.

[95] Armour, J., Hansmann, H. and Kraakman R., *op. cit.*, pp.8-9.

[96] For instance, consider the Directive 2013/36/EU of the European Parliament and of the Council and the Commission Delegated Regulation (UE) 604/2014, now mandatory to be implemented in the financial institutions, the ones posing the greater systemic risks to the economy.

[97] Which is implicit in the assumptions of the classical theory of the consumer. For instance, consider Gravelle, H. and Rees, R., *op. cit.*, pp. 12-22.

legal person, may not correspond to the intentions of the shareholders, embedded in their domain of the strategic orientation of the business activity. So far our analysis has been based on the rationality assumption of the agents involved as it is one of the pillars of the classical economic science in what concerns the analysis of the behavior of different agents in the markets, including corporations. In practice it means that both the manager acting as the agent and the shareholders acting as the principal are assumed to be rational in taking their decisions, including those that lead to the commission of a crime. The rationality had been traditionally defined as the ability of agents to take decisions in accordance with a coherent set of their pre-defined preferences, they are consistent in their choices and use all the available information to take the decision to act in a certain way[98]. As a result, we defined the contractual relationship to be established between shareholders and management, with the introduction of adequate compensation mechanisms, as the tool for aligning their preferences as represented by their utility functions.

Lately, the rationality assumption has been undermined by Behavioral Law and Economics[99], which aims to provide a more realistic theoretical pattern of behavior for human conduct than the one offered by classical economic theory, based on the rationality assumption[100]. Instead of the classical concept of rationality as defined above, this stream of economic science has reinforced the use of the new standard of the bounded rationality[101] in economics science, first introduced by Herbert Simon[102].

It is important to mention that this new behavioral theory does not replaces the neoclassical paradigm that provided us with the Principal-Agent theory analysis we

[98] Becker, G. (1993) "The Economic Way of Looking at Life.", *Coase-Sandor Institute for Law & Economics Working Paper*, No. 12, 1993) available at http://latlibre.org/wp-content/uploads/2019/02/The-Economic-Way-of-Looking-at-Life.pdf; Posner, R. (1997). "Rational Choice, Behavioral Economics, and the Law.", *Stanford Law Review*, 1551 (1997) available at https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2879&context=journal_articles and Dekel, E. and Lipman, B. (2010), "How (Not) to Do Decision Theory.", *Annual Review of Economics*, Vol.2 (2010), pp.257-282; Hammond, Peter J. (2001), *Rationality in Economics*, Stanford: Stanford University, pp. 8-10 available at https://web.stanford.edu/~hammond/ratEcon.pdf.

[99] Thaler, R.H., '*Behavioral Economics: Past, Present, and Future'*, American Economic Review 2016, 106(7): pp. 1579-1586.

[100] *Idem* a 92, pp. 1577.

[101] Whalley, J. (2005) *"Rationality, Irrationality and Economic Cognition,"* CESifo Working Paper Series 1445, CESifo Group Munich, pp. 2-6.

[102] For instance, Herbert A. S., (1984). *"Models of Bounded Rationality, Volume 1: Economic Analysis and Public Policy,"* MIT Press Books, The MIT Press, edition 1, volume 1, number 0262690861, August 1984.

addressed in the previous chapter. This first theory characterizes how optimal choices are taken by the agents and how the intended equilibrium may be achieved when the agents behave in this way. Behavioral theories appear as an upgrade in a sense that they provide us with a set of practical enhancements that lead to better predictions about behavior of actual individuals[103].

Once the criminal law is preventive by its nature, as further detailed in chapter H below, our understanding is that it cannot encompass the behavior of an ideal *homo economicus* only. The consideration of a more realistic approach of the behavioral of the actual individuals can allow us to draw some practical considerations so as to the subjective imputation of liability within a company[104]. In fact, some behavioral economists even consider that the recognition of the behavioral literature might lead to a rethinking of the legal and policy conclusions of the past decades in what concerns criminal law and policy[105].

Silva Sánchez already used this standard in the context of the criminal liability in a business context[106]. In particular, this author addressed the impacts of the most prominent cognitive deviations that affect the individual behavior, and of the so-called group dynamics, extracting a set of conclusions about the imputation of criminal liability to the agents who act integrated into organizational structures of a company[107]. We are of the opinion that these conclusions and the reasoning are also relevant when analyzing the issue of the imputation of the criminal liability to corporations themselves.

Concerning the set of sources of individual disturbance of the rationality, this author identifies the following ones[108]:

(i) **Overconfidence bias**, corresponding to the situation when the agents tend to have more confidence in their own knowledge, abilities and judgements than the one that would be justified under the real circumstances. The excess

[103] Thaler, R. H. (2016), 'Behavioral Economics: Past, Present, and Future', *American Economic Review*, 106(7): pp. 1579-1586.
[104] Silva Sánchez, J. M. (2016), *Fundamentos del Derecho penal de la Empresa*, 2nd edition, Madrid, 2016, pp. 207.
[105] McAdams, R. and Ulen, T. (2008), 'Behavioral Criminal Law and Economics', *University of Illinois Law and Economics Research Paper*, n.º LEO-8-035, 2008, pp.3-4.
[106] Silva Sánchez, J. M., *op. cit.*, pp. 204.
[107] Silva Sánchez, J. M., *op. cit.*, pp. 203-241.
[108] There had been identified a great number of cognitive deviations already, and we rely on the choice of Silva Sánchez for identifying those that are relevant from the criminal law perspective.

of confidence can lead the agent to accept uncritically its own decisions with no serious moral decisions[109].

(ii) **Overoptimism bias** occurs whenever the agent tends to judge the circumstances in the most favourable way. For that reason, he tends to envisage the consequences of his actions as successful and not as unfavourable. These attitudes taken in excess may lead to systematic errors in the decision making process[110].

(iii) **Illusion of control bias**, occurring whenever the agent considers he can control certain situations where, in reality, other factors external to the agent's desire have a determinant role[111].

(iv) **Confirmation bias**, corresponding to the situation where an agent uses a certain theoretic approach to organize ideas that he uses in his daily actions. Once the explanatory theory behind this approach is established, he tends to identify evidence confirming this approach, giving rise to what is known as "expectant observer effect". This effect takes place whenever, for instance, a researcher expects a certain result to occur and tends to manipulate unconsciously the experiment or to misinterpret its results in order to arrive to the desirable result[112].

(v) **Self-service bias**, characterized by the situation where the agent tends to attribute the foundation for achieving positive results to himself, while at

[109] Prentice, R. (2007), 'Ethical Decisions Making: More Needed than Good Intentions', *Financial Analysts Journal*, volume 63, n.º 6 (2007), p. 20; Prentice, R. (2004), 'Teaching Ethics, Heuristics, and Biases', *Journal of Business Ethics Education*, volume 1 (1) (2004), p. 60. *apud* Silva Sánchez, J. M., *op. cit.*, pp. 208-209.

[110] Cohan, J.A. (2002), 'I didn't know' and 'I was only doing my job': Has Corporate Governance careened out of control? A case study of Enron's information myopia', *Journal of Business Ethics*, volume 40 (2002), pp. 285 ff.; Langevoort, D. (1997) 'Organized Illusions: A Behavioral Theory of Why Corporations Mislead Stock Market Investors (and Cause Other Social Harms), *University of Pennsylvania Law Review*, volume 146 (1997), pp. 139 ff., *apud* Silva Sánchez, J. M., *op. cit.*, pp. 209-210.

[111] Langevoort, D. (1997) 'Organized Illusions: A Behavioral Theory of Why Corporations Mislead Stock Market Investors (and Cause Other Social Harms), *University of Pennsylvania Law Review*, volume 146 (1997), p. 139, *apud* Silva Sánchez, J. M., *op. cit.*, pp. 209-210.

[112] Cohan, J.A., 'I didn't know' and 'I was only doing my job': Has Corporate Governance careened out of control? A case study of Enron's information myopia', in *Journal of Business Ethics*, volume 40 (2002), pp. 283-284; Prentice, R. (2004), 'Teaching Ethics, Heuristics, and Biases', *Journal of Business Ethics Education*, volume 1 (1) (2004), p. 61. *apud* Silva Sánchez, J. M., *op. cit.*, pp. 210-211.

the same time the negative results are attributable to external factors (the situation, the authority, a third party[113]).

The incidence that these biases may have on the decision making process and the behavior of the agents integrated into organizational structures is remarkable, as it affects the valuation of the risks associated to certain decisions. In particular, a lot of decisions are based on excessive optimism, or under a false illusion of the control of the risks that will result from the proposed course of action suggested by managers[114].

However, the essentially individual nature of these biases implies that the obligation to neutralize them also lies within the individual sphere of the manager - natural person responsible for the commission of the crime. As Jesús María Silva Sanchez mentions, the basis for the subjective imputation of the criminal acts that have been practiced under the influence of these individual cognitive biases relies within the duty and the cognitive capability (although limited) of the manager to avoid the systematization of these errors and their repetition, as well as their duty and the cognitive capability (also limited) to detect and correct the automatization of the erroneous patterns of misconduct[115].

Considering the domain of strategic control attributable to shareholders, it is worth mentioning that the behavioral economists identified the so called *nudging strategies* as the ones that may be taken by a third party and to steer the agent into the direction of a rational choice, without substituting the agent in the process of the decision making (that is to say, no freedom is retrieved from the agent and he is still the one who takes the decision to act in a certain direction). That is to say, at least for certain cognitive deviations, the company could implement some nudging strategies so as to promote the annulment of deviations and the return to the rational pattern in the decision taking process[116]. However, we do not regard it as a basis to hold the company liable from a criminal law standpoint if it fails to do so, once these deviations occur and are originated in the individual sphere of the manager. Even though he acts in a business context and within an organization, the very existence of these deviations and their intensity do not

[113] Langevoort, D. (1997), 'Organized Illusions: A Behavioral Theory of Why Corporations Mislead Stock Market Investors (and Cause Other Social Harms)', in *University of Pennsylvania Law Review*, v. 146, p. 139.
[114] Silva Sánchez, J. M., *op. cit.*, p. 212.
[115] Silva Sánchez, J. M., *op. cit.*, pp. 224-225.
[116] Thaler, Richard, *Behavioral Economics: Past, Present, and Future*, American Economic Review 2016, 106(7), pp. 1594-1597.

derive from the very existence of the legal person and are not enhanced by its organization.

Beyond individual cognitive deviations, this author also employs the Social Psychology analysis considering that individual decisions can be also conditioned by the so-called situational forces (defined as "context and process")[117]. These situational forces are roles, norms, rules and authority, anonymity and de-individualization, dehumanizing processes, and pressures to achieve conformity with collective identity[118]. All these distortions can make an agent adopt new standards of conduct, imposed by the organization in which he is integrated, without fully realizing them[119].

The author identifies the following biases in this "collective" domain:

(i) **Conformity bias**, group think or group cohesion, that occurs whenever the agent tends to follow the majority opinion in order to belong to the group, even though his personal beliefs are different[120]. If the agent, additionally, expects to build a career, then he will tend to adopt his behavior to the behavioral matrix of the group[121]. This phenomenon is similar to the so called "group think" and "group cohesion" effects. The first one is of an individual nature and occurs whenever an agent, who is a member of a group, has a fear of being rejected by the group if he doesn't follow the patterns imposed by the leader or by the majority inside the group. This is the reason why he may sometimes engage in a "group think" that is in part or in whole opposite to its own beliefs. The "group think" may produce one of the two results from the perspective of "group cohesion": either a systematic and orderly group behavior or a sudden and disorderly behavior. In both cases the members of the group do not deter themselves to analyze the situation, to revisit their behavioral matrix and to question themselves as a group. Under such circumstances, even if illegal practices start to occur,

[117] Zimbardo (1997), *El efecto Lucifer: el porqué de la maldad, 2008. Un estudio de psicología organizacional que ilustra cómo funcionan las dinámicas de grupo en términos de "paradojas"*, in Smith/ Berg, *Paradoxes of GroupLife: Understanding Conflict, Paralysis, and Movement in Group Dynamics*, *apud* Silva Sánchez, J. M., *op. cit.*, p. 206.
[118] Silva Sánchez, J. M., *op. cit.*, p. 206.
[119] Silva Sánchez, J. M., *op. cit.*, pp. 219-225.
[120] Asch, S.E. (1956), 'Studies of Independence and Conformity: A Minority of One against a unanimous Majority', in *Psychological Monographs*, v. 70, n.º 9, 1956, pp. 1-70 *apud* Silva Sánchez, J. M., *op. cit.*, p. 225.
[121] Prentice, *Ethical Decision Making: More Needed than Good Intentions*, in *Financial Analysts Journal*, v. 63, n.º 6, 2007, p. 18. *apud* Silva Sánchez, J. M., *op. cit.*, p. 226.

the members of the group prefer to avoid discovering their existence, under the illusion that, if you do not know about their existence, they do not exist, or cease to exist. The most common defense mechanism for this purpose is usually rationalizing certain "mental labels" that self-justify the group behavior. Labels such as "we are a good and sensible group", "nothing is happening", "there are worse situations", among others, usually help to relax a possible feeling of guilt and responsibility[122].

(ii) **Obedience to authority** is a bias under which the agent may believe that he is behaving appropriately because this pattern is indicated by its superior, or stay conscious of the illicit nature of the behavior, but to believe that the superior is the one liable for this behavior. In a similar manner to the above described situation, where the members of the group tend to excuse themselves considering that the liability is attributable to the group, here the member excuses himself by attributing the liability to its superior[123].

(iii) **The effect of the assumed role** occurs when the agents interiorize the role that they have to perform in a group structure, or in relation to a certain situation. The functions associated to this role take over the agents, so that their behavior transforms into a reply to the action of the situational forces, rather than their internal disposition[124].

These group derived biases may erose the capacity of an agent to interiorize in an adequate way the perception of the reality around him, in particular the perception of the illegality of a certain act. Such erosion of cognitive perception takes place, in part, through the process of rationalization of certain behavior patterns transmitted by the already members of the group towards those who access it. The transmission of the inheritance of group thinking is what some criminologists call "diffusion of illegal practices"[125].

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[122] Silva Sánchez, J. M., *op. cit.*, p. 227.

[123] As it is further detailed by Silva Sahchez (Silva Sánchez, J. M., *op. cit.*, p. 228), the effect of "obedience to authority" was studied by social psychologist Stanley Milgram, through an experiment conducted in 1961. The experiment was first published in Milgram, *"Behavioral Study of Obedience,"* in *Journal of Abnormal and Social Psychology*, v. 67 (4), 1963, pp. 371-378; then in Milgram, *Obedience to Authority. An Experimental View*, 1974.

[124] Silva Sánchez, J. M., *op. cit.*, p. 229-230.

[125] Clinard, M.B. and Quinney, R. (1967), *Criminal Behavior Systems: a Tipology*, New York: Prentice Hall, p. 134. *apud* Silva Sánchez, J. M., *op. cit.*, pp. 231.

As Jesus María Silva Sanchez refers, the duty to neutralize such biases may be attributable to individual but also to a third party[126]. This author considers that in this case, contrary to the previous situation of individually driven biases that lead to the formation of systematic errors, here it is possible to sustain a possible mitigation of the personal liability due to diminished conscience of illegality, and in part the diminished demandability.

From the standpoint of the criminal liability of the legal person, we may conclude, from the arguments brought and developed by Jesus María Silva Sanchez[127], that unlike the individual deviations previously considered, the situational forces are a reflection of the very existence of the legal person and it is the existence and the interaction of the legal person as an organization that originates the risk of occurrence of such deviations and the commission of the criminal offences by managers. Contrary to the cognitive deviations of an individual nature addressed above, here the company interferes with the will of the natural person and its factual domain over the criminal offence. Consequently, we may conclude that the company has a direct influence on the factual domain of the relevant criminal act, committed by a natural person – its manager. Therefore, contrary to the previous situation, now the duty to neutralize these biases lies beyond the strictly individual sphere of the manager, and the action of the company as organization strategically guided by its shareholders shall be required for such a neutralization to be achieved.

E. Definition of separate domains of control for shareholders and managers

As we have seen above, the companies have been using the remuneration schemes and the contractual terms to address the issue of the mismatch between the preferences of the shareholders and the managers, which may ultimately lead to a commission of a crime that would not have been consented by shareholders if it was of their knowledge. Once the Principal-Agent problem arises due to the decision to delegate the management of the company to managers hired by contract and the problem of asymmetric information that is derived from such a decision, the efforts to induce the

[126] Silva Sánchez, J. M., *op. cit.,* p. 236.
[127] Silva Sánchez, J. M., *op. cit.*, pp. 235-241.

compatibility of the objectives and purposes of the managers with those of the shareholders shall be seen as falling within the domain of control of the shareholders.

However, these efforts may be insufficient, whilst the incentive mechanisms only function appropriately under the rationality assumption of the agents. It had been recently demonstrated that the most appropriate pattern of conduct of the agents is the one of a bounded rationality, with the agents (managers) being subject to a series of cognitive biases in their daily decision-making[128]. These biases may be either of individual or collective nature. The individual biases have an effect on the cognitive pattern of conduct of the individuals and may lead to automatization of erroneous patterns of misbehavior, which may result in a criminal conduct. The duty to avoid the formation of such errors by neutralizing the action of such biases relies within the individual domain of the manager acting as a natural person. Even though the shareholders or a compliance officer hired for the purpose may use the nudging technics as defined by the behavioral economics to induce the rational behavior in some cases, they shall not be held liable from the criminal law perspective once the occurrence of these deviations arises and affects the decision-making process at the individual level of a natural person and it is independent from the existence and operation of the company. This phenomenon is different from the one identified by the Principal-Agent theory, where the divergence of incentives arises at the moment the shareholders decide to delegate, prior to the decision-making process itself, that remains within the individual sphere of each concrete individual acting as a manager.

On the other hand, the collective biases are caused by group dynamics and have effect on the conscience of unlawfulness of the manager as a natural person[129]. Contrary to the individual biases, the companies do have a word to say in the neutralization of such forces as they emerge from the very existence of the company itself and remain within its organizational domain linked to the strategical domain of the company by its shareholders.

From our previous analysis of the Principal-Agent Theory and of the individual and collective biases of the managers, the appropriate mechanism for the neutralization of

[128] Simon, H. (1997), *Administrative Behavior*, 4th edition, New York: The Free Press, p. 72.
[129] Jäger, H. (1985), *Individuelle Zurechung kollektiven Verhaltens. Zur strafrechtlich-kriminologischen Bedeutung der Gruppendynamik,* Frankfurt a. M.: Alfred Metzner, p. 8 ff. *apud* Silva Sánchez, Jesús María, *op. cit.*, p. 235.

these "irrationality" biases seems to be a combination of the contractual and remuneration mechanisms, that address the problem of alignment of incentives among the shareholders and the managers. As the managers may deviate from the rational pattern of choice underlying the incentive compatibility structures, the implementation of the compliance programs, aiming to steer managers back to rationality, neutralizing the individual and collective biases, also appears to be necessary[130].

The general duty to mitigate these problems certainly implies that the shareholders shall prevent the occurrence of these phenomena with the mechanisms available to them irrespective of the source of the underlying deviations from the pattern of lawful behavior, but it shall not be confused with the problem of allocation of the criminal liability arising from the occurrence of a certain criminal offence. In order to assign the duty to neutralize such biases in an appropriate way it is necessary to define the domain of control for the shareholders and for the managers by reference to a committed criminal offence.

Concerning the managers, once they appear as the material perpetrator, they will be individually liable for the committed criminal act. The commitment of the crime is within their domain of control of their concrete action and they always observe the result of the criminal offence, corresponding to the damage inflicted on the relevant legal asset envisaged by that behavior.

Concerning the shareholders' role in respect of the same crime, we notice that the shareholders possess the functional domain of the company, exercised through the contractual design of their relationship with the managers and through the implementation and monitoring of the compliance programs. It does not seem possible, in this case, to establish a direct link between the concrete criminal act and the shareholders, as their action only tackles the general risk of the business activity. Thus, within this domain of action the shareholders cannot address the concrete risk of committing the criminal offence that has been committed, which is not observable to the shareholders, but they can only act against the risky situations and the risky behavior of the managers in general.

However, under certain circumstances the shareholders may also interfere with the factual domain of the criminal act. From the standpoint of the objective liability, the

[130] Silva Sánchez, J. M., *op. cit.*, pp. 237-240.

company and, consequently, its shareholders, may interfere with the factual domain of control of the manager through the cognitive biases triggered by group dynamics. In this case, there is a true objective imputation of the criminal act to the organization, as the existence of group dynamics potentiated the relevant risk, that materialized afterwards in a criminal outcome. From the standpoint of subjective imputation, the interference with the factual domain occurs through the influence of cognitive disruptions on the natural persons through the group dynamics, that affect their will. Although the intent is not attributable to the company or to its shareholders, the group dynamics derive from the organizational interactions and converge with the cognitive elements of the natural person in the formation of the criminal intent.

By way of summarising, the corporations (and their shareholders) cannot directly observe the committed criminal offence. However, under certain circumstances, their action may interfere with the factual domain of the criminal act, both from the point of view of objective and subjective imputation of the criminal liability.

F. Definition of the will of the legal person revisited

We are now able to trace the distinction between the will of natural persons and the will of corporations in the following way: while the natural persons possess the will themselves, and may choose whether to adopt or not the criminally relevant misbehavior in accordance with their preferences, the will of companies arises as a result of interaction of managers involved in daily management and the shareholders, responsible for strategic orientation of the activity.

This interaction gives rise to the corporate culture and corporate knowledge that emerges from the very existence of the organization, with the managers being individuals acting within organization and having the factual domain of the actions performed in its name and on its behalf. Even though the corporate culture and corporate knowledge may indeed potentiate risky behaviors by managers and material leaders of a company, they are not necessarily "embedded" in every single crime perpetrated by these individuals from the standpoint of the factual domain of that crime. For this to be the case, the corporate culture shall interfere and converge with the will of the manager acting as an individual in the formation of the intent, namely by way of

group dynamics, relying on the corporate knowledge of the circumstances as diffused within the organization.

G. Capability of action and capability of guilt revisited

Regarding the imputation of the criminal act to the managers acting as individuals, these are held liable for the commission of the specific crime. In relation to this crime, both the capability to act and the capability of guilt are met from the standpoint of the manager acting as a natural person.

On the other hand, in addressing the cases where the action of the group dynamics on the managers takes place, a direct link between the concrete criminal offence and the shareholders' area of competence arises, with their capability of action and capability of guilt being ascertained by reference to their domain of neutralization of such deviation dynamics, in relation to which they assume the guarantor's role[131]. Even when the shareholder himself is a legal person, it is always possible to identify the individual who is entitled to vote and to participate in the general meetings and other relevant initiatives, and who also has the capability of action and capability of guilt by reference to his sphere of control and his source of risk identified as group dynamics.

H. The fulfilment of the purposes of the penalties according to the proposed model of criminal liability

The ultimate ratio nature that characterizes the intervention of criminal law means that rights and freedom of the individuals should be reduced only to the extent strictly necessary for preservation of the essential legal assets[132]. It follows that the purposes of the judicial sentence can only be preventive in nature. This means that the intervention of criminal law shall not be only minimal, but also effective[133]. We regard the effectiveness in this case as targeting the decisions that are within the domain of control of each of shareholders and managers, because only in such a way the

[131] Even if these tasks are attributed to the compliance officer, this responsibility cannot be detached from the shareholders, once they are responsible for the structural organization of the company.
[132] Figueiredo Dias, J., *op. cit.*, pp. 78-79.
[133] Figueiredo Dias, J., *op. cit.*, p. 78.

preventive nature in relation to the future behaviors can be achieved and, consequently, the repetition of the criminal behavior can be prevented.

This preventive effect includes the positive general prevention purposes and the positive special prevention purposes. From the standpoint of special or individual prevention, the penalty applied should resocialize the offender and prevent recidivism (special positive prevention) and deter future crimes (special negative prevention). From the general prevention standpoint, it is necessary to ensure the confidence of the community in the effective criminal protection of the legal interests and assets at stake. The aim is therefore to safeguard community expectations in relation to the legal system by defining a penal framework where the upper limit corresponds to the idea of the "optimum measure" of the positive general prevention and the lower limit corresponds to the so called "point of defense of the legal order", with fixation of any penalty below this limit endangering the proper performance by the State of its guardian function of the legal interests and assets of its community.

While the trust of community is based on the protection of the offended legal interests and injured legal assets, this trust necessarily rests on the idea that the perpetrators of the injury are liable to the extent of their factual domain of the criminal act. We are of the opinion that, by reference to managers, who appear as the material offenders, this domain is complete and the damage caused is directly observable. On the other hand, by reference to shareholders, their domain of control is circumscribed to the mitigation of the sources of behavioral and cognitive disturbances such as mismatch in incentives, individual cognitive biases and group dynamics.

The action of the shareholders in this domain is materialized by holding the general assembly where the necessary measures shall be approved and their implementation periodically monitored, and by the periodic disclosure of the relevant corporate governance information, that shall be also assessed by shareholders. Thus, we are of the opinion that the optimal point and the minimum threshold of the penalty[134] to be applied has to be assessed by reference to this area of shareholders' intervention, whenever it is possible to establish a link between the concrete criminal offence and their action (as in the case of group dynamics addressed above).

[134] As defined by Figueiredo Dias (Figueiredo Dias, J., *op. cit.*, p. 84).

Once the general prevention framework has been defined, within the limits allowed by positive general prevention, special prevention purposes shall be taken into account to determine the exact measure of the penalty to be applied in a concrete case. These purposes include both the positive function of resocialization and the warning of the consequences of misbehavior in the future. While it does not seem possible to extrapolate the concept of resocialization for the legal person, the special prevention approach in this context will correspond to the need to warn the legal person. The point determined by reference to the necessity of such a warning shall not exceed the measure of guilt ascertained in a concrete case[135].

Similarly to our observations concerning the general prevention, the required extent of warning will have to take into account the domain of control of the shareholders. The consultation of the existing contractual mechanisms governing the relationship with the managers, the consultation of the minutes of the general meetings, of the corporate governance reports and their regular assessment by shareholders, the composition and functioning of the supervisory board, the hiring of an external auditor are some of the items that allow us to understand the extent of the commitment of shareholders in the alignment of their goals and purposes with those of the managers in practice.

The concept of guilt in the context of a legal person has a particularity that justifies introducing an additional concern in defining the exact measure of penalty to be applied. Once behind the legal person there is always a set of shareholders, their holdings in the company's capital will normally be significantly different. In particular, the companies that have reached a certain size and were admitted to trading will tend to have some controlling shareholders and a share of capital dispersed across small investors and investment funds.

Even though all the shareholders are responsible for introducing and maintaining their company as an actor in the market and controlling this autonomous legal entity which appears as a source of risk, it would not be reasonable to require all the shareholders to be diligent up to the same extent. At the same time, it is worth noticing that structurally the criminal liability is attributed to the legal person as to a unique and autonomous entity and, therefore, it is only possible to take into account the degree of dispersion of

[135] Figueiredo Dias, J., *op. cit.*, pp. 82-84.

shareholder control in general, and not the individual contribution of each shareholder to the monitoring activities in particular.

Having said that, we are of the opinion that the patrimonial nature of the penalty to be applied by itself already takes into account the individual contribution of each shareholder, due to the divisible nature of the fine imposed, by opposition to other penalties that are not applicable to a legal person, such as imprisonment. Consequently, a controlling shareholder with a bigger holding will be punished with a higher share of the fine than the one imposed on a shareholder of a smaller holding. For example, although in relative terms the loss in share value represents 10% of the market value of the position held, in absolute terms it can represent a loss of millions of euros to a controlling shareholder and of only a few hundreds of euros for a small retail investor.

I. Dogmatic Conclusion: going beyond the "administrativization" of the criminal liability

As we have seen throughout our analysis, the domain of control of the shareholders is essentially of a functional/organizational nature, but this fact should not, in our view, lead to a proposal of an autonomous crime of non-compliance. The provision of such a penalty for a defect or lack of control of the organization would mean that legal entities are considered to be liable only for adopting means for prevention and mitigation of the general risks arising from their presence in the market, but not for protection of the concrete legal interests and assets. It may be considered, as highlighted by some of the authors[136], that this structure of liability places it within the administrative domain, as it is necessary to distinguish between the criminal liability for the concrete crime that emerges from the company as an organization, and administrative liability for the lack of implementation or poor implementation of a compliance program. In particular, these authors consider that such a solution imposes a sanction on organizations on the basis

[136] "La reforma del régimen de responsabilidad penal de las personas jurídicas", in Quintero Olivares, G. (ed.) (2015), *Comentario a la Reforma Penal de 12015,* Navarra: Thomson Reuters-Aranzadi, pp. 81-89;. Quintela de Brito, T. (2018), *Compliance, Cultura Corporativa e Cultura Penal da Pessoa Jurídica, in* Estudos sobre *Law, Enforcement, Compliance* e Direito Penal, Lisboa: Almedina, p. 76. A contrary position is shared, for instance, by Gutiérrez Pérez, E. (2016), "La Circular 1/2016 de la Fiscalía General del Estado sobre las personas jurídicas o el retorno a los ecos del pasado", in *Diario La Ley*, año XXXVII, n.º 8707, de 22 febrero de 2016, pp. 1-9, available at http://pdfs.wke.es/6/0/1/8/pd0000106018.pdf; and also Sousa Mendes, P. (2018), "Law Enforcement and Compliance", *in* Estudos sobre *Law, Enforcement, Compliance* e Direito Penal, Lisboa: Almedina, p. 18.

of their efforts to pursue public interest purposes, such as good corporate governance, but it does not fulfill the traditional function ascribed to criminal law, namely the prohibition of offences to legal interests and assets, and reaction to the violation of this prohibition[137].

On the other hand, Sousa Mendes considers that this separation between these two fields of law has been already surpassed in some activities, as the banking and financial activity, and also within the domain of the Competition Law, due to the emergence of the regulatory authorities that aggregate the powers that have been traditionally separated up to this point, as the normative, executive and quasi-judicial powers[138]. However, even this author recognizes that this mixed approach and the emergence of regulatory bodies with such broad powers pose a number of issues arising in connection to the guarantees that shall be granted within the investigations and the exercise of the quasi-judicial powers traditionally separated from the normative and executive powers[139]. We therefore consider that the distinction between these two fields of intervention of the administrative and the criminal law is still valid, without prejudice to the emergence of the regulatory agencies that can aggregate these two areas of intervention.

The approach of a single autonomous crime of mismanagement that leads to this so-called "administrativization" of the criminal liability of legal entities had been already implemented in Italy (with the publication of Legislative Decree No. 231/2001) and, more recently, in Spain, with the 2015 reform of the penal code, responsible for establishing the same solution in article 31a[140]. This solution cuts the link to the crime that had been originally committed, as the judgement is done in relation to the mismanagement of the organization and not to the concrete damage inflicted to the legal interest or asset. Thus, the legal person may be exempt from criminal liability once it is verified that it has effectively adopted and implemented adequate organizational and monitoring models to prevent crimes of the kind of the one that had been actually committed, even though they have been unable to prevent the concrete offences.

[137] Quintela de Brito, Teresa, *op. cit.*, pp. 62-63.
[138] Sousa Mendes, P., *Law Enforcement & Compliance, in* Estudos sobre *Law, Enforcement, Compliance e Direito Penal*, Lisboa: Almedina, 2018, pp. 18-19.
[139] Sousa Mendes, P., *op. cit.*, p. 19.
[140] Quintela de Brito, T., *op. cit.*, p. 74.

Consequently, the concrete crime that had been committed and the concrete damage inflicted become irrelevant for the conviction of the legal entity.

In order for the core function of the criminal law to be preserved, in relation to the legal persons, we find it necessary to maintain the link between the commission of the crime and the damage inflicted on legal assets by the managers, and the liability of the legal person (*in maxime*, its shareholders), for this damage. This link is justified by the fact that the managers while performing their duties are influenced by a set of disruptions. While in relation to the individual cognitive biases, that can deviate the managers away from the rationality pattern of choice, the managers assume the role of guarantor by themselves, the cognitive deviations derived from group dynamics will tend to stay out of their exclusive domain of control. This reality leads us to the conclusion that in this last case their individual criminal misbehavior derives not only from their individual cognitive domain, but also incorporates the shareholders' lack of intervention (or its inadequacy) as guarantors responsible for mitigation of the collective cognitive deviations. To circumscribe the liability of the legal person to the purely administrative field would be to ignore this shareholders' input to the functional domain of the concrete injury inflicted to a concrete legal interest or asset.

J. Final Conclusion: the legislative proposal

We are now able to confront our conclusions with the current legislative solution concerning the criminal liability of the legal persons and draw the corresponding conclusions from this analysis.

Currently, the criminal liability of the legal persons is limited to a set of crimes defined in article 11 and only arises when the crimes are committed on behalf of the legal person and in its interest by a material leader in such an organization, who assumes the position of a guarantor. Thus, whenever the criminal action is due to the omissions in respect of this function the legal person will still be held liable. Number 4 of the same provision further clarifies that the leaders of an organization are deemed to be the corporate bodies, the representatives of the legal person and also the ones with the authority to exercise the control of its activity.

There is no express reference to the shareholders' role included in this article. Once they exercise the strategic control over the activity of the firm, we could interpret the

reference to the ones with the authority to exercise the control of the legal person's activity[141] as including the shareholders, once they possess the functional domain of the legal person and interfere with the decisions taken by managers, when the last ones act under cognitive biases of a collective nature. However, their contribution to the relevant act is not independent from the action of managers and a mere inclusion of shareholders into the scope of number 4 would not suffice for an allocation of the criminal liability to the legal person to be done in light of our conclusions, as it would treat the roles of corporate bodies, representatives and shareholders as independent and therefore capable of triggering such a liability *per si* in an independent manner.

From our perspective, in order to determine whether the legal person is liable within the criminal law field it would not be enough to verify whether the relevant action/ omission is attributable to the leader of an organization who is a manager and that it has been practiced on behalf and in the interest of the legal person, but it is also necessary to ascertain whether the strategic organizational guidance have been adequately performed by the shareholders so as to avoid the interference of the defective corporate culture and corporate knowledge with the factual domain of the crime possessed by the managers. We understand that this result can be achieved by adjusting the wording of number 6 of the same article, that already foresees the exclusion of legal persons' liability whenever the material perpetrator has acted against express orders or instructions from the persons entitled to provide them[142]. In particular, we propose to extend the scope of situations covered under number 6 to those where no contribution of equity holders or similar entities to the perpetrated crime have existed. When the criminal behavior resulted from a behavior of the manager who is the leader of the organization (either through a commission or an omission), but no sufficient evidence of the existence of group dynamics had been found, and the contractual design of the relationship between the shareholders and this manager had been structured in an adequate way, we do not think that the legal person shall be held liable, as there is no link between the relevant action of the shareholders and the committed crime and thus

[141] The exact wording of number 4 of Article 11 is as follows: "*Entende-se que ocupam uma posição de liderança os órgãos e representantes da pessoa colectiva e quem nela tiver autoridade para exercer o controlo da sua actividade."*

[142] The current wording of number 6 of Article 11 is as follows: *"A responsabilidade das pessoas colectivas e entidades equiparadas é excluída quando o agente tiver actuado contra ordens ou instruções expressas de quem de direito".*

there are no grounds for the imposition of a fine of a penal nature[143] on the company and, therefore, on its shareholders.

However, even in the absence of group dynamics an administrative fine shall be imposed on the company whenever there is sufficient evidence that the guarantor´s role had not been performed by the shareholders in what concerns the alignment of incentives and proliferation of individual cognitive biases. The administrative fine imposed in such cases shall not refer to the concrete crime, as there is no link of the shareholders level of diligence to the material domain of the crime as envisaged by the manager who committed it, but it can be rather defined as a fixed amount or by reference to the balance sheet or profits of the company, as it is generally the case with the fines of administrative nature.

On the contrary, whenever the existing evidence leads us to the conclusion that the alignment of incentives had been adequately performed, but relevant group dynamics had been identified, and the criminal behavior is due to those and not to the individual cognitive biases, then there are grounds for the imposition of a criminal conviction to the legal person together with an administrative fine.

Therefore we understand the application of administrative and penal fines to the companies are not mutually exclusive options as currently suggested by doctrine. As a matter of fact, they are necessarily complementary and tackle different situations: on the one side, the imposition of the administrative fines allows us to appropriately deal with the situations where the general risk of conducting a business activity had not been adequately tackled by the interaction of shareholders and managers that underlies the corporate knowledge and the corporate culture. On the other side, whenever, in addition to general risk of conducting the business activity, the lack of control of shareholders directly interfered with the material domain of the criminal offence by the manager acting as individual, at the cognitive level, the company shall be also held liable and condemned to the payment of a fine of a penal nature defined by reference to the protection of the legal asset at stake, as there is a direct interference with the damage inflicted on a legal asset protected by the criminal law. In this case, there are proper grounds to sustain that the penalty should be set within a frame established in accordance with the general prevention purposes, where the upper limit corresponds to

[143] And therefore with its magnitude being defined by reference to the concrete committed crime and the damage inflicted on the legal asset at stake.

the optimal point of protection of the legal asset at stake, and the lower limit is defined in accordance with the minimum requirements for the defense of the legal system[144]. Within this general prevention frame so defined, the concrete sanction is defined in accordance with the special prevention requirements and the degree of guilt ascertained by reference to the shareholders' domain of control, that is to say, by reference to their level of diligence in avoiding the formation of group dynamics.

[144] Figueiredo Dias, J., *op. cit.*, pp. 84-85

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