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Criminal responsibility of legal persons in Italy and in Slovak republic

La responsabilità penale delle persone giuridiche in Italia e nella Repubblica Slovacca

Il contributo tratta l'analisi della responsabilità penale nella Repubblica Slovacca e in Italia. Il contributo analizza i principi del diritto penale sostanziale, i suoi elementi quali la mens rea e l'actus reus e i principi procedurali specifici dei procedimenti penali contro le persone giuridiche. Confronta il quadro giuridico di questo concetto in Italia e nella Repubblica Slovacca, compresi i motivi di liberazione e il quadro dei programmi di compliance.

Criminal liability of legal persons in Italy and in Slovak republic

The contribution deals with the analyses of the criminal responsibility in the Slovak republic and in Italy. It elaborates on the substantive criminal law principles, its elements such a mens rea and actus reus as well the specific procedural principles of the criminal proceedings against legal persons. It compares legal framework of this concept in the Italy as well the Slovak republic including the liberation reasons and the framework for compliance programs.

1. *Basic substantive principles of criminal responsibility of legal persons in the Slovak republic.* Until 1 July 2016, the principle of individual criminal liability enshrined in Section 19 of the Criminal Code constituted an obstacle to the criminal prosecution of legal persons. The old Roman law principle societas deliquere non-potest was considered a fundamental principle of criminal law with which the criminal liability of legal persons was incompatible. However, the development of criminal law doctrine in recent decades has shown that this view has now been overcome and that this principle cannot be regarded as a dogma of criminal law doctrine. However, the assertion that the criminal liability of legal persons is a collective liability is equally incorrect, and we strictly reject it. We disagree with the view[1] that 'the law brings in a hitherto unknown collective liability. Criminal liability is not collective liability.

With the entry into force of the Act n.91/2016 of the Coll. about the criminal responsibility of legal persons (hereinafter referred to as "Act 91"), the provision of Section 19(2) of the Criminal Code reads as follows: "the perpetrator of a criminal offence may be a natural person and a legal person under the conditions laid down in a special regulation". The adoption of the Act 91 has thus created conditions for the application of criminal liability of legal persons in parallel with the criminal liability of natural persons or separately. In our opinion, this argument follows from the provision of Article 4(4) of the Act 91, according to which 'the criminal liability of a legal person is not conditional upon the establishment of criminal liability against a natural person (...), nor

[1] JELÍNEK, J., HERCZEG, J. *Act on Criminal Liability of Legal Persons and Proceedings against them.* Commentary with case law. Prague : Leges, 2012, 23.

is it conditional upon the establishment of the particular natural person who acted.' The assertion that the criminal liability of a legal person is independent of the criminal liability of a natural person is also supported by the provision in Article 4(6)(d) of the Act 91 that the provisions on the criminal liability of a legal person shall apply even if the natural person who acted on behalf of the legal person is not criminally liable for such an offence.[2]

We agree with the contention that the adoption of the so-called true criminal liability of legal persons will modify, but not break, a fundamental principle of

[2]As the Article 4 of the Act 91 is a cornerstone of the criminal responsibility of legal person, see the full textation as follows:

Criminal liability of a legal person

(1) An offence under section 3 is committed by a legal person if it is committed for its benefit, on its behalf, in the course of its activities or through it, if it has acted

a) by a statutory body or a member of a statutory body,

b) who exercises control or supervision within the legal person, or

c) any other person who is entitled to represent the legal person or to take decisions on its behalf.

(2) An offence under section 3 shall also be committed by a legal person if the person referred to in subsection (1), by failing to exercise the supervision or control which was his duty, even though negligently, permitted the commission of the offence by a person acting within the scope of the authority conferred on him by the legal person.

(3) The commission of an offence by a legal person under paragraph (2) shall not be imputed to the legal person if, having regard to the object of the legal person's activity, the manner in which the offence was committed, its consequences and the circumstances in which the offence was committed, the significance of the failure of the legal person or the person referred to in paragraph (1) to comply with the obligations of supervision and control on the part of the legal person's authority is insignificant.

(4) The criminal liability of a legal person shall not be conditional upon the establishment of criminal liability against the natural person referred to in paragraph 1, nor shall it be conditional upon the establishment of which particular natural person acted in the manner referred to in paragraphs 1 and 2.

(5) The criminal liability of a legal person shall not be extinguished by the declaration of bankruptcy, its entry into liquidation, its dissolution or the imposition of receivership.

(6) The provisions of paragraphs 1 to 5 shall also apply if

a) the commission of the offence occurred between the time of the establishment of the legal person and its formation,

b) the legal person has been established but the court has ruled that it is null and void,

c) the legal act which was intended to create the authority to act on behalf of the legal person is null and void or ineffective,

d) the natural person who acted on behalf of the legal person is not criminally liable for such an offence.

criminal law. At this point, we are inclined to the view of Mencer[3] , who argues that 'the principle of individual criminal liability will be transformed into the principle of parallel independent criminal liability of a natural person and a legal person for the same act. In this context, we also consider it essential to reiterate that it will not be contrary to the principle of ne bis in idem to hold a natural person and a legal person liable for the same act in parallel, since two different entities are liable for the same offence. [4]

The second basic principle of criminal law, which is modified in some way, is the principle of liability for fault... Criminal law is built on subjective liability. Culpability expresses the psychological relationship of the offender with all the facts that constitute the offence. When deciding on the offence and punishment of the offender, no fact can be imputed to the offender who is not covered by his culpability.[5] As we have already said, a legal person, as 'an artificial creation of law, is incapable of acting in a criminal sense because it has no will of its own and without will there is no guilt and without guilt there is no culpability (nullum crimen sine culpa). [6] The guilt of a legal person is inferred from the imputation of the offence to the legal person. More precisely, it is a fiction of culpability which has nothing to do with the culpability of a natural person, except that it is attributed to the legal person as part of the offence committed (i.e., as part of the subjective aspect of the offence). If cer-

[3] Ibid. 119 and see also BOHUSLAV L. *Criminal liability of legal persons*. Plzeň : Aleš Čeněk, 2014, 23.
[4] JELÍNEK, J., HERCZEG, J. *Act on Criminal Liability of Legal Persons and Proceedings against them*. Commentary with case law. Prague : Leges, 2012, 77.
[5] TURAYOVÁ, Y., TOBIÁŠOVÁ, L., ČENTÉŠ, J., ET AL. *Criminal liability of legal entities. Selected aspects of criminal liability of legal persons in the Slovak Republic*. Bratislava : Wolters Kluwer, 2016, 58.
[6] On this see also ŠÁMAL, P. *On the question of attributability of a criminal offence to a legal person*. Available [online] at: http://www.law.muni.cz/sborniky/dp08/files/pdf/trest/samal.pdf [cited 23. 09. 2021].

tain conditions set out in the law are met, the conduct will be imputed to the legal person as culpable conduct, either as a result of a deliberate decision by the legal person or as a result of the negligence of the legal person.[7] The principle of fault liability is thus supplemented by the principle of imputation of the offence to the legal person by the introduction of the true criminal liability of legal persons.

2. *Basic procedural principles of the criminal proceeding against legal persons in the Slovak republic.* Prosecutions against legal persons will be governed by the same principles as prosecutions against natural persons. These principles, as in the case of the prosecution of natural persons, form an interdependent system without which the purpose of the prosecution could not be achieved.
The basic criterion for the application of the principles of criminal prosecution and the granting of rights in criminal proceedings to an accused legal person will be the fact that such nonapplication of a certain principle or right will not result in a significant change between the procedural position of the accused, natural person and legal person, which would violate the principle of equality and nondiscrimination in access to the right to judicial and other legal protection under Article 46(1) of the Constitution of the Slovak Republic. The Criminal Procedure Code is adapted in content to the requirement to fulfil the aim of criminal prosecution, which is similar in the case of a natural person and a legal person. The need for a special statutory regulation taking

[7] JELINEK, J. *On the New Czech Law on Criminal Liability of Legal Persons*. In. Proceedings of the national conference with international participation held on 19 January 2012. Bratislava : Eurocode, 2012, 94.

into account the nature of a legal person is thus sufficiently expressed directly in the Act 91. The principle of legal certainty leads to the conclusion that the accused, guided by confidence in the law, should always have at least a general idea of whether the conduct he is committing is legally permissible or prohibited. The principle of equality before the law then means that the law should be interpreted in the same way for all cases that meet the same conditions. These principles do not apply unqualifiedly if there is a sufficiently legitimate reason for limiting them, i.e., a sufficiently legitimate reason for changing the interpretation of a legal norm, and if the procedural procedures for doing so have been complied with by the authority changing the interpretation of the norm. Those principles apply in particular to bodies whose task is, inter alia, to unify the decision-making of the courts.

A principle that can be restated in relation to the prosecution of a legal person is the principle of subsidiarity. This principle is reflected in the relative proportion between the prosecution of a natural person and the prosecution of a legal person. The indictment and prosecution of a legal person will always be secondary to the prosecution of a natural person, which should always be primary. Secondary criminal liability of the legal person is a complementary institution, which is intended to sanction offences that have been committed but would not otherwise be punishable due to the so-called split criminal liability, or to sanction offences in which the legal person is involved by complicity or participation[8] . Despite the principle of equal rights of the

[8] In several places, Act 91 gives priority to the prosecution of a natural person, or aspects thereof, over the prosecution of a legal person. As a practical example, the rule for determining the local jurisdiction in joint proceedings pursuant to Section 24(3), sentence after the semicolon, of the Act 91 or the provi-

accused natural person and the legal person, it is this principle that modifies to a large extent the principle of equality of the accused natural person and the legal person by establishing a different - subsidiary position for the legal person in the criminal prosecution by the nature of the case. However, this difference, which consists of the subsidiary nature of the prosecution of a legal person, must not affect the legality of the prosecution and the observance of its rights of defence or the guarantees of a fair trial.

Although a legal person is entitled to fundamental human rights and freedoms within the meaning of Article 1 of Additional Protocol No 1 to the European Convention for the Protection of Human Rights with regard to the peaceful exercise of property rights, it cannot be concluded without more that legal persons are entitled to all the same fundamental rights and freedoms as natural persons. This is first of all conditioned by the nature of the legal person, since the exercise of certain rights is precluded by the fictitious nature of the legal person.

In our opinion, the principle of presumption of innocence also applies without exception in relation to the prosecution of an accused legal person, despite the fact that the imputability of a criminal offence to a legal person pursuant to Section 4(1) of the Act 91 has elements of strict liability. However, the presumption of guilt cannot be inferred from this, as the law enforcement authority will necessarily have to seek evidence that sufficiently proves the 'imputability' of the offence to the legal person. According to recent develop-

sion of Section 24(3) of the Act 91, which determines the order of procedural acts to be carried out in joint proceedings against a natural person and a legal person, in both cases the decisive criterion being the prosecution of the natural person or its legal qualification, may be mentioned

ments and the understanding of the EU of the presumption of innocence, this principle applies differently and to a limited extent to the prosecution of legal persons[9] , as the right to the presumption of innocence encompasses different needs and degrees of protection for natural and legal persons alike, as is apparent from the case law of the Court of Justice on the right against self-incrimination[10] , in this respect, the protection of the right of legal persons to the presumption of innocence is presumably ensured by existing legal safeguards in national and Union law.[11] It should be stressed that the justification of the Directive by the case law of the Court of Justice in relation to the non-application of the Directive to legal persons refers to decisions which have considered preliminary questions in the context of administrative (competition) proceedings and not criminal prosecutions, which are covered by the text of the Directive.

A fair criminal trial combines several principles and tenets, including the constitutional principles of the construction of the judicial power, the equality of arms and adversarial nature of criminal proceedings, and the right to a defence.

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[9] Point 13; Preamble to the Directive on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings; Available on 3 June 2022 at: http://data.consilium.europa.eu/doc/document/PE-63-2015-INIT/en/pdf.

[10] C-301/04 P *Commission v SGL Carbon* [2006] ECR I-5915; Case T-112/98 *Mannesmannröhren Werke v Commission [2001] ECR* II-732. Authors' note: the above-mentioned decisions concern administrative proceedings for infringement of competition law provisions and not criminal prosecutions.

[11] Point 27, Explanatory Memorandum to the Directive on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings; Available on 3 June 2022 at: https://www.google.sk/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=0ahUKEwjdiqb5s4vNAhWGXRQKHbV_CuYQFggeMAE&url=http%3A%2F%2Fwww.ipex.eu%2FIPEXL-WEB%2Fdossier%2Ffiles%2Fdownload%2F082dbcc5429d1f4a0143005a9ea93586.do&usg=AFQjCNFvWmRh6vqH-FV0VdrojWWMbgrIoA&cad=rja.

The right to judicial protection referred to in Article 46(1) of the Constitution of the Slovak Republic does not only consist of the fact that persons may not be prevented from exercising their rights or discriminated against in exercising them; its content also includes the relevant proceedings of the courts and other authorities of the Slovak Republic regulated by law. This principle is complemented by the further principle of *denegatio iustitiae*, which means that the judge is obliged to exercise the administration of justice. A judge cannot refuse to exercise justice on the grounds that the said relationship or issue is not regulated by law.[12] In the event that a certain legal fact or institute is not directly regulated by the Act 91 as *lex specialis, the* Criminal Procedure Code may be applied in the alternative pursuant to Article 1(2) of the Act 91, only where the nature of the case does not preclude it in view of the status of the legal person. In the event that a sanction for an offence or administrative offence imposed by an administrative authority under Slovak law is of a criminal nature within the meaning of the above-mentioned Engel criteria, it is the duty of the law enforcement authorities to apply the principle of *"ne bis in idem"* and to discontinue the criminal prosecution against the accused by way of a resolution on the grounds of inadmissibility of the criminal prosecution pursuant to Section 21(1)(a) of the Criminal Procedure Code. 2 of the Criminal Procedure Code or (alternatively) to discontinue the criminal prosecution on the grounds of inadmissibility pursuant to Section 9(1)(g) of the Criminal Procedure Code or pursuant to Section 215(2)(b) of the Criminal Procedure Code, because this is provided for by an international treaty to which the Slo-

[12] ČIČ, M. ET AL. *Commentary to the Constitution of the Slovak Republic*. Matica slovenská, 1997, p. 235.

vak Republic is bound (with regard to the application of Article 4(1) of Protocol No. 7 to the European Convention on Human Rights, as referred to above, after having assessed whether the offence is an administrative offence which is of a criminal nature).

3. Basic substantive principles of criminal liability of legal persons in the Italy. The form of criminal liability of "inanimate" persons who lack the element of psychological participation has been a rejected thesis in the tradition of continental Europe for a long time, leading to the adoption of the principle *societas delinquere non potest*. Within the Italian conception of criminal liability, we can take as the basis of this concept Article 27 of the Constitutional Charter, which clearly enshrines the principle of the natural person concept of criminal liability and the re-educational purpose of punishment, which has generally been regarded as one of the insurmountable dogmatic obstacles to the establishment of other forms of criminal liability. However, this long-established concept was overcome by the entry into force of Legislative Decree No 231 of 2001 ("the Legislative Decree"), which introduced the separate and direct liability of "inanimate" entities for the commission of certain offences committed in the interests or for the benefit of the company by persons who occupied a qualified position within the company, or by persons directly subordinate to them.

In contrast to the actual criminal liability of legal persons, which has only been applied in the Slovak Republic since 2016, the criminal liability of entities under Italian legislation is based on the concept of a special adminis-

trative liability for criminal offences and has been in place for more than 21 years. Liability under the Legislative Decree is clearly criminal in nature but combines features of the criminal and administrative legal systems. The chosen nature of administrative liability could be attributed to legal opinions based on the assertion that it is not possible to attribute to an inanimate legal entity the culpability envisaged by criminal law. However, the concept of the purpose of re-education, to which criminal sanctions are subordinated, is directly related. In Italian case-law, we find three different views on the nature of this sanctioning mechanism. According to some opinions, what we are really dealing with is administrative liability, and this is also apparent from the linguistic interpretation of the Legislative Decree itself.[13] According to other views, this liability is criminal, and vice versa, the third tendency is inclined to the view that we are in the so-called "criminal law" *tertium genus*, which, although it combines the basic features of the criminal and administrative systems, conditions the individual liability of a legal entity on a third element, namely the commission of a specific criminal offence by a person in a top management function (or by a subordinate) in the interest or for the benefit of the legal entity, it being assumed that the legal entity has committed this criminal offence, for which it must be held liable.[14] Liability of a legal entity is therefore based on the commission of a predicate offence by a natural person who is integrated into the direct structure of the legal entity and, to determine the type of liability, it is also necessary to consider the nature of the interest

[13] In the light of Article 1 paragraph 1 of the Legislative Decree, this regulates "the liability of entities for administrative offences arising from criminal offences".
[14] Cass. Penale, Sez. un, 18.09.2014, n. 38343, Thyssenkrupp.

infringed. It can thus be clearly stated that the Legislative Decree itself has introduced a tertiary type of liability which incorporates features of the criminal and administrative systems, as well as an additional conditional element.

This specific conception of liability by the Italian legislator gives rise to practical problems, which we notice already in the language of the norm, using the terms tort, administrative offence, and criminal offence as synonyms. Article 1 paragraph 1 of the Legislative Decree itself states *that this Legislative Decree regulates the liability of legal entities for administrative offences arising from criminal offences.* For the purposes of this article, we shall use the term „*criminal offence of legal entity*".

Italian criminal liability of legal entities is based, as in other legal systems, on the principle of *nullum crimen sine lege, nulla poena sine lege*. The Legislative Decree and its principles set out in the introduction reproduce the wording of the articles of the Italian Criminal Code and introduce the principle of legality and the prohibition of retroactivity. No legal entity can be held liable unless the facts of the offence and the relevant penalties are expressly mentioned in the list of criminal offences to which the Legislative Decree applies, and this wording must have entered into force before the actual commission of the crime. It follows from the Legislative Decree itself that it is therefore an autonomous liability of the company, which applies in addition to the liability of the natural person who committed the crime.

Thus, while the Slovak legislation establishes an unambiguous, real criminal liability of legal persons, we acknowledge the Italian legislation sets forth an administrative liability, respectively an administrative liability of legal

entities, but with the application of criminal sanctions. In this sense, therefore, effective, proportionate, and dissuasive sanctions are imposed on legal persons. However, both types of criminal liability of legal entities, albeit in a different sense, are based on the principle of imputability, i.e. the attribution of a criminal offence to a legal entity.

Basic procedural principles of criminal proceeding of legal persons in the Italy. The provisions of the Legislative Decree, as well as (in the case of compatibility) the provisions of the Criminal Procedure Code and Legislative Decree of 28 July 1989, No 271[15], shall apply to proceedings concerning criminal offences of legal entities. As in the territory of the Slovak Republic, the Italian legislative system provides that the prosecution of legal entities shall be governed by the same principles as the prosecution of natural persons. The same procedural provisions apply to the prosecution of legal persons under the Legislative Decree as apply to a natural person accused under the Criminal Code.

The procedural rules contained in the Legislative Decree generally take precedence over the ordinary procedural rules of criminal law, thus, they are in a relationship of speciality to the Criminal Code.

The specific Italian concept of the liability of a legal entity for criminal offences, which is derived from the commission of a criminal offence by a specific person within its organisation, has brought up the situations where the accused legal person has also been placed in the position of the injured party.

[15] Implementing, coordinating and transitional rules of the Code of Criminal Procedure.

However, it is settled by Italian case-law that, in criminal proceedings against a legal person, it is not permissible for that legal person also to place himself in the position of being victimised by his own management who are accused of having committed the offence. The necessity of excluding that institution (standing as an injured party against its own employees) was confirmed by the Milan Court of Justice, when, in proceedings pending in the Second Criminal Division, it made an order setting aside a reservation formulated on preliminary questions relating to the adhesion procedure, while also ruling on the question relating to the possibility for the accused legal person to join a civil claim for damages brought in the same proceedings against its own accused managers. The Milan court clearly held that there was an incompatibility between the two positions, that of the accused and that of the injured party. Based on legitimate and well-founded precedents, the Court reiterated the thesis that a collective legal person and an individual perpetrator of a crime would constitute a form of cumulative liability that could be attributed to a system of concurrent liability within the dogmatics of criminal law. In fact, there would not only be concurrence between the legal person and the natural person, but even a certain necessary concurrence, since, from an objective and subjective point of view, it is in any event necessary for the liability of the legal entity that the predicate offence be committed by the natural person.[16] Nevertheless, on the other hand, the Legislative Decree has created a tertiary type of liability that is consistent with the principles of fault-based liability and vicarious liability; it is a separate liability based on organizational fault that

[16] https://www.giurisprudenzapenale.com/2017/04/07/lente-imputato-ex-d-lgs-2312001-non-puo-costituirsi-parte-civile-suoi-dirigenti-coimputati/ , Available on 10. september 2022.

arises even if the perpetrator of the offence has not been identified or cannot be charged, or if the offence has been extinguished for another reason.
The objective attribution of the offence clarifies the link between the offence and the entity's liability, and it cannot be excluded that the entity's act gives rise to compensable damage, with the consequence that the injured party is entitled to bring an action for the protection of his subjective rights, in accordance with Article 24 of the Constitution. This means that a legal entity may cause damage to third parties (outside the organisational structure of the entity) by committing a criminal offence. In such a case, the legal entity is obliged to compensate for this damage. In this respect, it is permissible for the injured party to bring a civil action in a proceeding involving the liability of the company within the meaning of the Legislative Decree.
Considering that the Slovak legislation on criminal liability of legal persons is also based on the principle of imputability of the act of a natural person (the perpetrator) to the legal person, while the possibility of the legal person to claim compensation against the perpetrator is not explicitly excluded by the legislator, it is likely that this issue will only be resolved by the Slovak courts.

Mens rea - countability of the criminal offence to the legal person in terms of Slovak legislation. To a large extent, the answer of the proponents of the so-called true criminal liability of legal persons in relation to the alleged violation of the principle of criminal liability for fault is the concept of imputability, or its reflection in the new basic principle of criminal law, the principle of impu-

tation of a criminal offence to a legal person.[17] A legal person, as an *artificial creation of law, is incapable of acting in a criminal sense because it has no will of its own and without will there is no guilt and without guilt there is no culpability.*[18] (*nullum crimen sine culpa*). [19]

The very use of the imputability of the offence of a natural person to a legal person can be defended on the basis of the exercise of the so-called risk management of the activities of the legal person. The said risk management of the activities constitutes a kind of control within the legal person, either *directly in the unlawful conduct of natural persons in the management of the legal person or in connection with the mismanagement of the increased risk arising from the operation of the business (fault of the management of the legal person).*[20] The duty to act with due care and skill implies that the actor acts in a particular matter with a certain amount of information and knowledge of the situation and that that action is in the defensible interests of the legal person. The concept of the care of a sound manager may be understood to mean that a sound manager performs legal acts concerning a company responsibly and

[17] Ibid.

[18] See ŠÁMAL, P. *On the question of imputability of a criminal offence to a legal person.* Available [online] at: http://www.law.muni.cz/sborniky/dp08/files/pdf/trest/samal.pdf [cit. 23. 09. 2017].

[19] Nevertheless, especially on the basis of the development of legal theory, it is possible to imagine culpable tort behaviour of a legal person, which is envisaged not only by civil law doctrine, but also by administrative law theory. Legal persons have the real capacity to act, both in accordance with and contrary to the command of a legal norm. The fact that natural persons always act on behalf of a legal person does not imply that this excludes the capacity of legal persons to act culpably, since, according to sociological research, legal persons as collectives of persons have a will that is different from that of the persons who make up the legal person, which is generally recognised by the law in relation to legal persons. Cf: ČENTÉŠ, J., ŠÁMAL, P. *Legal regulation of the criminal liability of legal persons in the Czech Republic In: Criminal policy of the state and the liability of legal persons*, Proceedings of the international scientific conference Bratislavské právnické fórum 2013. Bratislava : Faculty of Law, Charles University, 2013, pp. 141-158.

[20] On this see ŠÁMAL, P. ET AL. *Criminal liability of legal entities.* Commentary. 1st edition. Prague : C. H. Beck, 2012, p. 170.

conscientiously and, in the same way, takes care of its assets as if they were his own. The care of a proper manager does not presuppose that the member (of the statutory body) is equipped with all the expertise relevant to that function, but the basic knowledge enabling him to recognize imminent damage and prevent it from being caused to the assets under his management is sufficient for him to be responsible, and the care of a proper manager includes, according to the Court of Appeal, the duty of a member of the statutory body to recognise that the assistance of a specially qualified person is required and to arrange for such assistance. [21]

In assessing whether the perpetrator has fulfilled the elements of the relevant criminal offence, it is also necessary to take into account the possible existence of a private law relationship in which the perpetrator and the victim acted as parties and which is relevant to the specific criminal case. In the case of a private law relationship, it is necessary to insist that the parties to such a relationship should, above all, take care to protect their property interests. Those parties must be required to act prudently and to observe at least the elementary principles of caution, particularly where the means to do so are readily available. Where the injured party himself, by his obvious carelessness, which he could easily have avoided, has made a precarious financial disposition and has spent money, he must also deal with the consequences of those uncertainties himself, using the means of private law. It is unacceptable, in the light of the principles on which a democratic state is founded, that the necessary degree of caution on the part of the other party in protecting his

[21] Decision of the Supreme Court of the Czech Republic of 24 October 2006, Case No. 5Tdo/1152/2006.

own rights and property interests should be substituted for the criminal sanction of one party to a private law relationship. Criminal sanctions cannot substitute the institution of other branches of law designed to protect property rights and interests.[22]

In addition to the required relationship between a legal person and a natural person, there are other conditions of a corrective nature that are relevant to the imputation of a criminal offence to a legal person. These conditions are to be interpreted as alternatives and their essence lies in the fact that an offence may be imputed to a legal person only if it was committed *for its benefit*, *in its interest*, *on its behalf,* or *through it*.[23]

The purpose of these conditions as corrective elements is in particular to prevent excessive criminalization of legal persons or the exculpation of a legal person for excesses of a body or person referred to in Section 4(1)(a) to (c) of the Act 91, which have no required connection with the legal person. In evaluating the excesses of an organ or person referred to in Section 4(1)(a) to (c) of the Act 91, it is necessary to apply the principle that where an act has been committed principally against the interest or to the detriment of a legal per-

[22] Resolution of the Supreme Court of the Czech Republic 11 Tdo 1121/2012.

[23] Our view on the alternative nature of these conditions is supported by the wording of Articles 5.1 and 5.2 of Annex 1 to the Legislative Rules of the Government of the Slovak Republic, according to which, if the legal consequences or conditions are to occur together, the conjunction "and" is placed between the last two possibilities (5.1). If the legal consequences or conditions may or may not occur together, an exclusion conjunction 'or' is placed between the last two alternatives, if the alternatives are mutually exclusive, the word 'either' is placed before the first alternative and an exclusion conjunction 'or' is placed between the last two alternatives (5.2).

son, the criminal liability of the legal person so injured cannot be invoked, and only the criminal liability of that organ or person will be invoked.[24]

In addition to the above-mentioned conditions, other corrective elements serve to mitigate the overly strict application and derivation of criminal liability against a legal person through the attribution of a criminal offence to a certain natural person, which allow the legal person to exculpate itself in selected cases. Currently, the trend is to allow a legal person to be held liable (by demonstrating the existence of functioning *compliance* programmes[25] *)* only in cases of imputation of offences committed by natural persons from among 'ordinary employees' or persons without management and control authority. This fact has recently been criticised by a section of the professional public in the Czech Republic[26] , which has resulted in the introduction of the possibility of expulsion for excesses of managerial employees[27] .

We support our claim with the language of Section 4(3) of Act 91. Implicit in that provision is a negative definition of imputability, which sets out in what

[24] ŠÁMAL, P. ET AL. *Criminal liability of legal entities. Commentary.* 1st edition. Prague : C. H. Beck, 2012, pp. 190 and 191.

[25] However, a partially unanswered question remains: what are all the measures that can be required of a legal person in order to demonstrate the existence of functioning *compliance programmes*? Bohuslav states that "...if a legal entity properly sets up its compliance program, i.e. its management and control mechanisms, sufficiently regulates its code of ethics, trains its employees in the area of criminal liability of legal entities, breach of liability in the management of foreign property, crimes in the area of public procurement, gives employees the opportunity to warn of illegal conduct within the legal entity (the so called. If a legal entity is able to give employees the opportunity to whistleblow, then it can be said to have done all that can fairly be required of it, especially if it regularly evaluates and responds to these complaints." On this see BOHUSLAV, L. *Current Issues of Criminal Liability of Legal Persons - II.* Available [online] at: http://www.pravniprostor.cz/clanky/trestni-pravo/aktualni-otazky-trestni-odpovednosti-pravnicky-osob-ii [cited 23. 09. 2022].

[26] GŘIVŇA, T. *In the case of criminal liability of legal persons, I have a problem with the unclear attribution of the act.* Available [online] at: http://www.ceska-justice.cz/2015/06/tomas-grivna-u-trestni-odpovednosti-pravnickych-osob-mi-vadi-mi-nejasna-pricitatelnost-skutku/ [cited 23. 09. 2021].

[27] Act No. 183/2016 Coll., amending Act No. 418/2011 Coll., on criminal liability of legal persons and proceedings against them, as amended. (further mentioned as "ZoTOPO")

cases "...the commission of an offence by a legal person under paragraph 2 shall not be imputed to the legal person".

Mens rea – accountability of the criminal offence to the legal person in terms of Italian legislation. The determination of the subjective scope of criminal liability of legal entities is dependent on the offence. In the text of the norm itself, the term "entity" is used instead of "legal person", thus expressing the legislator's will to extend liability to persons without legal personality. This criterion considerably broadens the sphere of entities which, regardless of their formal status, are endowed with a certain degree of autonomy in relation to the natural persons who are part of them. The Decree regulates the liability of entities for administrative offences arising from criminal offences. An entity is liable for offences committed in its interest or for its benefit:

By persons who hold positions of representation, administration or management of the entity or one of its organisational units with financial and functional autonomy,

by persons subject to the direction or supervision of one of the persons referred to in point a).

However, the Decree stipulates that the entity is not liable if those persons acted solely in their own interest or in the interest of third parties.

The doctrine is almost unanimous in its support for referring only to collective entities in the administrative liability of entities for criminal offenses. The main argument remains the very meaning of liability, namely the need to address manifestations of crimes committed within organized and complex

structures, which should logically exclude its extension to entrepreneurs and single-person legal entities. To this must be added the complexity of identifying the interest of an enterprise, which is separate and independent from that of the individual entrepreneur who owns the enterprise. Applying the Legislative Decree to such an entity would lead to unnecessary duplication of sanctions against the individual if the individual entrepreneur is attributed with a (negligent) act committed by one of his subordinates.[28]

The very imputability of a criminal offence to a legal person as a model of liability of entities is based on the commission of one of the predicate offences by a person within the organisational structure of the entity, in the interest or for the benefit of the entity itself. The legislator has explicitly focused on the necessity to fulfil the following two criteria for the inference of culpability: holding a certain position within the organisational structure of the entity and acting in its interest. The person who instigated the commission of the offence must be held liable for the offences committed if he or she is in a position of direct managerial authority within the company or if he or she is a person directly subordinate to it. The distinction between a manager and a subordinate is of fundamental importance, as it creates the basis for a different regime of liability and the allocation of the burden of proof between the legal person and the public prosecutor.

We generally define senior executives as those who express the will and policy of the legal entity itself. However, the legislator has chosen a completely different understanding in this respect, namely that senior executives

[28] SBISA-SPINELLI, *Responsabilità amministrativa degli enti,* Milano, 2020, 40

cannot be understood in the conventional sense, means to include only one director or the board of directors, but may refer to all persons who express the will of the legal person and its corporate policy irrespective of the qualifications attributed to them. In that sense, the legislator has clearly defined the range of subjects that may be prosecuted for infringement, in direct relation to the specific functions performed, which must fall within the scope of competence of those persons. In addition, we distinguish between representatives belonging to a clear category of superior persons and, on the other hand, representatives who have been individually authorized on the basis of specific powers of attorney and have reporting obligations typical for a subordinate position, such as "procuratori" (proxies), as persons who have limited managerial and representative powers by virtue of the powers of attorney granted by the governing bodies.[29] In some cases, under Italian legislation, proxies are also entered in the Commercial Register, similarly to proxies under Slovak law. As regards the company's representatives themselves, in general, the management bodies are considered to be the company's representatives; however, on the other hand, we also encounter authorized representatives, in the sense of granting a general or special power of attorney, who have reporting obligations typical of their subordinate position. In the case of an offence committed under a general power of attorney, each aspect must be assessed on a case-by-case basis. In general, it is not a question of authorisations that

[29] The status of authorised representatives in-fact is regulated by the Italian Civil Code in article 2206, which provides that such power of attorney or termination of power of attorney must be authenticated and submitted to the competent Commercial Registry. In the absence of registration, the power of attorney is deemed to be general and its limitations are not enforceable against third parties, unless it is proved that they were aware of them at the time of the transaction.

are short-term in nature but requires the ongoing management of the company.

The Italian legislator has also dealt thoroughly with the issue of imputability of the offence in the event that the perpetrator is not clearly known. In this connection, it is necessary to refer to the explanatory memorandum to Legislative Decree 231/2001, to which we adhere, and which explains the issue perfectly: *„if the case of the unattributable perpetrator is in fact more theoretical than practical, the case of the failure to identify the natural person who committed the offence is, on the contrary, a typical phenomenon in the context of the liability of legal entities: it is one of the hypotheses in relation to which the need to sanction the liability of legal persons has been most felt. Examples of this are cases of subjective alternative attribution, where the offence (completed in all its elements) is undoubtedly attributable to the top management of the entity, and thus to two or more directors, but the evidence of their individual liability is lacking or insufficient. Failure to deal with such cases would therefore lead to a serious legislative gap which could undermine the overall meaning of the provision. Therefore, in all cases in which, due to the complexity of the internal organisational structure, it is not possible to establish criminal liability against a particular person, and yet it is established that a criminal offence has been committed, the entity must be held administratively liable...*"[30] We can therefore conclude that, like the Italian law, the Slovak law on the criminal liability of legal entities regulates the imputability of the offence to the legal entity, provided that the legal entity acted by a statu-

[30] Relazione ministreriale al D. Lgs n. 231/2001

tory body, a member of a statutory body, a person exercising control or supervision or another person authorised to act on behalf of the company on the basis of a granted power of attorney. In this case, however, it should be noted that the Italian legislator has focused on the use of a more extensive formula, as opposed to the Slovak more or less exhaustive calculation, which does not deal with the diversity of entities and focuses only on those specifically defined. This difference between the Slovak and the Italian approach of the legislator can be justified by the definition of a broader range of entities covered by the Italian Legislative Decree (as mentioned above this range may in certain cases also include entities without legal personality), as well as by the much richer legal regulation of the typologies of legal persons and their bodies enshrined in the Italian legal order.

Even though imputability is also defined by the Slovak law, the Italian legislation is considerably more elaborate in this respect, which we consider to be the predominant advantage of the Italian legislation. However, we are of the opinion that there is not so much difference in this respect when comparing the laws in question, since the substance of the main subjects themselves relates to top management, whereas the Italian legislation also recognises the concept of a directly subordinate person who may also be held liable for the infringements.

While the Slovak regulation refers only to the person authorised to represent or make decisions on behalf of the legal person, the Italian regulation explicitly refers also to persons directly subordinate to the top management. The inclusion of the category of subordinates in the Legislative Decree was intended

to prevent circumvention of the law, which the division of labour, typical of complex corporate structures, could easily lead to. The distinction between superiors and subordinates is essential for assessing which category a particular perpetrator falls into and is crucial for the purposes of selecting the subjective criteria for attributing liability applicable to a particular case. *"The second category of natural persons whose commission of criminal offences may lead to the administrative liability of a legal entity is represented by so-called subordinates. A decision to limit the liability of societas only to cases of crimes committed by top management would not prove to be justified from a logical and criminal policy point of view. In the first category, as noted above, the possibility of imputing liability to the societas also appears to be secured on the objective level by the fact that the offence was committed in the interests or for the benefit of the company (as regards the subjective level of the entities' liability). Under the second category, to hold otherwise would be to ignore the increasing complexity of the regulated economic entities and the consequent fragmentation of the applicable bases of guidance."*[31]

One of the most critical aspects of the criminal liability of legal persons is the so-called subjective imputability. The explanatory memorandum to the Legislative Decree lists the subjective criteria for attributing liability based on an assessment of the culpability of the person who, in the course of his or her activities, has failed to take the necessary measures to prevent unlawful conduct. Thus, a criminal offence is imputable to an entity if it is the result of a company's policy of failing to put in place a preventive compliance model

[31] Relazione ministreriale al D. Lgs n. 231/2001

and/or other effective control apparatus designed to ensure compliance with specifically defined management and supervisory obligations. It follows, therefore, that the liability of a legal entity is based on the commission of a criminal offence by a "qualified" person within its structure and exists whenever it can be established that appropriate systems to prevent criminal activity have not been put in place.[32] In addition to the above-mentioned qualified person, a subordinate person who is subject to the management or supervision of the qualified person may also commit the offence which may be attributed to a legal person. In this respect, the legislator has chosen not to give greater weight to specific addresses. In other words, the functions of persons within the meaning of the Legislative Decree are not to be understood in the traditional sense, i.e., only one director, but are to be understood more broadly, i.e., to include subordinate persons who express the will of the entity and its business policy, irrespective of the qualification attributed to it within the company.

7. Actus reus of the criminal responsibility of a legal person in terms of Slovak legislation. A criminal offence is committed by a legal person if the following conditions are cumulatively fulfilled:

An exhaustively stipulated criminal offence is committed; however, a legal person may be held criminally liable only for those criminal offences which are expressly provided for in Section 3 of the Act 91. The Slovak Republic has joined the legislation of countries that prefer the criminal liability

[32] SBISA-SPINELLI, *Responsabilità amministrativa degli enti,* Milano, 2020, 70

of legal persons for *numerus clausus* offences.[33] For all these offences not - listed in Act 91, only natural persons can continue to be prosecuted for their commission, even if the offence is committed for the benefit or on behalf of a legal person.

A criminal offence is committed in connection with the benefit of a legal person, on its behalf, in the course of its activities or through it; Another prerequisite for the emergence of criminal liability is the existence of a causal link on the one hand between the benefit of the legal person, the act on its behalf, the activities of the legal person (regardless of whether the activities are authorised or not), and on the other hand the existence of a causal link between the benefit of the legal person, the act on its behalf, the activities of the legal person (irrespective of whether the activities of the legal person are authorised or not) and the activities of the legal person. On the one hand, the unlawful act of a natural person with a certain relationship to the legal person.

The phrase 'for the benefit of a legal person' means any act from which a legal person benefits either financially, immaterially, or in any other way. This feature is to be interpreted as meaning that the benefit or advantage that the legal person accrues from the commission of the offence, by means of the benefit obtained from that offence by the body or person referred to in Section 4(1) (a) to (c) of Act 91, must be of such a nature that the benefit to

[33] For more on the issue of the scope of criminalization of the actions of legal persons, see the chapter "Substantive Scope of the Act 91".

any of the entities referred to in Section 4(1) (a) to (c) of Act 91 is contingent on the benefit or advantage that the legal person itself accrues.[34]

A statutory body or other natural person authorized to act in the - name of or on behalf of the legal person (e.g., proxy, power of attorney)

acts "on behalf of" the legal person, and there is no excess of such body or natural person. It follows from the provisions of Sections 4(1)(a) to (c) of the Act 91 that criminal liability requires that one of the bodies or persons listed here act on behalf of the legal person.[35]

The fulfilment of the condition "within the scope of its activities" presupposes the actions of the bodies or persons referred to in Articles 4(1)(a) to (c) of the Act 91, namely within the legal person determined by the scope of its activities, as defined, e.g. in the commercial register, the register of associations or in the articles of association or the articles of association. The fulfilment of this condition also includes unlawful acts, e.g. illegal handling of narcotic drugs, psychotropic substances or weapons, etc.

An offence is committed "through a legal person" where a legal person is used to commit a criminal offence and the relevant persons acting on behalf of the legal person are aware of the use. Therefore, this is not a case of '- indirect perpetration', in which the legal person would not be punished be-

[34] See, mutatis mutandis, Supreme Court of the Czech Republic of 24 November 2015, Case No. 8 Tdo 627/2015 (modified version).

[35] Act 91 provides for the procedure in the case when an act is performed on behalf of a legal entity and the court later decides that such act is invalid or ineffective (e.g. one member of the board of directors of a joint stock company acted despite the fact that according to the articles of association two members of the board of directors should have acted jointly). Such a decision does not exempt the legal person from criminal liability, with reference to the provision of Article 4(6)(c) of the Act 91, according to which the provisions on the criminal liability of a legal person shall apply even if the legal act which was intended to create the authority to act for the legal person is invalid or ineffective.

cause it was involved in the commission of the offence, for example, by mistake, coercion, etc..[36]

An unlawful act is committed in the interest of a legal person within the meaning of Section 8(1) of the ZoTOPO (Section 4(1) of the Act 91 - author's note) if the legal person benefits from it either financially or in any immaterial way or if it obtains any other advantage. The aforementioned feature shall be interpreted as meaning that the benefit or advantage of the legal person arising for it from the committed criminal offence through the benefits obtained by its employees or partners through the criminal offence must be of such a nature that the benefit or advantage of the employees or partners of the legal person is conditional on the benefit or advantage of the legal person itself. For example, if the sole shareholder of a legal person - a limited liability company - drove its motor vehicle, which he drove exclusively for his private purposes and his personal benefit, even though he was imposed upon by a final and enforceable court decision with penalty of prohibition of driving motor vehicles, it is not an act committed in the interest of the legal person, and therefore the legal person cannot commit the offence of obstruction of the execution of an official decision and expulsion pursuant to Section 337(1)(a) of the Criminal Code.[37]

The requirement of personal protection of the customer on the way home goes beyond the extent to which the operator of establishments where

[36] See appropriately ŠAMKO, P. *Notes on the Law on Criminal Liability of Legal Persons*. Available [online] at: http://www.pravnelisty.sk/clanky/a466-poznamky-k-zakonu-o-trestnej-zodpovednosti-pravnickychosob [cited 23. 09. 2022].
[37] Resolution of the Supreme Court of the Czech Republic of 24 November 2015, Case No. 8 TDO 627/2015.

the customer leaves the establishment with more money can be burdened with a precautionary duty. It is primarily the customer himself who is obliged to take care of his own safety if he leaves the casino with a larger sum of money. A casino operator cannot prejugate any potentially imminent excess by its employees in the future, especially if such conduct shows the hallmarks of a deliberate criminal offence. [38]

Ordinary falsehood is not misrepresentation where the assertion is subject to scrutiny and where nothing has been done to make scrutiny more difficult because of the extrinsic conduct. It must be held that even the deceived person (the injured party) in making a disposition of property must exercise the necessary degree of care which could have quite easily eliminated or excluded the mistake (misrepresentation). In this case, the bank acted irresponsibly and without the necessary degree of care when issuing and sending the credit card with the PIN code. The victim's exercise of the requisite degree of care must be duly examined, since it may well exclude the fulfilment of the essential element of the perpetrator's fraudulent conduct, namely' misleading' or 'taking advantage of a mistake.' Everyone, including the victim, has a duty to exercise the necessary degree of care, and that duty derives from Article 415 of the Civil Code, according to which everyone must act in such a way as to avoid damage to health, property, nature, and the environment. Therefore, if someone fails to perform this preventive duty, he is liable for the damage caused by the unlawful act. The principle of objective truth requires the court to base its decision on guilt and punishment upon clearly es-

[38] Judgment of the Supreme Court of the Czech Republic, ev 25 Cdo 3979/2011, of 29 May 2013.

tablished and safely proven facts, not on mere probability. Where it is not possible to determine with certainty which of the alternatives to the facts corresponds to the facts, the court shall, after exhausting all available evidence, choose the one that is more favorable to the defendant.[39]

An important legal regulation is the institute provided for in Article 4(3) of the Act 91, which introduces an additional corrective element in relation to the criminal liability of legal persons. According to the Explanatory Memorandum, the paragraph in question provides a material corrective in relation to the criminal liability of a legal person for the unlawful conduct of a person with the status of an 'ordinary employee', which was caused solely by the legal person's failure to fulfil the obligations imposed by law in the context of supervision and control over the activities of employees.

As a result of this circumstance, the legal person shall *not be charged with* such an offence *if the significance of the failure to comply with these obligations to the offence committed is insignificant in relation to the subject matter of the legal person's activity, the manner in which the offence was committed and its consequences, and the circumstances in which the offence was committed*. This legislation makes it possible for the legal person to be held liable in cases where criminal liability for a criminal offence committed by an employee would be imposed too severely on the legal person. Of course, it remains for application practice to define what will be considered a minor violation, e.g., a *compliance* program. However, it can be predicted that the assessment in question will have to be approached with a higher de-

[39] Judgment of the District Court Bratislava IV, 3T/185/2011.

gree of minutiae than the material remedy applied to natural persons, given the greater diversity of legal persons.

The criminal offence has been committed in a causal connection with the conduct of a natural person who is in a certain relationship to the legal person: Another prerequisite for the emergence of criminal liability is the existence of a causal connection between, on the one hand, the benefit of the legal person, the conduct on its behalf, the activity of the legal person (irrespective of whether it is an activity which it is permitted to carry out, or, respectively, the activity of the legal person), and, on the other hand, the existence of a causal connection between, on the one hand, the unlawful act of a natural person with a certain relationship to the legal person.

The definition of groups of natural persons in a certain relationship to a legal person (whose offences are attributed to the legal person) is only a formal condition for the criminal liability of legal persons defining the essence of the unlawful conduct of the legal person through natural persons.[40] The fault of a legal person in relation to one of the enumerated offences set out in Article 3 of the Act 91 is inferred in principle from the fault of a natural person who is in a certain relationship with the legal person.

The Explanatory Memorandum itself emphasises that the creation and existence of legal persons is a legal construction. Therefore, the manner in which legal persons as subjects of law act externally must also be constructed by law, since a legal person as a whole does not have a volitional component and thus cannot act according to its own will and manifest it externally.

[40] ŠÁMAL, P. ET AL. *Criminal liability of legal entities*. Commentary. 1st Edition. Prague : C. H. Beck, 2012, p. 173.

Therefore, the legal order provides that the legal entity's own acts are those expressions of will which are performed on behalf of the legal entity by its designated bodies or representatives of the legal entity as natural persons. According to the nature of their relationship with the legal person, natural persons can be divided into two groups, namely: (i) natural persons with a certain type of decision-making or control power, and (ii) natural persons with the status of "ordinary employees".[41]

Ad i) The legislator included in the first group of natural persons defined in the provisions of 4 (1) (a) to (c) of the Act 91:

a statutory body or a member of a statutory body,

whoever carries out control or supervision activities within the legal person; or another person who is authorised to represent the legal person or to make decisions on its behalf.

Ad ii) The second group of natural persons is embodied in Section 4(2) of the Act 91 and these are *persons who have acted within the scope of the powers conferred on them by the legal person.* [42]

The division of natural persons in a certain relationship with a legal person into two groups is not an end in itself. The essence of the division lies in the different criteria of the legal person's ability to exculpate itself in the exercise of criminal liability. According to Article 4(2) of the Act 91, a legal entity is

[41] Cf. KISELYOVÁ, Z. *Actions of individuals (natural persons) on behalf of a legal entity in the field of administrative and criminal liability.* Autonomie individuce Praha : Leges, 2014, p. 123 - 131.

[42] In the original draft of the Act 91, the scope of natural persons was defined in Section 4(1)(d) as *another employee or a person in a similar position in the performance of his/her work tasks.* We consider the originally proposed definition to be more appropriate, as we do not consider the notion of a person acting within the scope of the powers conferred on him by a legal person to be sufficiently definite and it is currently quite difficult to estimate the definitional scope of the definition of this notion given the considerably wide range of natural persons with certain powers conferred on them by a legal person.

only allowed to exculpate itself, e.g. by proving the existence of functioning *compliance* programmes, in cases of imputation of criminal offences in the case of natural persons from the ranks of 'ordinary employees', or in the case of persons without management and control authority referred to in Article 4(2) of the Act 91.

As a result of the changes in the provisions of Section 4(2) of the draft Act 91, questions have been formulated in the professional public for the imposition of criminal liability on a legal person in the case of persons who have a decisive influence on the legal person and are not in the position of a person as provided for in Sections 4(1)(a) to (c) of the ZTZPO. In other words, these are persons who stand outside the structure of the legal person and do not perform any function in it; they are not "entitled" to represent the legal person, but their influence is decisive for the legal person's actions. This is a situation of a controlled and controlling company according to Section 66 of Act No. 513/1991 Coll., Commercial Code, as amended, e.g. relations of a subsidiary and a parent legal entity which are not based on a controlling contract, but the control is only de facto. Other situations may arise in the case of persons who exercise decisive influence on the legal entity's actions from behind the scenes by means of persons who have been set up as white horses. A possible solution would seem to be an expansive interpretation of Section 4(1)(c) of the Act 91, where we could also subsume the aforementioned natural persons under the term "other person authorised to make decisions for the legal person".

For the sake of completeness, we note that the subject of discussion in relation to Section 4(1) of the Act 91 is its relationship to Section 4(4) of the Act 91. In particular, the provision of Section 4(1) of Act 91 implies an obligation to establish who acted on behalf of the legal person, whereas the provision of Section 4(4) of Act 91 implies that the criminal liability of a legal person is not conditional on the criminal liability of a natural person, nor is it conditional on establishing which particular natural person acted on behalf of the legal person. This may be the case when a vote has been taken in a collective body of a legal person, e.g. the board of directors of a joint stock company, and even though evidence has been taken, it cannot be established how the specific members of the board of directors voted. We are of the opinion that in such a case, failure to establish which member of the board of directors voted how is not an obstacle to criminal liability; the decisive factor will be how the board of directors of the joint stock company (statutory body) voted. [43]

The application of Section 4(4) of the Act 91 comes into consideration especially in cases of "chaotic management" of a legal person", as a result of which it will not be possible to establish the identity of a specific natural person to whom the offence committed is to be attributed to the legal person, but it will be proven by investigation that it was a circle of natural persons who are in the

[43] However, the mere voting of a collective body does not normally constitute the commission of a criminal offence. In a figurative sense, it is only the internal decision of the perpetrator to commit the offence, which is a stage of the offence that is in itself impunity. It is only the actions of a specific natural person, who will be bound by the decision of the collective body of the legal person, that will be criminally relevant. It follows that it will be known which specific natural person acted on behalf of the legal person. For that reason, it will, as a rule, be irrelevant to ascertain how the individual members of the collective body of the legal person took their decisions.

required relationship (according to Section 4(4) of the TZPO) to the legal person.

8. Actus reus of the criminal liability of legal person in terms of Italian legislation. The main circumstance that in the past prevented the introduction of forms of criminal liability of subjects was the interpretation of Article 27 (1) of the Italian Constitution, according to which the principle of culpability was understood in a psychological sense, meaning a psychological link between the act and the perpetrator of the act itself. However, the more recent interpretation of the principle of culpability eventually made it possible to adopt the institution of administrative liability of legal persons/entities arising from criminal offences, and thus the interpretation of the norm was updated and adapted to the growing category of collective entities entering the legal system. Also, according to the European Court of Human Rights, it is crucial that the essential guarantees of criminal proceeding will be extended to other forms of sanction mechanism with punitive content, regardless of the abstract names the legislator assigns to them. For the purposes of liability, it is therefore indispensible that the offence must not only be objectively attributable to the legal person but must also be the result or manifestation of the company's policy or, alternatively, must result from organisational culpability.[44] In this case, the legislator designed the sanction mechanism so that the actions of the natural persons and the actions of the "qualified person" are closely linked (simultaneousus processus, which responds not only to the need for economy, but

[44] Relazione ministreriale al D. Lgs n. 231/2001

also to the possibility of complexity of the investigation). However, in certain limited cases, the two may be the subject of separate considerations.

Thus, under Italian criminal liability law, an offence is committed by a legal entity if it is committed by a person who holds a management position or effectively controls the entity ("qualified person") and commits such an offence in the interest of or for the benefit of the entity. The general prerequisite for holding a legal person liable is precisely that the conduct must be directed towards the fulfilment of the interests of the company or directly towards obtaining a benefit for the company. The very notion of interest and benefit of the subject leads to two interpretative theses under discussion - dualistic and monistic.

The dualistic thesis is based on the principle of the use of the conjunction "or", which suggests an alternating relationship between the different criteria of objective assignment. In this case, the criterion of the interest of entity is understood as the purpose of the offence, a certain mode of benefit pursued by the subject, but the fulfilment of such purpose is not essential. An *ex ante* assessment is necessary for a concrete identification, taking into account the time of the commission of the offence. On the other hand, under the dualist thesis, the criterion of benefit is objective and is associated with the effects that the subject obtains as a result of the offence. In this case, the consequence that arises as a result of the offence must be assessed *ex post. "According to the prevailing approach, inspired also by the explanatory memorandum to the Decree, the two criteria for the attribution of interest and advantage are in an alternating relationship, as confirmed by the disjunctive conjunction "or" in the*

text of the provision. It is assumed that the criterion of interest also expresses a teleological evaluation of the offence, which can be assessed ex ante, at the time of the commission of the offence, and according to a distinctly subjective criterion of judgement, whereas the criterion of success has an essentially objective meaning, which can be assessed ex post, on the basis of the effects that have specifically resulted from the commission of the offence. There was, however, no lack of dissenting views which argued that the two criteria were of a uniform nature. The criterion of imputability of the offence would be the interest, while the advantage could play an evidentiary role aimed at proving the existence of an interest.".[45]

Articles 12 (1) and 13, last paragraph, of the Legislative Decree provide for the reduction of fines and the non-application of prohibitory sanctions where the predicate offence was committed in the overriding interest of the perpetrator and/or third parties and the entity has received no or only minimal advantage. In addition to confirming that 'interest' and 'advantage' are concepts which, in legal terminology, convey different notions, the provisions referred to above emphasise, in the opinion of the Court of Cassation, that a predicate offence may be capable of satisfying the concurrent interest of several persons and may therefore be a mixed interest.[46] Thus, we can conclude that while the subject's interest will refer to a subjective view of the individual's criminal conduct and which we will evaluate *ex ante*, the advantage will represent some objective fact.[47]

[45] Cass. Penale, Sez. un, 18.09.2014, n. 38343, Thyssenkrupp.
[46] Cass.pen., sez. VI, 22.05.2013, n. 24559, House Building S.p.A.
[47] Cass.pen., Sez.V, 04.03.2014, n. 10265, Banca Italease S.p.A.

In contrast, the second, monistic thesis holds that the normative meaning of interest and advantage is unitary, and these are used synonymously. It considers that the only objective criterion for the imputability of a corporate offence is the provision of the Legislative Decree which provides that the entity is not liable if the perpetrator acted in its own interest or in the interest of third parties, thus relegating the objectively obtained advantage to a causal variable and proof alone. In this case, it is necessary to reflect on the fact that, in the case of the existence of an exclusive interest of the perpetrator, the judge is not obliged to verify the existence of the advantage obtained by the legal person, which would mean that the existence of the advantage obtained is not necessary, nor is the mere existence of the advantage sufficient to establish liability against the legal entity.

These discussions concerning the criterion of interest led to the hypothesis of two different conceptions, subjective and objective. *"The subjective conception refers to the interest in the psychological sphere of the perpetrator in order to identify the goal that animates his actions, i.e. his awareness that he is acting at least partly in the interest of the legal person. From this perspective, the offence would be imputable to the legal person whenever the offender acts with an aim that coincides with the interest of the legal person. The objective conception identifies the interest of the offence, by which an objectively measurable purpose is realised, that is to say, a characteristic which qualifies the conduct by expressing its capacity to benefit the legal person."*[48]

[48] SBISA-SPINELLI, *Responsabilità amministrativa degli enti,* Milano, 2020, 63

In the end, however, the United Sections of the Court of Cassation[49] took the view that, following the case-law based on the existence of elements of both interest and advantage, although they denied the validity of the distinction between the two, they were inclined to adopt a dualist thesis. The interpretation according to which the two terms constitute autonomous criteria has been authoritatively supported by the Supreme Court, according to which those terms express legally distinct concepts, since a distinction can be drawn between the initial interest of the legal person, even if perhaps unrealised as a result of the offence, and the advantage objectively inherent in the offence. That interpretation has subsequently been confirmed by one of the most authoritative decisions in the field of the administrative liability of legal entities for criminal offences, case Thyssenkrupp. *"The liability of legal persons shall complement and not replace the liability of natural persons, which shall continue to be governed by general criminal law. The criterion for attributing an act to an entity is the commission of an offence 'for the benefit of' or 'in the interest of' the same entity by certain categories of persons. Thus, there is a concurrence of liability in the sense that the act of the natural person, with which the liability of the legal person is linked, must be regarded as the "act" of both, as both unlawful and culpable, with the result that the criminal liability of both the natural person and the legal person is formulated within the framework of the criminal paradigm of concurrent liability."*[50]

[49] Special Conformity of the Chamber of the Court of Cassation, composed of nine voting members, in accordance with Italian legislation.
[50] Cass. Penale, Sez. un, 18.09.2014, n. 38343, Thyssenkrupp.

Article 8 of the Legislative Decree provides for the liability of the subject even if the perpetrator has not been identified or the violation cannot be attributed to him or if the offence ceases to exist for another reason, such as amnesty.

The liability of a legal person arises from the commission of the offence by the perpetrator on the basis of a relationship of dependence which may be described as a presumption. It follows from the foregoing that there can be no corresponding offence without a breach and also that the liability of a legal person is supplementary to and not a substitute for the liability of natural persons. Some authors are of the opinion that the wrongful act itself is based on two types of liability, namely the liability of the legal person and the liability of the natural person, and from this point of view it is necessary to understand the separateness of the case only from a procedural point of view.

9. Exculpatory grounds in terms of Slovak legislation. The group of natural persons embodied in Section 4(2) of the Act 91 is defined as *persons who have acted within the scope of the powers conferred on them by the legal person*. In the original draft of the Act 91, this group of natural persons was defined in Section 4(1)(d) as *other employees or persons in a similar position in the performance of their duties*, i.e., similar to the ZoTOPO.

According to Section 4(2) of the Act 91, a legal person is only charged with a criminal offence if *the person referred to in Section 4(1) of the Act 91, through inadequate supervision or control, which was his or her duty, even though negligently, enabled the commission of a criminal offence by a person*

acting within the scope of the powers conferred on him or her by the legal person. This means that if the natural persons referred to in Section 4(1) of the Act 91 have sufficiently fulfilled their duties of supervision and control and a different natural person, acting within the scope of the powers conferred on him by the legal person, has committed a criminal offence, the offence is not imputed to the legal person.

With reference to the diction of Section 4(3) of the Act 91, the offence shall not be attributed to a legal person even if, *in view of the subject matter of the legal person's activity, the manner of committing the offence, its consequences, and the circumstances in which the offence was committed, the significance of the failure to fulfil the obligations within the framework of supervision and control by the body of the legal person or the person referred to in paragraph 1 is insignificant*. In essence, the wording in question constitutes a material corrective to be applied to minor misconduct or failure to fulfil the supervisory and control obligations of a legal person. The legislator thus gives scope to the practice of application in the area of criminal liability to assess and determine in each individual case the extent to which the legal person has failed to fulfil its supervisory and control obligations, so that the failure to fulfil those obligations in relation to the imposition of criminal liability is not too severe for the legal person.

In light of the above, it is obvious that in order for a legal entity to avoid criminal liability, whether we are talking about noncommitment of a

criminal offence or exculpation[51] and to remain only in the case of criminal liability against a natural person, it is necessary to develop activities aimed at coping with the new criminal risks brought about by the introduction of the first true criminal liability of legal persons into the legal systems of both the Slovak Republic and the Czech Republic. The activity of the legal entity should consist of the introduction of certain management, control, and supervisory measures, including preventive obligations to prevent the commission of criminal activities within the legal entity.

However, first of all, it is important to note that the law enforcement authorities will assess the introduction of the required measures in a legal person only in relation to the offence committed. The law enforcement authorities and the court will not assess the effectiveness of the measures taken by the legal person in general terms, i.e. it is not possible to define a certain general framework of measures that guarantee the execution of the legal person; on the contrary, these measures must be specific and individual, so-called tailored to the specific legal person.[52] The following principles and principles should be respected as a basic starting point in the design and implementation of preventive measures for each legal person.

(a) the principle of proportionality or proportionality of procedures,

[51] We are referring to the possibility of the legal entity developing outside the application of the effective regret enshrined in § 8 of the Act 91, respectively in the ZoTOPO.

[52] In the context of the implementation of the measures in question, it is possible to come across the concept of a *compliance programme*, which can help a legal entity to prevent criminal activity in an effective and appropriate way. The concept of a *compliance programme* is not a legal one, but a corporate one, by which is meant the legal entity's compliance with legal norms, as well as the establishment and observance of the relevant internal norms, both legal and ethical. It also includes the establishment and implementation of a management and control system of the legal entity, which is aimed at compliance with both legal and internal standards, according to which the legal entity is obliged to act.

(b) full involvement of the management or bodies of the legal entity,

(c) systematic risk assessment,

(d) the correct choice of internal control, supervisory and organisational tools,

(e) communication and training for functioning,

(f) sufficient control.

Ad a) Principle of proportionality or proportionality of procedures, it is related to the setting of internal control and appropriate measures in accordance with the nature of the legal entity. This principle should always be applied flexibly and individually for each specific legal entity, taking into account its specifics, such as size, type of activity (e.g., regional, multinational), type of activity or business, personnel substrate and its structure (e.g. ordinary employees and managers), nature and method of management, internal control system, existence of internal audit or *compliance* departments, structure of customers, structure of business partners. It is clear that in the context of the above specificities, there are abysmal differences between the various legal entities, which will, of course, also be reflected in the design and implementation of preventive measures.

Ad b) Full involvement of the management or bodies of the legal entity - the management of the legal entity or its bodies should play the role of guarantors of the existence and functionality of a quality system of measures to prevent the commission of crime. It is the task of the management of the legal person to regularly monitor the implementation of internal measures, to review the sufficiency of the measures, and to revise and improve the system

of measures. The management of the legal person must ensure that the staff is familiar with all relevant regulations and to monitor compliance with them. There is also a need for management peer review, monitoring, and recording of approval and decision-making processes, and an internal information retention system may be used to ensure these requirements.

In relation to the legal entity itself, it will generally be necessary to establish what bodies the legal entity has (board of directors, board of managers, supervisory board, audit committee), how often the bodies of the legal entity meet, and whether there is a schedule of meetings of those bodies. In relation to evidence, it will be crucial to check whether the meetings of the legal person's organs are documented and in what way (written minutes, e-mails, if applicable).

Important for the assessment of the reason for liberation is also the fact whether the legal entity has an employee or an organisational unit that actually carries out internal control of the compliance of the legal entity's activities with the objectives of its activities and legislation (both internal and generally binding) and whether this person has the possibility of direct access to the management of the legal entity or other (control) bodies of the legal entity in the event that it identifies a serious problem. Therefore, there should be at least one person within the management of the legal person who is responsible for the existence, compliance and continuous improvement of the internal measures, taking into account the principle of proportionality.

Ad c) Systematic risk assessment - when preparing and implementing an adequate system of preventive measures, it is necessary to assess the inter-

nal and external risks of the legal entity that could lead to criminal liability of the legal entity. Internal risks may consist, in particular, in personnel issues, incorrectly set internal control processes, inappropriateness, absence, or obsolescence of existing internal regulations or inadequate supervision and control of compliance with internal regulations. External risks are especially in relation to natural persons who have the authority to represent the legal entity externally and are in regular contact with partners or clients.

In relation to risk assessment, it will be crucial to verify that the legal entity's authorities are addressing risks (financial, legal, commercial, operational) and that the senior staff responsible for the different areas of the legal entity's activities have adequate education (attained, supplemented by training on an ongoing basis) and experience. In relation to the assessment of risks arising from the activities of the legal person, it is important whether the legal person carries out some form of risk assessment (financial, legal, commercial, operational), whether it is possible to demonstrate which risks it has assessed as significant, which it has recorded as less risky, and which it has decided to accept.

Ad d) The right choice of internal control, supervision and organisational tools - i.e. measures that must work in coexistence at the preventive level (in excluding, limiting, and neutralising factors leading to the commission of a crime), the detective level (in detecting factors leading to the detection of crimes), and the reactive level (in enforcing factors leading to the punishment of a crime). When internal tools and mechanisms are put in place, a quantum of duties are imposed on specific employees, and internal processes are set

up. Some of these obligations and processes are determined by legislation; others are introduced through internal rules that are general or specific in nature. General internal regulations include work rules, *corporate governance* rules[53] , the rules of conduct and organisational regulations. Specific internal rules regulate only a certain part of the internal duties and processes and include in particular standards of business conduct, code of ethics, internal guidelines on the use of legal entity assets, shredding rules, filing rules, archiving rules, internal anti-corruption rules, internal accounting rules, internal cash handling guidelines or rules for the protection of personal data.[54] The totality of all internal regulations and measures[55] shapes the character of a legal entity and creates a certain corporate culture, which, however, has its written and unwritten dimension. It is the schism or inconsistency between the written and unwritten corporate culture that will need to be assessed by law enforcement authorities, as the identified differences between the two may make a difference to the very possibility of the legal person being exculpated.

In relation to internal rules, it is important to ascertain whether the legal entity has a system of rules that defines the internal competences and

[53] *Corporate governance*, as defined by the OECD, is the system by which a legal entity is managed and controlled. The system defines the rights and obligations between the various individuals in the legal entity.

[54] The internal rules in question can be collectively referred to as internal preventive measures to prevent the commission of crime. Another such preventive measure may consist in the introduction of an internal or external ombudsman, who, inter alia, may serve as a communication point for reporting suspected criminal activity within the legal entity, which in a way personifies the function of another internal measure, namely *whistleblowing*, the essence of which is to alert current or former employees to unfair practices in the workplace. On the concept of *whistleblowing,* see the Transparency International Czech Republic material entitled 'Whistleblowing and whistleblower protection in the Czech Republic', Prague : Transparency International Czech Republic material, 2009.

[55] Specific self-preventive measures of a legal entity include e.g. training activities, methodological activities, advisory and consultancy activities, a quality regulatory base, clearly defined and enforceable obligations, a functional control system, insurance protection, etc.

rights to act on its behalf for the different components and employees (organisation rules, competence rules, signature rules, working rules, rules of procedure of the legal entity's bodies) and whether the managers actually exercise control and supervision in the area of their responsibility. It is also important for the assessment of liberalisation whether the legal entity has adopted directives, instructions, or guidelines, and whether these directives, instructions, or guidelines elaborate expectations, principles, as well as specific procedures and guidance on how to proceed in the most important areas of the legal entity's activities and whether there is credible documentation that employees have been made aware of these directives, instructions, or guidelines. It is also for the purposes of liberalisation to establish whether these standards are updated so that the current versions reflect the current job description, work/system environment, and legislative framework.

Ad e) Functioning communication and training - The system of internal measures can only function properly and effectively if all individuals at all levels of the legal entity are able to communicate. Similarly, a functioning system of internal measures is also due to the proper training of natural persons in the implementation of the measures and the internal control of the legal entity. Participation in training alone cannot be considered sufficient, and the form of training must be appropriately chosen and must be delivered by qualified persons. For an effective *compliance system* that can help a legal entity to liberate itself, an additional component is also necessary, which is a system of training and education of employees for relevant risk areas, both in terms of legal obligation (e.g., OHS, personal data protection, AML training), but

also in terms of what is necessary for an employee to know how to proceed in case of suspicion of committing a criminal offence.

Ad f) Adequate control within the legal entity must cover the sphere of preventive, detective, and reactive measures. The sufficiency of the control should lie in its comprehensiveness but above all in the fact that it reveals whether the system of internal measures is real and is being complied with or whether it exists only on paper. The legal entity should have at least one person to oversee compliance with the entire system of internal measures and its functionality.

From the point of view of an effective *compliance* system, it is essential whether the legal entity (in the case of entities employing at least 50 employees or being a public authority) has an internal regulation for the handling of internal complaints pursuant to Section 11(8) of Act No. 307/2014 Coll. On certain measures related to reporting illegal activities and on amending and supplementing certain acts, as amended (a Whistleblower Act), whether an employee/other person may submit a complaint at any time, whether the company has a mechanism in place for reporting unethical behaviour (beyond the legal requirements), and whether it allows anonymous reporting. It is also necessary for the system to have a process in place for handling reports (from registration through screening, accountability, and consequences, follow-up communication to the whistleblower and also within the company), how many reports have been received, how many have been screened, and whether certain types of reports are recurring. In terms of the handling of

complaints, there needs to be a process for investigating the complaint that guarantees:
-objectivity and independence,
-liability,
-remedial measures (preventive - setting up control mechanisms),
-reporting and communication rules,
-minimizing damage,
-informing the authorities.

The current issue of the introduction of required internal measures, which can potentially play an important role in the exculpation of a legal person, represents a new and broad area that will require increased attention from both legal and law enforcement authorities. The wording of the Act 91 does not set a minimum standard for the necessary measures for the exculpation of a legal person. In principle, however, it can be summarised that if a legal person achieves a state in which each of its employees is aware of the risks arising from its activities, knows how to prevent those risks, is regularly retrained and supervised, and knows how to react appropriately to the occurrence of an unlawful act in the legal person, then the legal person has duly fulfilled its supervisory and control obligations or has made all efforts that could reasonably be required of it to prevent the commission of a criminal offence.

10. Grounds for exculpation in terms of Italian legislation. In contrast to the Slovak legislation, which defines the grounds for exculpation in general terms,

the Italian legislator has dealt with the possibilities of exculpation in a much more specific way. It can be stated that the Slovak legislation on liberation refers only to a simple regulation of the conditions under which the offence is or is not imputed to the legal person. On the other hand, the Italian Legislative Decree, in the provision of Article 6, provides that even if the offence has been committed by a so-called "qualified person" within the legal entity and has been committed for the benefit or in the interest of the entity, the legal entity shall not be held liable for such offence if:

"the governing body has adopted and effectively implemented, prior to the actual commission of the offence, a model of organisation and management suitable to prevent the offences that have occurred;

the task of control and compliance with the model and ensuring that they are kept up to date has been entrusted to the body with the power of command and control;

persons have committed a criminal offence by fraudulently circumventing the organisation and control model;

there has been no neglection or insufficiency in the supervision by the authority referred to in point (b)."

Thus, the Italian legislator has made it quite clear that, even the conditions of immutability of an offence to legal entity are met, the latter may be held not liable if the entity is able to establish taking sufficient measures to avert the crime, as provided for by law. *""The entity must therefore demonstrate that it has adopted and effectively implemented a model of organization and management suitable for preventing the crimes that have occurred (mod-*

ulating this hypothesis to "findings", the doctrine and case law on specific negligence is rather opaque); it must also monitor the effectivness of the model, and thusitsr compliance; to this end, in order to ensure the maximum efficiency of the system, it is stipulated that the entities uses a structure that must be created internally within it (to avoid simple manoeuvres aimed at obtaining a preliminary legitimacy licence for acting of the entity trough formal use of compliant bodies, above all, to establish the entity's actual culpability), endowed with autonomous powers and specifically entrusted with these tasks."[56]

It should be noted that the adoption of an appropriate organisational model to ensure the prevention of crime is not a legal obligation. However, because of the failure to introduce an organisational model, it would not be possible to exempt the entity from liability. However, it is not sufficient for an entity to only adopt any organisational model. The organisational model must be 'tailor-made', duly adopted and sufficiently implemented, whereas the mere absence of a model, or even its incompleteness, may itself lead to a breach of the obligations of the governing bodies and also to a breach of the obligation relating to the adequacy of the company's organisational, administrative and accounting structure and the general duty to act with professional diligence. We can therefore conclude that, although the law does not qualify the adoption of the organisation and control model as an obligation, in the Italian territory its adoption is considered a very important tool for corporate governance, which has been implemented by the majority of large and medium-sized companies. In the light of the decision of the Court of Bari, the in-

[56] Relazione ministreriale al D. Lgs n. 231/2001

troduction of such a system under the Legislative Decree, *"corresponds to the logic of crime prevention, which is to be implemented precisely through the re-education of the entity; that is, Legislative Decree 231/2001 aims to impose on the entity that carries out economic activity the adoption of organizational models suitable for preventing the risk of crimes committed by individuals associated with the entity who have acted in its interest or for its benefit. The criminal law justification that inspires Legislative Decree 231/2001 is not a retaliation in itself, nor is it just a general prevention, but a special prevention within the key of re-education; that is intended to encourage the subject to adopt measures that will rectify the offence and enable it to overcome the social conflict that has arisen as a result of the offence, as well as appropriate, concrete and effective organisational models that will structurally influence the company's culture and enable it to continue to operate on the market in accordance with the law or, better still, to re-enter the market with a new legal perspective.* [57] It is therefore clear from the foregoing that failure to properly implement the model may lead to a breach of the obligations of the entity's senior management, in particular breaches of the obligations relating to the adequacy of the company's organisational, administrative and accounting structure[58] and the general obligation to manage with due professionalism, as already mentioned.[59]

Thus, the whole exculpation system of criminal liability of a legal entity can be considered in practice as a mere risk assessment aimed at prevent-

[57] Tribunale di Bari, Sez. I, 22.06.2022
[58] As follows from Article 2381(3) and (5) of the Civil Code
[59] As follows from Article 2392 of the Civil Code

ing the commission of criminal activities. Preventing the commission of crimes is also one of the objectives of the European Data Protection Regulation 679/2016[60], where we identify common elements especially with Legislative Decree 231/2001. Both norms prioritize the assessment of risks and the adoption of appropriate measures to avert or reduce them, the application of a sanction is not an objective but a consequence, thus encouraging the addressees to adopt a model of organization as a tool of prevention.

11. Organisation and management model. In order to evolve from the liability of the legal entity, the Legislative Decree presupposes not only the proper adoption but also the control of compliance with the model of organisation and management. While in Italy the legislator clearly lists the concrete steps that a company must take in order to escape liability[61], the Slovak legislator does not mention any specific measures for this purpose, but provides that the crime is not imputed to the legal person if, considering the subject of the legal entity's activity, the way the crime was committed, its consequences and the circumstances under which the crime was committed, the importance of non-fulfillment of obligations within the scope of supervision and control by the "qualified person", is insignificant.[62]

From the wording of the Italian Legislative Decree we can further conclude that for the actual drafting, adoption and implementation of the model of the organisation, a certain level of professional knowledge is neces-

[60] Known as GDPR
[61] Art. 6 del Decreto legislativo 8 giugno 2001, n. 231
[62] Art. 4, paragraph 3 of the Act No. 91/2016 Coll.

sary. The adoption of a model of organisation that does not meet the legal requirements and is judged by the court to be insufficient leads to a clear imputation of the offence of the natural person to the legal entity. More than 20 years of practice and jurisprudence in the field of administrative liability of legal persons for criminal offences in Italy have established the following minimum requirements of the model of organisation and management:

Identification of risky activities that may lead to the commission of crimes. Within the framework of the adoption of the organisational model, the risk analysis itself is considered to be essential, which consists of identifying areas and activities that may be directly at risk of committing crimes. The preparation of the organisational model itself must therefore be based on an in-depth analysis of the company's specific activities and be subject to regular revision thereafter. The analysis of potential risks must include the possible ways in which crimes may be committed within the different corporate structures, and this analysis must give a comprehensive picture of how crimes may be committed with respect to the entity's internal and external systems. In developing the model, the entity should also look at the "lessons learned" and therefore at crimes that have been committed within its corporate structure in the past.

Establishment of specific protocols (known in the Slovak legal environment as corporate directives) aimed, for example, also at the planning, development and execution of the entity's decisions in relation to the crimes to be prevented and the identification of the individual methods of financial resource management to be centered on preventing the commission of crimes. The entity is to adopt a sound system of protocols, procedures and controls aimed at

regulating the entity's activities within risk areas. For example, a code of ethics is considered to be one of these means, which should reflect the adoption of ethical principles as primary corporate values. One of the important factors is the actual division of the various functions within the corporate structure of the entity. The organisation must reflect the establishment of functions through the separation of duties between those responsible for critical activities. The aim is to ensure that one person does not independently carry out the entire process. This entails an appropriate separation of powers and delegation of authority, as well as the actual signing of relevant corporate documents.

Provision of an information obligation in relation to the authority responsible for overseeing the functioning and compliance with the model. The Supervisory Authority (Organismo di Vigilanza - OdV) has the task of supervising the actual functioning of the model. Its role is to oversee the compliance and application of the model and to keep it up to date. The Supervisory Authority has specific powers in terms of initiative and control, while complying with the requirement of separateness, autonomy and independence.

Putting in place an appropriate disciplinary system to punish non-compliance with the measures set out in the model. To ensure the effectiveness in addition to adopting the model, an entity must ensure that it is effectively implemented and that an effective disciplinary system is in place to sanction non-compliance. Such a disciplinary system should be an integral part of the organisational model and should be made publicly available so that both internal and external staff of the entity are aware of it. The introduction of a disci-

plinary system is primarily intended to fulfil a preventive function, to deter the perpetrator from committing the offence itself. However, if the measures laid down in the organisational model are violated, such conduct must automatically lead to the application of the disciplinary mechanism provided in the model, whether or not criminal proceedings have been initiated.

A model of organisation and control in terms of these requirements may be adopted on the basis of a code of conduct drawn up by the relevant trade association and subsequently approved by the Ministry of Justice in consultation with the relevant Ministry who may comment on the suitability of the proposed code of conduct for a specific field of economic activity.

The structure of the organizational model is usually divided into general and special parts, and its annex is the company's code of ethics, protocols and guidelines.

The general part regulates the organisation itself, the management model and the control system. It focuses on the objectives of the model, defines its specific addressees, regulates the process of implementation of the model and the communication between the different structures of the entity, including education about the model and the entity organisation. It also includes a separate chapter regulating the roles and procedure of the Supervisory Authority (OdV), including a list of persons involved in monitoring compliance with the model and contacts to which addressees may report violations of the model, as well as a system for receiving and processing such reports. In particular, this section should include information regarding the regular updating of the model, including update of the disciplinary system men-

tioned above. In summary, the general section can be regarded as a form of theoretical section, according to which the top management and the employees of the entity themselves should become more familiar with the entire system of the company, understand it and, above all, follow its guidelines.

The special section focuses on the individual processes in company and characterizes the categories of crimes that a subject may commit. Within this section, it is essential to identify in particular, sensitive activities, that is, activities that are generally characterised by a higher risk of the possibility of committing crimes. The entity is 'obliged' to set control standards, means the principles of prevention and related controls, in relation to the individual risk activities. Such control standards may be defined individually for each risk activity or, conversely, the entity may choose to have control standards that are cross-cutting, meaning that the standards, principles, protocols and controls will apply simultaneously to several or all-risk activities. Control standards should also be directly linked to certain regulatory actions and thus should also govern operational procedures, guidelines and other organisational tools.

As noted above, it is not enough just to adopt the model. The implementation of the model requires due expertise and interest in managing the entity according to its established measures. The Legislative Decree directly provides that the authority with autonomous powers of initiative and control is directly responsible for overseeing the implementation and compliance with the model, as well as its updating. Such a body is generally considered to be the Supervisory Authority (OdV) mentioned above; however, it is clear from

the statutory wording that the authority and liability for the adoption of the model rests with the statutory body of the entity. Indeed, the Legislative Decree makes it clear that it is the role of the statutory body to adopt and effectively implement the model and apply its provisions. It therefore follows systematically that, insofar as the role of the governing body is to adopt and implement the model, its updating should follow the same procedure and, consequently, updating should also be the liability of the governing body. On the other hand, in order to achieve the objectives of the organisational model, it is desirable that it be developed by an independent person, outside the company structure, who not only impartially assesses the risk activities and chooses appropriate organisational procedures, but also has the authority to carry out effective monitoring of compliance with the model, to react to (possible) breaches of the provisions of the model, as well as to request and propose organisational changes. In this case, it is desirable for the statutory body to entrust these tasks to a professional, just as it does when keeping the company's accounts, which, although it is responsible for, is in most cases entrusted to an accountant company.

If the judge deems the model insufficient, it invalidates the subject's ability to evolve from liability for the crime. This has the effect that inaction (or lack of action) by the statutory body in relation to the effective implementation and updating of the model exposes the statutory body directly to the risk of liability and may result in that body being held liable for the offence committed. It is therefore essential that the organisation model is constantly updated, as the Legislative Decree itself predicts in Article 7 (4). According to

this provision, effective implementation requires regular verification and possible modification of the model in the event that serious breaches are detected or if there are changes in the structure of the company or in the actual activities carried out by the company.

A clear gap in the legal regulation of criminal liability in the Slovak Republic is the fact that the legislator in this case did not deal at all with the extended possibilities for the company to be extorted from the commission of criminal offences, which causes a significant deficiency and disadvantage compared to the Italian legal regulation. We consider that the primary objective of both norms (Italian and Slovak) is to prevent the commission of crimes, not to punish them. While the Italian Legislative Decree gives the addressees a clear 'instruction' on what measures to take for this purpose, the Slovak Law on the criminal liability of legal persons is too brief in this respect and requires considerable interpretative effort, which brings ambiguity in its application.[63]

12. Supervisory Authority (OdV). In addition to the above-mentioned legal conditions, an entity may be exonerated from liability arising from the commission of possible criminal offences, provided that the task of supervising the functioning and compliance with the organisational model has been entrusted to a body which has autonomous powers of initiative and control, which in

[63] In this regard, Italia legislator even provides in art. 7 of Legislative Decree: 1. In the case of crime committed by employees the entity is liable if the commission of the offense has been made possible due to non-compliance with management or supervisory obligations. In any case, the entity is not considered non-compliant if, prior to the commission of the offense, has adopted and effectively implemented an organization, management and control model, suitable for preventing crimes of the kind occurred.

practice means the Supervisory Authority, known in Italy as the Organismo di Vigilanza, and at the same time it is necessary to demonstrate that there has been no omission or insufficient supervision of the organisational model and its performance by the Supervisory Authority. In practice, it is common that the function of the Supervisory Authority is performed by persons outside the management structure of the company. However, the Legislative Decree has also addressed this issue by providing that, for companies classified as small enterprises, the role of Supervisory Authority over the functioning of the organisational model may be performed directly by the statutory body. On the contrary, in public limited companies, this function must be performed directly by a Supervisory Authority (whether collective or one-person) standing outside the company.

The Legislative Decree contains only a very brief definition in relation to the Supervisory Authority, which is why directives or guidelines have been issued by various professional organisations, interest associations or chambers in this area. One of the most important guidelines on the exercise of the supervisory authority's functions under the Legislative Decree is the Confindustria[64] guideline. This guideline makes up for the failure of the legislator to regulate the composition of the Supervisory Authority itself and specifies that a legal entity may choose a single or collective composition of this body, whereby both internal and external persons may be invited to be part of the composition of the body, provided that they meet the statutory requirements. Con-

[64] Abbreviation for Confederazione Generale dell'Industria Italiana (General Confederation of Italian Industry), it is the main organisation representing Italian manufacturing and service companies, which, on a voluntary basis, brings together more than 150,000 companies, including banks and, since 1993, public enterprises, with a total number of approximately 5,439,370 employees.

findustria is therefore of the opinion that the composition of the Supervisory Authority for individual companies must be considered on a case-by-case basis. It acknowledges that a structure where external experts are combined with internal staff could facilitate the whole process of adopting and implementing the organisational model and could also best meet the requirements regarding the expertise that the Supervisory Authority must have. The issue of internal composition was also addressed by the Italian Court, which in its judgment stated that: *"the model (and therefore the control) should prove its effectiveness. On the other hand, the Milan court seems to have been satisfied with the fact that the 'draft' was drawn up by an internal body, whereas the statutory body (the managing director of the company) is then responsible for communicating the model to the addressees, subject to the control of the Supervisory Authority".*[65] The judges in this case confirmed that it is absolutely unacceptable for the Supervisory Authority to be directly subordinate to the Managing Director or the Chairman of the Board of Directors, with the Managing Director being directly part of the Supervisory Authority, as such a set-up would call into question the autonomy of the Supervisory Authority. According to the Court of Cassation, such an organisational set-up is contrary to the general principle that the Supervisory Authority cannot be directly subordinate to the supervised subjects (statutory bodies).

The Supervisory Authority is primarily concerned with overseeing the effectiveness of the model, which in practice means supervising the consistency between actual behaviour and adopted model. It is also concerned with

[65] Cass.pen., sez. V, 18.12.2013, n. 4677, Impregilo

examining the adequacy of the organisational model and thus not only its actual but also its formal ability to prevent prohibited conduct. It also performs requirements maintenance analysis with respect to the reliability and functionality of the model and deals with corrections, modifications and updates to the model. In particular it is responsible for providing suggestions for adapting the model to the company's organisational structure and to the activities carried out. It is therefore important that the members of the Supervisory Authority have the necessary expertise in order to perform their functions in the best possible way. Confindustria has also indicated that some of the functions cannot overlap with each other: *"The extension of the application of Decree 231 to offences poses a problem of the relationship between the OSH plan and the environmental protection programme and the organisational model, as well as between the activities of those responsible for OSH control and environmental protection and the activities of the Supervisory Authority. The autonomy of the functions of these bodies does not allow for an overlapping of these control tasks, which would thus be unnecessary and ineffective. As also indicated in the case study, the different inspection bodies carry out their tasks at different levels. The analysis also shows that the Supervisory Authority needs to have specialised expertise, predominantly control qualifications and assumes knowledge of ad hoc techniques and tools as well as a high degree of continuity of action."*[66] In relation to the activities of the Supervisory Authority, Article 6 (2) letter (d) of the Legislative Decree speaks of the clear need to establish an information obligation towards the body re-

[66] Linee guida per la costruzione dei modelli di organizzazione, gestione e controllo, Confindustria, časť 2.2, str. 76

sponsible for supervising the adoption and compliance with the model. It can be assumed that the legislator considered the information obligation towards the Supervisory Authority as a tool to facilitate the activity of supervising the effectiveness of the model and the subsequent identification of the causes that allowed the offence to occur. Since the explanatory memorandum to the Legislative Decree does not provide further explanation, the aforementioned Confindustria Guideline further develops this topic. *"If this is in the spirit of the regulatory requirement, then it should be taken into account that the obligation to provide information to the Supervisory Authority is addressed to firms and relates in particular to (a) the regular results of the control activities they carry out in order to implement the models (summary reports of activities carried out, monitoring activities, final indicators... (b) anomalies or atypicalities detected on the basis of the information available (a non-substantial fact, if considered on a case-by-case basis, could be treated differently in the case of a recurrence or an extension of the area of occurrence)."*[67] From the point of view of Confindustria, this will include, for example, information relating to applications for public funds; requests for legal aid made by senior executives (where there is a risk of criminal proceedings); measures or reports from the police or any other authority from which it can be inferred that an investigation is being carried out, although against unknown persons, for the offences provided for in the Legislative Decree; investigative commissions or internal reports implying responsibility for the offences referred to in the Leg-

[67] Linee guida per la costruzione dei modelli di organizzazione, gestione e controllo, Confindustria, časť 3, str. 89

islative Decree; reports on the actual implementation of the organisational model at all levels of the company, with evidence of the disciplinary procedures carried out and any sanctions imposed and measures taken to put an end to such procedures, stating the reasons; the results of the preventive and ex-post controls carried out during the reference period on contracts awarded under national and European tenders; the results of the monitoring and controls already carried out during the reference period on contracts awarded by public authorities. The information flows between the entity's management body and the Supervisory Authority serve in practice as a certain detection mechanism. The statutory body has the obligation to carry out control activities aimed at compliance with the organisational model, while the Supervisory Authority is responsible for the actual assessment of the effectiveness of these controls. The supervisory authority is therefore entitled to be informed of all relevant facts that fall under the entity, is entitled to consult the relevant documentation, is entitled to receive a copy of the periodic reports on occupational safety and health. The purpose of obtaining information is to enable the Supervisory Authority to improve the planning of its own inspection activities and the related timely and systematic correction of deficiencies. It should be noted, however, that the Supervisory Authority is not obliged to act, but it is at its discretion and under its liability to determine in which cases it will act.

Compliance with these requirements, activities and obligations constitutes a prerequisite for the Supervisory Authority to be considered as complying with the requirements set out in the Legislative Decree , case law and the main guidelines in this area, with the aim of exempting the legal entity from

liability arising from the possible commission of criminal offences. *"An appropriate organisational model must therefore have a section dedicated to the Supervisory Authority which, in the light of the above, regulates in particular its composition and appointment, its responsibilities, powers and budget, information flows to and from the Supervisory Authority to senior management, the collection and retention of information, and its relations between the Supervisory Authority and all supervised entities."*[68]

13. Whistleblowing. Another important component of administrative liability of legal entities for crimes, which has been dealt with earlier in Italian legislation, is the topic of whistleblowing as a requirement of the organisational model. Act No. 179 of 30 November 2017 introduced the issue and included the obligations under the UE regulation of the "Provisions for the protection of authors of notifications of crimes or irregularities of which they become aware in the context of a public or private employment relationship". The adoption of this act immediately led to a debate as to whether these provisions would become part of the Legislative Decree. Finally, whistleblowing also became part of the Legislative Decree in relation to the content of the organisational model.[69] Thus, the Legislative Decree stipulates that a company's organisational model must contain one or more channels enabling management and subordinate employees to report suspected illegal conduct and to report breaches of the entity's organisational model of which they become aware by virtue of their position, in order to protect the integrity of the entity.

[68] SBISA-SPINELLI, *Responsabilità amministrativa degli enti,* Milano, 2020, 147
[69] Art. 6 comma 2-bis del Decreto legislativo 8 giugno 2001, n. 231

The Legislative Decree clearly establishes the obligation to guarantee the confidentiality of the identity of the whistleblower when making a report. It shall also include at least one alternative channel for anonymous reporting by computer means. The model must provide for the prohibition of direct or indirect discriminatory action against a whistleblower for reasons directly or indirectly related to the report, and also provide, within the framework of the disciplinary system adopted, for direct sanctions against those who violate the whistleblower protection measures, as well as against those who, with malice or gross negligence, make reports that turn out to be unfounded. Law 179/2017 also introduced that the discriminatory dismissal of a whistleblower is null and void, and in the case of disputes concerning the imposition of disciplinary sanctions, demotion, dismissal, transfer or subjecting a whistleblower to other organizational measures that have a direct or indirect negative impact on working conditions, after the whistleblower has made a report, the burden of proof is on the employer to prove that these measures were based on reasons unrelated to the report.[70]

[70] SBISA-SPINELLI, *Responsabilità amministrativa degli enti,* Milano, 2020, 157