DALLA COMUNITÀ INTERNAZIONALE

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General observations on interpretative issues on the discipline of criminal liability of legal entities in the Republic of Albania: some comparative aspects with Italian legislation

1. Criminal liability of legal persons and the principle of culpable personal responsibility.

The phenomenon of delinquency constitutes a legal reality that in our days cannot be denied. Offenses arising from social subjects are always current with making their fight improper through traditional schemes of criminal responsibility of the legal persons.

The tendency of European lawmakers in drafting punitive provisions directly on legal entities is being increased. In France and Portugal criminal liability of legal persons is expressly provided in the penal codes of '90. In Finland, Denmark, and Belgium this politic-criminal option is developed through several additional special laws on disciplining legislati on on the phenoma.

In this prospective is directed, as well Albania by law 9754, dated 14.VI.2007, which introduced criminal liability of legal persons for crimes committed in their behalf and in their benefit.

From the well known principle "*societas delinqueri e puniri non potest" e*ven

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Albania passed in principle "*societas delinqueri e puniri potest*"[2]. However, the doctrine of criminal law has traditionally denied the possibility of a criminal liability for legal entities. Still today, the most careful Italian doctrine related to the aspects of interpretation of the principles of criminal law has highlighted the contradiction of criminal liability on trade companies with the principles of responsibility of personal criminal liability[3] and responsibility by fault of the individual[4].

Guilty under its modern concept is known as guilty under normative terms and not subjective terms- this doctroine has last for many years[5] -, it is related

[2] For more than a century the theory of criminal law has remained faithful to the teaching of Carl von Savigny under which only Physics person can possess rights, while legal person needing representatives for the development of its activities, constitutes a mere legal fiction and, as such, cannot commit in person offenses. From here derives and famous phrase:"Societas delinquere non potest". C.V. SAVIGNY, *Sistema del diritto romano attuale*, II, Bologna, 1900.

However, there have been different opinions that - completely in opposite to the theory of fiction - have noted that societies are subject to the same right as individuals. Representatives of companies cannot be separated from them, as are organs through which is expressed the social will. GIERKE V, *Das deutsche Genossenschaftsrechtm Db. I*, Berlin, 1868.

[3] From this principle comes the prohibition of criminal responsibility for facts realized by other individuals which means, on the positive, that everyone can be punished only for the fact of its own, as provided by law as criminal offense. For this principle to be applied to individual is necessary the fact that the latter has to be assigned to him objectively as well as subjectively. Objectively, one fact can actually be assigned to an individual if it is directly as a result of the action or inaction of the individual. If there is a causal connection between the individual conduct and the result of this behavior, the realized fact can be called as of the individual himself. It can be considered subjective behavior only if an individual is not imposed by an inevitable force which actors removes any real control over the situation. To consider personal the behavior is necessary that the person who operates understands his actions and is free and unconditional from outside. For this aspects refer to E. BOZHEKU, *Guilt. Some theoretical, methodological, and practical, functioning aspects of the second element of the offense*, E drejta - Law, n. 2, 2010, Pristina, p. 118, and E. BOZHEKU, *Analysis of the offense*, in *Jeta Juridike*, n. 2, 2011, p. 78.

These elements constitute the minimum requirements necessary for giving a judgment about the responsibility. An individual can be held responsible only if, given the opportunity to hold behavior in conformity with the legislation in force, consciously holds an opposite behavior. To be in charge of the offense for a fact it is necessary that the fact is controlled by the will of the entity that operates. (RAMACCI F., *Corso di diritto penale*, II ed., Torino, 2003, f. 50.). Refer also to E. BOZHEKU, *Guilty. Some theoretical, methodological, functional and practical aspects to the second element of the offense*, in E drejta - Law, n. 2, 2010, Pristina, p. 118, and on.

[4] In Albanian code guilt is expressly provided for in Article 14, on the basis of which "... No one may be punished for an act or omission contemplated by law as a criminal offense, if the offense is committed not by fault. Is is considered guilty, that person who commits acts willful or by negligence ". As indicated in doctrine, a person is guilty by his mental attitude to illegal action or inaction and harmful consequences. This mental attitude is expressed in a person's attitude toward the action or its consequences, which must be provided / imaginable and desired, or coming from negligence. I. ELEZI, S. KACUPI, M. HAXHIA, *Commentary* of *Criminal Code of the Republic of Albania*, Tirane, 2006, p. 112.

[5] Conception of culpability under the subjective aspect, i.e. as mental attitude held by active subject to

to the concept of a person able to orient its actions consciously. To place a person before criminal liability, the fact[6] realized should be assigned to the person, i.e. to be realized consciously and deliberately by the individual himself. The principle of personality requires on the one hand the realization of a material fact by the individual (personality in narrow sense), and on the other hand requires that offenses be committed subjectively by this person[7]. The offense should be done personally and have the guilty element[8]. Only in this way the penalty can realize the basic function of rehabilitation of the convicted[9].

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illegal action or inaction and its harmful consequences (SH. MUÇI, *E drejta penale, pjese e pergjithshme*, Tirane, 2007, p. 137) is a concept used for many years by the doctrine of criminal law. Modern doctrine of criminal law considers guilt under normative sense as reprimand of the individual who with his behavior shows an acceptance to the established rules to ensure peaceful coexistence; these rules are primarily criminal provisions G. LATTANZI, *Reati e responsabilità degli enti*, Milano, 2005, p. 10.

[6] It is known int the theory of criminal law that the fact and offense are synonyms. The offense is nothing else but the prediction of the fact by the lawmaker in a legal provision, the realization of which entail the application of a sanction. Therefore the word fact should actually be understood as synonymous with the word offense. On this argument F. RAMACCI, *Corso di diritto penale*, II ed., Torino, 2003, f. 6. Refer also to E. BOZHEKU, *Under the principle of legality and its principles*, in *Jeta Juridike*, no. 2, December, 2009, p. 91.

[7] One cannot speak for criminal responsibility in the case of X who is in an epileptic crises kills Y. In this case X cannot be responsible for the murder because the offense belongs only by material mean to him. Ssubjectively we have lacking of consciousness and will of action (called SUITAS) before lack of imagination and intent of the fact performed. F. ANTOLISEI, *Manuale di diritto penale*, *Parte generale*, a cura di L. Conti, Milano 2000, p. 342.

[8] These principles are common to all modern criminal legislations. In Albania, even though we did not encounter any article in the Constitution which expressly provides personal criminal responsibility of guilty, these principles in interpretative order can be drawn from Articles 1 / c, 2 and 4 of the Penal Code and Article 28, paragraph 5 of the Constitution. Article 1 / c provides: «...*The Criminal Code is based on constitutional principles of rule of law, equality before the law, fairness in assigning guilt and punishment*, and *to humanism* ...». Article 2 /1 of Penal Code provides: " *No one can be punished for an offense that is not explicitly* foreseen in a law *as a crime or criminal infringement* ...". Article 4 of Penal Code provides «...Not having known *the law that condemns the criminal act*, is *not a reason for exemption from criminal liability, unless it is objectively inevitable* ...».
From these articles emerges that for an offense to be applied to an individual he must know or be able to recognize that the act that he has done is contrary to legal object protected by law. In fact, only prior knowledge of the law makes it possible for the individual to consciously orient his actions (Article 4). In contrast to the application of normative facts made in an unprecedented moment of the entry into force of the criminal provision would be absurd.
Refer to I. ELEZI, S. KACUPI, M. HAXHIA, *Komentari i kodit penal te Republikes se Shqiperise*, Tirane, 2006.

[9] Citation of humanism as basic principle of the penal code, makes this article to get a basic function for the interpretation of all the penal provisions. The principle of humanism has to do with the individual's punishment. The punishment has even humanizing function for the individual, namely as reformatory to social values which he do not recognize or respect. If the defendant knew these values he would have not committed the criminal offense. For example, a natural disaster occurs and communications are expected with some areas of the country, in this period lawmaker issue new criminal provisions. It is

If we accept that the legal person is an entity separate from the individuals: i.e., if the legal person is considered as an autonomous legal entity, capable of being the center of rights and obligations, then problem arises how a subject like this can be responsible for criminal acts carried out by individuals within the entity.

The first problem arises with the fact that a legal person, if will have responsibility for facts[10] (offenses) performed by other individuals (for example, administrators or representatives), is called to answer for crimes carried out not personally by him, but from quite different subjects. In this way, the liability of legal person comes for the only fact that the offense is performed by an individual of its own, without having the opportunity to avoid the realization of this fact. In other words, the responsibility of the legal person is configured simply objectively (*versari in re illecita*)[11],only based on the fact that an offense is carried by one of its organs, in the absence of any psychological connection between the legal person and the offense.

It can be understood that natural person who commits the offense is

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clear that residents of areas hit by the disaster cannot be responsible for offenses arising in this period because objectively have not had the opportunity to recognize oriented provisions to consciously and deliberately orient their actions.

Humanization and guilt as fundamental principles of our legislation find full confirmation in Article 28, paragraph 5 of the Constitution which provides «...*Any person who has been deprived of his liberty under Article 27, has the right to humane treatment and respect for dignity ...*».

Systematic interpretation of the provisions cited above shows that in our code also emerges the principles of impeachment, humanism, knowledge of criminal law, etc., and they constitute the foundation of all criminal legislation.

[10] On the use of the word "fact" and not "offense" we are of the opinion that the first phrase is more appropriate because it identifies as a concrete reality, while the offense comes just as a technicality that does not fit the abstract principle of precision and that doesn't means anything else besides the fact. For this reason we are of the opinion that using the word fact, actually are in accordance with the principles of precision, binding and traditional. By using this expression we prevent the criticism that the doctrine pays to Albanian criminal law in general, and in particular our criminal code. To read this opinions refer to: P. PITTARO, *Il codice penale albanese: un'introduzione*, in *Riv. dir. pen. XXI sec.*, n. 2, 2006, 197; A. MANNA, *L'imputabilità nel codice penale albanese del 1995*, *ibidem*, 221 dhe vazhdim. M. BERTOLI, *Su alcuni problemi nella traduzione del codice penale albanese: tra fedeltà del testo ed efficacia linguistica*, *ibidem*, f. 263. E. BOZHEKU, *Parimi i legalitetit dhe nënparimet e tij, në Jeta Juridikë*, n. 2, dhjetor, 2009, pg. 91 dhe vazhdim; E. BOZHEKU, *Some remarks about the albanian crminal code in Conference Proceedings*, Vol. III, *Challenges of Albania's Integration in European Union*, Tiranë, 2010, p. 195 ss.; E. BOZHEKU, *Alcune riflessioni sul codice penale albanese*, në *www.diritto.it*, 2010.

[11] The objective Criminal Responsibility is a medieval concept based on the statement «...versari in re illecita etiam pro casu tenetur...». Whoever performed a lawlessness is responsible for all the consequences that come from this action. This principle which has prevailed for centuries in the world today is passed legislation. It is a principle that is based only on the causal link action-offense. As noted previously, modern criminal law is based not only on the causal link but also in psychic connection between the offense and subject.

doing it on behalf and for the benefit of the legal person which from material point of view has advantages or positive results from the realization of the illegal fact. However the problem with regard to the principle of guilt continues to stand. To respect this principle is necessary that legal person is aware about the illegal activity of its bodies and also be able to avoid the realization of the offense by a natural person: it requires a psychic connection between the legal person and the offense. Only in this way the legal entity may be responsible for the facts realized from his organs. In other words, offense has been voluntary committed or the legal person has been aware and negligently has allowed its realization[12].

But (and here is the strongest objection) how can we talk of psychic connection to an entity that exists only legally but is not as one person? Administrators and representatives of companies can be replaced if they commit offenses and haw a legal person may be responsible for the illegal activities of these subjects?

For these reasons the Italian legislation, law no. 231, dated 06.08.2001 does not speak for criminal liability of legal entities, but administrative responsibility for legal persons in relation to offenses carried out in their interest or to their advantage.

It is a pre-criminal system based on non-criminal sanctions (although the process that takes place is typically of penal procedure and are applied sections of the Italian criminal procedure code) on legal persons for offenses carried out by representatives or administrators. Thereby the Italian lawmaker avoided the law in question to fall in prone doubts referred to the violation of the guilty principle and of personal criminal liability expressly provided for in Article 27 paragraph 1 of the Italian Constitution[13].

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[12] As regard to this aspect, should be taken care to avoid being confused with the carelessness criminal responsibility of physics persons. In the case for which we are talking about the responsibility is defined in base of different criteria from those provided by the penal code. These criteria are in fact in the benefit of a legal person who is aware or could have been aware of the realization of these facts. Completion is that we provide an end "de jure condendo", i.e. a subjective conclusion that should be interpreted as – given our doctrinal formation – law courts to conform to the principles of criminal law.

[13] Article 27 paragraph 1 of the Italian Constitution provides: "... Criminal responsibility is personal ...". From this principle, with a decision considered "epoch-making", the Italian constitutional court (Decision no. 364/1988) declared not in conformity with the Constitution the dispositions of the penal code which does not respect the principle of culpable personal responsibility. The court stated that an offense may be considered made by an individual only if it belongs to the latter not only materially (i.e. causal connection) but also mentally. In this prospective, is not enough to have the realization of the fact but also a psychological connection between the author and the fact; psychological connection reflected in the form of guilty for carelessness. The latter should be understood as responsibility of a person for the realization of a fact for which if had been more careful would have expected and therefore would

Regarding Albania, law no 9754 dated 14.06.2007 provides criminal responsibility of legal persons. It is a solution that can be considered acceptable in principle.
First, it should be noted that if we accept that the legal person is an autonomous entity of interest and legal relationships, who is responsible for the acts of its legal entities, then the same logic should apply to illegal facts and their consequences. In this line of thoughts is observed that: "if the legal person can sign contracts, the subject of obligations arising from these contracts is the legal entity itself and the latter is the subject who can respect or violate them. This means that legal person may act illegally"[14].
If we go in depth: while the lawmaker knows to the legal person the capacity to act, to pretend, to take charges through physical entities that represent it, then it is reasonable to think that a legal person can be held responsible for unlawful acts that take place in the sphere of its activities. In this frame, the responsibility as a legal concept can be known to any and every subject which enjoy the ability to act[15].
Second, the principle of guilt can be considered separated from the traditional psychological conception[16] to switch to a normative conception of guilt. The latter is based on the admonition of any entity if that does not fit with the social values accepted by society. In this prospectus the guilty is not any more psychic connection (personal) individ-offence, but a reprimand directed to everyone, even to legal entities, who are not careful in respecting the law. In this context it is clear that guilty is not based on the subjective relationship fact- willingness or fact-intentional negligence, but in another element – reprimand – which can be applied to any subject. In this new view, legal persons may be called upon to answer for those social activities which, being considered offense, give the opportunity to reprimanded (legal person) becauese having a weak organization, was unable to avoid their realization.
However elimination in principle of interpretative problems connected with the principle of criminal guilt should not deceive: Albanian norms should be

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have, certainly, avoid it.

[14] K. TIEDMAN, *La responsabilità penale delle persone giuridiche*, in *Riv. it. dir. proc. pen.,* 1993, p. 1246.

[15] Concepts of legal capacity and capacity to act of natural and legal persons refer to KONDILI, *Civil Law I, General Part*, Tirana, 2007, f. 110, p. 139.

[16] As is well known psychological conception of guilt requires a close connection between the author and the fact-offense. The fact is to be considered of the author only if the latter has expected and wished the fact or could predict, but for giddiness did not predicted it. G. FIANDACA, E. MUSCO, *Diritto penale, Parte generale*, IV ed., Bologna, 2004, p. 169.

analyzed whether basic principles are conform penal code.
Norms are based in two key elements. First is the realization of a criminal offense by a natural person; The second is the realization of a criminal act "on behalf" or "benefit" of a legal person. These elements must be connected reciprocally: offense must have a connection with a legal person and legal person must have some benefits.
Before we begun analyzing the constituent elements is reasonable the development of an analysis related to legal persons to whom can be applied the norms.

2. Criminal liability of legal persons in the criminal code of the Republic of Albania.

Sensitivity shown in international circles has accelerated the awareness of Albanian legislators about a specific intervention on the discipline of responsibility of the legal entities.
Formally criminal liability of legal persons is affirmed for the first time in the 1995 Criminal Code (Law no 7895, dated 27.01.1995) Article 45 CC., repealed in 2001 and re-added in 2004[17].
The article sets the basic criteria of criminal liability of legal entities. Paragraph 1 stipulates that «*legal persons, with the exception of state institutions, are responsible for criminal acts committed on behalf of or for the benefit of their bodies and their representatives*».
Although formally exclude the liability of state institutions, it specifies that this exemption does not apply to the local government bodies in relation to offenses carried out by public or private entities delegated to the management of public services or activities. Paragraph 2 states explicitly: «*Local government units are criminally liable only for acts committed during the exercise of their duties, which can be exercised by delegation of public services*».
Coherently with international conventions is defined that criminal liability of legal persons is an independent responsibility (autonomous) and parallel to that of a natural person, in the sense that the latter is responsible for the criminal act carried out as well as the legal entity. Paragraph 3 states that «*criminal liability of legal persons does not exclude that of the natural persons, who have completed or are cooperating with the commission of the same offense*».

[17] Article 45 CC. Is repealed on 24.01.2001, from Article 4 of law no 8733 and is re-inserted by Article 7 Of law no 9275, dated 16.09.200 4.

It should be emphasized that the value of the article 45 CC. in its beginnings was simply symbolic, precisely because it was a programmatic provision – or as it is called in the correct order by doctrine: provision of reference[18] – without concrete application possibilities, expressly affirmed this aspect by self-lawmaker, which in the last paragraph of Article 45 CC. states that «*offenses and corresponding penalties, that apply to legal persons, and procedures for their establishing and executing are regulated by a special law*». So even though in Albania, from the formal point of view, there was a provision in the Criminal Code on criminal responasability of legal persons, the latter specifically – the expressed will of legislators– was a invalid letter, as the possibility of its application was reserved and postponed on the approval of a *ad hoc* law.

This choice of lawmakers is to be evaluated because it shows awareness of the latter on the importance of creating a separate criminal liability of legal persons, able, on the one side, to respond to social needs to combat the phenomenon of criminality by commercial companies, on the other side, formulated in respect of basic principles and guarantees provided by the criminal legislation.

On the contrary, an direct application of Article 45 CC. in 1995 (or 2004) would have had more serious consequences in the penal system, as would compel the doctrine and jurisprudence to revise – in analogical reasoning (*malam partem*) – all the principles of the criminal code adapting them in the context of a traditional application of criminal responsibility even in context of legal persons.

If that would have happened so, violations of the criminal code would have been inevitable: particularly the principle of legality, the principle of personal responsibility and the principle of guilt would have been victims of this interpretation; definitely would have been a totally wrong solution.

3. Law no 9754 dated 14.06.2007 on criminal liability of legal persons.

International pressures on the application of a particular discipline on the criminal responsibility of legal persons, pursuant to Article 45 of Criminal Code and commitments undertaken by Albania with the ratification of international conventions and especially with the ratification of the "Convention against corruption" bay law no 8778, dated 26.04.2001, brought

[18] I. ELEZI, S. KACUPI, M. HAXHIA, *Commentary of Criminal Code of the Republic of Albania*, cit., p. 228.

our lawmaker to approve law no 9754, dated 14.06.2007 on the criminal liability of legal persons for offenses committed on their behalf and their benefit.

Article 1 provides: *«...provisions of this law are applicable to legal persons to the extent that are not otherwise provided in the Criminal Code, Criminal Procedure Code and other criminal provisions. Unless otherwise provided in this law, to legal persons also apply, provisions of the civil and trade legislation...»*. Paragraph 2 of the same article provides *«...provisions of this law apply to foreign legal persons, who have acquired legal personality under Albanian legislation...».*

By norms appears that the said law can be applied to any and every legal entity that has the legal personality. In this context, paragraph 2 of Article 1 plays a key role. According to this article for foreign legal persons, application of the provisions in question is conditioned by the acquisition of legal personality according to Albanian legislation. As a result, from the paragraph in question should be understood that all Albanian legal persons applies the law no 9754 dated 14.06.2007. As a consequence, the law in question should be applied to legal private entities profit or non-profit, whether the latter is with or without membership[19].

For these subjects, which may be the association or other, by legislative policy choice is quite clear: from the moment it comes to subjects that may escape from state controls, the risk on the implementation of illegal activities is greater.

The law also appears that can be applied to political parties, trade union, local government units and public legal persons, without distinguishing whether pursuing economic goals or not. We come to this conclusion not only by the unconditional application of the law towards the legal persons, but also by the fact that the lawmaker for legal categories in question expressly provides in Article 9, paragraph 2 «...*The main punishment, defined in section 1 of this article, does not apply to local governments units, public legal persons, political parties and trade unions...».* It is a typical solution that characterizes the Albanian legislation.

In the Italian system, for example, Article 1 par. 2 of Law no 231, dated 08.06.2001 excludes the application of law towards state, local government bodies, non-economic public entities and entities that develop activities of

[19] E. BOZHEKU, I. ELEZI, *Criminal liability of legal persons – Theoretical Practical Handbook for students, lawyers, prosecutors, judges,* heads of *trade associations,* scholars *and readers of criminal law,* Tirana, 2012, p. 65.

constitutional matters, such as political parties or trade unions. Prediction of an immunity for these subjects is explained only by considering the consequences that norms may bring towards these entities.
The purpose of Italian legislators is to avoid any and every opportunity or pretext to strike political opponents or social groups – such as trade unions – not only by the sentence of closure of a legal person, but also through financial measures with the aim the closure of the activity of these subjects. A solution in the opposite from the Italian legislators would have brought serious consequences incompatible with the Italian constitution. Italian Constitution in Articles 39 and 49 provides the freedom of citizens to be organized in trade unions or political parties[20].
Precisely these problems seem to have pushed our legislators towards the application to the subject in question only of additional penalties provided for by Article 10 point c, ç, e.
So, for units of local government, public legal entities, political parties and trade unions not only do not apply the main convictions as the fine and closure of legal person, but also are not applicable to additional penalties provided for by Article 10 point a. b. d. dh.: on the closure of one or more activities or legal entity structures; the establishment of a legal entity on controlled administration; to seek ban on public funding and financial resources; the removal of the right to exercise one or more activities or operations.
Thereby Albanian lawmaker, sharply reducing the application of the law in question, has ensured that the subjects who enjoy a privileged position in our constitution (such as local government units, political parties, trade unions) from one side to be responsible for offenses carried out by their bodies, guaranteeing, on the other hand, complete freedom in fulfillment of the objectives guaranteed from the Constitution[21].

3.1. ...(continuation)... Entities without legal personality and foreign legal persons.

Article 2, paragraph 2 of Law no 9754, dated 14.06.2007 provides that *«provisions of this law apply to foreign legal persons, who have acquired legal personality under Albanian legislation».*

[20] S. VINCIGUERRA, M. CERESA CASTALDO, A. ROSSI, *La responsabilità dell'ente per il reato commesso in suo interesse*, Padova, 2004, p. 7.
[21] E. BOZHEKU, *Criminal liability of legal persons. Interpretive and comparative aspects with Italian legislation*, in *Jus&Justicia*, n. 4, 2010, p. 194.

By these provisions appears that the law can be applied to every kind of legal entity regardless of whether or not they have legal personality. In this frame Paragraph 2 of Article 2, of Law no 9754, dated 14.06.2007 plays a key role, because it stipulates that the application of the provisions of the law in question to foreign legal entities is conditioned by the acquisition of legal personality according to the Albanian legilsation. As a result, negatively by paragraph in question should be understood that to all Albanian legal persons is applied the law no 9754 dated 14.VI.2007, whether profitable or not profitable private legal persons, with or withut membership, regardless of whether or not they have legal personality[22].

In connection with these subjects, though without legal personality, by legislative policy is quite clear: from the moment it comes to subjects that can escape the state control, the risk on the implementation of illegal activities is greater. Also, in this way is guaranteed the possibility of collision of legal persons for criminal acts performed even before obtaining legal personality. Let's think for example realization of an offense in favor of a society: it would be illogical that the latter do not respond to the criminal responsibility just for the fact that has no legal personality. Also, let's think of a corruption case performed by the directors of a company to win a tender to his society which is on the procedures of obtaining legal personality. If the criminal liability of commercial society would begin only with the acquisition of legal personality, effects would be too negative because it will push in many cases – especially to win tenders with huge economic consistency – realization of offenses before the acquisition of the formal legal personality of the society, having in this way immunity to justice.

In terms of foreign legal entities, this provision introduces a range of problems from the moment that the application of the law 9754, dated 14.06.2007 conditions the acquisition of legal personality under our legislation. The paradox lies in the fact that a foreign legal entity can perform a range of offenses before obtaining legal personality in Albania and not be punished in connection with them[23]. An example will better explain our opinion: the Dutch society A would like to win the tender for the realization of the plant Z. Its manager comes in Tirana and gives a bribe to the politician B who guarantees obtaining the tender from A. Later the company open a

[22] E. BOZHEKU, I. ELEZI, *Criminal liability of legal persons – Theoretical and Practical Handbook*, cit., p. 67.

[23] E. BOZHEKU, I. ELEZI, *Criminal liability of legal persons – Theoretical and Practical Handbook*, cit., p. 68.

subsidiary office in Albania and acquire legal personality. A takes part in the tender and wins thanks to the bribe. In this case, paradoxically A cannot be legally prosecuted since in the time of the offense of active bribery did not enjoied legal personality in the Republic of Albania. A solution may seem otherwise unacceptable because would be in violation of section 2 of the Criminal Code[24] - the lack of an active subject, since the article in question does not provide for criminal liability of legal persons eligible before obtaining legal personality in the Republic of Albania.

But do things really stand this way?

It is true that the application of the law no 9754, dated 14.06.2007 to foreign legal persons begins only at the moment of acquisition of personality under the Albanian legislation. This is a problematic interpretative issue.

However, we believe that a coherent solution can be achieved through a deeper interpretation of our criminal legislation.

First, should be noted that as the world doctrine and the modern criminal legislation consider on the same level the natural person as well as a legal person, as both may be subject to duties and rights. They both can be prosecuted, in the sense that as a legal person and the natural person can be blamed (in a normative sense of guilt[25] if they are indifferent to social values affirmed by society. Well there is no doubt about the existence of a *eadem ratio* in the framework of the criminal discipline as for natural persons as well as legal persons.

Second, as stated in the first pages, article 2, paragraph 1 of the Law no. 9754, dated 14.06.2007 stipulates that in case of absence of the law in question should be applied the provisions of the Criminal Code.

Third, namely Article 2 paragraph 1 of Law no. 9754, dated 14.06.2007 specifies that the provisions of this law can be applied only if not in conflict with the provisions of the Criminal Code. If there exists a conflict, than must be favorite the interpretations that goes in favor of the provisions of the code (*interpratatio pro-codex*) and not the law in question[26].

In the case of foreign legal entities, provisions of Article 2 paragraph 2 of the Law no.9754, dated 14.06.2007 conflict with Article 7 paragraph 1 of the Criminal Code (*whereby "foreign nationals who commit offences in the*

[24] Comment on article 2 Criminal Code. Refer to I. ELEZI, S. KACUPI, M. HAXHIA, *Commentary of Criminal Code of the Republic of Albania*, cit., p. 42 and on.

[25] On the theory of normative conception of guilt and its values E. BOZHEKU, *Fajsia. Disa aspekte teorie, metodollogjike, funksionale dhe praktike te elementit te dyte te vepres penale*, cit., p. 119, 123.

[26] On these aspects refer too E. BOZHEKU, *Alcune riflessioni sulla responsabilità penale delle persone giuridiche in Albania*, në *www.penalecontemporaneo.it*, tetor 2012.

territory of the Republic of Albania, responses under the criminal law of the Republic of Albania") in the part where it excludes the application to the foreign legal persons who have not yet acquired legal personality under Albanian law.
Thus, it is clear that even in the case of criminal acts carried out by foreign legal persons before obtaining legal personality under Albanian legislation, under articles 2, paragraph 2, Law no 9754, dated 14.06.2007 and Article 7 of Criminal Code, these legal entities shall be criminally liable for offenses realized on the territory of the Republic of Albania, although have not yet acquired legal personality[27].

3.2. ...(continuation)... Legal persons to whom cannot be applied the law no.9754, dated 14.06.2007.

In our opinion, although the law no. 9754, dated 14.06.2007 generally speaks about the criminal liability of legal persons without making any difference between them, law in question may not apply to all entities which formally can be introduced through the notion of legal entity.
The conclusion can be understood more clearly if kept in mind that the purpose of the law no. 9754, dated 14.06.2007 is the control of the economic impact of the illegal earnings by legal persons. This, in our opinion, makes it non possible the application of the law in question versus subjects who did not profit as are cultural and artistic associations, foundations, charities, churches, mosques etc., when their activities are not of an economic nature[28].
Also we think that the law can not be applied to legal persons who represent very small structures as stores, bars, individual enterprises, professional associations of lawyers or accounting auditors[29] with a small number of employees or members, etc. even though these entities are formally registered as a legal entity under civil and trade law[30]. This is because the reasons for the legislation on criminal liability of legal persons stand in need of hitting a

[27] E. BOZHEKU, I. ELEZI, *Criminal liability of legal persons – Theoretical and Practical Handbook*, cit., p. 70.
[28] E. BOZHEKU, I. ELEZI, *Criminal liability of legal persons – Theoretical and Practical Handbook*, cit., p. 71.
[29] Regarding the exclusion of the application of law 231/2001, to the administrative responsibility of legal persons by the offense in Italian legislation, in connection with the accounting auditors societies refer to E. BOZHEKU, *Falsità nelle relazioni delle società di revisione: esclusa la responsabilità da reato dell'ente*, in *Dir. pen. proc.*, no. 3, 2012,
[30] For a deepening to the inability to criticize an individual legal entity, in the Italian jurisrpudence refer the court of Cassation, decision dated 03.03.3004 in the proceding Rubera, pubblished in the magazine Cassazione penale, 2004, p. 4047 and on.

different entity from the natural person. Only in this way can be explained and understood the need of a double punishment for the legal person as well as a natural[31]. Criminal liability of legal persons is based on need to criticize and punish a legal entity due to a deficient internal organization, whose absence brings realization of offenses. This logic and this reasoning cannot find application in relation to individual enterprises where completely is lacking the element of organization as a legal entity is fully identified with a natural person[32]. If these two subjects coincide, than the penal liability even of the legal entity not only make any sense but will also violate the principle *ne bis in idem*[33]. In this case natural person shall be punished twice for the same fact: First, as a natural offender; secondly, will once again be punished for the same fact in connection with the legal person, being the natural person the only subject.

In our opinion, in relation to subjects with small dimensions criminal conviction of a natural person is in itself sufficient to prevent the implementation of the offence and is not necessary a double penalty of the legal person. To better illustrate what we think, let's bring the case of a shop (registered as a commercial company with a partner) who sells fruit and vegetables and various accessories administered by A. A results formally manager of the company and specifically is the store salesman. To save money A disrupts the measurement system of electricity. It is clear that from this action, that configures as the offense of theft of electricity provided by Article 137 CC., the shop (legal person) receives an economic benefit. In this case, even for the small dimensions of the subject in question, would be excessive application of a penalty to the legal person, except that natural. This is due to a penalty against the legal person specifically would return in a second sentence on A. , This will be in violation of the principle of prohibition of punishment more than once for the same fact in violation of the principle of prohibition of punishment more than once for the same fact[34].

4. The offense committed by a natural person.

[31] For a deepening in the Italian legislation refer to P. DI GERONIMO, *La cassazione esclude l'applicabilità alle imprese individuali della responsabilità da reato prevista per gli enti collettivi: spunti di diritto comparato*, në *Cass. pen.*, 2004, 4052 an on.

[32] G. LATTANZI, *Reati e responsabilità degli enti*, cit., p. 34.

[33] P. DI GERONIMO, *La cassazione esclude l'applicabilità alle imprese individuali della responsabilità da reato prevista per gli enti collettivi: spunti di diritto comparato*, cit., 2051.

[34] E. BOZHEKU, I. ELEZI, *Criminal liability of legal persons – Theoretical and Practical Handbook*, cit., p. 68.

Article 3 of Law no 9754, dated 14.06.2007 expressly states that «*...legal person is responsible for crimes committed...*» "on his behalf" or "benefit" by persons who held a leading role or its employee. So is enough the realization of every kind of offense or crime by a person subject to legal person who acts on his behalf or for his benefit.

It is not a clear solution by the legislators. Although it is early to give conclusions on the fate of this law important problems will arise especially for those offenses committed by a natural person for which it is provided as subjective element the fault (guilt). For these offenses obviously arises the problem of the title of responsibility for legal entities. How can the latter may be responsible for the negligence of its administrators? Let us take an example: an employee of the construction company A, dies after falling from scaffolding. Expertise shows that from the leaders of society A was not taken the security measures related to the work. Arises the question: Can A be criminally liable for this fact? A reasoned response to this question will be given in the following pages.

As how is formulated the Article 3 of the law no 9754 dated 14.06.2007, the risk that legal persons can be called to answer for facts not related to their activity is very high. Such a situation, where deep problems arise under the profile of the principle of determining the fact[35], paves the way for a more robust power and no control in the hands of prosecutors. A valid example for better understanding: Mrs. B, who manages the society X after eating dinner and drinking alcohol with persons C and D, leaders of society Y competing with the first one in an industrial sector, becomes the subject of a rape by two individuals mentioned above. Due to this event the next day society X does not take part in a tender. Does the company Y be responsible for the offense provided for by Article 102? Even in this case, as the law is currently formulated, appears that the answer should be positive. But even on this example will return later.

Recognizing the profound problems that arise from the non-definition of criminal offenses – committed by natural persons – to which the legal entities can be called as the defendant, the Italian lawmaker has made a different choice from our lawmaker.

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[35] This principle constitutes the backbone of criminal law in fact. defined for the first time by German jurist Anselm Von Feuerbach in the second half of 1800, is today one of the most recognized principles of criminal law. On this principle: G. MARINUCCI, E. DOLCINI, *Corso di diritto penale*, Milano, 2001, p. 37. This principle even though still undeveloped in doctrine of criminal law is key to all aspects of the legislation as backgrounds under the laws, as in that of their application by courts.

Law no. 231, dated 08.06.2001 in Articles 24, 25, 25-bis to 25-octies, specifies a series of offenses provided for in the penal code only on which a legal person may be called as a defendant case of realization by its organs or employee. It is about criminal acts that objectively can bring advantages or performed on behalf of a legal entity such as: corruption, fraud, community benefit from European funds through fraud, social crimes such as tax evasion, counterfeiting, recycling of dirty money. Another solution would enter in conflict with the principle of determining the facts about which a subject can be called as a defendant.

Another problem that arises in our legislation is bound to relation that must have the offenses of legal person with offenses of the natural one. *Quid juris* if the prosecution discovers the offense realized by a legal person but does not identify a natural person?

For example: in a corruption case is revealed some bribes from which society X has win a tender X. It is not identified the natural person who made this operation to the benefit of society, or even if it is identified turns out to have died, or still cannot be prosecuted because of his benefit from an amnesty. Does the society be responsible for this criminal act, of which had the advantage of obtaining a tender? The logical answer would be yes, but as it is known every steps and any movement on the ground of criminal law must find answer and justification in law. Otherwise will be violated the principle of legality provided by Section 2 of the Criminal Code. Although for example in question, in principle, the answer seems positive, it may not be such.

The problem of determining the responsibility on the legal person for these cases is indeed essential.

In the Italian legislation solution is explicitly sanctioned by lawmaker which in Section 8 law no 231, dated 08.06.2001 has provides the autonomy of the responsibility of legal person. This autonomy manifests itself through separation of responsibility from legal person, first, by the identification of the offender; second, legal person is responsible for the facts realized even when the natural person is not punishable. It is clear that a solution of this kind makes it impossible for any maneuver to mask legal persons of the society. However, most important is that the opening of a criminal trial and conviction of the legal person in this case is determined by the law.

In Albania, in the absence of coordination of this nature for the conviction of legal person in cases like the above would be absurd. Our law currently provides for criminal liability of legal entities unless the alleged offense is committed by persons designated in Article 3 you are just administrators,

representatives, directors of a legal person or persons who are under their supervision (i.e. officer or dependents).
If the predicate offenses is carried out by an unidentified subject, then society cannot respond because it lacks an essential element without which cannot be punished. This missing typical element is criminal responsibility for facts (offenses) conducted by entities outside legal person but for his benefit or specific prediction of the responsibility of a legal person although is not identified the natural person who has committed the offense in his.
This solution seems more reasonable in respecting the law. It is a proposition which is also based on the principle *"in dubio pro reo"*. In case of doubt should be decide in favor of the defendant, principle this, which is also found in our Constitution Article 30[36]. By observing this principle should be noted that: not identification of a natural person who has committed the criminal offense creates suspicion that fact can be performed by a person who is not part of the structure of the legal entity neither as leaders nor as subordinate subject. While legal person cannot be responsible for offenses committed by natural persons other than those provided for in Articles 3 and 4, on the doubt that natural person who has carried the offense may have been or not a person within the legal person, the latter, exactly because of reasonable doubt cannot be taken as a defendant.
The same conclusion should we be drawn even in the case of death of the natural person managing the legal person or when a natural person cannot be punished. Even in these cases, the reason lies in the principle of punishment beyond any doubt[37]. While authentication of criminal liability for natural person who is dead or is not punishable is interrupted, then cannot continue the proceeding of the responsibility of the legal person. The authentication of the responsibility of the latter should definitely pass on authentication of the

[36] This article provides that «...*Everyone is innocent until guilt is proven in a final court decision...*». From this article, which is found in the constitutions of all countries that base their laws in the rule of law, is interpreted by worldwide doctrine as Latin expression (in dubio pro reo). From the article in question appears quite clear that if the individual was not proven guilty beyond reasonable doubt, The defendant must be released. This principle is the key element of all criminal law which, as is known has as primary purpose the guarantee of individual towards the abuses of judicial power. It is the duty of the prosecution to prove beyond any reasonable doubt that the defendant is guilty. On this priciple F. MANTOVANI, *Diritto penale, Parte generale*, V ed., Padova, 2007, pg. 59 and on.
([37]) This principle that may seem similar to the presumption of innocence, cannot be identified with the latter. In the modern doctrine of criminal law the concept of presumption of innocence is something different from that of proof of guilt beyond any doubt. Refer to G. SPANGHER, A. GIARDA, *Commentario C.p.p.*, Milano, 2006, p. 2531 and on. These aspects relate to what in criminal and procedure law is called nomodinamic. Refer to F. RAMACCI, *Corso di diritto penale*, Torino, 2003, p. 85.

natural person. Without determining the responsibility of the latter about the fact, it cannot be defined the responsibility of a legal person.
However it should be said that for disciplining these cases is reasonable a normative intervention by legislators[38].

5. Criteria of responsibility for legal entities.

Article 3 of Law no 9754 sets criteria of criminal responsibility for legal person. Provision in question expressly provides:
«...*The legal entity has responsibility for crimes committed:*
a) on behalf or for his benefit, from its bodies and representatives;
on behalf or for his benefit, by a person who is under the authority of the person who represents, leads and manages the legal person;
on behalf or for his benefit, due to lack of control or supervision by a person who leads, represents and administers legal person...».
Preliminarily, it should be said that from the moment we talk about criminal responsibility of legal entities, its liability must be proved by the prosecution as well as by objective and from the subjective side. In few words must be shown not only that an offense was carried out objectively by legal person, but also that the latter wanted, or negligently allowed the realization of offense.
This kind of interpretation is necessary not only because it is in line with all the principles of criminal law, but in conformity with Article 2, law no. 9754 dated 14.06.2007. This article provides that «...provisions of this law are applicable to legal persons to the extent not otherwise provided in the Criminal Code...». So interpretation (by doctrinal lawyer) and the implementation in practice (by judges and lawyers) must be in accordance with the provisions of the criminal code[39]. In this frame, for a deeper interpretation of the responsibility of legal person, there is a need for the development of a separate analysis in terms of objective and subjective element.

6. Criminal liability of legal entities by the objective point of view.

By provisions in question appears clear that a legal person is criminally liable,

[38] On this aspect refer E. BOZHEKU, I. ELEZI, *Criminal liability of legal persons – Theoretical and Practical Handbook*, cit., p. 68.
[39] We have stressed many times, but it is reasonable to remind, that criminal liability is based on two elements the objective and subjective one. For this concept refer to I. ELEZI, S. KACUPI, M. HAXHIA, *Commentary of Criminal Code of the Republic of Albania*, Tirana, 2006, pp. 87, 101, 114.

being subject to the penalties provided for by Articles 8 to 19, if criminal acts carried out by natural persons as defined in Articles 3 and 4[40] areconducted on behalf or for the benefit of the legal person.
Therefore is not enough the realization of a criminal offense by natural persons as provided in law, but it is needed also to have acted representing a legal person or by bringing to the later some benefits.
Regarding the commission of the offense *«...on behalf...»* of legal person there are some interpretative issues. By provisions in question seems that expression *«...on behalf...»* must be understood those offenses carried out by individuals within the legal person, while acting as its representative bodies. Consequently legal person should not respond to any and every criminal act performed by the entities referred to in Articles 3 and 4, but only those offences that are performed demonstrating its willingness. Although provided for in law, cannot be applied the norms in those cases where the offenses are committed by persons who cannot represent the will of the legal person. If subordinates and employee perform legal acts (which constitute offenses), which cannot be performed by them, legal person cannot be liable[41].
For example for the criminal offense of fraud made from the officers of the company who pretends to be acting on its behalf, have to answer only the natural person and not the legal person. In this case, the society must be considered injured because its reputation is misused.
The same reasoning should be made for those offenses carried out by the organs pf legal person for actions which, although in the name of the latter, are developed outside their competence: for example the legal entity cannot answer for a fraud committed in a contract which provides a very high amount by a manager who does not have the right to sign contracts for amounts exceeding a certain value. Even in this case the company is party injured by the illegal activities of its body.
Regarding the other element, committing a criminal act *«..on benefit...»* of legal person, should be understood as any advantage received by the legal person from committing a criminal offense by individuals referred to in Articles 3 and 4. By interpretation we can draw that «*...on benefit...*» should be understood the benefits realized for the company from committing the

[40] According to Articles 3 and 4 individuals, whose offenses could bring legal responsibility of the legal person are:
Persons who represent, govern, administer or supervise the activities of the legal person and its structure (Article 4), and employee and their subordinates (Article 3, c.).
[41] E. BOZHEKU, *Criminal liability of legal persons. Interpretive and comparative aspects with Italian legislation*, in *Jus&Justicia*, no. 4, 2010, p. 202.

offense. This may be a direct monetary benefit or could even be any other advantage[42].

The question arises whether the offenses carried out by a natural person must be characterized simultaneously by the two elements *«...on behalf...», «...in benefit...»*?

Seems that these elements may exist separately and not together, because the lawmaker has used the tab «*...or...*», but not the tab «*...and...*»[43].

In our opinion, this solution cannot be accepted because the consequences would be absurd. The above mentioned legal person will respond only to the fact that there was an advantage from an act which is only superficially based on the name of the company, or further still legal entity should only respond to the fact that there was an advantage to a criminal act carried out his organs though not on his behalf. If it was so in the case above mention[44] legal person must also respond in cases of rape or offenses that have no connection with its social object, but objectively lay out an advantage[45].

Therefore, for a correct interpretation, in accordance with the basic principles that underlie the legislation, should be noted that the offense committed by a natural person must not only be of benefit but also performed on behalf of the legal person. If one of these elements is missing, the criminal liability of a legal person shall be exempt.

Therefore, in the case of the rape of Mrs A IF C and D have done for a sexual pleasure, society Y cannot respond for having taken advantage by not taking part in the tender by the company X as a result of the event. Even if the physical ansence, through rape, of the the rival Mrs A, is performed during a work dinner where parties were representing each the respective society, still we cannot talk about the responsibility of a legal person after the act is performed by using the name of the company. anyway the act realized by C and D exceeds the limits of the competences that these entities have in society Y[46].

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[42] A different advantage from direct economic one can be considered in the case of bribery of a judge from the administrator of the company with the aim to avoid the punishment of one of the main shareholders in a criminal proceeding.

[43] this is not a cross word: interpretation in one way or another can completely convert all discipline.

[44] It is about the example of Mrs. A, Administrators of society X, that after eating dinner and drinking alcohol with person C and D manager of the company Y, leaders of society Y competing with the first one in an industrial sector, become the subject of a rape by two individuals mentioned above. Due to this event The next day society X does not take part in a tender. Company Y has objectively a benefit.

[45] E. BOZHEKU, *Criminal liability of legal persons. Interpretive and comparative aspects with Italian legislation*, in *Jus&Justicia*, no. 4, 2010, cit., p. 200.

[46] In this case we will achieve an opposite conclusion the lawmaker instead of the word «*...on behalf ...*»

An example where the legal person responsibility can be accepted should be when the company representative commits fraud for obtaining a contract tender[47].

Finally, the suggestion for the interpretation of the expression *«...on behalf...»* in join order with the expression *«...in its benefit...»* is not only reasonable, but there is also has the merit of giving to the whole system interpretative sustainability by respecting the principle of identification of the elements of the offense[48]. Otherwise, Article 3 should be declared not in conformity with the law and Article 2 of law no 9754, dated 24.06.2007, because is not in conformity with Article 2 of the Penal Code[49].

Another problem is the application of these factors *«...on behalf...»* and *«...in its benefit...»* in criminal cases with negligence[50].

Turning to the example of employees of a construction company A who dies after falling from scaffolding, where expertise shows that the managers of society have not taken security measures necessary for the work, the question whether the society is responsible or not should be respond with another question. How can we talk about homicide by negligence *«...on behalf...»* of a society? How can we talk about homicide by negligence *«...in benefit...»* of a society?

The answer on these questions is not easy. In this case can be proposed two solutions. The first: law no. 9754, dated 14.06.2007 may not apply to offenses by negligence realized by natural persons as defined in articles 3 and 4.,

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had used the phrase «*...in the interest...*». If so the act of rape committed on behalf of the legal person might be conceivable. There would have been a coincidence mutual interests. By using the expression «*...on behalf*» this conclusion is unacceptable, since this expression should be interpreted as those acts are carried out by using the name of the legal person, within the competences assigned by commercial law, charter or statute of the company.

[47] In this case the legal entity shall be responsible according to the law, because the offense is committed on behalf and by this act there was a benefit.

[48] The principle of identification is one of the fundamental principles of criminal law. In Albanian criminal code this principle derives from article 2 on the basis of which the offense would have to be provided «*...expressly...*» in law as an offence or felony. With the word expressly liability should be understood the liability of lawmakers when drafting the law, and to judge when interprets the law, to clearly define which actions and facts which should be considered illegal. In this way from one side the individual is oriented about what is or is not permissible, on the other hand restrained judicial power of possible abuses. By this principle prosecution may proceed criminally, and the court to decide on the responsibility of an individual, not for any and every fact or action that contradicts the moral and culture or society, but only for those (facts and actions) explicitly defined in law as offences.

[49] As noted above under Article 2 of the law on criminal liability of legal persons, the latter provisions are lawful and apply only if they are in accordance with the provisions of the criminal code.

[50] E. BOZHEKU, I. ELEZI, *Criminal liability of legal persons – Theoretical Practical Handbook*, cit., p. 111.

because the law's criteria, *«...on behalf...»* and *«...in benefit...»,* are not compatible with the concept of «...*carelessness*...» referred to in Article 16 C:C. According to Article 2 of the Law no 9754, dated 14.6.2007, disparities of the provisions of this law with Criminal Code always bring the non-application of the said law.

But a solution can be found. Natural persons, society bodies who work on its behalf, by not taking security measures to avoid incidents in workplaces bring a benefit to the society. The benefit lies in the fact that society saves an amount of money that should be spent to ensure the safety of its workers. In this way the society is responsible for an offense for which the lawmaker requires the subjective element of negligence. For acts executed with negligence is enough the element of benefit that a legal person receives from the non-compliance of the rules of care for the work conditions[51].

From two options the latter seem reasonable for the fact that the purpose of the law is the encourage and education of legal entities in developing profitable activities.

In conclusion it should be said that: criteria «...*on behalf*...» and *«...in benefit...»* for offenses carried out intentionally should exist and tested together. In the case of offenses committed by negligence, to determine the criminal liability of legal entities is sufficient the evidence of taken «...*benefit*...»[52].

After these necessary explanations which may be useful to guide interpretations of the courts that will deal with the application of the law in question, it is interesting to see how the criminal liability of legal entities is defined in Italy.

In Italy, objective element of legal responsibility consists of two factors. The offense should be performed by a natural person (subordinate or employee) in the interest or advantage of a legal person.

With «...*interest*...» Italian doctrine stressed that comes to those offenses realized by subordinate or employee subjects to encourage legal person to

[51] It is known that the negligence theory of criminal law is nothing else than the violation or disregard of the rules of care to be implemented by the specified entities in the development of their activities. For example: driving the car requires the application of rules of the road code and care by drivers; the doctor who performs a delicate operation must apply the rules of medical care to avoid infections with consequences for patient, he must perform its activities in the most prudent way. If these rules do not apply (in this case) from the driver or the doctor - whose negligence causes death of a man – criminal liability arises under articles 85 and 96 C.C.

[52] E. BOZHEKU, *Criminal liability of legal persons. Interpretive and comparative aspects with Italian legislation,* in *Jus&Justicia*, no. 4, 2010, cit., p. 202.

have an undue advantage. This benefit must be specific and be identified with the concept of advantage.
Interest has a subjective component and should be evaluated – in a preliminary analysis *ex ante* – a s the action of natural person not against legal person and also interest of a natural person should coincide with that of the legal person[53].
"...The advantage..." is objectively the profit that legal entity has from realization of the offense and must be certified (ex post) after the fact is commited.

7. The offense realized by a natural person and relations with the offense of legal entity.

From interpretation of the legislation appears that a legal person answers to all the offenses defined in the criminal code or other laws. It is clear from Article 3, which expressly states that *«legal person is responsible for offenses committed»* on behalf or for its benefit from its subordinate or employee. So it seems that is enough the realization of every kind of offense or crime by an officer of the entity on behalf of the legal person or in its benefit[54].
We think that such an interpretation is too superficial and does not take into account some key aspects of legislation on criminal liability of legal persons.
At first not consider the fact that the objective of the law is to prevent (and in case performance) the punishment of legal persons who through their entities organs (or related to) realize profits by committing crimes. In other words, the purpose of the law is the liability of legal persons who increase their wealth in violation of the law dispositions of fair competition.
This means that they can they can be liable only for those offenses which are functional in the context of the implementation of their activities and bring them a benefit.
Consequently, in our opinion, the legal person can not be liable for all the offenses set forth in the Crimoal Code. As we indicated earlier, from a deep argumentation of Article 3 of law no 9754, dated 14.06.2007, appears not only that the offense should be done on behalf but also in the benefit of a legal person.
This means that the latter can be prosecuted for those acts which may bring a direct and tangible benefits and, thus, can be considered as acts carried out by a legal person.

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[53] G. LATTANZI, *Reati e responsabilità degli enti*, Milano, 2005, f. 63.
[54] According to article 3 of C.C. offenses are divided into crimes and offenses.

As a result fort the offenses of which is impossible to establish a link to the legal entity, in the sense that the act completed cannot be called as of its policy, even if has benefited a concrete a utility, cannot be criminally liable for them.
Above we brought the example of rape carried out by a company administrator. As a conclusion that for such violation cannot be applied the criteria of "on behalf"/"in benefit" which constitute basic elements for liability of legal. This therefore shows that not all legal person can be prosecuted criminal. There is no logic to think that the offense of rape can constitute a managerial policy of legal person[55].
In these cases we cannot speak of an offense conducted by the legal entity since the latter is unable to perform and the offense has no connection with its commercial objectives and therefore the latter is not in conditions to realize the offence. Systematically a confirmation of our opinion is found in the fact that legislators to prosecute legal persons, looking as criteria the realization of the offence on its behalf, wanted to emphasize that the responsibility of a legal person can be affirmed only about offences realized from natural persons acting within their competencies in the performance of activities in the account and on behalf of the legal person. This means that the legal person cannot be held responsible for criminal acts performed by these entities off the performance of these competencies[56].
Thus for many offenses cannot be determined criminal liability of legal entities.
In conclusion, we believe that the first reasoning the court must do is to determine whether or not the responsibility of the legal person is that of determining whether a legal person can or not realize offense in abstract, effectively performed by natural persons defined by Articles 3 and 4 of law 9754, dated 14.06.2007. If it turns out that the offense cannot be accomplished by legal person as it is incompatible with its policy of managing, then the court should immediately close the case

8. Criminal liability of legal entities by subjective point of view.

The main problem that arises with the discipline of criminal liability of legal persons in the Albanian system is that of the subjective element.

[55] E. BOZHEKU, I. ELEZI, *Criminal liability of legal persons – Theoretical Practical Handbook*, cit., p. 113.
[56] E. BOZHEKU, I. ELEZI, *Criminal liability of legal persons – Theoretical Practical Handbook*, cit., p. 112.

In our opinion, the appropriate solution of this problem could be interference of legislators to make operational the provisions of the law no 9754 dated 14.06.2007.
The law in question does not provide anything about the criteria to be adopted to show the guilt or innocence of a legal person. As a result, currently, the discipline of criminal responsibility of the Legal persons is based only on objective element of the realization of the offense, identified in terms of *«...on behalf...»* and *«...in benefit...»*.
According to Article 2 of the Law no 9754, dated 24.06.2007 its provisions can be applied only if they are in accordance with the provisions of the criminal code[57].
A fundamental provision of the latter, that must apply to legal persons, is Article 14 C.C. which states *«...No one may be punished for an act or inaction contemplated by law as a criminal offense, if the offense is not committed by guilty. A person is guilty if he commits an act intentionally or by negligence...»*. But based on what criteria should be measured the guilt[58] of legal person?
According to current provisions seems that the responsibility of the legal person must be based only on realization of the offense by individuals on its behalf or for its benefit. But, in this way the legal person has no opportunity to defend himself. Under this profile law no 9754, dated 14.06.2007, is unconstitutional because it falls in conflict with Article 30 of the constitution. This article in a positive manner expresses the principle of presumption of innocence until guilty is not proven by the final decision. Grom this article cav derive: on one side is the duty of the prosecution to prove criminal guilt, on the other hand is the right of the defendant to prove his innocence.
But how a legal person may prove his innocence when the law does not provide any means to prove that he is innocent? In other words, how can be defended the right to show innocence when he subjective element intentional negligent for legal persons is not regulated by?
It is quite clearly, that legal entities being defferent than natural persons, ss highlighted earlier, cannot be applied guilty under a subjective concept, that of psychological connection between the action and the fact, but in that normative: guilt understood as a reprimand for not respecting the rules. And

[57] E. BOZHEKU, I. ELEZI, *Criminal liability of legal persons – Theoretical and Practical Handbook*, cit., p. 119.
[58] Emerges very clearly the importance of determining the guilt element to establish the criminal responsibility of legal entities.

just under this profile, in our law lacks legal rules that a person should follow to avoid his guilt, although, objectively is realized a criminal act on its behalf and for its benefit from its subordinate individuals.
For this reason it is considered interesting the solution given to this problem from a state with legal ancient tradition such as Italy.
In the neighbor caontry, the aspect of guilt of legal person is disciplined by the lawmaker expressly in Articles 6 and 7 of law 231/2001 and today represents one of the major issues as doctrinal interpretation[59], as well as in Italian court judgments.
In terms of managing subjects Italian law provides legal innocence of the person in case he manages to prove that:
governing bodies have applied efficiently, before the realization of the offense, organization models capable of preventing crimes as the one accomplished;
control and updating tasks of the model to be given a control autonomous body with the right of controlling initiative;
persons who have committed the offense while avoiding model in secrecy and with serious violations;
Not have been omission or lack of control by the control organization.
The Italian law in Article 6, paragraph 2 specifies that organizational models for the prevention of crimes should at least respond to these needs:
to find and define social activity which may be subject to realization of offenses;
to approve specific protocols on programming, formalization, mode of decision making with regard to the prevention of crime during the performance of activity;
to specify obliged information on functioning and vigilance organs on functioning and observance of the model;
to realize a disciplinary system capable to sanction the entities that do not apply the model.
It is not enough only the formal adoption of these measures, but is necessary to prove their ability to prevent specific offense committed[60].
So it is not enough to prove that the organization models are approved by the

[59] In Italy, interpretations of university doctrine is considered fundamental to the development of law. The interpretation is taken into consideration from the courts of first instance and especially from the supreme court.
[60] The Court of First Instance Milan, Section X , 20.IV.2007, My Chef.

Council of Managing Directors[61], but must be proved by a legal entity that models have functioned[62], are updated and control bodies has conducted a continuous and detailed activity. Only in this way can be proved that the models were able to prevent the criminal act which is performed, avoiding secretly and with serious violations, governing bodies.

The main problem that arises with Article 6 of the Law 231/2001 Is that evidence of the irresponsibility of a legal person for crimes committed by directors of a legal person shall be given by the latter. So, paradoxically, benefiting from the qualification of the discipline as administrative and not criminal responsibility, Italian legislator does not consider the responsibility of burden of proof on the prosecution, but places the burden of proof of innocence on the legal person. Therefore is sufficient that the prosecution allege criminal responsibility of a legal person: then belongs to the latter to prove his innocence[63].

Regarding the legal responsibility for crimes carried out by entities that are under the control and supervision, article 7 of law 231/2001 provides for liability of legal entities:

When the realization of the offense is made possible by the failure of managerial and control tasks (paragraph 1);

In case of failure of the organizational model, although able to prevent the realization of offenses (paragraph 2);

When we are absent in the model projections on measures to be taken to ensure the activity in respect of the law and that based on the nature, dimensions, type of activity must be able to quickly detect and eliminate dangerous situations for the realization of offenses (paragraph 3);

When the model is not modified after its violations, or lacks of updating after structural and organizational modifications of the activity (paragraph 4).

As underlined by Italian doctrine and how can quite easily be understand by the provisions of Italian law, organizational models are the key element on based of which must be proceeded to establish the guilt or innocence of the

[61] The Court of First Instance Naples, 26.VI.2007, Impregilo s.p.a.

[62] The Court of First Instance Milan, Section IV, 11.XII.2006.

[63] From this aspect, as well as by many others, clearly demonstrates the importance of training to criminal liability for legal persons as administrative responsibility for crimes committed by its organs or officers. Precisely for these aspects the responsibility of legal persons is considered af an amphibious nature A. FIORELLA, LANCELLOTTI, *La responsabilità dell'impresa per i fatti da reato*, Torino, 2004, p. 4 and on. Consequently, Article 6 of the law is in conformity with the Italian constitution wherein provided that the burden of proof belongs to prosecutors in criminal proceedings. While legal responsibility for legal persons is not criminal but administrative, there is no violation of constitutional provisions.

legal person.
So, in a concrete practices of Italian courts is precisely the analysis of these models and review of their preventive capacity the core to all legal proceedings against the legal person.

8.1. ...(continuation)... Models of organization and effective control (*compliance programs).*

The lack of definition of criteria that must follow a legal person, to avoid criminal responsibility for criminal acts performed by the entities referred to in Articles 3 and 4 of law no 8754, dated 14.06.2007, das make the Albanian legislation not adapt and currently non-functional in the fight against offences from legal persons[64].
Accornidng to Article2, law no 9754, dated 14.06.2007, the non-compliance to the principles of the Criminal Code is clear. In these circumstances, it is reasonable as a rapid intervention of legislators[65].
However - we have stated several times - just on the basis of Article 2, the interpretation and application of law is considered a subjects task, in practice (lawyers, judges, prosecutors), in theory (professors, assistant professors and scholars of criminal law), to provide an explanation and a functional interpretation of the law[66].
Consequently we feel necessary development of a tentative interpretation of the law in question even under the profile of finding and interpreting elements able to avoid criminal liability of legal persons, respecting the principle of guilt (and innocence) as affirmed in Article 30 of the Constitution as well as Article 14 of the Criminal Code.
It must be accepted that Albanian law is too confusing. It not only not establishes criteria for disciplining guilt (innocence) of the legal entity, but, imperceptibly, to some norms speaks for effective organization and control models (refer Article 14 and 20), without defining what they are and how these models work[67].
Specifically, Article 14, paragraph 4, Law no. 9754, dated 14.06.2007, states that «*within the powers defined by court,* administrator *[when to the legal*

[64] E. BOZHEKU, *Alcune riflessioni sul codice penale albanese*, në *www.diritto.it,* July, 2010.
[65] E. BOZHEKU, E. BOZHEKU, *Criminal liability of legal persons. Interpretive and comparative aspects with Italian legislation*, cit., p. 205.
[66] On this aspect refer to E. BOZHEKU, *Alcune riflessioni sulla responsabilità penale delle persone giuridiche in Albania*, në *www.penalecontemporaneo.it*, tetor 2012.
[67] E. BOZHEKU, I. ELEZI, *Criminal liability of legal persons – Theoretical and Practical Handbook* , cit., p. 121, 122.

entity is defined the measure of control management] will take care for successfully implementing and fulfilling of organizational models and effective control of crime prevention».

Article 20 provides for mitigation of criminal responsibility of a legal person where the latter «*has eliminated the organizational weaknesses that have caused offense, through the implementation of organizational models, suitable for crime prevention».*

However, even quoting the models in these articles makes us think that our lawgiver, in drafting the law, recognizes the institute of modeling of organization and control but (paradoxically) has forgotten to discipline it. It makes us feel more secure that, through an adequate proposal on the content and application of organizational and control models, can give to law no 9754, dated 14.06.2007 an adequate drafting.

Obviously, the fact remains that this should have been done by the legislature, which has not been determined what organizational models are, their functioning, criteria that must contain in order to be suitable for the prevention of crime; who were control subjects and criteria to be met to develop this feature; tasks and their competency over control models[68].

However, from the attached interpretation of Articles 14 and 20 we can deduce that, From the moment that the models are cited in relation to cases where a person has committed the offense, this means that the models must be applied by legal persons in advance, because it is the only way to avoid criminal responsibility for offenses carried out on their behalf or benefit by natural persons provided by articles 3 and 4.

In contrast, their concrete and efficient implementation and application after the realization of the offense (under Article 20) can only be considered as a mitigating circumstance.

In our opinion, although the legislator has forgotten to express, if the legal persons want to avoid their criminal responsibility are required to realize these models in advance (well before the offense is realized). This is easily inferred from the interpretation of Article 14 of Law no 9754, dated 14.06.2007, the part where it determines that is the task of manager (if it is applicable management control measures to the legal person), to «*care for the successful implementation and execution models of organization and effective control to prevent crime*». So administrator shall, during the management of the legal person under sentence of implementing management control

[68] E. BOZHEKU, I. ELEZI, *Criminal liability of legal persons – Theoretical and Practical Handbook*, cit., p. 123.

measure to create conditions that controlled legal person, after the termination of this period, develop its activities in conformity with the legal rules which consider the model of organization and effective control as a tool for the realization of an ethical law. But, if a legal person after the period of administration control should have a model, this means that the latter is still more necessary in cases where a person has not realized yet a criminal offense.
This interpretation seems reasonable, because not only displays *ratio juris* but also *ratio legis* that leads (or should lead) the whole system of criminal responsibility of legal persons.
Obviously from the moment that the legislator does not specify as the mandatory adoption of an organizational model, legal persons are not free to exercise and not to apply it. But if it will be called for a criminal charge before a court in connection with a criminal offense carried out on behalf and for the benefit of dependence or its executives subjects it will be extremely difficult - even impossible - to prove the innocence. In this case, evidence that they have done their utmost to avoid offense will be a *probatio diabolica*, namely unrealistic.
In this context, the legal persons must have in mind the principle of Hypoctratus: *primum non nocere* ("better to prevent than to cure").
Any further comment is inappropriate: *intelligenti pauca*.
In the following pages will be justified in a general way on the content that should have a model of organization and effective control to avoid criminal liability of legal persons; content that - we reiterate – it would have been better to have been determined by the lawmaker[69].

8.2. ...(continuation)... The basic criteria that should have a "Compliance program" to avoid criminal liability of legal entities.

An efficient organization and control model in the first place should describe in details the behavior to be kept from steering subjects, as well as from subordinates and from other entities carrying on an activity for legal entities. These behaviors must be defined as to the relationships within the legal person, and the third with subjects who develop their activities on behalf of the legal person. So it is necessary for a legal person to apply a code on ethical behavior of its employees.
The model must contain a detailed list of sectors in which the offense may be

[69] E. BOZHEKU, I. ELEZI, *Criminal liability of legal persons – Theoretical and Practical Handbook*, cit., p. 124.

realized. So, doing a self-assessment, the legal entity must find sectors where may be committed offenses by management or his subordinates. Secondly, should be monitored and analyzed sectors most exposed to lawlessness both within the organizational structure, as well as external entities (it's meant for the entities referred to in article 3, paragraph c) law 9754, dated 14.06.2007).
Also, the model should also influence managerial stage of the legal person, in the sense that the model should give the general lines associated with decisions. In other words, the models should provide specific protocols on programming, formalization, the manner of making decisions as to the prevention of criminal offenses, as well as in the development of activity. For example a decision to be written in order to more easily control the degree of legality (of course in accordance with the dynamics of decision-making of legal person in the development of its activities); the realization of certain activities (example for participation in a tender); decisions to be taken in the collegial form or the controller bodies to be immediately informed.
The legal entity must carefully choose its leaders in order to avoid administration by entities that have criminal record.
The model adopted by the legal entity shall provide for the separation of financial resources for the implementation and development of certain activities and audit of its expenditure.
The model should provide special training to employees on its content and behavior that should keep each of them in activities realized on behalf or in representation the legal person or any and every other activity that brings an immediate benefit to the legal person[70].
That model must contain also a system of fast and adequate information, because only in this way can be accomplished an efficient control. More specifically, the model should provide a monitoring and information system through which officers can inform the legal person (specifically bodies of control model) on crime committed without exposing them[71].
One or more members of the board of directors, or officers with administrative positions, must have the duty to verify the compliance of models from the officers. However, it would be reasonable that the control tasks and the updating of the model to be given to an autonomous control body with the right of control initiative and the right of taking disciplinary

[70] E. BOZHEKU, *The criteria for criminal* liability of *legal entities under* the *subjective profile*, in Avokatia, no. 1, 2012, pg. 42.
[71] C. MANDUCHI, *The introduction of corporate "criminal" liability in Italy,* në *www.diritto.it.*

sanctions[72].
The model should also provide that when an offense is realized, the legal entity shall take measures to avoid its recurrence[73].
The model should be efficient.
Efficiency can be achived only if the system provides a system of denunciation of any violation and an adeguate disiplinary system, able to give to the offenders adequate sanctions. In case of violation, is not enough the formal adoption of punitive measures against individuals who have carried out the offence (objectively on behalf and for the benefit of the legal person), but it is necessary to prove the ability of the concrete measures envisaged in the model and applied in this case to prevent future lealization of the same criminal effence.
The model should be updated from time to time keeping in mind the change of the dynamics and technology applications during the time of developed activity[74].
In our opinion, the model should also be presented before a public entity (as the Ministry of Industry or the Ministry of Economy) to get a formal assessment on its effectiveness. This assessment, which may not have the effect of directly exemption (*sic et simpliciter*) of the responsibility of the legal person, might prove important in the creation of a legal ethic of legal persons, which by introducing the model to the state subject show that they adhere or want to adhere to an legal ethic.
In other words, although the efficiency of the model approval from a state institute can not be considered fit for excluding criminal responsibility of legal entities – as this assessment belongs only to the court in the relation to determine criminal responsibility after completion of a criminal offense by one of the subjects of the legal person on behalf or for the benefit of his – the approval can be considered in the context of reducing the sentence by the court.
If a legal person can prove that it has correctly applied the above parameters, than it cannot be attributed with criminal responsibility.
We think that, beyond the evidence of an adequate adaptation of a model, legal person must also prove that the persons who have committed the offense have avoided model in secret and serious violations. Besides this test, the legal entity shall also prove that there was no omission or lack of control

[72] *Ibidem.*
[73] G. BENSON, *Code of Ethics*, në *Journal of Business Ethics*, 1989, no. 8.
[74] C. MANDUCHI, *The introduction of corporate "criminal" liability in Italy*, në *www.diritto.it.*

by the organization of control[75].
We are of the opinion that the belongs to the accused party to prove that the model adopted by the legal entity is not effective in the prevention of crime, as realized from a natural person, for which the legal person is also called as responsible under the criminal profile.
Regarding offenses carried out by subordinates and other subjects (who are related legal person due to a attorney representation) Article 3 of law no 9754, dated 14.06.2007, provides that criminal liability of legal persons arises only if these entities have acted «*on behalf or for the benefit of his, for lack of control or supervision by a person who leads, represents and administers the legal person*».
So, for these categories of subjects is not enough realization of the offense on behalf and for the benefit of the legal person but also that the work should be carried out for «*lack of supervision or control by a person who leads, represents and administers the legal person*».
In our opinion, in these cases, criminal liability of legal entities arises if the performance of the offense is made possible by the failure of steering and control tasks. This can happen if there is a lack of implementation of the organizational model, although able to specifically prevent the realization of offenses.
Obviously belongs to the prosecution to prove that the control of the respective bodies has been unable to avoid the realization of the offense.

8.3. ...(continuation)... The control of the organizing model and controller.

That an organizational and controller model to be really efficient and, therefore, capable of excluding criminal responsibility of legal persons, is required to undergo a continuous control of an independent body from the legal person. So, it is necessary that within a legal person must be created an autonomous structure with the aim of implementing control rules described in the organizational model[76].

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[75] J. WEBER, *Instituzionalizing Ethics into Business Organisatons a Model and Research Agenda*, in *Business Ethics Quarterly*, 1993, p. 419 and on.
[76] On the criteria to be followed in the formulation of an organizational model and controller capable of avoiding the realization of offenses refer R. RODORF, *I criteri di attribuzione della responsabilità. I modelli organizzativi e gestionali idonei a prevenire i reati*, in *Le Società*, no. 11, 2001, p. 1303 and on; P. SFAMENI, *La responsabilità delle persone giuridiche: fattispecie di disciplina di modelli di organizzazione, gestione e controllo*, in A. ALESSANDRI, *Il nuovo diritto penale delle società*, Milano, 2002, p. 96 and on.

Of course, to be truly effective, the control body must be independent from the legal person, not having any relations with the governing bodies (as administrators).
The structure must have a special budget and have the opportunity to check at any time to any activity of legal entity without having any permission. We suggest that this body should be elected directly by the general assembly. We are aware that, in relation to joint stock companies, problems may arise in the context of selecting the members of this body as the number of shareholders can be enormous. However, in these cases, the status of the company can define that the selection of the controller body of the model, to be made by the council of administration in the event of a management system with a level[77] or by supervisory council[78], in the case of two-level system.
Members of the controller body of the model should be individuals who enjoy prestige and honor in society, as well as highly skilled professional in the field of prevention of criminal acts[79]. Also, they must recognize the reality of the legal person, have technical skills in staff training, in applying the methodologies needed for detection of offenses within society; be knowledgeable in the field of psychology and human resource management, have legal and economic knowledge etc.[80].
The subjects who form the controller body of the model should not have interests or kinship or personal ties with leaders of the legal person[81].The

[77] The board of administrators is the body that controls the commercial activity, implements policies set by statute and the General Assembly of Shareholders. Under Article 154, paragraph 1 points a), b) f) law 9901, dated 14.04.2007 «*the board has the right and responsibility as follows*: a) *provide guidelines for managers to implement the company's business policies*; b) *control and monitor the implementation of the trade policy of the company from the administrators*; f) *appoint and dismiss managers, to define competences between them*». Under Article 155 «*The board consists of at least three or a greater number, but not more than 21 members. Members are individuals, most of whom must be independent and different from the administrators of the company.* 2. *Members of the Board of Directors* are *elected by the General Assembly by the majority required in paragraph 2 of Article 145 of this law*, applying *a term defined in statute*».

[78] In organizational system with two levels, the role of controller of administrators activities is performed by supervisory council. Under Article 166 of the law no 9901, dated 14.04.2008 expressly is determined that «in the *management system with two levels, administrators manage the company and decide on the manner of implementation of trade policy, while the Supervisory Board*, in *the quality of the supervisory body examines the implementation of these policies and their compliance with the law and statute*».

[79] C. MANDUCHI, *The introduction of corporate "criminal" liability in Italy*, në *www.diritto.it*.

[80] E. BOZHEKU, *The criteria for criminal liability of legal entities under the subjective profile*, in *Avokatia*, no. 1, 2012, 46.

[81] L. ANTONETTO, *Il regime del rapporto e della responsabilità dei membri dell'Organismo di Vigilanza*, in *Resp. amm. soc. enti.*, 2008, 75 and on.

body may consist of subjects who have no relation with the legal person (as psychologist, attorney, auditor, accountant, people with managerial experience in the field, etc.) and its internal entities. To our opinion, may participate as members only those subjects who do not play a leading role in society, but having a controlling role as, for example, members of the board of management or supervisory council[82].

We think that, however, the controlling body should be part of society (although independent of its governing bodies). This, in fact, that if the tasks are given to a foreign entity (as, for example, an accounting expert society), the legal entity to avoid his criminal liability may throw the responsibility of the inability of the organizing model to external controller subject. In contrast, the creation of a body control within the legal person makes the latter to be cautious in establishing an entity most truly independent and truly able to control organizational model and to identify the subjects who do not respect it. This, in fact, that if the model does not work or the control body is unable to perform its duties, the legal person shall be criminally liable in case of a criminal offense by the subjects prescribed by Articles 3 and 4 of the Law no 9754, dated 14.06.2007.

It is therefore the duty of the legal entity to conduct special bodies within his organizational model of control, to avoid his criminal responsibility[83].

To avoid spending for a whole structure, the legal person may trust the role of the controller body to the Board of Directors (in the system with a level) or to the supervisory council (in the system with two levels) guaranteeing – within the limits of the powers of the controlling body - the participation of a number of entities, which are not associated with it[84].

In our opinion, in all cases, the role of the president of the controlling body should be entrusted to an entity which has no connection with society (the members of the Board of Directors or Supervisory Board cannot take this role). This can guarantee the independence of management control by the administrative organs of the legal person. In this position can be, for example,

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[82] For an estimate on a new trade legislation in the Republic of Albania refer to A. MALLTEZI, *The tradition of corporate governance in the Republic of Albania*, in *Jus&Justicia*, no. 4, 2010, p. 147, 148.

[83] We believe that in order to avoid criminal responsibility for crimes carried out by the entities referred to in Articles 3 and 4 of the Law 9754, dated 14.06.2007, legal persons shall be equipped with an efficient control system models. So, is not enough the approval of a model which describes the ethical rules that must be followed by its employees, but it is necessary the realization of a special body within the legal entity which effectively and independently will control the respect of rules defined in the model.

[84] G. ZANALDA, M. BARCELLONA, *La responsabilità delle società e i modelli organizzativi*, Milano, 2002, p. 72 and on.

a lawyer, a certified public accountant, an economist, a psychologists who have no connection with the legal person (e.g. Hi is not one of the shareholders, has no leader or official functions within it, does not represents through a general or specific attorney the legal person to one or several activities, etc.).

In terms of legal persons with a small number of employees, we suppose that the function of the controller body can be trusted even just to a subject (and not to a council). The latter may be its governing body[85]. In this case – in our opinion – is the latter that should be consulted periodically with an external entity (lawyer, auditor, accountant, etc.). While, as regards controlling bodies related to groupings of companies[86], we suggest that each controlled company must have a controller of its own. However, it may be acceptable the option of creating an only controller of the parent body, who may delegate some of its assigned functions to some subjects within each controlled corporation[87].

9. Conclusions.

In the conclusion of this paper on one of the most difficult and problematic topics of criminal law, we are of the opinion that the discipline of criminal liability of legal persons in Albania, although shows the desire of legislators to achieve high legal standards, cannot save a critical and skeptical judgment.

The law in question appear confusing, contradictory, lacking in depth concept which cannot be filled only by scholars of law and the doctrine of criminal law[88]. The law subject of this article shows a lack of deep reasoning by

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[85] F. BAVA, *La responsabilità amministrativa delle società e il sistema di controllo interno*, në *Impresa c.i*, no. 1, 2003, p. 30 and on.

[86] The grouping of commercial companies is disciplined from articles 207 and following, law no 9901, dated 14.04.2008, "on traders and trading companies". Provision expressly states that «it is *estimated that there is a parent-subsidiary relationship, when a company behaves and acts regularly* in *accordance with the directions and instructions of another company. This control is called group controller.* 2. *When a society based on equity share owned from another company or under an agreement with that company, has the right to appoint at least 30 percent of administrators, members of the board of directors or supervisory board, or when it owns at least 30 percent of the total vote at the General Assembly, then it is considered as the parent company of the other company, while the other company* is *evaluated as a controlled company. This control is called influential group.* 3. *The rights of the parent over the subsidiary, provided for in paragraph 2 of this Article, are assessed even when these rights are exercised by another company, controlled by the parent or by a third person acting on behalf of that other company itself or on behalf of the parent company.* 4. *The third is presumed to act on behalf of the parent, if it is included in the provisions of Clauses 2 and 3 of Article 13 of this law*».

[87] E. BOZHEKU, I. ELEZI, *Criminal liability of legal persons – Theoretical Practical Handbook*, cit., p. 131.

[88] The law in question does not provide criteria for the discipline of guilt of the legal person. Some dispozitions not itentianaly talks about effective organization and control models (refer to articles 14 and

legislators and the entire legal community regarding the theme of the Albanian criminal responsibility of legal persons. It seems that, as often happens with Albanian lawmakers, it is a law, one would not hesitate to call "banner" with aim showing the achievements in the legal system. In fact the law not only has nothing contemporary and otherwise, can become really dangerous and a misleading tool to commercial companies which currently have not any possibility of defending their self in the courtrooms: it does create the impression that, as it is formulated the law no. 9754, dated 14.06.2007, commercial companies (legal entities) will become objects of punishment only because some offenses are conducted by their employees, by their leaders or subordinate entities.

It would be reasonable the fast intervention of legislators for a law review, by modifying and integrating the current discipline, after a deep reasoning with all the protagonists of the economic and legal system, including the commercial companies, universities, judges, prosecutors, lawyers and experts throughout the criminal justice and social justice.

20) without determining what it is and how these models function.