



Socio-legal basis of criminal liability of legal persons and corporate compliance to prevent crimes: Anthropic approach and behavioral game theory

OÑATI SOCIO-LEGAL SERIES VOLUME 14, ISSUE 2 (2024), 530–533: DERECHOS EMERGENTES Y BIENES COMUNES EN EL SUR GLOBAL

DOI LINK: [HTTPS://DOI.ORG/10.35295/OSLS.IISL.1830](https://doi.org/10.35295/OSLS.IISL.1830)

RECEIVED 24 JULY 2023, ACCEPTED 19 DECEMBER 2023, FIRST-ONLINE PUBLISHED 18 JANUARY 2024, VERSION OF RECORD PUBLISHED 1 APRIL 2024

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Abstract

Systems theory has garnered significant criticism from internationally recognized experts in the field of organizational analysis. However, a sector of criminal doctrine is adopting a strict approach to this theory to justify socio-legally the application of corporate criminal liability (this is a trend that has been embraced by the Spanish Supreme Court and is spreading throughout Latin America). The systemic idea of organization excludes the individuals who constitute and manage the company, dehumanizing it, separating corporate governance from the role played by individuals and even attributing human attributes to the company. In other words, the members that make up the organization, as well as the influences or constraints they generate in the context of the interaction of individuals within a corporation, are disregarded in the analysis. As an alternative, this text proposes the essential outlines of an “anthropic model” of corporate criminal liability, which is built on theoretically and experimentally validated notions and methodologies: neoinstitutionalism, game theory and behavioral compliance. In this anthropic model, the adoption and implementation of an effective

A substantial part of this work has been completed in the framework of a research stay as an academic visitor at the Centre for Socio-Legal Studies of the University of Oxford (<https://www.law.ox.ac.uk/centre-for-socio-legal-studies/centre-socio-legal-studies>). I am grateful for the advice and attention given to the management of the center, particularly to Florian Grisel, and Bettina Lange for giving me the opportunity to present this research in the ‘Regulation and Governance’ research cluster (<https://www.law.ox.ac.uk/centres-institutes/centre-socio-legal-studies/regulation-and-governance>).

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and adequate governance system to prevent irregularities (or crimes) does not depend on the system itself, but depends directly on the commitment and implementation of the “human component” of the organization.

Key words

Systems theory; collective action; cross-theoretical compliance; anthropic model; behavioral game theory

Resumen

La teoría de sistemas ha recibido críticas significativas por parte de expertos internacionalmente reconocidos en el campo del análisis de las organizaciones. Sin embargo, cierto sector de la doctrina penal está adoptando un enfoque estricto de esta teoría para justificar sociojurídicamente la aplicación de la responsabilidad penal de las empresas (una tendencia que ha sido aceptada por el Tribunal Supremo español y se está extendiendo por América Latina). La idea sistémica de la organización excluye del análisis a los individuos que constituyen y gestionan la empresa, deshumanizándola, separando la gobernanza corporativa del papel desempeñado por los individuos e incluso atribuyendo atributos humanos a la empresa. En otras palabras, se desestiman en el análisis penal tanto a los miembros que conforman la organización como a las influencias o constricciones que originan en ese contexto de interacción de individuos que configura la corporación. Como alternativa, se proponen los lineamientos esenciales de un “modelo antrópico” de responsabilidad penal corporativa, construido sobre nociones y metodologías teórica y experimentalmente validadas: neoinstitucionalismo, teoría de juegos y “behavioral compliance”. En este modelo antrópico, la adopción e implementación de un sistema de gobernanza efectivo y adecuado para prevenir irregularidades (o delitos) no depende del sistema en sí, sino que pende directamente del compromiso e implementación efectiva por parte del “componente humano” de la organización.

Palabras clave

Teoría de sistemas; acción colectiva; cumplimiento transteórico; modelo antrópico; teoría del juego conductual

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1. Introduction: the weakness of the systemic approach applied to the regimen of criminal liability of the legal entities that is being applied in Spain and spreading throughout Latin America

The most classical and rigorous approach to *systems theory* is characterized by its shortcomings in the practical and experiential field (Seidl and Mormann 2014, p. 26).¹ This criticism is not an isolated point of view, but represents the opinion of an important part of the highly specialized literature on the study of organizations. That sector considers that the hypotheses of a rigid vision of systems theory lack solid research to support them and methodologies that allow us to explain, from a general empirical level, the presumed validity of the postulates it assumes, as indicated by Knudsen (2005, pp. 107-129). Additionally, Adler *et al.* (2014, p. 6), tell us that systems theory continues to be included among the theories for the analysis of organizations due to a period of fame that it experienced in the last century, not because we have scientific evidence that demonstrates the validity of its premises.

The notion of an organization as a closed system with a real capacity for self-organization, self-reproduction and self-definition (*autopoiesis*² and *self-reference of the system*), with total independence of the physical persons (the position they occupy, the influences they generate or the functions they perform are indifferent) is one of the most controversial pillars of systems theory because there is no evidence that the systemic assumptions correspond with any degree of rigor to what really happens in organizations of people. Thus, an extensive and recognized scientific literature indicates that groups of people or business contexts do not function according to autopoietic criteria and dynamics (Mingers 2002, pp. 278–299; 2004, pp. 103–122; Fuchs and Hofkirchner 2009, pp. 111–129).

Well, the questioning of the strict vision of Luhmann's theory of systems would have no relevance or meaning in criminal law, if it were not for the fact that this theory is now expanding in Spain and Latin America to explain and justify the criminal liability regime of legal entities from a socio-legal approach. This theory is the one to which some doctrinal sector³ has resorted to try to support the basis of the criminal reproach to the legal person within a model of criminal self-responsibility of legal persons. In addition,

¹ *The Oxford Handbook of Sociology, Social Theory, and Organization Studies: Contemporary Currents*, p. 26: "Luhmann quickly abandoned his own empirical research in order to concentrate on the theoretical-conceptual side of his work, which in turn tends to attract researchers working conceptually rather than empirically. Moreover, Luhmann's later work in particular has been criticized for not lending itself to empirical investigation, because the assumption that social systems are operatively closed tends to undermine the researcher's position. So far, the little empirical research that incorporates Luhmann's work largely ignored, rather than tackled, these problems".

² Maturana and Varela 1980, 1984. Autopoiesis: the capacity of a system to develop, reproduce and maintain itself over time by itself. Self-reference: each action has its reference in the scaffolding of other previous actions of the same system.

³ This is not only a position that is limited to a sector of Spanish criminal doctrine, as it is also accepted by part of the doctrine of Latin America. Gómez-Jara Díez may be the most representative author of those who promote the incorporation of systemic hypotheses to the criminal field, see Gómez-Jara Díez (2005, pp. 417-467; 2006). For an overview of the defense of the systemic thesis in the framework of the criminal liability of the legal person by this renowned author, see Gómez-Jara Díez (2016, pp. 121-220; 2019). To the criticisms against Luhmann's systemic conjectures made by contemporary specialists in the study of organizations, we must add the frontal opposition presented in Spain by the Attorney General's Office.

the Spanish Supreme Court has adopted this theory and uses theory of systems as a primary socio-legal source to justify the existence of the independent crime committed by the legal person (its own *structural organizational defect*,⁴ completely independent and separate from the decisions and behaviors of the members who govern the organization).

However, this is an idea of *systemic governance* that completely excludes the individuals who make up and manage the company. This approach dehumanizes the organization and separates governance from the highly relevant role played by individuals. The members that make up the organization (e.g., executives, middle management, etc.) are ignored in the analysis, as are the influences they generate in the context of the interaction of individuals that is a company. On the contrary, those countries with more tradition and experience in the field of criminal liability of the legal person have not only ignored the strictest systemic conjectures when it comes to erecting a model of self-responsibility, but they also categorically reject the idea of liability for the company's own independent acts (or of strict corporate criminal self-responsibility) as a basis or explanation for the criminal punishment of the legal person. Thus, countries such as Austria, the USA,⁵ France, the UK, etc., have rejected the idea of liability based on the company's own independent and follow models of vicarious corporate criminal liability or liability for the acts of the natural person. This refers to a type of quasi-objective criminal liability that is imposed on the legal entity for the offense committed by a natural person within the organization.

It should be noted that in Spain and most countries in the Latin American context, the criminal liability of legal entities was adopted only a few decades ago. In relative terms, it is a very recent phenomenon (Argentina, Bolivia, Chile, Costa Rica, Ecuador, Peru, Dominican Republic, etc.). Therefore, we are at a crucial moment to develop an adequate and solid socio-legal basis to justify the criminal punishment of the company, while recognizing the role of the human component within organizations. The fact that the Spanish and Latin American jurisprudential doctrine on criminal liability of legal persons is resorting during its first years of development to a strict vision of a theory that is so questioned as a socio-legal basis for the criminal punishment of the company entails great risks: those arising from the absence of scientifically validated factual and methodological support that would allow it to face the legal-criminal challenges posed by the complex business reality.

It is especially relevant that a substantial part of the Spanish criminal doctrine has shown and shows itself to be in strong disagreement with the systemic hypotheses that are being assumed by the jurisprudence.⁶ The shortcomings of systems theory have already

⁴ Judgment of the Supreme Court dated 16 March 2016, as or starting point of the jurisprudential line, et seq.

⁵ With respect to U.S. law, the Foreign Corrupt Practices Act (FCPA), the model of corporate criminal liability adopted is vicarious liability, following the Anglo-Saxon tradition. This model establishes liability by virtue of the transfer that operates by virtue of the criminal conduct of the individual. In the doctrine known as *respondet superior*, the legal person is criminally reproached for the crime committed by managers or employees, provided that they had the purpose of benefiting the corporation and were carried out within the scope of their functions. Despite the predominance of the vicarious model (criminal liability of the legal person for the acts of natural persons), Górriz Arroyo (2019, pp. 32-34), indicates that in recent decades, in the context of the jurisprudential constructions of some States of the union, notions have emerged that could support a conception of the corporation's own fact (criminal self-liability of legal entities model).

⁶ E.g.: Bacigalupo Saggese 1997, Zugaldía Espinar 2003, p. 543, Del Rosal Blasco 2015, 2018, Gracia Martín 2016, pp. 1-95, Palma Herrera and Aguilera Gordillo 2017, 18-74, León Alapont 2020, among many others.

become evident in two types of problems that have emerged in criminal proceedings in Spain: 1st. The determination of the “unimputability” (i.e., the imposition of imposing penalties) of companies created to commit crimes and of those that do not have a relevant number of individuals or that do not have rules or procedures that regulate their activity. This conception of “non-imputable” legal entity is based on the already exposed systemic premise that defends the existence of companies with supposed self-organizational capacity independent of their members. Consequently, if “they themselves” do not govern or organize themselves adequately to prevent risks within their corporate perimeter, they are deserving of criminal reproach when some of their members protagonize certain criminal conduct generating benefits for the organization. In contrast, it is not possible to impose a penalty on companies that lacked a certain “own” organizational substrate, directing the criminal action solely towards the physical persons behind the organization.⁷ The implications are more than evident. From our point of view, the exclusion of the criminal liability regime of legal persons in these cases greatly weakens the political-criminal strategy that precisely originated the incorporation of this institution by the Spanish legal system. Ironically, for these types of cases, we return to a stage before 2010 (when the criminal liability of legal entities was established). 2nd. Lack of methodological criteria to clarify the “transfer” of criminal liability between legal entities after Mergers and Acquisitions operations. The second example of the fact that the systemic approach does not provide coherent and methodologically precise answers emerges in those scenarios in which it is necessary to clarify the appropriateness/inappropriateness of the transfer of criminal liability between corporations. In principle, in this type of Mergers and Acquisitions (M&A) operations, the criminal liability is transferred to the legal person resulting from the operation (which we will qualify as the resulting legal person), “being able” to apply the corresponding penalty proportionally to the part of the original legal person that remains in the resulting legal person. However, there are not methodological parameters to serve as an anchor for the analysis of the relevance or inappropriateness of the transfer of criminal liability between corporate entities, much less in what proportion it should be imposed in the case of partial coincidence of identity between the original and resulting legal person.⁸

However, in our opinion, there are no socio-legally consistent alternatives, because they are developed on the basis of traditional penal approaches, which do not take into account the necessary holistic and sociological approach. In the criminal area, at least in Spain, it is not usual for the doctrine to be very receptive or permeable to works, scientific studies and trends in other fields (sociology, group psychology, anthropology, behavioral economics, etc.).

⁷ Fourth paragraph of the aforementioned STS of October 22, 2020.

⁸ We are faced with a problem that may be aggravated in cases of spin-off, where two or more resulting legal entities could maintain a certain portion of the substrate or core identity of the original legal entity. The core aspects of this paper, especially those with importance in criminal practice (and those related to the Spanish Penal Code), are developed in the article written in Spanish, *Déficits del enfoque sistémico de responsabilidad penal de la persona jurídica: inimputabilidad y contagio penal en operaciones de M&A. Procedencia del modelo antrópico y behavioral game theory* (Déficits of the systemic approach to criminal liability of the legal person: unimputability and criminal contagion in M&A operations: provenance of the anthropic model and behavioral game theory) published in 2023 in *Revista Electrónica de Ciencia Penal y Criminología*, vol. 25-06.

As was shown at the beginning of this paper, the arguments against systemic ideas are not only raised by the criminal doctrine, from the same areas specialized in the study of group dynamics and in the socio-legal analysis of organizations, systems theory is conceived -mostly- as a theoretical line surpassed decades ago by other theories that have greater scientific backing. The conception of an organization as a closed system with the –real– capacity to self-organize and reproduce itself (autopoiesis) with total independence of individuals (regardless of the position they hold, the influences they generate or the functions they perform) is one of the most controversial pillars of systems theory. While, in certain cases within the field of biology, where systems theory emerged (Maturana and Varela 1984), these notions were validated, in the field of the study of people’s organizations, which has been analyzed from sociology, group psychology or behavioral economics, no clear evidence has been obtained to indicate that systemic conjectures respond directly to what happens in people’s organizations. Not surprisingly, the aforementioned precursor of the transposition of the systemic theses from biology to the field of the study of organizations (Luhmann 2005) admitted that he had to alter them, simplifying them to try to make them compatible with any type of organization. It is likely that this simplification, together with the attractive idea of considering the organization as an entity with anthropomorphic faculties and a kind of psyche comparable to the human one, has been a decisive factor for this theory to penetrate easily into certain sectors of criminal law. In addition, the great influence of German criminal doctrine (which in its day embraced the systems theory) on Spanish criminal doctrine is another factor that may have favored this issue.⁹

In our opinion, it is essential to move away from the most radical or extreme systemic hypotheses in order to construct a valid model of criminal liability of legal persons. Only in this way will we be able to face the dogmatic, methodological and practical challenges presented by corporate criminality. It is a matter of adopting a model that is built taking into account what scientifically validated contemporary studies tell us about what really happens in organizations in relation to compliance in organized frameworks: how the dynamics of decision-making processes work in organizations, how influences – criminal or not – originate in such contexts of interaction, the examination of the strategic factor and of dominant or strategically advantageous positions, etc. In short, we understand that these factors should not be ignored and that the human component is fundamental for an exhaustive analysis of the attribution of criminal liability to legal persons. For this reason, we have been advocating the adoption of an updated model that takes into consideration the above: an eclectic *anthropic model* of criminal liability of

⁹ A few decades ago, it was almost customary in the field of criminal law for Spanish researchers and academics to travel to Germany or to carry out their main research in that country (since it was considered the cradle or origin of criminal dogmatics). Nowadays, the destinations of researchers are much more diversified and the influence of the Anglo-Saxon world is much more intense than before. Luhmann’s systemic ideas had a decisive influence on the ideological foundations of the German school of criminal functionalism, led by Claus Roxin decades ago and developed by Günter Jakobs (as reference authors who were precursors of moderate and radical functionalism, respectively). These authors, especially the systemic ideas on which Jakobs’s functionalism is based, greatly influenced Spanish researchers several decades ago. As stated in footnote 3, I consider Gómez-Jara Díez to be one of the Spanish authors who most vehemently defended systemic postulates. I believe that these circumstances have ensured that the hypotheses have penetrated the minds of some of the judges of the Spanish Supreme Court.

the legal person¹⁰ whose synthesis of its essential legal-criminal components and main elements that form its backbone are set out below.

2. Outlines of the anthropic model of criminal liability of the legal person: neoinstitutionalism, game theory and behavioral compliance

2.1. Criminal punishment of the legal entity and collective action

For expository purposes, the starting point of this section will be the legal-criminal result of interweaving the proposed sociolegal theoretical and methodological concepts, that is, the immediate justification of the attribution of criminal reproach to the legal person when an individual acting within its perimeter commits an unjust act for which corporate criminal liability is foreseen. Subsequently, the socio-legal perspective that nourishes and sustains this anthropic perspective of the criminal law of the legal person will be related. Despite the fact that the configuring process follows the inverse logic, we understand that such prolepsis, where the result is already known in the legal-criminal field, facilitates the assimilation of the elements that come to sustain it socio-legally.

From this model, the company or corporation is analyzed as a context or framework of procedures, policies or practices accepted in a sphere of interaction. The company is an agent that influences the behaviors of the individuals that make it up. However, it is not obvious that these influences present in this corporate context do not originate from the company itself, since ultimately they always come from the individuals that are part of it. The human component is essential to the analysis. We know that in organizations the *human component* or factor is fundamental in the decision-making processes linked to compliance/non-compliance (on the extraordinary relevance of individuals in the sphere of corporate compliance we can refer to Blount and Markel (2012, pp. 1023–1062), among other authors). Motivation in the individual is a very important component in this subject (Deci and Ryan 2012) and cannot be ignored in the analysis, just as influences or procedures originating “in” the entity (and not “by” the entity in an autonomous manner) cannot be ignored.

The legal person can be (and must be) criminally sanctioned, yes, but without considering it as a hypothetical *autonomous system*. Since the legal person does not have the aptitude to truly develop its own independent crime, its criminal liability can only be declared when a heterogeneous culpability or a more complex configuration than that applied to natural persons can be glimpsed) can be glimpsed. This culpability applied to the legal person must have a very different configuration from the culpability applied to natural persons, since the corporate idiosyncrasy can hardly be assimilated to the characteristics of the psyche and the human condition. Consequently, from a factual

¹⁰ Obviously, it is not our intention to develop a complete sociolegal model of criminal liability of legal entities (a daring task that is out of keeping with my modest capacity). Nevertheless, this paper points out theories and concepts that, without doubt, could serve to build this updated model, a model that does not forget that “human activity” is the primary source that must activate the criminal accusation/reproach against the corporation, since it is ultimately the people who govern the companies and make decisions (not the company itself as an autonomous system), and it is the people who generate influences or constraints in these corporate scenarios. Constraints that can be positive (if they are in the direction of good governance that prevents and prosecutes misconduct) or negative (if they go in the direction of accepting irregularities or corrupt practices as something justifiable or accepted).

point of view, the corporation is incapable of committing a crime – properly speaking – , but it can be the recipient of criminal sanction if the conditions or requirements established by law are met and if there are influences or constraints within that are conducive to the crime. Therefore, the guilt of a legal person will be observed when there are influences in that organization that allow or accept the commission of criminal offences. In this case, there is a criminogenic reality¹¹ resulting from the influences generated in this sphere of strategic interactions, which is identified with the context conducive to the crime. From this perspective, the prior adoption and effective implementation of an adequate governance system, which includes a corporate compliance program with mechanisms and controls suitable for crime prevention is an obvious example of the existence of constraints aimed at controlling the human risk of criminal behavior. In other words, the legal entity is not a criminogenic context that encourages or promotes wrongdoing. Under such an assumption, punishment cannot be applied to the legal entity and only the individuals involved in the crime must be convicted.

This heterogeneous corporate liability is not situated within a fiction or organizational artifice that assumes the presence of a hypothetical system that is self-organized without the intervention of individuals, but is extracted from the context of “constrictions” and practices applied by these in the legal person and it is determined whether, although there are clear mandates issued by the public authorities to respect compliance and risk control in corporations, there are constrictions that favor the commission of improper conduct (a criminogenic context that has effects on individuals, despite the receipt of these mandates issued by the public authorities). In contrast, the adoption and effective implementation of a compliance program or, as the case may be, of a compliance management system, would constitute clear evidence of the materialization of constraints aimed at compliance and the adequate control of risks with possible criminal implications.

If it is proven that there was no corporate criminogenic reality, the legal entity cannot be criminally punished.¹² If the criminogenic reality is called an organizational defect, there is no problem, but it would be a non-self-generated (improper) organizational defect, since the origin lies in the human component and not in a humanized autopoietic system. And, it should be added that, contrary to what has to be sustained from the systemic assumptions, the effective implementation and execution of a compliance program or compliance system is not subordinated to an independent system as a sign of the non-existence of a structural – proper – organizational defect, but depends entirely on the work developed and the commitment assumed by the human component of the organization.

The corporate entity does receive criminal reproach, but we do not consider it appropriate that the solution to the dogmatic conflict and principles traditionally

¹¹ In the field of criminology and criminal law, a criminogenic zone or context is a fundamental concept and is understood as an area where factors or influences that facilitate or encourage the commission of crime coexist, see McCarthy and Hagan (1991, pp. 393-410) or Bradshaw (2014).

¹² The issue of proof is applied according to the procedural rules and standards of proof applied in each country. In this case, the test focuses on proving whether the organisation implemented the corporate compliance program sincerely and purposefully or not. This is not a particularly complex issue in the field of economic criminal law.

applied to the criminal law of natural persons is to resort to the speculative fiction that companies, foundations, associations, etc., can self-organize without the intervention of their members, and then apply to them criteria identical to those of natural persons. Therefore, in the anthropic model, the legal person is considered as an agent or influencing factor, the catalyzing nucleus of what is known in the sociological field as collective action (Holahan and Lubell 2009, pp. 186–208). The entity has an impact on the organization's individuals (who, in any case, continue to have the capacity to act freely and in accordance with their decisions, without being subject to a supposed system). The existence and effects of this factor find their scientific justification in neoinstitutionalism or new institutionalism, a corpus of study of the decision-making dynamics in organizations that goes beyond the approaches of rational choice theory, integrating in the analysis both individuals and the role of organizations, conceiving the link between the action of individuals and organizations as a mutually constitutive and, consequently, meaningful process: individuals constitute a context formed by rules or constraints, the legal person itself, which influences the individuals themselves.

2.2. The scientific elements and theories that support and explain this anthropic model of corporate criminal liability.

The notions and theories put forward to configure the theoretical-methodological corpus of the anthropic model of criminal liability of the legal person (neoinstitutionalism, collective-action and behavioral game theory) find in the original theory of rational choice and the search for profit a starting point. It is true that such notions are more evolved than rational choice theory, but it cannot be ignored that the pursuit of profit (a predominant factor in rational choice theory) is a very important element in the decision-making processes that take place in corporate contexts and, above all, a clear normative requirement for the attribution of criminal liability to the legal person in most legal systems. At the same time, we must assume that the political-criminal logic pursued with the criminal liability of the legal person and the subsequent exonerating effect of compliance programs (or, failing that, mitigating effect) is to encourage the design and deployment of effective self-regulatory mechanisms for the prevention, detection and reaction to breaches of criminal law in complicated corporate scenarios.

Consequently, in order for the effects of general and special prevention to take place, it is unavoidable to accept that the subjects involved develop behaviors that arise from a rational mental process, at least substantially (although later we will see that they suffer alterations arising from irrational aspects) or that, regardless of the decision finally adopted, they incorporate the criminal reproach of possible reception among the elements of judgment included in the assessment of costs and benefits of their decision. Otherwise, if we were to understand that the nuclear part guiding the decisions and conducts developed in the corporate frameworks obey irrational impressions, impulses and biases, the general and special prevention would be annulled due to the inability to comply with the mandate given by the Criminal Law. There would be no dissuasive effect on the subjects, the corporate evolution would be something similar to a lottery and the application of any ordinary process or control would be of little use.

Therefore, before pointing out some of the key points of neoinstitutionalism, of the necessary incorporation of the less rational aspects in decision-making processes or of

mathematical modeling in scenarios of strategic interaction with multiple factors, it is deemed appropriate to indicate the relevance of rational choice to know one of the supports of decision-making processes in groups and corporations, even to better understand the processes of cooperation and the configuration or design of organizations which, as developed by Abell (2014, p. 14), always emerge as instruments of cooperation; that is, they are created by individuals to achieve certain goals or objectives. In sum, it can be stated that the theory of rational choice is built on the scaffolding of what is known as formal decision theory; a theory that, from the various branches (socio-legal, economic, criminological, etc.), comes to consider individuals as decision-makers based on cost/benefit analysis – of any nature, not only pecuniary – of the range of possible options (Bell *et al.* 1988, Satz and Ferejohn 1994). Decision-makers are guided by preferences, which are hierarchical and transitive. Consequently, for the study of the decision, the list of possible decisions that can be adopted (feasible set) must be clarified and the list of consequences must be incorporated, since the decision will be taken on which a better consequence can be anticipated, i.e., the one that is most preferred, taking into consideration the advantages and disadvantages of the list of options. From this point of view, the key element of decision-making processes is the search for profit maximization, and this criterion is maintained within organizations.

If a director or manager of a business entity decides to behave in accordance with procedures without any irregularity of criminal significance being detected, it is precisely because his purpose is to achieve a benefit for his organization and, ultimately, for himself (e.g., because he achieves a certain objective, a bonus, a promotion, because he saves time/effort or, simply, because his level of income is maintained). Likewise, when you decide to breach procedures and commit an irregularity, the purpose is similar: to achieve profit maximization. For this reason, the increase of the deterrent effect through more severe punishments or the leap from the jurisdictional level to criminal law have been strategies included in the so-called economic analysis of law based on rational choice (Congregado *et al.* 2001, pp. 331–339). The aim is to prevent non-compliance from compensating in the evaluation or weighing of costs/benefits. In the area of criminology, Bermejo (2015, pp. 305–327) addresses the developments of opportunity theory and situational prevention strategies, which are a good example of the influence of rational choice for the study of crime prevention.

Opportunity theory argues that when individuals engage in criminal behaviour it is because in a given context (or sphere of activity) they have observed that there is an opportunity to maximise their profit through non-compliance (maximising profit may not only mean earning more money, but also reducing costs or avoiding situations that could compromise them, by bypassing controls). In other words, the visualisation of the options for offending, the possible benefits and the lack of control are factors that in most cases lead to crime. Once the potential offender has grasped the possibility of committing an offence, he or she reflects on the risks and costs of complying or not, taking into account factors such as time, effort, profit, etc. This is clearly a thesis closely associated with situational crime prevention. Consequently, when controls are designed and deployed that reduce the opportunity to offend, crime decreases; conversely, when controls that mitigate the risk of offending are removed, crime increases. In a business context, this translates into the following: a member of the legal person (employee, middle management or senior management) may choose to commit crime if he or she

sees the possibility of substantial profit maximisation and there are no structures, controls, procedures and sanctions in place to prevent crime, facilitate its discovery or prevent the perception that the cost of taking the risk of non-compliance is much lower than the cost of the penalty for non-compliance. In the area of compliance and crime prevention in large companies, it is therefore considered a basic rule that personnel directly involved in operational tasks or business areas (such as financial managers, legal advisors, commercial directors, etc.) should not also hold the position of compliance officer or have any role in the compliance body, other supervisory bodies or the management body.

This is based on an institutional design rooted in the principles of checks and balances, which means that corporate governance systems should be designed with structures featuring multiple, well-differentiated lines of defence or supervision. In this way, the risk of conflicts of interest is minimised, the adoption of irregular practices due to the perception of inadequate supervision is avoided, and real control within organisations is strengthened. Each line must have real autonomy, so it is important to avoid the same people holding positions in different lines (i.e. the same people supervising and controlling their own actions). If this mistake is made, the ability to detect non-compliance in organisations is seriously compromised. Therefore, the institutional design based on check & balances within companies, the implementation of process controls or the application of codes of conduct are some of the many examples of the acceptance of opportunity theory in the field of compliance. We reduce the risk of criminal conduct through the reduction of the possibilities of occurrence – within the feasible set – and of the incentives of the potential violator to commit a crime, together with the increase of controls and the increase of costs.

McCarthy (2002, pp. 418–423) offers a synopsis of the most decisive points of rational choice applied to organizations and collectives, including the importance of information flows, the elements that shape risk or uncertainty, the trends regarding the judgment of the stability of preferences and their relationship with behavioral economics or the defense of game theory as a scientific tool for clarifying the set of possible behaviors and the “positions of dominance” in a context of interaction such as organizations. Moreover, he does not ignore the fact that there are less rational or vehement criteria involved in the decision-making processes. This inclusion of the irrational component when analyzing compliance in organizations, i.e., the influences generated in a more impulsive or less reflexive manner, was one of the shortcomings of the original postulates of the original rational choice (Mayer 2013, pp. 118–120), so that a substantial improvement is observed in this theoretical line. Likewise, from a primordial vision of rational choice, what happened in organizations was conceived as the product of the accumulation of behaviors of individuals in a given context. This limits the effectiveness of the analysis, since it is not necessary to consider that the joint actions carried out by groups of people or members of organizations when they seek to achieve common objectives, collective action (Blanton 2016)¹³ is a mere sum of the behavior of individuals. We must bear in mind that it is much more than that, the imprint of the organization arises from that interaction and acquires its own features.

¹³ Similarly, regarding the potential of collective action and the extension of the theoretical scope of the neoinstitutionalism, see Rao *et al.* (2000, pp. 237–281) or Ostrom (2009, pp. 186–208).

The legal person is an agent shaped by the human component which, in turn, influences the human component; it is a mutually constitutive process. Therefore, the most decisive advance over the initial rational choice has been neoinstitutionalism, a theoretical component that we assume in this anthropic model (particularly in the rational aspect). point to neoinstitutionalism or new institutionalism as the most relevant evolution in the matter at hand, since it makes possible the incorporation of the organization as a context (Fernández-Alles and Valle-Cabrera 2006, p. 503) that intervenes or influences the interaction of subjects. Undoubtedly, this facilitates a much more precise analysis of what actually happens in organised contexts and its understanding (Deephouse and Suchman 2008, p. 49) allows for a coherent legitimisation of the attribution of criminal reproach to the legal person by virtue of the footprint it generates (but without incurring in the attribution of human faculties or awareness of themselves and their environment).

Thus, the new institutionalism of rational choice emerges as a product of the advances of rational choice and the developments of institutionalism as a theory of analysis of the configuration and functioning of organizations. Neoinstitutionalism encompasses in the analysis of organized contexts both the examination of the decision-making processes of the individuals that compose it and the imprint of the influences, normative constraints and structures of the organizations themselves. It should be noted that, from the point of view of Neoinstitutionalism, the main elements that help us to understand what happens (or may happen) are the following (Ostrom 2005, pp. 33–35):

- Participants (individual and corporate)
- Positions that participants may occupy
- Potential outcomes that can be achieved by participants
- Set of permissible actions, as well as the function linking actions and outcomes
- Control of actions and outcomes by individuals according to that function
- Available information on actions and outcomes
- Costs and benefits of actions and outcomes

Every social institutional relationship is built with these elements, from which rules, procedures, etc. can be deduced or extracted, which we will call “institutions” (which is why these elements are so important in shaping crime prevention programmes). In relation to individual participants and institutions as collective entities, it is worth noting that the new institutionalism accepts the existence of corporate actors, but this does not imply that they are considered as subjects with real capacity to self-organise independently of their members (nor does it assign them powers similar to those of human beings).

As mentioned above, the relationship between individual behavior and institutional dynamics is conceived as a mutually constitutive and, consequently, meaningful process; that is, the individuals interacting under the umbrella of an organized entity have shaped or contribute to shaping the practices, processes, guidelines, protocols, etc. of the organization itself. The result is influences or “constraints” (not self-generated by the organization) that channel or influence on a greater or lesser extent the behavior of the individuals that make up the legal entity and that may increase the risk of any

member of the organization committing any irregularity¹⁴. If such “constraints” were aimed at deterring/preventing the risk of the materialization of criminal – human – conduct, the possible attribution of criminal liability to that context, i.e., to the legal person, would be deactivated.

Following the structure applied in the general theory of crime in Criminal Law (crime configured by a conduct, typified, antijuridical, guilty and punishable), the influences or “constraints” that exist in the legal person are incardinated or placed within culpability (guilty). However, as explained above, the culpability of the legal person is not based on its own criminal conduct, but on the influence it exerts in this complex context (heterogeneous culpability). This reasoning respects what has always been a basic principle of criminal law: organizations do not commit crimes, it is individuals who actually commit crimes. The aphorism “*societas delinquere non potest*” was a clear demonstration of this essential idea for criminal law (not for other branches of law, where the principle of subjective liability does not apply). This idea has been respected over the years, even when various states have incorporated the criminal liability of legal persons. As it has been explained at the beginning of the article, the countries with the greatest tradition and experience in the field of criminal liability of legal persons punish the legal person for the crime committed by the individuals who are part of it (it is a criminal liability for the crime of others or *vicarious liability*).¹⁵ It has only been in recent years, when Spain has introduced the criminal liability of legal persons in its legal system, when attempts have been made to recover the systemic ideas to try to justify the punishment of the legal person (based on a hypothetical act of the organization itself). According to the ideas defended in this article, the legal person can be criminally punished, but without incurring in the fiction of attributing human capacities to it. The purpose is to explain the punishment of the legal person from a scientific approach, without the acceptance of the systemic ideas. Accepting fictions or theories not based on reality and scientific evidence in criminal law may involve high risk or dangerous. If we resort to theories not based on what science tells us about behavior to justify criminal punishment or we use facts under a supposed social function, there would be no reason not to criminally punish animals or robots.

Therefore, from the position I defend in this article, the legal person is considered a context of interaction of socially accepted norms that influence its members and even other possible intervening agents (but it is not considered a totally independent entity with the capacity to commit crimes). As developed by Mayer (2013, pp. 124–126), organizations play an important role in ensuring that their members do not commit non-compliance or, failing that, that they do not commit it. The articulation of procedures, controls or awareness-raising actions aimed at prevention are decisive. In this regard, the positions or positions occupied by the intervening subjects of the organization and the imprint of the organization itself; the list of possible behaviors of each intervening or participating subject; the set of potential results that can be achieved or obtained by each of them; the function that links the possible behaviors with the possible results; the

¹⁴ On this issue, it is worth noting the apt analysis of Palmer (2012) on how the risk of misconduct by apparently compliant individuals increases according to the environment or organization in which they are found.

¹⁵ Moreover, the country with the highest degree of respect for the postulates and principles of criminal law, Germany, has refused for the time being to introduce criminal liability of the legal person.

control applied on the actions and results according to that function; the costs/benefits of each action and result or the information flows available on actions and results are factors or elements that involve what happens in organized contexts and, consequently, must be present in the analysis carried out from the new institutionalism according to the holistic approach made by the Nobel Prize winner, Ostrom (2005, p. 13), author who, in addition, pointed to game theory as an ideal tool to clarify what really happens in the organization.

The usefulness of game theory to understand the strategic reality of organizations or groups has been highlighted for decades by expert researchers in organizational analysis. Hayek was one of the economists and jurists who had an impact on this idea, nowadays consolidated. In fact, his contributions were transcendental to advance, from a socio-legal point of view, in the knowledge of organizations and their internal dynamics (Foss and Klein, 2014, p. 6), especially in the examination that considers the effect of those elements that ignore certain subjects and other factors that come to fix their limited rationality (which we will address in the following section when dealing with the influence of irrational aspects in the decision-making processes (Takahashi 2013, p. 177). We assume that, in order to carry out an examination of the integral organization, we should not limit ourselves to the theoretical precinct of the rational, but should include everything that is involved in the decision-making processes that take place in the legal person. It is, therefore, necessary to adopt a holistic model of corporate criminal liability, which allows the incorporation of all those elements and factors that participate in the decision-making processes linked to compliance. This should be the horizon. In this regard, it is particularly significant that one of the most recent research carried out by the prestigious author specializing in behavioral economics and compliance, Feldman (2018), together with the expert from the Center for Law and Behavior of the University of Amsterdam, Reinders, the co-editor of *The Cambridge Handbook of Compliance*, Van Rooij, and other researchers, show us – on the basis of an in-depth scientific study on compliance with respect to the COVID-19 mitigation actions carried out in Israel – that the most appropriate way to understand and achieve compliance in the framework of the interaction of subjects is to resort to the cross-theoretical approach for a better understanding of all that compliance entails (Bruijn *et al.* 2022, pp. 1–36).

2.3. Behavioral game theory for optimizing the proposed anthropic model of criminal liability of legal entities

In decision making processes, there are elements of a more intuitive and unreflective nature that can affect the judgment or the meaning of our decisions and behavior. In fact, influential research, such as those conducted by researchers specializing in behavioral economics and psychology, Banaji and Greenwald (2016), or the Nobel Prize winner for his research on the rational decision-making model, Kahneman (2012), emphasize the existence of two ways or mechanisms of thinking: fast and slow thinking (although they are not radically separated). The former is impulsive and is intensely affected by biases, while the latter is more reflexive and allows a greater amount of information to be gathered prior to the decision, making it less likely to incur in an irregularity. Despite the fact that, due to the very configuration of the practices and procedures that govern decision-making scenarios in business environments, there is a tendency to choose those

informed decisions that are aligned with the strategies and policies of the organization (Mayer 2013, p. 118) offering us a much more comprehensive analytical vision of the motivations and behaviors that take place in legal entities. They also allow those responsible for the design of compliance programs or, as the case may be, compliance systems, and compliance officers to design tactics and controls, such as incentives and nudges (Ariely 2010) aimed at surreptitiously reducing the risks linked to the most irrational aspects or, directly, at promoting adequate compliance (and this, despite the fact that “direct or indirect benefit” is usually a legal-criminal requirement for the activation of corporate criminal liability).

Evidence from scientific experimentation has been gaining increasing prominence in the area of compliance and criminal risk control. So much so that, as shown by Langevoort (2018, pp. 263–281), “behavioral compliance” constitutes a singular subject matter highly valued for the design of more effective compliance systems, based on predictions elaborated on recent studies and experiments linked to the development of compliant/non-compliant behaviors. At this point, it is important to emphasize the importance of taking into account both the economic approach, which Miller (2018, pp. 247–262) stresses, and the behavioral experiences to increase the effectiveness of compliance systems from their design, and we consider it useful that, in litigation cases, advanced compliance expert opinions that incorporate these aspects in their analysis (whether they are carried out at the request of a party or agreed by the competent judicial body) are accepted (Aguilera 2022, p. 633). The “value-based approach to compliance and enforcement” (Hodges and Steinholz 2017) is an excellent example of the application to the corporate environment of what the behavioral sciences explain to us about compliance.¹⁶ Its precursors draw from psychology and behavioral economics numerous studies linked to issues such as the treatment of risk, group culture, the notion of justice, the sense of guilt in groups, the commitment to compliance in organizations, etc. to develop various strategies to strengthen compliance in companies. It is a matter of advancing in the study of compliance in organizations and abandoning theoretical ideas based on fictions that are easy to assimilate, as systems theory does by attributing human faculties to legal persons, a tendency¹⁷ that human beings have when analyzing any dynamic phenomenon (Wick *et al.* 2019). It is necessary to embrace the ideas and methodologies of analysis of the most complex studies based on scientific evidence, studies that truly consider the wide range of factors and circumstances that influence compliance within organizations (Van Rooij 2023).

As we have been emphasizing, in legal entities there is a context (which is the result of the interaction of the human component and not the result of a hypothetical system that self-generates it) that affects the behavior of the subjects that compose it (Ambrose *et al.*

¹⁶ I am grateful to Professor Christopher Hodges of the University of Oxford for the attention and material provided when I held the position of academic visitor at the Centre for Socio-legal Studies of this university.

¹⁷ Humans show a clear tendency to analyze or examine phenomena from a humanizing viewpoint. This happens when we try to understand events or acts associated with animals or things; in these cases, it seems intuitive for humans to attribute “human” faculties or feelings to other elements. And this despite the fact that this does not obey the reality of what is happening. About this phenomenon, the attribution of human faculties to other entities, it is appropriate to quote the old experiment performed by Heider-Simmel Illusion in 1944 (video of the experiment available at the following url: <https://www.youtube.com/watch?v=VTNmLt7QX8E>)

2008, p. 323, Jancsics *et al.* 2022), it is therefore important that the existing climate of constraints be conducive to compliance. There are factors that impact on our processes and knowing how to reduce this noise allows us to improve the judgments we human beings make (Kahneman *et al.* 2021), aspects that, as the reader will be able to deduce, are of enormous importance in the field we are dealing with. The conclusions of this typology of research on biases and less rational factors in decision making processes allow us to extract that, although the degree of influence on final behaviors can be discussed, such factors intervene following patterns (Ariely 2010) or guidelines, so they can be predetermined or normativized, incorporating their possible intervention together with the study of the list of – rational – decisions that can be adopted under the criteria of neoinstitutionalism.

At this point, it is appropriate to conclude this summary of the outlines of the anthropic model of criminal liability of the legal person with another tool that we consider relevant in this model: game theory (Palma and Aguilera 2017). This theory, which should not be confused with gamification or the use of playful games, is a field of economics and applied mathematics that uses models to study the strategic interaction of subjects when different factors or circumstances concur (e.g., different preferences, informational asymmetries, etc.). We are faced with a theory of widely proven scientific solvency and we consider that its meeting with the contributions of the behavioral sciences offers an advanced instrument, the “behavioral game theory” (Durlauf and Blume 2010), which could play a crucial role in clarifying the attribution of corporate criminal liability – as well as in the design of compliance systems –. In clear contrast to what happens with Luhmann’s questioned systems theory, game theory enjoys full validity and has the solid scientific backing of a very relevant group of Nobel Prize winners who have contributed to its improvement or used it as a tool for the study of human behavior in strategic contexts and when there are asymmetric flows of information (conditions that are very present in legal persons).

In addition to the aforementioned Ostrom, Nash and Hayek (Nobel Prizes in 2009, 1994 and 1974, respectively), we can point out Aumann and Chelling (Nobel Prizes in 2005) or Fama, Hansen and Shiller (Nobel Prizes in 2013) as some of the scientific researchers who have been awarded the Nobel Prize for their contributions to game theory and the study of decision dynamics. Among the most remarkable aspects of game theory, it is worth noting that its use as a tool for the analysis of decision-making processes involving various agents or strategic contexts where there may or may not be cooperation has been occurring and being promoted for years with great success. Thus, for example, game theory has allowed Elster (1989, p. 60 f.) to explain how order, norms and institutions appear spontaneously, as a result of the necessary cooperation of individuals; MacKaay (1991, p. 417) to explain the reasons for compliance with the rules of the game (e.g., the need to cooperate with the rules of the game) to explain the reasons for the fulfillment/breach of pacts or contracts and the necessary enforcement by the authorities; to McCarthy (2002, p. 417). It enabled him to offer very useful criteria for the prediction of crime in organized frameworks that consider key aspects of criminal sociology, etc.

Game theory is currently used by research agencies and public bodies as well as by private corporations to understand, and even predict, preferences and behaviors in groups and strategic frameworks. In fact, it is used to model pandemic breakthroughs,

strategies in war and socio-political conflicts, to understand preferences in markets, to clarify dominant positions and collusive practices, etc. In essence, through this theory we can extract which decisions are the most effective, the least beneficial, the riskiest, etc. from the set of possible decisions and, in turn, it enables a better understanding of the reasons that support the cooperation or non-compliance of the subjects that interact in the organizations.

This type of information resulting from modeling is enormously varied if we combine it with the factors or elements of study of neoinstitutionalism and behavioral compliance (in some cases coinciding), since it allows us to understand what really happens in companies and to design strategies of different nature (Wu *et al.* 2014), procedures and controls that prevent or reduce the probabilities of occurrence of irregularities or crimes, redirecting the strategic decision-making preferences of the subjects towards compliance and the adequate treatment of risk. In short, we argue that game theory in conjunction with the evidence of behavioral economics, provides the criminal law of the legal person with a rigorous methodology for a comprehensive analysis of the strategic interrelationship of legal persons. Its usefulness is not limited to offering a better understanding of the reality presented by organizations, i.e., it is not only appropriate as an explanatory theory of organizations, but it is a widely supported and scientifically consolidated analytical tool for predicting or designing adequate reaction mechanisms in the face of the extensive range of possible compliant/non-compliant decisions within the organization. And this from a dynamic – not static – and interrelated point of view, which takes into account a multitude of factors that influence the decision-making processes that take place in organizations.

3. Conclusions

Systems theory is one of the theories of organization analysis most criticized and questioned by the specialized literature due to its lack of ontological support. There is no solid scientific evidence to show that organizations function as closed autopoietic systems, with the capacity to self-organize and self-direct independently of the individuals that compose them. On the other hand, there are other more advanced theories and scientifically supported methodologies to which public agencies and private corporations resort to gain a more rigorous understanding of how organizations function and what happens in them.

In spite of this, a certain doctrinal sector and the Spanish Supreme Court have resorted to systemic theses as socio-legal support to justify the criminal reproach on the legal person. Since, from the systemic viewpoint, the organization can self-organize (ignoring the subjects, regardless of the position or functions they occupy), the legal person will be penalized for its own structural organizational defect (self-generated), which constitutes the corporate entity's own wrongdoing. The simplicity of the systemic postulates and the attribution of human aptitudes to the legal person (a tendency in which, intuitively, we all incur in trying to explain non-human dynamics) facilitated the assimilation of this theory by certain sectors of the criminal doctrine less permeable to the most recent – and complex – studies and evidence on the study of organizations.

We believe that the intense questioning of the systemic conjectures by the current specialized literature should have encouraged the Spanish Supreme Court to adopt a

more cautious stance and not to resort to them as a basis for corporate criminal liability. In our opinion, it would be appropriate to progressively abandon the jurisprudential acceptance of the strict systemic approach to support the model of self-responsibility. In contrast to the systemic model of criminal liability, we propose an anthropic model of criminal liability of the legal person that is based on notions, theories and scientific methodologies that have shown in other areas a great theoretical-experimental solvency to explain in a rigorous and comprehensive manner what happens in organizations.

The socio-legal basis of the anthropic model proposal enjoys, in addition, two aspects that give it further support: 1) that behind the theories that support it, and whose incorporation we propose to the field of criminal law of the legal person, there are an important number of recognized experts and Nobel Prize winners, and 2) that public institutions and private corporations resort to them to know, even predict, preferences and behaviors in groups or to establish possible strategic frameworks. As can be seen, these are factors that contrast radically with systems theory. According to this anthropic model, the legal person is conceived as an agent shaped by the human component that has an impact on the decision-making processes of the individuals in the organization, particularly with regard to the risk of criminal behavior. This corporate context that influences individuals is not self-generated and is not self-organizing, but is always the result of the strategic interaction of the individuals themselves, who are the ones who actually contribute the ideas, approve the decisions and policies, apply the procedures or controls and play a leading role in the organization's behavior. The human component, therefore, is essential in the examination of corporate criminal liability within the anthropic model. Under this model, the legal person is subject to criminal reproach when there is evidence of the presence of "constrictions" or influences conducive to the criminal conduct of the natural person. Since the legal person lacks the capacity to engage in its own wrongdoing, criminal liability can only be decreed when a "heterogeneous culpability" of the entity is established. This culpability, necessarily adapted to the corporate idiosyncrasy, of a different configuration from that of natural persons, will become apparent when in that corporate context the existence of a criminogenic reality that favored the commission of the crime is appreciated. In contrast to the systemic hypotheses, the adoption and implementation of a crime prevention model or system is not subordinated to the system itself, since it depends absolutely on the commitment and application of the human component of the organization. If a criminal conduct materializes within the scope of a legal entity that shows the effective execution of a compliance system containing suitable procedures, actions and controls (suitability judgment), the punishability of the corporate entity would be stopped.

The basis of the proposed anthropic model of criminal liability of the legal person is made up of theoretical and methodological elements perfectly aligned with an eclectic position of attribution of corporate criminal liability. Neoinstitutionalism, the evidence of behavioral compliance linked to compliance and game theory are the main elements that provide the socio-legal foundation for an anthropic model in which it is not accepted that the legal person can actually engage in unlawful conduct, but which considers the corporate entity as an agent or context transmitting influences that affect the decision-making processes.

Neoinstitutionalism makes it possible to conceive of the legal entity as an agent that influences individuals in making profit-oriented decisions, together with other key elements taken into account in decision-making processes (e.g.: set of possible actions and outcomes, position of subjects in the organizational chart, costs and benefits, etc.). Game theory, for its part, allows us to analyze with the utmost rigor the dynamics of action arising from the interrelation of individuals in organizations and, in addition, offers us very valuable information to determine aspects such as the predominance of certain positions, the effect of informational asymmetries on decisions, etc. Although its understanding is much more complex (due to its modeling and mathematical aspect) than the systemic postulates for those of us in the legal-criminal field, we believe it is appropriate to be permeable to this scientific tool, since it has solid experimental support in the analysis of decision-making in organized contexts and strategic interaction.

Finally, the incorporation into this corpus of those less rational aspects that affect the decision-making processes associated with compliance (illustrated by the experiments offered by the field of behavioral economics and group psychology known as behavioral compliance) allows us to complete those aspects of the study of decision-making processes in corporate contexts not contemplated from a strictly rational perspective. The idea is to assume that there are more emotional or irrational circumstances or factors that affect or cloud rationality when it comes to developing compliant/non-compliant behaviors. The incorporation of these elements provides a comprehensive understanding of the decision-making processes that take place in legal entities and their confluence with the modeling offered by behavioral game theory methodologically refines this anthropic model proposal. In short, we consider that the conjectures of the former systems theory should not serve as a valid socio-legal basis for corporate criminal liability. In our opinion, the theses and notions that make up the proposed anthropic model, although more complex, can offer us a scientifically validated theoretical and methodological corpus, which would allow us to face the challenges presented by the criminal liability of the legal person with greater coherence.

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