

Programmes for the prevention of criminal accusations: from a recommendation to a legal requirement

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In order to alleviate the difficulties encountered by our judges over the past three years in respect of the interpretation and scope of the criminal liability of legal persons, introduced in our legal system on 23 December 2010, the Criminal Code Reform Bill (the "Reform Bill") has introduced a set of significant new features: (i) greater precision of the elements that make up the criminal liability of legal persons, (ii) express recognition of the programmes for prevention of criminal accusations leading to the legal person's exemption from criminal liability in those cases in which, fulfilling a set of requirements, the programmes have been duly implemented, and (iii) legislative intent to introduce a new type of offence in respect of a legal person's breach of its duties of oversight and control.

1. Requirements for the accusation of a legal person

Pursuant to the intended new wording of article 31 bis of the Criminal Code, legal persons will be criminally liable if the following requirements concur:

1. Commission of any of the offences classified in the Criminal Code as capable of being committed by a legal personⁱ.
2. The offence must be committed while carrying out company business in the name or on behalf of the legal person and to its direct or indirect benefit.
3. It must be committed:
 - a) By the legal person's statutory representative or by those persons who, acting

individually or as members of the legal person's governing body, are authorised to make decisions on the legal person's behalf, or when such persons hold organisational and control powers in the legal person.

- b) By the legal person's employees, subject to the authority of the persons mentioned in paragraph (a) above, who commit the offence due to a breach of the duties of supervision, oversight and control over them.

This new wording leaves behind the concept of a *de facto* or *de iure* director as an individual liable for the offence attributed to the legal person and now bases such criminal liability on the real or effective management and control capacity within the legal person. It also eliminates the ambiguity of the word "advantage" in the current version, replacing it with the requirement that the legal person obtain a "direct or indirect benefit" as an additional element of the class of offence for which it is liable.

2. Organisational and management models as instruments for the legal person's exemption from criminal liability

One of the most significant new features introduced by the Reform Bill is precisely that it provides the possibility of the legal person being "exempt" from criminal liability, as opposed to the current wording, which only provides for a possible "mitigation of the sentence" in those cases where, prior to the trial being held, the

legal person has established efficient measures for the prevention and discovery of future offences.

In order for a legal person to be exempt from liability, the concurrence of certain conditions is required, depending on the specific individual who has committed the offence:

1. *Statutory representative or person with decision making or management and control powers.* The company may be "exempt" from criminal liability if the following conditions concur:

- a) *Organisation:* if the governing body has implemented organisational and management models that include the ideal oversight and control measures for prevention of offences of the same nature as those of which the legal person is accused.
- b) *Timing:* the organisational and management models must be adopted and executed prior to the commission of the offence of which the legal person is accused.
- c) *Functionality:* supervision of the functioning and fulfilment of the organisational and management models must be entrusted to an independent body within the company.

The Reform Bill clarifies that in small legal persons, that is, those that are authorised to file abridged income statements, this supervision and control function may also be assumed by the governing body, with no need for there to be another body within the legal person charged with this function. This is due to the fact that the Reform Bill intends that these organizational and management models

adapt to the size and characteristics of each legal person.

- d) *Intent:* fraudulent avoidance of the organisational and management models by the presumed authors of the offence.
- e) *Due care:* no negligence in the independent body's supervision and control duties.

In the event that all these conditions do not concur or that they can only be partially evidenced, the final sentence imposed on the legal person may only be mitigated.

2. *Employees subject to the authority of the statutory body of employee representatives or person with decision-making or management and control powers.* In these cases, only the concurrence of the following conditions is required:

- a) Implementation of the organisational and management models prior to the commission of the crime.
- b) Monitoring of working and fulfilment of such management models must be entrusted to an independent body of the company. In any event, what has been mentioned regarding small legal persons is also applicable to these cases.¹

3. Criminal charge prevention programmes: requirements that must be met.

Regardless of what natural person within the legal person commits the offence, organisational and management models must have been adopted and implemented effectively and must meet the following requirements:

- a) Identification of activities of the legal person in whose ambit the offences that must be prevented may be committed.

¹ Article 258 of the Spanish Companies Act.

- b) Establishment of protocols or procedures specifying the legal person's process of: (i) intention-formation; (ii) decision-making; and (iii) implementation.
- c) Have adequate financial resource management models to prevent the commission of the crimes that must be prevented.
- d) Imposition of the duty to report on potential risks and breaches to the body responsible for monitoring the operation and observance of the organisational and management model.
- e) Implementation of a disciplinary system that adequately punishes the breach of measures under the model.
- f) Adoption of measures tailored to the legal person's activities, size and nature, aimed at early detection and prevention of risk situations.

The organisational and management models should also provide for their own modification and upgrade in the event of detecting significant infringements of the measures under the same or when changes in the legal person's organisation, control structure or conducted activity transpire.

4. The new category of offence deriving from the legal person's breach of duty to supervise and control.

The Reform Bill widens the current liability of *de iure* or *de facto* board directors.

The new article 286.6 of the Criminal Code provides for prison sentences or fine and professional disqualification for statutory representatives or *de facto* or *de iure* directors of any legal person or company, organisation or entity that lacks legal personality, that has failed to adopt supervision or control measures necessary to prevent infringement or dangerous duties or behaviour classified as an offence; all this with the commencement of one such unlawful conduct that would have been prevented, or at least seriously hampered, if due care had been taken.

The Reform Bill stresses the need to establish a causal link between the commission of the

offence and the absence of oversight measures, in the sense that if the organisational and management models had been implemented, the unlawful conduct would not have occurred or at least would have been seriously hampered.

As for what those oversight and control measures will be, the Reform Bill includes recruitment, careful and responsible selection, and monitoring of the person or persons responsible for carrying out independent oversight and control in pursuance of the organisational and management models.

The Bill also provides for the reckless commission of said offence. In no event can a penalty be imposed that is more severe than that provided for the offence that should have been prevented or hindered by the oversight and control measures.

In short, the significance of this new provision is that if the wording of the Reform Bill is passed, the statutory representatives or the *de facto* or *de iure* directors of any legal person or company, may be convicted (i) for offences committed where, the conditions to be charged with an offence not being personally met, they are met by the legal person or company in whose name or on whose behalf they act, as well as (ii) for offences committed within the legal person or company due to neglect or omissions in the adoption of those oversight and control measures for the prevention of criminal conduct.

This provision would also apply in those cases where directors cannot be made criminally liable for the criminal offence which could have been prevented if the organizational and management models had been duly implemented in the legal person they represent.

The discovery and disclosure of secrets offence; fraud and its forms; offences concerning punishable insolvencies; computer crime; crimes against intellectual and industrial property; against the market and consumers; corruption between individuals; money receipt and laundering offence; crimes against the Spanish Inland Revenue and Social Security, against the rights of foreign citizens; crimes in construction, building and urbanization; against natural resources and the environment; offences related to nuclear energy and ionizing radiation; risk caused by explosives offence;

counterfeiting credit cards, debit cards and travellers checks offence; bribery offence; crimes involving influence peddling; corruption in international business transactions offence; illegal

trafficking of organs offence; illegal human trafficking offence; offenses related to prostitution and corruption of minors; terrorist financing offences and crimes against the public health.

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