

Legal Entity: Criminal Liability

Organic Law 5/2010 of 22 June 2010, which amends Organic Law 10/1995 of 23 November 1995, on the Criminal Code (*LO 5/2010 of 22 June, which modifies LO 10/1995 of 23 November of the Criminal Code*) ("**LO 5/2010**") establishes for the first time in the Spanish Criminal Code (*Código Penal*) ("**CP**") an express provision on the criminal liability of legal entities for crimes committed on their behalf by their representatives, de facto and de jure administrators, employees and/or workers.

Premises of the legal entity's criminal liability

LO 5/2010 amends the Spanish law concept of the criminal liability of legal entities for crimes committed on their behalf and for their benefit by legal representatives, administrators, employees and/or workers.

The criminal liability which a court or tribunal may impose on a legal entity is compatible with (i) the criminal liability which may be imposed on an individual having committed the offence, (ii) any civil liability deriving from the loss and damage that the offence may have caused to the injured party or parties, and (iii) any other type of civil or administrative liability which may be imposed on the legal entity or the individual.

In order for the legal entity to be criminally liable, the offence must have been committed for or on its behalf and for its benefit by the following individuals:

- the legal representatives and de facto and de jure administrators of the legal entity;
- the workers and/or employees of the legal entity, provided that the crime was committed while carrying out business activities on behalf of the entity and that the events took place as a result of not having exercised due supervision in line with the circumstances of the event.

The legal entity is only liable for certain criminal offences that are expressly provided for in the Criminal Code. The following crimes are particularly relevant as regards corporate law:

- discovery and disclosure of confidential information;
- fraud and criminal insolvency;
- crimes relating to intellectual and industrial property, markets and consumers;
- tax fraud and money laundering;
- urban planning and environmental offences; and
- corruption.

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Penalties which may be imposed on legal entities

LO 5/2010 contains the following penalties which may be imposed upon a legal entity:

- fines;
- dissolution of the legal entity;
- suspension of activities for a period of up to 5 years;
- closure of the premises and establishments for a term of up to 5 years;
- ban on carrying out any activities in the future during the performance of which a criminal offence was committed, abetted or concealed. This ban may be temporary or permanent, with any temporary ban not exceeding 15 years;
- disqualification from obtaining subsidies and public aid, from entering into contracts with the public sector and from enjoying tax or social security benefits and incentives for a term of up to 15 years;
- legal intervention for a period of up to 5 years.

Means to avoid criminal liability

LO 5/2010 does not expressly regulate the mechanisms with which a legal entity may decrease the risk that it will be considered criminally liable for the crimes committed on its behalf and for its benefit by its representatives, administrators, employees and/or workers.

However, LO 5/2010 requires that, in order for the legal entity to be criminally liable for offences committed by workers and/or employees, the latter must have been able to carry out the events as a result of due supervision not having been exercised in accordance with the specific circumstances of the case. Therefore, the legal entities will not be criminally liable if they enforce appropriate supervision policies for their employees. In any case, this is a question of fact that must be assessed on a case-by-case basis.

Furthermore, LO 5/2010 stipulates as attenuating circumstances of the legal entity's criminal liability the establishment of enforceable measures to prevent and discover the offences which may be committed in the future with the legal entity's means or under its supervision.

In accordance with the above, **it is highly advisable for legal entities to establish internal measures to prevent and discover crimes which may be committed in the future.** Such measures must be reflected in a corporate compliance manual which sets out, among other considerations, the entity's risk-mapping, bearing in mind its activities and organisational structure, the internal policies and procedures in accordance with such risks, the internal upstream and downstream channels of communication and the establishment of a supervisory committee, to name but a few.

The measures contained in the corporate compliance manual must be logical and consistent with the codes of proper conduct and the internal supervision procedures that the legal entities have already implemented, adapting them as necessary to the new regulation and reinforcing matters such as money laundering, corruption, fraud and use of privileged information.

Clifford Chance Madrid has a multidisciplinary team specialised in advising its clients on the implications that this new regulation has for its business, as well as in drafting corporate compliance manuals.

This Client briefing does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

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