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Corporate Criminal Compliance in Spain

The reform of the Spanish Penal Code
(in force since 1st of July 2015)

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Abstract:

Following the major changes introduced in Spain by the Ley Orgánica 1/2015, we consider appropriate to write these short lines about the drafting of Article 31bis of the Spanish Penal Code, which governs, although in a way not quite complete, the criminal liability of legal persons.

The recent reform of the Spanish Penal Code (*Ley Orgánica 01/2015*) introduces in Spain, for the first time, a real “Corporate Compliance” system in Spain.

The Spanish legislature confirms and develops the intent of the previous reform of the Penal Code, dated 22nd June 2010.

The responsibility system devised by the Spanish legislature bases its foundations on direct Compliance models to prevent the commission of crimes in the bosom of his business.

The Article 31a, albeit is not entirely exhaustive, indicates the minimum requirements that the *Compliance* models have to possess.

The Article 31 bis of the Spanish Penal Code

At the paragraph 1 of Article 31bis, the objective and subjective requirements that make criminally responsible for a legal person are listed.

First at all, the company will respond to the offenses committed for their direct and indirect advantages (indirect benefit means the economic saving caused by the failure to follow a rule, but also the possible advantage on the competition illegally obtained).

Physical persons who can “transfer” the responsibility of the legal person are:

- The legal representatives and volunteers, administrators of fact and law, and those who, acting individually or as part of an organ of the legal person, holding the right to organize and control the Company.
- Employees under the authority of the persons mentioned above, if they have committed crimes for a severe lack of supervisory, supervision and control duties.

In order the company is not sentenced, the following circumstances have to contribute:

- The adoption of models of organization and management, before the commission of the offense, aimed at the prevention and reduction of criminal risk (Compliance Program).
- The operation and observance supervision of the model headed by an internal organ of the Company with autonomous initiative and control powers.

- People who committed the crime have fraudulently eluded the models of organization and management.
- There was an omission or insufficient exercise of oversight, control and supervision by the body of organization and control.

The burden of proof

Recent judgments of the Spanish Supreme Court (STS 154/2016 e STS 221/2016) have been expressed, in obiter dicta, about the burden of proof of the listed requirements, stating that weighs on the charges the burden of proving the existence of the legal person offense.

What Spanish judges maintain is that any probative reversal would create an unacceptable rebuttable presumption of guilt, openly violating the presumption of innocence of art. 24.2 of the Spanish Constitution.

Paragraph 3 of art. 31bis

Continuing with the analysis of the new article 31 bis, at the paragraph 3, the Spanish legislature has granted to the directors of small and medium-sized enterprises the opportunity to be part of the control and supervision.

Paragraph 4 of art. 31bis

The paragraph 4 of this Article provides that when the crime has been committed by a subordinate (Article 31 bis, paragraph 1, letter “b”), the Company will be liable if it has not adopted and implemented effectively a model of organization and management.



Paragraph 5 of 31bis: technical requirements of the model of organization

Of great interest is the last paragraph (5) of the Article 31bis which lists the technical requirements that a model of organization and management needs so that is considered suitable and effective.

The organizational and management models have to:

- Identify the areas in which the offenses (criminal risk assessment and analysis) can be committed.
- Plan specific protocols regarding the adoption of decisions and their execution.
- Have adequate resources to prevent the commission of crimes that have to be prevented.
- Plan information obligations to the body responsible for supervising the functioning and observance of the models.

- Create a whistleblowing and a system of sanctions.
- Periodically check the operation of the model and modify it in the event of violations that denote an ineffectiveness of the same.

Which companies have to adopt the Compliance models?

The Article 31bis is directed to legal persons.

Article 31 fifth of the Criminal Code, however, exclude from the application of public body legislation (State, public administration, economic public bodies, international organizations).

The Spanish legislator, while not imposing a specific obligation, emphasizes the importance of creating an entrepreneurial culture of regulatory compliance, providing that the only extenuating circumstance and the correct application of a model of *Compliance*.



A specific case: the Spanish subsidiaries of foreign Companies.

Special reference must be made in relation to branches of foreign companies in which *Compliance* internal models are already enforced.

It is important to clarify how the normative contented in the Article 31 bis, paragraph 5 prevents the automatic application of models coming from a foreign parent company. The need to adapt the prevention internal protocols of the *Holding* stems from the following regulatory elements:

- The regulatory obligation, ex Article 31 bis, of the Criminal Code, to carry out an analysis and evaluation of the specific risks of the Spanish criminal branches.
- The existence of different types of offense that the Legal Person may commit in Spain.
- The adaptation of the whistleblowing of the Company to the Spanish labor law and to the law regarding Spanish privacy.
- The existence of a different regulation for environmental crimes.
- The requirement to create an internal specific body for the Spanish branch to which they attribute the supervisory tasks, supervision and operation of models.

Compliance Officer or an internal organ?

The Spanish legislation does not refer to a “*Compliance Officer*”, but rather to an internal organ of control, as specifically mentioned in Article 31 bis, paragraph 2, 2nd.

The Spanish Penal Code, in fact, requires the creation of an official internal organism with autonomous initiative and control powers.

This corporate structure has distanced itself from the model, mostly US, which gives internal managers (*Compliance Officer*) the responsibility to supervise and control the activities of the company on a global or regional level.

It is necessary, therefore, in the case of branches in Spanish territory, the creation of an “internal control body” or, at least, an internal review related to the real capacity of the Global / regional *Compliance Officer* to monitor effectively the subsidiary *Compliance* model.



Conclusions

Bufete Escura offers a wide range of *Compliance* services addressed to Spanish and foreign companies, including:

- The implementation of Compliance models that include the analysis of criminal risks according to the offenses covered by the Spanish Penal Code, the creation of a whistleblowing appropriate to the Spanish legislation and personnel training.

- The creation of an internal Organ more appropriate to the Company’s Supervisory, preparation of rules of procedure and specific training of its members.

- External advice to the Supervisory or internal as member advisory.

Bufete Escura, as member of **TAGLAW**, **INTERLEGAL** and **HISPAJURIS**, is one of the most important law firms in Spain specialized in consulting and development of Compliance systems in Spain.

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