

Legal Entity: Criminal Liability

Organic Law 5/2010, of 22 June, which amends Organic Law 10/1995, dated 23 November, on the Criminal Code (*LO 5/2010, 22nd June, which modifies to LO 10/1995, 23rd November, of Criminal Code*) ("**LO 5/2010**") establishes for the first time in the Spanish Criminal Code (*Código Penal*) ("**CP**") an express regulation 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 in Spanish law the concept of criminal liability of legal entities for crimes committed on their behalf and in 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 that committed the offence, (ii) any civil liability deriving from the loss and damage that the offence may have caused to the victims, 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's criminal liability to exist, the offence must have been committed for or on its behalf and in 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, when the crime was committed while carrying out corporate activities and the events took place as a result of not having exercised due supervision in accordance with the circumstances of the event.

The legal entity is only liable for certain crimes that are expressly established in the Criminal Code. The following crimes stand out for their relevance in Corporate Law:

- Discovery and disclosure of secrets;
- Fraud and punishable insolvency;
- Crimes related to intellectual and industrial property, the market and consumers;

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If you would like to know more about the subjects covered in this publication or our services, please contact:

[Fernando Giménez-Alvear](#)

[Iñigo Villoria](#)

[José María Fernández-Daza](#)

[Natalia López Condado](#)

Phone .+34 91 590 7500

To email one of the above, please use firstname.lastname@cliffordchance.com

Clifford Chance,
Paseo de la Castellana 110,
28046 Madrid, Spain
www.cliffordchance.com

- Tax fraud and money laundering;
- Urban planning offences and crimes against the environment; and
- Corruption offences.

Penalties which may be imposed on legal entities

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

- Fine;
- Dissolution of the legal entity;
- Suspension of activities for a term of up to 5 years;
- Closure of the premises and establishments for a term of up to 5 years;
- Prohibition from carrying out in the future any activities during whose performance the crime was committed, favoured or concealed. This prohibition may be temporary or definitive. If it were temporary, the term may not exceed 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 term of up to 5 years.

Means to avoid the legal entity's 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 in 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 because due supervision was not 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 over 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 crimes 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 recommendable for legal entities to internally establish enforceable measures to prevent and discover crimes which may be committed in the future.** Such measures must be reflected in a Corporate Compliance Manual which describes, among other aspects, the entity's risk-mapping, bearing in mind its activity and organisational structure, the internal policies and procedures in accordance with such risks, the internal channels of upward or downward communication and the establishment of a supervisory committee, to name 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 already have 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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