Compliance programs in the Draft Bill on the Reform of the Criminal Code: are they obligatory, with a failure to implement them constituting an offence?

On 20 September 2013, the government passed a decision to send a far-reaching([1]) Draft Bill of an Organic Law on the Reform of the Criminal Code to the *Cortes Generales*, so that it could begin its passage through parliament. Among other things, it introduces a new offence in what would be new Article 286.6, which states as follows:

> "*1.- Any legal representative,* de facto *or* de iure *director of a legal person or company, organisation or entity without legal personality, that fails to adopt the measures of surveillance or monitoring that are required to prevent the breach of duties or dangerous conduct classed as an offence, when such unlawful conduct commences and would have been avoided or, at least, severely restricted if the proper diligence had been exercised, will be punished with a term of imprisonment of between three months and one year, or a fine of between twelve and twenty-four months, together with special disbarment from industry or trade for between six months and two years in any event.*
>
> *These measures of surveillance or monitoring include the hiring, careful and responsible selection and surveillance of the inspection and monitoring personnel and, in general, those set out in sections 2 and 3 of Article 31 bis.*
>
> *2.- If the offence is committed due to negligence, the fine will be of between three and six months.*
>
> *3.- The punishment imposed will not be more severe than that envisaged for the offence that should have been prevented or restricted by the surveillance and monitoring measures not adopted.*"

This new precept, if passed as is, definitively requires companies to design and implement organisation and management models that include the appropriate surveillance and monitoring measures to prevent criminal behaviour that the company (or its directors, representatives or

[1]. We will be sending our clients a memo on the other aspects shortly.

employees) is potentially at risk of committing, due to its activity. Because, unless the measures are adopted, the directors or representatives will be adding further criminal liability to the criminal liability of the company and that of its directors, representatives or employees for the main offence.

The rule makes no exception for companies on grounds of size; that is, it does not release any kind of company from the obligation, because the offence does not distinguish between small, medium-sized or large companies and, as such, they are all obliged to implement these management models, although they will obviously have to be adapted to the characteristics of the company in question.

It does not go so far as to criminalise the failure to implement a crime prevention model in all cases, only in those in which an offence was committed by directors, representatives or employees of the company that could have been avoided or seriously restricted had such a model been implemented. Therefore, the companies that have not implemented said model, or their directors and representatives, know that they are running a twofold risk; the risk of generating liability for the offence not avoided and the risk of not having avoided said offence.

Moreover, and it is important to highlight this, the Project includes the negligence scenario, where the negligence does not have to be serious. This means that not only are those persons who deliberately failed to implement a model punished, so are those who could and should have implemented the model, but failed to do so in this case due to a failure to exercise the proper diligence.

Meanwhile, the text of the precept stresses that the surveillance and monitoring measures should include:

- The hiring, careful and responsible selection, and surveillance of inspection and monitoring personnel;

- The measures envisaged in sections 2 and 3 of Article 31 bis.

These measures envisaged in said sections of Article 31 bis of the Draft Bill, which constitute the minimum content of the prevention model, consist of the following:

1. **In the case of offences committed for or on behalf of companies, for their direct or indirect benefit, by legal representatives or those who, acting individually or as members of a body of a legal person, are authorised to take decisions on behalf of the legal person or hold powers of organisation or control within the same:**

   First, that prior to the commission of the offence, the management body has adopted and efficiently executed organisation and management models that include the appropriate surveillance and monitoring measures for preventing offences of the same kind;

   Second, that supervision of the operation of and compliance with the prevention model implemented has been entrusted to a body of the legal person with autonomous powers

of initiative and control (appointment of a compliance officer or compliance committee), although in "*smaller-sized*" companies (i.e., those authorised to present an abridged profit and loss account) this function can be performed by the management body; and

Third, that there has been no omission or insufficient exercise of the surveillance and monitoring functions on the part of the compliance body. If these circumstances can only be proven in part, they may also be taken into consideration for the purposes of mitigating any sentence.

2. **For offences committed in the performance of corporate activities and on behalf and for the direct or indirect benefit of the same, by persons who, while subject to the authority of the natural persons mentioned in the first paragraph of section one, were able to carry out the acts due to a failure by the former to perform the duties of supervision, surveillance and monitoring of their activity, in the context of the particular circumstances of the case, when an organisation, management and monitoring model that is appropriate for preventing offences of the kind committed has been effectively implemented.**

3. **In any event, the prevention models must meet the following requirements:**

   a) **Identify the activities in the sphere of which the offences that must be prevented could be committed (risk assessment);**

   b) **Put in place the protocols or procedures that establish the process for constituting the will of the legal person, the decision-making process and the execution of decisions in relation thereto (code of ethics or corporate conduct);**

   c) **Include appropriate management models for financial resources in order to avoid the commission of the offences that should be prevented;**

   d) **Impose the obligation to inform the body responsible for overseeing the operation of the prevention model of possible risks and breaches (*whistle blowing*);**

   e) **Establish a disciplinary system that appropriately sanctions any breach of the measures introduced by the model.**

All these measures will obviously have to be designed and adapted according to the nature and size of the organisation as well as the type of activity carried out, so that they guarantee the performance of its activity in accordance with the law and make it possible for situations of risk to be rapidly detected and prevented.

Moreover, the model must be verified periodically and if necessary modified where significant infringements of its provisions are identified or when there are changes in the organisation, in the control structure or in the activity carried out that make such modifications necessary.

Clifford Chance is prepared to advise our clients on any doubts they may have when it comes to learning about and understanding this draft bill for new legislation, and will be only too happy to help you design or implement a crime prevention model in your company.

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