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THE REFORM OF THE CRIMINAL CODE: MARKET ABUSE AND CORRUPTION. NEW COMPLIANCE RISKS

Following several requests from the European Union, LO 1/2019, of 20 February, was approved, transposing a variety of Community Directives, including particularly significant ones on market abuse -manipulation of information and transactions- and the fight against fraud that affects the financial interests of the European Union, as well as issues pertaining to traffic in organs and terrorism.

As we indicate below, in a summarised analysis of the main new developments affecting financial markets and corruption, this will have to lead to significant changes in compliance programmes as the legislator has modified the risks to be prevented, particularly in relation to markets and embezzlement of public funds, an offence for which legal entities can now be held liable.

Key issues

- Market abuse and use of inside information
- Private sector corruption
- Public sector corruption
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MARKET ABUSE AND USE OF INSIDE INFORMATION

The most significant aspects in relation to market abuse and the use of inside information are the increase in the prison sentences which can now be up to six years, and the extension of the same to include scenarios that were previously dealt with via the administrative route, such as attempted offences, now expressly cited in the Preamble as possible offences related to the securitise market.

MARKET ABUSE (ART. 284 CP)		
Manipulation of information (art. 284.2 CP)	The reform introduces a specific reference to internet and other information and communications technologies, as well as increasing the number of scenarios that can constitute an offence.	• prison sentences between six months' and six years • a fine of two to five years or triple the profit obtained or favoured or the losses avoided • special disqualification from intervening in the financial market as an actor, agent or mediator or informer for between two and five years.
Manipulation of transactions (art. 284.**3** CP)	The reform removes the reference to the use of inside information from the text, meaning that this offence can be committed with or without inside information.	

INSIDE INFORMATION (art. 285 CP)
New wording of the rule is introduced, criminalising the acquisition, transmission or assignment of a financial instrument, or the cancellation or modification of an order, using inside information to which restricted access was obtained. The inside information will have been obtained by the member of the management, administrative or supervisory body of the issuer or of the participant in the emission allowances market, who holds a stake in the capital of the issuer or of the participant in the emission rights market, who is in possession of the same through the exercise of his/her professional or business activity or in the performance of his/her duties, and who obtains it as a result of criminal activity.

Under the previous regulations, both scholarly opinion and case law made it clear that the amounts which delimited administrative liability and criminal liability were precisely objective conditions of accountability. Following the reform, due essentially to the interpretation contained in the Preamble, the delimiting elements become constituent elements, which in practical terms means that it can include cases of attempted offences, which under the previous regulations, like with tax offences, fell outside the sphere of criminal law.

The delimiting elements, according to the new reform, for cases of manipulation of transactions and information, will be the following:

a) That the profit obtained or harm caused by the conduct is in excess of two hundred and fifty thousand euros, except in the case of the use of inside information, where it is increased to five hundred thousand euros.

b) That the amount of the funds used is in excess of two million euros.

c) That is has a major impact on the integrity of the market.

In addition to the above, it establishes an escalation of sentences which must be in the upper half of the scale for cases where a person regularly carries out such abusive practices, where the profit or loss is of particular significance or the person responsible is a worker or employee of an investment services company, financial institution, supervisor or regulatory authority, or governing entities of regulated markets or trading centres.

ART. 285 BIS, TER Y QUÁTER,	Punish market prospection by using inside information, that the financial instruments can be European and Spanish and that will also punish preparatory acts -provocation, proposition and conspiration-.

As a result of the escalation of the sentences for natural persons for the offences of market abuse and the use of inside information, the sentences to be imposed on legal persons are also modified. Thus, Article 288.2º a) CP envisages a fine of between two and five years, or between three and five times the profit obtained or that could have been obtained if the resulting amount is higher. Moreover, the sentences envisaged in Article 33.7 CP may be imposed, which include the winding-up of the legal person, the suspension of activities, the closure of premises and establishments, the prohibition on carrying out activities in the context of which the offence was committed in the future, a disqualification from receiving public subsidies or aid and intervention by the courts.

PRIVATE SECTOR CORRUPTION

The reform only amends the wording of Article 286 bis CP in that it adds the *promising or offering* to obtain an unfair benefit or advantage for oneself or for a third party, to the list of the conduct of receiving, requesting and accepting it, which were already provided for therein.

PUBLIC CORRUPTION

In this regard, two changes are made which, once again, extend the scope of criminalisation of certain kinds of conduct: firstly, and especially, in terms of individuals reporting to the European Union now being considered public officials and, secondly, as a result of extending the criminal liability of legal persons in relation to offences of embezzlement of public funds, which is foreseen in Article 435.5. This opens the door to future amendments along similar lines to the offences of misappropriation and improper management. As a result of the reform, the offence of embezzlement of public funds now falls within the list of offences for which legal persons can be held criminally liable, pursuant to Article 31 bis CP.

- **European officials**

The amendment to the definition of public officials is made by means of the insertion of paragraph d) into Article 427 CP, which reads: "any individual entrusted with and carrying out a public service role involving the management of financial interests of the European Union or the decision-making on such interests, in the Member States or in third countries".

- **Embezzlement of public funds as an offence for which legal persons can be held liable**

The above-mentioned amendments are most certainly relevant to compliance programmes, as any risks detected may have varied as a result of the significantly heavier penalties. They are also particularly relevant to companies operating in the public sector - especially those working with public enterprises and institutions - given the notable changes to the risks related to the offence of embezzling public funds, and even more so following the latest Supreme Court decisions in this regard, which considerably broaden the concept of public funds.

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