

# CONTEMPORARY CHALLENGES OF CRIMINAL LIABILITY OF LEGAL ENTITIES: CRITERIA FOR IMPUTATION, GUILT AND BASIC PROCEDURAL RIGHTS.<sup>1</sup>

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## *Abstract*

The recognition of criminal liability of legal entities is unstoppable, although, as we will see, on the one hand, said recognition is introduced with notable timidity in terms of its scope, and, on the other, to date, there are few significant procedures in those that have been used. From a material perspective, the problems that arise of criminal liability of legal entities are essentially at four levels: a) crimes to which they apply; b) responsible parties; c) criteria of imputation; d) culpability. We have dealt with all of them on numerous occasions, so we refer to what was said then, limiting ourselves in this paper to a succinct exposition of the last two issues to which we will add a brief reference to constitutional rights of legal persons, both material and procedural.

## *Keywords*

Criminal liability. Legal entities. Constitutional rights.

## *Summary*

1. Introduction. 2. Criteria for the imputation of crimes to supra-individual entities. 2.1. Approach. 2.2. Connecting fact and wrongfulness of the crime attributable to legal persons: dangerousness for legal assets and criticism of the defect of organization as a nuclear element. 3. Organizational defect as a matter of guilt of the legal person. 4. Basic procedural rights of legal persons. 4.1. Approach. 4.2. The case law of the Court of Justice of the European Union (CJEU). 4.3. Presumption of innocence and the right to defense of legal entities. 4.4. Other procedural rights, especially the right not to incriminate oneself.

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## 1. Introduction

As is well known, the dominant trend in the countries of our legal and cultural environment has been to overcome the old brocardia *Societas delinquere non potest* or *Universitas delinquere nequit*. The recognition of criminal liability of legal persons is unstoppable, although, as we shall see, on the one hand, this recognition is introduced with notable timidity as regards its scope, and, on the other hand, to date, there are few significant proceedings in which it has been used. By way of example (and regardless of the modifications being experienced in each country), the aforementioned liability was recognized in a pioneering manner in Brazil in its 1988 Constitution and effectively in the Environmental Crimes Law in February 1998; it was followed by Chile in 2009 with Law 20.393; Argentina with Law 26.683 B.O. 21/06/2011 (article 304 CP)<sup>3</sup>; Ecuador in 2014<sup>4</sup>; Peru, through Law 30424 in 2016 ("administrative" liability of legal persons); in Mexico at the federal level in 2016 (publication on June 17, 2016 in the Official Gazette of the Federation amending the Federal Criminal Code and National Code of Criminal Procedures) to which must be added some Criminal Codes of the states, Mexico City, etc.

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<sup>3</sup> Although it already had precedents in laws 26.683 (money laundering), 24.769 and 26735 (tax criminal) and 26.733 (economic and financial order), despite which certain doubts had been raised, regarding such precedents; as of today, it is necessary to take into account Law 24.701 of November 27, 2017 criminal liability regime for legal persons for crimes committed against the public administration and transnational bribery.

<sup>4</sup> Indeed, art. 49 of the Organic Comprehensive Criminal Code of Ecuador (hereinafter CP) recognizes the criminal liability of legal persons "in the cases provided for in this Code". However, it is then limited to a few figures: art. 205, fraudulent insolvency; art. 243, lack of affiliation to the Ecuadorian Institute of Social Security; art. 258, environmental crimes; unjustified private enrichment, tax fraud, etc. As far as I can see, the main corruption crimes are not included: bribery, extortion, embezzlement and influence peddling.

Nevertheless, there is still a certain group of reluctant countries, such as Colombia and Uruguay. However, my impression is that in time the phenomenon is unstoppable and will eventually be recognized in practically all systems.

Overall, it can be said that the system is generalized (with the exceptions mentioned above, in addition to Germany, which is not minor); of limited scope; based on its own facts; and with recognition of the cause of exclusion or mitigation of culpability of the implementation of *compliance programs* suitable for the prevention of unlawful acts.

The factors that have determined the expansion of the phenomenon are multiple. I would cite three. On the one hand, the Anglo-Saxon influence (surely also the Spanish one, although it is worth remembering that in Spain the criminal liability of legal persons was introduced by means of the LO 5/2010 of June 22, the system being modified by means of the Organic Law 1/2015 of March 30). On the other hand, the requirements of the OECD for the entry of the country had been requiring the implementation of criminal liability of legal persons for corruption offenses. Finally, a certain dogmatic climate has overcome the traditional reticence very much determined by German thought.

In addition, it is important to make some clarifications.

1. All systems are characterized by the recognition of the possibility of sanctioning legal persons administratively, a responsibility, therefore, much earlier in time, than criminal law. Therefore, if traditionally the principles of criminal law are applied to administrative sanctioning law, on this particular point it seems that the opposite phenomenon may occur and the criteria that have been applied to administrative sanctions against legal persons may eventually be extrapolated to criminal law<sup>5</sup>. It is worthwhile in

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<sup>5</sup> In general, we refer to M. Gómez Tomillo; I. Sanz Rubiales, *Derecho administrativo sancionador. Parte general*, 5th ed., 2023, Ch. 5; "Principios constitucionales nucleares del derecho penal y matices característicos del derecho administrativo sancionador", *Revista de Derecho Aplicado LLM UC*, (6), 2020 (<http://ojs.uc.cl/index.php/RDA/issue/view/1647>).

this context to quote Colombian Law 1778, of February 02, 2016, which regulates the "administrative liability of legal persons to prevent the crime of transnational bribery", to the extent that in Colombia there is no criminal liability of legal persons, but they sanction by means of pure administrative sanctions to organizations for typically criminal acts, such as acts of corruption. Something similar happens in Brazil, where there is only liability of legal entities for environmental crimes, of very limited application, and, however, they contemplate pure administrative infractions to entities for acts of corruption, by means of Law 12.846 of August 1, 2013. Finally, in Mexico, the General Law of Administrative Responsibilities of July 18, 2016, punishes administratively individuals and legal entities for acts that are normally attributed to criminal law, such as bribery, embezzlement, embezzlement of public funds, influence peddling, etc.

2. Some countries call their systems "administrative liability", although materially the sanctions are criminal, and formally their imposition is assigned to the judiciary, similarly to what happens in Italy (as in the case of Peru or, in Europe, Bulgaria). However, it is generally recognized that we are dealing with criminal liability, since these are sanctions imposed by the criminal jurisdiction, in accordance with the rules of investigation, prosecution and punishment of the Code of Criminal Procedure, with application of the rules of criminal statutes of limitation, etc.

Obviously, in all countries there is a discussion as to whether we are dealing with hypotheses of self-responsibility, of liability for one's own actions, or whether, on the contrary, we are dealing with hetero-responsibility, of liability for the actions of others. I suppose that this is a discussion typical of new phenomena. Surely, the dominant criterion is that the criminal liability of legal persons is for their own wrongdoing and culpability, to the extent that hetero-responsibility is incompatible with the principle of personality of penalties or prohibition to punish *ex iniuria terti*, for the acts of others. In any case, it is significant that most of the legal systems include a clause by virtue of which the conviction of the natural person acting is not necessary for the same to be done with the entity in the name or on behalf and for the benefit of which it is acting (vid. Article 4 of

Peruvian Legislative Decree 1352; Articles 4 and 6 of Argentinean Law 27.401; Article 49 of the Ecuadorian Organic Integral Criminal Code, Article 29, fifth paragraph, of the Mexican National Code of Criminal Procedure, 31 ter of the Spanish Criminal Code, etc.).

From a material perspective, the problems that arise are essentially at four levels: a) crimes to which they apply; b) responsible parties; c) criteria of imputation; d) culpability. We have dealt with all of them on numerous occasions<sup>6</sup>, so we refer to what was said then, limiting ourselves in this paper to a succinct exposition of the last two issues to which we will add a brief reference to constitutional rights of legal persons, both material and procedural.

## 2. Criteria for the imputation of crimes to supra-individual entities

### 2.1. Approach

Undoubtedly, this is a matter where the most diverse criteria prevail, to the point that there are very few consensuses and as many models as there are authors or resolutions that have approached the matter.

From our perspective, the imputation of an offense (criminal or administrative) to a legal person presupposes at least one requirement: a connecting fact, i.e., the act or omission of a natural person linked to the legal person. In Spanish criminal law, two other requirements are added: social sense of the conduct (i.e., that it is carried out in the name, on behalf and for the direct or indirect benefit of the legal person, art. 31 bis PC<sup>7</sup>) and,

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<sup>6</sup> On this issue we refer to M. Gómez Tomillo, *Introducción a la responsabilidad penal de las personas jurídicas*, 2nd ed.

<sup>7</sup> Interestingly, the requirement of the Bulgarian Administrative Offences Act, art. 83a, according to which, in order to be able to charge the legal person with an offense, it is necessary that the legal person has enriched themselves or could enrich themselves (art. 83a of the Bulgarian Administrative Offences Act on a German draft that includes such a requirement, vid. B Feijoo Sánchez, "La función de la responsabilidad penal de las personas jurídicas en el Derecho Penal español", Vol. 1, 2023, *Revista de Responsabilidad Penal de las*

according to the criteria of the Spanish Supreme Court, the lack of a culture of compliance or the existence of a culture of non-compliance. These last two requirements are contingent. In fact, the first does not appear in all legislations in the same terms, and is even dispensed with in some<sup>8</sup>. The

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*Personas Jurídicas y Compliance*, pp. 17 et seq, in particular, p. 20; R. Robles Planas, "Pena y persona jurídica: crítica del art. 31 bis CP (1)", *La Ley* 7705, 2011, p. 8, where he considers that unjust enrichment is the very basis of corporate liability).

<sup>8</sup>This is the case of Chile's Law 21595 on Economic and Environmental Crimes. Although it could be understood that the Chilean system is heading towards an objective liability, understood as automatic liability for the mere commission of a criminal offense within the supra-individual entity, we understand that it is possible to avoid this censure with a well-structured concept of culpability. In our opinion, such culpability must be understood, in the classic sense of Tiedemann, as an organizational defect, although, admitting proof of a diligent organization (we will return to this below). However, from certain conceptions, the suppression of the requirement expressed in the text may pose problems. Specifically, in cases of excess of the natural person with respect to what he/she was authorized to do. The problem cannot be examined here; we understand that a case-by-case analysis must be carried out, so that, if there is the aforementioned organizational defect and, therefore, corporate culpability, the so-called excess of the natural person can be reproached to the legal entity (which, in Spanish positive law, would be captured by the expression "on behalf of the legal entity"); in the same sense, within its own doctrinal parameters; J.G. Fernández Teruelo, *Parámetros interpretativos del modelo español de responsabilidad penal de las personas jurídicas y su prevención a través de un modelo de organización o gestión (compliance)*, 2020, p. 121. In the North American literature along the same lines, Kathleen B. Brickey, *Corporate criminal liability*, 2 ed., 1992, § 3.01; however, in some exceptional cases in the American courts such liability has been excluded (id., Kathleen B. Brickey, § 3:08). In Spain, on the other hand, it is more usual to consider that the excess is not attributable to the legal entity: C. Gómez Jara, "La responsabilidad penal de las personas jurídicas en la reforma del Código Penal", *La Ley*, 14962/2010, p. 6); J.M. Silva Sánchez, "La responsabilidad penal de las personas jurídicas en Derecho español", *Criminalidad de empresa y compliance*, (J.M. Silva Sánchez dir.), Barcelona, 2013, pp. 26 et seq.; B. del Rosal Blasco, "La delimitación típica de los llamados hechos de conexión, en el Nuevo artículo 31 bis nº 1 del Código Penal", *CPC* 103, 2011; B. Feijoo Sánchez, "La función de la responsabilidad penal de las personas jurídicas", *cit.*, pp. 56-57; J.M. Zugaldía Espinar "Teorías jurídicas del delito de las personas jurídicas (aportaciones doctrinales y jurisprudenciales). Especial consideración de la teoría del hecho de conexión", *CPC* 121-2017, p. 26.; J. Cigüela Sola, *La culpabilidad colectiva en Derecho Penal*, 2015, p. 311.

second, a construct assumed by the Supreme Court, is more than debatable<sup>9</sup>. However, the requirement of a connecting factor is unavoidable because the legal person cannot in any way act on its own, so it must rely on some natural person, which is unavoidable, even if the thesis of autopoietic social systems is upheld, according to which the legal person is self-organized, self-conducting and self-determining, completely independent of the individuals of which it is composed<sup>10</sup>.

## **2.2. Connecting fact and wrongfulness of the crime attributable to legal persons: dangerousness for legal assets and criticism of the defect of organization as a nuclear element.**

It follows from the above that the wrongfulness in the case of crimes of legal persons must consist of the realization of an objectively typical act by a physical subject, dangerous to legal property, which is imputed to the

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Of course, each of the aforementioned authors presents their own nuances that we cannot go into now.

<sup>9</sup> We refer to M. Gómez Tomillo, "Responsabilidad penal de las personas jurídicas y carga de la prueba de la idoneidad de los programas de cumplimiento", *Diario La Ley* 8861, 2016; A. Galán Muñoz, "Visiones y distorsiones del sistema español de responsabilidad penal de las personas jurídicas: un diagnóstico 13 años después", *REDEPEC*, vol. 2, 2023, pp. 20 et seq.; by the same author, *Fundamentos y límites de la responsabilidad penal de las personas jurídicas tras la reforma de la LO 1/2005*, 2017, pp. 195 et seq.

<sup>10</sup> On the same, vid. C. Gómez Jara, "El modelo constructivista de (auto)responsabilidad penal de las personas jurídicas: tres contribuciones de la teoría a la práctica", *Revista de Responsabilidad Penal de las Personas Jurídicas y compliance*, vol. 1, 2023, especially pp. 22 et seq. and p. 21, n. 28, where ample notice is given of those who defend the idea in one way or another. We assume the criticisms formulated by J.M. Zugaldía Espinar "Teorías jurídicas del delito de las personas jurídicas...", *cit.*, p. 17 ff; R. Aguilera Gordillo, "Déficits of the systemic approach to criminal liability of the legal person: inimputability and criminal contagion in M&A operations. Procedencia del modelo antrópico y behavioral game theory", *RECPC* 25-06 (2023), *passim*.

organization, within which it is developed<sup>11</sup>. This act must be *ex ante* harmful or dangerous to legal property.

The construction outlined here cannot be criticized for the difficulties in finding a fact specific to the legal person as distinct from that of the natural person<sup>12</sup>. The unjust characteristic of legal persons turns out to be of a complex nature. It derives from the conjunction, from the synergy of the actions of a natural person with the special structural possibilities and means of the legal person actually used and necessarily implies the injury or endangering of legal assets (in fact, it is a particularly dangerous situation due to the context in which it occurs)<sup>13</sup>. This situation is very close, although

<sup>11</sup> I understand that the position of A. Galán Muñoz is not very far from this, who maintains that the liability of legal persons is based on the effective production of an undue and reproachable contribution favoring the crime committed, derived from the incorrect collective preventive action, and not on the existence or not of a *compliance* program (A. Galán Muñoz, "Visiones y distorsiones del sistema español de responsabilidad penal de las personas jurídicas...", *cit.*) The practical difficulty lies in the fact that it is possible to convict the legal person without convicting the natural person who materially acted or failed to act; if this is so, proving intent or recklessness without the presence of the natural person in the proceeding is particularly complex.

<sup>12</sup> J.M. Silva Sánchez, "La responsabilidad penal de las personas jurídicas en el Convenio del Consejo de Europa sobre cibercriminalidad", *Cuadernos de Derecho Judicial* 9, 2002, p. 131; C. Gómez-Jara "La responsabilidad penal de las personas jurídicas en la reforma del Código Penal", *La Ley*, 14962/2010, p. 9); on the issue, vid. A. Galán Muñoz, "La responsabilidad penal de la persona jurídica tras la reforma de la LO 5/2010: entre la hetero- y la autorresponsabilidad", *Nuevos instrumentos jurídicos en la lucha contra la delincuencia económica y tecnológica*, (C.M. Romeo Casabona; F. Flores Mendoza, eds.), 2012, *passim*, especially 509 et seq.; B. Feijoo Sánchez, "La función de la responsabilidad penal de las personas jurídicas," *cit.* pp. 84-85, n. 171; A. Pérez Machío, *La responsabilidad penal de las personas jurídicas en el Código Penal español*, 2017, p. 175.

<sup>13</sup> I understand that the point of view expressed is not far from that of A. Galán Muñoz, when he considers that legal persons are punished on the basis of the non-compliance with the preventive duties established by the State for legal persons (*Fundamentos y límites...*, *cit.*..., especially p. 212, especially p. 212.); however, I believe that these duties, in turn, are based on a preventive need derived from the special danger to legal assets (and, procedurally, on

not identical to the characteristic of co-perpetration in the criminal law of natural persons, in which the acts of some individuals are also attributed to others who have not committed them directly or corporally<sup>14</sup>.

An unavoidable consequence can be deduced from the above: the widespread idea that the typical wrongfulness in the case of crimes committed by legal entities lies in an organizational defect of the latter<sup>15</sup>

the investigative difficulties) of objectively typical conducts carried out within the collective entity. See also M. Díaz and García Conlledo, "Reflexiones sobre el núcleo de la responsabilidad penal de las personas jurídicas en el derecho penal español y algunos cabos sueltos", *RDPJyC*, vol. 2, 2023, p. 29), where it is argued that "legal persons...are dangerous structures in relation to the possible commission of crimes", which makes it convenient to react against the legal person themselves (id., pp. 29-30).

<sup>14</sup> Vid. K. Tiedemann, "Die "Bebüssung" von Unternehmen nach dem 2 Gesetz zur Bekämpfung der Wirtschaftskriminalität", *NJW* 41, 1988, p. 1171; see also the synthetic exposition and references by G. Trug, "Zu den Folgen des Einführung eines Unternehmensstrafrechts", *Wistra* 7, 2010, p. 243; critical is G. Heine, *Die strafrechtliche Verantwortlichkeit von Unternehmen*, cit. Heine, *Die strafrechtliche Verantwortlichkeit von Unternehmen*, cit., p. 243, primarily with regard to co-perpetration, but not so much with regard to perpetration-by-means. E. Paliero "La responsabilità penale della persona giuridica: appunti per una dogmatica", *Libro homenaje al Profesor Luis Arroyo Zapatero. Un Derecho Penal humanista*, vol. 1, 2021, p. 538, with further Italian doctrinal references. In recent times there have been those who understand the criminal liability of legal persons as participation in the crime of natural persons; R. Baldomino Díaz, *Bases de la responsabilidad penal de las personas jurídicas*, Valencia, 2022, particularly p. 78.

<sup>15</sup> This is undoubtedly a very repeated perspective in the Spanish dogmatic panorama. In recent times, for example, A. Pérez Machío, *La responsabilidad penal de las personas jurídicas en el Código Penal español (The criminal liability of legal persons in the Spanish Criminal Code)*, cit. pp. 178 et seq.; J.L. Fuentes Osorio, *Sistema de determinación de las penas impuestas a las personas jurídicas*, Barcelona, 2023, pp. 34 et seq.; A. Nieto Martín, "La eficacia de los programas de cumplimiento: propuesta de herramientas para su valoración", *Revista de Responsabilidad Penal de las Personas Jurídicas y Compliance*, vol. 1, 2023, passim; R. Montaner; M. Fortuny, *La exención de responsabilidad penal de las personas jurídicas: Regulación jurídico-penal vs. UNE 19601 (1)*, *La Ley Penal* 132, May 2018, p. 8; J. Cigüela Sola, *La culpabilidad colectiva...*, cit., p. 317 et seq. (although he recognizes that it is not sufficient to justify a criminal charge); P. García Caveró, *Criminal compliance*, 2014, p. 91. For previous authors, see our *Introduction to the*

(which, however, must play a relevant role in the judgment of guilt) cannot be accepted. Such a thesis has to overcome numerous problems that we can only systematize in this paper.

In the first place, the construction we criticize here presents a clear disconnection from the legitimate purpose of criminal law: the protection of legal interests.

Secondly, with a wrongful act consisting of an organizational defect, there would clearly have been a transition from a criminal law of the act to a kind of criminal law of the perpetrator, associated with the way of conducting life, in our case to social, business, organizational life...<sup>16</sup>

Thirdly, if the wrongfulness of legal persons consists of an organizational defect, the whole system would have been reduced to a single crime consisting precisely in the absence of an organization effectively

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*criminal liability of legal entities, cit.* In Spanish jurisprudence, vid. the relation provided by C. Gómez Jara, "El modelo constructivista de (auto)responsabilidad penal de las personas jurídicas: tres contribuciones de la teoría a la práctica", *cit.* pp. 17-19. In the first case, there would be no organizational defect whatsoever (nor would the exonerating effect of effective compliance programs make sense); in the second case, we would not be dealing with an organizational defect, but with a breach of specific control obligations by the individuals in charge of enforcing them (J.G. Fernández Teruelo, *Parámetros interpretativos...., cit.* E. Galán Corona, "Culture or structure, that is the question? La difícil convivencia y coordinación de los dos sistemas de tratamiento penal de las personas jurídicas en el ordenamiento español", *Libro Homenaje al Profesor Luis Arroyo Zapatero*, Madrid, 2021, pp. 207 ff).

<sup>16</sup> In fact, this is precisely P. García Caveró's criticism of the construction of the organizational defect as the core issue in the judgment of guilt ("Responsabilidad penal de personas jurídicas y consecuencias accesorias", *REDEPEC* 2023, vol. 2, p. 5). From our perspective, configuring the organizational defect as the core of the guilt of a company would not imply punishing it for what it is, but for what it did (which is what must be taken into account in the judgment of criminality: the action or omission dangerous for legal assets deployed by a natural person linked to the legal entity).

aimed at preventing the commission of crimes or administrative offenses<sup>17</sup>. A sort of *crimen societatis* would have been designed<sup>18</sup>. However, it is clear that most of the regulations in our legal and cultural environment (such as the Spanish system itself) provide for various *crimina societatis*. In other words, with the criticized construction, the crime committed by the natural person would be irrelevant, reduced to the category of a mere objective condition of punishability.

Fourthly, there may be such an organizational defect and yet there is no danger to legal assets; for example, when within the company there are no measures in place to control the workers who, nevertheless, perform their work correctly, so that no criminally relevant event occurs. We understand that, in no way, in such cases can we speak of an attempt to commit a crime. In short, it is difficult to explain that the core of the unjust is present according to the thesis that we criticize and, nevertheless, there is no punishment.

Fifth, the organizational defect thesis poses difficulties for the resolution of the complex problems of application of the criminal law in space and time, when dealing with legal persons. Because of its diffuse nature (the organizational defect will never be punctual, but conceptually

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<sup>17</sup> A similar idea seems to be expressed by J.C. Carbonell Mateu, "Aproximación a la dogmática de la responsabilidad penal de las personas jurídicas", *Constitución, Derechos fundamentales y sistema penal. Semblanzas y estudios con motivo del setenta aniversario del Profesor Tomás Salvador Vives Antón*, T. I, 2009, p. 320; by the same author, "Responsabilidad penal de las personas jurídicas: reflexiones en torno a su dogmática y al sistema de la reforma de 2010", *CPC 101 2010*, pp. 18-19.; M. Díaz y García Conlledo, "Reflexiones sobre el núcleo de la responsabilidad penal de las personas...", *cit*, pp. 18-19; J.M. Palma Herrera, "El papel de los *compliance* en un modelo vicarial de responsabilidad penal de la persona jurídica", *Procedimientos operativos estandarizados y responsabilidad penal de la persona jurídica*, (J.M. Palma Herrera, dir.), 2014, pp. 176 et seq.

<sup>18</sup> On this type of crime, see extensively, M. Gómez Tomillo, *Compliance penal y política legislativa*. M. Gómez Tomillo, *Compliance penal y política legislativa. El deber personal y empresarial de evitar la comisión de ilícitos en el seno empresarial*, 2016, *passim*.

requires a time span), it will always be difficult to locate it in a specific place (*locus commissi delicti*) and at a specific time (*tempus commissi delicti*). For this reason, the construction we criticize will present problems, among others, in determining both the applicable criminal law and the *dies a quo* in the statute of limitations. We understand that this criticism is not transferable to the requirement of a dangerous *ex ante* action, carried out by an individual in the business or corporate context.

Sixth, important practical problems arise from the organizational defect thesis. It seems clear that a suitable compliance program would exclude the organizational defect, and with it the possibility of imputing the crime to the legal person (we would be dealing with a core issue of the type of wrongfulness in the construction we criticize)<sup>19</sup>. Consequently, if the position questioned here is maintained, the burden of proof of its inadequacy would be on the prosecution (like any other element of the type), which would have to be proven in all cases, a position of the Spanish Supreme Court, which, of course, is very advantageous for the defense. This, on the one hand, leads to enormous difficulties for conviction. What would the Public Prosecutor's Office have to do: request an entry and search to obtain the compliance program used at the time of the commission of the acts, surely different from the one in force at the time of the investigation, sometimes many years later? On the other hand, the first defensive measure of the legal entity would have to be the destruction of the compliance program<sup>20</sup>.

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<sup>19</sup> We cannot go into the details; vid. regarding the legal nature of management and organizational models, for all, J.G. Fernández Teruelo, *Parámetros interpretativos...*, *cit.*, pp. 184 et seq.; J.L. González Cussac, "La eficacia exigente de los programas de prevención de delitos", *Estudios Penales y Criminológicos XXXIX*, 2019, pp. 643 et seq.

<sup>20</sup> In line with the text, vid. A. Galán Muñoz, "Visiones y distorsiones del sistema español de responsabilidad penal de las personas jurídicas...", *cit.* I find interesting the idea of A. Nieto Martín who argues that the seriousness and quality with which the risk analysis was carried out can also be proven in other ways, such as through the declaration of the

Related to the last point, the widespread perspective that we criticize is a real missile to the waterline of the system of liability of legal persons, whose procedural *raison d'être* lies, we understand, in the need to facilitate the investigation of crimes committed within complex corporate structures (hence the importance of mitigation or exemption from liability, both for collaboration with the investigation and for self-reporting)<sup>21</sup>.

### 3. Organizational defect as a matter of guilt of the legal person<sup>22</sup>

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specialists who performed it ("La eficacia de los programas de cumplimiento", *cit.*, p. 29). However, difficulties remain. On the one hand, such a perspective implies a renunciation of direct evidence. On the other hand, it seems reasonable that, in an overwhelming number of cases, those who carried out the risk analysis or the compliance program itself will argue that both were suitable instruments (it can only be exceptional for them to argue that what they themselves designed was not suitable). In any case, it will have to be the company itself that indicates who drew them up and its legitimate silence cannot be considered in itself as evidence against the legal entity, if it is accepted - and I believe there is no alternative - that it has a right not to incriminate itself (see below). Also interesting is the practice in certain countries, in which the legal person must prove the existence of the compliance program and the prosecution of its inadequacy. However, despite being a position that facilitates the resolution of problems, I believe that it is not very consistent from a dogmatic perspective; the burden of proof is either on the prosecution or on the defense (which, in turn, depends on the dogmatic position regarding the role of compliance programs). The solution expressed is not supported by one criterion or the other, which casts doubt on its coherence.

<sup>21</sup> From a material perspective, the aim is to protect legal assets, in the case of legal entities, by encouraging the implementation of compliance programs and similar mechanisms for the prevention of crime within such entities.

<sup>22</sup> Critical of the reasoning that leads to demanding culpability in legal persons, parallel to that of natural persons, J.M. Silva Sánchez, "Lo real y lo ficticio en la responsabilidad "penal" de las personas jurídicas", *Revista de Responsabilidad Penal de las Personas Jurídicas y Compliance*, vol. 1, 2023, pp. 17-20; B. Goena Vives, *Responsabilidad penal y atenuantes en la persona jurídica*, Madrid-Barcelona, 2017, pp. 347 et seq.; another perspective, P. García Caveró, "Responsabilidad penal de personas jurídicas y consecuencias accesorias", *cit.*

It is a different matter whether the organizational defect is the guiding criterion for the culpability of the legal person, as Tiedemann designed in his day, although, in contrast to the well-known construction of the German author, we understand that there must be proof of diligent organization on the part of the legal person<sup>23</sup>. In such terms, culpability

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<sup>23</sup> We cannot dwell on the details; we refer to M. Gómez Tomillo, *Introducción a la responsabilidad penal de las personas jurídicas*, cit. Ch. 9). I understand that this does not transform the proposed model into a kind of *crimen culpae* (B. Feijoo Sánchez, "La función de la responsabilidad penal de las personas jurídicas", cit, p. 50), since the organizational defect is a fact that is taken into account in the judgment of guilt (certainly common to all crimes, as is characteristic of the judgment of guilt), while at the level of wrongdoing, as we have pointed out above, what is relevant is that a natural person has carried out an objectively typical variable fact (fraud, laundering, environmental crime, tax, etc.) in the corporate or business sphere, so there is still a system of plural *crimina societatis* and not of a single *crimen societatis*. I understand that it is not a minor issue the one pointed out by Fernández Teruelo, who emphasizes that in the case of crimes committed by leaders within the legal person, the compliance program lacks operability (ibid.). From our perspective, the organizational defect is not only the absence of a compliance program or the presence of an inadequate compliance program, even though it is a central assumption. Even though, on the one hand, Fernández Teruelo's reflection is generally valid, especially in intentional crimes, on the other hand, in such cases, there is still a predictable organizational defect of the entity and, therefore, culpability, although it is difficult to exclude the latter. Such difficulty is not equivalent to impossibility; on certain occasions I understand that, in spite of everything, it would be possible for there to be willful misconduct of the leader (even senior leader) and exclusion of liability, particularly when the approval of the program is prior to the incorporation of the leader, whose criminal conduct is very close in time to his taking office, in cases of change in the Board of Directors, etc. As is well known, the duality to which Fernández Teruelo points has been translated into proposals that seek to differentiate the regime of the burden of proof of the suitability of the compliance program depending on who has carried out the act of connection. The crime of workers without decision-making power does not have a high burden of proof to dismantle the suitability of the organizational model, so it would be up to the prosecution to specifically prove the breach of the duties of supervision and control. On the other hand, when the offender was a leader, the possibility of inferring the ineffectiveness of the compliance program from his involvement in the crime is higher, so it would be possible to presume *ius tantum* the

would be a judgment of censure formulated against a legal entity because it has failed to adopt the measures that are required of the entity to ensure an orderly and non-infringing development of the business activity (surely, insofar as the legal system cannot be expected to provide an organizational guideline that exhaustively covers all measures that the company has to adopt to prevent crimes, the criterion of the average company is useful in specifying when such organizational defect occurs). As in the case of individuals, the culpability of collective entities would involve a complex assessment that requires the weighing of multiple issues by the judge.

These data to be taken into account are multiple, without aspiring to exhaust the question: the existence or absence of a compliance program, the personal characteristics of the physical subject actually acting, the presence of malice or recklessness in the latter, the existence or not of express instructions, the hierarchical level of the subject who carried out the action or omitted to act, the performance of an adequate supervision or control over the personnel without power of direction, etc. This conception has the advantage of being in line with what is materially the judgment of guilt, in which one should proceed to consider (which is valid for natural and legal persons) the individual factors of the infraction, ignored in the judgment of unlawfulness; in this way, the punitive response is adapted to

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ineffectivity of the prevention measures; A.M. Neira Pena, "La efectividad de los criminal compliance programs como objeto de prueba en el proceso penal", *Política Criminal*, volume 11, number 22, 2016, pp. 467-520, available online at [www.politicacriminal.cl/Vol\\_11/n\\_22/Vol11N22A5.pdf](http://www.politicacriminal.cl/Vol_11/n_22/Vol11N22A5.pdf); critically, C. Arangüena Fanego, "Proceso penal frente a persona jurídica: garantías procesales", *El nuevo proceso penal sin Código Procesal Penal* (R. Castillejo Manzanares (dir.), 2019, pp. 761 et seq. I believe that this is a differentiation that should not be made because it would mean that there would be materially two different kinds of crimes attributable to legal persons and not just one with different contingent requirements.

reality, and includes the thought that not only the equal should be treated as equal, but the unequal, as unequal<sup>24</sup>.

The core consequence of the above would be that the burden of proof of the adequacy of the compliance program for the prevention of unlawful conduct within the legal person is on the latter. Again, I understand that there are multiple arguments that support such a perspective. Here are some of them.

In the first place, as is well known, it is normal that the burden of proof of the elements of the defense should be on the person who alleges them<sup>25</sup>.

Secondly, it is reasonable to exempt from proof that which is exceptional: what is normal can be presumed. It can only be understood as exceptional when the program is correctly designed and implemented and, in spite of this, the crime is committed. The experience of comparative law seems to corroborate the above, i.e., that while mitigation of liability is

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<sup>24</sup> We cannot go into the very widespread idea of culpability as a lack of culture of compliance or culture of non-compliance that seems to have been so successful in doctrine and jurisprudence (see the account provided by C. Gómez Jara, "El modelo constructivista de (auto)responsabilidad penal de las personas jurídicas: tres contribuciones de la teoría a la práctica", *cit.*) Assuming that this is a valid construction, however, we understand that it faces some drawbacks. We highlight two. First, the Anglo-Saxon doctrine in which it arises often labels it as excessively ambiguous. Secondly, a newly created company can clearly be charged with a crime or an administrative infraction, but it can hardly be said that it lacks a culture of compliance, or possesses one of non-compliance. Conceptually, such a culture requires a minimum temporary stability; it cannot be improvised overnight (although an organizational defect is an idea of a more concrete nature). Formulated in other terms, culpability must refer to the moment of commission of the acts and not to the life trajectory of the subject, whether an individual or a legal entity. Nevertheless, this idea is not far from the perspective defended here, which, in our opinion, is preferable.

<sup>25</sup> Vid. with citation of STS 1068/2012, of November 13, the dissenting opinion to STS 154/2016 of February 29; STC 87/2001 of April 2, FJ 10.

relatively frequent, full exemption from liability will be an exceptional situation<sup>26</sup>.

Thirdly, there are obvious practical reasons, since it is the company that has in its hand the precise data to prove it: the *compliance program*, the updates of said program, its certification, who was the compliance officer, who was in charge of carrying out a certain task, for what reasons one or the other was appointed, with what criteria, etc. It is artificial to shift to the prosecution the burden of proving what is readily available to the legal person.

Fourthly, and closely linked to the above, the practical reason for recognizing the criminal liability of legal entities is related to the need to counteract the growing power and complexity of such entities, transferring to them the responsibility for implementing compliance mechanisms (material reason)<sup>27</sup>, in view of the difficulties that the prosecution, the judiciary and members of the law enforcement agencies have in investigating what happens within companies (procedural reason). If this is so, it would be inconsistent to shift the burden of proof of the proper implementation of such compliance programs to the prosecution, as this would erode the functionality of the system itself.

## 4. Basic procedural rights of legal persons

### 4.1. Approach

The recognition of material and procedural rights of even constitutional rank is consubstantial with the possibility of penalizing legal persons criminally or administratively. The contrary would imply both the

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<sup>26</sup> W.S. Laufer, *Corporate bodies and guilty minds*, Chicago, London, 2006, p. 119.

<sup>27</sup> Silva Sánchez goes so far as to speak of "the conversion of every legal entity into a delegate for the prevention of all crimes committed within it" ("La exigente de "modelos de prevención de delito". Fundamento y bases para una dogmática", *Delito y empresa. Estudios sobre la teoría del delito aplicada al Derecho penal económico-empresarial*, (R. Ragués i Vallès; R. Robles Planas, dirs.), 2018, p. 241.

possibility of arbitrary decisions and the understanding that the criminal law of legal persons is a second-class criminal law. Thus, as a starting point, it does not seem to be questionable that, from a material perspective, the rights enjoyed by legal persons are those deriving from the principle of criminal legality, the principle of *non bis in idem*, the principle of culpability and the principle of proportionality. It is more complex to delimit procedural rights. We understand that, among the latter, there are, at least, the rights to effective judicial protection, to the presumption of innocence, to defense, to a process with all the guarantees, to not incriminate oneself and to the last word. Additionally, it does not seem that it can be questioned that the rights to the inviolability of the home, the secrecy of communications or the inviolability of communications between lawyer and client should be recognized. We cannot address the issue in its entirety in this paper, so we will limit ourselves to some aspects that we consider nuclear in the light of some central pronouncements of European jurisprudence.

#### **4.2. The case law of the Court of Justice of the European Union (CJEU)**

The judgment of the CJEU, Delta Stroy case, dated November 10, 2022 (C-203-21), contains a relevant legal basis in the field we are dealing with. As a starting point, we will indicate that this judgment was handed down in the context of a sanctioning procedure against a legal person, followed under the provisions of the Bulgarian Law on Administrative Infringements and Sanctions. However, the said proceeding was for the commission of offenses that can be classified as criminal (in this case, tax offenses), which was conducted at the proposal of the Public Prosecutor's Office and before a court (in fact, its nature as a criminal sanction is recognized in § 42 of the same judgment). In short, we are faced with a situation analogous to that envisaged in the Italian model of "administrative" liability of legal persons, also present, for example, in Peru.

The CJEU concludes that it undermines the principle of presumption of innocence and the rights of defense if the legal person may be subject to a criminal sanction by final judgment, as a consequence of an

infringement imputed to the natural person entitled to bind or represent it,—without the competent court having the power to assess the actual existence of the infringement (committed by the natural person), without the legal person being able to comment on it or if there is no possibility of a subsequent trial of full jurisdiction, available to the legal person, after the relevant exoneration of the natural person, in which it would be possible to challenge the conviction of the organization. Specifically, it stresses that, in such cases, "such a legal person cannot effectively exercise its right of defense, since it cannot deny the reality of that offence" (§ 62) and that "Article 48 of the Charter must be interpreted as precluding a national rule under which the national court may impose a criminal penalty on a legal person for an offence for which a natural person entitled to bind or represent that legal person is responsible, where the latter has not been able to contest the actual existence of that offence" (§ 67)<sup>28</sup>.

#### **4.3. Presumption of innocence and the right to defense of legal entities**

As is known, Directive (EU) 2016/343 of the European Parliament and of the Council, of 9 March 2016, strengthening in criminal proceedings certain aspects of the presumption of innocence and the right to be present at the trial, excluded from its scope of application legal persons investigated or accused in criminal proceedings by considering that such recognition was premature (*vid.*, especially, Recital 14). Nevertheless, it does not seem that, in practice, there were many doubts in this regard, so that, in general, such rights have been applied in the framework of administrative sanctions

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<sup>28</sup> Let us recall that art. 48 of the Charter of Fundamental Rights of the European Union refers to the right to the presumption of innocence and the right to defense, in the following terms:

"Every accused person is presumed innocent until his guilt has been legally established. The rights of the defense shall be guaranteed to all accused persons".

(materially criminal for the Court of Justice of the European Union and the European Court of Human Rights) also to legal persons<sup>29</sup>.

In any case, European case law, in the case at hand, goes beyond positive law and ends up expressly taking the step that the Directive did not dare to take. This is clear both from § 59 of the Delta Stroy judgment ("the situation may manifestly undermine the principle of the presumption of innocence and the rights of the defense, which are guaranteed to that legal person under Article 48 of the Charter"), and from the final declaration (§ 67, already reproduced).

It is true that these rights had been recognized in Spain for supra-individual entities, either at the level of ordinary legality or by jurisprudence<sup>30</sup>. However, at the Spanish level, a formal declaration of their recognition as rights of a constitutional nature by our Constitutional Court is still lacking (which, in Spain, is relevant for eliminating their contingent nature, eliminating doubts and reductive nuances, and definitively opening the way for legal persons to appeal to the Constitutional Court, both for administrative and criminal sanctions)<sup>31</sup>.

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<sup>29</sup> Vid. CJEU in the Delta Stroy case, § 51, citing the judgment of 9 September 2021, Adler Real Estate and others, C-546/18, EU:C:2021:711, paragraph 46; specifically in relation to the rights of the defense, vid. § 52 of the same judgment Delta Stroy, citing the judgments of 14 September 2010, Akzo Nobel Chemicals and Akros Chemicals v Commission and Others, C-550/07 P, EU:C:2010:512, paragraph 92, and of 15 July 2021, Commission v Poland, C-791/19, EU:C:2021:596, paragraph 204.

<sup>30</sup> It is not the purpose of our work to examine the issue in detail, which would otherwise be impossible; we refer you to C. Arangüena Fanego, "Proceso penal frente a persona jurídica: garantías procesales", *cit.*

<sup>31</sup> There are, however, several constitutional rulings in relation to administrative offenses against legal entities. In practically all of them, it is assumed that the entity enjoys the right to the presumption of innocence, without formally declaring it, limiting itself to transferring constructions from criminal procedural law. Thus, in the first place, it is worth citing STC 31/2022 of March 7, FJ 7, where, apart from other types of inaccuracies, it seems to assume that the appellant, a legal entity, enjoys such a right. Nothing different emerges from STC

#### 4.4. Other procedural rights, especially the right not to incriminate oneself

It must be concluded that, if the legal entity is the holder of the right to the presumption of innocence and the right to defense, it must also be considered the holder of the rest of the constitutionalized procedural rights, provided that they are compatible with its nature. In essence, the alternative conclusion would be arbitrary (why is the person considered the holder of some rights and not of others). Besides, particularly with regard to the right not to incriminate oneself, these rights are based precisely on the rights to the presumption of innocence and the right to defense, expressly recognized by the Delta Stroy judgment for legal persons. As is usually recognized, the right not to incriminate oneself is linked to the right to the presumption of innocence, since, obviously, the burden of proof of the elements constituting the criminal offense falls on the prosecution, not on the defense. As for the latter, the accused may legitimately opt for a purely passive defense<sup>32</sup>. It would make no sense to recognize the above procedural

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54/2015 of March 16, which assumes that the legal person enjoys the right not to self-incriminate, which, in turn, it states, is closely related to the rights to the presumption of innocence and defense. Along the same lines, see SSTC 175/2012 of October 15; 70/2012 of April 16; 80/2011 of June 6; 82/2009 of March 23; 243/2007 of December 10; 23/2007 of February 12; 129/2003 of June 30; 117/2002 of May 20, etc.

<sup>32</sup> As is well known, the rights not to testify against oneself and not to plead guilty, according to the Spanish Constitutional Court, are conceived as guarantees or rights instrumental to the generic right of defense, "to which they provide coverage in its passive manifestation, that is, that which is exercised precisely through the inactivity of the subject on whom an accusation falls or may fall, who, consequently, may choose to defend himself in the process in the manner he deems most convenient for his interests, without in any case being forced or induced, under any constraint or compulsion, to testify against himself or to confess guilt" (SSTC 36/1983, FJ 2; 127/1992, FJ 2º; 197/1995 of December 21, FJ 6 or, among the latest, 23/2014 of February 13, FJ 4, 21/2021, of February 15, FJ 4). For the Constitutional Court, "they are also connected with one of the manifestations of the right to the presumption of innocence: that which places the burden of proof on the prosecution; this burden cannot be changed factually by placing on the accused the

rights of the organizations and yet not recognize all the others (logically provided they are compatible with their nature), especially the rights to remain silent, not to plead guilty and not to testify against oneself.

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obligation to provide elements of proof that imply self-incrimination" (SSTC 161/1997, of October 2, FJ 5; 68/2006 of March 13, FJ 2). This connection with the presumption of innocence is highlighted by the ECtHR (see Saunders v. United Kingdom judgments of 17 December 1996, § 68; Serves v. France of 20 October 1997, § 46; Heany and McGuinness v. Ireland, 21 December 2000, § 40, etc.; Weh v. Austria, Judgment of 8 April 2004, § 39, etc.). In the doctrine, in recent times, for all, vid. M. Gómez Tomillo, "Los derechos a no declarar contra sí mismo, a no declararse culpable y a guardar silencio en procedimientos de inspección o supervisión administrativa previos a un procedimiento sancionador o penal", *Estudios Penales y Criminológicos* 42 (2022); A. Liñán Lafuente, "La Ley 2/2023, de protección del informante, vs. el derecho a la no auto incriminación de la persona jurídica," *Diario la Ley* July 11, 2023, nn. 5, 22 and 23.