

COMPANY CRIMINAL LAW

CRIMINAL LIABILITY OF ORGANISATIONS

The entry into effect on 23 December 2010 of Constitutional Law 5/2010, of 22 June 2010, which amends a large part of our Criminal Code, explicitly recognises the criminal liability of corporate persons. Consequently, this brings to an end the old dogmatic discussion – linked to continental legal tradition and expressed in the aphorism «societas delinquere non potest» – given that these corporate structure formations could not credit criminal sanctions, as they have no capacity for action, culpability and penalty.

The Spanish Parliament has chosen to establish a double incrimination channel for organisations in Article 31b, Section 1 of the Criminal Code (hereafter, CC). On the one hand (i) it sets out the criminal liability of organisations for crimes committed by their legal representatives and de facto or legal administrators, providing that they have acted in the name and on behalf of, and in benefit of, the organisation. On the other hand, (ii), it establishes the criminal liability of the organisation for crimes committed by its employees as a consequence of the lack of control that it should have exercised over them, providing that, as in the case above, they have committed this offence while carrying out their corporate activities and on behalf of and in benefit of the organisation.

This being the case in the different criminal liability systems for organisations, our Parliament has chosen the «*numerus clausus*», in that it is in the special part of the Punitive Code which expressly states the crimes for which the organisation is liable, and also acts as liability separate to that of the individual who has committed the crime, as established in Section 2 of Article 31b of the CC.

In terms of the different sentences that can be passed on organisations, Section 7 of Article 33 of the CC establishes a catalogue of these, in which it specifies that they are all considered serious sentences and adds, to what have been termed so far as the accessory consequences of Article 129 of the CC, the following: (a) the share or proportional fine sentence, (b) the sentence which disqualifies organisations from receiving subsidies and public aid for contracting with Public Administrations and enjoying tax or National Insurance benefits and incentives, and (c) the sentence which consists of legal sequestration.

Finally, it should be stressed that this reform also specifically regulates in Section 4 of Article 31b of the CC in cases of the mitigation of the criminal liability of organisations, including the establishment on their part of "effective measures to prevent and discover crimes that may be committed in future with the means or under the protection of the organisation." This leads to the necessary implementation at companies' headquarters of the so-called "crime prevention plans".

TAX

MANDATORY ELECTRONIC NOTIFICATIONS AND COMMUNICATIONS REGARDING TAX

Since 1 January 2011, the system has been in place through which certain taxpayers are obliged to receive tax notifications and communications electronically through joining the notification system via their enabled e-mail address (D.E.H.).

Article 27.6 of Law 11/2007 regarding public electronic access to Public Services establishes the possibility that in accordance with regulations, electronic communication is established as mandatory for organisations or certain groups of individuals. In this sense, Royal Decree 1363/2010, which regulates cases of mandatory tax notifications and communications, imposes this system on Public Limited Companies and Limited Liability Companies, on non-resident organisations and permanent establishments, Temporary Business Associations, Economic Interest Groupings and other organisations, as well as other persons and organisations registered in the Large Companies' Register, in the VAT Monthly Return Register (REDEME), on those who pay tax in accordance with the Tax Consolidation System or the Special VAT Organisations Group System, and, finally, on certain customs operators. This is not mandatory for individuals, except those to whom some of the inclusions apply.

These taxpayers are not automatically included in the system and it requires prior notification of the inclusion agreement from the Tax Agency via traditional means. As made clear by the Tax Agency, it is to be expected that taxpayers will be incorporated into the system gradually and reasonably, not massively, in order to ensure that its practical implementation is carried out correctly. Taxpayers must have a digital certificate or electronic signature, or a registered authorisation. Regarding the functioning of the D.E.H. system, we should point out that it is configured like a virtual mailbox where the Administration will deposit the communications and notifications that it makes to a specific taxpayer. The system will allow the date and time when the notified administrative act was made available to be accredited, as well as access to its contents, as of which time the notification will be considered to have been made with all its legal effects. When 10 calendar days have elapsed after a record of a notification has been made available in the D.E.H., the notification will be understood to have been rejected, with the established legal effects for notification rejection (i.e. the notification will be considered to have been made and the deadlines will begin to be calculated for extending, appealing and hearing an application, etc.).

NEW INCOTERMS 2010 RULES REGARDING THE USE OF COMMERCIAL TERMS

The International Chamber of Commerce recently published the new INCOTERMS 2010 rules regarding the use of commercial terms. The 2010 version of the Incoterms came into effect on 1 January 2011 replacing the old Incoterms 2000 version. In the new version, the thirteen commercial terms have been reduced to eleven with the DAF (Delivered at Frontier), DES (Delivered Ex Ship), DEQ (Delivered Ex Quay) and DDU (Delivered Duty Unpaid) rules being replaced by two new ones: DAT (Delivered at Terminal) and DAP (Delivered at Place), which can be used for any form of agreed transport. In DAT, the goods are made available to the buyer once they have been offloaded from the arrival transport means, which is why it is recommended that the place of the delivery terminal be stated clearly, as the risks that exist until this point will be the vendor's responsibility. In DAP, the goods are made available to the buyer in the arrival transport means, ready for offloading at the designated destination. In this case, the buyer is responsible for the risk during the offloading. The remaining Incoterms will remain the same: EXW (Ex-Works), FCA (Free Carrier), FAS (Free Alongside Ship), FOB (Free on Board), CFR (Cost and Freight), CIF (Cost, Insurance and Freight), CPT (Carriage Paid To) and CIP (Carriage and Insurance Paid To), although in the FOB, CFR and CIF rules, the delivery of goods "alongside" the ship has been replaced with delivery when they are "on board" the ship.

IMMIGRATION

AMENDMENT TO THE COMMUNITY RESIDENCE ACQUISITION PROCEDURE IN FAVOUR OF COMMUNITY LINEAL ANCESTORS

Royal Decree 1161/2009, of 1 July 2009, provides a new text for Royal Decree 240/2007, of 16 February 2007, which regulates the system that applies to community citizens and certain non-community family members of theirs, in terms of immigration, as a result of the Supreme Court Ruling of 1 June 2010. Among the many new features, it highlights the amendment of the procedure established in its previous text which refers to non-community lineal ancestors of EU and EESA (European Economic Space Agreement) nationals and those of their non-community spouses. This amendment makes it possible for lineal ancestors to request and obtain the corresponding residence authorisation on Spanish soil, should they be in Spain, to enable them to make the application in person without having to return to their country of origin or residence to process the corresponding visa. The new feature is relevant as it eliminates the discrimination in the previous version, which established the obligation on the part of lineal ancestors to apply for a residence visa at Spanish diplomatic representations, which refers to the procedure established for the regrouping of lineal ancestors if the regrouping is a non-community individual. This last point was by any reckoning discriminatory to community citizens and their spouses, as established in the above Supreme Court Ruling.

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TOWARDS DOMAIN NAME DIVERSITY

The domain name system (DNS) is on the brink of undergoing a drastic transformation as a result of the introduction by ICANN (Internet Corporation for Assigned Names and Numbers) of a great number of generic domains. In addition, compared with the relative uniformity of current generic domains, a wide range of so far unknown uses and types will appear: with characters other than the Latin alphabet, ones that are closed to the public register, for the exclusive use of a company or service, high-level security, territorial yet generic types, etc. Also, compared with the relative similarity of register and conflict resolution policies of current domains, we will soon see, on the one hand, hugely diverse policies, while at the same time, the emergence of new uniform third-party rights protection mechanisms.

CIVIL

TECHNICAL INSPECTION OF APARTMENT BLOCKS IN CATALONIA

Decree 187/2010, concerning the Technical Inspection of Apartment Blocks, was published on 23 November 2010 in the Official Gazette of the Catalan Government. Authority for this is granted in Article 137 of the Catalan Statute of Autonomy and its purpose is to regulate technical inspections that have to be carried out to ensure the required levels of quality regarding apartment blocks. Consequently, it is the owners' responsibility to submit apartment blocks for technical inspection. In the case of condominium buildings, this responsibility is met through the relevant residents' association bodies. Of course, the financial cost of the inspection is met by those responsible for carrying it out. Once the inspection is complete, the Administration will issue a certificate of worthiness which qualifies the building as suitable for use as an apartment block, unless very serious or serious deficiencies have been detected. This certificate of worthiness is valid for ten years. After this time has elapsed, it should be renewed following the same procedure and within the next year after its expiry. Failure to fulfil this obligation will result in the competent administration imposing coercive fines and penalties on those responsible in accordance with the provisions of the Law on Housing Rights (Law 18/2007 of 28 December 2007). We should stress that the responsibilities imposed by this Decree do not affect relations, subject to private law, between owners and insurance companies. Lastly, in exceptional circumstances assistance to cover the cost of these inspections may be granted, which will be exceptional providing that the insufficient economic means of the persons responsible for meeting this cost are accredited. It is scheduled to come into effect on 23 February 2011.

TRANSPORT NEWSLETTER JANUARY 2011

Regulation (EU) no. 996/2010 of the European Parliament and Council of 20 October 2010 regarding research into and the prevention of civil aviation accidents and incidents, which repeals Directive 94/56/CE

Regulation (EU) 996/2010 establishes a series of measures which ensure a high level of efficiency, diligence and quality regarding research into safety and which provide assistance to the victims of air accidents and to their families.

In order to improve air safety and prevent accidents, each member state will guarantee that research into safety aspects is carried out by a permanent national authority and that a European network of authorities in charge of safety research is established. Research into safety will not under any circumstances seek to determine culpability or liability and will be independent and will be conducted separately and without prejudice to any legal or administrative proceedings designed to determine culpability or liability. An annual national report into air safety will also be published.

Directive 2010/65/UE of the European Parliament and Council, of 20 October 2010, regarding formalities for the provision of information required by ships on their arrival at or departure from ports in member states

To achieve a European maritime transport area without any barriers and reduce shipping companies' administrative workload, formalities regarding information required by the European Union and member states need to be simplified and brought into line with one another. This ruling establishes that electronic data transmission media must be used generally for all information formalities as soon as possible and, at the latest, by 1 June 2015, in line with the international rules drawn up by the FAL Agreement.

The SafeSeaNet systems established at national and European Union level must facilitate the reception, exchange and distribution of information regarding maritime activities between the information systems of the member states.

Ships operating between ports located within the European Union customs territory do not have to transmit the information referred to in the FAL forms if these ships do not originate from, make stop-overs in or are not on course for a port situated outside this territory or to a free zone subject to type I forms of control for the purposes of customs legislation, without prejudice to the European Union legal agreements that apply and to the information that member states may require to protect internal security and order and to apply customs, tax, immigration, environmental and health-related legislation. Exemptions to the administrative formalities must also be authorised based on a ship's cargo and not solely on its destination or point of departure.

Law 41/2010, of 29 December 2010, regarding protection of the maritime environment.

Directive 2008/56/CE, of 17 June 2008, which establishes a framework for community action concerning marine policy, is incorporated into Spanish law through Law 41/2010, of 29 December 2010, regarding protection of the maritime environment. The Law establishes the legal system which governs the adoption of the necessary measures to place and maintain the marine environment in good conditions, through its planning, conservation, protection and improvements to it. Regulations have been incorporated regarding the dumping of material into the sea from ships and aircraft, the burning of waste in the sea and the placing of material on the sea bed, in accordance with the Barcelona Agreement regarding the protection of the marine environment and the Mediterranean coast, the OSPAR Agreement, regarding the protection of the marine environment in the north-east Atlantic, and the London Agreement (Agreement regarding the prevention of sea pollution through the dumping of waste and other materials) and its Protocol.

The Universal Postal Service Law 43/2010, of 30 December 2010, regarding the rights of users and the postal market

The law implements Directive 2008/6/CE, of 20 February 2008, which amends Directive 97/67/CE of the European Parliament and Council, of 15 December 1997, regarding the common rules for the development of the internal postal services market in the Community and improvements to the service.

The Law regulates the universal postal service which is defined as a set of quality postal services determined by the Law, provided permanently throughout the national territory and at a price that is within the reach of all users; it excludes from its scope of regulation services that are provided under the self-provision system and those relating to items sent without the addressee's postal address; it adds new rights for users which include the right to information about the postal services and to claims lodged through effective procedures.

The *Sociedad Estatal Correos y Telégrafos, Sociedad Anónima* is appointed operator for a period of 15 years; a fund has been created to ensure that the universal postal service has sufficient finances; declared as jointly liable with the postal operators for postal infringements committed by its employees are anyone succeeding the postal operator in the performance of its work, and its de facto administrators or administrators by law.

Royal Decree 1593/2010, of 26 November 2010, which amends Royal Decree 210/2004, of 6 February 2004, which establishes a system for maritime traffic monitoring and information

The aim of this Royal Decree is to complete the incorporation into Spanish law of Directive 2009/17/CE of the European Parliament and Council, which amends Directive 2002/59/CE, which essentially seeks to implement and use technical advances to achieve a more efficient system for the control of maritime navigation that brings the freedom to sail into line with maritime safety and the preservation of the marine environment.

This Directive introduces the use of the community maritime information exchange system, known as SafeSeaNet, a system which comprises a data exchange network and a standardised version of the main data available about ships and their cargoes, enabling precise and up-to-date information about ships sailing in community waters to be located quickly and sent to the maritime authorities.

Royal Decree 1737/2010, of 23 December 2010, which approves the Regulation that regulates inspections of foreign ships in Spanish ports

Royal Decree 1737/2010, of 23 December 2010, incorporates into Spanish law Directive 2009/16/CE of the European Parliament and Council, of 23 April 2009, regarding the control of ships by the state which governs the port, and repeals Royal Decree 91/2003, of 24 January 2003. The aim of this Royal Decree is to regulate inspections of foreign ships in Spanish waters by requiring stringent compliance with international and community regulations regarding maritime safety, maritime protection, environmental protection and living and working conditions on board ships of all flags. It also sets out common criteria for controlling ships and harmonising procedures used for their inspection and immobilisation.

INT ORDER/3215/2010, of 3 December 2010, which regulates communication of the usual driver and long-term lessee to the Vehicle Register

This Ruling regulates the terms of the communications by the usual driver and long-term lessee to the Directorate General of Traffic Vehicle Register to enable Public Administrations to communicate penalties directly against whoever is the usual driver and not simply its holder-owner.

FOM ORDER/3386/2010, of 20 December 2010, which establishes the rules for holding Transport Arbitration Meetings for the depositing and disposal of goods

The Ministerial Order includes the circumstances in which transported goods may be deposited and disposed of, it establishes the procedure that must be followed to make the deposit and the auction and it determines who is responsible for meeting the costs of instigating it. Specifically, the deposit may be requested when impediments to transport arise, due to the addressee not being at the address indicated on the bill of lading, due to not taking charge of the goods under the conditions established in the contract, not undertaking the offloading procedures that apply to them or refusing to sign the delivery document, if the carrier was unable to request new instructions or was not given those that were requested; goods that are at risk of being lost or being seriously damaged, without there being time to deliver them or for their owners to take delivery of them or for them to give instructions regarding this, may be disposed of in any event. Also during the 10 calendar days as of the non-payment of the price and other transport costs, the carrier may request that the withheld goods be deposited and disposed of.

For parcel and similar transport, the law states that if the customs declaration of value is not made, the goods will be understood to have been abandoned if three months have elapsed after the date when their initial delivery to the addressee was attempted and no instructions have been received regarding their destination.

Ruling of 5 October 2010, by the Directorate General of the Merchant Marine which publishes the Council of Ministers Agreement of 20 August 2010 which approves the Special Sea Rescue Services For Persons in Distress and Marine Environment Pollution Prevention Plan for 2010/2018

The Special Sea Rescue Services For Persons in Distress and Marine Environment Pollution Prevention Plan, which is valid for 2010/2018, reviewed in 2013, and effective as of 2014, has been created to consolidate the Spanish sea rescue and pollution prevention system.

The aim of the Plan is to safeguard, inspect and penalise those responsible for pollution, disseminate the culture of prevention, fund the development of a Response System for incidents and accidents at sea, create an institutional framework based on coordination and cooperation at international, national and regional level and foster Spanish leadership in marine issues, and promote innovation and applied research.

Public aid

For 2011, the Directorate General for Land Transport has set out the aid packages to reciprocal guarantee companies operating in the road transport sector, to independent road hauliers who have left the industry, and aid for road transport training through FOM ORDER/3191/2010, FOM ORDER 3192/2010 and FOM ORDER/3193/2010, all of 1 December 2010.

The EU intervenes against drivers who commit offences abroad

EU Transport Minister have reached an agreement designed to penalise drivers for offences that they commit abroad, especially speeding, jumping red traffic lights, not wearing seat belts and drink-driving. The aim of this measure is to put an end to the customary practice of foreign drivers not being pursued when they return to their country of origin.

Ruling IRP/4155/2010, of 21 December 2010, which establishes regulation measures for traffic and goods transport by road in Catalonia for 2011 (Official Gazette of the Catalan Government of 31 December 2010)

Measures for the regulation of traffic and transport in regional Catalan demarcations for the period from when this Ruling came into effect until 31 December 2011 constitute restrictions on authorisations of testing and sports and recreational activities; traffic prohibitions on Catalan interurban public highways on the dates, at the times and on the stretches of road indicated in Appendix B of the Ruling 1) for goods transportation vehicles, except for those transporting livestock, fresh milk or rubbish with or without charge, as well as those transporting water for human consumption through mobile cisterns, postal services and daily press distribution; 2) for general goods transport vehicles that cannot use the AP-7 motorway to France, except for vehicles or vehicle groups of all types of MMA for refrigerated, perishable goods and livestock transport; 3) for vehicles that require special administrative authorisation, due to their size, dimensions or load; 4) for special works machinery-type and services vehicles and self-elevating machinery vehicles, except those which provide assistance to vehicles that have broken down or been in an accident; 5) for vehicles that have to carry regulation orange danger panels and vehicle groups of all types of MMA, which cannot use the roads either stipulated in Section 3 of Appendix D of this Ruling.

The Ruling also sets out the routes for dangerous goods, as well as additional restrictions due to weather conditions that may endanger road safety and for tunnels, with special mention for the Cadí tunnel.

A general systems of exemptions to the restrictions is also established, including authorisations for testing and sports and recreational activities with a social purpose or of a traditional nature, special permanent or temporary authorisations and exemptions from exceptional or emergency situations.

Liability for a concession holder regarding traffic congestion affecting thousands of users. Supreme Court Ruling (Civil Court, Section 1) Ruling No. 473/2010 of 15 July 2010

The Ruling sentences the AP1 (Burgos-Armiñon) motorway concession holder for their negligent actions during the snowy conditions on 27 and 28 February 2004, as it finds that it did not act with the due diligence nor did it preserve or treat the motorway in line with the weather conditions, nor did it resolve the tail-backs caused by the accidents that occurred. The existence of snow in winter cannot be considered an unforeseeable event, for which reason the concession holder is obliged to adopt maximum precaution to avoid or at least lessen the risk for traffic under these circumstances. The fact that this is the competent administrative authority to pass traffic regulations and adopt the emergency measures does not exempt the concession holder from its corresponding liability in line with its role of collaborator with the Administration as regards policing and road safety derived from its ownership of the road.

The Ruling sets the moral and equity damage suffered by consumers and users because of the situation they had to endure for hours in a snow and wind storm, stuck in traffic chaos, which left them feeling worried, anxious, despairing, frightened, extremely unhappy, uncertain and helpless, and established fixed financial compensation at € 150 and at the sum established in the Rates Table according to vehicle type. However, compensation will be paid to those who are considered consumers and users in accordance with the Consumers and Users Protection Act and this excludes those who may have used the motorway service in order to be included in production, transformation, sales and provision to third parties processes.

Supreme Court Ruling (Court of Judicial Review, Section 6) Ruling of 10 November 2010

The Supreme Court passed the Ruling rejecting the judicial review appeal lodged by a maritime agent and ship consignee against the alleged appeal and subsequently express claim for personal liability of the legislator state for damages suffered to its equity derived from the payment of port fees during the 2002 financial year to Barcelona Port Authority covered by the rule which was declared unconstitutional and void, specifically Sections 1 and 2 of Article 70 of Law 27/1992 regarding State Ports and the Merchant Marine, in its wording passed by Law 62/1997, of 26 December 1997.

The Court ruled that through payment of the corresponding fee, the institution lodging the appeal accessed this port service (use of public domain or port service) and through this obtained the corresponding benefit which it incorporated into its equity. The declaration of unconstitutionality did not alter the equity situation of the institution lodging the appeal, nor were any detriment to equity or real and effective damages recorded. Besides this, the Ruling stated that the interested party may lodge claims for the fees paid, i.e. that undue payments be returned, since no legal regulation exists which covers settlement of the fee. In this case, incorporation of the service into the equity for which the fee was paid cannot be considered an unlawful source of income.

Ruling of the Supreme Court of Catalonia, Employment Tribunal 14 May 2010. Legal system that applies to self-employed financially dependent employees who work in transport

The company unilaterally terminates the provision of services contract that it has had with a haulier for over 14 years. TRADE has the right to receive compensation for damages, since the company has not recorded any non-fulfilment by the haulier.

The Ruling states that TRADE cannot be considered a denatured employee and on this basis rules similarly regarding all issues between TRADE and the client, appealing to institutions regulated by the Employees Charter. LETA establishes a legal system specifically for self-employed financially dependent workers, whereby all workers whom it does not regulate must use the regulations of civil, mercantile or administrative law, depending on the nature of the contract that has been signed.

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