Corporate Criminal Liability: Tool or Obstacle to Prosecution?

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Abstract White-Collar crimes are especially difficult to investigate. In the United States, prosecutors, whose conduct is guided by the principle of opportunity, have a great discretion in order to force corporations to cooperate; moreover, corporations do not enjoy the same procedural rights as individuals. By contrast, in many European countries the principle of legality prevents prosecutors to negotiate agreements about bringing charges, and corporations are granted with the same procedural rights as indicted individuals. Consequently, substantial differences between the U.S. and European procedural systems may mean that corporate criminal liability, which is a useful tool in the United States, instead becomes an obstacle for criminal investigation in Europe.

1 Corporate Criminal Liability as a Prosecution Instrument

In the U.S., corporations can be criminally convicted for crimes committed by individual directors, managers and low-level employees. The possibility that legal persons can be held criminally liable has existed for over a 100 years.[1] This eventuality takes place in a corporative context where investigations are particularly complex and certain procedural guarantees further compound the difficulties of prosecution. Moreover, U.S. prosecutors, whose conduct is guided by the principle of opportunity, can decide whether to bring charges or not, which charges

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[1] It is noteworthy the Supreme Court's landmark 1909 decision in *New York Central & Hudson River Railroad v. United States,* 212 U.S. 481(1909).

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to bring, and whether to negotiate plea bargains. All these circumstances lead U.S. prosecutors to use their powers to force corporations to cooperate in determining, prosecuting and convicting individual responsible persons. In return for this forced cooperation, corporations, almost always, are rewarded with a favorable deal—often a deferred prosecution agreement (DPA), which contains a promise to defer any prosecution as long as corporations comply with the terms of the agreement, and even a non-prosecution agreement (NPA), which drops charges.

Traditionally, in civil law countries the possibility that legal persons can be held criminally liable has been denied. But currently, systems of corporate criminal liability are spreading throughout Europe and some Latin American countries. The problem is that these countries have a different legal context. Prosecutions usually follow the principle of legality, according to which all crimes must be prosecuted and punished. Consequently, prosecutors do not have the power to negotiate and decide on bringing charges, which can lead to devastating consequences for a legal person that is submitted to public trial. In addition, when a legal person is accused, contrary to what happens in the U.S., investigation becomes more difficult. The reason for this difficulty lays in the recognition of certain procedural rights also for legal persons—such as the privilege against self-incrimination or the right against unreasonable searches and seizures—which they did not enjoy previously or whose protection was weaker.

Ultimately, specificities of corporate crime demand specialties in the prosecution of such offenses, but they should never justify violations of procedural rights. Therefore it is necessary to find a balance between impunity of the company and individual wrongdoers acting within it on the one hand, and respect for peoples' procedural fundamental rights on the other hand. To deal with this dilemma, it must be taken into account that a corporation it is not the same as an individual at all, but wrongdoers acting within a corporation must enjoy the same rights as any other defendant.

The aim of this contribution is to draw attention to the differences between the systems of corporate criminal procedure in Europe and in the U.S, and above all how these systems work in practice against corporations. To this end, firstly I discuss some particularities of corporate crimes and how these particularities could justify some specialties of the U.S. way of prosecuting corporations. Secondly, I will comment on the implications of the investigative powers of European authorities handed to them when introducing corporate criminal liability systems. And finally, I will try to convey some conclusions about what I believe a balanced solution between both systems should be like.

2 Specialties of Prosecuting Corporate Crimes

As a general rule, detecting and proving crimes committed within corporations is more difficult than in common crimes. Crimes committed in a business environment often do not relate to an isolated criminal behavior of a single person; rather

they are usually the result of a combination of numerous acts or omissions attributable to different people. This is a consequence of the division of labour and of decentralizing the decision-making process. Both circumstances make identifying individual wrongdoers and proving which individuals are responsible for the facts more difficult.

In this sense, the legal person promotes the *concealment of individuals responsible for criminal acts*. When individuals act on behalf of the corporation, many times the legal cover serves to hide individual wrongdoers. In this context, establishing the "law of silence" as company policy can turn a corporation impenetrable for the state.

Moreover, white-collar crimes are difficult to detect because tracks left, usually documents, are held by the criminals, which hinders the criminal investigation. In common crimes as murders or rapes, evidence is generally easier to obtain because it is not under control of the criminal. In contrast, corporative wrongdoers usually posses or keep *documents and others evidences* under control.

In addition, it must be taken into account that the *economic power* of corporations is usually greater than individuals. As a reflection of this unequal economic power, in the U.S. many companies have established by contract to advance attorneys' fees for individual employees. Large companies can afford long trials and the best teams of lawyers which put them in a leading position to negotiate agreements. Besides, investigating some corporate criminal cases costs millions of dollars due to the technical complexity and long duration; therefore it is helpful to encourage corporations to cooperate.

Furthermore, companies rely on the *support of lawyers*, not only during criminal proceedings, but also before initiating criminal actions. These professionals sometimes cooperate in crimes, and at other times advise their clients how to commit crimes with impunity. While in other types of criminality the relationship between the defendant and the lawyer is always subsequent to the crime, in corporate crimes it is often simultaneous. Transactional lawyers paid by and working for the firm, supply *ex ante* legal assistance to actors contemplating whether to engage in a particular action or activity.[2] The firms' lawyers take part in the riskiest business activities and provide advice focused on legal risk assessment. As a consequence, companies are in a greater position to avoid criminal actions. At the same time, lawyers become knowledgeable of relevant and confidential information; therefore, in this context the protection of attorney-client and work product privileges covers a substantially broader scope.

These features may justify certain procedural specialties, but there is also a need to always respect the boundary marked by the due process of law. Corporate criminal liability in the U.S. is used to combat the particular obstacles of criminal investigation within firms. The state faces unique obstacles to the detection and to proving wrongdoing when it occurs within legal entities.[3] "These difficulties (...)

[2] Buell (2007), p. 1658.

[3] Buell (2007), p. 1616.

are only exacerbated in the context of white-collar criminal proceedings, in which the underlying facts are likely to be particularly complex, the investigations particularly time consuming, and the defense counsel particularly skilled".[4]

3 On the Situation in the U.S.: Criticism to the Misuse of Prosecutorial Power

Corporate criminal liability is criticized in the U.S. for its conceptualization as a tool used by prosecutors to manipulate certain aspects of the U.S. criminal procedure.[5] Three specific procedural practices have been described as objectionable: employers coercing employees to waive the right not to testify and, above all, the state using the fruits of such waiver; the state pressuring corporations to cease to indemnify their agents for litigation costs; and the state negotiating with corporations on the waiver of their attorney-client and work product privileges.[6]

3.1 Privilege Against Self-Incrimination

In 1906, the Supreme Court held in Hale *v*. Henkel[7] that a corporation does not enjoy the Fifth Amendment privilege against self-incrimination because the right applies to natural persons and not to corporations.[8] At the same time, the Court permitted corporations to challenge the governments' seizure of corporate records on Fourth Amendment grounds.[9] To explain this different treatment, the Court acknowledged that the breadth of the organizations' rights is not as great as that recognized for individuals, because it rejected to anthropomorphize the corporation. The determination of whether a constitutional right should apply to a corporate criminal defendant and how broad this protection should be depends on two factors. It is necessary to weight up the possibility of power abuses by the government absent the constitutional protection on the one hand with the effect of permitting a corporation to assert the right on the governments' ability to enforce the law effectively[10] on the other hand.

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[4] Diskant (2008), p. 131.

[5] Diskant (2008), p. 132.

[6] Buell (2007), p. 1616.

[7] 201 U.S. 43 (1906).

[8] Id. at 75–76; see Braswell *v*. United States, 487 U.S. 99, 108–109 (1988) (explaining that the Fifth Amendment privilege does not apply to "collective entities").

[9] Id. at 76.

[10] This is the approach adopted in Hale *v*. Henkel. And it is also adopted and deeply explained in Henning (1996), especially pp. 795ff.

3.2 Facilitating Employee Cooperation

With regard to statements of employees, a corporation is expected to facilitate employee cooperation with the ongoing investigation.[11] In order to comply with the conditions to be considered cooperative, corporations must use their best efforts to make employees available to the government—one requirement usually included in NPAs and DPAs.[12] Corporations threaten employees with losing their jobs if they refuse to testify or to be questioned, in order to comply with the requirements of prosecutors and in order to enjoy the advantages of "cooperatives corporations".

But the problem is that employees, who are given the choice of either speaking with corporate investigators or losing their jobs, often are not provided an own counsel to discuss that choice; in fact, they do not have a free choice: In Garrity *v.* New York, the Supreme Court held that such a choice to lose ones' means of livelihood or to abide the penalty of self-incrimination is the antithesis of free choice to speak out or to remain silent.[13] From the perspective of due process of law this is a really worrying situation. The actions of private employers induce employees to provide incriminating evidence against themselves, but their actions are planned and enforced by the government, so they may be fairly attributable to the government within the meaning of the Fifth Amendment.[14]

3.3 Employees' Right Not to Testify

Regarding the employees' right not to testify, should they know that the information they provide may be used against them in criminal proceedings and they might refuse to testify in order to prevent the risk of self-incrimination. In fact, although mediated by the employer, to coerce employees to provide evidence would be considered a state action. Actually, when the government has provided the employer with significant encouragement to force their employees to cooperate, this coercion on employees should be attributed to the state.[15] "Coercing a waiver of the right to silence through a delegated threat of termination is just such a bypass and public constitutional norms should prevent it despite the formalism of the state action requirements".[16]

This does not mean that the employer cannot terminate an employee who refuses to cooperate in an investigation, e.g. if it was previously set as company policy, or,

[11] Bohrer and Trencher (2007), p. 1481.

[12] Bohrer and Trencher (2007), p. 1488.

[13] 385 U.S. 493, 500 (1967).

[14] See United States *v.* Stein (Stein II), 440 F. Supp. 2d, 315, 334–335, 337 (2006); Griffin (2007), p. 365; Bohrer and Trencher (2007), p. 1489.

[15] Griffin (2007), pp. 365ff.

[16] Griffin (2007), p. 364.

above all, in relation with staff in positions of trust, whose dismissal does not require a specific reason. What is not permissible is that the statements made by employees under threat of dismissal may be used in criminal proceedings whenever such a threat was relayed by the employer, but originally stems from the government, given that, the employer can be considered the executive arm of government in such a case.[17] The Fifth Amendment does not protect employees from an unfair dismissal; it protects them from having coerced statements being used in criminal proceedings against them.

The right of defense along with other more specific rights—as the advice of an attorney, the right against self-incrimination and the attorney-client privilege—are fundamental rights of individuals in the U.S. The waiver of such rights should be entirely voluntary, done by the natural owner of the right. In internal investigations of corporate crimes, however, most of times the employees' waivers are done under threat.

3.4 Employees' Legal Expenses

Companies advancing or paying attorneys' fees for their employees may be also considered an indication of non-cooperative behavior. The threat of cutting off payment of legal expenses of any employees who refused to talk to the government or who invoked the Fifth Amendment privilege against self-incrimination was considered by Judge Kapland to be out of bounds of appropriate government action.[18]

In my opinion, if the company is committed to its employees to pay these expenses, it is contrary to good faith to stop paying in order to put pressure on them. However, bearing the costs of litigation for employees could be an incentive to crime. That may show that the company is not a good corporate citizen. However, this should be assessed from an *ex ante* perspective. If it is provided *ex ante* that the company will pay his litigation costs unless the employee commits a crime against compliance rules, this foresight would have a positive effect in order

[17] Griffin (2007), p. 360.

[18] Judge Lewis A. Kaplan has issued two opinions finding rights violations based on governmental coercion of KPMG. See United States *v*. Stein (Stein I), 435 F. Supp. 2d 330 (S.D.N.Y. 2006); United States *v*. Stein (Stein II), 440 F. Supp. 2d 315 (S.D.N.Y. 2006). In the first ("Stein I"), the court held that the Thompson Memorandum's suggestion—followed by prosecutors in the case—that cooperation could be judged by the corporation's decision whether to pay the attorneys' fees of its potentially culpable officers and employees improperly interfered with those targets' Fifth Amendment right to due process and Sixth Amendment right to counsel. In the second opinion ("Stein II"), the court held that two of the proffering employees who had been threatened with termination of their jobs and payment of their legal fees if they did not make a statement to the government, made their statements under coercion attributable to the government, and their Fifth Amendment rights against self-incrimination were violated. See Bharara (2007), pp. 24ff., especially p. 24.

to prevent criminal risks because it would increase risk aversion. I believe that government could assess positively this type of forethought, but it should not force companies to stop paying and breaching earlier agreements with employees.

3.5 *Attorney-Client and Work Product Privilege*

Regarding the attorney-client and work product privilege, its scope in the U.S. is too broad and perhaps it should be reduced, but again: its waiver should not be forced at all. In my opinion, the problem is that the U.S. understanding of attorney-client privilege is excessively broad and this trouble is compounded by the special role of lawyers in corporate crimes. One possibility may be to reduce the breadth of this privilege by limiting this protection to documents produced in the preparation of the defense by the outside counsel. In this regard, the Court of Justice of the European Union has distinguished between internal and external counsel. Only the external one is protected by the right to professional secrecy, while an in-house lawyer is not, because he cannot enjoy the same degree of independence. This lack of independence links him to the strategies of the company[19] rather than the defense strategy that is worth protecting.

The negotiations on these issues, which affect individual rights, are possible because of the great prosecutorial power. Some authors justify these prosecutorial powers by the unique perils of U.S. criminal procedure.[20] From this point of view the adversarial system recognizes defensive rights and privileges so broadly that they may be abused by corporation. In return of this situation U.S. prosecutors possess powers that are being misused.[21] Other authors justify these prosecutorial powers by the peculiarities of corporate crime.[22] And some of them criticize this situation because it undermines rights, privileges and the adversarial system taken as a whole.[23]

3.6 *The Necessity of Limiting Prosecutorial Power*

In 2006, the approval of the McNulty Memorandum[24] limited the prosecutors' power to qualify companies as cooperatives. According to this Memo, it is not enough to indict the company and to deny it DPAs that it continues to pay attorney

[19] C-550/07 P—Akzo Nobel Chemicals and Akcros Chemicals *v*. Commission.

[20] Diskant (2008), p. 150.

[21] Diskant (2008), p. 175.

[22] Buell (2007), pp. 1622ff. The author explains this "distinctive setting of the firm".

[23] Silber and Joannou (2006), p. 1240.

[24] Memorandum from Paul J. McNulty, Deputy Attorney Gen., U.S. Dep't of Justice, to Heads of Department Components and U.S. Attorneys, Principles of Federal Prosecutions of Business

fees of its agents[25] or it does not waive the attorney-client privilege.[26] In order to assess such behavior as non-cooperative, additional negative requirements are needed, for example a specific aim of hindering the investigation that legitimates the need for the waiver. Despite of those theoretical limitations, corporations under investigation must still offer complete and genuine cooperation in order to escape an indictment[27] that could mean their death. And, "since an indictment firm is a dead firm, a decision to defend an indictment is a suicide".[28]

In light of the potentially devastating impact an indictment may have on the business continuity, corporations are under incredible pressure to avoid that result. With the Department of Justice looking for "authentic" cooperation, which means the corporation must become the "agent" of the government in helping to "catch the crooks", i. e. the investigative arm of the government, "it is not surprising that waivers of the attorney client privilege and work product privilege are becoming more frequent and more complete".[29]

The U.S., system of corporate crime could have a procedural justification.[30] In this sense, some authors maintain that this type of liability is regulated by the U.S. law in order for not being applied. And it is understood that the reason for regulating corporate criminal liability is to facilitate the criminal investigation by forcing corporations to cooperate. In fact, virtually in all cases against corporations the process ends up without a trial against the corporation, and even without bringing charges.

Prosecutors have the duty to address both corporate and individual wrongdoing; moreover, corporate liability is too broad because of the *respondeat superior* theory. In addition, DPAs and NPAs are conditioned to the depth and sincerity of the corporations' cooperation[31] and prosecutors have tremendous discretion to plea bargain cases. All these circumstances, together with the devastating consequences of an indictment for a corporation, make it essential for a corporation to cooperate, in order to ensure its survival. Corporations cooperate fully by waiving their rights, and not only their own rights but also the rights of their employees, and they conduct internal investigations that cost millions of dollars in order to avoid being indicted. It must be taken into account that an indictment could mean the

Organizations (Dec. 12, 2006), available at http://www.justice.gov/dag/speeches/2006/mcnulty_memo.pdf (12.2.2014).

[25] Id. § VII (B) (3) at 11–12.

[26] Id. § VII (B) (2) at 10.

[27] Bohrer and Trencher (2007), p. 1488.

[28] Oesterle (2004), p. 476.

[29] Silber and Joannou (2006), p. 1230.

[30] Diskant (2008), p. 141. The author explain the role that entity criminal liability plays: "by charging both the corporation and the individuals, U.S. prosecutors rather artificially create codefendants, and as is so often the case in the U.S. system, one defendant can then be compelled to plead guilty and cooperate in the prosecution of a codefendant".

[31] Bohrer and Trencher (2007), p. 1481.

corporations' death. Therefore, it can be stated that corporations do not cooperate voluntarily but under enormous pressure.

4 The Different Situation in Continental Countries: With Special Reference to the Spanish Case

The situation in continental countries is very different for two main reasons. Firstly, the *principle of legality* prevents prosecutors from not bringing charges when a crime has been committed. Therefore, the power to negotiate agreements is more reduced, at least in theory. Secondly, introducing corporate criminal liability actually *turns* corporations *into a new and strengthened rights holder*.

4.1 A Different Approach

Most of the European and especially the Spanish doctrine understand that the broader—and even coextensive with the individuals—recognition of rights and guarantees to legal persons is the unavoidable counterpart of introducing corporate criminal liability in our law.[32] They base this assertion on an *anthropomorphic conception* of the legal person. This also involves a conception of procedural rights and guarantees based on protecting the indicted from abuses of power, rather than on human dignity.

Following this approach *strictu sensu*, legal persons could also enjoy other rights they lack in the U.S., such as free legal aid, the right to the presumption of innocence, the right to self-defense through a representative, the right not to incriminate themselves, or the right against unreasonable searches and seizures, including the inviolability of the domicile. All of them reinforce the entity's right of defense but the problem is that sometimes it overly hinders criminal investigations.

4.2 Right Against Self-Incrimination

In Spain, the subjective scope of the right not to incriminate oneself has been expanded by law in order to include legal persons.[33] This right is recognized in general for all defendants in criminal proceedings. Before corporate criminal liability was introduced, only individuals could be charged. Nowadays, legal

[32] Gascón Inchausti (2012), p. 66, who asserts that legal person may be imputed or charged means it has to have all the rights that the law links to this procedural positions. See also Brodowski, in this volume, pp. 211ff.

[33] Bajo Fernández and Gómez-Jara Díez (2012), p. 283, the Spanish legislator has chosen to equate the procedural status of the individual accused and the legal person accused.

persons can also be a defendant in a criminal process, hence any natural or juristic person has the right not to incriminate themselves in order to avoid becoming charged and eventually convicted.

Most authors deny the possibility of applying the rules of civil law to criminal procedures, because in criminal proceedings special guarantees must be respected without exceptions. For example, the right not to incriminate themselves precludes the application of a rule of civil procedure that allows to draw negative conclusions from inconclusive or evasive answers of the defendant or to force the representative of the legal person in the process to identify who personally intervened in the facts in dispute.[34]

Taking as an example the Spanish regulation, it is observed that the introduction of criminal liability of legal persons has strengthened their right not to incriminate themselves. By means of the new regulation of corporate criminal liability, *the representative who acts on behalf of corporation in a criminal proceeding has the right not to testify* (art. 409 bis LECrim[35]).[36] According to this, it could happen that a potential witness—with knowledge of the facts but not personally implicated in the facts under investigation—might be appointed as representative and therefore protected by the right not to testify, although Spanish Criminal Procedure Act attempts to avoid this situation establishing an incompatibility between being witness and representative of the corporation (art. 786 bis 1. II LECrim). On the other hand, scientific doctrine discusses if employees, officers, board members or other members of the organization would also have the right not to testify when they act on behalf of the legal person charged.[37]

Before corporate criminal liability was introduced, the Spanish Constitutional Court pronounced two decisions[38] in which it stated that coercive requirements to legal persons to produce incriminatory documents and later use of these documents against administrators was constitutionally legitimate. The courts' argument was that the documentary requirement had been adressed to the corporation itself. Therefore, the defendant, a natural person, had not been personally coerced or required to submit such documents, so his right not to testify had not been violated. What would happen today with the new legal regulation of corporate criminal liability? Probably, evidence obtained from corporations by coercive requests would be void, for they were obtained by violating the fundamental right not to incriminate itself. As a result, they could not be used to condemn the entity and possibly neither to condemn the individual wrongdoer. This is because evidence obtained in this way is legally null and void therefore may not be used.

[34] Del Moral García (2010), pp. 758f.; in this sense see also De Aranda y Antón (2010), p. 17.

[35] Royal Decree of September 14, 1882, approving the Spanish Criminal Procedure Act.

[36] Bajo Fernández and Gómez-Jara Díez (2012), pp. 283ff. In this point the wording of the law is clear. So, it does not give room for restrictive interpretation.

[37] Del Moral García (2010), pp. 739ff.

[38] Rulings of Spanish Constitutional Court 18/2005, February 1st and 68/2006, March 13th.

4.3 Consequences Beyond Criminal Proceedings

Under the new legal regulation, it will not be possible to use documents or other evidence coercively obtained in an administrative disciplinary proceeding any more.[39] This is because the protection of the right of defense, including the right not to incriminate itself, is much stronger in criminal proceedings than in administrative disciplinary proceedings.[40]

Ultimately, since legal persons are liable to be charged, all its collaborative obligations decay and the entity may reject requests for information, should it fear that it could be used in a future criminal proceeding against it. It is understood that the absence of an obligation to provide documents is offset by considering cooperation under the attenuating factors of criminal responsibility, foreshadowing a greater difficulty in the investigation of the cases due to the exercise of the right to remain silent.[41] But it must be taken into account that the cooperation of the entity has to be voluntary, without coercion, and evidence of guilt cannot be derived from the lack of cooperation.[42]

4.4 Inviolability of the Home

Another right that is strengthened by means of this new regulation is the inviolability of the domicile, as searches and seizures of offices or operational headquarters are equated by law to searches and seizures of private homes. When the Spanish law on criminal procedure was modified in order to allow the intervention of legal persons in criminal proceedings, a new concept of domicile was settled.[43] The space defined on the law, that includes headquarters and other offices or establishments protected from third parties' gaze, cannot be searched without consent of the owner or the representative of the company. In the absence of consent, a judicial search warrant is necessary. With this legislative reform, the level of protection of private homes, registered offices and operational headquarters is equated by law. Namely corporations have the right to be free from unreasonable searches and seizures and the protection of this right is coextensive with the security afforded the

[39] In this sense see Funke *v*. France (Case A/256-A) European Court of Human Rights [1993] 1 CMLR 897 25 February 1993.

[40] Del Moral García (2010), p. 741.

[41] Maza Martín (2010), p. 8.

[42] Many European constitutional Courts and the European Court of Human Rights has said that you cannot appreciate the lack of cooperation as evidence of guilt, because the opposite would render meaningless the right not to testify.

[43] Article 554.4º LECrim—the Spanish Criminal Procedure Act—defines the domicile of legal entities as the physical space that constitutes the direction center, whether headquarter or dependent establishments, or such other places where may be found documents or other means of your daily life that are reserved to the knowledge of third parties.

individual. Before the reform, protection for legal persons was lower because judges had more discretion to assess the circumstances of each particular case.

4.5 Attorney-Client Privilege

With regard to the attorney-client privilege,[44] Spanish law protects the information and communications with defense counsel as part of the general right to counsel. The right to professional secrecy or confidentiality is narrower than in the U.S. because it only protects legal advice associated with the procedural defense of the parties, which may include pre-trial or extra-procedural advice. But confidentiality does not protect the work product or communications related to financial services, agency services—as tax consulting, financial accounting or payroll services—or property management services.

Actually, the Directive 2005/60/EC on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing[45] establishes obligations for reporting suspicions of money laundering or terrorist financing with some exceptions for lawyers, but only when they are in the course of ascertaining the legal position for their client or performing their task of defending or representing that client in, or concerning judicial proceedings, including advice on instituting or avoiding proceedings (Art. 9.5).

In short, as secrecy is conditional upon the advice being related to current or future legal proceedings, the possibility for legal person to become a defendant in a criminal trial means greater protection for them. In the current situation, companies are more likely to refuse to provide certain information protected by right to professional secrecy in order to prepare its defense, or in order to avoid criminal proceedings altogether.

5 Conclusions: Learning from the Mistakes of Others

In short, in the U.S. attempts have been made to adapt the procedural system of guarantees to the specialties of corporate criminal liability. By contrast, in Spain, and in general in other continental countries, the option has been for a full alignment with individual, natural persons charged. *The argument is simple and even simplistic: corporations can become charged as individuals, so they should have the same procedural rights*. But full equality between natural and legal

[44] A further study can be seen in Bajo Fernández and Gómez-Jara Díez (2012), pp. 294ff.

[45] Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing, OJEU 25.11.2005, L 309/15.

persons is not appropriate for several reasons. First of all, this equalization overly hinders investigation and prosecution. And above all, it should not be forgotten that corporations and individuals have an entirely different nature, among other things because corporations lack human dignity. Corporations and individuals are not the same at all!

Despite the problems of the U.S. system, full equality between natural and legal persons is not appropriate because it overly hinders research in a field in which it is inherently difficult to investigate. It is necessary to consider whether an accountability system, which hinders the investigation of white collar crimes, is convenient. In this sense, one of the criticisms of the Law and Economics school, which has developed the theory of optimal sanctions against corporate criminal liability, is that criminal process increases costs more than civil process because it implies greater guarantees for the defendant.[46]

In Europe, it would be advisable to standardize the system of guarantees for legal persons, to reject anthropomorphism and to grant corporations just the rights which are in accordance with its special nature. In addition, it would be convenient to establish certain duties for companies, for example documenting their actions and providing them periodically to public authorities. Besides, it would be recommendable to expand the possibilities of reaching NPAs or DPAs, which may include fines, but which also allows to avoid public trials and thus limits collateral damages for stakeholders.

In the U.S., the system of corporate criminal liability should be narrowed down in order to avoid power abuses from prosecutors. For the same purpose, prosecutorial negotiations and agreements should be standardized and their judicial control should be strengthened. In any case, prosecutors should prevent the investigation from finishing falsely, reaching agreements which contain mechanisms for sliding accountability at lower levels. Shifting risks toward the lower echelons of the corporate hierarchy,[47] which has been called reverse whistle-blowing,[48] is unacceptable from the point of view of the procedural guarantees of the indicted employees. And, it is also truly unfair because those who benefit the most from corporate crimes are normally those in control of the organization.

In my opinion, some continental countries imported the U.S. system thoughtlessly. In the U.S., with certain limitations, such as those marked by due process of law, the regime of corporate criminal liability can be useful to facilitate the investigation of corporate crimes and bringing legal entities to justice. On the contrary, in Europe, the equalization between firms and individuals overly hinders investigation and prosecution, and the strict principle of legality prevents negotiating with companies and makes it difficult to keep legal proceedings secret.

[46] Gómez-Jara Díez (2010), pp. 264f.

[47] Guidelines introduce strong incentives for managers to shift risks toward the lower echelons of the corporate hierarchy and leaders of the company with the company counsels' aid denouncing employees just to save the corporation, Nieto Martín (2008), p. 207.

[48] Laufer (2006), pp. 137ff.

Moreover, specifically in Spain, private individuals can initiate criminal actions that could mean the ruin of a corporation that has not committed any crime but just is indicted.

Consequently, substantial differences between European and the U.S. procedural systems may cause corporate criminal liability to change from a useful tool in the U.S. into an obstacle to criminal investigations in Europe.

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