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Money laundering, artificial intelligence, criminal responsibility of legal persons and corporate crime[2]

Abstract

The tools of artificial intelligence can revolutionize the fight against money laundering, but it is necessary to maintain a balance between efficiency and safeguarding fundamental rights. The common criminal instrumentalization of companies for the commission of money laundering motivated in 2010 their incorporation into the criminal responsibility of legal persons and the possible exemption or mitigation of punishment in 2015 through compliance programs, which pose several problems. Directive 2018/843 also seeks to achieve greater transparency of transactions, companies, legal entities, trusts and similar instruments, and Directive 2018/1673 makes it compulsory to ensure that legal persons can be held responsible for the money–laundering offense, although it does not require the use of criminal penalties; however, a reform of art. 303 of the Criminal Code was necessary, and this amendment should be used to remove obvious errors, but Organic Law 6/2021 introduces a professional aggravation among the types for organizations of art. 302.1. Furthermore, the unsystematic legislator of 2021 wasted the reform by not eliminating in art. 303 aberrant mentions. Last, but not least, the spanish supreme court has created a theory of corporate crime that can violate the principle of legality and confuse law with morality.

Key words

Money laundering, artificial intelligence, criminal responsibility of legal persons, corporate crime.

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1. Money laundering and artificial intelligence

Artificial intelligence is not about the panacea or the much–sought remedy that cures all ills, but artificial intelligence is fallible[3] due to programming defects and lack of control of the algorithms[4], it is given a halo of infallibility that does not correspond to reality, since these are highly manipulable statistics and methodologies, because all artificial intelligence requires manual work of constant correction and algorithms adapt to prejudices and systems of oppression[5], are insecure in their scope and reliability, lack transparency and are not reproducible[6], which is why the secrecy of algorithms has been compared to ancient alchemy and some results have been criticized because it is not known how to get there[7]. In addition, the environmental[8] and energy[9] catastrophe caused by artificial intelligence was denounced, since, as an example, a conversation with ChatGPT consumes half a liter of water and tens of millions are made daily[10].

In short, digitalization has an ambivalent effect[11]: it has raised barriers and fostered distance, but it has also made possible interactions of very different types[12], it makes life easier, although it also creates new risks[13], which

[3] Caro Coria, D.C., Compliance, neurociencias e inteligencia artificial, in Demetrio Crespo, E. (Dir.), Derecho penal y comportamiento humano. Avances desde la neurociencia y la inteligencia artificial, Tirant lo Blanch, Valencia, 2022, p. 645.

[4] *Ibidem*.

[5] Cfr. Jaume Palasí, L., ¿Ha impulsado la pandemia la digitalización?, in Santalla Pulido, M. . (Coord.), ¿Estamos preparados para el mundo que viene? La sociedad poscovid, 3, La Voz de Galicia, A Coruña, 2023, pp. 75, 77, 79 and 80.

[6] Cfr. Demetrio Crespo, E., El Derecho penal ante el desafío neurotecnológico y el algorítmico: reflexiones preliminares, in Derecho penal y comportamiento..., cit., 2022, p. 26.

[7] Cfr. Martínez Garay, L., ¿Ciencia o alquimia? Algoritmos y transparencia en la valoración del riesgo de reincidencia, in Demetrio Crespo, E., Derecho penal y comportamiento..., cit., 2022, p. 498.

[8] Regulation (EU) 2023/1114, of May 31, on cryptoasset markets, in its whereas 7, highlights the possible adverse effects on the climate and the environment of the mechanisms to validate operations with cryptoassets.

[9] Blockchain technology has a high cost due to the electrical consumption necessary for the encryption, due to the nodes that support the distributed registry that guarantee security (cfr. Navarro Cardoso, F., Blockchain, smart contract y compliance: anotaciones para el Derecho penal y procesal de la persona jurídica, in Demetrio Crespo, E., Derecho penal y comportamiento..., cit., 2022, p. 679).

[10] Cfr. Jaume Palasí, L., *op. cit.*, pp. 76 and 77.

[11] Innerarity Grau, D., ¿Vivimos en una sociedad más controlada y menos libre?, in Santalla Pulido, M. (Coord.), ¿En qué hemos cambiado?, La sociedad poscovid, 2, La Voz de Galicia, A Coruña, 2023, p. 50.

[12] *Ibidem*.

[13] Cfr. Muñoa Vidal, T., Blanqueo de dinero y mundo digital, in Abel Souto, M./Lorenzo Salgado, J. M./Sánchez Stewart, N. (Coords.), IX congreso sobre prevención y represión del blanqueo de dinero, Tirant lo Blanch, Valencia, 2024, p. 553.

must be addressed in the framework of the security–freedom conflict[14], because although the tools of artificial intelligence can revolutionize the fight against money laundering, it is necessary to maintain a balance between efficiency and safeguarding fundamental rights[15].

Certainly the absence of credit risk, as there is normally a prepayment, discourages service providers from obtaining complete and accurate information about clients or the nature of commercial relationships[16], providers who usually use weak technology[17]; The voracity of the markets to access all types of data for the most varied uses and its obtaining outside the interested parties contrary to the Right to Privacy has been denounced [18].

In addition, security gaps have been detected in artificial intelligence and blockchain tools have been associated with the use of cryptocurrencies for money laundering[19], there are tumblers or multi–address mixers that guarantee anonymity[20], in fact mixer services processed the majority of bitcoins laundered[21], Regulation (EU) 2023/1113, of May 31, on information on transfers with funds and cryptoassets, warns of the high risk regarding money laundering of technologies designed for anonymity, citing cryptoasset mixers[22] and the Regulation (EU) 2023/1114, also of May 31, or MiCA Regulation, on cryptoasset markets, also added a section 6 to article 18 of Directive 2015/849[23] that obliges the European Banking Authority to pay special attention, by favoring anonymity, to mixing services.

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[14] Morón Pendás, I., La utilidad de las nuevas tecnologías en la prevención del blanqueo de dinero, in Abel Souto, M./Lorenzo Salgado, J. M./Sánchez Stewart, N., IX congreso..., cit., p. 604.

[15] Cfr. Pavlidis, I. G., Deploying artificial intelligence for anti–money laundering and asset recovery: the dawn of a new era, in Journal of Money Laundering Control, vol. 26, nº 7, 2023, p. 155.

[16] Cfr. FATF, Money laundering using new payment methods, october 2010, http://www.fatf–gafi.org, p. 21, §§58 and 61.

[17] Gómez Iniesta, D. J., El uso de las monedas virtuales y el dinero electrónico en el delito de blanqueo y la Directiva 843/2018, in Abel Souto, M./Lorenzo Salgado, J. M./Sánchez Stewart, N. (Coords.), VIII congreso internacional sobre prevención y represión del blanqueo de dinero, Tirant lo Blanch, Valencia, 2021, p. 656.

[18] Morón Pendás, I., *op. cit*., pp. 1 and 2.

[19] Cfr. Moreira Domingos, I., Las nuevas tecnologías y el impacto del blanqueo de dinero procedente de la corrupción organizada en la democracia, in Abel Souto, M./Lorenzo Salgado, J. M./Sánchez Stewart, N., IX congreso..., cit., 2024, p. 549.

[20] Cfr. Gómez Iniesta, D.J., El uso de las monedas virtuales…, cit., p. 660.

[21] Cfr. Joffre Calasich, F., Criptocriminalidad, in Meirovich, G. D./Berruezo, R. (Dirs.), Ilícitos económicos y evidencia digital, Editores Fondo Editorial, Buenos Aires, 2022, pp. 190 and 195.

[22] Whereas 17.

[23] About the two directives of 2018 vid. Abel Souto. M., Blanqueo de dinero, responsabilidad criminal de las personas jurídicas y directivas de 2018, in Sanz Hermida, A. M. (Dir.), La justicia penal del siglo XXI ante el desafío del blanqueo de dinero, Tirant lo Blanch, Valencia, 2021, pp. 41–75. There is an English version of this article under the title Money

Likewise, there are non-fungible tokens, which constitute smart contracts managed on the blockchain and traded in a digital market. Unlike cryptocurrencies, they are not used as a means of payment, which is why they are classified as non-fungible, although they are really fungible because they can be exchanged like any commodity, proof of this are their prices: 69.3 million dollars cost Everydays and 2.9 the first twitter[24]. Its boom occurred in 2021[25] and in February 2023 the FATF warned that non-fungible token markets represent an emerging vulnerability[26] in terms of money laundering. They serve as certificates of ownership of works of art, videos, songs, writings, actions... and both their high volatility and their speculative fluctuation make them ideal to justify criminal income, thus 8 billion dollars have been laundered by non-fungible token platforms from 2017 to 2021[27] and in 2022 Baller Ape sold non-fungible tokens in the form of drawings, often with a monkey, and shortly after eliminated the investment project, keeping $2.6 million through multiple virtual asset blockchains[28].

Decentralized exchangers, smart contracts that provide cryptoasset exchange services on the blockchain without intermediaries, therefore are not subject to anti-money laundering provisions, also raise problems with money laundering; the stolen money is normally converted and divided into different tokens, as happened on the AscenEx, Qubit Finance and Fortress Protocol platforms[29].

Finally, in June 2023, the FATF showed its serious concern because the majority of jurisdictions, three quarters, exactly 73 out of 98, did not comply, in whole or in part, with the recommendations on virtual assets and their service providers, even qualifying vital the need for rapid compliance by countries[30].

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laundering, criminal responsibility of legal persons and 2018 directives, in pp. 301–334 and in Journal of Applied Bussiness & Economics, vol. 22, 2020, pp. 205–222. Regarding the Spanish role in the fight against money laundering vid. Abel Souto, M., FATF's most compliant countries. Spains's technical compliance and effectiveness: lessons for least compliant jurisdictions, De Legibus, 2022, pp. 241–266. About SEPBLAC and its highest international qualification vid. Lorenzo Salgado, J. M., El blanqueo de dinero procedente de los delitos descritos en los artículos 368 a 372 del CP y las nuevas tendencias de financiación del terrorismo advertidas por las directivas de 2018, in Abel Souto, M./Lorenzo Salgado, J. M./Sánchez Stewart, N. (Coords.), VII congreso sobre prevención y represión del blanqueo de dinero, Tirant lo Blanch, Valencia, 2020, pp. 460 and 461, n. 63. Vid. also FATF, Consolidatet assessment ratings, http://www.fatf–gafi.org (February 2021).

[24] Cfr. Joffre Calasich, F., *op. cit*., p. 201, n. 44.

[25] Cfr. FATF, Targeted update on implementation of the FATF standards on virtual assets and virtual asset service providers, june 2023, http://www.fatf.gafi.org, p. 33.

[26] FATF report. Money laundering and terrorist financing in the art and antiquities market, february 2023, http://www.fatf.gafi.org, p. 41.

[27] Cfr. Joffre Calasich, F., *op. cit*., pp. 201 and 202.

[28] Cfr. FATF report. Money laundering and terrorist financing in the art..., cit., p. 53.

[29] Cfr. Joffre Calasich, F., *op. cit*., pp. 202–204.

[30] Cfr. FATF, Targeted..., cit., pp. 2 and 4.

In short, to condemn the dangers that artificial intelligence and new technologies represent with respect to money laundering, it has been said that the name of the search engine chosen on the Internet allows us to open "the gates of Dante Alighieri's hell"[31], so before clicking the button should remember what was written on the lintel of the door to hell: lasciate ogni speranza, voy che entrate[32].

However, artificial intelligence and the development of technologies, including the Internet, have implied unquestionable advantages[33], cryptographic security, the traceability of the blockchain, the development of user profiles[34], the obtaining of evidence by the prosecution through Transaction tracking through blockchain[35] and artificial intelligence even facilitates, through online resources, identity verification or other duties of diligence for the prevention of money laundering[36], such as in Fintech companies through big data systems and computer applications[37], v. gr., the Chainanalysis Reactor investigation software is used judicially as expert evidence by identifying transaction users and analyzing movement flows, searching for bitcoin addresses to detect tax crimes[38], with which the encrypted protocols "serve investigation and repression organizations to track illicit operations and identify those responsible"[39], and Regulation 2023/1113, of May 31, on information on fund transfers and crypto assets, refers to the "use of analytical tools based on distributed registry technology, to detect the origin or destination of cryptoassets"[40] and with a vision of the future obliges the Commission to present, until June 30, 2027, a report on technological solutions for compliance with the obligations imposed on cryptoasset service providers with the latest advances and the use of distributed ledger analytical tools to identify transfers as well as trends in the

[31] Salazar Icaza, J. C., Blanqueo de dinero y medios digitales, in Abel Souto, M./Lorenzo Salgado, J. M./Sánchez Stewart, N., IX congreso..., cit., 2024, p. 558.
[32] Dante Alighieri, Divina Comedia, translated by Cayetano Rosell, illustrated by Gustavo Doré, Montaner y Simón editors, Barcelona, I, 1870, p. 13, song 3, verse 9.
[33] Cfr. Mata Barranco, N. J. De La, Ilícitos vinculados al ámbito informático, in Cuesta Arzamendi, J. L. De La (Dir.), Derecho penal informático, Civitas/Thomson Reuters/Aranzadi, Cizur Menor, 2020, p. 16.
[34] Cfr. Gómez Iniesta, D. J., El uso de las monedas virtuales…, cit., pp. 652 and 663.
[35] Cfr. Moreira Domingos, I., *op. cit*., p. 550.
[36] Vid. The money laundering officer's practical handbook 2011, Compliance training products limited, Cambridge, pp. 37–39 and 54.
[37] Cfr. http://www.iebschool.com.
[38] Cfr. Joffre Calasich, F., *op. cit*., p. 191, n. 20.
[39] Ferré Olivé, J. C., Los hechos previos del blanqueo, con especial consideración en la ciberdelincuencia y los delitos antecedentes en la Directiva 2018/1673, in Abel Souto, M./Lorenzo Salgado, J. M./Sánchez Stewart, N., IX congreso..., cit., 2024, p. 253.
[40] Whereas 17.

use of self–hosted addresses to make transfers without third–party intervention and their risks for money laundering[41].

It is not about artificial intelligence based on big data deciding innocence or guilt, since justice is not programmable and requires human intervention, but about a collaborative model between people and machines that process a large amount of information to make predictions[42]. Nor is it just that compliance programs exempt or mitigate the criminal liability of legal entities and that they have an evidentiary function, but that artificial intelligence and new technologies incorporated into compliance programs must provide added value to management business and play a more proactive or preventive role, warning of risks, than reactive, reacting against dangers that have already materialized[43].

New money mules are also proliferating, recruited by email with work–at–home opportunities, for which sometimes the only payment they receive is criminal prosecution for money laundering[44], job offers that have increased during the COVID–19 pandemic[45], and which usually end in a conviction for fraud, and have even been convicted of reckless money laundering as a deus ex machina solution[46], as a "questionable" type of collection[47]. This resource ἀπὸ μηχανῆς θεός, so frequent in the Greek theater of Euripides, introduces a divinity into the scene with a crane to illogically solve a problem against the internal coherence of the system. But Aristotle already criticized in his Poetics these solutions that do not take into account "what is necessary or what is plausible"[48], since subjective demands are dispensed with and police functions are transferred to citizens on the basis of duties of care that are not described[49].

In short, as evidenced in the strategic agenda of the European Union[50] until 2024, although in the coming years "the digital transformation will con-

[41] Cfr. Art. 37.3, b) and e).
[42] Cfr. Caro Coria, D.C., *op. cit*., pp. 638 and 639.
[43] Cfr. Navarro Cardoso, F., *op. cit*., pp. 691 and 692.
[44] Cfr. Clough, J., Principles of cybercrime, Cambridge University Press, Cambridge, 2010, pp. 187 and 188.
[45] Cfr. Abel Souto, M., COVID–19 y comisión del delito de blanqueo de dinero mediante las nuevas tecnologías, Revista Electrónica de Ciencia Penal y Criminología, 2022, p. 21.
[46] Cfr. González Uriel, D., Cibermulas y criptomulas, Revista Aranzadi Doctrinal, n. 6, junio de 2023, pp. 3, 5 and 7–14.
[47] Cfr. Abel Souto, M., Jurisprudencia penal reciente sobre el blanqueo de dinero, volumen del fenómeno y evolución del delito en España, in Abel Souto, M./Sánchez Stewart, N. (Coords.), IV congreso internacional sobre prevención y represión del blanqueo de dinero, Tirant lo Blanch, Valencia, 2014, p. 139.
[48] Aristóteles, La Poética, edición trilingüe por Valentín García Yebra, Gredos, Madrid, 1974, 3ª ed., XV, 1454a, 34, pp. 178 and 183.
[49] Cfr. González Uriel, D., *op. cit*., pp. 12 and 13.
[50] On the construction of a European criminal law vid. Ferré Olivé, J. C., El Corpus Iuris de normas penales para la tutela de los intereses financieros de la Unión Europea, in Abel Souto, M./Lorenzo Salgado, J. M./Sánchez Stewart, N., VIII congreso…, cit.,

tinue to accelerate and have far–reaching repercussions", European policy must continue to reflect the values I of our society, promoting inclusion and respecting the European way of life[51].

Therefore, great caution is necessary, given that artificial intelligence, like nuclear energy, can enlighten us, but is also capable, uncontrolled, of "destroying civilizations"[52]. Thus, despite the fact that the volume of money laundered through artificial intelligence and cryptoassets is still not very high, we must remain vigilant, since "cryptocurrencies and blockchain will continue to challenge the financial sector in the coming years"[53], because cryptocrime can undermine the credibility of the financial system and precisely the winners of the Nobel Prize in economics in 2022 revealed how speculative banking panics contribute to financial crises[54].

On the other hand, artificial intelligence is in the hands of large technology companies more powerful than many states, which by using secret and industrial property[55] can end up violating the most basic constitutional principles and rights, such as non-discrimination or freedom of information[56]. Obviously, innovation and development are permanent sources of tension for the Law[57], forcing it to redefine categories or even generate new ones[58]. Therefore, the risks of artificial intelligence must be offset by regulation that protects, among many other things, from algorithmic bias[59].

In this sense, the Presidency of the Council and the negotiators of the European Parliament reached an agreement in December 2023 on the Artificial Intelligence Regulation to ensure that its use in Europe is safe and respects both fundamental rights and the values I of the Union[60]. After two marathon sessions, of 22 and 14 hours, a framework was agreed upon so that technological innovation is guided by ethical and legal principles[61], with a risk–

2021, pp. 781–804 and 971–973; Lorenzo Salgado, J. M., Consideraciones sobre el dogma legalista como principio básico en la construcción de un Derecho penal europeo, in Abel Souto, M./Lorenzo Salgado, J. M./Sánchez Stewart, N.,VIII congreso…, cit., pp. 813–842, 977 and 978.

[51] Cfr. Consejo Europeo, Una nueva agenda estratégica 2019–2024, Bruselas, 2019, 4.

[52] Cfr. Salazar Icaza, J. C., *op. cit.*, II, p. 562.

[53] Wronka, C., Money laundering through cryptocurrencies, Journal of Money Laundering Control, vol. 25, n. 1, 2022, p. 93.

[54] Cfr. Joffre Calasich, F., *op. cit.*, p. 213, n. 79.

[55] Caro Coria, D.C., *op. cit.*, p. 633.

[56] *Ibidem*.

[57] Navarro Cardoso, F., *op. cit.*, p. 692.

[58] *Ibidem*.

[59] Cfr. Caro Coria, D. C., *op. cit.*, pp. 651 and 652.

[60] Cfr. Consejo Europeo, Reglamento de inteligencia artificial: el Consejo y el Parlamento alcanzan un acuerdo sobre las primeras normas del mundo en materia de inteligencia artificial, in http://www.consilium.europa.eu/es/press/press–releasses/2023/12/09, p. 1.

[61] Cfr. Parra, S., La UE pacta la primera ley sobre inteligencia artificial del mundo: usos prohibidos, multas y antecedentes, in http://www.nationalgeographic.com.es, pp. 4 and 6.

based approach that requires stricter standards for cases of greater danger, evaluations of impact on fundamental rights prior to the implementation of high–risk artificial intelligence systems and prohibitions on uses of artificial intelligence that entail unacceptable risks, such as cognitive behavioral manipulation, indiscriminate tracking of facial images and some cases of police surveillance predictive, although exceptionally police emergency procedures are allowed to use artificial intelligence tools without assessment or remote biometric identification in certain crimes and real threats, such as terrorism or more serious crimes[62]. The Regulation also affects generative artificial intelligence models, such as ChatGPT, with rules to guarantee transparency and risk management, as well as copyright[63], which has already generated lawsuits against the companies that created ChatGPT and other popular platforms artificial intelligence[64].

2. Money laundering, criminal responsibility of legal persons and corporate crime

It is not surprising that, due to the frequent incidence of money laundering within companies[65] and the "linkage"[66], from the very first incriminations, between money laundering and organized crime[67], with measures of establishments closure, suspension of activities or dissolution[68], by introducing the reform dated June 22, 2010, the criminal responsibility of legal persons incorporated money laundering into this innovating model of criminal responsibility[69] provided for in Article 31 bis of the punitive legislation[70], but it is

[62] Cfr. Consejo Europeo, Reglamento..., cit., pp. 3–5.
[63] Cfr. Parra, S., *op. cit.*, p. 5.
[64] Vid. Grynbaum, M.M./Mac, R., The New York Times demanda a OpenAI y Microsoft por el uso de obras con derechos de autor en la IA, The New York Times, 27 de diciembre de 2023, pp. 1–4.
[65] Cfr. Gomes De Magalhães, G. G., La responsabilidad penal de las personas jurídicas en el delito de lavado de dinero. Análisis de los casos Lava Jato y Mensalão, B de F, Buenos Aires/Montevideo, 2018, p. XXIII.
[66] Sanz Hermida, A. M., La lucha contra el blanqueo de capitales a través del ámbito penal en la Unión Europea, in Sanz Hermida, A. M., Tirant lo Blanch, Valencia, 2020, p. 2.
[67] Vid. Abel Souto, M., Blanqueo de dinero, criminalidad organizada y responsabilidad penal de las personas jurídicas, in Demetrio Crespo, E. (dir.), Derecho penal económico y teoría del delito, Tirant lo Blanch, Valencia, 2020, pp. 539–568.
[68] Cfr. Vidales Rodríguez, C., Blanqueo, responsabilidad de las personas jurídicas y programas de cumplimiento, in Gómez Colomer, J. L. (dir.), Tratado sobre compliance penal. Responsabilidad penal de las personas jurídicas y modelos de organización y gestión, Tirant lo Blanch, Valencia, 2019, pp. 434 and 435.
[69] Cfr. Fernández Teruelo, J. G., Blanqueo de capitales, in Ortiz De Urbina Gimeno, I. (coord.), Memento experto Francis Lefebvre, Madrid, 2010, p. 319, marginal 2936; Fernández Teruelo, J. G., El nuevo modelo de reacción penal frente al blanqueo de capitales. Los nuevos tipos de blanqueo, la ampliación del comiso y la inte-

striking that Organic Law 1/2015 boasts a "technical improvement"[71] in the until recently poorly applied[72] regulation, as I stated in Doha[73], an application that has become regular although not particularly frequent[74] recently[75], because Organic Law 1/2015, in addition to generating inconsistencies such as the invocation of a non-existent application experience[76] and "many shadows that need to be cleared"[77], incurs obvious contradictions, such as exempting, according to the second and fourth paragraphs of Article 31bis, legal persons from criminal responsibility for money laundering that should not have existed by virtue of the adoption and effective implementation of compliance programs that are suitable or adequate to prevent it[78].

In any case, according to Silva Sánchez, in the face of the alleged "need to fulfill international commitments"[79], this model of liability was not compulsory[80],

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gración del blanqueo en el modelo de responsabilidad penal de las empresas, in Diario La Ley, nº 7657, 22 de junio de 2011, pp. 2 and 16.

[70] Vid. Abel Souto, M., La expansión penal del blanqueo de dinero operada por a Ley orgánica 5/2010, de 22 de junio, in La Ley Penal. Revista de Derecho Penal, Procesal y Penitenciario, nº 79, febrero de 2011, pp. 31 and 32; Abel Souto, M., La reforma penal, de 22 de junio de 2010, en materia de blanqueo de dinero, in Abel Souto, M./Sánchez Stewart, N. (coords.), II congreso sobre prevención y represión del blanqueo de dinero, Tirant lo Blanch, Valencia, 2011, pp. 105–108.

[71] Preamble, third paragraph, first subpagraph.

[72] The first sentece of the Spanish Supreme Court (TS) on the criminal responsibility of legal entities, which declared the inalienable principles that inform criminal law applicable to their sentences, did not occur until September 2, 2015. Vid. STS nº 514/2015, de 2 de septiembre, RJ\2015\3974, fundamento de derecho segundo, in www.westlaw.es (January 2024). For a comment on this sentence vid. Gómez-Jara Díez, C., El Tribunal Supremo ante la responsabilidad penal de las personas jurídicas: aviso a navegantes judiciales, in Diario La Ley, nº 8632, 26 de octubre de 2015, pp. 1–8.

[73] Cfr. Abel Souto, M., Criminal responsibility of legal persons and money laundering, en 19th World Congress of Criminology, October 27–30, 2019, Doha, p. 1.

[74] Cfr. Díaz Y García Conlledo, M., La responsabilidad penal de las personas jurídicas: un análisis dogmático, in Gómez Colomer, J. L., *op. cit.*, pp. 102 and 103.

[75] Vid. Gómez-Jara Díez, C., El Tribunal Supremo ante la responsabilidad penal de las personas jurídicas. El inicio de una larga andadura, 2ª ed., Thomson Reuters/Aranzadi, Cizur Menor, 2019.

[76] Cfr. Quintero Olivares, G., Los programas de cumplimiento normativo y el Derecho penal, in Demetrio Crespo, E./Nieto Martín, A. (dir.), Derecho penal económico y derechos humanos, Tirant lo Blanch, Valencia, 2018, p. 142.

[77] Galán Muñoz, A., Fundamentos y límites de la responsabilidad penal de las personas jurídicas tras la reforma de la LO 1/2015, Tirant lo Blanch, Valencia, 2017, p. 293.

[78] Vid. Abel Souto, M., Antinomias de la reforma penal de 2015 sobre programas de prevención que eximen o atenúan la responsabilidad criminal de las personas jurídicas, in Matallín Evangelio, A., Compliance y prevención de delitos de corrupción, Tirant lo Blanch, Valencia, 2018, pp. 13–27.

[79] Bermejo, M. G./Agustina Sanllehí, J. R., El delito del blanqueo de capitales, in Silva Sánchez, J.-M. (dir.), El nuevo Código penal. Comentarios a la reforma, La Ley, Madrid, 2012, p. 460.

since conventions normally only require "effective, proportionate and dissuasive" sanctions, which include administrative sanctions, security measures and other legal consequences other than penalties in the strict sense[81]. The fact that several European Union countries have not considered the criminal responsibility of legal persons[82], such as Germany, is clear proof that there is no incrimination mandate, but in the end Spain joined the "current"[83] of Western countries in 2010, and in Europe the Netherlands enshrined the criminal responsibility of legal persons in 1976, United Kingdom, Norway and Ireland in 1991, Iceland in 1993, France in 1994, Finland in 1995, Slovenia and Denmark in 1996, Estonia in 1998, Belgium in 1999, Switzerland and Poland in 2003 or Portugal in 2007. In Latin America, Chile has also followed this trend in 2009, Ecuador in 2014, Mexico and Venezuela in 2016, Argentina in 2017 and Peru in 2018[84]. There has even been talk, with regard to the criminal punishment of legal persons, of a necessity imposed "in the law of our time"[85].

On the other hand, with the company as a "source of danger"[86], those directors or managers who have not adopted an effective compliance program[87] will be held responsible, since they now all act "as guarantors of the non-commission of money laundering offenses in their organization, in other words, as police officers"[88], "collaborators in the exercise of public functions, even to their own detriment"[89], a surprising transfer of police functions from their profession when the technical police in the field did not suspect any illegal activities[90], and in the event of non-cooperation, the sword of Damocles

[80] Cfr. Mata Barranco, N.J. De La, Derecho penal europeo y legislación española: las reformas del Código penal, Tirant lo Blanch, Valencia, 2015, pp. 126 and 129, regarding the directives 2001/97 and 2005/60.

[81] Cfr. Silva Sánchez, J.-M., La reforma del Código penal: una aproximación desde el contexto, in Diario La Ley, nº 7464, 9 de septiembre de 2010, p. 3.

[82] Cfr. Quintero Olivares, G., Los programas de cumplimiento…, cit., pp. 152 and 153.

[83] Díaz Y García Conlledo, M., La responsabilidad penal de las personas jurídicas…, cit., p. 101.

[84] Cfr. González Cussac, J. L., El plano político criminal en la responsabilidad penal de las personas jurídicas, in Matallín Evangelio, A., Compliance…, cit., p. 102, notas 32 and 33.

[85] Quintero Olivares, G., Los programas de cumplimiento…, cit., p. 153.

[86] Fernández Zacur, J. M., Dominio del hecho por dominio de la configuración en la empresa, Thomson Reuters/La Ley, Asunción, 2018, p. 100.

[87] Cfr. Díaz-Maroto Y Villarejo, J., Estudios sobre las reformas del Código penal. (Operadas por las LO 5/2010, de 22 de junio, y 3/2011, de 28 de enero), Civitas/Thomson Reuters/Aranzadi, Cizur Menor, 2011, p. 475.

[88] Silva Sánchez, J.-M., Los delitos patrimoniales y económico–financieros, in Diario La Ley, nº 7534, 23 de diciembre de 2010, p. 9.

[89] Rodríguez Estévez, J. M., El criminal compliance como fundamento de imputación penal corporativa, in Durrieu, N./Saccani, R.R. (dirs.), Compliance, anticorrupción y responsabilidad penal empresaria, Thomson Reuters/La Ley, Buenos Aires, 2018, p. 88.

[90] Cfr. Berruezo, R., El delito de lavado y los honorarios profesionales, en Berruezo, R., Imputación penal, Editorial Mediterránea, Córdoba, 2015, p. 304.

hangs over them on a money–laundering charge[91], which represents "a considerable expansion of criminal law"[92], another example of police cooperation with American roots[93], such as the punishment of the attempt that favours the figure of the agent provocateur[94], which, moreover, is already expressly defined in Article 1956 a, 3, A), which refers to undercover police action[95]. Consequently, the State transfers control duties to the company, but at the same time there is another transfer of responsibility from the managers to the workers, as denounced by González Cussac, since the risk that corresponded to the capital now, with the compliance programs, extends to the employees, who assume duties to avoid and manage risks, with loss of rights such as privacy, in relation to the use of new technologies, to keep silent or be contradictory, and the entrepreneur increases his/her monitoring and disciplinary powers, furthermore, the administrators, who are given the responsibility, are separated from the capital, which remains with the dividends or the share appreciation, the large fines go to the cost/benefit balance sheet of the company and mitigate the constant financial crisis of the State[96]. However, economic and business criminal law, in order to face the criminal instrumentalization of corporations, companies and multinationals, cannot become a "differentiated sub–model"[97] that privileges and darkens "the figure of the individual – economic criminal –"[98].

Even in the United States, there is a specific type of money–laundering under Title 18 of the Criminal Code, section 1960[99], which punishes anyone who conducts, controls, manages, monitors, directs or owns an unlicensed money–transmission business[100], an offense whose volitional requirements

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[91] Cfr. Arzt, G./Weber, U./Heinrich, B./Hilgendorf, E., Strafrecht, Besonderer Teil: Lehrbuch, 3. Auflage, Gieseking, Bielefeld, 2014, §29, Geldwäsche, §261, marginal 7.

[92] Vidales Rodríguez, C., Blanqueo, responsabilidad de las personas jurídicas…, cit., p. 435.

[93] Vid. Abel Souto, M., La expansión mundial del blanqueo de dinero y las reformas penales españolas de 2015, con anotaciones relativas a los ordenamientos jurídicos de Bolivia, Alemania, Ecuador, los Estados Unidos, Méjico y Perú, in Abel Souto, M./Berruezo, R./Celorio Vela, A./Rojas Torrico, Y. (coords.), Derecho penal económico y de la empresa, tomo I de la colección de libros de actas de los congresos de la Asociación Iberoamericana de Derecho penal económico y de la empresa, Centro Mejicano de Estudios en lo Penal Tributario, Ciudad de Méjico, 2018, pp. 9–103.

[94] Cfr. Arzt, G./Weber, U./Heinrich, B./Hilgendorf, E., *op. cit*., marginal 52.

[95] Cfr. Doyle, C., Money laundering: an overview of 18 U.S.C. 1956 and related federal criminal law, in Bennet, C.M./Turner, C.D. (eds.), Money laundering. An analysis for federal law, Novinka, New York, 2013, pp. 9, 10 and 74, note 64.

[96] Cfr. González Cussac, J. L., El plano político criminal…, cit., pp. 107, 108, 110 and 111.

[97] González Cussac, J. L., El plano político criminal…, cit., p. 111.

[98] *Ibidem*.

[99] Vid. Corpus juris secundum, 2014 cumulative annual pocket part, vol. 37, Thomson Reuters, §29, p. 4.

[100] Cfr. Doyle, C., *op. cit*., pp. 31, 91 and 92, notes 256–269.

have been relaxed by the Patriot Act[101], many companies linked to organized crime (RICO) are engaged in money laundering and Articles 1961 to 1964 punish with up to 20 years' imprisonment persons linked to companies that are structured in a mafia-like manner or that carry out a racketeering activity, which is very broadly defined in Article 1961, first paragraph[102].

Although the charge of improper omission by managers or control bodies in a position of guarantor[103] requires more than the neglect of the functions of surveillance and poses considerable problems[104], such as the perpetration of acts through command responsibility[105] and the application to legal persons of the theory "the perpetrator behind the perpetrator" created for criminal organizations or the charging of several person[106]s, including the compliance officer, [107]and the admission of both the perpetration[108] and the participation of a natural person to generate criminal responsibility of legal persons, since article 31 bis of the Criminal Code refers to the commission of the offense and not to the execution of the action[109].

As a result, risk management[110], or the evaluation and monitoring by the regulated entity of the money laundering risk with respect to its clients,

[101] Cfr. Watterson, C., More flies with honey: encouraging formal channel remittances to combat money laundering, in Texas Law Review, vol. 91, nº 3, 2013, p. 725.

[102] Vid. Doyle, C., *op. cit.*, pp. 31–33, 57–67 and 92–94, notes 270–294.

[103] Vid. Demetrio Crespo, E., Responsabilidad penal por omisión del empresario, Centro Mejicano de Estudios en lo Penal Tributario, Ciudad de Méjico, 2017.

[104] Vid. Quintero Olivares, G., Los programas de cumplimiento…, cit., pp. 145–148.

[105] Vid. Ayala Herrera, H., Autoría mediata ¿Autor intelectual? Su aplicación a los aparatos organizados de poder, Straf, Ciudad de Méjico, 2018.

[106] Vid. Quintero Olivares, G., Los programas de cumplimiento…, cit., pp. 147 and 150. Regarding the holdings vid. García Albero, R., Responsabilidad penal y compliance en los grupos de empresas, in Gómez Colomer, J. L., *op. cit.*, pp. 277–298; Quintero Olivares G., Los códigos de buenas prácticas y la transmisión de responsabilidad penal de las personas jurídicas en los grupos de empresas, in Gómez-Jara Díez, C. (coord.), Persuadir y razonar: Estudios jurídicos en homenaje a José Manuel Maza y Martín, tomo II, Thomson Reuters/Aranzadi, Cizur Menor, 2018, pp. 499–517.

[107] Vid. Aguilar Fernández, C./Liñán Lafuente, A., El secreto profesional del abogado y su aplicación al asesoramiento penal preventivo del compliance officer, in Gómez-Jara Díez, C., Persuadir…, tomo II, cit., pp. 787–811; Dopico Gómez-Aller, J., Presupuestos básicos de la responsabilidad penal del compliance officer tras la reforma penal de 2015, in Frago Amada, J. A., Actualidad compliance, Thomson Reuters/Aranzadi, Cizur Menor, 2018, pp. 215–232.

[108] Vid. Martínez-Buján Pérez, C., La autoría en Derecho penal. Un estudio a la luz de la concepción significativa (y del Código penal español), Tirant lo Blanch, Valencia, 2019.

[109] Cfr. González Cussac, J. L., La eficacia eximente de los programas de prevención de delitos, in Estudios Penales y Criminológicos, nº XXXIX, 2019, p. 652.

[110] Vid. Gaitán Urrea, A. F., Análisis de riesgo en la toma de decisiones de administradores de bancos en la prevención y control del lavado de activos visto desde el contrato de mutuo, leasing, cuenta de ahorros y CDI. Consecuencias a la luz de la normatividad colombiana y de la orden ejecutiva 12978 de 1995, expedida por el gobierno de Estados Unidos, in Revista de Derecho Privado. Universidad de los Andes, nº 48, 2012, pp. 1–40;

through [111]compliance programs[112], plays an important role in determining the criminal responsibility of legal persons[113], although, even if government authorities have stated otherwise, [114]"it will not be enough"[115], the mere ex-

Hoffmann, L., A critical look at the current international response to combat trade–based money laundering: the risk–based customs audit as a solution, in Texas International Law Journal, vol. 48, No. 2, 2013, pages. 325–348; Shepherd, K. L., The gatekeeper initiative and the risk–based approach to client due diligence: the imperative for voluntary good practices guidance for U.S. lawyers, in ACTEC Law Journal, No. 37, 2011, pages. 1–27.

[111] Vid. Carbonell Mateu, J. C./Morales Prats, F., Responsabilidad penal de las personas jurídicas, in Álvarez García, F. J./González Cussac, J. L. (dirs.), Comentarios a la reforma penal de 2010, Tirant lo Blanch, Valencia, 2010, pp. 55–86; Nieto Martín, A. (dir.), Manual de cumplimiento penal en la empresa, Tirant lo Blanch, Valencia, 2015; Fernández Teruelo, J. G., Instituciones de Derecho penal económico y de la empresa, Lex Nova, Valladolid, 2013, pp. 79–144; Gómez Tomillo, M., Introducción a la responsabilidad penal de las personas jurídicas en el sistema español, Lex Nova, Valladolid, 2010, 2ª ed., Aranzadi, Cizur Menor, 2015; Gómez-Jara Díez, C., Fundamentos modernos de la responsabilidad penal de las personas jurídicas. Bases teóricas, regulación internacional y nueva legislación española, B de F, Montevideo/Buenos Aires, 2010; González Cussac, J. L., El modelo español de responsabilidad penal de las personas jurídicas, in Gómez Colomer, J. L./Barona Vilar, S./Calderón Cuadrado, P., El Derecho procesal español del siglo XX a golpe de tango. Liber amicorum, en homenaje y para celebrar el LXX cumpleaños del profesor Montero Aroca, J., Tirant lo Blanch, Valencia, 2012, pp. 1033–1049; Palma Herrera, J. M. (dir.), Procedimientos operativos estandarizados y responsabilidad penal de la persona jurídica, Dykinson, Madrid, 2014; Robles Planas, R., El responsable de cumplimiento (compliance officer) ante el Derecho penal, in Robles Planas, R., Estudios de dogmática jurídico–penal. Fundamentos, teoría del delito y Derecho penal económico, B de F, Montevideo/Buenos Aires, 2014, pp. 271–289; Rosal Blasco, B. Del, Responsabilidad penal de empresas y códigos de buena conducta corporativa, in Diario La Ley, nº 7670, 11 de julio de 2011, pp. 1–12.

[112] Vid. Arroyo Zapatero, L./Nieto Martín, A. (dirs.), El Derecho penal económico en la era compliance, Tirant lo Blanch, Valencia, 2013; Bonatti Bonet, F. (coord.), Memento experto Francis Lefebvre, Sistemas de gestión de compliance. Normas ISO y UNE 19601, Lefebvre–El Derecho, Madrid, 2017; Casanovas Ysla, A., Compliance penal normalizado. El estándar UNE 19601, Thomson Reuters/Aranzadi, Cizur Menor, 2017; Compliance. Guía práctica de planificación preventiva y plan de control de riesgos, Thomson Reuters/Aranzadi, Cizur Menor, 2018; Gómez Tomillo, M., Compliance penal y política legislativa, Tirant lo Blanch, Valencia, 2016; Puyol Montero, J., Criterios prácticos para la elaboración de un código de compliance, Tirant lo Blanch, Valencia, 2016; Puyol Montero, J., Guía para la implantación del compliance en la empresa, Wolter Kluwer/Bosch, Barcelona, 2017; Reyna Alfaro, L. (dir.), Compliance y responsabilidad penal de las personas jurídicas. Perspectivas comparadas. EE.UU., España, Italia, México, Argentina, Colombia, Perú y Ecuador, Ideas Solución Editorial, Lima, 2018; Ruiz Rengifo, H. W./Polaino Orts, M. (dirs.), Anuario de corporate compliance. Nuevas tendencias de programas de autorregulación regulada para empresas sobre prevención, detección y reacción penal para España, Perú, Chile, Colombia, Méjico, Argentina, Brasil y Paraguay, Ibáñez/Hoowarr/Ascoldpem, Bogotá, 2019.

[113] Cfr. Bermejo, M. G./Agustina Sanllehí, J. R., *op. cit.*, pp. 446 and 459–461.

[114] Vid. Catalá asegura que la reforma del Código penal propiciará una nueva cultura empresarial con mayor seguridad jurídica, in Diario del Derecho, Iustel, 15 de junio de 2015, p. 1.

istence of a protocol of good practice "will not be sufficient"[116] to mitigate or exclude the responsibility of a legal person or to avoid the responsibility of certain individual obligated parties",[117] because compliance programs represent a necessary but insufficient requirement for exemption or mitigation[118] and not a "guarantee of automatic exclusion of the company's criminal responsibility"[119], despite the fact that Organic Law 1/2015 dated March 30 contradictorily introduces new paragraphs, the second one (condition one) and fourth, into article 31 bis of the Criminal Code, exempting from criminal responsibility legal persons that adopt and effectively implement an organization and management model that is suitable or appropriate for the prevention of offenses related to the nature of the crime committed or for the significant reduction of its perpetration risk, since in most cases the subsequent money–laundering will demonstrate the inefficiency of the model, its inappropriateness or unsuitability to prevent it, and that the danger of criminal commission has not been significantly reduced[120]: "the best proof of ineffectiveness"[121] will be "that the perpetration of a crime has not been prevented"[122], hence the "high problematic burden" of demonstrating effectiveness after the initiation of proceedings for the commission of an offense, "insurmountable situation" or "paradoxical"[123], although the paradox can be partially avoided "if we rule out an impossible parameter of absolute material suitability"[124]. Indeed, an interpretation in accordance with the principle of validity requires that suitability, adequacy or effectiveness be understood not in an "absolute"[125] way but in a relative sense, since "suitable"[126] is not "infallible"[127], therefore "the measurement parameter must be reduced to a relative

[115] Rosal Blasco, B. Del, Las pymes son las que menos preparadas están, in Diario La Ley, nº 8532, 5 de mayo de 2015, p. 1.
[116] Díaz Y García Conlledo, M., El castigo del autoblanqueo en la reforma de 2010. La autoría y la participación en el delito de blanqueo de capitales, in Abel Souto, M./Sánchez Stewart, N., III congreso..., cit., p. 292.
[117] *Ibidem*.
[118] Cfr. González Cussac, J. L., La eficacia eximente de los programas…, cit., pp. 593, 598 and 622.
[119] Quintero Olivares, G., Los programas de cumplimiento…, cit., p. 112.
[120] Vid. Abel Souto, M., Blanqueo de dinero y responsabilidad penal de las personas jurídicas, in Libro homenaje al profesor Luzón Peña, 2020, pp. 1–11.
[121] Quintero Olivares, G., Los programas de cumplimiento…, cit., p. 134.
[122] *Ibidem*.
[123] Quintero Olivares, G., Los programas de cumplimiento…, cit., pp. 113, note 5, 118 and 135.
[124] González Cussac, J. L., La eficacia eximente de los programas…, cit., p. 611.
[125] Quintero Olivares, G., Los programas de cumplimiento…, cit., p. 144.
[126] Quintero Olivares, G., Los programas de cumplimiento…, cit., p. 132.
[127] *Ibidem*.

material suitability ex ante"[128] and there is no discussion "in the abstract"[129] about the "program's goodness"[130]; as an example, normally the program's controls prevent the acceptance of cash from the sales representatives, but on some occasions they admit it, generating a risk of money laundering, so that it can be stated that the danger is reduced[131] and that the offense prosecuted involved "a sporadic, occasional and even exceptional risk[132].

In fact, "there is an undeniable relationship between prevention of money laundering and compliance programs"[133] and it has even been said that the exemption or mitigation of punishment of legal persons by the adoption of compliance programs "seems to be inspired by the risk–based approach"[134] to money laundering prevention, since the enhancement of this approach has been "of essential importance in the creation of compliance programs"[135], although the policies and procedures to be reflected in the prevention of money laundering manual are not exactly the same as the compliance programs mentioned in the Punitive Legislation[136], which affect different offenses, such as bribery, influence peddling[137] or crimes against public finances[138], and obviously not only legal persons bound by the prevention of money laundering regulations can commit this offense[139].

However, the exemption is condemned to "a negligible application"[140], demonstrated by the Italian experience, important here since the reform of

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[128] González Cussac, J. L., La eficacia eximente de los programas…, cit., p. 612, that in note 29 mentions secular jurisprudence in the matter of impossible crime, inordinate, unreal or superstitious attempt. On temporary, formal and material suitability vid. pp. 606–624; González Cussac, J. L., Condiciones y requisitos para la eficacia eximente o atenuante de los programas de prevención de delitos, in Gómez Colomer, J. L., *op. cit*., pp. 320–325.

[129] Quintero Olivares, G., Los programas de cumplimiento…, cit., p. 133.

[130] *Ibidem*.

[131] Cfr. González Cussac, J. L., La eficacia eximente de los programas…, cit., p. 615.

[132] *Ibidem*.

[133] Vidales Rodríguez, C., Blanqueo, responsabilidad de las personas jurídicas…, cit., p. 435.

[134] *Ibidem*.

[135] Núñez Paz, M.A., La responsabilidad criminal y la gestión del riesgo mediante programas de cumplimiento en relación con la Directiva de 2015, in Abel Souto, M./Sánchez Stewart, N., V congreso…, cit., p. 359.

[136] Vid. Vidales Rodríguez, C., Blanqueo, responsabilidad de las personas jurídicas…, cit., pp. 429 and 430.

[137] Vid. Rosal Blasco, B. Del, Manual de responsabilidad penal y defensa penal corporativas, La Ley/Wolters Kluver, Madrid, 2018, pp. 261–317.

[138] Vid. Ferré Olivé, J. C., El compliance penal tributario, in Gómez Colomer, J. L., *op. cit*., pp. 211–242.

[139] Cfr. Vidales Rodríguez, C., Blanqueo, responsabilidad de las personas jurídicas…, cit., pp. 430, 435 and 436.

[140] González Cussac, J. L., Responsabilidad penal de las personas jurídicas: arts. 31 bis, ter, quáter y quinquies, in González Cussac, J. L., Comentarios a la reforma del Código penal de 2015, 2ª ed., Tirant lo Blanch, Valencia, 2015, p. 189.

2015 reproduces literally a criticized Italian legislative decree, dated June 8, 2001, a servile copy that even incorporates verbal disagreements[141]; more often than not, as in this country or in the United States, the "cradle of compliance"[142] which does not usually exempt legal persons[143] either, will be used as a mitigating factor[144] for "partial accreditation", which of course cannot refer to an unacceptable reduction in the burden of proof, of the prevention systems[145], but rather to the "insufficiency[146]" of the "organizational and management models"[147], although the different description of the mitigating factor in paragraphs 2 and 4 of Article 31 bis for the actions of managers and subordinates also poses interpretation problems[148]. V. gr., condition one of Article 31 bis (2) requires the adoption and effective implementation, prior to the offense, of a compliance program suitable to prevent crimes of the same nature, so that if the management body agrees to adopt a program but does not implement it[149], it "could be considered as mitigating"[150], although "there is a gap"[151] between the mitigation applied to condition one of Article 31 bis (2) and the ex–post mitigating circumstance of 31c(d), where the suitability to prevent or reduce the risk of the committed offense is not established but society claims that the program otherwise works. In the absence of a specific parameter, it would not be possible to create "a supralegal exoneration, nor an analogical extenuating circumstance without express legal authorization"[152], however, the judge could evaluate it in the choice and modulation of the penalty within the discretion that the Criminal Code allows in judicial individualization[153]. Most often the mitigating factor is "skillfully combined with plea bargaining"[154], which has the powerful stimulus of creating fears of facility closures or business interruptions that will result in much greater business disruption. This is also the case in the United States, the [155]"cradle of plea

[141] Cfr. Quintero Olivares, G., Los programas de cumplimiento…, cit., pp. 120 and 131.
[142] Ferré Olivé, J. C., Reflexiones…, cit., p. 71; Ramírez Barbosa, P. A./Ferré Olivé, J. C., Compliance…, cit., p. 85.
[143] *Ibidem*.
[144] Vid. Faraldo Cabana, P., Los compliance programs y la atenuación de la responsabilidad penal, in Gómez Colomer, J. L., *op. cit*., pp. 157–180.
[145] Cfr. González Cussac, J. L., Responsabilidad penal de las personas jurídicas, cit., p. 189.
[146] Quintero Olivares, G., Los programas de cumplimiento…, cit., p. 144.
[147] *Ibidem*.
[148] Vid. Quintero Olivares, G., Los programas de cumplimiento…, cit., pp. 151 and 152.
[149] Cfr. González Cussac, J. L., La eficacia eximente de los programas…, cit., p. 607.
[150] *Ibidem*.
[151] González Cussac, J. L., La eficacia eximente de los programas…, cit., p. 623.
[152] *Ibidem*.
[153] Cfr. González Cussac, J. L., La eficacia eximente de los programas…, cit., pp. 623 y 624.
[154] González Cussac, J. L., Responsabilidad penal de las personas jurídicas, cit., p. 189.
[155] Ferré Olivé, J. C., Reflexiones…, cit., p. 70; Ramírez Barbosa, P. A./Ferré Olivé, J. C., Compliance…, cit., p. 84.

bargaining"[156], where there are deferred prosecution agreements and agreements not to prosecute for the benefit of the company and the prosecuting authorities[157], such as the recent and controversial agreement between the Department of Justice and the Swiss bank HSBC, which paid a historic fine in order to continue operating in the United States[158], informal agreements that the Crime and Courts Act introduced into English law[159] on February 24, 2014. In Spain, this means that a legal entity can claim a lesser penalty by accepting a negotiated sentence and renouncing both oral proceedings and the presentation of evidence[160].

In any case, "it would be a contradiction in terms if those who control the legal person which they use to channel their criminal activity in turn implemented measures to prevent their own purposes and plans"[161], as stated in the sentence dated July 19, 2017, because in the case of intentional crimes "the function of general prevention is deployed by the Criminal Code, and not a compliance program"[162] and "maliciousness is bad for the ideology of prevention and care"[163], just as there is no point in a "paper compliance" or [164]"cosmetic compliance"[165] that reflects "a pretended but not real willingness to take crime prevention seriously within the company"[166], a program not of compliance but, in the jargon, of "compliance and lying".

With regard to the emergence of prevention programs, on February 23, 1947, the International Organization for Standardization (ISO) was created within the United Nations to promote worldwide, certifiable standards that would guarantee the quality of products and services[167]; In 1977, the United States issued regulations against corruption and bribery, within the framework of which the Organizational Guidelines were approved, which provided for the

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[156] Vid. Ferré Olivé, J. C., El Plea Bargaining, o cómo pervertir la justicia penal a través de un sistema de conformidales low cost, in Revista Electrónica de Ciencia Penal y Criminología, 20–06, 2018, pp. 1–30.

[157] Cfr. Ferré Olivé, J. C., Reflexiones…, cit., p. 70; Ramírez Barbosa, P. A./Ferré Olivé, J. C., Compliance…, cit., pp. 84 y 85.

[158] Cfr. González Cussac, J. L., El plano político criminal…, cit., p. 107, note 46.

[159] *Ibidem*.

[160] Cfr. Ferré Olivé, J. C., Reflexiones…, cit., p. 71; Ramírez Barbosa, P. A./Ferré Olivé, J. C., Compliance…, cit., p. 85.

[161] STS nº 583/2017, RJ\2017\4864, fundamento de derecho vigésimo séptimo, en www.westlaw.es (January 2024).

[162] Quintero Olivares, G., Los programas de cumplimiento…, cit., p. 148.

[163] *Ibidem*.

[164] Vid. Frago Amada, J. A., El paper compliance, su detección y el tratamiento procesal del mismo, in Frago Amada, J. A., Actualidad compliance 2018, Thomson Reuters/Aranzadi, Cizur Menor, 2018, pp. 317–329.

[165] Ferré Olivé, J. C., Reflexiones…, cit., p. 72; Ramírez Barbosa, P. A./Ferré Olivé, J. C., Compliance…, cit., p. 89.

[166] *Ibidem*.

[167] Cfr. Quintero Olivares, G., Los programas de cumplimiento..., cit., p. 116.

reduction of the penalty for companies that incorporated compliance programs. Later, the UN drafted a convention that forced the States to promote measures against corruption[168], and as a consequence of Organic Law 1/2015, dated March 30, the compliance programs were introduced into Spanish criminal law, which can be certified by AENOR[169] (UNE regulations), a member of the ISO since 1986. This is how the standards ISO 19600: 2014 on compliance management systems, 19601: 2017 on criminal compliance[170] and UNE 19602: 2019 on tax risks[171] appeared and compliance programs were born as a "translation of the codes of conduct into criminal law"[172], first implemented in American business[173] activity and which "would later travel to Europe"[174] driven by the "great transnational corruption scandals"[175]. Although even before the 2015 reform in Spain, compliance programs were already contained in the "duty of companies to control their own employees and managers"[176], according to company law, the regulations on health and safety in the workplace and, of course, in the subject under discussion, the prevention of money laundering, to which the financing of terrorism was assimilated[177].

Obviously, compliance represents an added value to the company, it is in vogue in our country and the reform dated March 30, 2015 gave it a great diffusion impulse[178]. However, "the Spanish model is very generous"[179] in allowing "a compliance program to operate as an exemption"[180], since the criminal process is neither "an audit"[181] nor a "quality assessment"[182]. The total exclusion by compliance programs of the criminal responsibility of legal persons is a problem, especially when it derives, as in Spain, from the actions of a natural person and above all with respect to criminal decisions adopted by those who have the corporate power for whom control systems are useless[183]. It is

[168] Cfr. Quintero Olivares, G., Los programas de cumplimiento..., cit., p .117.
[169] *Ibidem*.
[170] Vid. Casanovas, A., La norma UNE 19601 y los requisitos del Código penal, in Gómez–Jara Díez, C., Persuadir…, tomo II, cit., pp. 887–916.
[171] Ferré Olivé, J. C., Reflexiones..., cit., p. 76; Ramírez Barbosa, P. A./Ferré Olivé, J. C., Compliance..., cit., p. 97.
[172] González Cussac, J. L., El plano político criminal..., cit., p. 98.
[173] Cfr. Quintero Olivares, G., Los programas de cumplimiento..., cit., p. 137.
[174] *Ibidem*.
[175] González Cussac, J. L., El plano político criminal..., cit., loc. cit.
[176] Quintero Olivares, G., Los programas de cumplimiento..., cit., p. 153.
[177] *Ibidem*.
[178] Cfr. Quintero Olivares, G., Los programas de cumplimiento..., cit., pp. 110, 111 and 137.
[179] González Cussac, J. L., La eficacia eximente de los programas..., cit., p. 622.
[180] *Ibidem*.
[181] González Cussac, J. L., La eficacia eximente de los programas..., cit., p. 623.
[182] *Ibidem*.
[183] Cfr. Quintero Olivares, G., Los programas de cumplimiento..., cit., pp. 136, 143 and 154, that in pp. 141 and 142 criticies the fact that the exemption from liability for prevention

enough to remember that Enron's compliance program was designed to divert criminal responsibility towards the inferior ones, who absorbed it, so that compliance programs also generate disillusionment and a risk of becoming judicially simple nominal sticker controls[184], so that an AENOR certification[185] could come to be considered a "criminal responsibility vaccine"[186] or "safe-conduct"[187] moving corporate responsibility "to nebulous grounds between the public and the private"[188] in another example of a singular economic criminal law or "covert self-regulation"[189]. However, the role of a compliance program should not be simplified to a mere "protective shield" or [190]"bull"[191], as the company will never be fully confident of adopting an effective program[192], because "it is impossible to state ex ante that applying a series of measures will prevent the perpetration of offenses or reduce the risk of their perpetration"[193]. Therefore, even though the judge may take into account the certifications, "in no event is he subject to them"[194], "they do not bind him"[195] nor do they represent "an absolute guarantee or credit of the program's effectiveness"[196] but simply constitute one more element of the judicial assessment[197].

With regard to the legal consequences[198], it must be taken into account whether we are dealing with legal entities or companies in which those responsible for the offenses have a total or majority shareholding. Accordingly, the ruling dated July 19, 2017, reduced the penalties for legal entities from

programs extends not only to crimes committed by employees but also to those of their managers.

[184] Cfr. González Cussac, J. L., El plano político criminal..., cit., pp. 107 and 110.

[185] Vid. Bonatti Bonet, F., Claves para introducirse en la certificación de sistemas de gestión de compliance penal, in Frago Amada, J. A., *op. cit*., pp. 143–156.

[186] Quintero Olivares, G., Los programas de cumplimiento..., cit., p. 112.

[187] Ferré Olivé, J. C., Reflexiones..., cit., p. 77; Ramírez Barbosa, P. A./Ferré Olivé, J. C., Compliance..., cit., p. 99.

[188] González Cussac, J. L., El plano político criminal..., cit., p. 100.

[189] *Ibidem*.

[190] Quintero Olivares, G., Los programas de cumplimiento..., cit., p. 118.

[191] *Ibidem*.

[192] Cfr. González Cussac, J. L., La eficacia eximente de los programas..., cit., p. 624.

[193] *Ibidem*.

[194] González Cussac, J. L., La eficacia eximente de los programas..., cit., p. 625.

[195] Ferré Olivé, J. C., Reflexiones..., cit., p. 77; Ramírez Barbosa, P. A./Ferré Olivé, J. C., Compliance..., cit., p. 99.

[196] González Cussac, J. L., La eficacia eximente de los programas..., cit., p. 626.

[197] *Ibidem*.

[198] Vid. Cuesta Arzamendi, J. L. De La, Penas para las personas jurídicas en el Código penal español, in Gómez Colomer, J. L., *op. cit*., pp. 67–99; Escobar Jiménez, R., Régimen penológico aplicable a la persona jurídica responsable penal, in Gómez-Jara Díez, C., Persuadir…, tomo I, cit., pp. 805–838; Manzanares Samaniego, J. L., Las penas de las personas jurídicas, in Manzanares Samaniego, J. L., Cuestiones polémicas del Derecho penal español en el siglo XXI, Reus, Madrid, 2018, pp. 13–34.

five to two years, with a reduction in the daily fee from 2,000 to 100 euros, and for the suspension and closure of premises and establishments from five to two years in one case and from four years in another, with a daily fee of 2,000 euros, to two years and a fee of 100 euros per day[199].

Finally, even though a large proportion of money laundering operations are carried out by companies and many of the parties bound by the prevention regulations are legal persons[200], the order of the Criminal Division of the Spanish National Court of Justice dated May 19, 2014, which refused to register a trading company, which had its assets seized and whose sole administrator was the defendant in a money laundering proceeding, began to explore the concept of corporate responsibility[201] and to distinguish between legal persons that are not subject to tax and those that are subject to tax, those "that have sufficient material substrate"[202], since "tortuous chains of linked companies"[203] are often used that only aim to "lose track of the capital movement"[204] to launder money, so that some companies will be subject to Article 129 of the Criminal Code and others will be liable under Article 31 bis, provisions that imply different legal systems in the effectiveness of prevention programs, procedural rules and legal consequences[205].

In this way, legal persons which "operate normally in the market"[206] and to which the provisions on compliance programs in Article 31 bis[207], paragraphs 2 to 5, are addressed shall be "chargeable companies"[208]. Also considered "imputable"[209] are "companies that carry out a certain activity, mostly illegal"[210], which are normally used for money laundering by mixing criminal funds with those of the company's legal activity, which appears to be much greater than the real one; they are referred to in the second rule of Article 66 bis[211] as those used "instrumentally for the perpetration of criminal offenses",

[199] STS nº 583/2017, cit., fundamento de derecho cuarto and fallo.
[200] Cfr. Bermejo, M. G./Agustina Sanllehí, J. R., *op. cit*., p. 455.
[201] Cfr. Fiscalía General Del Estado, Circular 1/2016, sobre la responsabilidad penal de las personas jurídicas conforme a la reforma del Código penal efectuada por la Ley orgánica 1/2015, in www.fiscal.es (January 2024), p. 28.
[202] *Ibidem*.
[203] Borja Jiménez, E., Reglas generales de aplicación de las penas: arts. 66, 66 bis, 70 y 71, in González Cussac, J. L., Comentarios a la reforma del Código penal de 2015, cit., p. 278.
[204] *Ibidem*.
[205] Cfr. González Cussac, J. L., Responsabilidad penal de las personas jurídicas y delito de blanqueo de dinero, cit., p. 347.
[206] Fiscalía General Del Estado, Circular 1/2016..., cit., p. 28.
[207] *Ibidem*.
[208] González Cussac, J. L., Responsabilidad penal de las personas jurídicas y delito de blanqueo de dinero, cit., loc. cit.
[209] *Ibidem*.
[210] Fiscalía General Del Estado, Circular 1/2016..., cit., p. 28.
[211] *Ibidem*.

which offers a genuine interpretation of instrumentalization, "that the legal activity of the legal person is less relevant than its illegal activity"[212], although the identical wording of the two paragraphs (b) of the second rule of Article 66 bis poses problems, since the same hypothesis serves to exceed the limit of two and five years, that is why the sentence of July 19, 2017 reduced the penalty for the closure of premises and establishments to two years[213], or allows the permanent imposition of certain penalties that sometimes match, legislative laziness that must be saved by "a systematic interpretation"[214] and in accordance with the principle of validity that allows a distinction to be made between "a greater intensity of criminal instrumentalization of the legal person"[215], so that if a tax consultancy is engaged in money laundering rather than in its legal work, the two–year limit on the penalty of prohibition of activity could be exceeded, the five–year limit on this penalty could be exceeded if the company is engaged in significantly more money laundering than in consultancy, and it would be possible to impose the above–mentioned prohibition permanently when "the company is engaged almost exclusively in money laundering"[216]. Finally, "non-imputable companies"[217], which would not be liable under Article 31 bis but under Article 129[218], would be those with no legal activity, v. gr. the three companies referred to in the sentence dated September 15, 2016[219] or those referred to in the sentences dated December 15, 2016[220] and October 3, 2017[221], those used simply for the holding or ownership of assets which conceal the natural person who possesses or enjoys them, as in the case of

[212] Likewise, Peruvian legislation contemplates an aggravating circumstance due to the instrumental use of the legal entity in art. 13 of the legislative decree of January 6, 2017, which also provides an authentic interpretation: when its activity is predominantly illicit. Regarding the initial version of the draft Code of the Bolivian penal system, it was considered, in letter c) of its art. 76, aggravating circumstance the criminal instrumentalization of the legal entity, but such circumstance disappeared from both the catalog of aggravating circumstances of art. 71 in the subsequent version of the project, dated May 25, 2017, as the brief definitive list of aggravating circumstances contained in art. 70 of the non nato Code of the Bolivian penal system.

[213] Cfr. STS nº 583/2017, cit., fundamento de derecho cuarto.

[214] Borja Jiménez, E., *op. cit.*, p. 280.

[215] *Ibidem*.

[216] Borja Jiménez, E., *op. cit.*, p. 281.

[217] González Cussac, J. L., Responsabilidad penal de las personas jurídicas y delito de blanqueo de dinero, cit., loc. cit.

[218] *Ibidem*.

[219] Cfr. STS nº 706/2016, RJ\2016\4558, antecedente de derecho primero, on a couple of drug traffickers that built a corporate network in which a third party appeared as administrator, a surprising resolution due to the cumulative disproportion of the three fines of five million euros, in www.westlaw.es (January 2024).

[220] Cfr. STS nº 939/2016, RJ\2016\5987, fundamento de derecho cuarto, in www.westlaw.es (January 2024).

[221] Cfr. STS nº 649/2017, RJ\2017\4264, fundamento de derecho tercero, in www.westlaw.es (January 2024).

the sentence dated May 19, 2017 regarding the sole administrator of a company "which had no activity other than holding ... aimed at separating the ownership of those assets"[222], shell or facade corporations with no real activity, organization, infrastructure or assets, used as criminal tools or to hinder investigation, to which the figure of contractual simulation and the theory of lifting the corporate veil[223] had already been applied and which are still valid[224]; societies in which there is "an absolute and substantial identity"[225] between the manager and the legal person, with totally overlapping wills, are also considered "non-imputable"[226], so that a double incrimination[227] contrary to reality and violating non bis in idem[228] is avoided, since "the double demand for responsibility is meaningless"[229] when the society simply represents "a way of reversing a one–person business"[230].

In fact, the use of shell companies for money laundering is frequent, as evidenced by the Supreme Court rulings dated June 26, 2012[231] and February 4, 2015, which refer to about fifteen companies, some domiciled in tax havens such as Belize, Bahamas, Virgin Islands, Panama, Liberia, Jersey or Liechtenstein, which concealed the ownership of a huge volume of properties "whose sole list takes up twenty–three pages of the court ruling"[232], but so far the accessory consequences and the doctrine of the lifting of the corporate veil, which outlaws the prevalence of created legal personality if fraud is committed or third parties are harmed, had sufficed, as pointed out in the Supreme Court rulings dated March 2, 2016[233] and December 5, 2012, which confirmed the involvement of 14 companies – including four Delaware companies participating in three limited liability companies, a couple of Gibraltar companies and two others domiciled in the United Kingdom– owned by a lawyer, whose assets were clearly and unjustifiably confused with the

[222] Cfr. STS nº 362/2017, RJ\2017\2711, fundamento de derecho cuarto, in www.westlaw.es (January 2024).
[223] Cfr. Fiscalía General Del Estado, Circular 1/2016..., cit., pp. 27 y 29.
[224] Cfr. Moral García, A. Del, Cuestiones generales, in Camacho Vizcaíno, A. (dir.), Tratado de Derecho penal económico, Tirant lo Blanch, Valencia, 2019, p. 547.
[225] González Cussac, J. L., Responsabilidad penal de las personas jurídicas y delito de blanqueo de dinero, cit., loc. cit.
[226] *Ibidem*.
[227] Vid. Fuentes Soriano, O., Responsabilidad penal de la persona jurídica y ne bis in idem, in Gómez Colomer, J. L., *op. cit*., pp. 805–835.
[228] Cfr. Fiscalía General Del Estado, Circular 1/2016..., cit., p. 29.
[229] Moral García, A. Del, *op. cit*., p. 547.
[230] *Ibidem*.
[231] Vid. STS nº 578/2012, RJ\2012\9057, fundamento de derecho décimo, in www.westlaw.es (January 2024).
[232] Cfr. STS nº 57/2015, RJ\2016\258, fundamento de derecho séptimo, in www.westlaw.es (January 2024).
[233] Cfr. STS nº 165/2016, RJ\2016\5767, fundamento de derecho quincuagésimo sexto, in www.westlaw.es (January 2024).

companies' assets, to pay costs, fines and civil liabilities arising from their money-laundering and tax offenses, and against the Public Finance[234], civil liability on which, of course, there was no problem with legal entities, as noted in the Supreme Court ruling dated April 9, 2012, that it upholds the appeal in cassation brought by the private prosecution to hold La Caixa and Fibanc-Mediolanum liable for the breach of the rules on prevention, which undoubtedly facilitated the perpetration of the offense, which would have been made extraordinarily difficult by the obligatory reporting to the administrative authorities because "the indications that the operations were suspected of being lawful were evident from their very high amount, the absence of any ascertainment of the real origin of the funds, the intervention of a foreign citizen, the mechanics of their execution with a clear inclination towards quick conversion into cash, etc.[235]

I also reported[236] the fact that the incorporation of the "complex and disorderly"[237] regulation on the criminal responsibility of legal persons had not been accompanied by the essential procedural reform[238] of rules that were not adapted to the new model of incrimination[239]. The legislator did not even allude "to the need for a contemporary reform of the Law on Criminal Procedure"[240] that would establish the procedural status of legal persons[241], which would materialize for them the presumption of innocence[242], the right not to testify against themselves[243] and the other procedural guarantees[244],

[234] Cfr. STS nº 974/2012, RJ\2013\217, fundamento de derecho décimo cuarto, in www.westlaw.es (January 2024).

[235] STS nº 279/2012, RJ\2012\5606, fundamento de derecho noveno, in www.westlaw.es (January 2024).

[236] Vid. Abel Souto, M., La expansión..., cit., pp. 6 y 32; Abel Souto, M., La reforma..., cit., pp. 61, 107 and 108.

[237] Mapelli Caffarena, B., In Cuello Contreras, J./Mapelli Caffarena, B., Curso de Derecho penal. Parte general, Tecnos, Madrid, 2011, p. 259, marginal 478.

[238] Regarding the prove in general vid. López Ramírez, A., La prueba ilícita penal, Tirant lo Blanch, Ciudad de Méjico, 2019 and with respect to legal persons vid. Planchadell Gargallo, A., Prohibiciones probatorias en la investigación de delitos cometidos por personas jurídicas, in Gómez Colomer, J. L., *op. cit*., pp. 1121–1163; Rosa Cortina, J. M. De La, La prueba en el proceso penal contra las personas jurídicas, in Gómez-Jara Díez, C., Persuadir…, tomo I, cit., pp. 771–803.

[239] Cfr. Fernández Teruelo, J. G., Blanqueo..., cit., p. 329, marginal 3006.

[240] Silva Sánchez, J.-M., La reforma..., cit., p. 7.

[241] Vid. Gómez Colomer, J. L., Introducción: La responsabilidad penal de las personas jurídicas y el control de su actividad. Estructura jurídica general en el Derecho procesal penal español y cultura de cumplimiento (compliance programs), in Gómez Colomer, J. L., *op. cit*., pp. 25–63.

[242] Vid. Pillado González, E., Presunción de inocencia y compliance, in Gómez Colomer, J. L., *op. cit*., pp. 1091–1119.

[243] Vid. Arangüena Fanego, C., El derecho al silencio, a no declarar contra uno mismo y a no confesarse culpable de la persona jurídica y el régimen de compliance, in Gómez Colomer, J. L., *op. cit*., pp. 439–472.

a modification without which "it is extremely doubtful that the new model will be able to meet its intended objectives[245]", since not taking into account the specific characteristics of the business activity leads to a "preventive inefficiency"[246]. That is precisely why the State Prosecutor General during one of the previous socialist governments had described the need to reform the criminal process as "imperative"[247] in order to clarify the many doubts about how to put a society on the bench[248]. In this regard, Law 37/2011 dated October 10 on procedural acceleration measures[249] somewhat improves the situation by enshrining a certain procedural status of legal persons in two new articles of the Criminal Procedure Act, since one applies to the taking of statements from the representative appointed by the legal person "the rights to remain silent, not to testify against himself and not to confess guilt"[250] and, equally, the other states, with almost identical wording, that the representative may testify on behalf of the legal person "without prejudice to the right to remain silent, not to testify against himself and not to confess guilt, as well as to exercise the right to the last word at the end of the trial proceedings"[251].

Many questions remain to be resolved in the context of the criminal responsibility of legal persons, including in the procedural field, where it seems systematically appropriate to conclude with the right to the last word. In the case of a convicted legal person's claim that he has not been given the opportunity to make final allegations, which leaves it up to the offending natural person to agree to the legal person, to compensate him or to cooperate with the authorities, which, according to the ruling dated February 29, 2016, would be an intolerable limitation of the right of defense that should be legally resolved by the appointment of a judicial defender of the legal person, the attribution to independent persons, the assignment to the so–called compliance officer, or to someone alien to any procedural conflict of interest chosen by the representative bodies, without the participation of those who will be judged in the same process, the ruling dated July 19, 2017 states that in

[244] Vid. Milans Del Bosch Y Jordán De Urries, S., Algunas cuestiones atinentes al Derecho de defensa de la persona jurídica, in Frago Amada, J. A., *op. cit*., pp. 301–315; Moreno Catena, V., El Derecho de defensa de las personas jurídicas, in Gómez Colomer, J. L., *op. cit*., pp. 1009–1038.

[245] Silva Sánchez, J.-M., La reforma..., cit., loc. cit.

[246] Terradillos Basoco, J. M., Financiarización económica y política criminal, in Serrano-Piedecasas Fernández, J. R./Demetrio Crespo, E. (dirs.), El Derecho penal económico y empresarial ante los desafíos de la sociedad mundial del riesgo, Colex, Madrid, 2010, p. 148.

[247] Conde–Pumpido pide «estrangular financieramente» a los grupos que blanquean dinero en España, in Diario La Ley, nº 7535, 27 de diciembre de 2010, p. 2.

[248] *Ibidem*.

[249] B.O.E. nº 245, de 11 de octubre de 2011.

[250] First paragraph art. 409 bis.

[251] Art. 786 bis, first paragraph, first subparagraph.

the case under examination "it lacks viability"[252], because there are no contradictory interests between a limited company and its de facto owner or between a company and those who hold the majority of its share capital. Since the real owners have been part of the process and have enjoyed all the rights, there are no conflicting interests between them, and it is "a legal person that comes to identify himself with the accused natural persons"[253].

In this sense, it is necessary to take into account the Spanish reality, in which small and medium enterprises, the so–called SMEs, represent 99.9%, 89% of private companies are family businesses, which generate 67% of employment, and micro enterprises, with no more than nine workers, represent 42.2%, an immense field for the double criminal responsibility of natural and legal persons, which entails a great danger of harming the principle of non bis in idem[254], insofar as, as Quintero Olivares states, "the smaller the undertaking, the greater the risk of the criminal penalty being doubled"[255]. Compliance programs were created for large Anglo–Saxon companies, but the problems of multinationals are not those of most Spanish companies, where the duties of administration and control usually come together in the same person and the criminal consequences end up with that person[256]. This is recognised in part by the Punitive Legislation, which allows "small legal persons"[257] to have supervisory functions "assumed directly by the administrative body"[258]. So it will be very difficult both to "prevent the company from being declared criminally responsible based on the identification between the company's will and that of its owners"[259] and to prevent the greater criminal severity of small businesses in which natural and legal persons agree, unlike large companies, whose "fines do not personally hit their managers"[260].

In addition, concerning the possible instrumentalization of legal persons for the perpetration of money laundering by organized crime, Royal Decree Law 11/2018[261] dated August 31 amends Article 26 of the Law on Prevention of Money Laundering, which requires regulated entities to have prevention manuals closely related to compliance programs, non-compliance with

[252] STS nº 583/2017, cit., fundamento de derecho segundo.
[253] *Ibidem*.
[254] Cfr. Quintero Olivares, G., Los programas de cumplimiento..., cit., p. 140.
[255] *Ibidem*.
[256] Cfr. Quintero Olivares, G., Los programas de cumplimiento..., cit., pp. 140 y 141.
[257] Art. 31 bis.3 of the Criminal Code.
[258] *Ibidem*.
[259] Quintero Olivares, G., Los programas de cumplimiento..., cit., p. 141.
[260] *Ibidem*.
[261] Real decreto–ley 11/2018, de 31 de agosto, de transposición de directivas en materia de protección de los compromisos por pensiones con los trabajadores, prevención del blanqueo de capitales y requisitos de entrada y residencia de nacionales de países terceros y por el que se modifica la Ley 39/2015, de 1 de octubre, del Procedimiento Administrativo Común de las Administraciones Públicas, BOE de 4 de septiembre.

which is sanctioned in the amended Article 51. Therefore, there is a need to create a specific money laundering prevention compliance or to integrate it into a broader criminal compliance, but unlike criminal legislation this "adequate"[262] prevention manual is compulsory[263] and must be kept "up to date"[264]. Also new are both the establishment of an internal whistleblowing[265] channel or "internal procedures for reporting potential non-compliance"[266] and the creation of an "internal control body and representative before the executive service"[267], a compliance officer, which, also unlike criminal regulations, is compulsory[268], unless otherwise stipulated by regulation[269]. In addition, annual audits and biennial follow-up reports by external experts[270] on internal control measures and bodies under Articles 26 bis and 26 ter are provided for. In addition, Article 13.3 prohibits credit institutions from establishing or maintaining correspondent relationships with shell banks, which it defines as "a credit institution, or an institution engaged in a similar activity, incorporated in a country in which it does not have a physical presence enabling it to exercise genuine management and control and which is not a subsidiary of a regulated financial group"[271]. Finally, the new wording provided by Royal Decree–Law 11/2018 to Article 4.4 of Law 10/2010 warns about the need to identify the real owners of legal persons, considering as such those who own more than 25% of the capital or voting rights or who control them by other means and in trusts, the settlors, trustees, protectors, beneficiaries as well as those who control them[272], in addition to enforcing a registration and a declaration of the real owners[273].

With regard to the fifth anti-money laundering Directive dated May 30, 2018, with "extensive whereas"[274], which amends the fourth Directive of

[262] Cfr. Fernández Teruelo, J. G., El compliance y las políticas y procedimientos del art. 26 de la Ley 10/2010, modificado por el RDL 11/2018. Su integración en el modelo de compliance penal corporativo (art. 31 bis et seq. CP), in Abel Souto, M./Lorenzo Salgado, J. M./Sánchez Stewart, N. (coords.), VII congreso sobre prevención y represión del blanqueo de dinero, Tirant lo Blanch, Valencia, 2020, p. 424.

[263] Art. 26.5.

[264] *Ibidem*.

[265] Cfr. Fernández Teruelo, J. G., El compliance y las políticas…, cit., p. 431.

[266] Vid. art. 26 bis.

[267] Vid. art. 26 ter.

[268] Cfr. Fernández Teruelo, J. G., El compliance y las políticas…, cit., p. 433.

[269] Vid. art. 26 ter.5.

[270] Cfr. art. 28.1.

[271] Art. 13.3, second subparagraph.

[272] Cfr. art. 4.2 letras b) and c).

[273] Cfr. fourth paragraph of the single additional provision.

[274] Lorenzo Salgado, J. M., El blanqueo de dinero procedente de los delitos descritos en los artículos 368 a 372 del CP y las nuevas tendencias de financiación del terrorismo advertidas por las Directivas de 2018, in Abel Souto, M./Lorenzo Salgado, J. M./Sánchez Stewart, N., VII congreso…, cit., p. 459.

2015[275], apart from new developments in the field of service providers both for virtual currency exchange in fiduciary currency and for the custody of electronic purses[276], it insists on the need to "adopt measures to ensure greater transparency of financial transactions, of companies and other legal entities, and trusts and legal instruments of similar structure or function"[277], the fifth Directive requiring Member States to establish registers of beneficial ownership for companies and other legal entities no later than January 10, 2020, and for trusts and similar legal arrangements no later than March 10, 2020, which had to be interconnected by a central European platform[278] by March 10, 2021[279].

In particular, the fifth Directive aims at an environment "hostile to criminals who seek shelter for their finances through opaque structures"[280], since a sound financial system in the Union requires "ensuring"[281] transparency not only in companies and other legal entities, but also in "trusts and similar legal arrangements"[282]. This is why the register of beneficial ownership and trusts is amended, in order to "clarify certain issues which had been confused in the fourth Directive and to strengthen its effectiveness[283].

Thus, Article 3(6)(b) adds trusts as a specification in brackets and forces Member States to impose penalties on trustees to obtain and retain adequate information on the actual ownership of trusts or similar instruments[284], penalties which shall be effective, proportionate and dissuasive[285].

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[275] Regarding Directive 2015/849, of 20 May, vid. Sanz Hermida, A. M., Prevención de la utilización del sistema financiero para el blanqueo de capitales o financiación del terrorismo, in Revista General de Derecho Procesal, nº 37, septiembre de 2015, pp. 1–5.

[276] Vid. Andrés Pérez, S. DE, Principales novedades de la quinta Directiva en materia de prevención del blanqueo de capitales y la financiación del terrorismo, 21 de junio de 2018, in www.abogacia.es (January 2024); Navarro Cardoso, F., Criptomonedas (en especial, bitcóin) y blanqueo de dinero, in Revista Electrónica de Ciencia Penal y Criminología, 21–14, 2019, pp. 1–45.

[277] Directiva (UE) 2018/843 del Parlamento Europeo y del Consejo, de 30 de mayo de 2018, por la que se modifica la Directiva (UE) 2015/849 relativa a la prevención de la utilización del sistema financiero para el blanqueo de capitales o la financiación del terrorismo, y por la que se modifican las Directivas 2009/138/CE y 2013/36/UE, en Diario Oficial de la Unión Europea, L 156, 19 de junio de 2018, whereas 2.

[278] Directive 2017/11132, on certain aspects on Company Law, of 14 June 2017, created the European central plataform requiring the coordination of national systems with different technical characteristics, as evidenced by whereas 37 and by arts. 30.10 and 31.9 of Directive 2018/843.

[279] Cfr. whereas 53 and art. 67.1.

[280] Whereas 4.

[281] Lorenzo Salgado, J. M., El blanqueo..., cit., p. 462.

[282] Whereas 4.

[283] Andrés Pérez, S. DE., *op. cit*., p. 2.

[284] Cfr. art. 31.1.

[285] Cfr. Núñez Paz, M.A., El tipo agravado de blanqueo por pertenencia a una organización y el acceso de los grupos terroristas a las instituciones financieras internacionales según la

Data on holders of bank and payment accounts or safe deposit boxes are fragmented and beyond the reach of the authorities, so it is "essential to establish centralized automated mechanisms in all Member States"[286], e.g. registers or data consulting systems[287], and to take account of the increased risks to money laundering posed by "certain intermediate structures"[288].

These records should be "publicly available" [289]because disclosure of ownership is very important for "the confidence of investors and the general public in financial markets"[290]. The Fourth Directive allowed access to information in Article 30(5)(c), to "any person or organization which can demonstrate a legitimate interest", an expression which "gave rise to doubts of interpretation"[291]. As a result, the fifth Directive changes the formula[292] to "any member of the public" and the legitimate interest, to be defined by the States, extends not only to judicial or administrative proceedings but also to non-governmental organizations and investigative journalism[293], although access may be refused "where there are reasonable grounds for suspecting that the written request is not in accordance with the objectives of this Directive"[294].

Certainly "accurate and up–to–date information on the beneficial owner is a key factor in locating criminals"[295], who may be hidden "behind a corporate structure"[296], and because of differences between legal systems some trusts and similar instruments were not subject to supervision or registration[297], but in order to respect privacy and protect personal data as well as to safeguard proportionality[298] only "the minimum data necessary for conducting investigations"[299] should be stored and what "should be made available to the public should be limited"[300], and therefore disappears from Article 30. 5 the reference to "all" information. Accordingly, the name and surname, month and year of birth, country of residence, nationality and the nature and extent of

directiva 2018/843, in Abel Souto, M./Lorenzo Salgado, J. M./Sánchez Stewart, N., VII congreso..., cit., p. 288.

[286] Whereas 20.
[287] Whereas 24.
[288] *Ibidem*.
[289] Whereas 33.
[290] Whereas 32.
[291] Andrés Pérez, S. DE, *op. cit*., p. 2.
[292] Vid. Núñez Paz, M. A., El tipo agravado..., cit., pp. 288 and 289.
[293] Cfr. whereas 42.
[294] Whereas 28.
[295] Whereas 25.
[296] *Ibidem*.
[297] Cfr. whereas 26.
[298] Cfr. Lorenzo Salgado, J. M., El blanqueo..., cit., p. 460.
[299] Whereas 21.
[300] Whereas 34.

"ownership held"[301], referred to in the spanish version of the Fourth Directive as "real participation", will be made public about the actual holders and the Fifth Directive changes it to "real interest" and incorporates as a novelty that national regulations may allow access to additional information enabling the identification of the beneficial owner, which will at least include his/her date of birth and contact details[302]. In short, the access that should be allowed on the beneficial ownership of trusts and related instruments should be similar "to the corresponding rules that apply to companies and other legal entities"[303] to avoid their use by money launderers[304].

The same year, 2018, the European Union adopted another Directive on money laundering, in an unprecedented legislative succession that undermines legal certainty: Directive 2018/1673[305], which is the result of a Commission proposal dated December 21, 2016, and a compromise text dated May 20, 2017[306], which seeks to harmonize criminal legislation in the countries of the European Union[307], also deals with the responsibility of legal persons, which it defines as "any entity having legal personality under the applicable law, except for States or other public bodies in the exercise of State authority and for public international organizations"[308].

Article 7 of the Directive on combating money laundering through Criminal Law[309] is clearly inspired by Article 10 of the Warsaw Convention[310] or

[301] Andrés Pérez, S. DE, *op. cit.*, p. 2.
[302] Cfr. arts. 30.5 c) and 31.4.
[303] Whereas 27.
[304] *Ibidem*.
[305] Vid. Directiva (UE) 2018/1673 del Parlamento Europeo y del Consejo, de 23 de octubre de 2018, relativa a la lucha contra el blanqueo de capitales mediante el Derecho penal, in Diario Oficial de la Unión Europea, L 284, 12 de noviembre de 2018, pp. 22–30.
[306] Cfr. Sanz Hermida, A. M., Nuevos retos de la lucha contra el blanqueo de capitales en la UE: la orientación general de la Comisión Europea, in Revista General del Derecho Procesal, nº 44, enero de 2018, p. 6.
[307] *Ibidem*.
[308] Art. 2.3.
[309] Regarding the proposal for this Directive vid. Vidales Rodríguez, C., Del blanqueo como amenaza a la amenaza del blanqueo. Comentarios a la propuesta de Directiva del Parlamento Europeo y del Consejo sobre la lucha contra el blanqueo de capitales mediante el Derecho penal a la luz de la experiencia española, in González Cussac, J. L./Flores Giménez, F. (coords.), Seguridad y derechos. Análisis de las amenazas, evaluación de las respuestas y valoración del impacto en los derechos fundamentales, Tirant lo Blanch, Valencia, 2018, pp 247–276.
[310] Cfr. Carpio Delgado, J. Del, Hacia la pancriminalización del blanqueo de capitales en la Unión Europea. Un análisis crítico de la Directiva (UE) 2018/1673 relativa a la lucha contra el blanqueo de capitales mediante el Derecho penal, in Revista Penal, nº 44, julio de 2019, pp. 23 and 38; Vidales Rodríguez, C., Condotte integranti il delitto di riciclaggio. Osservazioni sulla Direttiva (UE) 2018/1673 del Parlamento Europeo e del Consiglio, 23 ottobre 2018, relativa alla lotta al riciclaggio di capitali attraverso il Diritto penale, in www.criminaljusticenetwork.eu/it, p. 7 (January 2024).

Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism dated May 16, 2005,[311] and requires Member States to ensure that legal persons can be held liable for the offense of money laundering committed for their benefit by any person, acting either individually or as part of an organ of the legal person, who has a leading position based on a power of attorney of the legal person, or on the power to take decisions on behalf of the legal person, or to exercise control over the legal person[312]. They shall also ensure that they can be made responsible where the lack of monitoring or control has made possible the perpetration of money laundering for the benefit of the legal person[313]. Finally, Article 7(3) provides that the responsibility of legal persons shall not exclude criminal proceedings against natural persons responsible for money laundering.

The "sanctions applicable to legal persons" are covered by Article 8 of Directive 2018/1673, which requires Member States to ensure that legal persons responsible for money laundering are punishable "by effective, proportionate and dissuasive sanctions" so there is no need to make legal persons criminally[314] responsible[315]. It is compulsory[316] to impose fines, whether criminal or not[317], and it is optional to apply other sanctions mentioned in a non-closed list of examples[318]: disqualification from public benefits or aid, temporary or permanent exclusion from public financing, including tenders, subsidies and grants, temporary or permanent disqualification from the exercise of commercial activities, judicial intervention or dissolution, and temporary or permanent closure of establishments used for the offense[319].

Article 10 of Directive 2018/1673 also refers to legal persons: after requiring Member States to establish their jurisdiction over money laundering offenses committed, in whole or in part, in their territory and by their citizens[320], allows, subject to a mandatory report to the Commission, for extra-territorial extension of jurisdiction where the perpetrator is habitually resident in that country[321] or "the offense was committed for the benefit of a legal person established in that country"[322], ultra–territorial applications of criminal law that will generate conflicts of jurisdiction[323], which Article 10.3 seeks to

[311] BOE de 26 de junio de 2010.
[312] Cfr. art. 7.1.
[313] Cfr. art. 7.2.
[314] Cfr. Carpio Delgado, J. Del, Hacia la pancriminalización..., cit., p. 38.
[315] Cfr. Vidales Rodríguez, C., Condotte..., cit., p. 8.
[316] Cfr. Carpio Delgado, J. Del, Hacia la pancriminalización..., cit., p. 38.
[317] Cfr. Sanz Hermida, A. M., La lucha contra el blanqueo…, cit., p. 10.
[318] Cfr. Vidales Rodríguez, C., Condotte..., cit., p. 8.
[319] Cfr. art. 8, a), b), c), d), e) and f).
[320] Cfr. art. 10.1, a) and b).
[321] Cfr. art. 10.2, a).
[322] Art. 10.2, b).
[323] Cfr. Sanz Hermida, A. M., La lucha contra el blanqueo…, cit., p. 15.

resolve with the cooperation of the Member States in initiating proceedings, taking into account the place where the offense was committed, the nationality or residence of the perpetrator, the country of the victim[324], an inappropriate criterion which is due to the uncritical reproduction of the provisions of other directives concerning individual victims[325], and "the territory in which the perpetrator was found"[326].

Finally, even if Spanish criminal legislation is far more expansive[327] than Directive 2018/1673 and did not need many changes to fulfill the community requirements, which also reflect "the expansive and punitive criminal policy that characterizes contemporary criminal law"[328], a reform of our punitive legislation "by December 3, 2020"[329], deadline missed by the legislator despite having been warned in time by Lorenzo Salgado, was necessary: Article 303 of the Spanish Criminal Code "will have to be modified"[330] due to the mandate, established in Article 6(1)(b) of Directive 2018/1673, to consider it an aggravating circumstance "that the perpetrator is a regulated entity within the meaning of Article 2 of Directive (EU) 2015/849, and has committed the offense in the course of his professional activity", Article 2 which includes not only financial and credit institutions, but also an extensive catalogue of natural and legal persons, when acting professionally, which extended the Directive 2018/843 of 30 May[331], Directive transferred to Spanish domestic law by royal decree law 7/2021, of April 27, which modified Law 10/2010 on the prevention of money laundering[332]. This essential reform of article 303 of the punitive legislation should be used to eliminate, once and for all, the heinous references to doctors, social workers, teachers or professors[333], who have no sense of money laundering and who come from offenses related to drug trafficking, "which explains, but does not justify, the amazing reference"[334].

[324] Cfr. art. 10.3, a), b) and c).
[325] Cfr. Carpio Delgado, J. Del, Hacia la pancriminalización..., cit., pp. 39 and 40.
[326] Art. 10.3, d).
[327] Vid. Abel Souto, M., Las reformas penales de 2015 sobre blanqueo de dinero, in Revista Electrónica de Ciencia Penal y Criminología, 19–31, 2017, pp. 1–35.
[328] Sanz Hermida, A. M., La lucha contra el blanqueo…, cit., pp. 9 and 10.
[329] Artículo 13.1, first suparagraph.
[330] Lorenzo Salgado, J. M., El blanqueo..., cit., p. 465.
[331] Vid. art. 1.1.
[332] Vid. Real decreto–ley 7/2021, de 27 de abril, de transposición de directivas de la Unión Europea en las materias de competencia, prevención del blanqueo de capitales, entidades de crédito, telecomunicaciones, medidas tributarias, prevención y reparación de daños medioambientales, desplazamiento de trabajadores en la prestación de servicios transnacionales y defensa de los consumidores, BOE, n. 101, 28 de abril de 2021, apartado III, pp. 49752–49754, and art. 3, pp. 49788–49803.
[333] Cfr. Lorenzo Salgado, J. M., El blanqueo..., cit., p. 465, note 73.
[334] Lorenzo Salgado, J. M., El blanqueo..., cit., p. 447.

However, the preamble of Organic Law 6/2021, of April 28, boasts of carrying out a technical improvement[335] with the introduction of a new aggravated type in the Penal Code for those bound by prevention regulations when launder money in the exercise of their professional activity, but the legislative technique is conspicuous by its absence, since as it is a professional aggravation it should have been located in art. 303 of the Penal Code, as had been correctly proposed doctrinally, and not among the aggravated types for organizations of art. 302.1. Furthermore, the unsystematic legislator of 2021 wasted the reform by not eliminating art. 303 the aberrant mentions of doctors, social workers, teachers or educators[336].

Last, but not least, the spanish supreme court has created in sentences 221/2016, 234/2019, 165/2020, 833/2021 and 264/2022 a theory of corporate crime that requires a structural defect in the mechanisms of prevention[337], a lack of business ethics or culture of compliance, requirements that violate the principle of legality because they are not found in the Penal Code and confuse law with morality[338]. Certainly the broad and intense[339] emergence of the criminal liability of legal entities has generated such a change in a long–standing historical tradition[340] that it has even been said, using a pun, that we are not faced with a criminal law different but, more properly, something different from criminal law.[341] However, it is necessary to apply articles 31 bis, ter, quater and quinquies of the penal code in accordance with fundamental rights, especially the presumption of innocence and non bis in

[335] Organic Law 6/2021, penultimate paragraph of the preamble.

[336] Vid. Abel Souto, M., El nuevo tipo agravado de blanqueo en el ejercicio profesional de los obligados por la normativa de prevención, incorporado por la Ley orgánica 6/2021, y los proveedores de servicios de cambio de moneda virtual y de custodia de monederos electrónicos, in Revista Penal México, 20, 2022, pp. 17–25.

[337] Cfr. González Uriel, D., La responsabilidad penal de las personas jurídicas, el delito corporativo y el blanqueo de dinero, in Anuario de Derecho Penal y Ciencias Penales Revista Aranzadi Doctrinal, LXXVI, 2023, pp. 260–262.

[338] Cfr. González Cussac, J. L., Responsabilidad penal de las personas jurídicas y programas de cumplimiento, Tirant lo Blanch, Valencia, 2020, pp. 304–311.

[339] Orts Berenguer, E./González Cussac, J. L., Introducción al Derecho penal. Parte general, Tirant lo Blanch, Valencia, 2020, p. 151.

[340] Fernández Teruelo, J. G., Responsabilidad penal de las personas jurídicas, in Bustos Rubio, M./Abadías Selma, A. (dirs.), Una década de reformas penales. Análisis de diez años de cambios en el Código penal (2010–2020), J. M. Bosch Editor, Barcelona, 2020, p. 67; Fernández Teruelo, J. G., 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). Incluye un análisis de los modelos de responsabilidad penal de las personas jurídicas en Méjico y Ecuador, Thomson Reuters/Aranzadi, Cizur Menor, 2020, p. 25.

[341] Muñoz Conde, F./García Arán, M., Derecho penal. Parte general, 11ª ed., revisada y puesta al día con la colaboración de Pastora García Álvarez, Tirant lo Blanch, Valencia, 2022, p. 596.

idem[342], and in order for there to be a minimum of legal certainty, given the relevance of the principle of legality, it is very important not to deviate from the letter of the Law[343]. Therefore, given the various legislative discrepancies regarding the criminal liability of legal entities, I have carried out in this article an interpretation in accordance with the principle of validity.

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[342] Cfr. Orts Berenguer, E./González Cussac, J. L., Compendio de Derecho penal. Parte general, 10ª ed., Tirant lo Blanch, Valencia, 2023, p. 344.

[343] Cfr. González Cussac, J. L., La eficacia eximente de los programas de prevención de delitos, in Estudios Penales y Criminológicos, n. XXXIX, 2019, pp. 603 and 604.

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Pranie pieniędzy, sztuczna inteligencja, odpowiedzialność karna osób prawnych i przestępczość korporacyjna

Streszczenie

Narzędzia sztucznej inteligencji mogą zrewolucjonizować walkę z praniem pieniędzy, ale konieczne jest zachowanie równowagi między skutecznością a ochroną praw podstawowych. Powszechna kryminalna instrumentalizacja spółek w celu popełnienia prania pieniędzy spowodowała w 2010 r. włączenie ich do odpowiedzialności karnej osób prawnych oraz możliwe zwolnienie lub złagodzenie kary w 2015 r. poprzez programy zgodności, które stwarzają kilka problemów. Dyrektywa 2018/843 ma również na celu osiągnięcie większej przejrzystości transakcji, spółek, osób prawnych, trustów i podobnych instrumentów, a dyrektywa 2018/1673 nakłada obowiązek zapewnienia, że osoby prawne mogą zostać pociągnięte do odpowiedzialności za przestępstwo prania pieniędzy, chociaż nie wymaga stosowania sankcji karnych; konieczna była jednak reforma art. 303 kodeksu karnego. 303 kodeksu karnego była konieczna, a nowelizacja ta powinna zostać wykorzystana do usunięcia oczywistych błędów, ale ustawa organiczna 6/2021 wprowadza profesjonalne zaostrzenie wśród typów dla organizacji z art. 302 ust. 1. 302.1. Co więcej, niesystematyczny ustawodawca z 2021 r. zmarnował reformę, nie eliminując w art. 303 aberracyjnych wzmianek. Wreszcie, co nie mniej ważne, hiszpański Sąd Najwyższy stworzył teorię przestępczości korporacyjnej, która może naruszać zasadę legalności i mylić prawo z moralnością.

Słowa kluczowe

Pranie pieniędzy, sztuczna inteligencja, odpowiedzialność karna osób prawnych, przestępczość korporacyjna.