SPECIAL REPORT

The reform of the Argentine Criminal Code: its impact on companies, managers and corporate reputation

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With the collaboration of:

Governance Latam
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1. INTRODUCTION

On February 13, the Committee of Experts submitted what is known as the Criminal Code Amendment, **Update and Integration Draft Project**[1] to President Cristina Fernández de Kirchner. The mere announcement of this initiative entailed a **controversial debate**, particularly as regards the presumably more lenient criteria that the Project would propose in the field of criminal prosecution and the supposedly negative consequences it would have on the control of urban crime, one of the main concerns of the Argentine population according to the results of several public opinion surveys carried out recently[2].

The Project has not been sent to Congress yet. This amendment aims to reform an old Code, **enacted in 1921**, to which over **900 further special laws** have been added. Many of these partial amendments were due to short-term urgencies and the rush of the legislators to meet specific social demands, which ultimately affected the quality that a Code of this importance should have.

The most **illustrative** recent cases were the reforms introduced in 2004, with Nestor Kirchner in power, as a response to the public protests and demands made by Juan Carlos Blumberg, father of a victim of a brutal crime. Among other measures, this reform disproportionately increased the penalties and limited the implementation of releases on parole for specific severe crimes (Law 25.886).

The current criminal legislation is **disorganized** (there were multiple incoherent types of offenses within the Code), uses an **outdated language** which does not meet the international standards ("idiot or insane woman") and, due to the aforementioned continuous modifications, establishes a system of **penalties which lacks the slightest internal consistency** (the punishment imposed for armed robbery can be more severe than that of a murder).

The committee responsible for the modernization of this document (Decree 678/12) was comprised of Eugenio Zaffaroni, Minister of

1 Please check the full document here: http://new.pensamientopenal.com.ar/sites/default/files/2014/02/anteproyecto_de_coidigo_penal_de_la_nacioin._definitivo.pdf

2 For example, the survey carried out by Poliarquia in February showed that insecurity is the country's main problem for 21% of the respondents and the largest "personal problem" for 27% of the population, in some cases combined to the phenomenon of drug trafficking.

"The complexity of economic relations and transnational crime led some countries to choose to extend criminal liability to legal persons. The reform raised in Argentina assumes a sharp position in this regard"

the Supreme Court, particularly close to Kirchnerism; national congressmen Ricardo Gil Lavedra (radicalism/social democracy) and Federico Pinedo (PRO/ center-right), the Provincial Representative of Santa Fe - Buenos Aires- Maria Elena Barbagelata (socialism) and former Minister for Justice, Leon Arslanian (Peronism). This is a politically **pluralistic** group, with **prestigious** members within the legal sphere who defend a **liberal** understanding of Criminal Law.

This paper analyzes the impact that the new Criminal Code would have on the corporate arena if it were adopted. Specifically, since this amendment will make companies be held liable for a wide range of offences that are not currently set out or merely govern the actions carried out by individuals and not legal entities.

2. . CRIMINAL LIABILITY OF LEGAL PERSONS

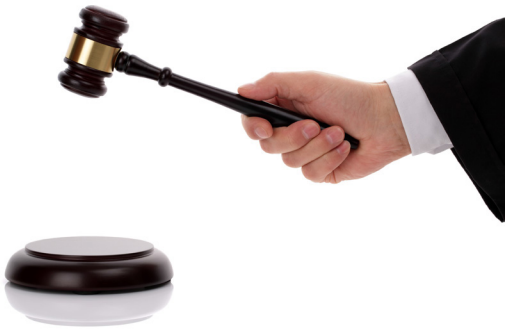
For decades, the law has debated on whether legal persons can commit crimes just like natural persons.

The complexity of the economic relations and transnational organized crime led several countries —particularly Anglo— Saxon nations- to implement the aforementioned solution. In Argentina, just like in other Latin American countries who followed the legal tradition of the continental Europe, the criminal liability of companies had been discarded until a few years ago, when it started being gradually included in specific offences: Criminal Exchange (Law 19.359), those included in the Law of Supply (20.680), crimes against the Integrated Retirement and Pension System (24.241), Custom-related offences (22.415), Criminal Tax (24.769), crimes against Free Competition (25.156) and, finally, crimes against the Economic and Financial order, such as money laundering, financing terrorism and other actions related to the capital markets —for example, *insider trading*— introduced more recently into the Criminal Code.

The Preliminary Draft seeks to enhance this process by taking a strong stance establishing in its General Section (Article 59) the following points:

- "Private legal entities shall be held liable (...) **for the offences committed by their governing bodies or the representatives acting in their name and interests"**
- The corporation shall still **be liable even if**:
  - » "The intervening persons act without the authority to represent the company (...) if (the latter) had validated this management, even tacitly"
  - » "The action would not entail benefits or interest the company (...) yet the offence had been made possible arising from a breach of its management and monitoring duties".

"The penalties are foreseen for companies for offenses committed or permitted by their representatives, ranging from fines to the cancellation of the legal entity, going through the total suspension of its activities"



That is, corporations of all sizes, associations or any other private legal entity can be prosecuted **not only for criminal conducts carried out by its bodies or representatives**, but also **other staff members** whose actions had not been unauthorized by the bodies or representatives or even those activities which did not benefit or interest the corporation but **were "allowed"** by a lack of management and monitoring.

Under this responsibility framework, legal entities might be subject to any of the **ten established penalties**, which could be grouped as follows (Art. 60):

- **Fines and statutory payments** of up to one third of the net assets of the organization
- **Total cancellation of its legal status**, if the organization was set up to merely commit crimes
- **Cancellation or total or partial closure of activities.** In the first case, for a maximum period of a year and only when the legal entity were frequently used to commit crimes; in the second case, for a maximum period of six months
- **Suspension of the use of patents and trademarks**, state aid, participation in public tendering processes or official records for up to 3 years
- **Total or partial publication** of the sentence at the expense of the legal entity itself

The initiative provides that these penalties shall be carried out **individually or jointly** (article 61), in accordance with the judge's view and the **following conditions** (article 62:1):

- In relation to the conduct of the **legal entity**, the degree of violation of the laws and its internal procedures as well as the degree of failure to control the people who committed the crime
- As regards the **results of the crime**, its social importance and severity
- Concerning the **conduct of the legal entity after the crime**, its cooperation to clarify the facts and spontaneous willingness to repair the damages or solve the conflict in question

Thus, following the Anglo-Saxon model[3], the criminal liability of companies as established in the Criminal Code Draft is not merely related to the actions of managers or CEOs of the company, but particularly **linked to what the latter failed to do in order to prevent** their staff from committing any

3 As an example of standards linked to fighting transnational corruption, please see the U.S. Foreign Corrupt Practices Act (FCPA) or the United Kingdom Bribery Act (UKBA)

"This legal system leads to companies and their directors dealing increasingly with the establishment of regulatory compliance programs, to reduce the risk of incurring such behavior"

criminal activity on the behalf of the company.

In turn, the Draft includes incentives **for companies in order to cooperate with criminal prosecution bodies in the detection**, clarification and resolution of criminal conflicts. This is achieved in two ways: first, in order to **establish the penalty**, the court must consider "the potential cooperation to clarify the facts, the subsequent behavior and spontaneous willingness to mitigate or repair the damage or to resolve the conflict"; on the other, plea **bargain criteria** have been introduced to enable the Public Ministry to continue or withdraw the prosecution in cases of financial crimes in which no acts of personal violence were committed (article 42). These could hypothetically occur if a company were able to show that the crime was committed despite the existence of internal management and monitoring procedures aimed at preventing the unlawful act.

As happened in the Anglo-Saxon world, this legal system of punitive measures and incentives promoting the prevention and cooperation will necessarily encourage companies, managers and directors to pay more attention to the establishment of **compliance programs to reduce** the potential risks of breaking the law, as they will establish mechanisms and systems aimed at complying with the law and the regulations governing their activities.

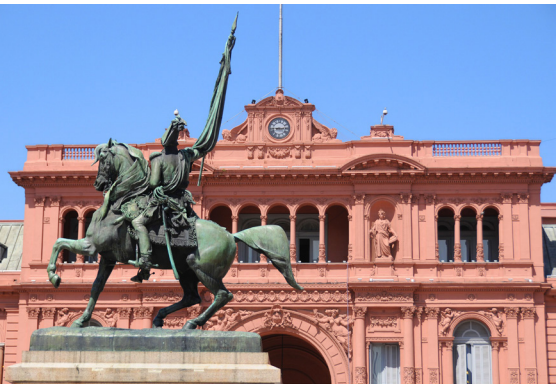
3.CRIMES

The Special Section of the Draft Reform provides that legal persons can be held liable for various offenses (established as a *numerus clausus*: they could only be held accountable for the behaviors that the Draft expressly mentions).

The number of crimes for which legal entities can be prosecuted has been significantly increased. In accordance with the Draft, they could be held liable for:

- Crimes against the **Economic and Financial order**. They have been expanded, including and updating currently scattered offenses into special laws (such as Smuggling, Shortages, crimes against the Exchange Control or distortion of competition) and creating new regulations, such as active financial bribery (Article 178.2)
- **Crimes against humanity** (Article 73.4)
- Certain **crimes against Individual** Freedom, like subjection to servitude (Article 105), trafficking (Article 111) or the crime of unlawful hiring and working conditions (Article 114)
- All **crimes against Property**, currently called Property crimes
- Some **crimes against Public Security** (Article 184.8) and National Security (Articles 224 and 225)

"The draft bill does not provide any generic offense for bribery between privates, as recommended by the United Nations Convention against Corruption, from which Argentina it's part"



- **Bribery and influence peddling and other offenses** against the public administration
- **Environmental crimes, against the fauna and flora**, and the new pollution crime (Article 204)

The draft does not include any generic offense in **relation to commercial bribery**, whose criminalization has been recommended by the United Nations Convention against Corruption (Article 21), to which Argentina belongs. The only bribery actions covered by the Draft are those who might take place in the operations of capital markets (financial bribery).

4.PRELIMINARY DRAFT AND CONTEXT

The Draft has taken its first steps in a **volatile social and political climate**. The government of Cristina Fernández de Kirchner is going through the second half of the term facing significant economic hurdles –an incredibly large inflation, dropping reserves, risk of general stagnation of the activities– and growing suspicions of corruption among some of its senior officers.

Urban insecurity had already been a problem for years, but it has become one of the most debated topics in all electoral campaigns during the Kirchner decade. So far, the Criminal Code Draft has been merely discussed in a lax and poor manner by the media; they merely focused on the impact that the reform would have on insecurity. No quality-debates have been held yet.

The project has been treated somewhat tritely: the discussions, promoted by the opposition party Frente Renovador (Peronism), exclusively focus on the reduction of certain penalties. The main spokespeople of the Government have not dared to defend the initiative strongly and the controversy might have forced the ruling party to take the issue off the agenda and postpone its formal issuance to the Congress.

Representatives of the ruling party have suggested that the debate against the reform could even be an initiative promoted by corporations as a result of the introduction of the criminal liability of legal entities. Thus, the population would apparently be criticizing the reform for being too "soft" on urban crime, but in fact people would not accept it for being too "hard" on companies. However, although these measures could be seen as another anti-corporate initiative developed by Kirchner, the truth is that the increased use of robust criminal or administrative punitive sanctions against legal entities has become an increasingly common trend not only in the U.S. and Europe[6], but also in Latin America (Colombia , Chile and Brazil[7]).

Extending the criminal liability to companies is a process which, with nuances, is spreading all over the world. In fact, it is interesting to note that in its foundations the Draft argues that, regardless of how

"Parallel to this process of criminal pressure, companies are suffering worldwide an increasingly severe scrutiny from a variety of stakeholders in relation to their ethical behavior and transparency in their performance"

debatable this affair is, "there is no political or media space to stop the regulation of these sanctions in the Criminal Code".

Thus, the context is important, but not only at the national level. On one hand, criminal liability now applies to legal entities, on the other, corporations are being analyzed in an increasingly severe manner by its audiences all around the world in a wide range of spheres: regulators, civil society organizations, media, activists and citizens do it through well-known tools. These groups use social networks to voice their opinions on the obligations that companies have not only towards their employees, but also towards the community in which they operate from a social, ethical, environmental, human rights and, in general, regulatory compliance point of view.

It is for these reasons that the need for transparency and compliance with the law are increasingly demanding. We live in the era of reputation: it is no longer acceptable for a company to be managed with the mere objective of generating the largest economic return possible for its owners or shareholders and at the expense of other stakeholders -employees, communities, citizens-. Similarly, modern and responsible corporations cannot ignore certain values and obligations. Criminal law, often used —mistakenly or not— as a measuring stick to analyze the values that a society seeks to promote, seems to be catching up with the reputation era.

5. CRIMINAL LAW AND CORPORATE REPUTATION

The same surveys reflecting the lack of confidence in the Argentine political parties, the Congress or the unions also show that the Argentine entrepreneur sphere and businessmen have their own reputation problems [8].This scenario is not the result of a single cause and is not limited to the last decade either. It is not a phenomenon exclusively affecting Argentina: the crisis in Europe and the U.S. has had a significant impact on the confidence that all players have on organizations and also increased distrust among citizens -on both sides of the Atlantic- in relation to companies. Companies are increasingly forced to meet the demands of a complex series of audiences.

The current great challenge for the corporate world is to come to terms with the fact that it has lost the leadership and authority that other players have acquired: the organized civil society, universities and certain opinion leaders. In the same vein, companies and entrepreneurs need to try to restore the lost confidence not only among the shareholders, but also between the wide range of stakeholders that make the business management incredibly complex.

In the old approach, the account of financial-economic results was

"A regulatory reform as the one arising represents a challenge for companies in the area of governance, good corporate governance and reputation"

exclusive: shareholders were the only relevant players for the management and economic benefits the only goal. As regards the new model that is slowly spreading, in this reputation era the accountability systems are now at least quintuple; besides the results measured in economic terms there are four further indicators[9]:

- Social results: sustainable and responsible contributions made by a business to the community in which it operates
- Talent management: the way in which the company promotes the integral development of its employees
- Environmental issues: the relationship between the company and the sustainability of the natural environment
- Sound corporate governance: ethical behavior in all business activities

Thus, corporate reputation is the result of the perception that the various stakeholders have about the commitments undertaken by the corporation in the aforementioned fields. Managing this reputation is a complex and essential task: on one hand, the level of visibility and scrutiny that companies need to face is unprecedented and, on the other, organizations unable to manage their reputation will find it difficult to relate to their audiences and, in the long term, to maintain their social license and economic sustainability.

Logically, a criminal code amendment as the one that the Argentine government seeks to promote is a challenge for the areas of governance and sound corporate governance.

As previously described, the Draft to Reform, Update and Integrate the Criminal Code expands the liabilities of companies and entrepreneurs. This higher criminal risk should focus on designing and implementing mechanisms to ensure that the business leaders and all the operative processes of the company comply with the law. So far, the regulatory compliance programs in Argentina have been developed mainly by the subsidiaries or affiliates of multinational corporations which are exposed to potential investigations and sanctions by the regulatory authorities of the company's country of origin —primarily in the U.S.— through the implementation of comprehensive jurisdictional principles. These programs seek to prevent crimes through risk analysis and definition of internal policies, procedures and rules, the establishment of incentive schemes and —among other things— a training and constant communication which promotes an organizational culture of compliance with the law. Up to this point, these programs have become the means that companies have chosen to reduce the chances of incurring liability and at the same time, meeting the increasingly demanding requests and incentives from both regulators and other stakeholders.

"So far, regulatory compliance programs in Argentina have been built almost exclusively by subsidiaries of multinational companies"

With the private sector in the spotlight of the public debate, companies are increasingly recognizing the fact that efficient regulatory compliance programs which seriously try to prevent unlawful actions –and go beyond merely promoting a "good image"– can reduce legal risks, improve the competitive advantages and strengthen the reputation of any organization.

This trend will probably be enhanced if the amendment is passed and, although not being approved, it will certainly not stop this phenomenon either.

6. CONCLUSIONS

- The Executive Branch has in its hands the Draft to Reform, Update and Integrate the Criminal Code, which expressly establishes the liability of legal entities.
- The initiative increases the penalties for certain offences by legal entities already included in the Criminal Code and also recognizes new crimes which affect companies. More specifically, the Amendment enhances the criminal risks of companies and its managers.
- The legislative management of the Project is still uncertain. Even if it is not immediately approved, the trend to increase the liability of businesses and entrepreneurs and the corresponding sanctions seems to be unstoppable.
- The reputational risks of organizations increase as well, since the sound corporate governance and compliance with the law practices now have more demanding formal standards, beyond the new Code.
- The need for a careful management of the reputation of all organizations is thus enhanced, requiring the establishment of legal and regulatory compliance programs aimed at ensuring the compliance with the obligations that the legal entities need to meet.
- A sound corporate governance embodied in such programs will enable to reduce legal and reputational risks and entail competitive advantages.

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