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TWO CONTRA LEGEM INTERPRETATIONS OF THE SYSTEM OF EXEMPTION OF LEGAL PERSONS FROM CRIMINAL LIABILITY (ART. 31A(2) AND (4))

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SUMMARY: I. Introduction; II. A simple model, two different attribution and exemption criteria and the underlying reasoning; 1. The notorious: two different channels for attributing criminal liability to a legal person; 2. The explanation of the double route in the 2015 Spanish model: the specific nature of watching the watchman; III. The proposed interpretatio abrogans by the Supreme Court and the Public Prosecutor's Office; 1. The Supreme Court's proposal: repeal the more stringent system, generalise the less stringent regime; 2. The proposal of the state prosecutor's office: repeal the less stringent system, generalise the more stringent system; IV. Conclusion.

I. Introduction.

At the start of 2016, the two main institutional authorities responsible for interpreting criminal law (the 2nd Chamber of the Supreme Court and the Public Prosecutor's Office) presented their respective interpretations of the regulations governing the criminal liability of legal persons following the 2015 reform. The Public Prosecutor's Office addressed this interpretation through its extensive Circular 1/2016. The Supreme Court did so by offering an extensive and original *corpus doctrinalis* in its Ruling of 29 February 2016[210], No. 154/2016[211].

Two of the state 's highest institutions were thus set against one another in offering their respective visions of this regulation, in what appeared to be a struggle for taking a lead in the legal discourse on the matter[212] between two strikingly different positions, in

[210] Referred to by ZUGALDÍA amusingly "la bisiesta": ZUGALDÍA ESPINAR, "Teorías jurídicas del delito de las personas jurídicas (aportaciones doctrinales y jurisprudenciales). Especial consideración de la teoría del hecho de conexión", in *CPC* No. 121, I, period II, 2017, p. 11.

[211] As has been said, the subject matter of that ruling did not require this detailed development on the issue of organisational and management models, compliance and crime prevention measures at companies: the case dealt with companies set up for the commission of crimes and, in some cases, mere front companies. Therefore, the reasoning behind this ruling was described, not without reason, as a mere obiter dictum in a dissenting opinion signed by half but one of the judges who could vote in the ruling (DOLZ LAGO was particularly critical in the ruling, "Primera sentencia condenatoria con doctrina general sobre la responsabilidad penal de las personas jurídicas. Análisis de los requisitos del artículo 31 bis CP/2015. Organización criminal que opera a través de mercantiles dedicadas a la exportación e importación internacional de maquinaria con droga oculta en su interior. Votos discrepantes", in *Diario La Ley* No. 8796, 5/7/16).

[212] In fact, as is well known, the genesis of the Circular and the aforementioned ruling ran parallel, although in the end the former was published a month earlier, as the report of the Ruling was not approved upon first

relation to which huge discrepancies can perhaps be *explained*, but in no way *justified* by appealing to the fact that they start from different dogmatic starting points[213].

In the defence of their respective opposing positions, as regards a specific point (the clauses exempting legal person in cases of offences committed by their *directors* - Art. 31 bis 2- and their *subordinates* - Art. 31 bis 4-), both institutions go so far as to advocate an objective departure from the current regulations, with interpretations that are incompatible with the text of the Law. In fact, it has even been said:

> "*The entire discourse of the Rulings, although not so much that of the dissenting opinion and, even less so, that of the Circular, seems to be constructed outside the scope of the Law"*[214].

This is despite there being any of the prerequisites that would entitle a court or the Public Prosecutor's Office to such an exceptional response.

Before starting to develop on the issue, I must make two *excusations non petitae*:

1. Due to the limited length of this paper, the aim of which is to focus on the analysis of the first positions taken by these two institutions, I will not be able to address the extensive and interesting doctrinal treatment that a large and growing number of authors have given to this subject since the entry into force of the 2015 reform.

2. This analysis will not address the matter from the perspective of *dogmatic models*. Firstly, because an interpretation *contra legem* does not cease to be one simply because it is explained based on one dogmatic model or another. And secondly, because these first attempts by the Supreme Court and the PPO to propose dogmatic models *were not appropriate*. As the wise Theodor VIEHWEG would say[215], dogmatics can only start from a basic set of agreements between debaters. And, as we shall see, on this point there was not (and, unfortunately, to a large extent still is not) the necessary minimum consensus on the content of the Law[216]. It is precisely by determining the meaning of the content of the Law that it will be possible to seriously analyse the shortcomings of the dogmatic approaches underlying the two interpretations analysed here. "*However, that is another story and must be told another time"*[217].

II. A simple model, two different attribution and exemption criteria and the underlying reasoning.

1. The notorious: two different channels for attributing criminal liability to a legal person.

vote and was delayed for several months from the initial ruling date until the end of February 2016, when the report finally managed to obtain the necessary majority.

[213] DEL ROSAL BLASCO, "Sobre los elementos estructurales de la responsabilidad penal de las personas jurídicas: reflexiones sobre las SSTS núms. 154/2016 y 221/2016 y sobre la Circular núm. 1/2016 de la Fiscalía General del Estado", in *Diario La Ley* No. 8732, 1/4/16.

[214] DEL ROSAL BLASCO, *op. cit.*

[215] VIEHWEG, *Topics and Law*, Barcelona, 1997, p. 145-146, 173.

[216] A criticism along these lines of the SC's dogmatic proposals in this area is formulated by DEL ROSAL, *op. cit.*

[217] ENDE. *La historia interminable*, Madrid, 1982, p. 419.

It is not possible to deny what is notorious: the Criminal Code, literally copying Arts. 6 and 7 of Italian Legislative Decree 231/2001, has sought to regulate the attribution of criminal liability to the legal person by means of *two different sets of clauses, with two different sets of requirements for both attribution and exemption from liability*.

a) The "first way" is the one applied when the natural person who is the perpetrator of the offence is one of the *leaders* of the legal person: a person *with a high degree of authority at the company*[218]*:*
   - Art. 31 bis 1 a) regulates the positive assumptions of the criminal liability of the legal person in such a case; and
   - Art. 31 bis 2 regulates a *demanding set of four negative requirements* (copied literally from Art. 6.1 of the Italian DL 231/2001) which, if met, must result in the judge or court not declaring the legal person liable even though the offence was committed for the benefit thereof by one of its top managers:
     1º. existence of an organisational and management model with appropriate measures to prevent offences like the one committed;
     2º. existence of a supervisory body with sufficient autonomy and power to ensure that these measures allow for the control of even individuals with the most authority at the company;
     3º. that the offence was due to the fraudulent circumvention of these measures by its material perpetrator;
     4º. the supervisory body has not incurred in an omission or negligence.

b) The "second way" is applicable when the natural person who materially committed the offence was a *person subordinate* to the company's management. In this case,
   - Art. 31 bis 1 b) regulates the positive assumptions for attributing liability (similar to Art. 7.1 of the Italian DL 231/2001); and
   - Article 31 bis 4 contains *a single negative condition* which, if met, must result in the legal person being declared not liable despite the commission of the offence for the benefit thereof by a subordinate (copied verbatim from Article 7.2 of Italian DL 231/2001). Thus, this clause reflects almost literally[219] the *first* of the four requirements of Art. 31 bis 2, but does not reflect the other three.
     1º. an organisational and management model that is adequate to prevent offences of the nature of the one committed or to significantly reduce the risk of them being committed.

From this complex regulatory reality, several debates may arise on how to interpret these two sets of positive and negative requirements. Therefore, as is well known, the SC and the PPO have different solutions for different aspects such as

[218] I deliberately use this very vague term ("person with a high degree of authority at the company"), in light of the unfortunate definition in Art. 31 bis 1 a) of the group of persons included under this paragraph. For an explanation of the legislative error underlying this wording, and with a proposal for a restrictive interpretation pursuant to the Directive, see DOPICO GÓMEZ-ALLER, in De la Mata/Dopico/Nieto/Lascuraín, *Derecho Penal Económico y de la Empresa*, Madrid, 2018 (https://e-archivo.uc3m.es/handle/10016/26715), p. 140-141; a more detailed explanation in THE SAME, "Análisis crítico del nuevo régimen de responsabilidad penal de las personas jurídicas según el proyecto de reforma de 2013", in AAVV, *Informe de la sección de Derechos Humanos del Ilustre Colegio de Abogados de Madrid sobre los proyectos de la reforma del Código Penal, Ley de Seguridad Privada y LO del Poder Judicial (Jurisdicción Universal)*, p. 18 et seq.

[219] Although with some not so irrelevant variations, which unfortunately we cannot dwell on here (it fails to refer, unlike Article 31 bis 2, to the fact that the model must have "surveillance and control measures suitable for preventing offences of the same nature as the one committed", but limits itself to requiring, in more generic terms, "that it is suitable" for such purposes).

(a) who has the *onus probandi* in each case;

(b) the legal nature of each of the precepts (is Article 31 bis 2 an *exemption* or a clause *a contrario* defining the *offence* of which the legal person is accused)?

(c) the debate between "*vicarious"* versus *"own-action"* liability of the legal person[220]; etc.

In these and similar debates, different visions of the liability of legal persons collide (not only in the SC/PPO debate, but mainly in case law); and it is true that there are arguments both for and against each of these positions.

However, it cannot be ignored that the Legislator has established ***two*** *clearly different sets of requirements for attributing or rejecting the criminal liability of the legal person*: it has established them for ***two*** different groups of cases (those of the offence of the *manager and* those of the offences *of the subordinate made possible by the manager's lack of care*); it has also established them in clearly different sections of Art. 31 bis, and with different factual assumptions, both for the *attribution* and for the *exemption* from liability[221]. It is certainly possible to *protest* against this duality of systems, to *criticise it* from political-criminal perspectives or to *deny its dogmatic interest*. But a court cannot ignore this dual regulation without seriously breaching the principle of legality. *Ubi lex distinguit, distinguere debemus.*

2. The explanation of the double route in the 2015 Spanish model: the specific nature of watching the watchman.

The limited length of this paper makes it impossible to explain in detail the logic of our version of the "two-track" model (copied literally from the Italian system by the Spanish legislator), so I will limit myself to a brief note on the subject.

[220] This issue is often raised in questionable terms. Indeed: certain versions of this concept hold that it would be *unconstitutional* to impose a penalty on a legal person simply for the wilful misconduct committed by its director in the exercise of his duties and for its benefit (without also proving a "defect of control"); however, at the same time they consider it fully constitutional to penalise the same legal person if the same offence is committed by any subordinate due to the *reckless lack of control* of the same director in the exercise of his duties. In other words: in this view, if the director commits the offence intentionally, in order to convict the legal person, it would be necessary to additionally prove a *lack of control*; but if the director merely *tolerates it recklessly*, then it is no longer necessary to prove anything else (!), because his own recklessness would already be interpreted as a lack of control. Inconsistencies of this kind make it necessary to revise visions of certain categories that are surprisingly commonplace in Spain.
To sum this up in very simple terms: criminal liability cannot be imposed on a natural person "for the actions of another", because the actions *of another* cannot be *one's own* action. However, in the case of collective subjects, *every action of their own is, at the same time, the action of another natural person*. Every action attributable to a collective subject is always the action of a natural person: from the establishment of preventive or decision-making procedures (the implementation of which was *obviously* the work of natural persons) to the adoption of specific decisions. Therefore, there is no basis for denying the attribution of an event to a legal person because it is an event that can also be attributed to a natural person.
In relation to it being impossible to consider the conduct of the legal person's administrator in the exercise of his functions and acting on behalf thereof as an "extraneous fact" thereto, consult for example, in Italian doctrine PULITANÒ, *Diritto Penale*, Torino, 2005, p. 741; DE VERO, *La responsabilità penale delle persone giuridiche*, Milano, 2008, p.150; DE SIMONE, "La responsabilità da reato degli entii enti: natura giuridica e criteri (oggetivi) d'imputazione", in *Diritto Penale Contemporaneo* 28.10.2012, p. 21; AS WELL AS, *Persone giuridiche e responsabilità da reato, Pisa,* 2012, p. 362; and, as goes without saying, *Relazione ministeriale al D. Lgs n. 231/2001*, point 3.2 (the *ministerial report* is.

[221] "La distinzione 'interna' fra soggetti apicali e subalterni acquista rilievo ai fini della determinazione delle condizioni, in presenza delle quali la responsabilità dell'ente si vuole esclusa"(PULITANÓ, *op. cit.*p. 738).

The Italian model of 2001 had a clear intention: to depart from the model of the European Directives and Framework Decisions, regulating a channel for the avoidance of liability if companies had exercised "diligence in vigilando"; and that this channel should *also be applicable to the case of offences committed by directors and senior managers*. Not a mitigating circumstance, nor a negotiated way out of criminal proceedings[222], but a genuine *exemption from liability by pre-ordering due diligence*.

In the corresponding European Framework Decisions, Directives and Conventions, this exemption was only expressly provided for in the *case of offences committed by subordinates*, and never in the case of offences committed by the top management of a company. The reason for this is clear: the difficulty of *watching the company's top management*.

To address this issue, the Italian text introduced the figure of the "*organo/organismo di vigilanza":* a *body whose autonomy and powers of control facilitate the supervision of control and accountability measures over leadership figures*. This body is an inescapable prerequisite when it comes to the actual *supervision of supervisors* and, thus, of the possibility of the legal person being exempt despite the fact that a director, in the exercise of their functions, has committed an offence for their benefit[223].

The supervisory body (colloquially abbreviated in the Italian doctrine as "OdV") is a strange figure for those of us accustomed to the *monist* model of corporate governance as is the case of the Spanish model, as it obeys the logic of *dualist models*: models that contemplate two types of governing bodies: on the one hand, those responsible for management and representation (such as the Board of Directors) and, on the other, those that perform control and supervisory functions (such as the Italian *Consiglio di Sorveglianza* or the German *Aufsichtsrat*). It is on this second legislative tradition that this "supervisory body" is based[224].

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[222] Here, there is one important fact to bear in mind: in the Italian criminal system, as in the Spanish system, the *principle of mandatory prosecution by the public prosecution* rules supreme. This made it difficult to regulate other options such as *plea bargains*.

[223] "Un órgano de vigilancia '*ad hoc*' dentro de la persona jurídica que permita controlar a sus 'máximos representantes'"(JORGE BARREIRO, Agustín, "Reflexiones sobre la regulación de la responsabilidad criminal de las personas jurídicas en el vigente Código penal español", in *Estudios Jurídicos. Liber Amicorum in honour of Jorge Caffarena*, Madrid, 2017, p. 461 et. seq. p. 475).

[224] The question of how to interpret the mention of the "OdV" in the context of the Spanish corporate governance system is beyond the scope of this paper. Suffice it to say that, as part of the doctrine has already indicated, it should be understood that this body could be embodied in the *Audit Committee* (in this regard, GÓMEZ-JARA, in BAJO/FEIJOO/GÓMEZ-JARA, *Tratado de responsabilidad penal de las personas jurídicas*, p. 196 et seq.; LASCURAÍN SÁNCHEZ/NIETO MARTÍN, "Urgente: dos órganos de cumplimiento en las empresas", in *Almacén de Derecho* 3/6/2016 (http://almacendederecho.org/urgente-dos-organos-cumplimiento-las-empresas/); FEIJÓO, *El delito corporativo en el Código penal español*, 2nd ed., Civitas, 2016, p. 110-111; DOPICO, "Presupuestos básicos de la responsabilidad penal del 'compliance officer' tras la reforma de 2015", in AA. VV., *Actualidad Compliance 2018*, Aranzadi, 2018, p. 217-219. It is evident that the Spanish legislator, by inserting the reference to a body "legally entrusted with the function of *supervising the effectiveness of the internal controls of the legal person*" in the definition of the OdV, means the Audit Committee, one of whose functions, according to section 4.b) of art. 529 quaterdecies of the Spanish Corporation Law, is precisely to "*supervise the effectiveness of the company's internal control*, internal audit and risk management systems".
It is a common mistake to assimilate this supervisory body, *without further ado*, to the compliance officer. As the "OdV" is a distinctly Italian institution, it is very illustrative to see how Italian doctrine distinguishes these two control structures. For instance: COLONNA, "I rapporti tra compliance officer ed Organismo di

Thus, the supervisory body is the key element of Article 31 bis 2 in relation to the exemption of the legal person from liability for offences committed by directors, even though it has been almost ignored by case law and the Public Prosecutor's Office, and even though it has received very little attention from a large part of Spanish doctrine, which is more focussed on the analysis of other issues.

Therefore, in order to establish the lack of liability, one of the main points of the debate is whether it can be said that, despite the fact that the offence was committed, the legal person had exercised *due diligence in watching over* the perpetrator. And therefore, if we are talking about senior management, Art. 31 bis 2 (para 2), not only does this require an organisational model that includes suitable measures to prevent crimes by senior officials, but *also* a *special body* or *supervisory body* with sufficient autonomy and powers to assert that there is effective control.

Finally, Art. 31 bis 2 of the Criminal Code sets out two further requirements for declaring a lack of liability on the part of the legal person.

- On the one hand (paragraph 4), the supervisory body must not have been guilty of omission or negligence. This is an inevitable consequence of the system, since the irresponsibility of the legal person derives precisely from the fact that there would have been diligent supervision of the administrators themselves.
- On the other hand (paragraph 3), the preventive measures to which the company's directors were subject must have been of such a nature that the company director who committed the offence would have had to take some kind of *fraudulent action to evade them*.

Note that the Criminal Code reserves this high standard only for the exemption clause in relation to offences by senior management. In relation to offences committed by subordinates, the Criminal Code attributes liability to the company if there has been a *serious breach* of the supervision, vigilance and control duties by the natural persons described in the first clause; and only submits the lack of liability of the legal person to the existence of preventive measures. It therefore does not require the establishment of a specific "senior supervisory body", since the *usual levers of managerial power are sufficient* to exercise the duty of control over subordinates, without the need for any body in addition to those in place at the company[225].

In short: in order to exempt the company from criminal liability in relation to offences committed by its directors, *Art. 31 bis 2* requires *four conditions to be met*. With this in mind, if the legal person had taken preventive measures against its directors *but had not set up a body with the capacity to control them*; or if this body *had been negligent in its control responsibilities and* therefore favoured the offence; or if the measures were so

Vigilanza", in *Rivista 231* 2008/1, p. 117 et seq.; MONGILLO, "The supervisory body ("organismo di vigilanza") under Legislative Decree No. 231/2001", in FIORELLA (ed.) *Corporate Criminal Liability and Compliance Programs. Volume I: Liability 'Ex Crimine' of Legal Entities in Member States*, Naples, 2012, p. 57 et. seq.; "L'Organismo di Vigilanza nel sistema della responsabilità da reato dell'ente: paradigmi di controllo, tendenze evolutive e implicazioni penalistiche", in *Rivista 231* 2015/4, p. 83 et. seq. MONGILLO, *La responsabilità penale tra individuo ed ente collettivo*, Torino, 2018, p. 208; CORTINOVIS / COLAROSSI; "Ruolo e funzioni dell'Organismo de Supervision spagnolo", in *AODV 231* (www.aodv231.it); "I modelli organizzativi in Spagna", in *La resp. amm. soc. enti* 2016/4, p. 239.

[225] DOPICO GÓMEZ-ALLER, in De la Mata/Dopico/Nieto/Lascuraín, *Derecho Penal Económico...*,p. 146.

incisive that the director did *not need any fraudulent activity to* circumvent them[226], then the law does not allow the company to be held harmless. Art. 31 bis 2 thus sets a *very high threshold*[227] for exempting the legal person in the case of offences committed for its benefit and on its behalf by its directors and associates[228].

Let's take a look at this in the form of a synoptic table:

REQUIREMENTS FOR THE LEGAL PERSON NOT TO BE HELD LIABLE	
Leaders (31 bis 2)	**Subordinates** (31 bis 1b, 31 bis 4)
Model with preventive measures	Model with preventive measures
Supervisory Authority	
Fraudulent circumvention of measures	
Neither omission nor negligence on the part of the OdV	

III. The proposed interpretatio abrogans by the Supreme Court and the Public Prosecutor's Office.

We will see below that the Supreme Court and the Public Prosecutor's Office commit the same interpretative *sin*: where the Law establishes two different systems with different requirements for the attribution/exemption of liability, they declare that only one should be applied (the one that each, for different reasons, has preferred) and propose a derogation by way of interpretation of the other.

1. THE SUPREME COURT'S PROPOSAL: REPEAL THE MORE STRINGENT SYSTEM, GENERALISE THE LESS STRINGENT REGIME.

The already well-known initial position of the Supreme Court is set out in STS No. 154/2016[229] (FD Octavo). The key passages, for the purpose of our analysis, are as follows:

[226] This is one of the essential aspects of the *leading* Italian *case* on the subject: the *Impregillo* case. Fundamental to this end, in Spanish, is NIETO MARTÍN, "Regreso al futuro: el nuevo 31 bis del Código Penal desde la experiencia Italiana. El caso Impregilo", in *Almacén de Derecho* 24/6/2015 (https://almacendederecho.org/regreso-al-futuro-el-nuevo-31-bis-del-codigo-penal-desde-la-experiencia-italiana-el-caso-impregilo/).

[227] This threshold has apparently recently been *drastically lowered* by the much criticised Corte di Cassazione Ruling 1329/21 of 11 November 2021, published on 15 July 2022. To this end, in Spanish, see NIETO MARTÍN, "Regreso al futuro (2): La eficacia de los programas de cumplimiento en el caso Impregilo de la Cassazione", IN *Almacén de Derecho* 28/10/2022 (https://almacendederecho.org/regreso-al-futuro-2-la-eficacia-de-los-programas-de-cumplimiento-en-el-caso-impregilo-de-la-cassazione).

[228] PULITANÓ claims that this exemption clause in the case of business leaders is limited to *exceptional situations (*"situazioni limiti nelle quali il soggetto apicale, che normalmente impersona l'ente, abbia chiaramente agito ... non semplicemente in contrasto con le regole, ma in modo da frustrare, con l'inganno, il diligente rispetto delle regole da parte dell'ente nel suo complesso": op. cit., p. 740).

[229] There are numerous comments on this important resolution. To cite just some of the first to appear, see VILLEGAS GARCÍA, "Hacia un modelo de autorresponsabilidad de las personas jurídicas. La STS (Pleno de la Sala de lo Penal) 154/2016, de 29 de febrero", in *Diario La Ley*, No. 8721, 14/3/16; GÓMEZ-JARA, "El pleno jurisdiccional del Tribunal Supremo sobre responsabilidad penal de las personas jurídicas: fundamentos, voces discrepantes y propuesta reconciliadora", in *Diario La Ley* No. 8724, 17/3/16; DEL ROSAL BLASCO,

1. To determine the liability of the legal person, consideration must be given as to whether effective measures were in place to prevent the offence or not: "*the establishment and proper implementation of effective control measures that prevent and seek to avoid, as far as possible, the commission of criminal offences by members of the organisation"*.
2. An analysis must therefore be performed as to whether the offence of the natural person (manager or subordinate) "*has been made possible, or facilitated, by the absence of a culture of respect for the law*, as a source of inspiration for the actions of its organisational structure and independent of those of each of the component natural persons, *which must be manifested* [scil: "have been manifested] *in one of the specific forms for monitoring and controlling the behaviour of managers and hierarchical subordinates*".
3. However, this core issue (the existence or non-existence of "specific forms of supervision and control" should not be confused with the exemption clause in Art. 31 bis 2: "*And this goes beyond the possible existence of organisational and management models which, fulfilling the requirements specifically listed in the current Art. 31 bis 2 and 5, could in fact give rise to the concurrence of the exemption"*.
4. Because this circumstance has a different purpose and should not be confused with this core issue: "*An exemption from liability which, in the ultimate analysis, is essentially intended to facilitate the prompt exemption of the legal person's liability, in order to avoid greater reputational damage to the company, but which in any case should not be confused with the basic core of the liability of the legal person*".

Points 3 and 4 are obscure and problematic. On several occasions, the ruling states that *one thing is the attribution of liability to the legal person* (which would depend on whether or not the lack of these "specific forms of supervision and control" is proven); however, it is another thing completely, with which "it should not be confused", to decide whether or not the exemption in Art. 31 bis 2 applies, based on the "existence of organisation and management models" (and which, the ruling forgets to mention, has *three other requirements*).

When it comes to establishing why these are different issues, the confusion only increases and sometimes reaches the point of outright contradiction. Thus, in paragraph 15 of the Final Provision Eight, it is stated that the exemption is a cause of *objective atypicality* because it is based on the existence of internal controls "whose absence *would integrate... the typical core of the criminal liability of the legal person*". However, two paragraphs later, this is contradicted when it says that this exemption "*should not be confused with the basic core* of the liability of the legal person"; and that, in reality, it obeys a specific purpose: "to enable the prompt exemption of the legal person from this

"Sobre los elementos estructurales de la responsabilidad penal de las personas jurídicas: reflexiones sobre las SSTS núms. 154/2016 y 221/2016 y sobre la Circular núm. 1/2016 de la Fiscalía General del Estado", in *Diario La Ley* No. 8732, 1/4/16; ZUGALDÍA ESPINAR, "Modelos dogmáticos para exigir responsabilidad criminal a las personas jurídicas (A propósito de las SSTS de 2 de septiembre de 2015, 29 de febrero de 2016 y 16 de marzo de 2016)", in *La Ley Penal* No. 119, March-April 2016; DOLZ LAGO, "Primera sentencia condenatoria con doctrina general sobre la responsabilidad penal de las personas jurídicas. Análisis de los requisitos del artículo 31 bis CP/2015. Organización criminal que opera a través de mercantiles dedicadas a la exportación e importación internacional de maquinaria con droga oculta en su interior. Votos discrepantes", in *Diario La Ley* No. 8796, 5/7/16.

liability, in order to avoid further reputational damage"[230]. When reading these two paragraphs together, the reader is left in serious doubt, not knowing what this "typical core" of the liability of collective subjects is, which sometimes coincides and sometimes does not coincide with the non-concurrence of the aforementioned exemption.

This argument has practical implications. In effect: if, as STS 154/2016 states, the requirement for the liability of the legal person were solely and exclusively limited to an absence of "specific forms of supervision and control"[231] that would have led to the commission of the offence, without the need for the other requirements of Art. 31 bis 2[232], then we would be faced with an *interpretatio abrogans of Art. 31 bis, paragraphs 2, 3 and 4*, because if only the first requirement were met, it would no longer be possible to speak of the criminal liability of the legal person, requirements 2, 3 and 4 would never come into play.

Thus, *de facto,* STS 154/2016 *proposed repealing the more demanding system of exemption from criminal liability and generalising the less demanding system under Art. 31 bis 4 for both routes*[233]. Now, let's compare this with the synoptic table we used above:

REQUIREMENTS FOR THE LEGAL PERSON NOT TO BE HELD LIABLE	
Leaders (31 bis 2)	**Subordinates** (31 bis 1b, 31 bis 4)
Model with preventive measures	Model with preventive measures
~~Supervisory Authority~~	
~~Fraudulent circumvention of measures~~	
~~Neither omission nor negligence on the part of the OdV~~	

[230] Sooner than that derived from the *non-concurrence of the assumptions* of the criminal liability of the legal person?

[231] In reality, the Ruling considers that the presence or absence of such measures is not so much the *legal presupposition of the liability or non-liability* of the legal persons: rather, it considers that the requirements set out in the Law are important only as a mere *manifestation* of a "culture of respect for the law" or "ethical culture" (sic). The dissenting opinion rightly criticises the fact that the Ruling elevates a concept to a governing criterion that is not found in the Law; and, it should be added, the meaning of which is never specified. The limited length of this paper does not allow for an in-depth examination of this very important issue.

[232] "Therefore, it would seem that it is one thing to have any control measures to prevent crimes and another to have implemented them pursuant to the requirements of the Criminal Code" (DEL ROSAL BLASCO *op. cit.*).

[233] This interpretation could not be defended on the grounds that it is a matter of interpreting the law in the light of the constitutional principle of culpability. This is because we are talking about a *post-constitutional* rule, which means that an ordinary judge or court cannot impose an *interpretatio abrogans* of any of its legal requirements (i.e. an interpretation that violates the limit of possible meanings) on the grounds that it is contrary to constitutional principles such as the principle of culpability: at most, one could resort to the route of the question of constitutionality (a route that, in my opinion, could not result in the declaration of any of the requirements of art. 31 bis 2 being declared unconstitutional).

2. THE PROPOSAL OF THE STATE PROSECUTOR'S OFFICE: REPEAL THE LESS STRINGENT SYSTEM, GENERALISE THE MORE STRINGENT SYSTEM.

a) The same error, but in the opposite direction.

The same error, albeit in the opposite direction, is made in PPO Circular 1/2016. In this case, the Public Prosecution Office begins by acknowledging that the requirements for the exemption of the legal person *are different* depending on whether the offences are committed by its leaders or by its subordinates, and that in the case of the latter, the law *does not demand* those more demanding requirements to which exemption is subject in the case of leaders. However, the Circular considers that this "silence" (!) should be *remedied*, so that this dual and differentiated treatment is *homogenised* by way of interpretation.

The text in question can be found in section 5.2 of the Circular. The key paragraphs are as follows (emphasis added):

> "Paragraph 4, devoted to the latter [i.e. subordinates], reproduces with minor wording differences the first condition of paragraph 2 [i.e. the exemption clause in the event of offences committed by leaders]. (...)
>
> *However, paragraph 4 does not refer to the rest of the conditions set out in paragraph 2. Despite this silence* (sic), *the requirement of a supervisory body for the model ... is also common to both* types of allocation (as referred to in the fourth requirement of paragraph 5).
>
> The *same applies to condition 4, which is applicable to both exemption systems*, since if the supervisory body has omitted or insufficiently exercised its functions, the model will not have been implemented with the effectiveness required by both paragraphs 2 and 4, and one of the six requirements set out in paragraph 5 for both organisational models will also necessarily have been breached.
>
> In fact, the only difference in the double exemption system for legal persons is to be found in the third condition of paragraph 2, which is only applicable to offences committed by the subjects of paragraph a). This condition is not foreseen for subordinates, which allows the legal person to avoid liability in the cases set out under letter b) by simply proving that its model was adequate, without the need to prove that the employee acted fraudulently. (...)
>
> A slightly broader framework of exemption from liability of the legal person is thus designed for offences committed by subordinates. It should be noted, however, that in practice, the minimal difference made by condition 3 of paragraph 2 will be relative since, with the exception of reckless conduct, it will be *difficult to prove that a programme is effective if it can be broken by dependants without the concurrence of conduct involving fraud.*

When going back to the scheme used previously, the results are as follows.

REQUIREMENTS FOR THE LEGAL PERSON NOT TO BE HELD LIABLE	
Leaders (31 bis 2)	**Subordinates** (31 bis 1b, 31 bis 4)
Model with preventive measures	Model with preventive measures
Supervisory Authority	Supervisory body *(even though this clause has decided not to include it, unlike the clause in Art. 31 bis 2)*
Fraudulent circumvention of measures	*In practice*, fraudulent circumvention of measures *(although this clause has decided not to include it, unlike the clause in Art. 31 bis 2).*
Neither omission nor negligence on the part of the OdV	Neither omission nor negligence on the part of the OdV *(even though this clause has decided not to include it, unlike the clause in Art. 31 bis 2)*

It is indeed surprising that where the legislator has decided to distinguish expressly and most emphatically between the requirements for exemption of the legal person in the case of offences committed by the directors and in the case of offences committed by their subordinates, the Circular understands the lower requirement in the latter case to be a *silence* that an interpreter can *bridge*. Now, let's look at their reasoning.

b) A “supervisory body” also in the case of offences committed by subordinates?

The first objection is obvious: *ubi lex distinguit, distinguere debemus*. Attempting to ignore such a clear legislative decision as the option for this dual treatment would contradict the principle of legality and, moreover, in this case in a particularly serious way as it is an interpretation *contra reo*, since it restricts an exemption clause with requirements that the Legislator explicitly decided *not to include* in it.

However, as we have seen, the difference in treatment is not due to chance, but to the characteristics of the model imported from Italy. It would have been sufficient to consult Italian doctrine or case law to know that making the exemption for the legal person subject to the existence of an *"OdV" only makes sense in the case of offences committed by the "soggetti apicali" or leaders*, because in order to speak of a reasonable supervision over the work of the "sottoposti", *no kind of organ with autonomous powers of initiative and control is necessary*: the organs, mechanisms and levers of the ordinary power of management are sufficient.

The Circular attempts to support its conclusion by stating that the supervisory body is also mentioned in Art. 31 bis 5(4), which is applicable to both exemption "routes", and which regulates certain conditions that an organisational and management model must fulfil.

However, this is a mistake:

i. Firstly, Article 31 bis 5(4) only refers to the body supervising the functioning of the preventive model, *regardless of whether or not it has the necessary autonomous powers to supervise that the measures control the leaders*. Thus, if a company has instituted a

controlling body, but without sufficient power to control its own leaders, then there could be no exemption in the case of *apicali* offences, but there could be exemption in the case of *sottoposti*.

ii. Above all, however, when it comes to discussing whether or not the legal person can be *exempted* in relation to offences committed by subordinates, it is *first* of all necessary that the positive requirements for *attributing* liability are met: something which in this 2nd route requires gross negligence (§ 31 bis 1 b). Therefore, if the company was indeed diligent in supervising its subordinate perpetrator, the requirements of Art. 31 bis 1 b would no longer be fulfilled and, therefore, one cannot speak of liability on the part of the legal person... *even if this diligence had not taken the form of an organisational and management model with the requirements of Art. 31 bis 5.* This is, in fact, what can be deduced from the most natural reading of Art. 31 bis 1 b). The opposite would mean that a company that had taken the utmost care to prevent a spillage by a reckless employee should nevertheless be condemned if this care was not accompanied by an *organisational and management model*.

Here, then, is the key to this dual treatment typical of the Spanish (Italian) model: the Law only establishes these specific higher requirements to be able to speak of diligent control of the company *over its top management;* requirements that it *does not* demand in relation to the more normal form of preventive diligence (the control of superiors over subordinates), which is provided by the normal use of management powers.

The above demonstrates that the PPO's attempt to introduce the requirements of the *existence of a supervisory body* by way of interpretation into the clause of Article 31 bis 4 and *its diligent action* into Article 31 bis 2 not only violates the principle of legality and restricts an exemption clause without any material basis (thus unduly extending the punishment), but also contradicts the entire logic of the model implemented in 2015.

c) Is "fraudulent evasion" (Art. 31 bis 2, 3rd requirement) also required for exemption in the case of subordinate offences?

The logic of the fraudulent circumvention requirement, as explained above, is straightforward. The current model *sets the bar higher* when it comes to admitting an exemption for diligent supervision in the case of offences committed by a company's management. Therefore, not *just any preventive measure* will suffice*:* if, acting on behalf of and for the benefit of the legal person, the director has committed an offence, in order to not be found liable, the Criminal Code requires that *particularly incisive* measures have been taken: measures of such a nature that, in order to commit the offence, the director would have had to act with fraudulent circumvention to circumvent the control or to deceive the controller[234].

This high level of incisiveness is only required in relation to the company's *management*. It would not be feasible to require a company to set out such measures for *all* its employees. To this end, when regulating both clauses, the legislator decided to *only* require it in the first case and not in the second.

[234] NIETO MARTÍN, "Regreso al futuro..." *cit.*; DOPICO, "Las guías de conducta o códigos internos son insuficientes para eximir de responsabilidad penal a las personas jurídicas", in *Almacén de Derecho* 18.9.15 (https://almacendederecho.org/las-guias-de-conducta-o-codigos-internos-son-insuficientes-para-eximir-de-responsabilidad-penal-a-las-personas-juridicas/).

Certainly, Circular 1/2016 in this case does not expressly state that such a requirement should be introduced by way of interpretation. However, it does *de facto*, as it argues that, when speaking of *effective measures*, they must be measures that cannot be circumvented without "some kind of fraud".

This too must be rejected. There are numerous crime prevention measures that are suitable and effective, but whose incisiveness does not require that the crime is not possible without fraudulent circumvention (e.g. random checks, *ex post facto* checks, etc.). This level of incisiveness is required by the Criminal Code only with regard to measures affecting a small number of persons: *administrators and similar persons*.

All of the above leads to the rejection of this interpretation which, as already criticised in STS No. 154/2016, artificially *standardises* the duality of exemption systems under Art. 31 bis; with the consequence, in this case, of unduly avoiding exemptions, by generalising the most rigorous clause through interpretation and making the exemption of the legal person subject to requirements not foreseen in the Law in the case of offences committed by subordinates.

IV. Conclusion.

Beyond the importance of the specific interpretation given to the clauses on the absence of liability of the legal person, what is important is how to prevent the institutional authorities responsible for interpreting them from reading them in such a way that are not only opposed to one another, but that are also so problematic from the perspective of the limit of possible meanings. For the principle of legality to be effective, the words of the law must mean something.