Weaknesses in Spanish Jurisprudence on the Criminal Liability of Legal Entities

Non-Imputability of Certain Legal Entities and Lack of Methodology When Applying the Transfer of Criminal Liability between Corporations

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ABSTRACT

Systems theory has been criticized in literature on the analysis of organizations and groups of people. Its weaknesses include the lack of ontological support and the absence of evidence demonstrating the validity of its premises. Since Spain incorporated the criminal liability of legal entities into its criminal code as a means of combating corporate crime and corruption, however, the Spanish Supreme Court has been resorting to systems theory to determine when a legal person should be punished.

This article analyzes the serious practical problems that this approach entails, especially when certain complex legal-criminal issues are being dealt with. In addition to the conflicts that arise concerning the principle of legality, systems theory lacks a solid methodology to resolve two questions that emerge in corporate reality: 1) determination of the non-liability of certain legal entities, and 2) clarification of the (in)appropriateness of the criminal punishment of legal persons resulting from and arising out of mergers and acquisitions (M&A transactions). These aspects undoubtedly affect the necessary legal certainty that must exist in the corporate context.

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I. Introduction: The Questionable Socio-Legal Grounds Chosen by the Spanish Supreme Court to Punish Legal Entities

Many experts in organizational analysis and socio-legal theories criticize the validity of the more traditional view of systems theory as a way to explain what happens in organizations and groups of people.[1] These specialists consider that the hypotheses of classical systems theory lack solid research to support them, as well as methodologies that allow us to explain, from an experimental point of view, the presumed validity of the postulates it assumes, as *Knudsen* points out.[2] In fact, *Adler*, *Du Gay* and *Reed*, specialists in the study of the functioning of organizations, point out that systems theory continues to be included in the list of theories on the analysis of organizations because of a period of fame it experienced in the last century and not because we have scientific evidence to demonstrate the validity of its premises.[3] Indeed, this intense questioning of *Luhmann*'s systems theory, which is found in the most specialized literature,[4] would have no significance in the legal-criminal field, were it not for the fact that this theory has been used by some jurists[5] to explain the criminal punishment of companies (within a rigid model of criminal self-responsibility of the legal person).What is more relevant for practical implications, however, is that the Spanish Supreme Court has assumed the theory of systems to be valid. [6] Therefore, the Court has been using it as a primary socio-legal basis to justify the existence of *a wrongful act* carried out by a legal person and to establish the notion of a *structural organizational defect*, after Spain incorporated the *criminal liability of legal entities* into its Criminal Code (CP, hereinafter) in 2010.

Likewise, we are facing an issue that goes far beyond the Spanish criminal law sphere, since the discussion on the socio-legal basis of the criminal liability of the legal person and its implications are also affecting those Latin American countries that have introduced this legal institution in recent years. However, countries with more tradition and experience in the field of the criminal liability of the legal person have not only ignored the systemic conjectures in order to establish a model of self-liability but also dismissed the idea of liability for one's own actions or strict self-liability as a basis for the punishment of the legal person. Countries such as Austria, Belgium, the USA,[7] France, and the UK, are not interested in the idea of strict self-liability as a basis for the punishment of the legal person. Even the country that Spain emulated in the drafting of the regulatory precepts, Italy, assumes a model of hetero-responsibility, albeit through the imposition of administrative sanctions.[8]

The translation of the most extreme aspects of the systemic hypotheses into the criminal law sphere entails that the legal person be considered an entity or system with an – allegedly – real and effective capacity for self-organization, with total operational independence for the individuals that compose it (these individuals are considered to be mere interchangeable parts with no capacity to influence the organization, regardless of the positions or functions they perform in it). Thus, from this systemic Luhmannian vision of the legal person, it follows that the corporate entity or company must be the recipient of criminal punishment if there is a *self-generated structural organizational defect*, an aspect that constitutes the core of the *typicity of a corporate crime*.[9] Therefore, once a wrongful act has been committed by one or more natural persons acting within the scope of the organization and which generates a certain benefit for the corporation, the legal entity will be punished if such a self-organizational defect is found. The self-organizational defect is conceived as an act of its own, totally autonomous and independent of the natural persons.

The fact that the jurisprudence of the Spanish Supreme Court on the criminal liability of legal persons is resorting to such a questionable theory[10] in order to try to define the socio-legal basis for the allegedly

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independent “corporate crime” entails great *risks* in practice: these risks arise from the absence of evidence-based factual and methodological validation to meet the legal-criminal challenges posed by complex corporate reality. In fact, the shortcomings of applying systems theory to the framework of the criminal liability of legal persons when examining cases of corruption or economic crime in business contexts have already been revealed in various Spanish criminal proceedings (some of which have received a great deal of media attention). The following will explain two types of problems that have emerged in certain criminal proceedings since Spain approved the criminal liability of legal persons; they have increased and become more accentuated over the last three years (as investigations, prosecutions, and convictions of legal entities became more widespread): 1) the determination of the *non-imputability* of certain legal persons, and 2) the lack of systemic parameters to clarify the “extension of criminal liability to other legal persons” resulting from corporate transactions known as *mergers and acquisitions* (M&A).

II. Practical Impact: Legal-Criminal Problems Generated by Adopting a Systems Theory Approach

1. Non-imputability of legal entities created to commit crimes

The decision of the Spanish Supreme Court, dated 22 October 2020,[11] is one of the court decisions that has come to represent what this Court has held since its decision of 29 February 2016:[12] that the regime of criminal liability of legal entities approved in Spain does not apply when we find ourselves confronted with entities or companies that have been created to commit crimes (even though these entities have a legal personality and the other requirements of the Criminal Code are met). This concept of an “unimpeachable” legal entity is based on the aforementioned systemic premise, which points to the existence of entities with an alleged self-organizing capacity; consequently, if “they themselves” do not adequately organize the prevention of risks within their corporate perimeter, they give rise to criminal reproach when any of their members engage in certain criminal conduct generating benefits for the organization. It is not possible, however, to impose a penalty on entities or companies lacking a certain "own" organizational substratum, as the Supreme Court states in the fourth ground of law of the first judicial decision cited above “in these cases, the system of imputation will be given by the mechanism of the ‘lifting of the veil’, which directs the criminal action only towards the natural persons behind the organization”.[13]

Following this line of jurisprudence, the Spanish Supreme Court differentiates between three types of entities: 1) those with more licit than illicit activities (they are imputable; the criminal liability regime of the legal person applies); 2) those with more illicit than licit activities (equally imputable) and, lastly, 3) those constituted, solely, as an instrument or means for the development of illicit activities (they are considered unimputable and are therefore excluded from the criminal liability regime of the legal person).

In my opinion, this distinction causes unnecessary questions to arise *ex novo* that should not have arisen if the Criminal Code had been followed: What happens when a legal entity initially created for criminal purposes develops a small amount of lawful activity over the course of a few months or years? What should happen if said legal activity developed for criminal purposes becomes a majority after its creation? What parameters are applicable to discern between “relevant” and “irrelevant” lawful activity for these purposes? These are all questions whose solution is complex and to which the theory of systems itself does not offer technically well-armed answers; therefore, they tend to cloud a process that is already complicated.

In addition to these f questions, which are relevant because of the effects that may be generated, there are others that are more closely linked to the systemic basis on which this jurisprudence is based. According to the logic of the Supreme Court, in order for the corporate criminal liability regime to be applicable, it must be

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possible to appreciate a certain organizational capacity of the entity itself; for this reason, when a legal person is created by individuals as an "instrument" to commit crimes, there is no such self-organizational substrate in the legal person (it cannot admit *organizational guilt*). In this regard, the Supreme Court decision of 18 March 2022[14] emphasizes that if the criminal actions are committed by a natural person and the legal person is constituted and shown to be an instrument, lacking the will or its own personality to act in the commercial traffic, the legal person is unimputable. I do not agree with the above, however, as I consider all criminal conduct to always be committed by individuals and that the entity lacks its own will, regardless of what has been agreed upon by the individuals within the management bodies.

Moreover, all legal persons are created *ab initio* by natural persons; hence, before their creation and during their organizational development, they are conceived as instruments to achieve certain purposes. Whether these purposes are licit or illicit should not be linked to the existence of a hypothetical self-organizational capacity of the resulting legal person, which, if its existence were accepted, would depend on yet other factors. There may well exist companies, foundations, etc. focused on illegal activities, which are made up of complex organizational charts, a large number of individuals, and copious procedures. In other words, one thing is the objective or activity being carried out by the legal entity (which may be legal, illegal, or a mixture of both) and quite another is its hypothetical capacity for self-organization, which I believe could occur in the three scenarios distinguished by the Supreme Court (a distinction that does not appear in the Spanish Criminal Code). In turn, the aforementioned court decision of 18 March 2022 seems to include cases of sole proprietorship, if they correspond to the application of the *non bis in idem* principle.

Likewise, the Court points out that the decisive factor in excluding the legal person from possible criminal liability is that the crime is manifested directly and personally by a natural person, so that the actions of the organization are blurred. However, this is what always happens in organizations: the criminal conduct is manifested by individuals. In other words, we find ourselves faced with highly interpretable notions for which no clearly defined and evidence-based criteria have been observed that would allow a neat clarification of the question in a manner congruent with the systemic postulates that must support them. The decision of the Supreme Court of 11 November 2022[15] is one of the recent decisions in which the conviction of the legal person was revoked and annulled, while the convictions of a legal representative and administrator of the legal person were maintained. This court decision sustains such revocation in the absence of a minimally complex structure of the legal person and, therefore, the impossibility of the entity to be the perpetrator of the "corporate crime" or source of its own injustice (structural organizational defect).

We find ourselves, therefore, with a double aspect of this jurisprudential doctrine: the un-imputability of legal persons created instrumentally to commit a crime and the un-imputability of legal persons without a minimum organizational structure. In both cases, the Luhmannian or systemic reasoning to which the Supreme Court resorts is similar: the legal person in question lacks this – hypothetical – self-organizing capacity. As on previous occasions, there is little in this decision, however, as to the process of analysis and how such an important conclusion (the un-imputability) is reached, nor is there any further analysis of the procedures, guidelines, or protocols existing in regard to the legal person, which confirms the absence of a clear and refined systemic methodology for resolving this type of issue. In my opinion, the court decision seems to show that the declaration of the legal person's un-imputability is based on a more or less intuitive assessment that is derived from the number of individuals in the organization. This is difficult to reconcile with systemic postulates (where natural persons are interchangeable and not relevant to the analysis) and also increases the risk of arbitrariness in reaching a conclusion on something as relevant as the possibility of criminal conviction of a legal person.[16]

However, the jurisprudence analyzed reveals another very important obstacle: the principle of legality. It makes sense to question the compatibility of what is specifically provided for in Art. 31 bis of the Spanish CP

regarding the difference in treatment based on the systemic conjectures that make the legal person subject to or excluded from the criminal liability regime on the basis of the appreciation or non-appreciation of a certain internal organizational complexity. From an exegetical point of view, the questionable systemic interpretation by the Spanish Supreme Court exposes another obstacle: according to the provisions for determining the penalties applicable to legal persons, in Rule 2 of Art. 66 bis CP, the penal aggravation must be applied when "the legal person is used instrumentally for the commission of criminal offenses". It seems obvious that the legislator is seeking to aggravate the criminal reproach against the legal person when it is used as a means to commit a crime (and not to exclude it from the approved corporate criminal liability regime). This Article also clarifies that the legal person must be considered to have been used to commit crimes when its illegal activity is more substantial than its legal one. Although the Article does not specify what should happen when all the activity is illegal, the most logical interpretation would be that this circumstance should be included in these aggravated cases. In spite of this logic, however, we have seen how the jurisprudence of the Spanish Supreme Court argues that, when the unlawful activity of the legal person is total, the provisions of Art. 66 bis CP do not apply (inferring that this type of legal person, constituted for the purpose of committing crimes, lacks the capacity for systemic self-organization).

2. Lack of methodology to determine the "transfer" of criminal liability between legal entities after M&A transactions

The second problem of the systemic approach emerges in those scenarios in which it is necessary to clarify the appropriateness of the transfer of criminal liability between corporations, a circumstance provided for in section 2 of Art. 130 CP. Corporate criminal liability does not cease in cases where the commission of a crime was carried out by an individual acting within the perimeter or scope of a legal entity[17] (which we qualify as the original legal person) that is subsequently subject to some type of transformation, merger, spin-off, etc. In principle, in this type of business operation, known as mergers and acquisitions (M&A), criminal liability is transferred to the legal person resulting from the operation (which we can qualify as the resulting legal person), with the corresponding penalty "being applicable" in proportion to the part of the original legal person that remains in the resulting legal person.

Art. 130.2 CP does not provide any methodological parameters or criteria to determine when the transfer of criminal liability between legal entities is appropriate, let alone to what extent a penalty should be imposed in the case of a partial coincidence between the original legal person and the resulting legal person.[18] We are basically faced with a problem that may be aggravated in cases of spin-offs, where two or more resulting legal entities could maintain a certain portion of the substrate or core identity of the original legal entity.[19] In a systematic interpretation of Art. 130 CP, one could refer to the provisions of the second paragraph of section 2 of the Article. It states that the processes of covert or apparent dissolution of the legal person do not nullify its criminal liability. The provision further specifies that it will be considered an apparent dissolution if the economic activity and the substantial identity of clients, suppliers, and employees, or of the most relevant part of all of them, are maintained. In accordance with what has been pointed out in this second paragraph, the substantial overlap or match of employees is one of the main elements that indicate the continued existence of the corporate entity. However, this criterion could not be further from one of the presuppositions of the idea of the systemic thesis: the irrelevance of individuals in the organization within the analytical framework of an entity with a hypothetical capacity for self-organization.

The degree of overlap between the employees of the original legal person and those of the resulting legal person is an aspect that, if we are consistent with the systemic approach to self-liability, should be completely ignored when examining the appropriateness of the transfer of criminal liability between companies. This is because, according to systemic postulates, natural persons should be excluded from the analysis of the identity of the legal person (because they are irrelevant in the self-organizing dynamics of the system).

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The following assertions of one of the staunchest defenders of the systemic thesis, *Gómez-Jara Díez*, are particularly representative of this view:

"Membership, therefore, symbolizes the link between the norms of the organization and the norms of membership – which is none other than the link between the structures of the system and the limits of the system. Thus, despite the fact that the members of the organization are constantly changing, the organization retains its identity".[20]

This assumption, erroneous in my opinion, is unequivocal: the identity of the entity is detached from the individuals that make it up.

Therefore, if the Spanish Supreme Court wants to maintain a position consistent with the systemic postulates. It is incongruous and untenable for any judicial analysis of the appropriateness of transferring corporate criminal liability to focus on the human component. Otherwise, the basis on which the Spanish Supreme Court itself has resorted in order to apply the criminal liability of the legal person (see above) would be violated. I understand that it would not be coherent for the jurisprudence to engage with the systemic thesis to conceive the legal person as an entity with the capacity to facilitate its own organizational defect[21] and to subsequently ignore such systemic ideas when studying the relevance of the transfer of criminal liability between legal persons. If the human component has no place as a criterion in the analysis of the attribution of criminal liability to the legal person – and if it neither constitutes a factor identifying the organization from the systemic standpoint, nor is used for the examination of the subsequent transfer of corporate criminal liability –, there must be a minimum overlap in identity between the original and the resulting legal person). Otherwise, the principle of culpability (within systemic parameters) would be violated and a proscribed objective criminal liability would be applied.

The lack of criteria or methodological guidelines to clarify the transfer of corporate criminal liability from a systemic viewpoint has been confirmed in transactions such as the one involving the absorption of *Banco de Valencia* by the banking entity *Caixabank* (where it was decided that it was inappropriate to charge *Caixabank* in the framework of a criminal investigation against Banco de Valencia and some of its senior managers). Another example is the case of the prosecution of *Banco Santander* by *Banco Popular*, following the famous merger by absorption, in which the Criminal Chamber of the National High Court annulled this particular case, following the corresponding appeal against the summons of *Banco Santander* as a defendant under investigation. Although the revocation of the status of the legal person under investigation can be shared, the court orders issued do not explain the process of socio-legal analysis or the method by which (in accordance with the systemic postulates) the inappropriateness of the transfer of criminal liability was determined. And those court orders do not contemplate it because it does not exist, since the theory of systems lacks a scientific methodology by which to resolve this type of factual question.

In my opinion, the deficits outlined above have a significant impact on the legal certainty that must exist in the criminal sphere. It is necessary to move away from the hypotheses of systems theory and adopt an approach towards the criminal liability of legal persons that is based on evidence-based contemporary studies that explain how the dynamics of decision-making processes work in these organizational frameworks: what influences – criminal or not – are at play in such interaction contexts, what are the strategic factors, and what are the dominant or strategically advantageous positions, etc. In short, I believe that such extremes should not be ignored and that the human component is crucial in any exhaustive analysis of the attribution and transfer of criminal liability to legal persons.

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III. Concluding Remarks

Systems theory is one of the most questioned theories of organizational analysis in the specialized literature. Despite strong criticism of the system theory, the Spanish Supreme Court uses it to justify when it is appropriate to convict a legal person. In my opinion, the lack of ontological validity of systems theory generates problems when there are criminal-legal issues of practical importance. This is what has happened (and will continue to happen if the Supreme Court does not reorient its jurisprudence) so far with two issues analyzed above (II): the determination of the "non-imputability" of certain legal persons and the clarification of the "transfer" of criminal liability between corporate entities. The lack of evidence-based solutions and methodological rigor of systems theory as applied to the criminal law of the legal person is evident here.

The jurisprudence of the Spanish Supreme Court regarding the "un-imputability" of certain legal entities has two aspects: the un-imputability of corporate entities created to commit crimes and the un-imputability of entities without a minimum organizational structure. In both cases, the basis for the entities' unaccountability is the same, namely the absence of an alleged capacity for self-organization and, therefore, for the occurrence of an organizational defect. It was argued here first that the determination of un-imputability in these cases clashes with the most logical interpretation of what is provided for in the Spanish Criminal Code. Second, in addition to the collision of systemic theorizing with actual reality represented by the organizations, there consequently is a serious problem of compatibility with the principle of legality.

In regard to legal persons being excluded from the criminal liability regime of entities created to commit crimes on the grounds that they lack self-organizing capacity, it should be noted that all legal persons are created to achieve certain ends, i.e. they are instruments to achieve certain purposes. Whether these purposes are lawful or unlawful does not mean that there is - or is not - a certain self-organizing capacity of the entity. We believe that the correlation between an entity's self-organizational capacity and the lawfulness of its ends, assumed by the Supreme Court, is inaccurate. A large number of individuals and a complex hierarchy do not necessarily equate to lawful activities, as such an entity could still be totally or partially involved in unlawful activities.

On the other hand, with regard to the jurisprudence that indicates the non-imputability of legal persons that do not have a minimum substrate or self-organizing capacity (despite the fact that the Spanish Criminal Code does not indicate that these legal persons are unimputable), we must emphasize that the determination of such an assessment in the judicial decisions issued to date suffers from a lack of fine-tuned criteria. The court decisions that have been handed down in Spain so far do not set out a serious socio-legal methodology to explain when we are dealing with an imputable legal person or an imputable legal person. In my opinion, the judicial declarations on the non-imputability of legal persons issued so far are based on very simple assessments of the judges, more or less intuitive. They are assessments that judges deduce from the number of individuals that make up the organization (usually applied to legal persons composed of a very limited number of individuals) and not on minimally sound socio-legal criteria or evidence-based methodology.

The clarification of the "transfer" of criminal liability between legal entities after M&A transactions is the second case where case law shows us that systems theory lacks components that respond to and align with the complexity of what really happens in organizations. It is evident that there are no clear and coherent parameters that make it possible to discern when the "identity" of a legal person remains or persists in another legal person. If we are consistent with Luhmann's systems theory, in order to punish the legal person for its own structural organizational defect, the overlap of the human component between the original legal person (the one under whose scope the crime was committed) and the resulting legal person should not play a role, even if there is a very high percentage of overlap between managers and employees in both organiza-

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tions. In summary, the conjectures of the criticized systems theory should not be relied upon as a valid basis for determining the applicability of the criminal liability regime to legal persons, and therefore when they can be criminally charged and punished.

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1. As a paradigm of the criticisms of systems theory, see D. Seidl and H. Mormann, "Niklas Luhmann as Organization Theorist", in: P. Adler; P. Du Gay; G. Morgan and M. Reed (eds.), *The Oxford Handbook of Sociology, Social Theory, and Organization Studies*, 2014, p. 26: "Luhmann quickly abandoned his own empirical research in order to concentrate on the theoretical-conceptual side of his work, which in turn tends to attract researchers working conceptually rather than empirically. Moreover, Luhmann's later work in particular has been criticized for not lending itself to empirical investigation, because the assumption that social systems are operatively closed tends to undermine the researcher's position. So far, the little empirical research that incorporates Luhmann's work largely ignored, rather than tackled, these problems".↩
2. M. Knudsen, "Displacing the Paradox of Decision Making: The Management of Contingency in the Modernization of a Danish County", in: D. Seidl; K.H. Becker (eds.): *Niklas Luhmann and Organization Studies*, 2005, pp. 107-126.↩
3. P. Adler, P. du Gay, G. Morgan and M. Reed, *The Oxford Handbook of Sociology, Social Theory, and Organization Studies*: Contemporary Currents, 2014, p. 6.↩
4. Together with those mentioned above, we can cite many others that share this deeply critical position on system theory, e.g.: J. Minguers, "Can Social Systems Be Autopoietic? Assessing Luhmann's Social Theory", (2002) 50(2) *Sociological Review*, pp. 278-299; C. Fuchs and W. Hofkirchner, "Autopoiesis and Critical Social Systems Theory", in: R. Magalhães and R. Sanchez (eds.), *Autopoiesis in Organization Theory and Practice*, 2009, pp. 111-129.↩
5. This is not only a position that is confined to a sector of Spanish doctrine, as it is also being adopted by the doctrine and jurisprudence of certain Latin American countries. Gómez-Jara Díez could be considered the most representative of those who promote the incorporation of systemic hypotheses into the corporate criminal field: C. Gómez-Jara Díez, "Teoría de sistemas y derecho penal: culpabilidad y penal en una teoría constructivista del derecho penal", in: C. Gómez-Jara-Díez (ed.), *Teoría de Sistemas y Derecho Penal: fundamentos y posibilidades de aplicación*, 2005, pp. 417-467; C. Gómez-Jara Díez, "Capítulo. VI. El injusto típico de la persona jurídica, in: M. Bajo Hernández, B. Feijoo Sánchez and C. Gómez-Jara Díez (eds.), *Tratado de responsabilidad penal de las personas jurídicas*, 2016, pp. 121-220.↩
6. Organic Law 5/2010, of 22 June 2010, which amends Organic Law 10/1995 of 23 November 1995 of the Penal Code. This article consolidates a part of the work in which the weaknesses of the systemic thesis are more widely exposed and the outlines of a possible alternative model of criminal liability of the legal person are explained, which, in my opinion, has a more solid scientific basis: Cf. R. Aguilera Gordillo, "Déficits del enfoque sistémico de responsabilidad penal de la persona jurídica: inimputabilidad y contagio penal en operaciones de M&A. Procedencia del modelo antrópico y behavioral game theory", (2023) *Revista Electrónica de Ciencia Penal y Criminología*, pp. 1-54.↩
7. Respecto al Derecho estadounidense, M.A. Villegas and M.A. Encinar, *La lucha contra la corrupción, compliance e investigaciones internas. La influencia del Derecho estadounidense,* 2020, pp. 93-137. The authors underline that, within the scope of the *Foreign Corrupt Practices Act* (FCPA), the model of corporate criminal liability adopted is vicarious liability, following the Anglo-Saxon tradition. This model establishes liability by virtue of the transfer that operates by virtue of the criminal conduct of the individual. Under the doctrine known as *respondeat superior*, the legal person is criminally reproached for the crime committed by directors or employees, as long as they had the purpose of benefiting the corporation and it developed within the scope of their functions. However, despite the predominance of the vicarious model, E. Gorriz Arroyo indicates that notions have emerged in recent decades in the context of the jurisprudential constructions of some states of the union, notions that could sustain a conception of the corporation's own fact. See E. Górriz Arroyo, "Criminal compliance ambiental y responsabilidad de las personas jurídicas a la luz de la LO 1/2015, de 30 de marzo", (2019) 4, *Revista para el análisis del Derecho InDret*, pp. 32-34.↩
8. A comprehensive exposition of the models of criminal liability of legal persons, Council of Europe report (Economic Crime and Cooperation Division Action against Crime Department), *Liability of Legal Persons for Corruption Offences*, <*https://rm.coe.int/liability-of-legal-persons/16809ef7a0*>, accessed 1 December 2023.↩
9. The first significant court ruling and one that marked the beginning of the jurisprudential doctrine on this matter by the Spanish Supreme Court was the ruling dated 29 February 2016 (a ruling that saw almost half of the judges in a dissenting position).↩
10. Not only has it been questioned in the scientific field of organizational analysis itself (and by some of the judges of the court), but the majority of representatives of Spanish criminal doctrine has also criticized the systemic vision adopted by the Supreme Court and denounced its shortcomings. Among the critics of the systemic approach (regardless of whether they defend positions or models of self-liability or hetero-liability of the legal person). The Spanish State Attorney General's Office itself is in total disagreement with the systemic approach of the Supreme Court (a position that is clearly stated in Circular 1/2016 of the State Attorney General's Office). The Prosecutor's Office defends the fact that the Spanish Criminal Code adopts a vicarious model of criminal liability as regards the legal person and, consequently, the attribution of criminal liability to the legal person proceeds like the criminal action of a natural person acting within the scope of the organization (not the legal person itself). <*https://www.boe.es/buscar/doc.php?id=FIS-C-2016-00001*> accessed 1 December 2023.↩
11. Judicial decision of the Spanish Supreme Court dated 22 October 2020 [sentencia del Tribunal Supremo español de fecha 22 de octubre 2020] <*https://www.poderjudicial.es/search/AN/openCDocument/cac2ec927df2ac2410b129baa45c19bfd6ae01958accae29*> accessed 1 December 2023.↩
12. Judicial decision of the Spanish Supreme Court dated 29 February 2016 [sentencia del Tribunal Supremo español de fecha 29 de febrero de 2016] <*https://www.poderjudicial.es/search/AN/openDocument/46ebea8f10494412/20160302*> accessed 1 December 2023.↩
13. Fourth Ground of Law [Fundamento de Derecho Cuarto] contained in the aforementioned judicial decision dated 22 October 2020.↩
14. Judicial decision of the Spanish Supreme Court dated 18 March 18 2022 [sentencia del Tribunal Supremo español de fecha 18 de marzo de 2022] <*https://www.poderjudicial.es/search/openDocument/e09e50f73ca340b6*> accessed 1 December 2023.↩
15. Judicial decision of the Spanish Supreme Court dated November 11, 2022 [sentencia del Tribunal Supremo de fecha 11 de noviembre 2022] <*https://www.poderjudicial.es/search/AN/openDocument/16aa9cd321ffac14a0a8778d75e36f0d/20221125*> accessed 1 December 2023.↩
16. At the same time, it may encourage a pernicious strategy in small legal entities with few individuals in which there is a pre-existing level of acquiescence towards improper conduct, on the one hand, or, on the other hand, a certain fear of the effects of such conduct despite certain precautions, namely that the application of policies and procedures of regulated self-regulation, such as the adoption of compliance systems is

not promoted, because it is understood that this may have a very negative impact on a possible criminal proceeding. The existence of such elements of an organizational nature could encourage the judge to appreciate the hypothetical self-organizational capacity of the entity and, consequently, the application of the criminal liability regime of the legal person.↩

17. It is understood that all requirements of the titles of imputation in letter a) or letter b) of Art. 31 bis 1 CP are met and that this unlawful conduct can be subsumed in one of the types of crime for which the criminal liability of legal persons is foreseen.↩
18. I consider that the power of the judge to moderate the penalty or not, according to the degree of subsistence of identity of the original legal person in the resulting legal person [since Art. 120.2 CP states: "may moderate" ("podrá moderar")], should have an imperative nature in order to ensure some respect for the principle of personality for penalties adapted to the complex and very different corporate reality ["may" should be replaced by "should" ("deberá")].↩
19. In this sense, special precautions should be taken to ensure that, in any punitive process, whether criminal or administrative, the *non bis in idem* principle is not violated due to the identity of the subject (now split up, meaning the permanence and degree of the resulting legal entities must be clarified), same fact and same basis (or grounds for punishment), except for jurisprudentially exceptional cases (Spanish Constitutional Court decisions: STC 152/2001 of 2 July 2001 and STC 2/2003 of 16 January 16 2003).↩
20. Translation of: "*la condición de miembro, por tanto, va a simbolizar la vinculación entre normas de la organización y normas de pertenencia –que no es otra que la vinculación entre las estructuras del sistema y los límites del sistema–. Así, pese a que continuamente los miembros de la organización vayan cambiando, la organización conserva su identidad*", in: C. Gómez-Jara Díez, "Autoorganización empresarial y autorresponsabilidad empresarial: Hacia una verdadera responsabilidad penal de las personas jurídicas", (2006) *Revista Electrónica de Ciencia Penal y Criminología*, núm. 08-06, p. 05:7.↩
21. From my point of view, this position was established with the purpose of trying to avoid the existing problems regarding the principle of culpability in the criminal law of the legal person.↩

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