

CARIOLA DIEZ PEREZ-COTAPOS

A B O G A D O S

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INVESTIGATIONS, COMPLIANCE AND CRIMINAL LIABILITY, EIGHT YEARS FROM THE ENACTMENT OF LAW 20.393

1. Law on criminal liability of juridical persons: Questions and answers

• What is the Law 20.393?

Law 20.393 is the regulation that establishes and regulates the criminal liability of corporations in Chile. According to this regulation, companies can be held criminally responsible for the acts of their employees, regarding four crimes: bribery, handling stolen goods, money-laundering and terrorism financing.

• To whom does the Law apply?

It applies to all legal entities, public or private, including nonprofit corporations.

• What kind of penalties does Law 20.393 contemplate?

Among the penalties applicable to legal persons due to the perpetration of the crimes mentioned above, the law establishes the following:

- I. Dissolution of the legal entity or cancellation of the legal entity.
- II. Temporary or perpetual prohibition of entering into contracts and/or another legal acts with any state organization.
- III. Partial or total loss of fiscal benefits or absolute prohibition of applying for them during a specific period of time.
- IV. Fines that can go from 200 up to 200.000 UTM¹

• What is a Crime Prevention Model?

A Crime Prevention Model ("CPM") is a mechanism proposed by Law 20.393, and it consists of a set of various means and controls that companies can perform on the processes or activities exposed to risks of perpetration of the crimes indicated in this law.

¹ Unit that varies in a monthly basis according to inflation. 1UTM = USD 78,50 approximately (January 2018)

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In general terms, it consists of an internal code of conduct, good practices and controls aimed for identifying risks of perpetrating crimes, preventing them and reacting to them. The implementation of a Crime Prevention Model involves an analysis of the company, its activities and structures and a review of the main risk areas, in order to establish means of prevention and monitoring mechanisms, an internal compliance structure, the appointment of a compliance officer, a whistle blowing policy for internal complaints, among other elements.

- **Why implementing a Crime Prevention Model?**

The correct implementation of a Crime Prevention Model in a company allows it to comply with the duties of management and oversight demanded by Law 20.393. This means that if a Crime Prevention Model is properly implemented, the company is not criminally liable for the commission of the aforementioned crimes. Nevertheless, in order for the model to effectively liberate the company from liability, it should not be limited to the formal elaboration of tools to prevent crimes, but should constitute an appropriate and reasonable mean to significantly prevent the perpetration of crimes, as required by the legal and factual conditions of the company.

- **Who is in charge of the implementation of the Crime Prevention Model?**

The implementation of the model within a company must be in charge of a specific person, which Law 20.393 names "Prevention Officer". The law does not establish restrictions on who can be appointed in this charge; it may be someone from the same company or an external person. However, as minimum requirement for its performance, the regulations state that this person must have autonomy regarding the administration of the company, on one side, and in the other, he or she must have sufficient means and faculties for the proper implementation of the Crime Prevention Model.

- **What is the certification of a Crime Prevention Model?**

The certification is a process developed by specialized groups external to the company meant to establish that the Crime Prevention Model adopted and implemented in

the company meets the minimum standards required by Law 20.393 for the avoidance of incurring into criminally punishable behavior.

- **What is the benefit of certifying the Crime Prevention Model?**

The certification constitutes an additional form through which the companies can demonstrate that they fulfilled the duties of management and oversight required by law in order to exempt them from criminal liability, through external evaluation on the suitability of the Crime Prevention Model adopted and implemented.

2. Who is responsible for the acts of the companies?

It is a basic principle of criminal law that criminal liability is strictly personal and that those who have participated in a crime are the only ones who are responsible for such crime. Therefore, those who have intervened in the punishable act respond for the Corporation, as stated in article 58 of the Criminal Procedural Code. The difficulty with criminal liability of companies is that commonly the responsibility comes from the omissions of their executives, not from their actions. Therefore, they should review the attributions and specific competences of each position, in order to identify who should have taken the omitted prevention measures.

National courts do not usually carry out an in-depth analysis of the duties attached to each position within a company when deciding on criminal liabilities. So, in most cases courts tend to make the general manager accountable for the company, without further analysis.

Only in high profile cases, involving over complex organizations including different administrative charges that can be made accountable, has the manager of the involved area been criminally charged, in addition to the general manager, although the analysis of the faculties of each position remains relatively simple.

Thus, in the "SQM" case, the general manager was criminally charged; in the "Pharmacies case", the general manager as well as the commercial manager and main executives were charged; in the "La Polar" case, the Chairman of the Board (who had been the general manager of the company before), the general manager in office, the manager of financial

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products, and the manager of administration and finances were charged; and in the “Universities” case, the Principals of each University were charged too.

In view of the above, it is important that companies establish clear and defined organization charts, in which the faculties of each position are sufficiently delimited in order to avoid confusions that could expose certain executives to be made accountable for events that happened outside the scope of their attributions.

3. Implementation and enforcement of the Law 20.393: most relevant cases

This law - that establishes the criminal liability of legal persons for the crimes of bribery, handling stolen goods, money-laundering and terrorism financing - came into force in December 2009. Since then, criminal investigations against legal persons have not been abundant, though significant. Among the most emblematic cases so far, we can single out the following:

I. Ceresita Case: The Public Prosecutor’s Office initiated an investigation into an alleged bribery of “Industrias Ceresita S.A.” to the Director of Public Works of the Municipality of Recoleta, with the purpose of obtaining an authorization for the operation of a factory in that place. In view of the fact that the crime was carried out in the direct interest of Ceresita, the company was charged and the case was terminated through the alternative exit of the conditional suspension of the proceeding² that implied the undertaking of the company to carry out works valued at USD 2.5 million.

“**Áridos Maggi**” Case: In this case, “Sociedad Áridos Maggi Ltda.” was sentenced to the prohibition of entering into contracts with any state organization for a 2 years’ time, and was forbidden of receiving fiscal benefits for breaching the duties of management and oversight contemplated in Law 20.393. This, because company personnel offered to make payments to agents of the Department of Public Works so that they did not report that the amounts of material received were less than those indicated in the dispatch guides.

The sentence handed down in an abbreviated trial ordered to pay a fine of 500 UTM to each company, as well as a penalty of loss of fiscal benefits for a 3-years period, the cancellation of the fraudulently obtained inscriptions and a the publication in “El Mercurio” newspaper of an extract of the Court’s final judgement.

“**CNA Universidades**” Case: Universidad del Mar was sentenced to pay a fine of 2000 UTM, for bribery crimes perpetrated in order to obtain accreditation from the National Accreditation Council (CNA). The same cause ended with alternative proceedings for the SEK University and the Pedro de Valdivia University, involving payments of CLP 25 and 50 million respectively.

J “Constructora Pehuenche” Case: This construction company was accused of making payments to the former sub director of paving of the Municipality of Santiago in order to delay the delivery dates of the construction works, as a way for avoiding the application of the corresponding contractual fines and even the termination of the contract due to the repeated application of fines. “Constructora Pehuenche” was forbidden of entering into contracts with any state organizations for a 4 years’ time and also to pay a fine of 680 UTM.

² The conditional suspension of the proceeding is an alternative procedure to the oral trial that allows suspending the criminal process, even without a sentence, under the condition that the accused is to comply k]h` WfhU]b` fi` Yg` cZ WtbXi Vh` gYh` Vm` hY` q` X[Y` Zcf` U` WfhU]b` dYf]cX` cZ hJa Yz` k` \]Wz` cbW` z` z` YXz` Yl` h]b[i`]g` hY` W]a`]bU`]UV`]m

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This incipient jurisprudence leaves some relevant points. These first criminal convictions have always been issued in cases of bribery. These cases generally bring public attention, because public officials are involved. For this reason, some interest groups have proposed the alternative of increasing the penalties associated with these crimes, and extending their scope of application to bribery committed between private parties, and to consider the benefit obtained or the damage caused to fix the amount of the fines. As a result, a bill has been put forward (Boletín N ° 10155-07) seeking to increase penalties for the perpetration of bribery, to expand the catalog of crimes for which a legal person can be held criminally liable, and to incorporate new figures such as bribery between private parties. This bill is in the second constitutional process in Congress.

4. Recognition and importance of a Crime Prevention Model

In accordance with the duties of management and oversight demanded by Law 20.393, the implementation of a Crime Prevention Model is an ideal mean to avoid criminal liability of Corporations. This means that, despite a crime being committed within the company, if the company proves that it has properly implemented a prevention model, it can be acquitted as a legal entity.

As per the application of Law 20.393 in the area of criminal investigation, the Public Prosecutor's Office has issued a report called "Practical Guide of Good Practices of Investigation relating Criminal Liability of Legal Persons", issued by the Anti-Corruption Specialized Unit of the Public Prosecutor's Office. This report contemplates different strategies to carry out investigations, depending on whether the investigated company has a Crime Prevention Model or not.

If the company has not implemented a Crime Prevention Model, the Public Prosecutor's Office estimates that the minimum standard regarding the duties of management and oversight duties required by Law 20.393 has not been met. In this scenario, the investigation for the Public Prosecutor's Office is easier, since it should only focus on proving that a model was not implemented, as this constitutes an important hint that the company under investigation has not complied with its supervision and oversight duties.

Conversely, if a Crime Prevention Model has been implemented, although the possibility of imputing criminal liability to the company does not disappear, the Public Prosecutor's Office should direct its investigation to find out if the model meets the legal requirements; if the implementation is real, effective and not purely formal or apparent; and if the model designed and implemented is effective.

Even further, in cases in which the company has certified its Crime Prevention Model, the Public Prosecutor's Office estimates that while this does not change the initial strategy for the examination of the Crime Prevention Model, it does imply a greater challenge for presenting charges against the company, for the prosecution would need to find evidence to invalidate the certification of the model, since the certification is an important evidence of compliance.

Accordingly, the national jurisprudence also attributes a preponderant role to the implementation of crime prevention models when accepting agreements between the prosecutor and the company or when delivering criminal judgements.

Thereby, in the aforementioned "Ceresita Case", a conditional suspension of the proceeding was agreed and approved, in which one of the main conditions established was that the charged company, "Ceresita S.A.", should implement a Crime Prevention Model.

In the "CNA Universidades" case, the Crime Prevention Model was a central issue during the process and outcome for the presentation of charges of criminal liability against the legal persons involved in this case. The 8th Court of Guarantee of Santiago imposed as a condition for the suspension of the proceeding against University Pedro de Valdivia, that it had to implement and maintain in operation a Crime Prevention Model, since at the time of the commission of the crime the entity didn't have one.

However, regarding "Universidad del Mar", the same court considered the absence of a Crime Prevention Model as sufficient reason to declare the breach of the duties of management and oversight, and delivered a condemnatory judgement against this University.

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Finally, in the case "Áridos Maggi", the Court of Guarantee of Chillán considered that the absence of a Crime Prevention Model constituted a breach of the duties of management and oversight that the law demands from legal persons, in relation to the perpetration of the conduct sanctioned by Law No. 20.393; which is the reason why the Court deemed appropriate delivering a criminal judgement against the company.

In this context, the requirements of companies in order to certify and implement Crime Prevention Models have experienced a sustained growth since the enactment of Law 20.393 in December 2009. As a reference, in 2011 only five legal persons had been certified, in 2014 this number grew up to 337, and in 2016, a total of 5352 companies certified their Crime Prevention Models. This trend is also explained by the importance that the courts have recognized in their rulings to the management and oversight duties that each company must oblige and promote.