Criminal Sanctions for Corporations in Spain*

A Systematic Approach After The 2015 Penal Code Reform

By Dr. **Beatriz Goena Vives**, Navarra**

In 2010, the Spanish legislator introduced the criminal liability of corporations in art. 31 bis of the Spanish Criminal Code. However, this reform did not involve the reformulation of "societas delinquere non potest" since legal persons are incapable both of the reproach of guilt and of suffering a penalty. Instead, the Spanish legislator has improperly named corporate sanctions "punishments", which is the same way in which the Spanish Criminal Code refers to sanctions imposed on individuals. Criminal sanctions against corporations have a different goal than penalties imposed on individuals. They are aimed at a preventive reaction and can only be considered "penalties" in the context of a two-track system of criminal law.

The distinct nature of the remedies against legal entities necessitates their separation from the allocation model in which penalties for natural persons fall. Thus, in the case of companies, it is appropriate for the adjudication of liability to occur independent of the subject's freedom or guilt. This paper offers a model in which corporate sanctions should be framed in order to respect the deepest foundations of the Theory of Crime.

I. Introduction

The new century in which we have lived for just over a decade has been marked by a growing importance of social and political transformations. Today's society carries hitherto unknown descriptors like "global", "multicultural", "mediatised" or "of risk". There are new challenges and new situations which the approaches of the past are unable to answer to satisfaction. In this sense, our criminal law is a paradigmatic prism through which to study this process of change. Since it came into being in 1995, the Spanish Criminal Code has come closer to a police law with which to respond to the demands of a society that calls for security at any price. Undoubtedly, criminal law holds a symbolic significance that other areas of law do not possess. Now then, does that make it the appropriate instrument for meeting the demands of society? The immediate yes of the major political parties in response to this question is reflected in an increasingly tough and expanded criminal policy.[1] There is a recklessness which threatens to distort criminal law and turn it into something else. As a consequence, delving into the theoretical foundations that inspire it becomes extremely necessary.

Any of the issues raised by the latest reform[2] of the Spanish Penal Code in 2015 is more than adequate for reflecting on the rationale and justification of a criminal law which has begun to take on a new shape. However, the squaring of the circle posed by the criminal liability of corporations is particularly suggestive. It is a topic in which Spanish legislation has done nothing more than to tag along with a process initiated in the United States and imported into the European Union.[3] Sooner or later, Spanish law would have to meet its international commitments and respond to corporate crime. But ... Is this the response? The new liability system for corporations is full of hybrid responses that register a discord between the role of criminal law and the purposes of punishment. There are numerous grey areas surrounding concepts like authorship, participation and the principle of culpability. Apparently, the framers opted to follow the example of the Anglo-American tradition[4], without sacrificing important elements of the Germanic system.[5] Thus, the model of liability of legal persons transforms the Spanish Criminal Code into a set of orphan laws that lack any clear pattern or direction. For one example, in less than four years, this precept, which had hitherto been forbidden entry into the Criminal Code, has multiplied five-fold.[6] This situation could be seen

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[1] See *Silva Sanchez*, La expansión del Derecho penal, Aspectos de Política criminal en las sociedades postindustriales, 3rd ed. 2011, passim. And more recently, see *Felip i Saborit*, in: Robles Planas/Sánchez-Ostiz Gutiérrez (eds.), La crisis del Derecho penal contemporáneo, 2010, p. 63.

[2] The Organic Law 1/2015 which was signed in March, entered into force last July 2015. The reform affects more than 200 articles and therefore, turns the Criminal Code into something almost new. Among other things, one of the institutions that has changed most after the aforementioned reform is the regime that regulates criminal liability of corporations.

[3] See Framework Decision 2003/80/JHA of 27.1.2003. From then on, other European guidelines and dispositions repeated the duty for all the member states to implement sanctions against corporations.

[4] On the influence that the Anglo-American tradition is having on the Spanish Criminal Law, see *Nieto Martín*, RDPC 1 (2014), 3; *ibid.*, RP 19 (2007), 120; *ibid.*, EDJ 61 (2004), 13; *ibid.*, RP 12 (2003), 3; *Vogel*, in: Mir Puig/Corcoy Bidasolo/Gómez Martín (eds.), La política criminal en Europa, 2004, p. 129. From the American perspective, see *Beale/Safat*, Buff. Crim. L. Rev. 8 (2004), 89.

[5] On the reciprocical or mutual influence between the US federal law and the continental system when dealing with corporate crime prevention, see *Beale*, ZStW 126 (2014), 27.

[6] Before 2010, the majority of the doctrine was against the introduction of corporate criminal liability. Some of the most important works about criminal liability of corporations before 2010 are the following: *Bacigalupo Saguesse*, La re-

as a metastasis of the legislative cancer embodied by the criminalization of collective liability.

While the reform operated by the Organic Law 1/2015 of March 30, 2015 has managed to shed light on the system, we still face a welter of measures that are disjunctive to our legal theory of crime and constitutional system. The reform of the criminal liability of corporations has been managed in the same way as a boomerang is thrown. Unless we want the reform to wind back up in the parliamentary chambers from where it emerged to be revised (or even repealed), it is time to start building the house from the foundation up and not from the roof down. The misstep embodied by art. 31 bis is still salvageable with interpretive and regulatory development that helps to fulfil the aims of the law while keeping the principles and institutions of our system.

In this sense, the foundation of criminal sanctions against legal persons must by studied, in order to offer a model in which to frame these sanctions. Although Spanish criminal law now establishes the possibility of sanctioning corporations, the fact that legal persons are not comparable to other criminally chargeable subjects remains undoubted. Therefore, it is particularly well suited for a discussion whether legal persons are to be regarded as true subjects of criminal law who must be sanctioned for their own actions and their own culpability. As stated before, there is a need for building an interpretive model consistent both with the law and with the main principles of our criminal law system. This is the main object of the present study.

First, to locate the area in which this research is based, I will summarize the current legislative situation as it relates to the criminal liability of corporations (II.). Next, I will attempt to put forth a model from which to reinterpret the entire system of liability of legal persons. Therefore, I will examine what the foundation of criminal sanctions against legal persons is (III.). Subsequently, I will offer a model to frame these sanctions (IV.).

II. Corporate Criminal Liability under the Spanish Law after the 2015 Penal Code reform

The criminal liability of corporations was introduced into the Spanish Criminal Code through Organic Law 5/2010. This institution was preceded by figures such as the "accessory consequences"[7] of art. 129 or the "subsidiary fines execution mechanism"[8] in former art. 31 para. 2. However, the enactment of art. 31 bis in 2010 represented the first time that criminal responsibility was directly placed on collective entities. In detail, the Spanish Criminal Code made it possible to hold a corporate entity criminally liable for the criminal offences committed in its name and on its behalf by its legal representatives or officers, or by its employees if it had failed to exercise "due control" over them.

However, corporate criminal liability was such a new institution that neither the prosecutors nor the corporations themselves knew how to implement the new regulation. As a consequence, although corporate criminal liability has been in force since 2010, the Spanish case law has not yet successfully reached an indictment of any criminal entity.[9] Several investigations against certain companies have been undertaken during all these years. But they have not yet reached the courts.

Among other things, the referred lack of application of the provisions introduced in 2010 to prosecute corporations confirmed the need to significantly upgrade the existing legislation. Therefore, the Organic Law 1/2015 of March 30, 2015 amended the existing corporate crime regime and resolved a number of issues relating to its interpretation. In this sense, according to the new dispositions introduced by the aforementioned reform, the main characteristics of corporate criminal liability under the Spanish criminal law could be summarized as follows:

Firstly, corporations are held liable for the act committed by certain individuals within the organization. In detail, art. 31 bis para. 1 of the Spanish Criminal Code expressly[10] states:

sponsabilidad penal de las personas jurídicas, 1998, passim; *Feijoo Sánchez*, Sanciones para empresas por delitos contra el medio ambiente, 2002, passim.; *Gómez-Jara Díez*, La culpabilidad penal de la empresa, 2005, passim.; *Gracia Martín*, in: Romeo Casabona (ed.), Dogmática penal, política criminal y criminología en evolución, 1997, p. 103; Mir Puig/Luzón Peña (eds.), Responsabilidad penal de las empresas y sus órganos y responsabilidad por el producto, 1996, passim.; *Nieto Martín*, La responsabilidad penal de las personas jurídicas, Un modelo legislativo, 2008; *Zugaldía Espinar*, Responsabilidad penal de empresas, fundaciones y asociaciones: presupuestos sustantivos y procesales, 2008, passim.; *Zúñiga Rodríguez*, Bases para un modelo de imputación de responsabilidad penal a las personas jurídicas, 2009, passim.

[7] See *Mir Puig*, Derecho Penal, Parte General, 9th ed. 2011, sec. 34 para. 78 ff., with multiple references. To contrast two extremely different ways of understanding the accessory consequences in Art. 129, see on the one hand, *Silva Sánchez*, Derecho penal económico, Manuales de formación continuada, Justicia y Economía 2002, 307. On the other hand, see *Zugaldía Espinar*, PJ 46 (1997), 327.

[8] See *Quintero Olivares*, in: Quintero Olivares (ed.), Comentarios al Nuevo Código Penal, 3rd ed. 2004, p. 332 ff.; *Ramón Ribas*, in: Quintero Olivares (ed.), Comentarios al Nuevo Código Penal, 4th ed. 2005, p. 338 ff.; *Silva Sánchez/Ortiz De Urbina Gimeno*, InDret Penal 2/2006, p. 3 ff.

[9] However, there are some cases against corporations which are being investigated and will probably go to court. These include cases against entities such as Bankia Credit Corporation, Barcelona Football Club, or Pescanova.

[10] The translation into English was done by myself. The official Spanish Code states: "En los supuestos previstos en este Código, las personas jurídicas serán penalmente responsables: a) De los delitos cometidos en nombre o por cuenta de las mismas, y en su beneficio directo o indirecto, por sus representantes legales o por aquellos que actuando individualmente o como integrantes de un órgano de la persona jurídica, están autorizados para tomar decisiones en nombre de la persona jurídica u ostentan facultades de organ-

> "Legal persons shall be criminally liable:
> a) For crimes committed in the name or on behalf of them, and in their direct or indirect benefit, by their legal representatives or those who in acting individually or as part of a body of the corporation, are authorized to make decisions on behalf of the legal person or hold powers of organization and control within the same.
> b) For crimes committed in the exercise of company activities on behalf and in the direct or indirect benefit of the same, by any person who, being subject to the authority of the natural persons mentioned in the previous paragraph, have been able to carry out such acts due to the failure of those persons in their duties of supervision, monitoring and control of their activity, and meeting the specific circumstances of the case".

Secondly, corporations cannot be held liable for any of the offences in the Criminal Code. Instead, each statute by which a corporation can be held liable must state it expressly. The articles which include the possibility of sanctioning a corporation are, among others, the following: fraud, fraudulent insolvency, corporate espionage, insider trading, market manipulation, private-sector corruption, bribery, money laundering, criminal offences against territorial regulation, against natural resources and the environment, against worker rights and against the market or consumers.

If any of the criminal offences just mentioned above is committed within the framework of a corporation, all consequences which may be imposed are considered as serious penalties. They range from a criminal fine to a ban on receiving public subsidies, public funds or entering into contracts with the public administrations, judicial intervention or even closure.

Moreover, since the reform of the Criminal Code by the abovementioned Organic Law 1/2015, art. 31 quáter allows that the companies mitigate or completely eliminate their exposure to criminal liability if, once the criminal offence is detected, they collaborate in seeking evidence or take steps to repair the damage caused.[11] Companies are also encouraged to implement adequate measures to prevent criminal offences from being committed and to detect any that may be committed in the future.

Companies are expressly encouraged to establish a clear and ethical corporate culture which eases the detection of the risks inherently linked to their activity, structure and/or employees at all levels. In this sense, the new regulation of the corporate liability states that the investigated company will be exonerated from liability (or that liability will at least be mitigated) if a criminal compliance program had effectively been adopted and implemented before the offence was committed. In a clear effort to reduce the uncertainty derived from the pre-existing regime, the new art. 31 bis develops a range of very concrete criteria that specify the requirements that a suitable criminal compliance program must have. Using the same wording as the Criminal Code when referring to criminal compliance programs as an extenuating circumstance, art. 31 bis provides as follows[12]:

> "1. They shall identify the activities within whose scope the crimes to be prevented may be committed.
> 2. They shall establish protocols and procedures specifying the process for forming the legal person's intention, for the adoption of decisions and execution thereof in relation thereto.
> 3. They shall feature financial resource management models adequate for preventing the commission of the crimes that must be prevented.

ización y control dentro de la misma. b) De los delitos cometidos, en el ejercicio de actividades sociales y por cuenta y en beneficio directo o indirecto de las mismas, por quienes, estando sometidos a la autoridad de las personas físicas mencionadas en el párrafo anterior, han podido realizar los hechos por haberse incumplido gravemente por aquéllos los deberes de supervisión, vigilancia y control de su actividad atendidas las concretas circunstancias del caso".

[11] Art. 31 quáter could be translated as follows: "Mitigating factors to the criminal liability of corporations shall be limited to the conduct of the following activities, after the commission of the crime and through its legal representatives: a) To have confessed the offense to the authorities before knowing of the proceedings brought against it; b) To have cooperated in the investigation of the act by proffering evidence at any stage of the proceedings, which were new and decisive for clarifying the criminal liabilities arising from the acts; c) To have acted, at any stage of the proceedings and prior to the oral trial, to redress or diminish the damage caused by the crime; d) To have established, prior to the commencement of the trial, effective measures for preventing and detecting crimes that could be committed in the future using the means or under the cover of the legal person". (translated by the author).

[12] The translation into English was done by myself. The official Spanish Code states: "Los modelos de organización y gestión […] deberán cumplir los siguientes requisitos: 1. Identificarán las actividades en cuyo ámbito puedan ser cometidos los delitos que deben ser prevenidos. 2. Establecerán los protocolos o procedimientos que concreten el proceso de formación de la voluntad de la persona jurídica, de adopción de decisiones y de ejecución de las mismas con relación a aquéllos. 3. Dispondrán de modelos de gestión de los recursos financieros adecuados para impedir la comisión de los delitos que deben ser prevenidos. 4. Impondrán la obligación de informar de posibles riesgos e incumplimientos al organismo encargado de vigilar el funcionamiento y observancia del modelo de prevención. 5. Establecerán un sistema disciplinario que sancione adecuadamente el incumplimiento de las medidas que establezca el modelo. 6. Realizarán una verificación periódica del modelo y de su eventual modificación cuando se pongan de manifiesto infracciones relevantes de sus disposiciones, o cuando se produzcan cambios en la organización, en la estructura de control o en la actividad desarrollada que los hagan necesarios".

4. They shall impose an obligation to report potential risks and noncompliance to the body responsible for overseeing the operation and enforcement of the prevention model.
5. They shall establish a disciplinary system to adequately punish noncompliance with the measures established by the model.
6. The model shall require in any case its periodic review of and potentially the amendment thereof where significant violations of its provisions come to light, or where there are changes in the organization, the control structure or the activity carried out that necessitates the above".

According to the referred legislation, it is clear that the Spanish regime is inspired by the US Respondeat Superior doctrine[13], which on a vicarious liability basis states that the corporation is responsible for the actions which its representatives and/or employees performed within the course of their employment. This is a very important point since it makes clear that corporations do not commit the offence themselves. Their criminal responsibility under the Spanish criminal law is based on the acts of the individuals who form the organization. The "Societas delinquere non potest" aphorism is still alive in Spanish criminal law, as the Spanish District Attorney's Office's last Circular Letter 1/2016 has recently stated.[14]

III. "Societas delinquere non potest sed puniri potest"

As it has been stated, since 2010 corporations can be held liable for the crimes committed for their benefit.[15] In spite of some doctrinal discrepancies,[16] this precision does not involve the reformulation of "societas delinquere non potest". This follows not only from the texts that preceded the aforementioned Organic Law 5/2010, but also from the current regime itself. Legal persons are incapable both of the reproach of guilt and of suffering a penalty. The reform of the Criminal Code does not alter this situation.[17] The fact that corporations are criminally responsible does not imply their guilt or their capability of committing crimes. This is, societas delinquere non potest, sed puniri potest.

Based on this idea, it must be stated that the penalties in art. 33 para. 1-6 (for individuals) are not the same as the "penalties" in art. 33 para. 7 (for corporations). The Spanish legislator has improperly named them punishments,[18] ("penas") which is the same way in which the Spanish Criminal Code refers to the sanctions imposed on individuals. However, since corporations have "no soul to dam and no body to kick"[19], the sanctions that they must face have nothing to do with the harm (Strafleid) and the retributive and deterrent effect that characterizes the intervention of the criminal law. Therefore, the legal consequences for corporations indicated in art. 33 para. 7 are not punishments. Following what *Silva* stated three years ago[20], corporate sanctions can only be considered "penalties" in the context of a two-track system of criminal law[21], with the tracks differing along the substantive and procedural dimensions.

In order to clarify this idea, I find that that although being quite an extended quotation, the transcription of *Cohen's* following words is really clarifying:

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[13] See *Norman*, Akron Law Review 1 (1968), 25; *Williams*, in: Baker (ed.), Textbook of Criminal Law, 3rd ed. 2012, p. 189.

[14] On Friday, January 22, 2016, the Spanish District Attorney's Office issued the Circular Letter 1/2016. This document consists of several guidelines meant to ease the interpretation of the corporate criminal system, especially after the last reform of the Criminal Code in 2015. The guidelines expressly reject all interpretations which hold that corporations are capable of being punished for their own acts and their own culpability.

[15] The works on this topic are uncountable. Some of the most important ones from 2010 to date are the following: *Bajo Fernández/Feijoo Sánchez/Gómez-Jara Díez*, Tratado de responsabilidad penal de las personas jurídicas, 2012, passim; *De Vicente Remesal*, in: Hefendehl/Hörnle/Greco, (eds.), Dogmática del Derecho penal material y procesal y Política criminal contemporáneas, Homenaje a Bernd Schünemann, vol. II, 2014, p. 16 ff., 31 ff.; *Gómez-Jara Díez*, in: Silva Sánchez/Pastor Muñoz. (eds.), El nuevo Código penal. Comentarios a la reforma, 2012, p. 43 ff.; *Robles Planas*, Estudios de dogmática jurídico-penal, 2014, p. 203 ff.; *Zugaldía Espinar*, LLP 76 (2010), 5. Zugaldía Espinar/Marín De Espinosa Ceballos (eds.), Aspectos prácticos de la responsabilidad criminal de las personas jurídicas, 2013, passim.

[16] There are some authors who consider that the Spanish system for sanctioning corporate crime is not a vicarious liability one. They believe that corporations are punished for their own actions and their own culpability. Some of the most paradigmatic works in this sense are the following: *Bajo Fernández/Feijoo Sánchez/Gómez-Jara Díez*, Tratado de responsabilidad penal de las personas jurídicas, 2012, passim; *Zugaldía Espinar*, LLP 76 (2010), 5; *ibid.*, in: Zugaldía Espianr (ed.), Fundamentos de Derecho penal, Parte General, 4th ed. 2010, p. 575 ff.

[17] See *Gómez Martín*, in: Gómez Martín/Mir Puig/Corcoy Bidasolo (eds.), Garantías constitucionales y Derecho penal europeo, 2012, p. 331 ff., with further references.

[18] See *Robles Planas*, Diario La Ley 7705 (2011), p. 1 ff. Published in German in this journal as "Strafe und juristische Person" (ZIS 2012, 347). The author makes an interesting critic to the inadmissible fact of naming corporate sanctions punishments. He deeply justifies why the term punishment is only admissible for human beings capable both of suffering them (Strafleid) and of reacting to their traditional goals. Therefore, he concludes that referring to corporate sanctions as punishments can only be done in the formal sense. The truth meaning of the term is not aplicable to corporations.

[19] See *Coffee*, Michigan Law Review 79 (1980-1981), 386.

[20] See *Silva Sánchez*, in: Kempf/Lüderssen/Volk (eds.), Unternehmenstrafrecht, 2012, p. 59 (63).

[21] See *Silva Sánchez* (fn. 1), passim.

> "I have made two related, but different points. One is that the corporation is a suitable object for the imposition of sanctions. Second, insofar as the imposition of sanctions is deemed desirable, it needs not to be hampered by the same constraints as those that tie the government´s hands when dealing directly with individuals. This dual conclusion has wider repercussions, within criminal law and beyond [...] Exploring these possibilities might eventually lead to a two-track system, with the tracks differing along the substantive, procedural, and evidentiary dimensions. These tracks need not, however, end at the boundary of criminal law. The considerations that shape them pertain to other legal areas as well, suggesting a two-track legal system throughout"[22].

Anyhow, it can be argued that the least important issue is whether the sanctions imposed on corporations qualify as penalties, as administrative sanctions or as misdemeanor sanctions. Despite the impression that a quick approach to the different systems for sanctioning corporations may suggest, most of the legal systems concur in asserting what the main goal of sanctioning corporations is. Although the Anglo-American tradition[23] establishes criminal sanctions for corporations and other legal systems, such as the German[24], have expressly rejected[25] that option[26], that situation does not preclude the undeniable coincidence between the aims that inspire the different systems for prosecuting corporations. As a consequence, the different theories and practices to punish[27] corporations both in the Anglo-American system and in the continental one are not substantially divergent. This is because they share the same goal: prevention[28], as adapted to the peculiarities of legal corporations. This is, sanctions to corporations are inspired by an organizational conception of deterrence[29], with its own particularities that make it different from the traditional theories of punishment for individuals. Criminal sanctions for corporations have their own goal. This is the same in systems where corporate sanctions are governed by criminal law (e.g. USA, Spain) and in regulations where corporate sanctions are defined by other fields of law (e.g. Germany). In brief, it could be stated that the main goal when sanctioning corporations matches in all the different legal systems, amounting to a particular deterrence, including rehabilitation and incapacitation that could be known as "reactive prevention" and is different from the deterrence that inspires the punishments for individuals.

In this respect, it is proposed to view art. 33 para. 7 of the Spanish criminal law as based on "reactive prevention"[30], as a proper rationale for the particular criminal response which is different from the penalties against individuals. It is a double foundation, formed by principles which are closest to rehabilitation, but that allows considerations of general deter-

[22] *Dan-Cohen*, Journal of Law and Policy 19 (2010), 15.

[23] See *Alschuler*, Am. Crim. L. Rev. 46 (2009), 1359. On p. 1360 the author expressly states: "A judge's goal in punishing a corporation should be to induce a level of monitoring that will prevent more criminal harm than the monitoring will cost". In detail, for a description of the theoretical foundations of the Corporate Crime System in the United States, see for example: *Henning*, J.L. & Pol'y 19 (2010), 83. More clearly, *ibid.*, Am. Crim. L. Rev. 46 (2009), 1417. Similarly, see *O'Reilly/other authors*, Punishing Corporate Crime, Legal Penalties for Criminal and Regulatory Violations, 2009; *Weissmann/other authors*, Reforming Corporate Criminal Liability to promote Responsible Corporate Behavior, 2008, p. 1 ff.

[24] One of the works which best synthesizes the discussion on the (in)adequacy of introducing a criminal liability of corporations in Germany is Hettinger (ed.), Reform des Sanktionenrechts, Verbandsstrafe, Vol. 3, 2002, passim. See also, *Böse*, ZStW 126 (2014), 132; *Kudlich*, in: Kuhlen/ Kudlich/Ortiz De Urbina Gimeno (eds.), Compliance y teoría del Derecho penal, 2013, p. 283. *Rotsch*, ZStW 125 (2013), 481.

[25] However, there are some German criminal law experts that are in favor of introducing criminal punishments for corporations. See e.g. *Ackermann*, Die Strafbarkeit juristischer Personen im deutschen Recht und in ausländischen Rechtsordnungen, 1984, passim; *Eidam*, Straftäter Unternehmen, 1997, passim.; *Heine*, Die strafrechtliche Verantwortlichkeit von Unternehmen, 1995, passim; *Müller-Gugenberger*, in: Müller-Gugenberger/Bieneck (eds.), Wirtschaftsstrafrecht, Handbuch des Wirtschaftsstraf- und ordnungswidrigkeitenrechts, 6th ed. 2015, § 23; *Schroth*, Unternehmen als Normadressaten und Sanktionssubjekte. Eine Studie zum Unternehmensstrafrecht, 1993, passim; *Volk*, JZ 1992, 429.

[26] For an intermediate position, see *Schünemann*, Unternehmenskriminalität und Strafrecht, Eine Untersuchung der Verantwortlichkeit der Unternehmen und ihrer Führungskräfte nach geltendem und geplantem Straf- und Ordnungswidrigkeitenrecht, 1979.

[27] A comparative study of the punishment of corporations in the US and the German tradition can be found in *Dubber/ Hörnle*, Criminal Law, A Comparative Approach, 2014, p. 329 ff.

[28] Even the authors who are in favor of retribution as a valid rationale for corporate sanctions admit that prevention is de facto the main goal when sanctioning corporations. In this sense, see *Robson*, Am. Bus. L. J. 47 (2010), 109; *O'Sullivan*, Am. Crim. L. Rev. 29 (2014), 51; on p. 64,the author states: "Clearly, the DOJ in practice has abandoned its stated goal of 'punishment' (that is, retribution) in making charging decisions except in the most extreme cases of corporate wrongdoing (and only then when collateral consequences permit)"; *Schlegel*, Just Desserts for Corporate Criminals, 1990, p. 13 ff. On p. 17, the author states that "Deterrence is commonly accepted as the primary goal for imposing criminal sanctions on corporation and on individuals acting on corporation behalf".

[29] See *O'Sullivan*, Am. Crim. L. Rev. 29 (2014), 51.

[30] I propose this name on the basis of the proposal of "galvanizing deterrence" posed by *O´Sullivan* (fn. 29). However, I do not agree with the terminology proposed by this author since she understands that corporate criminal liability should be linked to just deserts.

rence and incapacitation, too. The system seeks a "reaction"[31] from the specific sanctioned company, and by extension, from the majority of companies.

This paper proposes that the fine and other sanctions in art. 33 para. 7 are "criminal remedial measures", different from the punishments imposed on individuals. This is a concept best suited to the reactive prevention which inspires it. While still referring to the neutralizing effect of sanctions such as the ban on receiving public subsidies or closure (art. 33 para. 7 b to g), special prominence is given to the rehabilitation[32] or restructuring that is invited by the fine or intervention in 33 para. 7 lit. a and g.

In line with the conclusion stated above, it is clear that the distinct nature of the remedies against legal entities necessitates their separation from the allocation model of the traditional theory of crime under which penalties for natural persons fall.

IV. Imputation of culpability vs. Attribution of responsibility

In the case of companies, it is appropriate for the adjudication of liability to occur independent of the subject's freedom or guilt. Corporate sanctions are not an allocation of culpability (or Zurechnung) but a mere attribution of responsibility (or Zuschreibung), which does not require guilt and freedom of action, as opposed to allocation, which does[33].

The requirements of the two models are not identical. In the mere attribution model, guilt is addressed as a principle only rather than as a reproach. That is, any restriction of rights must be informed by the guarantees that are applicable depending on the nature of the recipient and the branch of law that has been violated. It is therefore appropriate to adopt requirements that protect the peculiarities of the recipient and the characteristics of the reaction. But there is no requirement for a systematic category of enforceability, solely applicable to free individuals and not to corporations.

The ascription of responsibility based on an attribution model is already known in various other areas of the law different from criminal law. This is the case of liability under tort law, tax penalty law and administrative penalty law, for example. In these contexts, liability is not allocated. It is attributed instead[34].

Moreover, in the framework of the criminal law itself "sub-models" of liability exist wherein the requirement of a culpable and punishable unlawful act is relaxed, and mere attribution is appropriate. Indeed, not all criminal law responds to an allocation model inspired by general deterrence and retribution, suitable to guilty, culpable subjects[35]. In particular, security measures, confiscation, civil liability for offenses, sanctions against minors[36], and the strict liability of Anglo-American Law[37], can be characterized as previously known models of criminal attribution.

Therefore, art. 31 bis of the Spanish Criminal Code concerning corporate criminal liability should be seen as a model for the mere attribution of criminal responsibility. This statement involves significant consequences for the way in which the Spanish criminal law should be understood when sanctioning corporations. On one hand, the understanding that it serves merely for attribution implies that the criteria for the adjudication of liability are different from the traditional allocation model. Specifically: (i) the subject is not a free agent in possession of dignity, but a corporation; (ii) its requirement is not an actus reus, but an "unlawful state of things"[38]; and (iii) the consequence is not a punishment sensu

[31] See *Braithwaite*, To Punish or Persuade: Enforcement of Coal Mine Safety, 1985, p. 119 ff.; *Ayres/Braithwaite*, Responsive Regulation, Trascending the Deregulation Debate, 1992, p. 35 ff.

[32] In this sense, see *Fisse*, Southern California Law Review 56 (1983), 1141. On p. 1160, the author very rightly states: "When an individual *criminal* is punished or threatened with punishment for a street crime, *the goal of the punishment or threat is to inhibit rather than to catalyze*. The message conveyed is 'refrain from committing that offense', rather than 'refrain from committing that offense and take such steps to improve your physiological and psychological capacity for self-control as are necessary to guard against repetition.' *By contrast, when a corporate offender is punished or threatened with punishment, the message is catalytic as well as inhibitory*. The message conveyed, for corporate offenses of commission as well as for those of omission, is 'refrain from committing that offense *and take such steps as are necessary organizationally to guard against repetition*'" (emphasis added by the *author*).

[33] The clearest precedent of this distinction when referring to the different ways in which responsibility can be imposed can be found in *Kant*, Vorlesungen über Moralphilosophie, Methaphysik der Sitten Vigilantius, Akademie Ausgabe, Vol. 17.2.1, p. 564, lines 36 and 37, "Zurechnen distinguirt sich daher auch von: Jemandem einen eventum zuschreiben, insofern Handlung auf einer mera facultas, und nicht auf einem Pflicht Gesetz beruhete, z. E. daβ/ p. 565, líneas 1 y 2: der Bediente, dem ich ein Geschenk machte, es vertrank, Händel anfing u.s.w."

[34] In a similar way, but not specifically about corporate criminal responsibility, see the distinction between allocation (Zurechnung) and mere attribution (Zuschreibung) in *Kindhäsuer*, GA 1982, 477.

[35] My proposal, in this sense, might remember the one made by *Kuhlen* in relation to what he calls "Kummulationsdeikte", see *Kuhlen*, ZStW (105) 1993, 704. However, the Zuschreibung or Attribution model which I propose is not exactly the same. I mention the theory suggested by *Kuhlen* just to illustrate how the criminal sanction is not always linked to culpability.

[36] To confront a similar approach, see *Feijoo Sánchez*, RJUAM 4 (2001), 9. The author shows that the criminal law knows plenty of sanctions that are detached from culpability. However, his work does not refer to corporations. It is about sanctions against minors.

[37] For a systematic approach to this issue, see the study made by *Robinson*, Yale Law Journal 93 (1984), 609.

[38] See *Silva Sánchez* (fn. 20), p. 63.

stricto, but a remedy oriented towards reactive prevention. On the other hand, the understanding that it is criminal assumes that the restriction of rights must be informed by the guarantees that apply[39]; that is, those that do not arise from human dignity. For example, sanctions imposed on corporations should respect criminal law principles such as proportionality and must be imposed in a due process in which the responsibility of corporations is proved beyond a reasonable doubt.

V. Conclusion

In short, the way in which the Spanish criminal law has regulated corporate responsibility does not imply that corporations are capable of offending with culpability. Corporations should be punished for the law of control – or unlawful state of things – which allowed the commission of a crime by an individual in the framework of the organization. And the sanction imposed for that purpose is not a criminal punishment inspired by retribution and/or deterrence, but a mere corrective measure based on reactive prevention as a particular way of understanding corporate deterrence. Sanctions to corporations belong to the fields of the criminal law that similarly to other criminal institutions such as security measures or strict liability do not require the traditional elements that define the allocation model that usually (but not always) guides the theory of punishment. However, since the sanctions for corporations are criminal, the restriction of rights must be informed by the guarantees that apply in the field that has traditionally been defined as the Magna Charta of the offender.

[39] Reaching a similar conclusion, see *Mir Puig*, in: Mir Puig/Corcoy Bidasolo/Gómez Martín (eds.), Responsabilidad de la empresa y Compliance. Programas de prevención, detección y reacción penal, 2014, p. 3 ff.