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Organic Law 14/2022, reforming Organic Law 10/1995 on the Criminal Code

On 23 December 2022, Organic Law 14/2022, of 22 December, on the transposition of European directives and other provisions for the adaptation of criminal legislation to European Union law, and the reform of offences against psychological welfare, public disorder and smuggling of dual-use weapons (“OL 14/2022”) was published, and has been in force since 12 January 2023.

The purpose of this legislation is to transpose several European Directives and it has led to the amendment of the Criminal Code, affecting both natural persons and also the criminal liability of legal persons. This is a major change in our legal system, in that it amends a number of offences (offences against psychological welfare, offences against property and the socio-economic order, forgery offences, offences against the Public Administration) and removes others (offences against public order and the offence of sedition).

Some of the amendments to the Criminal Code (“CC”) introduced by OL 14/2022 include the following:

1. Amendment of the criminal liability of the legal person in offences against psychological welfare (Article 173.1 CC)

Organic Law 10/2022, of 6 September 2022, on the comprehensive guarantee of sexual freedom, established the criminal liability of legal persons in the field of offences against psychological welfare. To this end, it introduced a fourth paragraph to Article 173.1 CC, under which a legal person would be liable for the commission of the offences referred to in the first three paragraphs of Article 173.1 CC. In this respect, OL 14/2022 has introduced in the second paragraph of Article 173.1 CC the offence of repeated concealment of information on the whereabouts of a dead body from the person’s relatives or friends by whoever has such knowledge.

The introduction of this new offence, without amending the wording of the last paragraph of Article 173 CC -now paragraph 5-, which continues to refer to “the three previous paragraphs”, implies the exclusion of criminal liability of a legal person for the existence of degrading treatment that seriously undermines psychological welfare, the basic type of offence against psychological welfare contained in the first section of Article 173 CC -and the most serious of them-. As a consequence of the above, it is expected that a new amendment of this article will be carried out to rectify the error generated by OL 14/2022.

2. Introduction of non-cash payment instruments

With the aim of transposing one of the European directives on combating cybercrime using cryptocurrencies, the concept of “*any means of payment other than cash*” has been added to Article 399 *ter* CC, to include virtual currencies and other cryptoassets, as well as electronic wallets and mobile phone payment applications that can be used on a recurring basis to make different payments.

As a consequence of this, the following offences have been amended:

A. Offence of fraud (Articles 248 and 249 CC)

The most significant amendments can be found in the definition of computer fraud. The conducts giving rise to liability in this regard have been developed in greater detail, although the associated penalties have not been amended. In addition, hindering or unduly interfering with the functioning of an information system, or the introduction, alteration, deletion, transmission or suppression of computer data in order to obtain “*any asset to the detriment of another*”, have been included as new ways of committing the offence.

Likewise, the definition of fraud committed by means of credit card, debit card, traveller’s cheque or the data contained therein now includes as an instrument through which the offence can be committed “*any other material or immaterial payment instrument other than cash*” used to carry out “*transactions of any kind to the detriment of the holder or a third party*”.

Finally, the penalty for this offence is reduced to the lower half for those who “*for fraudulent use and knowing that they were obtained unlawfully, possess, acquire, transfer, distribute or make available to third parties credit or debit cards, traveller’s cheques or any other tangible or intangible payment instruments other than cash*”.

B. Offence of counterfeiting credit and debit cards and traveller’s cheques (Article 399 bis CC)

Along the same lines, Article 399 bis CC extends the criminal offences by including an open clause that refers to “*any other instrument other than cash*” together with the rest of the objects the falsification, possession or use of which make up the criminal offences punishable under this article. In addition, subsection 4 criminalises possessing or obtaining, for fraudulent use and knowing them to be false, debit cards, credit cards, travellers’ cheques or any other non-cash payment instrument.

3. Amendment of offences relating to the market and consumers (Article 285.5 CC) - Abuse and disclosure of insider information

The new legislation amends the attenuated type under Article 285.5 CC to convert it into a specific offence without any attenuation. As a consequence of this, the same penalties will be imposed as those included for the other conducts under Article 285 CC when the person responsible for the act does not have reserved access to the insider information and obtains it in any way other than the ways listed in subsection 4 and uses it knowing that it is insider information.

4. Exemption from penalties for corruption offences in business dealings (Article 288 bis CC)

The new Article 288 bis CC contains the exemption from liability of certain individuals such as directors, de facto or de jure administrators of any company incorporated or being formed who have committed any of the acts listed in Article 288 CC, provided that they “*put an end to their participation in the same and cooperate with the competent authorities*”, and comply with a series of parameters set out in the article itself. This ground for exemption from penalties does not refer to an exclusion of punishability but to an annulment or lifting of punishability, since the offence has already been committed and the exemption from punishment is granted retroactively.

5. Offence against workers' rights: new subsection 2 of Article 311 CC

According to the Preamble of OL 14/2022, the incorporation of new technologies into the organisation of the labour market has led to a form of evasion of corporate responsibilities through the legal camouflage of paid employment under other formulas that deny workers their labour rights.

As a consequence of this social reality, and in order to provide greater legal protection to “riders”, among others, a new penalty has been introduced for all those who “*impose illegal conditions on workers by hiring them under formulas other than an employment contract, or maintain them in contravention of a court order or administrative penalty*”. The main difference between this new criminal offence and that contained in Article 311.1 CC - which consists of imposing working or Social Security conditions on workers that prejudice, suppress or restrict the rights they have recognised by legal provisions, collective bargaining agreements or individual contracts - is the victim of the offence. In subsection 1, the victim refers to those persons who have the legal status of employees, while subsection 2 covers those persons who are not legally employees, but *de facto* fulfil the characteristics to be considered as such.

Furthermore, the aggravating factors contained in Article 311.5 CC will also be applicable to this new type of offence, so that the higher penalty may be imposed when this conduct is carried out with violence or intimidation.

6. New regulation of the offence of embezzlement

The amendment of the offence of embezzlement implies, as stated in the Preamble of OL 14/2022, “*a return to the traditional Spanish model, i.e. the one prior to the 2015 reform*”. This new regulation distinguishes, on the one hand, between conduct involving the appropriation or diversion of public funds for direct or indirect private benefits, and on the other hand, conduct which, without involving a definitive appropriation or temporary use for private purposes, involves a deviation from the legally established purposes or actual mismanagement to the detriment of the public cause.

The legislation therefore clearly distinguishes between three levels of embezzlement, depending on whether the conduct involves appropriation of public assets or diversion for private or public use:

A. Misappropriation (*malversación apropiativa*) (Article 432 CC)

OL 14/2022 drastically reforms Article 432 of the Criminal Code by removing mismanagement as one of the conducts that can be subsumed under the basic form of the offence. This amendment does not imply the decriminalisation of these conducts, as they can still be punished through Article 252 CC, and the aggravating factor of a prevailing public nature under Article 22.7 CC can be applied, as well as the accessory penalty of special disqualification from public employment or office under Article 56.3 CC when the circumstances stipulated for this purpose are present.

Article 432 CC therefore penalises conduct committed by an official or authority who, for gain, appropriates or consents to a third party, with the same intention, appropriating public assets under his or her charge by reason of his or her functions or on the occasion of these functions.

The major development introduced by the reform refers to the new subjective element of the offence: that it be for gain. The State Prosecutor's Office has unified criteria and established

guidelines on the application of the offence of embezzlement after this latest reform of the CC, stipulating that the “for gain” requirement will always be satisfied when there is an intention to use public money to “obtain an advantage or benefit for oneself”, without the need for there to be a “financial advantage or economic increase”.

Therefore, it will be considered to be for gain in all cases in which the perpetrator is aware and intends to dispose of the thing as if it were their own, using it for purposes other than the public function in order to obtain an advantage or benefit of any kind for themselves or for others.

Furthermore, in the list of aggravating circumstances under Article 432.2 CC, a new aggravating circumstance has been included, namely when “*the embezzled items were of artistic, historical, cultural or scientific value; or if they were goods intended to alleviate a public catastrophe*”.

B. Misuse embezzlement (*malversación de uso*) (Article 432 bis CC)

Likewise, Article 432 bis CC makes it an offence for any authority or public official who, without the intention of appropriating it, uses for private purposes the public assets placed in their charge by reason of their functions or on the occasion of these functions.

If the public assets that were used privately are not returned within 10 days of the start of the criminal proceedings, the same penalty as that set out in Article 432 CC will be imposed (as it will be presumed that their actions were for gain in such a case).

C. Budgetary embezzlement (*malversación presupuestaria*) (Article 433 CC)

The third step of the reform consists of giving the administered public assets a public use other than the one for which they were intended. This type of budgetary misappropriation or expenditure that is difficult to justify leads to imprisonment of the perpetrator if there has been serious damage or hindrance to the service for which the public funds are intended.

D. Definition of public assets (Article 433 ter CC)

In order to provide greater legal certainty, OL 14/2022 introduced, through Article 433 ter CC, the concept of public assets for criminal purposes, which will be understood to include “*all assets and rights, with an economic or property content, that belong to public administrations*”.

E. Attenuation of penalties under the offence of embezzlement (Article 434 CC)

Article 434 CC includes the attenuated type of embezzlement in similar terms to the previous regulation. The main difference between the two is the increase in the requirements for obtaining a reduced penalty, so that under the new rule, it will be necessary to have “*effectively and fully repaired the damage caused*” before the start of the oral trial. In addition, attenuation is conditional on active and effective cooperation with the authorities or their agents.

7. Unjust enrichment offence

A new offence has been introduced under fraud and illegal exactions (Article 438 bis CC), when committed by a civil servant or authority who sees their assets increase by more than 250,000 euros during their term of office and up to 5 years after they have ceased to hold office, provided that they do not justify such enrichment.

8. Offences against public order

The reform introduced by OL 14/2022 abolishes the former offence of sedition. The offence of public disorder has therefore been amended to include several of the conducts that previously came under the offence of sedition with lower penalties.

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