Criminal Law Risks in the Corporate Context

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Risk, from a pragmatic perspective, may be defined as the possibility that a given event might occur. Thus, risk may represent both a threat, in a negative scenario, and an opportunity, in a positive one. In this context, the risk inherent in penal liability for the practice of a crime is the sentence, the sanction, to be imposed in necessary and sufficient measure to punish and prevent the offence. However, though the sentence is the ineluctable consequence of penal liability and clearly a risk, there is a galaxy of other coercive measure that orbit the gravitational center of the offence which also threaten the accused or those merely under investigation. These may include such preliminary measures as asset freezes and seizures and provisional arrest and imprisonment, which, as the name suggests, occurs before any final judgment conviction.

In principle, criminal law risks are not any greater or lesser in degree as a function of the context in which the offence takes place. Generally speaking, the field of work of the subject of a criminal complaint is a neutral factor in the process to establish penal liability. This is because, under the general rules of the Brazilian legal system, liability for a criminal offence may only be attributed (imputed) to a natural person. Exception is naturally made for crimes against the environment in which there is an express legal provision allowing for liability for legal entities, in conjunction or not with the natural persons identified as having practiced the offence.

Stated differently, under the general rule, only an expression of human will (conduct) is relevant from a criminal law perspective. That is, from the purely theoretical perspective of legal scholarship, criminal law risks in the corporate context should elicit no greater concern because a legal entity may not be held criminally liable, except in the highly-restricted context of environmental crimes. This being the case, one might conclude that there are no grounds for any greater apprehension with criminal law risks in the corporate context.

It happens that, though from a purely technical perspective there are no grounds for a greater degree of criminal law risk in the corporate sphere, in practice the scenario is quite different. In fact, in such cases it is easy to see how the investigative process takes on particular characteristics.

In practice, what one sees in concrete business cases in which several persons are involved in the same decision are quite complex impediments to the investigation which must be overcome in order to ascertain the proper penal liability. In such cases, it becomes difficult to identify the agent di-

rectly involved in the criminal conduct – the one who in fact had the decision-making power to practice the crime. In other words, currently company organizations are marked by decentralization of command and control and by the dilution of attributions and responsibilities, such that decisions are often taken by a collegiate body, or, at a minimum, must be validated along a hierarchical chain of authority before being realized, a fact which inevitably raises the degree of difficulty of the investigation, especially as it relates to the authorship of the offence.

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By way of example, let us imagine a police investigation which seeks to solve a crime of tax evasion allegedly engaged in by a corporation's executive committee. The scheme was present in each State in Brazil but lead to the insertion of inaccurate information in the company's books in only two States. Given the chain of suspect individuals involved in decisions related to taxation, how can those who in fact had the power to decide about the illicit conduct engaged in be identified, or how may those who had the power to persuade the employees to execute the fraud be determined?

In order to be able to impute an illicit act to a certain individual or group of persons, who may have in fact collaborated individually through their conduct with the carrying out of the crime, it is necessary to overcome the impediment created by the modern characteristics of the division of labor. As a practical consequence, coercive measures, especially those of a preliminary nature, have become useful tools in criminal investigations whose use has progressively increased in the corporate sphere. It should also be noted that asset freezes, the placing of holds on bank accounts, and provisional arrest and imprisonment have become ever more utilized as instruments to guarantee the success of complex criminal investigations.

It is true that precedents of the Brazilian Federal Supreme Court may clear that the objective fact of an individual holding a management or high-administrative position is not enough, in and of itself, to authorize a presumption of culpability: in the criminal sphere, the presumption remains that of innocence and the burden of proof lies with the accuser. On the other hand, it is not unknown in day to day court practice for many accusations to impute the practice of an offence to an individual not for what he or she has done, but rather due to the position he or she holds. The accused becomes a target for the accusation not for having effectively contributed with his or her conduct to the commission of the offence but, rather, on account of being a partner, manager, compliance officer, or accountant of the company involved in the facts supporting the criminal charge.

In general, the criminal law risks in the corporate context have become ever more real, as illustrated by the recent excesses of the Brazilian judicial author-

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ities. This has been seen both in the use of temporary injunctions in an indiscriminate manner – thus affecting and harming the rights of those who would have been spared by a more careful judicial analysis – and through the use of such measures when they are not warranted, as forms of prior punishment for offences still under investigation. In short, it seems to us that these excesses must be combated when they limit the rights and guarantees enshrined in the Brazilian Constitution and cause irreparable harm to the accused or investigated individuals involved.