THE FIGHT AGAINST FRAUD FROM THE POINT OF VIEW OF THE LEGAL SERVICE OF THE SOCIAL SECURITY ADMINISTRATION

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**Social Protection Reform Project**

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1. INTRODUCTIONS

I.1. Aim and approach.

Considering the patterns and guidelines suggested by the organizers, in the invitation to take part in the study visit of the Chinese delegation to the Ministry of Employment and Social Security, that will take place in Madrid on 2 to 4 September 2015, within the framework of the “Project to Reform Social Protection EU-China”, this speech is going to essentially consist on setting out all the measures where the Legal Service of the Social Security Administration, through the Directorate of the Legal Service and under the higher leadership of the Secretariat of State for Social Security, has had an active participation in matters of fight against fraud and where it intervenes, given its specific field of action.

The presentation is addressed from the approach of all actions (works, proposals of legal reforms and coordination actions) carried out by the Legal Services of the Social Security Administration, to which I refer on grounds of my participation as member of the Work Group set up then in the Directorate of the Legal Service of the Social Security Administration, in matters of Penal Law and fight against fraud in the field of Social Security, and as present Chief Lawyer of the delegated Central Legal Service in the General Fund of Social Security (from now on, TGSS).

Specifically, the new regulation of the offenses against Social Security contained in Organic Law 7/2012 of 27 December will be analysed. The said Organic Law modifies Organic Law 10/1995 of 23 November of the Penal Code, in matters of transparency and fight against fiscal fraud and fraud in Social Security, besides the coordination actions carried out.

The research will be done from the point of view of the gestation and processing, targets sought and general view of the approved measures, ending with the quotation of some of the judicial resolutions where the legal reform has been applied, with the purpose to assess the incidence of the reform.

* 1. Fight against fraud as a guarantee of the sustainability of the Social Security system.

The main problem faced by the Social Security systems, specifically distribution systems like the one of the Spanish Social Security, is that of sustainability.

To these effects, together with other elements of risk, like the ageing of the population and the rise in life expectancy, or the proportion between actives and passives, fraud is shaped as an element of risk for sustainability.

This situation is especially significant in times of economic and financial crisis, like those suffered by Europe in the last years, when the aggression of fraud is one of the most severing elements for the economic potential risks of the Social Security systems.

In this way, the measures of control and fight against fraud and its consequences, besides being able of taking the shape of efficient dissuasive weapons for whoever tries to act on the margin of the system, and as tools of social awareness raising about the justice of the Social Security system solidarity, they have a perfect place among the preventions and provisions that help to correct the economic risks for their sustainability.

The Plan to fight labour and Social Security fraud, contained in the National Reform Programme of Spain for 2012 and approved by the Cabinet on 27 April 2012 to be sent to the European Union and to the European Commission was addressed from this point of view.

Within the economic strategy designed in the Programme, the measures seeking to guarantee the sustainability and the efficiency of the public Social Security system were addressed to three fields of action:

* The viability of the pension system,
* The efficiency in the management of the Social Security,
* And the plan to fight fraud in matters of Social Security.

As the most pernicious and important effect of fraud, the effect on the public funds was highlighted in the mentioned Programme, since, as the income in Social Security is lower, the sustainability of the System is at stake.

In this way, the measures contained in the Plan were designed as instruments “to end given behaviours that give rise to income deficits in the resources of the Social Security system, with a decrease in the economic rights for the workers, undue and unfair access to social benefits and unfair competition with the enterprise that meet their obligations”.

Thus, the correcting effect of the damage to social and labour rights of the workers, and the prevention of unfair competition with the enterprises that fulfil their obligations, the Plan of fight against fraud was given an eminently economic objective, that of reinforcing the fulfilment of the obligations by workers and employers, to boost the appearance of the irregular economy and to avoid the receipt of benefits and allowances, which de-stabilize the social protection system.

In order to achieve the goals set out, the Plan prepared measures which would cover the two big fields of the system, the field of collecting contributions and the field of benefits, as spaces where the fraud takes place. The planned measures focused on:

* Detection of irregular employment,
* Measures to fight fraud in the acknowledgement and receipt of Social Security benefits,
* And measures of control and follow-up of bonuses and other incentives in matters of Social Security.

These measures took shape in legal reforms. Among these, the reform of the Criminal Code in matter of transparency and fight against fiscal fraud and fraud against Social Security deserves to be highlighted, and we will later refer to it, or reforms of organization and coordination actions.

To these effects, the successive reform programmes in Spain in the years 2013, 2014 and 2015 have continued to implement the Plan of fight against fraud designed in 2012, have reinforced the organizational measures and promoted the collaboration between institutions in order to fight fraud.

To be specific, in the National Reform Programme of Spain for the year 2015, the continuity given to the actions included in the Plan to fight fraud 2012-2013 is highlighted, together with the conclusion of several collaboration agreements between institutions, in order to intensify the efficiency in the mentioned matter of fight against fraud, as well as the adoption of new additional measures, like the introduction of the new system for the payment of contributions to the enterprises or the new law ordering the Labour Inspectorate.

In the mentioned Programme for 2015, an assessment of the Plan to fight fraud is made, highlighting that the global economic impact of the actions against irregular employment and fraud to Social Security is estimated in 9,271 million euros (1,643 million euros between January and May 2014) since the approval of the Plan. On the other hand, as qualitative description of the impact since the approval of the Plan, it is underlined that 203,206 irregular jobs have been discovered and 88,354 fictitious inscriptions with Social Security have been annulled.

We can conclude therefore that the contribution of the policies against fraud to the sustainability of the Social Security system is more than obvious.

1. INCIDENCE OF THE LEGAL SERVICE OF THE SOCIAL SECURITY ADMINISTRATION ACTION ON THE FIGHT AGAINST FRAUD

II.1. The legal service of the Social Security Administration.

In the Spanish legislation, the legal assistance of the Social Security Administration, consisting on the legal advice and the representation and defence in trial in the field of the managing Entities and common Services of the Social Security Administration, concerns the High Corps of Lawyers of the Social Security Administration, integrated in the Legal Service of the Social Security Administration, an administrative organization with the nature of common service, without an own legal status, directly depending from the Secretariat of State for Social Security.

Given its functions, the action of the Legal Service of the Social Security Administration in the field of fight against fraud in defence of the interests of the Social Security System is essential, to which the added value of being made up by a specific and high corps of officials, lawyers specialized in the matter of Social Security, and therefore experts in the mechanisms of action of fraud to the System, of the ways of answering to them, or of the deficiencies and gaps to react must be added. In fact, a great part of the launched projects and of the measures against fraud that are going to be set out in this paper start from the proposals made by the Lawyers of the Social Security Administration, as a result of their experience in representation and defence of its interests, and from the analysis of the problems made by the delegated Legal Services or remitted and set out by them in order to allow for the measures to correct them.

II.2.Actions in matter of fight against fraud. Reforms of the rules

As we have already said, the Legal Service of the Social Security Administration, through the Dircetorate of the Legal Service and under the higher direction of the Secretariat of State for Social Security, has had an active participation in the Plan to fight fraud, formulating and proposing measures for this purpose within the framework of the National Reform Plan that started with the Plan for the year 2012.

For this purpose, research was carried out in the Legal Service, both to analyse the evolution of fraud to the Social Security System and to correct the main deficiencies detected concerning the exercise of the penal action in its representation and defence.

In the field of Social Security in Spain, fraud traditionally consisted on a behaviour that tried to elude the system, acting apart from it with the aim to avoid the payment of the due contributions; in fact, offense against Social Security was originally shaped as an offense in contributions to Social Security that attacked the collecting side of the Social Security System. The evolution, on the contrary, has meant a change, with the appearance of new kinds of fraud that act from the inside, with those who, without meeting the requirements, try to illegitimately obtain the benefits, now joining it.

This is the case of the new and abundant kind of fraud to the Social Security System consisting on the inscription of the so called fictitious enterprises. This fraud consists in general terms in the setting up of simulated enterprises with no activity, which unduly inscribe themselves in the Social Security System and, in return for a financial consideration, register supposed workers, sometimes massive numbers, without any real services being done, usually giving rise to contribution gaps or lack of payments, with the final and fraudulent purpose to regulate the situation in Spain of false workers, through the corresponding residence and work permits, to complete grace periods to obtain the benefits, or to unduly obtain benefits from the System considered to be minor as they need few grace periods (temporary incapacity, unemployment or maternity benefits, mainly).

Together with these cases of fictitious enterprises or of absolute simulation, there are equally other kinds of fraud of relative simulation that does not directly affect the inscription of the enterprise, since they are enterprises with activity, but that simulate labour relations, registering workers with the same previously described purposes.

In view of these new kinds of fraud, to launch or, if this is not the case, to find administrative mechanisms against it from the firstsigns, before inscriptions of enterprises that do not meet the requirements for their inclusion in the System or concerning undue registrations of workers, allows to develop a policy to prevent the immediate economic consequences of the defrauding activity, in this way preventing their final aim, which is the fraud of those benefits which would be unduly received.

Thus, and concerning the analysis of the evolution of fraud to the Social Security System and the answers to it, in the research carried out by the Legal Service it was started from the premise that an appropriate and efficient reaction must be preceded by a permanent updating of the answers, which means not only to resort to already existing legal penal measures but also, in some cases, to carry out the due legislative reforms that update the legislation to offer appropriate legal solutions, as the existing legal mechanisms are sometimes taken into account by the authors of fraud, who act in advance of them.

It has been understood that the policy against fraud must cover the study of administrative action proposals against incipient fraud, in a way that, before the first evidences of fraudulent actions against the Social Security System, we are able to articulate mechanisms of reaction that reduce consequences to the minimum or, in some cases, even give rise to the prevention of fraud itself. In this sense, the experience shows us that the speed, immediateness and coordination in the action is crucial for the prevention or, as appropriate, the prosecution of fraud.

In research carried out against the new kinds of fraud and the mechanisms of answer to it, the method used has been to reason the route for possible administrative answers in view of what we could call defrauding process, distinguishing in the analysis between the legal proposals of previous action, concerning the actions of categorizing the enterprises and the workers or, concerning the collecting process, and legal proposals of actions relating to the acknowledgement of benefits.

As the possible penal answers are concerned, it has been started from the premise that the penal law is the last ratio and, taking into account the principles that rule our penal law, resorting to it should be done with the needed caution and only when the administrative mechanisms would be insufficient, or inefficient.

In this field of the penal actions against fraud to Social Security, given legislative reforms were considered necessary to give an appropriate answer to the evolution of fraud, covering:

The correction of malfunctions and distortions detected in the traditional regulation of the offense against Social Security, that has shown itself as inefficient to prosecute given fraudulent behaviours, in such a way that an appropriate answer could be given to the evolution of the traditional fraud in matter of contributions, because of the sophistication it achieved with the creation and use of networks and structures to avoid the payment.

* And the new kinds of fraud in the fraudulent receipt of benefits (fictitious enterprises).

In relation to the last aspect, it arose the convenience of a specific or independent regulation of the defrauded benefits of the Social Security System, addressing fraud in its two sides, collectionof contributions and receipt of benefits.

The reform of this aspect found a dual justification: on the one hand, to extract the fraud of benefit behaviours from the specific description of fraud in subsidies (opposing given case law interpretations), and, on the other hand, to give a strong answer to the new kind of fraud through the creation of fictitious enterprises, thus preventing the impunity of given behaviours of massive fraud, without not regulating all other cases of illegal receipt of benefits.

These legislative reforms culminated in the modification accomplished by the Organic Law 7/2012 of 27 December, modifying Organic Law 10/1995 of 23 November of the Penal Code in matters of transparency and fight against fiscal fraud and fraud against Social Security (BOE 28 December 2012), which later will be object of a specific analysis.

II.3 Promotion of the administrative coordination and collaboration.-

In order to fight fraud, the need to promote coordination between the administrative entities involved, mainly the National Institute for Social Security (managing entity in charge of acknowledging benefits) and the General Fund of Social Security (TGSS) (common service for collection and payment) was addressed, as well as that of reinforcing the duty of collaborating in the field of the Social Security Administration.

The actions in this field were carried out not only in the internal field but also in the external field, with other Public Administrations involved.

In the internal field of the Social Security Administration actions of coordination were carried out with the managing Entities and with the General Fund of Social Security, for the control of the fictitious enterprises and of the fraudulent registrations with Social Security.

Externally, actions were planned in different directions with the Investigation Section of the Social Security, with the Inspectorate for Labour and Social Security and with the Attorney General.

With the Investigation Section of the Social Security, as special police unit, meetings are being held and a way of direct communication has been achieved, which has given rise to knowing several investigation police operations.

For its part, with the Inspectorate of labour and Social Security, the permanent collaboration stage has culminated in the signing of the “joint instruction of the Directorate General of Labour and Social Security and of the Legal Service of the Social Security Administration to establish a framework for coordination in the field of criminal illicit acts against Social Security”, on 4 March 2013. From this cooperation – as set out in the instruction – a field for collaboration in two levels, provincial and central, arises. At provincial level, by naming peripheral representatives (in our case, our coordinating lawyers), which implies a permanent way or link. At central level, by setting up a work group with three peripheral representatives of the labour inspectorate and three of the Legal Services. The collaboration at central level has materialized in the preparation of the Annex to the Joint Instruction, dated 16 September 2013, where criteria are established concerning the assessment of behaviours categorised as offenses, and its purpose is to establish common criteria and procedural strategies, which will be periodically examined in view of the evolution of case law.

In the external field are focused also the coordination actions carried out by the Attorney General and by the Legal Service of the Social Security Administration, in the different territorial fields and in concurrent matters, specially concerning the prosecution of offenses against Social Security. It has been realized in a specific duty of collaboration by the provincial delegated Legal Services with the attorneys in charge of the cases, favouring work meetings in the provincial field. To these effects, coordinating lawyers in penal matter, with an operating nature, have been named, and with the aim to provide information, support to investigation, design of the legal strategy, inter-provincial collaboration, as well as link with the Directorate of the Legal Service in respect to these coordination actions.

1. ORGANIC LAW 7/2012 OF 27 DECEMBER MODIFYING ORGANIC LAW 10/1995 OF 23 NOVEMBER OF THE PENAL CODE, IN MATTER OF TRANSPARENCY AND FIGHT AGAINST FISCAL FRAUD AND FRAUD AGAINST SOCIAL SECURITY (BOE OF 28 DECEMBER 2012).

This rule contains a deep modification of the offenses against the PublFinance and against the Social Security and its wording was the result of a consensus between the Ministry of Finance and the Ministry of Employment and Social Security.

As it had already happened with the initial regulation of the offense against Social Security of 1995, with OL 7/2012, the text of OL 7/2012 had an independent procedure from the global reform of the Penal Code, which has culminated in Organic Law 1/2015 of 30 May, in force since 1 July 2015, as a result of the priority given to all instruments of fight against fraud in the National Reform Plans.

As the offenses against Social Security are concerned, with OL 7/2012 an important review of article 307 of the Penal Code, regulating offense against Social Security in its side of contributions fraud, was carried out. An article 307 bis is introduced to regulate the fraud in benefits, which is shaped as the reverse of the regulation of fraud in contributions, with this precept, article 307 ter, being the landmark, as has being required by the doctrine of regulating for the first time, in a specific and separated manner, the fraud of benefits of the Social Security System, which is now shaped as a special offense.

The general objective of the reform was to improve the efficiency of the mechanisms for the control of public income and expense, mainly against the new and developed criminal practices that put budgetary and financial stability and sustainability of the System at stake, offering a strong answer against fraud to Social Security in two aspects, collection of contributions and payment of benefits.

III.1. Offense against Social Security. Article 307 of the Penal Code.

Article 307 provides:

“1. Who, by way of action or of omission, commits fraud against Social Security by evading payment of the contributions to it, and items of joint collection, unduly obtaining reimbursements of them or enjoying deductions for whatever reason likewise in undue form, provided the amount of the defrauded contributions or of the undue reimbursements or deductions exceeds fifty thousand euros, will be punished with prison from one to five years and fine of so much to six times the mentioned amount, except if he or she had regularized his or her situation before the Social Security under the terms of paragraph 3 of this article.

The mere submission of the contribution documents does not exclude fraud when this is accredited by other facts.

Besides the mentioned punishments, the offender will be deprived of the possibility to obtain public subsidies or aids and of the entitlement to enjoy the fiscal benefits of incentives of the Social Security for a period of three to six years.

2. In order to determine the amount mentioned in the previous paragraph, it will be the total defrauded amount for four natural years.

3. The situation before the Social Security will be considered as regularized when the person obliged to it had acknowledged and paid the total amount due before being notified that inspecting actions are going to be started to determine the said debts or, if such actions had not taken place, before the Prosecutor or the Social Security Lawyer demands or denounces him or her, or before the Prosecutor or the Judge carry out actions that allow him or her to formally know that the proceedings have been instituted.

Likewise, the effects of the regularization foreseen in the previous paragraph shall be applicable when the debts have been paid to Social Security, once the entitlement of the Administration to determine them by administrative way has prescribed.

The regularization of the situation before the Social Security will prevent the said subject from being prosecuted for the possible accounting irregularities and other instrumental false acts which, exclusively concerning the regularized debt, he or she might have committed before regularizing his or her situation.

4. The existence of a penal procedure for an offense against Social Security will not halt the administrative procedure for the settlement and the payment of the debt to Social Security, except if the Judge decides it after a guarantee has been given. In case no guarantee, totally or partially, can be given, the Judge may exceptionally decide the suspension with total or partial dispensation of the guarantees, in case it would be appreciated that the implementation could give rise to irreparable damages or damages of very difficult reparation. The administrative settlement will finally adjust to the decision of the penal procedure.

5. Judges and Courts may impose the obliged to Social Security or author of the offense a penalty of one or two degrees less, provided that he or she pays the debts to Social Security and judicially acknowledges the facts before two months have elapsed since he or she has been summoned as accused. This will be equally applicable with respect to other participants in the offense other than the debtor to Social Security or author of the offense, if they actively collaborate to obtain the decisive evidences to identify or catch other responsible people, for the offense to be completely solved or to find out the assets of the obliged to Social Security or those of other responsible for the offense.

6. In the procedures for the offense dealt with in this article, for the implementation of the fine penalty and the civil responsibility, which will cover the amount of the debt to Social Security not settled by the Administration on grounds of prescription or other legal cause, including the default interests, the Judges and Courts will require the aid of the Social Security Administration services, which will demand them through the compel payment administrative procedure.”

- The objective of the reform.

The objective of the reform in this field sought the technical improvement of this kind of offense, in order to obtain a higher efficiency in the fight against fraud in the field of Social Security in the matter of collection of contributions.

* Generally speaking, we can highlight the following aspects of its contents:

1.Reduction of the amount establishing the offense as objective condition to be punished to 50,000 euros.

The previous regulation of the offense against Social Security had shown itself as insufficient and inefficient in practice. The previous amount of 120,000 euros was obviously excessive, as it had shown its lack of operational nature against these criminal practices. Consequently, it was considered to be appropriate to reduce the economic threshold from which these defrauding behaviours that previously were object only of penal sanction where other elements of offensive nature, like punishable bankruptcy, were present. Now they can be prosecuted.

The amount tries to approach the Spanish regulation to the line contained in European compared law and in the Community context. Thus, article 2 of the Brussels Agreement of 25 July 1995, relating to the protection of the financial interests of the European Communities, understands that it should be considered as severe fraud affecting the financial interests of the European Union any fraud affecting a minimum amount of 50,000 euros.

Likewise and concerning the amount,, its regulation is homogenized with that contained in the (at the time) Bill for the reform of the Penal Code (today OL 1/2015) of the “criminal deception” offense, included as severed offense where the value of the fraud exceeds 50,000 euros, and of the offense of “frustrated implementation”, where the penalty is severed if the debt is of Social Security or Public Finance.

2.Determination of the amount. Term of four natural years.

The fraud must be higher than 50,000 euros in four natural years.

Taking into account that this kind of offensive behaviours are carried out through a continuous action of fraud, the term of prescription of the action to demand the payment of the debts for contributions to Social Security has been raised, which does not mean that it has to be waited until the end of the term, but it is understood that the offense is committed at the time when the amount of the fraud during a period of four years is exceeded.

3.The regularization of the situation before Social Security as an element of the offense nd not as an excuse to be absolved.

Defining the regularization of the debt to Social Security as an element of the offense instead of doing it as an excuse to be absolved is one of the novelties introduced in article 307. This avoids either denouncing or proceeding the obliged who, on a voluntary and complete basis, regularize their situation before the Social Security. Both the Attorney General and the Supreme Court describe this way regularization as a full return to legality.

The return to legality meant by the regularization covers both the offense against Social Security and the accounting irregularities and other false accts that coincide with the offense, and these effects are extended where the fraud does not reach the amount to be an offense against Social Security, due to the application of final provision 5, as, if regularization was not possible, the false acts would be in this case prosecutable.

It contains a clear provision of the concept “regularization”, in a way that the situation before the Social Security is considered as regularized when the obliged fully acknowledges and pays the debt before the inspecting procedure starts, it is denounced or demanded, or the judge or the prosecutor start actions that allow the obliged to formally know that investigation procedures are going to be practiced.

4. The mere submission of contribution documents does not exclude the existence of fraud.

The offense against Social Security in its modality of contributions fraud is an eminently fraudulent offense, since in Spain there is no penalty of prison for debts. In relation to this subjective aspect, judicial interpretations had arisen that considered that the mere submission of contribution documents excluded the subjective element of the injustice, without assessing whether they contained incorrect, inexact or false data. With this modification in the precept it is tried to include an authentic interpretation of the rule and to give an answer to these judicial interpretations, thus giving a solution to the problems arisen from the consideration as reason for excluding from the definition of the offense the mere submission of the contribution documents, without any further research on the subjective element of the injustice.

5. Imposing on the responsible subject the penalties of loss of the possibility to obtain subsidies and fiscal or Social Security advantages or incentives.

It is considered to be appropriate, both for the ordinary offense and for the severed offense, to expressly include the imposition to the responsible of the penalties of loss of the possibility to obtain public subsidies or aids and of the right to enjoy the fiscal or Social Security advantages or incentives, whose duration will vary according to the severity, as is the case with the offense against the Public Finance.

6. The existence of the penal procedure will not suspend the administrative collection procedure.

This provision seeks to remove the favourable treatment to the offenders of halting the collecting action of the Public Administrations due to the existence of a penal procedure, in this way increasing the possibility of collecting the debt.

7. Collection through the administrative forced collection procedure of the final penalty and the civil responsibility derived from the offense.

Just as it happens with the fiscal offense by the Tax Agency in the case of procedural costs, in the case of the offense against Social Security, the General Fund of Social Security will collect the penalty fine and the civil responsibility charge derived from the offense through the forced collection administrative procedure.

8. Regulation of a mitigated case for repentant and collaborators

The penalty is reduced by one or two degrees where the author (repentant) pays the debt and acknowledges the facts before two months have elapsed since the author was summoned as accused.

The reduction of the penalty by one or two degrees is equally applicable to other participants (collaborators) who help to clarify the facts, to find out the author or responsible, or to find out the wealth of them.

The objective is that the supposed guilty acknowledges the offense and totally pays the debt to Social Security, as well as giving incentives to collaboration with the Authorities at clarifying the facts, identifying or catching the responsible persons.

III.2. New article 307 bis. Severed offense against Social Security in the modality of fraud in the payment of contributions.

-Article 307 bis:

“1. The offense against Social Security will be punished with the penalty of prison from two to six years and a fine from double to six times the amount where in the commission of the offense some of the following circumstances would be present:

a)When the amount of the due contributions or of the undue reimbursements or deductions exceeds the amount of one hundred twenty thousand euros.

b)That the offense of fraud has been committed within a criminal organization or group.

c)That the use of interposed physical or legal persons or entities without legal status, businesses or fiduciary instruments or tax havens or territories of nil taxation hides or impairs the identity of the obliged or of the responsible of the offense before the Social Security, the determination of the defrauded amount or of the wealth of the obliged person or of the responsible for the offense before the Social Security.

2. All other provisions contained in article 307 will be applicable to the cases described in this article.

3. In these cases, besides the penalties mentioned, the loss of the possibility to obtain public subsidies or aids, and the right to enjoy the fiscal or Social Security-related advantages or incentives during a period from four to eight years shall be imposed on the responsible person.

-The objective of the reform:

The objective of the reform in this field is the higher penalty and penal reproach to especially severe behaviours on grounds of the unpaid amount or other concurrent circumstances of special entity, like the use of networks, interposed entities or criminal groups.

-Generally speaking, we highlight the following aspects of its content:

1. Circumstances determining the severity.

The severity is determined by the amount, established in the previous basic type, i.e., 120,000 €, or other concurrent circumstances, like the use of networks, interposed persons or criminal groups.

2. Increase of the term of prescription of the offense to 10 years.

The increase of the maximum penalty to 6 years of prison brings about with it that, due to application of article 131 of the Penal Code, the term of prescription of the offense is raised to 10 years.

3. Implementation of all other provisions of the offense against Social Security.

All other provisions contained in article 307 relating to the determination of the amount in the term of four years, regularization as an excuse to be absolved, non suspension of the forced payment administrative procedure, and the possibility of imposing a penalty of one or two degrees less to collaborators and repentant persons (it would be the mitigated case for the severed offense) are applicable to this offense.

III.3. New article 307 ter. Fraud in benefits of the Social Security System.

-Article 307 ter:

“1. Who obtains, for him or her or for other, the enjoyment of benefits of the Social Security System, the undue extension of it, or facilitates its enjoyment to others, by means of error induced through the simulation or distortion of the facts, or conscious hiding of facts on which he or she is obliged to inform, in this way causing a damage to the Public Administration, will be punished with the penalty of six months to three years of prison.

Where the facts, in view of the defrauded amount, of the means used or of the personal circumstances of the author, are not especially severe, they will be punished with a fine from the same amount to six times it.

Besides the already mentioned penalties, the loss of the possibility to obtain subsidies and the entitlement to enjoy fiscal or Social Security advantages or reductions during the period from three to six years will be imposed upon the responsible.

2. Where the value of the benefits was higher than fifty thousand euros or any of the circumstances referred to in letters b) or c) of paragraph 1 of article 307 bis are concurrent, a penalty of prison from two to six years and a fine from as much the defrauded amount to six times it will be imposed.

In these cases, besides the mentioned penalties, the loss of the possibility to obtain subsidies or the right to enjoy fiscal or Social Security advantages or incentives during the period from four to eight years will be imposed.

3. The person who reimburses an amount equivalent to the valued of the benefit increased by an annual interest equivalent to the legal interest of money increased by two percentage points, from the moment when he or she received them, before the decision of inspection and control actions has been notified to him or her, and, if the said actions had already taken place, before the Prosecutor, the State Lawyer, the Social Security Lawyer, or the representative of the autonomic or local Administration concerned demands or denounces him or her, or before the Prosecutor or the Judge carry out actions that allow him or her to formally know that actions have been started, shall be exempt from the criminal responsibility in relation to the behaviours described in the previous paragraphs.

The exemption of penal responsibility provided for in the previous paragraph will equally reach the said subject for the possible instrumental false facts which, exclusively in relation to the reimbursed defrauded benefits, he or she might have committed before the regularization of the situation.

4. The existence of a penal procedure for one of the offenses of paragraphs 1 and 2 of this article, shall not prevent the competent Administration from requiring the reimbursement by administrative way of the unduly obtained benefits. The amount to be reimbursed will be understood as provisionally determined by the Administration, and will later adjust to the amount finally decided in the criminal procedure.

The criminal procedure will either not halt the action of collection by the competent Administration, which will be able to start the actions aimed at the collection, except if the Judge, ex officio or at the request of a party, had decided the suspension of the implementation actions after a guarantee has been given. If no guarantee, totally or partially, could have been given, the Judge may exceptionally decide the suspension with total or partial exemption of guarantee, if he considered that the implementation would cause irreparable or very difficult to repair damages.

5. In the procedures for the offense provided for in this article, and for the implementation of the penalty of fine and of civil responsibility, the Judges and the Courts will request the assistance of the Social Security Administration services, which will require them through the administrative procedure of forced payment.

6. The provisions in paragraph 5 of article 307 of the Penal Code shall be applied to the cases regulated in this article”.

-The objective of the reform:

The reform in this field sought, first, to remove these behaviours of fraud in the receipt of benefits from the criminal type of fraud in subsidies, as, due an old concept of subsidy and to the case law interpretations to this respect, there were decisions that included the fraud in benefits in the offense of fraud in subsidies, and therefore it was only an offense if the defrauded amount was higher than 120,000€. Secondly, it also sought that a strong answer could be given to the new modalities of fraud, that have been detected more and more frequently, consisting on authentic criminal organized networks and on the so called fictitious enterprises, to which we have already referred.

-Concerning the content of the reform, we highlight the following aspects:

1. A specific type is introduced to punish the frauds in benefits of the Social Security System. This type is similar to the swindle type.

This specific regulation does not mean that the behaviours were previously not defined, as they could be perfectly included in the swindle offense, but the new regulation allows to give the same penal treatment to all behaviours of fraud in the receipt of benefits of the Social Security System, being subsumed in a special type, similar to the swindle offense, and therefore regardless of the concurrence or not of the objective condition of being possibly punished only if they exceed a given economic amount.

2. Regulation of a mitigated type.

In order to mitigate the rigor of the rule, and in order to avoid adverse effects not sought in the reform, a mitigated case is foreseen which will be punished with a fine where the facts, in view of the defrauded amount, of the means used, and of the circumstances of the author, are not especially severe.

3. Regulation of a severed type.

In an analogous way to the case foreseen in article 307 bis, a severed type is foreseen as an answer to the specially severe frauds, on grounds of the amount (50,000 euros, like swindle), or organized networks or criminal organizations, in a way that the behaviours of the “·fictitious enterprises” are punished.

III.4. Interesting judicial decisions.

According to its Second Final Provision, Organic Law 7/2012 entered into force on 17 January, which means that it only may be applied to cases occurred after this date or to those previously occurred and in respect to which the new regulation can be considered as the most favourable penal law. Consequently, the judicial decisions where it has been applied are few, as the time elapsed is short. In fact, in the few sentences where it has been applied, it has been so by retroactive application, because it was the most favourable in the specific case.

-However, we highlight the following sentences of interest in the matter:

-Sentence of the Penal Division of the Supreme Court (TS) of 28 January 2015.

The SC confirms the sentence of the Provincial Court of Valencia of 5 May 2014, where, although the rule is not applicable, an analysis is made of the OL 7/2012 of 27 December concerning the definition ex novo of the Social Security benefits fraud.

The Supreme Court points out that the objective of the reform, contained in the declaration of motives of the Law, is to provide “a differentiated penal treatment to the fraudulent receipt of aids and subsidies, that offers an efficient answer as compared to the cases of fraud with serious damage to the Social Security wealth”, underlining that it responds to the objective of removing the fraudulent behaviours in relation to the Social Security benefits from the field of article 308 PC, fraud in subsidies, a type to which the case law of the Court, since its plenary session of 15 February 2002, readdressed the fraud affecting the unemployment allowance, subject to an objective condition of being possibly prosecuted linked to the amount. However, it points out, when it was about pensions, the Court readdressed the cases of fraud to the swindle offense. Thus, the new article 307 ter is built in the set of rules as a special law in respect to the swindle offense in frauds affecting the wealth of Social Security through its different benefits.

-Sentence of the Provincial Court of Granada of 8 March 2003, relating to the so called OPERACIÓN NOTA.

The sentence number 184/2013 of 8 March is the first sentence known which applies to the authors of the offense of fraud in benefits to the Social Security System article 307 ter of the PC, introduced by the reform carried out by Organic Law 7/2012 of 27 December, and condemns them.

The organizers or promoters of the network or fictitious enterprise as authors of an offense of fraud, severed type, against article 307 ter paragraph 2, in relation to article 307 bis c) are condemned. Likewise, the supposed workers, as authors of the offense of fraud in benefits of article 307 ter, paragraph 1, basic type, were condemned too.

Besides the solidary sentence of the authors to the payment of the civil responsibility to the National Public Employment Service (SEPE), it is decided to delegate the GFSS to promote the declaration of nullity of the periods of fraudulent inscription in the fictitious enterprises, to the effects derived from inscription with the Social Security System.

The sentence declares that it has been proven that the accused and finally sentenced, members of the same family and environment, made a plan directly aimed at achieving in a fraudulent way and through deceit the receipt of unemployment benefits and allowances, through the creation of a network of societies with the purpose to defraud the SEPE and the TGSS for an undetermined amount of money which in each case the supposed worker paid. It is likewise declared proven that they resorted to two interposed persons, a drug addict and somebody devoted to a marginal activity of scrap metal collection, for these purposes, whom they registered with Social Security as individual entrepreneurs with the corresponding seats, without them knowing it, It is proven that the mentioned enterprises had no activity, were impossible to spot, and had neither seats or real fiscal domiciles, or work centres, or material means to render services in the building sector, the activity to which they fictitiously were devoted.

The mentioned accused, fully simulating labour relations and acquainted with the fact that no services were going to be rendered, registered numerous workers with Social Security, after preparing fictitious work contracts that were submitted to the SEPE, keeping the workers in this situation during the sufficient time to accede to unemployment benefits and allowances, and without ever paying the corresponding contributions to Social Security.

The accused equally simulated the end of the labour relations by submitting to the SEPE the necessary documents to attain their objectives, a documentation in whose preparation the supposed workers participated, in a way that they received unemployment benefits and allowances and generated grace periods for the future receipt of unemployment and Social Security benefits.

-Sentence number 199/2013 of 22 May of the Penal Court of Valencia.

It is the second definitive sentence known that has been implemented, and it condemns the authors of the offense against Social Security in its modality of fraud in contributions, severed type of article 307 bis of the PC, introduced by the reform achieved by Organic Law 7/2012 of 27 December.

An entrepreneur and his daughter, devoted to building and innovation of houses, were sentenced as authors of an offense against Social Security, severed type, as it has been proven that they committed a fraud against Social Security by defrauding 866,284.14 euros in contributions due to the General Scheme of Social Security between the years 2002 and 2007.

Besides the prison and accessory disqualification penalties, the sentence has imposed a fine of 1,800,000€ and has sentenced the authors to pay a joint and solidary indemnity to the General Fund of Social Security as civil responsibility of 866,284.14€ plus interests in arrears and the costs caused to the private prosecution.

Concerning the facts that constitute an offense, the sentence declares it proven that, as a modus operandi, the accused and finally sentenced, in order to elude their responsibilities and obligations towards the General Fund of Social Security, devised the setting up of successive societies for the different works they made, in a way that they successively opened and closed different enterprises where they employed the same workers, always leaving the contributions of the general scheme without paying them, sometimes placing as figureheads the wife and mother, and the son and brother of the condemned. As well as a worker of the enterprise, who have been absolved because they were not aware of the elusive intention of the condemned authors.

It was likewise declared proven that, by using the network of enterprises, one after each other, the accused failed to pay the contributions to Social Security, both employers and workers contributions, although they had retained them, or they declared them but didn’t pay, thus trying to frustrate the collection of the General Fund of Social Security, for whose effectivity and in order to prevent spotting the true responsible of it, they carried out continuous changes of seat, to then abandon it. They then carried out the effective end of activity without deregistering the workers with Social Security, in this way frustrating the possible spotting by the Labour Inspectorate in the seat, in whose domicile the enterprises were unknown and in ignored domicile.

III.5. Incidence of the reform

As we have previously said, Organic Law 7/2012 entered into force on 17 January, and it is therefore soon to do a definitive assessment of the incidence of the reform.

However, and to these effects, the assessment made by the Directorate of the Legal Service of the Social Security Administration is significant. In its information note of 11 June 2014, and concerning the penal procedures where the Social Security Administration was present after the reform accomplished by the Organic Law 7/2012.

In the said note, prepared at the initiative of the Secretariat of State for Social Security in order to include it in the report for the assessment of the Plan to fight irregular employment and fraud to Social Security, and in order to assess the incidence in this field of the reform made, although starting from the fact that it only had been in force for a short time, it is concluded that an impact of the reform or dissuasive force of the reform as exemplary method had been observed. The report points out that it is not about increasing the number or penal procedures, but of improving the result of them, being more efficient in the fight against fraud, what is detected in the increase of condemning sentences after the entry into force of it.