

# The criminal liability of legal persons: the issue of dissolution

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The courts have had few occasions to rule on the grounds that extinguish the criminal liability of a legal person since such liability was added to the Spanish Criminal Code (SCC). The question of whether criminal liability should be transferred to a legal person who has neither participated nor had any involvement in the offence raises important technical issues from the point of view of the principle of culpability.

Article 130.2 of the SCC provides that, without exception, the transformation, merger, absorption or other division of a legal person does not remove their criminal liability, but instead transfers it to the resulting entity or entities. Furthermore, Article 130.2 SCC establishes that the concealed or apparent dissolution of the legal person does not remove criminal liability when the legal person: (1) continues their economic activity; and (2) the substantial identity of clients, suppliers and employees, or of the most significant part thereof, is maintained.

What is striking is that the criminal legislator lists some commercial transactions that do not extinguish criminal liability – and even transfer or extend it – but does not establish any kind of rule on other types of corporate modifications, such as the sale of the company, or simply its dissolution, or even its judicial dissolution through insolvency proceedings. This leaves the circumstances that have not been explicitly provided for in a sort of limbo. These situations are particularly conflictive as they go beyond criminal liability being transferred from the legal person to the new entity. What they produce is the elimination of the legal person, since as the criminal liability is also removed and can no longer be ‘inherited’.

The purpose of this article is therefore to analyse the matter that was resolved by Order 413/2021 of the Criminal Bench of the National Court (Fourth Section), of 15 July 2021 (the Order).

In this specific case, a company was charged with allegedly committing a certain offence. However, by order of Central Instruction Court no 3 of the National Court, dated 25 January 2021 (the Appealed Order), it was agreed that the entity would not be charged, with the Court considering that the company had been dissolved by the competent court. According to the Appealed Order, this entailed the elimination of its potential criminal liability under Article 130.2 SCC. The Public Prosecutor’s Office and the State Advocate’s Office (the Appellant) appealed this decision, arguing that it is not upon dissolution, but upon liquidation, that the criminal liability of the legal entity is extinguished. The Order, in summary, resolved the appeal by confirming and agreeing with the legal grounds of the Appealed Order.

The legal question arising from the Order is therefore: Is the criminal liability of a legal person extinguished on its dissolution (as the Order states) or is its criminal liability only extinguished after the liquidation of the legal person (as the Appellant claims)?

As we anticipated, the interest in this issue lies with the fact that: (1) there is almost no case law regarding this matter, and none from the Supreme Court of Spain; (2) the Criminal Code is not entirely clear on this matter; and (3) academic opinion is divided with one side in favour of the Appellant of the Order and the other in favour of the grounds used in the Order. We have considered these in more detail below.

## The dissolution of legal persons and criminal liability

### Legal framework of the matter analysed by the Order

The wording of Article 130.2 SCC establishes the causes of extinction of criminal liability, in relation to dissolution: ‘Article 130. Criminal liability is extinguished: [...] *Criminal liability is not extinguished by the concealed or merely apparent dissolution of the legal person*’ (emphasis added).

This must be read in conjunction with Article 33.7.b) SCC, which provides: ‘b) Dissolution of the legal person. *Dissolution shall cause the definitive loss of its legal personality*, as well as of its capacity to act in any way in legal transactions, or to carry out any kind of activity, even if lawful’ (emphasis added).

With that the criminal legal framework concerning the case has been drawn, this article will analyse in detail the two positions that confront each other in the Order.

### The position defended by the Appellant

The Public Prosecutor’s Office and the State Advocate’s Office argued that the dissolved company retains its legal personality while the liquidation is being carried out, as the dissolution opens the liquidation phase. They consider that the criminal liability of the entity is not extinguished until liquidation is complete. The basis for their position lies in non-criminal regulations, specifically Article 371 of Royal Legislative Decree 1/2010, 2 July, which approved the Revised Text of the Spanish Companies Act, which provides that ‘the dissolution of the company opens the liquidation period [...] the dissolved company will retain its legal personality while the liquidation is being carried out’.



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This same position is shared by academic authors such as Alfaro Águila-Real and Quintero Olivares, who go further, arguing that this could even be a mistake by the legislator: 'The legislator's mistake is more serious when examining art 130.2 II SCC. When it says that criminal liability is not extinguished by "covert or merely apparent dissolution", it seems to have clearly confused dissolution with extinction'.<sup>[1]</sup> The thesis they put forward considers dissolution to be solely and exclusively related to the corporate agreement, while extinction (through liquidation) relates to the separate assets held by the entity. According to both authors' theses, as long as the entity exists (which is the case until it is liquidated) it can be held criminally liable. The entity maintains its legal personality until it is liquidated.

Furthermore, to defend their thesis, the authors argue that nothing would prevent the partners of an accused entity from voluntarily agreeing to dissolve it, which demonstrates the absurdity of considering dissolution as the determining legal moment for establishing the extinction of the legal person's criminal liability.

But what does criminal law say in this regard?

## The position defended by the National Court in the grounds of the Order

The grounds of the Order, which are more conservative, are based on the principles of legal certainty and criminal legality. The judges consider that the Criminal Code offers a specific and sufficient regulatory framework for the matter under analysis. In their resolution they criticise the fact that the Appellant has based its appeal on non-criminal regulations, without taking into account the specific criminal regulations that exist in this regard, which are of preferential application, as established in Article 4.1 SCC.

The specific criminal law to which the Order refers to support its decision is found in Articles 130.2 and 33.7(b) SCC. In this way, the Court moved away from extensive interpretations and held that, if the commercial dissolution of the entity was agreed by the competent court, and it was not a disguised dissolution (in the specific case, the Commercial Court declared the insolvency proceedings that led to the dissolution to be unforeseeable), under Article 130.2 SCC, there is a clear extinction of the criminal liability of the entity. The appeal could only be upheld if the Appellant were to provide evidence that the dissolution was covert or apparent, which is an exception to the extinction of the criminal liability of the legal entity in cases of dissolution. Nevertheless, although it is not binding, the fact that the competent court declared the dissolution to be unforeseeable (in this case, Commercial Court No 3 of Alicante), greatly limits the possibility of the criminal jurisdiction classifying the dissolution as apparent or covert.

It must also be emphasised that despite the Order declaring criminal liability to have been extinguished, at no time does it deny that the entity may maintain its legal personality beyond dissolution. Instead, it establishes that, considering the provisions of the Criminal Code, it is upon dissolution that criminal liability disappears, without assessing that there is still a distinct set of assets pending liquidation.

Finally, and this is of great significance, the Order ends by insisting that, despite what has been said with regard to criminal liability, the civil liability that the entity may have incurred through its actions remains in force.

## Conclusion

In the authors' opinion, the position adopted by the National Court in the Order is, in accordance with the principles of criminal legality and legal certainty, the correct response to the situation raised. Some academic authors have also defended this position. Dopico Gómez-Aller states that 'Article 130.2 SCC introduces some considerations related to the extinction of criminal liability by the circumstance most similar to the death of a legal person, namely, the dissolution.'<sup>[2]</sup> It is true that the Appellant's position has some merit since the wording of the Criminal Code is not entirely clear and it is important that the legal concepts are not confusing. However, it would be helpful for the legislator to change the wording of the provisions, so non-criminal regulations do not need to be consulted to resolve the case, bypassing what is established in the Criminal Code.

In this way, and in accordance with the provisions of Articles 130.2 and 33.7(b) SCC, the criminal liability of a legal person is extinguished on the dissolution of the company, provided that this has not been concealed or is not merely apparent. Moreover, the Order has determined that dissolution does not extinguish the possible civil liability of the entity. In Spain, case law is created on the basis of three decisions that interpret a rule in the same way. In this case, as it is an isolated decision (and, in addition, an order rather than a judgment), the issue has not been definitively resolved. It therefore remains to be seen how the case law will develop in future, given the importance of a legal reform that would clarify this issue.

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### Notes

<sup>[1]</sup> Alfaro Águila-Real, Jesús y Quintero Olivares, Gonzalo, 'Dissolution of companies and extinction of the criminal liability of legal persons' (*Disolución de sociedades y extinción de la responsabilidad penal de las personas jurídicas*), Almacén de Derecho, 1 May 2021, <https://almacenederecho.org/disolucion-de-sociedades-y-extincion-de-la-responsabilidad-penal-de-las-personas-juridicas> accessed 6 October 2021.

<sup>[2]</sup> Dopico Gómez-Aller, Jacobo, 'Penal responsibility of juridical persons', (*Responsabilidad penal de las personas jurídicas*) in Norberto J De la Ta, Jacobo Dopico, Juan Antonio Lascurain, Adán Nieto (eds), *Economic and Corporate Criminal Law* (Dykinson 2018, p161).

