Pérez-Llorca

Year in review 2021

White Collar Crime and Investigations

ESP

Index

Editorial

EDITORIAL

Editorial

For the second year running, the Pérez-Llorca White Collar Crime and Investigations team is pleased to present a new edition of our Year in Review, in which we provide a detailed analysis of the most relevant legislative and jurisprudential developments of 2021.

By comparing 2021's legislative advances with those of 2020, we can safely say that, although in this edition we have fewer "star" developments - such as the Preliminary Draft of the Criminal Procedure Law -, this year, we have witnessed the publication of several important texts. One example is the legislation governing the functioning of the European Public Prosecutor's Office in Spain - a newly created body that is already investigating dozens of cases in Spain - or the transposition of the 5th EU Directive on the prevention of money laundering and terrorist financing - which improves prevention measures and enhances the transparency and availability of information on the beneficial owners of companies and other entities without legal personality that act in legal transactions.

The long-awaited transposition of the Whistleblowing Directive into national law - due to be completed before the end of the year - deserves special mention. Although some initiatives that follow the European text were implemented in 2021, such as the creation of the Andalusian Office against Fraud and Corruption, and the establishment of a specific protection regime designed for individuals who file a complaint with this body, to date this transposition has still not been carried out in Spain. When it comes into effect, all companies will undoubtedly need to review their internal policies and procedures - and especially those with a compliance programme - to ensure that they comply with the legislation.

The reality of the current situation shows that the importance of such instruments continues to gain momentum. Few people reading this will be unfamiliar with the implications of the content of Article 31 *bis* of the Spanish Criminal Code for any company operating in Spain - and much has already been written on this issue. Although it is common knowledge that the implementation of a compliance programme continues to be a discretionary decision in Spain, this type of instrument is beginning to become an essential element to access certain public resources - as is the case of the funds of the Recovery, Transformation and Resilience Plan promoted by the European Union to mitigate the economic impact of the COVID-19 crisis.

Once again, we conclude our Year in Review 2021 with a review of the judgments issued in 2021 that we consider most relevant. For obvious reasons, it is impossible to include all the judgments that have been issued in recent months in this short publication, but we hope that the selection we have made will provide some insight into some of the issues that are of interest to all of us.

As a final development, the Year in Review is also published in English. In this regard, we hope to reach as many readers as possible and thus facilitate its wider dissemination.

We hope you find it useful.

Kind regards,

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Regulatory developments

REGULATORY DEVELOPMENTS

Access to **regulatory development**

Regulation of the European Public Prosecutor's Office in Spain

Entry into force of Organic Law 9/2021 of 1 July and the internal rules of procedure of the European Public Prosecutor's Office

A. ENTRY INTO FORCE OF ORGANIC LAW 9/2021

On 3 July 2021, Organic Law 9/2021 of 1 July ("**OL 9/2021**") entered into force, supplementing Council Regulation (EU) 2017/1939 of 12 October 2017, *implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office* (the "**Regulation**") and regulating the procedure to be followed in Spain to investigate crimes against the financial interests of the European Union ("**EU**").

Two particularly important changes have been introduced to Spanish legislation through this new regulation. Firstly, powers to prosecute the aforementioned crimes have been granted to a supranational body, distinct from the Spanish Public Prosecutor's Office and with its own legal personality –the European Public Prosecutor's Office–. Secondly, in these cases, this body has been appointed to direct the investigation instead of the Investigative Courts, thus altering the organising principles of Spanish criminal procedure and, to a certain extent, anticipating the implementation of the new model contained in the Preliminary Draft of the Organic Law on Criminal Procedure, which seeks to assign the management of all criminal investigations to the Spanish Public Prosecutor's Office.

Main new features of OL 9/2021

The main new features introduced by OL 9/2021 are as follows:

1. Jurisdiction of the European Public Prosecutor's Office to investigate certain offences

OL 9/2021 establishes the jurisdiction of the European Public Prosecutor's Office to investigate and prosecute offences against the EU's financial interests in Spain, subject to certain exceptions provided for in the Regulation.

In particular, it is authorised to investigate and prosecute the following offences of the Spanish Criminal Code ("**SCC**"):

(i) Offences against the EU tax authority that do not concern direct national taxes, as defined in Articles 305, 305 *bis* and 306 SCC. In the case of revenue accruing from VAT own resources, the European Public Prosecutor's Office will have jurisdiction only where the facts relate to the territory of two or more Member States and involve a total loss of at least EUR 10 million.

(ii) Fraudulent misappropriation of European subsidies and aid, as defined in Article 308 SCC.

(iii) Money laundering offences involving the proceeds of criminal offences that are detrimental to the EU's financial interests.

(iv) Offences of bribery, embezzlement and those contained in Organic Law 12/1995 of 12 December 1995 on Combatting Smuggling, when they affect the financial interests of the EU.

(v) The offence of participation in a criminal organisation as defined in Article 570 *bis* SCC, where the main activity of the organisation is to commit any of the above offences.

The jurisdiction of the European Public Prosecutor's Office may also be expanded, in accordance with the provisions of the Regulation, to offences inextricably linked to those listed in (i) to (iv) above.

Furthermore, although OL 9/2021 refers to the regulation contained in the current Spanish Criminal Procedure Act ("**CrimPA**"), it exempts the application of the time limits for the duration of criminal investigations provided for in Article 324 of said Act.

2. Jurisdiction of the Spanish High Court

OL 9/2021 grants jurisdiction to the Spanish High Court to prosecute these crimes - with the exception of cases that involve jurisdictional privilege -, through the Central Criminal Courts or the Criminal Chamber, depending on the seriousness of the crime in question.

3. The Supervisory Court in Preliminary Proceedings is introduced

In relation to the provisions established in the Preliminary Draft of the CrimPa, OL 9/2021 orders the creation of the Supervisory Court in Preliminary Proceedings, the main function of which will be to manage the investigative activity of the European Public Prosecutor's Office and whose decisions may be subject to appeal in certain cases.

Given that this court does not currently exist in the Spanish legal system, OL 9/2021 provides that its functions will be assumed by the Central Examining Courts of the Spanish High Court –with the exception of cases that involve jurisdictional privilege–.

The functions attributed to the Supervisory Court in Preliminary Proceedings are as follows:

(i) Authorising investigative measures that restrict fundamental rights.

(ii) Agreeing on personal precautionary measures when the adoption of such measures is reserved to the judicial authority.

(iii) Securing personal sources of evidence against the risk of loss.

(iv) Authorising the secrecy of the investigation and its extension.

Access to **regulatory development**

Regulation of the European Public Prosecutor's Office in Spain

Entry into force of Organic Law 9/2021 of 1 July and the internal rules of procedure of the European Public Prosecutor's Office

(v) Agreeing to the opening of oral proceedings or the dismissal of the case.

(vi) Resolving appeals against decisions made by the European Public Prosecutor's Office.

(vii) Taking appropriate measures for the protection of witnesses and experts.

4. Private prosecution by persons unaffected by the alleged offence is prohibited and the separate exercise of civil actions is allowed

In accordance with the provisions followed in the rest of the European countries that apply the Regulation, OL 9/2021 prohibits private prosecutions in these types of proceedings.

With regard to the exercise of a civil action, a new feature is that victims of crime are authorised to exercise it separately from the criminal action. In such cases, they may appear exclusively as civil parties in the proceedings.

B. ENTRY INTO FORCE OF THE INTERNAL RULES OF PROCEDURE OF THE EUROPEAN PUBLIC PROSECUTOR'S OFFICE

In another development, the Internal Rules of Procedure of the European Public Prosecutor's Office, which govern the organisation of the work of the European Public Prosecutor's Office, were published in the Official Journal of the European Union ("**OJEU**") on 21 January 2021. These Rules were subsequently amended and expanded by a decision published in the OJEU on 29 October 2021.

The Regulation covers, among other issues, the organisational aspects of the European Public Prosecutor's Office, operational matters –including the regulation of the registration and verification of information and the rules for the conduct and conclusion of investigations–, the case management system and the data protection regime.

REGULATORY DEVELOPMENTS

Access to **regulatory development**

Circular of the State Prosecutor's Office on the time limits for judicial investigations

*The criteria for action in relation to the time limit system of Article 324 of the Spanish Criminal Procedure Act (**"CrimPA"**) are updated*

The Circular of the State Prosecutor's Office 1/2021, of 8 April, on the time limits for judicial investigation under Article 324 of the Criminal Procedure Act (the "**Circular**") updates the criteria governing the actions of Prosecutors in accordance with the system of time limits introduced by Law 2/2020, of 27 July, amending Article 324 of the Criminal Procedure Act ("**Law 2/2020**").

In accordance with the reform of Article 324 CrimPA, the Circular introduces criteria to unify the interpretation and application of the aforementioned provision, among which we highlight the following:

1. Objective scope of application:

The time limits under Article 324 CrimPA are restricted to cases processed as ordinary proceedings and preliminary proceedings of the abbreviated procedure. Proceedings before a jury, proceedings for the speedy trial of certain offences, *procedimientos por aceptación de decreto* (a special type of procedure led by the Public Prosecutor) and for minor offences are excluded. In accordance with the entry into force of OL 9/2021, proceedings that fall within the jurisdiction of the European Public Prosecutor's Office are also excluded.

2. Requirements for the extension of the judicial investigation

The extension of the judicial investigation will be legally admissible provided that the requirements of Article 324 CrimPA are met - that the impossibility of completing the investigation as a result of the need to carry out relevant proceedings for the course of the investigation is established with reasons - regardless of the reasons that have prevented the carrying out of the proceedings that are deemed necessary and that this impossibility is attributable to the judicial body or to the appearance of circumstances that have arisen during the course of the investigation.

The reform does, however, impose the duty to give reasons for the decision by which the judicial body decrees the extension of the investigation, as well as the specific proceedings that remain to be carried out, with an expression of the reasons why these are considered relevant for concluding the investigation phase.

3. Determination of the powers of the investigating body and the parties in relation to the extension of the judicial investigation

The extension of the time limits established has the status of a judicial time limit, without the need for a prior request from the party, as was the case before the reform of Law 2/2020. The possibility of an *ex officio* extension of the investigation places the Public Prosecutor's Office and the other parties to the proceedings on an equal footing.

4. Calculation of time limits

The start date for the calculation of the time limits is the date of initiation of the proceedings, albeit with a number of nuances:

(i) In the case of jurisdictional objections, the relevant date is the date of the first order of initiation.

(ii) In the consolidation of proceedings under Article 17 CrimPA, the start date will be the day on which the order initiating the last proceedings initiated was issued.

(iii) In proceedings excluded from the objective scope and their conversion, the start date will be calculated from the date of their initiation as ordinary proceedings or preliminary proceedings of abbreviated proceedings.

The expiry of the time limits under Articles 184 and 185 of the Organic Law of the Judiciary ("**LOPJ**") and Article 201 CrimPA confers an exclusively procedural and preclusive nature on this period, as opposed to substantive time limits, such as those of prescription or expiry. The expiry of the time limits without completion of the investigation phase does not cause the expiry of the criminal prosecution, nor does it extinguish criminal liability. Therefore, the only consequence of complying with the legal deadlines is the obligation of the court to rule on the termination of the investigation phase by issuing the order concluding the summary or abbreviated procedure.

5. Interruption of the running of the time limit

In the event that a provisional stay of proceedings is granted, the time limit will cease to run from the moment the order is issued and without waiting for it to become final. The time taken to process any appeals will not be taken into account for the purposes of Article 324 CrimPA. Moreover, in the event of reopening proceedings that have been provisionally dismissed, the time remaining in the judicial investigation will be resumed, and the time elapsed between the order of initiation and that of provisional dismissal will be counted for the purposes of Article 324 CrimPA. The interruption also applies to returnable references for preliminary rulings and to the period during which translation work is carried out.

Access to **regulatory development**

First initiatives in the transposition of the Whistleblowing Directive in Spain

Law 2/2021, of 18 June, on the prevention of fraud and corruption in Andalusia and the protection of whistleblowers

On 9 July 2021, Law 2/2021 of 18 June, which creates the Andalusian Office against Fraud and Corruption and establishes the protection regime for those who lodge complaints with this body (the "**Office**" and "**Law 2/2021**"), was published in the Official State Gazette on 9 July 2021.

The purpose of Law 2/2021 is to (i) create the aforementioned Office; (ii) regulate the procedure it must follow to investigate facts that could constitute fraud, corruption, a conflict of interest or any other illegal activity that is detrimental to public or financial interests; (iii) establish a protection regime for persons who file complaints with the aforementioned Office in relation to any of the aforementioned facts; and (iii) regulate a penalty system for possible breaches of the law.

The Explanatory Memorandum of Law 2/2021 makes specific mention of the whistleblower protection regime provided for in Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law (the "Whistleblowing Directive"), which makes Law 2/2021 the first piece of legislation in Spain aimed at partially transposing the Whistleblowing Directive.

1. Measures to protect whistleblowers adopted in Andalusian Law 2/2021

Under Law 2/2021, whistleblowers are natural or legal persons and entities without legal personality that file a complaint with the Office regarding facts that could constitute fraud, corruption, a conflict of interest or any other illegal activity which is detrimental to public or financial interests.

Law 2/2021 provides for the submission of complaints to the Office to be made through procedures and channels that are designed, established and managed securely, to ensure that the confidentiality of the identity of the person making the complaint and that of any third persons mentioned in the complaint is protected. In addition, the complaint can be made anonymously, in one's own name or on behalf of the bodies, entities and institutions for which the whistleblowers provide services.

From the moment the complaint is filed, all whistleblowers will have the following rights: (i) the right to know the status of the investigation and inspection procedure arising from their complaints and to be notified of action taken and of decisions issued in this regard (provided that, in the latter case, this is expressly provided for); (ii) the right for complaints to be finalised by means of a reasoned decision; (iii) the right not to suffer reprisals as a result of the complaints made (including threats and attempted reprisals); and (iv) the right to compensation for unjustified loss and damage suffered as a result of the complaints.

In relation to the above, it is worth noting that, under law, it will be presumed that the harm identified by the whistleblowers was caused in retaliation for whistleblowing, with the onus being on the person who has taken the harmful measure to prove that such measure was based on duly justified grounds. It also states that the following shall be considered unjustified prejudice in any case: (i) expenses incurred by whistleblowers in relation to legal advice, assistance, defence and representation in any judicial or administrative proceedings brought by or against the whistleblowers and arising directly from their complaints; and (ii) expenses relating to psychological assistance they may need as a result of mental illness arising directly from their complaints.

A special feature of Law 2/2021 is that it incorporates a specific protection framework for whistleblowers who have the status of civil servants under regional regulations. This is due to the obligation to report that applies to these individuals, among other reasons. Under this specific protection framework, as soon as it is agreed that the investigation and inspection procedure will be initiated, the whistleblower can contact the Office, requesting that it ask the competent body in matters of Civil Service of the Administration of the Andalusian Regional Government or, where appropriate, the head of the Vice-Ministry to which the entity is attached, to grant a provisional transfer to another post.

2. Whistleblower protection regulations

With the approval of Law 2/2021, Andalusia joins the list of Autonomous Communities that have passed specific anti-corruption and whistleblower protection legislation. In particular, these regional initiatives include the following:

(i) **Aragon**: Law 2/2016, of 11 November, which regulates the actions to follow up on information the Autonomous Administration receives concerning facts relating to crimes against the Public Administration and establishes the guarantees for informants; and Law 5/2017, of 1 June, on Public Integrity and Ethics.

Access to **regulatory development**

First initiatives in the transposition of the Whistleblowing Directive in Spain

Law 2/2021, of 18 June, on the prevention of fraud and corruption in Andalusia and the protection of whistleblowers

(ii) **Principality of Asturias**: Law 8/2018, of 14 September, on Transparency, Good Governance and Interest Groups; currently in the process of regulatory development with the processing of the Draft Decree regulating the whistleblower's statute of the Principality of Asturias.

(iii) **Castile and León**: Law 2/2016, of 11 November, which regulates the actions to follow up on information the Autonomous Administration receives concerning facts relating to crimes against the Public Administration and establishes the guarantees for informants.

(iv) **Catalonia**: Law 14/2008, of 5 November, on the Anti-Fraud Office of Catalonia.

(v) **Community of Madrid**: Organic Regulation of the Municipal Anti-Fraud and Anti-Corruption Office, of 23 December 2016.

(vi) **Valencian Community**: Law 11/2016, of 28 November, on the Agency for the Prevention and Combating of Fraud and Corruption of the Valencian Community.

(vii) **Balearic Islands**: Law 16/2016, of 9 December, creating the Office for the Prevention and Combating of Corruption in the Balearic Islands.

The Whistleblowing Directive, has not yet been transposed in Spain at a national level. However, the Spanish Council of Ministers recently approved a draft bill thath aims to achive this objective

Access to **regulatory development**

Companies wishing to access funds from the recovery, transformation and resilience plan must have a compliance programme in place

Ministerial Order HFP/1030/2021, of 29 September

The Recovery, Transformation and Resilience Plan ("**RTRP**") is an instrument promoted at a European Union ("**EU**") level to mitigate the economic impact of the COVID-19 crisis and to modernise the productive fabric of Member States, advocating respect for the environment and promoting the digitalisation of their economies. In order to achieve this objective, the RTRP will provide countries with financial assistance to enable them to meet the milestones and targets in their respective recovery plans.

In Spain, the Ministry of Finance and Civil Service recently approved Order HFP/1030/2021, of 29 September, which sets up the management system of the Recovery, Transformation and Resilience Plan (the "**Order**") with the aim of implementing the initiatives proposed by the EU in the shortest possible time. The Order, published in the Official State Gazette (BOE) on 30 September 2021, includes the obligation for entities involved in the implementation of RTRP measures to strengthen mechanisms to prevent, detect and correct fraud, corruption and conflicts of interest.

At the same time, in order to ensure the proper use of RTRP funds, Article 8 of the Order sets out a number of requirements to be met by the final recipients of such funds (whether grant beneficiaries, contractors or subcontractors), which are described below.

1. Adherence to the highest standards of regulatory compliance

The managing and executive bodies dealing with the invitations to apply for aid provided for in the RTRP must require recipients to submit a "*sworn statement regarding the commitment to comply with the cross-cutting principles established in the RTRP*" in accordance with the model included as Annex IV.C. of the Order.

Annex IV.C. of the Order includes a commitment by the beneficiary of RTRP funds to adhere to "*the highest standards in relation to compliance with legal, ethical and moral rules, adopting the measures required to prevent and detect fraud, corruption and conflicts of interest, and reporting any non-compliance to the appropriate authorities*". Namely, committing to having developed and implemented a crime prevention or compliance programme.

While it is true that the Order does not expressly refer to crime prevention programmes, the commitment to adopt the necessary measures to prevent and detect certain crimes such as fraud or corruption is closely linked to the adoption of organisational and management models "*which include surveillance and control measures suitable for preventing crimes*" referred to in Article 31 *bis* 2 SCC.

In this regard, it is worth remembering that Article 31 *bis* 5 SCC establishes that crime prevention models must comply with the following requirements:

(i) Identify the crimes that should be prevented and activities that may lead to such crimes being committed.

(ii) Establish internal protocols or procedures for making and implementing decisions within the company.

(iii) Have appropriate financial resource management models in place to prevent crime.

(iv) Impose the obligation to report possible non-compliance to the person responsible for the prevention model.

(v) Establish a disciplinary system to penalise non-compliance with the prevention model.

(vi) Carry out regular checks of the prevention model and keep it up to date.

Access to **regulatory development**

Companies wishing to access funds from the recovery, transformation and resilience plan must have a compliance programme in place

Ministerial Order HFP/1030/2021, of 29 September

Although the Order emphasises the prevention and detection of fraud, corruption and conflicts of interest, it cannot be ignored that assuming "*the highest standards in relation to compliance with legal, ethical and moral rules*" means that crime prevention models must also take into account other risks inherent to the activity of each company in accordance with Article 31 *bis* 5 SCC, such as the commission of crimes concerning intellectual property, the market and consumers, or even the environment (respect for which is specifically promoted by the RTRP).

2. Other requirements

Independently of the requirement described above, the Order requires the entities managing RTRP funds to request certain minimum documentation from the beneficiaries for the purposes of auditing and controlling the use of the aid. Although it is more of a formal requirement, the documentation to be collected includes:

(i) The Tax Identification Number (NIF) of the beneficiary.

(ii) The name of the natural or legal person.

(iii) The tax domicile of the natural or legal person.

(iv) Acceptance of the transfer of data between the Public Administrations involved.

(v) Registration in the Census of business owners, professionals and withholders of the State Tax Administration Agency or in the equivalent census of the Regional Tax Administration, where applicable.

In view of the above, it is clear that the Administration wishes to establish a culture of compliance, especially when it comes to receiving aid from the different institutions. The management of RTRP funds is a challenge that requires the coordinated action of the administrations involved and of the beneficiary entities, especially since it takes place in the context of the recent creation of the European Public Prosecutor's Office, which has the aim of protecting the EU's financial interests[1].

In any case, leaving public administrations aside, the publication of this Order highlights the importance of the development and implementation of crime prevention programmes by companies, regardless of their legal nature, size or the sector in which they operate.

1 See Article 4 OL 9/2021.

REGULATORY DEVELOPMENTS

Access to **regulatory development**

Access to **regulatory development**

Transposition of EU Directives on the Prevention of Money Laundering and Terrorist Financing and amendment of the Criminal Code

Royal Decree-law 7/2021 of 27 April 2021 and Organic Law 6/2021 of 28 April 2021

The Council of Ministers has approved Royal Decree-law 7/2021 of 27 April 2021 ("**RDL 7/2021**"), transposing, among other European directives, Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018, amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing ("**AML**"), and amending Directives 2009/138/EC and 2013/36/EU (the "**5th Directive**"). RDL 7/2021 entered into force on 29 April 2021, with the exception of certain provisions that do not affect the regulation of AML.

These new provisions introduce significant developments to Law 10/2010 of 28 April 2010, on the prevention of money laundering and terrorist financing ("**Law 10/2010**") and the Regulation of Law 10/2010, approved by Royal Decree 304/2014 of 5 May 2014 ("**RD 304/2014**") (together, the "**AML Regulations**").

Specifically, the reform pursues a twofold objective: firstly, to improve the mechanisms to prevent terrorism and, secondly, to improve transparency and the availability of information on the beneficial owners of legal persons and other entities without legal personality acting in the course of legal business.

It is also worth noting that the definitive transposition of the 5th Directive in RDL 7/2021 does not include some of the amendments which were in the Preliminary Draft Law, published on 12 June 2020, with the intention of amending Law 10/2010, raising the standards established by the 5th Directive. By way of example, the Preliminary Draft Law included securitisation funds and SOCIMIs as obliged entities and even established a new system of liability for external experts. None of these measures were ultimately included in RDL 7/2021.

A. MAIN NEW FEATURES OF THE AML REGULATIONS

The main developments resulting from the transposition of the 5th Directive are as follows:

1. Inclusion of new obliged entities

RDL 7/2021 incorporates the following new obliged entities:

(i) Intermediaries involved in the leasing of real estate for a total annual rent equal to or exceeding 120,000 euros, or a monthly rent equal to or exceeding 10,000 euros.

(ii) Persons who provide material help, assistance or advice on tax matters as their main business or professional activity.

(iii) Providers of electronic currency services and services for exchanging virtual currency for legal tender (and vice versa), as well as custodial wallet or key management services.

2. Registration of Beneficial Ownership

The transposition of the 5th Directive implies the creation by the Ministry of Justice of a single central register throughout the national territory as a system of identifying beneficial ownership, which will be fed with information from the General Council of Notaries and the Commercial Register. This new registration system will allow information sharing with the registries of the other European Union countries and will facilitate public access to this information. RDL 7/2021 introduces numerous provisions to regulate the operation of the system, including the following:

(i) The scope of persons who will be able to access information on beneficial owners and other types of entities has been broadened to include obliged entities and third parties, in addition to the competent AML authorities.

(ii) Access to and consultation of the Register of Beneficial Ownership will be mandatory for compliance with beneficial ownership due diligence obligations in all cases.

(iii) Different levels of access are provided for each category, as well as different eligibility requirements.

(iv) It provides for the obligation for legal persons and unincorporated entities to obtain, preserve and update information on their beneficial

Access to **regulatory development**

Access to **regulatory development**

Transposition of EU Directives on the Prevention of Money Laundering and Terrorist Financing and amendment of the Criminal Code

Royal Decree-law 7/2021 of 27 April 2021 and Organic Law 6/2021 of 28 April 2021

owners and to provide it to authorities and obliged entities. In this regard, it specifies the information to be kept in the Register, as well as the persons responsible for updating it.

(v) The registration of trusts and similar entities operating in Spain, as well as their beneficial owners, is made compulsory.

(vi) Legal persons will be obliged to obtain, retain and update the information on their beneficial owner(s) for 10 years. Similarly, the Board of Directors, and in particular the Secretary of the Board of Directors, regardless of whether he/she is a director, will be responsible for keeping the information on beneficial ownership up to date.

3. Due diligence measures

RDL 7/2021 includes amendments to specific aspects of the current regulations in relation to the application of due diligence measures, the most important of which are as follows:

(i) It establishes the obligation to apply due diligence measures when the client's circumstances change or when the obliged entity has a legal obligation during the calendar year to contact the client to review the relevant information concerning the beneficial owner.

(ii) It includes the obligation to establish due diligence measures for trusts, including the Spanish fideicomiso, the Italian fiducia, and the treuhand under German law.

(iii) The following requirements are established for financial institutions acting as acquirers to accept payments made with anonymous prepaid cards issued outside Spain:

- They cannot be rechargeable or must have a maximum monthly limit for payment transactions of 250 euros and can only be used in the specific Member State.
- The maximum amount stored electronically must not exceed EUR 250.
- It must be used exclusively to purchase goods or services.
- Anonymous e-money financing is prohibited.
- There must be sufficient control of the issuer's transactions or the business relationship to enable the detection of unusual or suspicious transactions.

4. Non-face-to-face transactions

In terms of the verification of the client's identity in non-face-to-face transactions, reference is made to the qualified electronic signature[1]. Thus, when a qualified electronic signature is used for customer identification, it will not be necessary to obtain a copy of the documents needed to perform the due diligence required by law. However, it will be compulsory to keep the identification data that demonstrates the validity of the procedure.

5. Persons with Public Responsibility ("PRP")

Senior officials of political parties with regional representation and senior officials of political parties with representation in constituencies of more than 50,000 inhabitants at a local level have been included as PRPs. Also included are persons who perform important public functions in international organisations which are accredited in Spain.

On the other hand, obliged entities and third parties that manage files containing data identifying PRPs are obliged to have procedures in place that allow them to keep such data continuously updated. To this end, appropriate technical and organisational measures must be employed to ensure a level of security that is in accordance with the risk.

2 Qualified electronic signatures are regulated in Regulation (EU) 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions.

REGULATORY DEVELOPMENTS

Access to **regulatory development**

Access to **regulatory development**

Transposition of EU Directives on the Prevention of Money Laundering and Terrorist Financing and amendment of the Criminal Code

Royal Decree-law 7/2021 of 27 April 2021 and Organic Law 6/2021 of 28 April 2021

6. Measures to protect whistleblowers

RDL 7/2021 provides that persons subjected to threats, hostile action or adverse employment actions as a result of reporting their suspicions internally or to competent authorities may safely and confidentially lodge a complaint with the Executive Service of the Commission for the Prevention of Money Laundering and Monetary Offences (known as SEPBLAC).

7. Enhanced due diligence measures

In the case of business relationships with high-risk countries, it establishes an obligation to request additional information about the client, the beneficial owner and the purpose and nature of the business relationship, as well as information about the source of the funds, the source of income of the client and beneficial owner and the reasons for the transactions.

It also establishes that, for high-risk third countries expressly determined as such by European Union legislation, obliged parties must implement, where appropriate, one or more of the following measures:

(i) Apply enhanced due diligence measures in business relationships or transactions involving nationals or residents of the third country.

(ii) Establish systematic reporting of transactions involving nationals or residents of the third country or involving financial movements to or from the third country.

(iii) Prohibit, limit or set conditions for business relationships or financial transactions with the third country or with nationals or residents of that country.

8. Internal communications between entities of the same corporate group

RDL 7/2021 specifies that the exception to the prohibition on disclosure, provided for communications between obliged entities belonging to the same group, is also applicable to the communication of information with obliged entities domiciled in third countries, provided that they apply group policies and procedures that comply with the standards required by the AML Regulations.

9. Centralised Banking Account Register

The regulation specifies the reporting obligations of reporting institutions and extends this obligation to safe deposit boxes and all payment accounts, including those opened with e-money institutions and with all payment institutions.

In conclusion, following the entry into force of RDL 7/2021, obliged entities must adapt their risk assessment and, where appropriate, their internal procedures relating to AML, to the new regulatory requirements.

B. AMENDMENTS TO THE CRIMINAL CODE

Organic Law 6/2021, which amends the Criminal Code, among other regulations, entered into force on 30 April. Through the new wording given to the last paragraph of Article 301.1 SCC, which criminalises money laundering, the legislature has completed the transposition of Directive (EU) 2018/1673 of the European Parliament and of the Council of 23 October 2018 on combating money laundering by criminal law.

Specifically, the amendments introduced refer to certain aggravating circumstances applicable to the offence of money laundering, which entail the imposition of the penalty in its upper half:

(i) Aggravating circumstance when the active subject has the status of an obliged subject in accordance with the regulations on the prevention of money laundering and the financing of terrorism and commits the offence under Article 301 SCC in the exercise of his/her professional activity.

(ii) Aggravating circumstance when the assets laundered originate from crimes of human trafficking, crimes against foreign citizens, prostitution, sexual exploitation, corruption of minors and those related to corruption in business, in addition to those already contemplated in the SCC (trafficking in toxic drugs, narcotics or psychotropic substances or those especially related to corruption).

REGULATORY DEVELOPMENTS

Access to **regulatory development**

The protection of personal data related to criminal offences is regulated

Entry into force of Organic Law 7/ 2021, of 26 May

On 16 June 2021, Organic Law 7/2021 of 26 May (the "**OL 7/2021**") entered into force, transposing into Spanish law Directive (EU) 2016/680 of the European Parliament and the Council of 27 April 2016 (the "**Directive**"), on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data.

The approval of OL 7/2021 represents a decisive step forward for the effectiveness of international legal cooperation between authorities in different areas - security, prisons, tax, prevention of money laundering, financial offences and financing of terrorism, and the securities market - among themselves and with judicial and police authorities at the European Union level.

To this end, it is essential to establish a minimum level of harmonisation in the standards in force in all Member States, thus consolidating a suitable legal framework for the transfer of data for effective police and judicial cooperation in criminal matters. This is the objective of the Directive now transposed into Spanish law. For the same purpose, it is provided that the recipient of the transfer of this type of personal data may be a third country or international organisation, in which case the European Commission, or in its absence the controller, will be the supervisor assessing the adequate level of data protection in that third party outside the European Union.

Main objectives of the Directive

The Directive pursues two main purposes:

(i) To protect the fundamental rights and freedoms of natural persons, especially their right to the protection of personal data, in cases where the processing is carried out by law enforcement authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences, including the prevention of and protection against threats to public security.

(ii) To ensure that the exchange of such personal data by competent authorities within the Union, where such exchange is required by Union or Member State law, is not restricted or prohibited on grounds relating to the protection of natural persons with regard to the processing of personal data.

Main new features of OL 7/2021

We highlight the following developments in OL 7/2021:

1. Duty to cooperate

According to the wording of the regulation, a general duty of collaboration with the competent authorities is established - which extends to both public administrations and private individuals - to provide the data, reports, background information and supporting documents that are necessary for the investigation and prosecution of criminal offences or for the enforcement of penalties.

In order to guarantee the investigation, an obligation is imposed not to inform the data subject of the transmission of his or her data.

Compliance with this duty to cooperate is exempted in those cases in which judicial authorisation is legally required to collect the data.

2. Conservation period

As a general rule, the maximum period for the deletion of data is set at twenty years, unless there are factors such as the existence of open investigations or offences for which the statute of limitations has not expired, non-completion of the execution of the sentence, recidivism, the need to protect victims or other justified circumstances.

Notwithstanding the above, OL 7/2021 requires the data controller to carry out a review of the need to store, restrict or erase all personal data contained in each of the processing activities under its responsibility, at least every three years.

3. New safeguards to ensure proper data processing

OL 7/2021 contemplates a significant number of guarantees aimed at ensuring that the processing of personal data is proportional, timely, minimal and sufficient for the fulfilment of the purposes pursued -the success of international legal cooperation in the field of criminal law and public security-. We highlight the following:

(i) The use of personal data for criminal profiling in this area is expressly prohibited, as this would contravene the standards of criminal law, according to which individuals can only be held criminally liable for their actions and not for their attitudes or thoughts.

Access to **regulatory development**

The protection of personal data related to criminal offences is regulated

Entry into force of Organic Law 7/ 2021, of 26 May

(ii) The rights of access, rectification, erasure and restriction recognised to the data subject, the owner of the data, are recognised. These rights would, for practical purposes, entail, for example, the possibility for a person with a criminal record to request that this data not be used in the context of an investigation in another country, when the personal data should be kept only for evidentiary or security purposes or the accuracy of the data is disputed by the person concerned. However, the data subject may be restricted in the exercise of these rights where this is necessary in order not to impede the successful outcome of a criminal investigation or where public security is endangered.

4. Penalty system

Those who fail to comply with OL 7/2021 may face penalties ranging from 6,000 to 1,000,000 euros, depending on the degree of infringement.

Access to **regulatory development**

Update on the Instruction of the State Prosecutor's Office on computer crime

Instruction No. 2/2011, of 11 October

On 21 September 2021, the State Prosecutor's Office ("**SPO**") published an update to Instruction No. 2/2011, *on the Prosecutor of the Cybercrime Chamber and the cybercrime sections of the Prosecutor's Offices* (the "**Instruction**").

Among its objectives is the **need to adapt the initial list of offences that formed part of the first version of the instruction**, published in 2011, to the new features introduced with the reform of the SCC carried out by OL 1/2015 and 2/2015 and by the sixth final provision of OL 8/2021.

Furthermore, the Instruction introduces an **element of weighting for assigning knowledge of a given crime to this specialised unit of the Public Prosecutor's Office**, so that the mere use of information and communication technologies ("**ICTs**") is not the only criterion for assigning this speciality, on the basis that they are present in practically all types of scenarios in one way or another.

The main new features introduced by the Instruction are as follows:

A. UPDATE OF THE LIST OF OFFENCES WHERE THE OBJECT OF THE CRIMINAL ACTIVITY IS THE COMPUTER SYSTEMS OR ICTs THEMSELVES

The Instruction develops the list of offences that allow the SPO's specialised body to be given powers in the area of cybercrime. In addition to those already included in 2011, the following are included:

(i) Offences against data and computer systems and availability of tools to commit such offences (Articles 264 *bis*, 264 *ter* and 264 *quáter* SCC).

(ii) Offences of illegal access to systems, unlawful interception and having access to tools to commit such offences (Articles 197 *bis*, 197 *ter*, 197 *quáter* and 197 *quinquies* SCC).

(iii) Offences of distribution or public dissemination through ICTs of content aimed at promoting, encouraging or inciting minors or disabled persons in need of special protection to commit suicide (Article 143 *bis* SCC).

(iv) Offences of distribution or public dissemination through ICTs of content aimed at promoting, encouraging or inciting self-harm in minors or persons with disabilities in need of special protection (Article 156 *ter* SCC).

(v) Crimes of distribution or public dissemination through ICTs of content intended to promote, encourage or incite the commission of crimes of sexual abuse and assault of minors under 16 years of age, exhibitionism and sexual provocation (Article 189 *bis* SCC).

(vi) Offences of distribution or public dissemination through ICTs of content aimed at facilitating, among minors or people with disabilities in need of special protection, the consumption of products, preparations or substances or the use of techniques for ingestion or elimination of food products whose use is likely to generate a risk to health (Article 361 *bis* SCC).

(vii) Permanent harassment offences (Article 172 SCC), when they are committed through ICTs and provided that this circumstance is a determining factor in the criminal activity and generates special complexity in the criminal investigation.

B. EXPANSION OF THE POWERS OF SUPERVISION OF INDICTMENTS BY THE SPO'S SPECIALISED CYBERCRIME UNIT

In addition, the Instruction agrees to empower the specialised unit of the SPO in this area so that the corresponding territorial prosecutor's offices can send to the former the indictments to be examined prior to their presentation in relation to a broader list of offences than that which was contemplated in the first version of the 2011 Instruction.

Therefore, from now on, this specialised unit must also examine the indictments filed in cases in which any of the following crimes are known:

(i) Any offence that was already covered by the initial wording of Instruction No. 2/2011, when committed by a criminal organisation.

(ii) When any of the above offences affects the scope of action of more than one provincial prosecutor's office.

(iii) Offences relating to child pornography or offences against persons with disabilities in need of special protection in all its forms.

(iv) Offences against intellectual property (Articles 270 to 272 SCC), when they are committed in the provision of information society services.

(v) Crimes of illegal access to systems (Article 197 *bis* 1 SCC), irregular interception of communications between systems (Article 197 *bis* 2 SCC), computer damage (Articles 264 and 264 *bis* SCC) and related to the abuse of devices (Articles 197 *ter* and 264 *ter* SCC).

Other regulatory developments

Access to financial information in the investigation and prosecution of serious crime

On 22 June 2021, the Council of Ministers approved the Preliminary Draft Organic Law regulating the access and use by the competent authorities of financial and other information which is useful for the prevention, detection, investigation and prosecution of criminal offences. The final text is still pending.

The regulation transposes into Spanish law Directive (EU) 2019/1153 of the European Parliament and of the Council of 20 June 2019, which establishes a set of rules to facilitate the use of financial and other information for the prosecution of criminal conduct and extends the access of competent authorities to centralised records of bank accounts and payments where they are indispensable to the success of a criminal investigation into a serious crime.

Fighting digital fraud

On 8 November 2021, the Council of Ministers approved the Preliminary Draft Law amending Organic Law 10/1995, of 23 November, on the Criminal Code, to transpose the following EU directives: (i) Directive (EU) 2019/713 of the European Parliament and of the Council of 17 April 2019 on combating fraud and counterfeiting of non-cash means of payment - aimed at combating cybercrime and punishing fraudulent use of newly emerging digital means of payment; (ii) Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 - aimed at combating market abuse caused by insider dealing; and (iii) Directive (EU) 2019/884 of the European Parliament and of the Council of 17 April 2019 - related to the exchange of criminal record information on third-country nationals.

Case law

CASE LAW

Access to **case law**

The legitimacy of investigations carried out in other States

Judgment of the Spanish Supreme Court (Criminal Chamber, 1st Section), No. 197/2021, of 4 March 2021

Through this judgment, the Supreme Court ("**SC**") has recognised the legitimacy and validity of transnational investigations as a source of evidence in criminal proceedings in Spain provided that they comply with minimum standards.

In the case in question, the appellant had been convicted of the offence of sexual exploitation of minors as a result of an investigation carried out in our country, which had been initiated as a consequence of the communication made by an NGO in the United States. The Instagram platform reported to the organisation the appearance on the social network of videos with pornographic content of minors, specifying the IP number used to download the material and host the pornographic content on the network. The result of this investigation was communicated to the National Police in Spain which, after requesting the corresponding judicial authorisations, obtained the necessary data to locate the server that supplied this IP address and its user.

The appellant alleged that Instagram, which initially reported the facts, did not have judicial authorisation to disclose the IP through which the connections were made, which would constitute an infringement of the fundamental right to personal privacy, provided for in Article 18(1) of the Constitution of Spain ("**CS**"), and to the secrecy of communications, provided for in Article 18.3 CS.

Firstly, the SC held that the legitimacy of investigations carried out in other countries must be presumed to be in compliance with their regulations, with no requirement that they comply with Spanish domestic regulations, as long as they have been conducted in accordance with some shared minimum standards. Consequently, the judgment acknowledged the validity of investigations carried out abroad even if, in their implementation or execution, they may differ from the specific measures applied, provided that these are essentially respectful of the protection of the fundamental right concerned.

The SC also stressed the importance of distinguishing between the relationship between a private individual and an authority that demands data from him - precisely by virtue of that authority - and the relationship between a company that manages a social network and a private individual who contracts with it under specific conditions, in which he is informed about the possibility of communicating certain data in the event of an offence.

Concerning the potential impact on fundamental rights, the SC held that the IP data is not protected by the right to secrecy of communications under Article 18.3 CS, since this right prohibits third parties from interfering with the content of an ongoing communication process. Thus, this right will not be affected when what is disclosed is data that does not constitute the communication itself but is associated with that communication process (identification of the sender or the place of emission, technological data, etc.).

In this regard, the judgment explains that new generation rights, such as the right to informational self-determination or the right to virtual identity, are not recognised as having such intense protection in terms of the need for judicial intervention, compared to other rights such as the secrecy of communications. Thus, not every impact on these rights requires prior judicial authorisation.

In relation to the above, the SC held that the IP address data was entered into the network by the network user himself, so that the operator assumed that the data became public knowledge for any Internet user, and therefore lacked an expectation of privacy with respect to this specific data. Thus, no judicial authorisation was required to know what is already public.

The judgment then goes on to analyse the issue under debate from the perspective of the protection afforded by the right to personal privacy, enshrined in Article 18.1 CS. In this regard, the SC held that the IP address is a piece of data which, on its own, is not invasive of privacy if it is not accompanied by subsequent enquiries, since it only allows for the identification of the person behind the user when it is linked to other data. On the contrary, a judicial authorisation is required when it is intended to reveal the identity of the terminal, telephone or contract holder of a specific IP address, as was done by the Spanish police in the case we are dealing with here.

In short, the SC concluded that the legitimate knowledge of the data - in this case, of the IP - on the part of the company that managed the social network and assumed by the person using the network, enabled the company to disclose this data in order to comply with the legal obligation to report crimes and to prevent the perpetuation of an infringement of fundamental rights, especially in circumstances where it was a matter of fundamental rights, with minors affected.

CASE LAW

Access to **case law**

Successive money laundering and "Sito Miñanco" case

Judgment of the Spanish Supreme Court (Criminal Chamber, 1st Section), No. 299/2021, of 8 April 2021

Through this judgment, the SC considers it proven that the convicted individuals - the one known as "Sito Miñanco" and several people around him - formed an organisation that laundered money from drug trafficking between 1988 and 2012. The money laundering was carried out in the first place through two special purpose vehicles, set up to conceal and return the profits obtained or linked to the drug trafficking activities in which "Sito Miñanco" had previously participated. Subsequently, real estate acquisitions were at odds with the company's income and whose purchase criteria were always below market prices.

The judgment concludes that the foregoing proven facts allow the elements of the criminal offence of "*laundering of laundered proceeds*"[1], known as "*successive money laundering*", to be identified with complete clarity, based on the following reasoning:

(i) In protracted cases, money laundering generates money laundering profits which in turn generate new money laundering. The chain of transactions, often under the guise of legal business, makes it difficult to observe with the desirable clarity the primary criminal origin and the very objective of profit that motivates it. Despite the time that has elapsed, a laundered asset is not a legitimate asset. The difficulty lies in the fact that it is an asset that continues to be contaminated by its origin and thus contaminates all those who, directly or indirectly, originate from it.

(ii) Successive actions aimed at transforming, concealing or covering up the origin of assets only exacerbate the injustice, multiplying the harmful effects that the recurrence of such transactions have on the functioning of financial systems which, despite their apparent normality, have a weakening effect on the controls in place for the balanced functioning of the market.

(iii) Only in the case of very long intervals - for example, those that coincide or are close to the statute of limitations for the crime - between the original money laundering transactions and the subsequent ones, can the disconnection effect be produced by weakening the necessary representation of the criminal origin of the previously laundered asset[2].

(iv) The assets from which the laundering transaction originate must be of criminal origin and, furthermore, there must not have been any significant temporal or causal break in the process, so that traceability can be identified between the different transactions (a chain of transactions laundering the illicit proceeds, meaning that the last laundered asset is in some way, directly or indirectly, derived from the previous one).

(v) The offence of money laundering is not punishable for acts committed before 24 March 1988, but for acts committed after that date, taking advantage of the laundering structure created before that date. The funds or assets resulting from the crime do not lose their criminal origin because at that time there was no specific criminal regulation punishing acts of laundering so their use for the transformation or return of other assets once the law was in force must be considered typical conduct.

In conclusion, according to the SC, the key to successive money laundering activities is the continuity of the structure created to conceal and transform the criminal origin of the assets. Consequently, for evidentiary purposes, the evidence must be capable of proving that each of the acts corresponds to a laundering model designed, maintained over time and executed by the different participants. And, to this end, the interconnection of all the evidence is decisive; both that which deals with the existing relationships between the participants, as well as that which deals with the increases in assets produced and the economic activity that can explain them.

1 See Judgments of the Supreme Court (Criminal Chamber, 1st Section) No. 257/2014, of 1 April [ECLI:ES:TS:2014:1457]; and 583/2017, of 19 July [ECLI:ES:TS:2017:3210].

2 The Supreme Court (Criminal Chamber, 1st Section) Judgment No. 893/2013, of 22 November [ECLI:ES:TS:2013:5774], which dealt with the case of the transfer of a taxi licence, seventeen years after it had been acquired with funds from drug trafficking, is cited to this effect.

CASE LAW

Access to **case law**

Reckless money laundering and failure to identify the duties of care breached

Judgment of the Spanish Supreme Court (Criminal Chamber, 1st Section), No. 47/2021, of 21 January 2021

The offence of reckless money laundering is usually connected to the use of presumptions in view of the difficulties of proving its existence. In this case, the SC interprets and sets the limits of presumptive evidence in the offence of reckless money laundering, based on the estimation of the appeals filed by the representatives of the convicted individuals and declaring that the appellants' right to the presumption of innocence and the principle of guilt had been violated in the case in question.

As a starting point, the SC noted that the offence of reckless money laundering requires, in order to be applied, the identification of a breach of two interdependent duties: (i) the duty to avoid the result of favouring a previous criminal activity, by means of any of the actions described in Article 301.1 SCC; and (ii) the duty to activate the instrumental mechanisms of verification, investigation and representation of the origin of the asset or money received. The breach of the first duty is explained by the breach of the second duty as a result of grossly negligent conduct on the part of the police officer.

In addition, the individual officer's ability to warn and avoid the danger must be examined on the basis of a double standard: (i) firstly, it must be asked what behaviour was objectively required in a given situation of the risk of harm to the legal asset; and (ii) secondly, whether this behaviour can be demanded of the perpetrator in view of his individual characteristics and capacities .

This necessarily entails identifying the specific duties of prevention and foreseeability that obliged the person who introduced the unapproved risk and, of course, the personal and situational conditions to comply with them. But this in and of itself is insufficient. The typical requirement of the seriousness of the reckless conduct calls for a quantitative and qualitative assessment of the degree of non-compliance, for which it is necessary to take into account both the contents of the respective relevant duties and the causal effectiveness of their non-compliance in producing the result, as well as the specific and situational conditions of enforceability.

The SC insisted that this issue cannot be considered from a presumptive and generalist approach in the sense that if a prohibited act is carried out, all the consequences arising therefrom are considered reckless. And this is because, as stated in the judgment of the SC No. 501/2019, of 24 October -cited in the judgment that is now under consideration- "*the crime of money laundering as defined in Article 301 CC does not enjoy a relaxed evidentiary regime, either legally or in case law*".

From an evidential point of view, on the basis of the evidence, questions as to why the officer could have foreseen, or why he could and should have foreseen the outcome, must be answered by identifying the following factors: (i) what information was actually available to the officer; (ii) what information could have been available to him in situational terms; (iii) what mechanisms of enquiry or verification of the origin of the asset could have been activated; (iv) what was the objective content of the required action; (v) what regulatory elements of production determined the execution of that action; (vi) on what principles of socio-cultural experience did the officer evaluate the information received; (vii) what type of precautions did he adopt when carrying out the action that introduced the danger; and (viii) what type of relationship did he maintain with the person from whom the criminal assets originated.

Moreover, the seriousness of the breach must be measured, because only grossly reckless conduct is criminally relevant. In this regard, grossly reckless conduct is considered conduct that ignores a substantial risk that the prohibited result will occur as a consequence of that conduct. A risk that by its nature and degree makes it clear that the plaintiff's indifference, given the circumstances of which he is or should have been aware, represents a serious deviation from the standard of conduct that a person respectful of the rule would observe in his situation.

In view of the foregoing, the SC concluded that (i) the proven facts of the judgment under appeal did not provide sufficient evidence to conclude that there had been a regulatory breach of any duty of care specifically imposed by the criminal protection rule; (ii) the judgment did not individually identify the evidence supporting the conclusion of the appellants' participation; and (iii) the judgment did not analyse the regulatory requirements for the imputation of the objective result due to recklessness.

1 This explains, precisely, the repeated intervention of the European Union legislature to identify "due diligence clauses", which are required of all those who operate in the financial and asset exchange system, to prevent the results of favouring criminal activities through the concealment or transformation of assets originating from them. See Articles 6 to 13 of Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing (3rd AML/CFT Directive); Articles 8 to 13 of Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purpose of money laundering or terrorist financing (4th AML/CFT Directive); and most recently amended by Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purpose of money laundering or terrorist financing and amending Directives 2009/138/EC and 2013/36/EU (5th AML/CFT Directive).

2 In this regard, the judgment now under consideration brings to mind the SC Judgment (Criminal Chamber, 1st Section) No. 997/2013, of 19 December [ECLI:ES:TS:2013:6564], which analyses in detail, from the perspective of individual enforceability, a case of reckless money laundering.

3 See Judgment of the SC (Criminal Chamber, 1st Section) No. 501/2019, 24 October [ECLI:ES:TS:2019:3247].

CASE LAW

Access to **case law**

Limitations on the knowledge of police investigations carried out before the start of legal proceedings

Judgment of the Spanish Supreme Court (Criminal Chamber, 1st Section), No. 312/2021, of 13 April 2021

On 13 April 2021, the SC issued a judgment dismissing the appeals lodged by two individuals who were sentenced by the High Court of Justice of Madrid to 8 years' imprisonment for an offence against public health. In this judgment, the Second Chamber of the SC established the content and scope of the right of the defence, stating that there is no right to know about the police investigation carried out before the start of the judicial proceedings.

In their pleadings, the appellants complained of a violation of their right to due process, in that they had been denied access to the investigation carried out by the money laundering group of the Central Operational Unit of the Guardia Civil (UCO), which led to the subsequent arrest of the two appellants on suspicion of possession of a consignment of cocaine which was seized in their possession.

In their appeal, they argued that the refusal to grant access to the requested information had infringed their rights of defence as expressed in Directive 2012/13 EU of the European Parliament on the right to information in criminal proceedings (the "**Directive**"). Article 7 of the Directive establishes the right of any detainee to be provided with documents relating to the file on his detention and, more generally, recognises the right of any person under investigation to have access to all material evidence in the possession of the relevant authorities in order to safeguard the fairness of the proceedings and to be able to prepare his defence.

The SC, after carrying out an exhaustive analysis of the Directive, concluded that the right to know the information that may be relevant to the evidence is not an absolute and unqualified right. For the defence request to be wrongfully denied, not only must there be a correlation between the object of the evidence and the instrument proposed for its verification, but the evidence must reasonably be capable of effectively strengthening the defence's case.

Therefore, there is no right to know the specific tools and materials available to the police for the investigation. This right is only available in cases where a party presents well-founded evidence that the police or pre-trial proceedings may have violated his fundamental rights or committed irregularities, or that it was conducted in a way that may affect the validity of the evidence or the criminal proceedings, or when he provides evidence of circumstances in the investigation that may affect the incriminating force of the evidence.

And even in these circumstances, the defence may only request the judicial authority to incorporate those specific points of the preliminary investigation that reflect such conditions.

Once this request has been received, the court must carry out an external and internal check of relevance and necessity, and only if both checks are passed may the requested information be provided, albeit limited to what is strictly necessary.

In conclusion, through this judgment, the SC has concluded that the right to know the information that may be relevant to the evidence is not absolute, as this right refers to the material that is part of the judicial proceedings but not to the content of the pre-trial investigation.

CASE LAW

Access to **case law**

The issuance of a European Arrest Warrant interrupts the statute of limitations for an offence

Judgment of the Spanish Supreme Court (Criminal Chamber, 1st Section), No. 41/2021, 21 January 2021

On 21 January 2021, the SC issued a judgment on the cassation appeal filed by private prosecution against the order of the Provincial Court of Madrid dated 25 February 2019, which confirmed a previous decision of a Court of Alcobendas dated 9 November 2018, that declared the case against the accused to be barred by the statute of limitations.

The appealed decision stated that the limitation period for the acts under investigation is 20 years -a matter which was not disputed- and that the start date of the limitation period must be calculated from the order of 28 July 1998, by virtue of which the alleged perpetrator of the acts in question was declared absent. The appellant challenged the start date of the limitation period in the appeal. Specifically, the appellant claimed that the criminal proceedings continued to be pursued against the defendant, citing various proceedings and decisions taken at first instance. Notable among these is the order of 18 March 2004, reopening the proceedings to issue a European Arrest Warrant ("**EAW**") for the arrest and surrender of the accused.

The judgment specifies the scope of the doctrine of the SC judgment No. 297/2013, of 11 April, cited by the appealed decision, as a basis for denying the interruptive effect of the statute of limitations on the EAW, focusing on the differences between extradition and the search and arrest warrant.

In this regard, the judgment examines the legal nature of the EAW, based on the precedent set by the order of the SC No. 695/2016, of 17 March, which states unequivocally that the EAW is an effective procedural decision to interrupt the statute of limitations period for crimes. The SC held that it is irrelevant that the accused had been previously located because, by the very nature of the EAW, this constituted an autonomous decision that determined the effective continuation of the criminal proceedings in progress, and, consequently, interrupted the statute of limitations. The SC stated that, although it is true that the EAW requires, among its prerequisites, a previous final judgement ordering the enforcement of a custodial sentence, a pre-trial detention order or a national arrest warrant, the EAW itself constitutes a new judicial decision with its own authority. Therefore, it cannot be argued that the EAW is a mere transfer or notification of the prior national decision which in some way allows the deprivation of liberty of the accused.

The judgment also contains references to decisions of the Court of Justice of the European Union ("**CJEU**"), from which it is concluded that the EAW requires, among other necessary elements, the consent of the person to be deprived of liberty. Thus, in relation to judicial decisions that authorise the pre-trial deprivation of liberty, the SC examined the consolidated and settled jurisprudence that holds that a provisional detention order does interrupt the limitation period insofar as it is a decision that unequivocally highlights the will of the State to prosecute a criminal offence. Thus, mutatis mutandis, the SC held that the EAW "*also entails an activation of the process, it activates the prosecution and reinforces the accusation against the person on whom it is imposed*".

In addition, the judgment analyses the jurisprudential criteria according to which the extradition request interrupts the statute of limitations, concluding that they also apply to the EAW:

(i) The EAW, like extradition, is a judicial decision involving at least two Member States of the European Union, and it requires an autonomous judicial decision of deprivation of liberty for the sole purpose of surrendering the accused.

(ii) The EAW has a specific rule; the Framework Decision of the Council of the European Union 2002/584/JHA whose content is currently part of Law 23/2014 of 20 November on the mutual recognition of criminal orders in the European Union.

(iii) The EAW, like the extradition order, always has a transnational component.

(iv) In relation to knowledge or ignorance of the accused's whereabouts, the SC recognised that in cases of extradition, knowledge of the residence or location of the accused is presupposed, whereas in EAW this is not always the case. However, the issuance of an EAW does not necessarily entail that the individual has been located. The EAW integrates an autonomous judicial decision aimed either at depriving a person of his liberty or at subjecting him to provisional measures that result in his being placed at the disposal of the authorities of a Member State; a decision that fulfils the requirements for that person to be handed over to the issuing court at the time that he is located.

(v) Finally, similar to extradition, the essential purpose of an EAW is the arrest and surrender of the individual to the authorities of the requesting State either for prosecution or for serving a sentence.

The SC concluded by dismissing the appeal "*because the issuing of a European arrest warrant interrupts the statute of limitations of the crime; as we have reiterated, it implies an activation of the process, it activates the prosecution and reinforces the accusation of the person on whom it is imposed; and in relation to its importance, systematic or nature, the jurisprudential criteria by virtue of which it is concluded that the extradition request interrupts the statute of limitations are predictable ad maiorem ratio*".

CASE LAW

Access to **case law**

The first conviction for an environmental crime against the operator of an illegal waste disposal site

Judgment of the Court of Appeal of Madrid (15th Section), No. 203/2021, of 19 April 2021

On 19 April 2021, the 15th Section of the Court of Appeal of Madrid issued the first conviction for the commission of an environmental crime (Articles 325 and 327 a) SCC) against an individual responsible for an illegal waste dump. The Court sentenced him to two years and three months imprisonment and special disqualification from exercising professions related to waste treatment and disposal as a result of having carried out unauthorised hazardous waste management activities - such as dumping fluorescent lamps containing mercury, containers containing corrosive liquids or petrol and oil bottles, among others - on land whose soil was only partially cemented and into which substances could seep when spilled.

The Court of Appeal held that the wilful intent of the person responsible for the landfill site had been proven, as he was fully aware that he lacked the authorisation to install it and failed to exercise caution when accepting waste from construction sites, on which no treatment or classification activity was carried out.

The judgment also obliges the convicted party to restore the affected site to its original state and to pay a fine of 4,800 euros.

1 La resolución todavía no es firme.

CASE LAW

Access to **case law**

What is the Supreme Court's opinion on the time limit of Article 324 of the Criminal Procedure Act?

Judgment of the Spanish Supreme Court (Criminal Chamber, 1st Section), No. 455/2021, of 21 January 2021

In this judgment, the SC ruled on the system of time limits introduced in the investigation or preliminary criminal investigation phase under Law 41/2015, of 5 October, amending the CrimPa, which gave rise to the new wording of Article 324 CrimPa, for the streamlining of criminal justice and the strengthening of procedural guarantees. Under this reform, the time limit for the investigation will be a maximum of twelve months, with the possibility of successive extensions for periods of six months or less.

This amendment has generated a great deal of uncertainty and controversy, since failure to comply with the deadlines introduced by this reform results in the invalidity of the proceedings agreed as of that date, and, therefore, the nullity of everything that has been done once the investigation period has ended without extension.

With this judgment, the SC has taken a position in favour of strict compliance with these deadlines, regardless of any nuances or circumstances that may arise during the proceedings. Thus, through this judgment, the cassation appeal filed by the Public Prosecutor's Office and the private prosecution against the judgment of the Murcia High Court of Justice dated 28 May 2019, that in turn confirmed the judgment of the Murcia Court of Appeal which acquitted the accused because the deadlines had not been met during the pre-trial phase, has been resolved.

The SC based its decision on the following facts: the Investigative Court No. 3 of Lorca (Murcia) issued a dismissal order due to the expiry of the time limit for the extension of the investigation without having issued the decision by which the said extension should have been agreed upon. When the prosecution appealed to the Court of Appeal against that decision, it was held that, given the complex nature of the investigation, the dismissal order of the investigating Judge should be revoked. The case was then referred to the Court of Appeal for trial and the Court upheld the preliminary issue raised at the beginning of the oral hearing by the defendants' counsel in relation to the failure to issue an order extending the pre-trial investigation period.

Thus, the same judicial body declared the nullity of the proceedings from the moment in which the Court of Appeal issued the order resolving the appeal mentioned and declared the proceedings that had been carried out outside of the six-month period *ex.* Article 324 of the CrimPA without effect and invalid. Among the evidence in respect of which the Chamber declared it null and void was the statement of the accused at the pre-trial stage. The absence of the defendants' statements made it impossible to bring them to trial, so the Court of Appeal acquitted them instead of returning the proceedings to the Investigative Court.

In this regard, the Spanish High Court has noted that the time limit set for taking steps in the investigation phase cannot be remedied, but must be complied with, and it is impossible to remedy a procedure that is not valid *ex* origen.

Taking proceedings outside the time limit set *ex lege* -or exceeding the corresponding time limit without an agreed extension- results in the nullity of the proceedings and of what has been done. Thus, the Chamber considered that if new investigative measures or the reopening of the investigation had been tolerated without having agreed to the extension within the established time period there would have been an imbalance between the parties and the person under investigation would be deprived of a defence, leading to an erosion of the right to a defence.

Thus, the SC reaffirmed that the investigation period constitutes an insurmountable limit the non-compliance with which entails the nullity of the proceedings, material defencelessness and infringement of the right to a defence, as it allows the prosecution to bring investigative measures that it could not have brought beforehand, and thus to build up material to support the prosecution, based on a *contra legem* action.

CASE LAW

Access to **case law**

The extinguishment of the criminal liability of the legal person due to its dissolution

Order of the Spanish National High Court (Criminal Chamber, 4th Section), No. 422/2021, of 15 July 2021

In this order, the Fourth Section of the Criminal Chamber of the National High Court examined the extinguishment of the criminal liability of the legal person in the context of a bankruptcy liquidation process. Specifically, the decision dismissed the appeal filed by the State Attorney representing and defending the State Tax Administration Agency ("**AEAT**"), which the Public Prosecutor's Office supported, against the order dated 25 January 2021 issued by the judge of the Central Investigative Court No. 3. The confirmed order agreed to withdraw the status of the company under investigation, after the dissolution of the company, the opening of the liquidation phase and its consequent winding up, had been agreed by the Alicante Commercial Court No. 3.

Thus, an apparent contradiction arose between criminal law -which establishes the extinguishment of criminal liability at the moment when liquidation is initiated within the insolvency process- and civil law -which establishes that legal personality is preserved until the end of the liquidation process.

The decision of the Central Investigative Court No. 3 based its decision to withdraw the indictment of the insolvent company, on the provisions of Articles 33.7.b) and 130.2 SCC.

The appeal of the State Attorney's Office was based on the regulation contained in our civil legislation -in particular, the Companies Act and the Insolvency Act, in which the legal personality of the company is extinguished when the liquidation process ends- and arguing that as the company still had a legal personality its investigation had to continue and its criminal liability had not been extinguished.

However, the Chamber established in the decision now being examined that criminal legislation clearly defines when and under what circumstances the criminal liability of the legal person is extinguished, and that it is not necessary to resort to civil legislation, thus, upholding the decision of the commercial court. Thus, it confirmed that the criminal liability of a legal person in insolvency proceedings is extinguished at the moment of the commencement of the liquidation phase since from this moment onwards the company cannot carry out any activity, not even lawful activity. The exception is only provided for when this dissolution of the legal person is covert or merely apparent, and an extension of the application of the cases provided in Article 130.2 SCC is not permitted when the dissolution of the legal person is by judicial decision.

Thus, it confirms that, once the dissolution, liquidation and extinguishment have been agreed by order of the competent Commercial Court within the corresponding insolvency proceedings, the criminal liability of the legal person is extinguished, without prejudice to a declaration of civil liabilities against the company or its directors.

CASE LAW

Access to **case law**

Criminal proceedings delay the start of the statute of limitations for civil action

Judgment of the Supreme Court (Civil Chamber, 1st Section), No. 92/2021, of 22 February 2021

In this judgment, the Civil Chamber of the SC ruled in favour of the appellant and rejected the time barring of the civil action as previously held by the Alicante Court of Appeal. Thus, the High Court held that in cases where there are prior criminal proceedings based on the same facts, and specifically, where the injured party has reserved civil actions,"*the beginning of the computation of the time barring of the action of non-contractual liability must be established on the day of notification of the decision that ended the criminal proceedings, regardless of the persons against whom the criminal proceedings were directed*."

The main issue debated in the decision in question was the statute of limitations for tort actions in the civil jurisdiction where criminal proceedings are underway. Specifically, the Chamber considered that the applicable legal precepts - Article 1969 of the Civil Code, in conjunction with Articles 111 and 114 CrimPA - do not allow the statute of limitations declared at first instance to be assessed.

In order to reach this conclusion, the SC referred to the principle *actio nondum nata non praescribitur* - an action that has not yet arisen cannot be time-barred - and stated that the one-year limitation period, provided in Article 1968 of the Civil Code, must begin to be calculated from the moment in which the criminal judgment or the dismissal order or order to close the proceedings, duly communicated, becomes final. The Court explained that it is only at that moment that the endpoint of the stoppage of time resulting from the pre-trial criminal proceedings and the corresponding possibility of civil action is known. Consequently, the start date must be established at the moment when the factual and legal elements suitable for commencing litigation are known.

Finally, the SC held that this is not incompatible with the fact that the criminal proceedings were directed against indeterminate persons or persons other than those against whom the civil action is brought. The suspension of the statute of limitations also affects civil actions against persons who were not investigated in the criminal proceedings. Only in those cases in which, for reasons of connection or dependence, prior knowledge of the fact of interruption can be presumed, may it be understood that the limitation period began at the moment in which such knowledge can be verified.

CASE LAW

Access to **case law**

Criminal liability of legal entities

Order of the Spanish National High Court (Criminal Chamber, 4th Section), No. 391/2021, of 1 July 2021 - The right of legal persons under investigation not to incriminate themselves

On 1 July 2021, the Spanish National High Court ("**SHC**") partially upheld the appeal filed by the company Abengoa, S.A. ("**Abengoa**"), which was under investigation in these criminal proceedings, against an order requiring Abengoa to provide certain documentation. This included the following documents: (i) a certified copy of its compliance policies (the "**Compliance Documentation**"); and (ii) all internal complaints received through the company's complaints channel between 2013 and 2016, together with the files on the processing thereof that may have been generated (the "**Complaints Channel Documents**").

After analysing the existing regulatory and jurisprudential framework - both national and European - regarding the right of natural and legal persons not to incriminate themselves, the SHC concluded that a natural or legal person against whom criminal proceedings have been brought cannot be required to provide documents that directly support or allow his or her accusation to be supported.

However, the SHC held that, regarding requests for documentation from legal persons, a distinction must be made between two types of materials: (i) materials whose existence does not depend on the will of the party under investigation (documents that exist by operation of law) and (ii) those that exist by the will of the party under investigation. Therefore, the former would be excluded from the scope of protection of the right against self-incrimination (e.g. mandatory accounting documents), while the latter would be covered by this fundamental right.

In this specific case, the High Court noted that both the Complaints Channel Documents and the Compliance Documentation "*would be protected by the right of companies not to incriminate themselves*". Concerning the documentation of the compliance system, the SHC considered that, given that the criminal liability of the legal person requires the existence of a defective organisation of said entity, this issue is part of the core of its defence in the criminal proceedings. Therefore, the procedural opportunity to be provided is part of the defence strategy of the legal person.

Based on the above considerations, the SHC decided to uphold the appeal and, therefore, to exclude from the order for documentary disclosure both the Complaints Channel Documents -as they directly affect the legal person's right not to incriminate itself- and the Compliance Documentation -as its provision is "*a decision that corresponds exclusively to the legal person under investigation, as it may affect its procedural position in the proceedings in question*."- However, it should be noted that the SHC noted in its judgment that the lawful means of obtaining such documentation would have been through the entry and search procedure, since one of the documents that should logically be obtained in this type of proceedings is the regulatory compliance policies of the company under investigation.

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Publications

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Adriana de Buerba, Andrea Bartolomé y Juan García Herrera

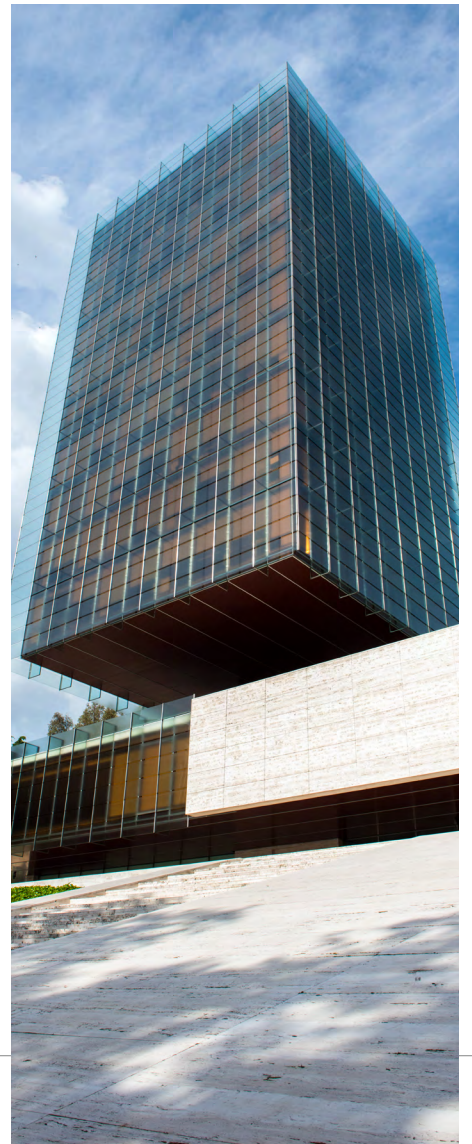

White Collar Crime
and Investigations

White Collar Crime and Investigations

Pérez-Llorca's White Collar Crime and Investigations team is formed of specialised lawyers with multidisciplinary experience, who deliver personalised advice to every client.

The White Collar Crime and Investigations lawyers at Pérez-Llorca have wide-ranging expertise in various White Collar Crime law areas and, with the support of other specialists at Pérez-Llorca, are able to find comprehensive legal solutions for our clients, tailored to each individual case. Our team's advice particularly focuses on the following areas:

- Criminal procedures for economic crimes. Our White Collar Crime and Investigations team specialises in complex criminal investigations with transnational components relating to corporate crime, tax fraud and money laundering which could give rise to the criminal liability of corporations or other legal entities. Our team also has considerable experience in all kinds of investigations related to cybercrime (e.g. fraud online, spoofing, phishing, pharming), and acts on behalf of legal entities that have been affected by this type of crime. Recently our team has also been handling investigation proceedings initiated by the European Public Prosecutor's Office.
- International mutual legal assistance in criminal law. Our White Collar Crime and Investigations team specialises in international mutual legal assistance (MLA), and more specifically, in drafting letters rogatory in order to obtain evidence or testimonies or to freeze and recover stolen assets (Stolen Assets Recovery, StAR), as well as in extradition procedures and European arrest and surrender warrants. The Firm's international outlook allows the team to employ their expertise in this field by regularly advising our foreign clients, both individuals and companies, who are involved in criminal procedures being carried out in Spain.
- Internal investigations. Our White Collar Crime and Investigations team also provides ongoing advice on crisis management and internal investigations relating to criminal matters or any other serious breach of internal policies. In particular, our White Collar Crime and Investigations team routinely leads and coordinates internal investigations involving various jurisdictions, collaborating with law firms in other countries.
- Corporate Compliance and legal advice within the framework of M&A transactions. Our White Collar Crime and Investigations team advises companies of all sizes on creating or improving their internal procedure for the prevention and early detection of potential criminal irregularities, on internal corporate investigation procedures, and on anti-money laundering policies. Within this field of law, the team advises foreign companies that need to adapt their internal procedures to comply with Spanish regulations in order to operate in Spain. The team also specialises in criminal risk assessments within the framework of corporate transactions.



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Internal Investigations
and Cybercrime

Internal Investigations and Cybercrime

The implications of business wrongdoing or the effects of cybercrime are so complex that comprehensive legal advice can only be provided when different professionals understand and analyse all the implications. At Pérez-Llorca, we involve lawyers from different practices and sectors to meet the client's needs.

Multidisciplinary team

We build response teams made up of specialists from all the areas that may be related to the incident.

Multijurisdictional team

We assemble teams with firms from other jurisdictions with proven experience in cybercrime and internal investigations. This is vital given the nature of these types of incidents.

Immediate response

In crisis situations such as a cyber-attack, the first 24 hours are critical. Our teams respond within 2 hours of communication of the attack.

Experience

Our experience in this type of crisis allows us to quickly advise on issues of particular complexity.

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The team

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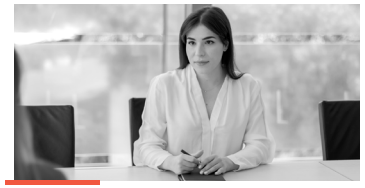

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