

White Collar Crime - Spain

Criminally liable legal persons prohibited from entering into public sector contracts

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Introduction

Criminal law perspective

Administrative law perspective

Comment

Introduction

Under Spanish law, any legal person convicted of a criminal offence⁽¹⁾ is banned from entering into contracts with the Spanish public administration.

Traditionally, this prohibition was not foreseen in the law as a criminal penalty, but rather as an administrative disqualification. However, since December 23 2010 the Criminal Code, as amended by Law 5/2010, has established the possibility of punishing legal persons which have been held liable for criminal offences with a prohibition on entering into contracts with the public administration.

This update analyses the consequences of this prohibition from a criminal and administrative law perspective.

Criminal law perspective

From a criminal law perspective, the prohibition on entering into contracts with the public administration was first established in the Criminal Code by means of Law 5/2010, which also governed a legal person's criminal liability for the first time in the Spanish legal system.

The prohibition on entering into contracts with the public administration has the following characteristics:

- The prohibition is applicable only to legal persons, not to individuals;
- The prohibition shall exceptionally be imposed as a criminal penalty when it is deemed necessary in order to prevent the criminal offence from continuing. Otherwise, the general rule is that legal persons held criminally liable shall be penalised with a fine;
- The prohibition shall be imposed taking into consideration:
 - its financial effects, especially for the company's employees; and
 - the position that the individual ultimately responsible for the perpetration of the criminal offence holds in the company;
- The prohibition may be imposed only for criminal offences perpetrated after Law 5/2010 entered into force on December 23 2010, due to the non-retroactivity of criminal laws; and
- The prohibition may be imposed only as a consequence of certain criminal offences (eg, bribery, trading in influence, tax evasion or corruption of foreign public officials in international business transactions).

The prohibition has a maximum duration of 15 years. The Criminal Code establishes no minimum duration.

The territorial scope of the prohibition is limited to the Spanish public sector and cannot be extended to other countries, notwithstanding the local legal requirements for entering into public contracts in each country.

Administrative law perspective

The prohibition on entering into public sector contracts is also regulated under Spanish administrative law by Articles 60 and 61 of Royal Legislative Decree 3/2011, which

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approved the amended text of the Public Procurement Act.

Article 60 of Decree 3/2011 establishes a number of situations in which the administration may impose this prohibition on a company or an individual, including in the event of the termination of a public contract as a result of wrongful conduct by the contractor or the initiation of insolvency proceedings by a contractor.

Article 60.1(a) of Decree 3/2011 establishes the prohibition on entering into contracts with the public sector for companies which have been convicted for corruption, unlawful association, bribery, money laundering, crimes against workers' rights or the environment or tax fraud.

The disqualification can also be imposed on companies whose representatives or board members have been convicted for any of the criminal offences listed in Article 60.1(a), provided that the criminal offences were committed when the representative or board member was representing the contracting company.

The prohibition on entering into public sector contracts can be imposed only by the administration if the criminal ruling has not already imposed this penalty.

Should this be the case, according to Article 61 of Decree 3/2011, once the company's representative has been sentenced, the administration must initiate and conduct specific proceedings in order to determine the duration of the prohibition on entering into public sector contracts. During these proceedings, the convicted company has the right to be heard and put forward any facts or legal arguments in its defence. The purpose of these proceedings is limited to discussing the duration of the disqualification, not its applicability. Therefore, if a criminal conviction has already been handed down, the administration has the duty to impose this prohibition.

The proceedings must be initiated and conducted by the Consultative Board for Administrative Procurement – an administrative body which reports to the Ministry of Tax and Public Administration. The prohibition can be applied for a maximum of eight years, but the decree establishes no minimum duration.

If the prohibition is imposed, the company will be unable to enter into contracts with any public sector entity in Spain. This includes the state, its regions and town councils and any other public body related to them. For instance, the prohibition will prevent convicted companies from entering into a contract with any company that is owned by any public administration (or in which the administration holds a major stake).

Furthermore, this prohibition will not only prevent the company from establishing future relationships and agreements with the public sector, but it may also affect existing contracts entered into by the company. Spanish case law (particularly the Supreme Court's October 4 2005 ruling) has set out that in the event of a company being convicted for any of the crimes listed in Article 60.1(a) of Decree 3/2011, the administration has the right to terminate any pre-existing contracts.

Comment

A significant number of Spanish companies (eg, construction companies and health services providers) work mainly for the administration and their turnover is closely linked to public procurement. Therefore, this prohibition can serve as a powerful deterrent for companies operating in the public sector.

This penalty has so far been infrequently imposed, both in criminal and administrative jurisdictions. However, given the political climate in Spain, and with the public increasingly calling for tougher punishment for corruption, it is likely that the courts and public administration will impose this penalty more often.

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Endnotes

(1) Not every criminal offence gives rise to the prohibition on entering into public contracts, but rather only those for which it is specifically foreseen by the law.

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