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## White Collar Crime - Spain

### Supreme Court defines international jurisdiction of courts in criminal matters

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#### Spanish courts

#### Development of universal jurisdiction

#### Existing regulation

#### Spanish courts

In accordance with Spanish law,<sup>(1)</sup> the Spanish courts have jurisdiction over criminal matters according to four principles.

#### ***Principle of territoriality***

The Spanish courts have jurisdiction to try all criminal offences committed in the Spanish territory.<sup>(2)</sup>

#### ***Principle of personality***

The Spanish courts have jurisdiction to try criminal offences committed by Spanish citizens abroad, provided that:

- the act is punishable in the country where it was committed;
- the public prosecutor or victim files a criminal complaint in Spain; and
- the accused has not been acquitted, sentenced or pardoned abroad.

#### ***Principle of public order***

The Spanish courts have jurisdiction to try certain criminal offences committed abroad by Spanish or foreign nationals against Spanish sovereignty or public order, including:

- treason;
- criminal offences against the Spanish monarchy or Spanish royal family;
- rebellion or sedition;
- forgery of Spanish official seals or other forgeries affecting Spanish public interests;
- attacks against Spanish public authorities or officials;
- criminal offences committed by Spanish public officials who exercise their duties abroad; and
- criminal offences against the Spanish public administration.

#### ***Principle of universality***

The Spanish courts have jurisdiction to try certain criminal offences committed abroad by Spanish or foreign nationals (including criminal offences against the law of nations, such as genocide, terrorism or piracy).

#### Development of universal jurisdiction

According to the Supreme Court, the purpose of universal justice is to protect the values essential to humankind which are recognised and protected in all civilised nations. Therefore, universal justice deals with the prosecution of international offences, regardless of the nationality of the offender or the place where the offence was committed. According to the Supreme Court, the principle of universal justice is complemented by the principle of secondary justice. According to this principle, criminal offenders should be tried by the judicial authorities of the state in which they are apprehended, provided that:

- the state which has primary jurisdiction (ie, the state in which the offence was committed or the state of the offender's nationality) does not initiate criminal proceedings for this purpose; or
- extradition to that state cannot be granted.

The regulation of universal jurisdiction in Spain has passed through three different stages since it was first recognised in 1985. When the law was enacted in 1985, it granted jurisdiction to the Spanish courts for criminal offences wherever they were committed, without further requirements. The only limitation was that the defendant could not have been sentenced, acquitted or pardoned by any foreign state.

On November 5 2009 an amendment to the law was passed, according to which the Spanish criminal courts would have jurisdiction over the listed offences where one of the following requirements were met:

- The alleged perpetrator was located in Spain;
- Spanish citizens were among the victims; or
- The criminal offence had a relevant link to Spain.

Also, the Spanish courts would lose their jurisdiction when a court in another competent country or an international court initiated proceedings for the investigation and effective prosecution of the alleged wrongdoing.

On March 14 2014 a new amendment to the law was passed which considerably curtailed the extension of the Spanish courts' universal jurisdiction.

### Existing regulation

As a result of the 2014 amendment, the Spanish courts shall have jurisdiction to try criminal offences committed abroad in accordance with the principle of universal jurisdiction and in the following cases, provided that the requirements indicated in each case are met.

Criminal offences	Requirements
Genocide, crimes against humanity and crimes against persons and properties protected in times of war by the Geneva Conventions	<p>The alleged perpetrator must be:</p> <ul style="list-style-type: none"> <li>• a Spanish citizen;</li> <li>• a foreign citizen who is a Spanish resident; or</li> <li>• a foreign citizen arrested in Spain whose extradition is denied by the Spanish authorities.</li> </ul>
Torture and criminal offences against moral integrity	<ul style="list-style-type: none"> <li>• Proceedings are launched against a Spanish citizen; or</li> <li>• The victim had Spanish nationality at the time the offence was perpetrated and the alleged perpetrator is located in the Spanish territory.</li> </ul>
Enforced disappearance foreseen in the New York International Convention, December 20 2006	<ul style="list-style-type: none"> <li>• Proceedings are launched against a Spanish citizen; or</li> <li>• The victim had Spanish nationality at the time the offence was perpetrated and the alleged perpetrator is located in the Spanish territory.</li> </ul>
Piracy, terrorism, drug trafficking, human trafficking, smuggling of migrants and offences against safe navigation perpetrated in marine areas	In cases foreseen in the international conventions ratified by Spain.
	<ul style="list-style-type: none"> <li>• The alleged perpetrator is a Spanish citizen;</li> </ul>

Terrorism	<ul style="list-style-type: none"> <li>• The alleged perpetrator is located in the Spanish territory;</li> <li>• The criminal offence was perpetrated on behalf of a legal person resident in Spain;</li> <li>• The victim had Spanish nationality at the time the offence was perpetrated;</li> <li>• The criminal offence was perpetrated to influence the actions of the Spanish public administrations;</li> <li>• The criminal offence was perpetrated against an EU institution or body with its headquarters in Spain;</li> <li>• The criminal offence was perpetrated against a Spanish ship or aircraft; or</li> <li>• The criminal offence was perpetrated against any official Spanish premises, including embassies and consulates.</li> </ul>
Criminal offences foreseen in the Convention for the Suppression of Unlawful Seizure of Aircraft, signed in The Hague on December 16 1970	<ul style="list-style-type: none"> <li>• The alleged perpetrator is a Spanish citizen; or</li> <li>• The criminal offence was perpetrated against a Spanish aircraft.</li> </ul>
Criminal offences foreseen in the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, signed in Montreal on September 23 1971 and its protocol	In the cases foreseen in the convention.
Criminal offences foreseen in the Convention on the Physical Protection of Nuclear Material, signed at Vienna and New York on March 3 1980	The alleged perpetrator is a Spanish citizen.
Drug trafficking	<ul style="list-style-type: none"> <li>• The alleged perpetrator is a Spanish citizen; or</li> <li>• The offender is an organisation or group which intends to perpetrate a criminal offence in Spain.</li> </ul>
Participation in the constitution or financing of, or membership of, criminal organisations or groups, and criminal offences perpetrated as part of a criminal organisation or group	The criminal organisation or group intends to carry out a serious criminal offence in Spain
Criminal offences against sexual freedom perpetrated against underage victims	<p>The criminal proceedings must be launched against:</p> <ul style="list-style-type: none"> <li>• Spanish citizens;</li> <li>• foreign citizens who are Spanish residents; or</li> <li>• a legal entity domiciled in Spain.</li> </ul> <p>The victim had Spanish nationality or was a Spanish resident at the time the offence was perpetrated.</p>
	The criminal proceedings must be launched against:

Criminal offences foreseen in the Convention of the Council of Europe on Preventing and Combating Violence Against Women and Domestic Violence, May 11 2011	<ul style="list-style-type: none"> <li>• Spanish citizens; or</li> <li>• foreign citizens who are Spanish residents.</li> </ul> <p>The victim had Spanish nationality or was a Spanish resident at the time the offence was perpetrated, provided that the alleged perpetrator is located in Spain.</p>
Human trafficking	<p>The criminal proceedings must be launched against:</p> <ul style="list-style-type: none"> <li>• Spanish citizens;</li> <li>• foreign citizens who are Spanish residents;</li> <li>or</li> <li>• a legal entity domiciled in Spain.</li> </ul> <p>The victim had Spanish nationality or was a Spanish resident at the time the offence was perpetrated, provided that the alleged perpetrator is located in Spain.</p>
Private corruption and corruption in international business transactions	<p>The criminal proceedings must be launched against:</p> <ul style="list-style-type: none"> <li>• Spanish citizens;</li> <li>• foreign citizens who are Spanish residents;</li> <li>• directors, administrators, employees or collaborators of a company domiciled in Spain; or</li> <li>• a legal entity domiciled in Spain.</li> </ul>
Criminal offences foreseen in the Convention of the Council of Europe on the Counterfeiting of Medical Products and Similar Crimes Involving Threats to Public Health, October 28 2011	<p>The criminal proceedings must be launched against:</p> <ul style="list-style-type: none"> <li>• Spanish citizens;</li> <li>• foreign citizens who are Spanish residents;</li> <li>or</li> <li>• a legal entity domiciled in Spain.</li> </ul> <p>The victim had Spanish nationality or was a Spanish resident at the time the offence was perpetrated.</p>
Any other criminal offence that must be prosecuted by Spanish authorities in compliance with any other international instrument or agreement	The requirements foreseen in the corresponding international instrument or agreement.

## Judicial interpretation of new regulation

### **National Court ruling**

In accordance with the final provisions of the 2014 law which amended universal jurisdiction:

*"at the time this law enters into force, the criminal proceedings pending for criminal offences of the list included therein, shall be stayed until it is confirmed that the requirements established in each case are met."*

In view of this provision, the judges of the National Court<sup>(3)</sup> ordered the stay of a number of ongoing criminal investigations for criminal offences included within the scope of the new universal jurisdiction regulations. Both the approval of the amendment and the National Court's subsequent decisions created controversy among Spanish jurists and in Spanish society in general. Some of the cases which were stayed received wide press coverage and raised political and societal concerns – for example, the

investigations of the alleged genocide in Tibet and the Western Sahara. However, the cases which were perhaps more difficult for Spanish people to understand were those regarding drug trafficking by sea. The Spanish law enforcement agencies have always been active in combating drug trafficking in accordance with the 1982 United Nations Convention on the Law of the Sea and the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. Under these conventions and their implementing rules, and also due to its geographical setting, Spain is obliged to guard and monitor a large marine zone covering the Mediterranean Sea and Atlantic Ocean, far beyond its territorial sea and the contiguous zone.<sup>(4)</sup> Such effort and investment resulted in the interception of a considerable number of ships involved in drug trafficking and the apprehension of their crew. The same applies to other criminal offences committed in marine spaces (eg, piracy, human trafficking or migrant smuggling).<sup>(5)</sup>

As a result of the 2014 amendment to the universal justice regulations, on May 6 2014<sup>(6)</sup> the National Court ruled that the Spanish courts no longer have jurisdiction to try criminal cases for drug trafficking in international waters, unless it can be established that the final destination of the intercepted vessel was in the Spanish territory. Consequently, the National Court ordered the stay of a number of such pending cases and the release of the defendants. The court argued that the applicable international agreements do not directly grant jurisdiction to the Spanish courts, but only establish that each party may take such measures as may be necessary to establish jurisdiction over the offences (Article 4 of the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances).

The General Public Prosecutor's Office appealed to the Supreme Court.

### **Supreme Court decision**

On July 24 2014 the Supreme Court held a plenary session with all its members with the purpose of analysing the matter and interpreting the relevant regulation. This interpretation, insofar as it has been adopted by all the Supreme Court judges, constitutes jurisprudence and is therefore binding on all lower judges and courts.

In summary, the Supreme Court reached the following conclusions:

- Spanish law establishes that the Spanish courts have jurisdiction "over the cases foreseen in international agreements" applicable to piracy, terrorism, drug trafficking, human trafficking, smuggling of migrants and offences against safe navigation committed in marine areas.
- It is unnecessary for the international agreement to expressly grant jurisdiction to Spain. It is necessary only that the criminal conduct be foreseen in the international instrument. Should this be the case, Spanish law, as amended in 2014, establishes the Spanish courts' jurisdiction.
- When Spanish enforcement agencies intercept a vessel in an international marine zone engaged in one of the criminal offences, the following rules apply:<sup>(7)</sup>
  - If the vessel is not flying a flag or marks of registry or if the flag or marks it displays are false, the Spanish courts have jurisdiction to try the case; and
  - If the vessel is flying a flag of another state, the Spanish courts have jurisdiction, provided that the flag state either consents or takes no action to prosecute.

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### **Endnotes**

(1) Article 23 of Law 6/1985 on the judiciary.

(2) Includes criminal offences committed onboard Spanish ships or aircrafts.

(3) Competence for trying criminal offences committed abroad rest with the National Court.

(4) In accordance with the 1974 International Convention for the Safety of Life at Sea and the 1979 International Convention on Maritime Search and Rescue and annexes thereto.

(5) In accordance with the 1982 United Nations Convention on the Law of the Sea and the 2000 United Nations Convention against Transnational Organised Crime and the two Protocols thereto to Prevent, Suppress and Punish Trafficking in Persons and against the Smuggling of Migrants by Land, Sea and Air.

(6) This was the first National Court decision on these cases; it was followed by a number of similar cases which adopted the same decision.

(7) In accordance with Spanish law and Articles 4 and 17 of the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.

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