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The Supreme Court and the General Public Prosecutor's Office spell out corporate criminal liability in Spain

Overview of corporate criminal liability in Spain

Corporate criminal liability was first introduced in the Spanish Criminal Code (SCC) by Organic Law 5/2010, leaving behind the settled principle that only individuals could be found criminally liable in Spain. Organic Law 5/2010 introduced Article 31 bis into the SCC, which established the circumstances under which criminal liability could be attributed to legal entities, namely the perpetration of certain criminal offences¹ on behalf and profit of a legal entity, when committed by the following persons: managers or legal representatives of the legal entity, or employees who, acting under the authority of the managers or legal representatives of the legal entity, could have been able to perpetrate the criminal offence as a result of not having been subject to due control.

On 31 March 2015, the SCC was again amended through Organic Law 1/2015, which entered into force in July 2015 and sought to provide a more comprehensive regulatory regime of corporate criminal liability. The most significant change introduced by this amendment has been undoubtedly the role attributed to 'compliance programmes' which, if appropriately designed and executed, could not only mitigate, but even exclude corporate criminal liability.

This recent amendment of the SCC raised many doubts among legal practitioners, especially regarding its implementation in practice: How would judges and public prosecutors assess the effectiveness of compliance programmes? What would they expect regarding the features and duties of the internal control body to which the SCC refers? Seeking to answer to these questions and to establish a common interpretation by Spanish prosecutors,

on 22 January 2016, the General Public Prosecutor's Office published its Opinion No 1/2016, which focuses, among others, on two main aspects of the reform: (1) the requirements that must be met by the compliance programmes in order to apply the exemption of corporate criminal liability; and (2) the requirements that must be met by the internal control body: the compliance officer or compliance body.

The exclusion of corporate criminal liability under the interpretation of the General Public Prosecution's Office

The General Public Prosecutor's Office has set out in its Opinion No 1/2016 the following guidelines concerning the exclusion of corporate criminal liability.

What requirements must compliance programmes meet in order to exclude corporate criminal liability?

The General Public Prosecutor's Office concludes that adequate compliance programmes that could give way to the exclusion of corporate criminal liability must proceed as follows:

- Identify the specific risks the legal entity could be exposed to from a criminal law perspective in view of its activity. Compliance programmes elaborated by other companies will not give way to the exclusion of corporate criminal liability;
- Set out the internal procedures for the approval and implementation of compliance policies. The execution of decision regarding said policies shall also be clearly set out;
- It is important that companies, especially large ones, implement software that allows them to control their internal business procedures;
- Provide models for an adequate



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- management of financial resources;
- Set out a procedure to enable employees to report any breach of the compliance programme;
- Establish disciplinary mechanisms that adequately penalise breaches of the compliance programme. This results in the need to implement internal codes of conduct that clearly provide obligations and prohibitions for employees and directors;
- Establish periodical reviews and amendments of procedures to keep the compliance programme updated.

According to the General Public Prosecutor's Office, the company has the burden to prove that its compliance programme is adequate and that it meets with the required standards to exclude its criminal liability. Partial compliance with the aforementioned requirements will mitigate corporate criminal liability.

What criteria will public prosecutors apply to assess the effectiveness of compliance programmes?

- Whether the compliance programme reflects the company's commitment to promote an ethical corporate culture will be assessed. The management board and directors' behaviour and commitment are key factors in this regard;
- The existence of high ethical standards in the recruitment and promotion of directors will be viewed positively;
- The compliance programme's ability to detect criminal practices will be assessed;
- The company's behaviour with regard to similar situations will be assessed;
- Once a criminal offence has been perpetrated, the following will be taken into account: the seriousness of the offence, whether the perpetration of the offence is widespread throughout the company, the number of employees involved in said perpetration and the intensity of the fraudulent mechanisms used by the perpetrator to avoid internal compliance procedures;
- Regarding the conduct of the company after the perpetration of the offence, the immediate restitution or compensation of damages or undertaking an internal investigation and subsequent disclosure of the findings to the authorities will be considered, at least, as mitigating factors and will be viewed positively when deciding on the application of the exclusion of

- corporate criminal liability. An opposite effect will be attained if the perpetrated offences are reported with delay or if the company refuses to cooperate;
- Certificates issued by companies that specialise in assessing matters relating to compliance will be taken into account when assessing the suitability of the compliance programme. However, these certificates will not constitute automatic evidence of the effectiveness of the compliance programme.

Are the requirements for the exemption of corporate criminal liability the same in all cases?

- If the offence has been perpetrated by the company's managers or directors, corporate criminal liability will be almost automatic. The exemption may apply when the company is able to prove that it had an adequate compliance programme and that the perpetrator of the criminal offence fraudulently avoided the existing prevention and control mechanisms;
- On the other hand, if the offence has been perpetrated by an employee, corporate criminal liability can be excluded if the company is able to prove that it had an adequate compliance programme. Whether the offender used fraudulent mechanisms to avoid the compliance measures will not be decisive in these cases.

What are the features that the compliance body must have?

- It must be an internal body of the company whose members must be appointed by the management board. The management board is, in view of the General Public Prosecutor's Office, responsible for establishing internal policies for risk management and control and for supervising their implementation;
- Depending on the company's size, the compliance body will have one or several members;
- Its members will need to have sufficient knowledge and experience to carry out their functions and will need adequate technical means as well as access to the company's internal procedures, information and activities;
- This body will need great levels of independence. For this purpose, compliance programmes must provide mechanisms to adequately deal with conflicts of interest that could arise with the

management board.

Supreme Court's recent judgments

In this context, on 29 February 2016, the Spanish Supreme Court rendered a judgment confirming the conviction of three legal entities for the commission of several criminal offences against public health, forgery of official documents and others.

Surprisingly, seven out of the 15 magistrates who integrate the Spanish court rendered a dissenting vote that disagreed with the reasoning contained in the judgment, but reached the same conclusion. This circumstance has generated much uncertainty in the legal community that will have to be addressed by subsequent judgments.

Furthermore, on 16 March 2016 the Spanish Supreme Court rendered a new judgment by which a company has been acquitted of fraud.

Judgment dated 29 February 2016

The importance of this judgment lays in the analysis of the circumstances that trigger corporate criminal liability according to the Spanish Supreme Court, given as follows:

- Corporate criminal liability is based on the prior commission of a criminal offence by an individual who acts on behalf of a company;
- The legal entity must obtain a direct or indirect profit that results from the criminal offence committed by the individual;
- The basic core of corporate criminal liability is the absence of adequate control measures to avoid the commission of criminal offences. As a consequence, it has to be proved by the prosecution that the company lacks a corporate culture based on the observance of the law;²
- It is essential that companies establish and correctly implement effective control measures that prevent, as much as possible, the commission of criminal offences by those who act on their behalf;

The judgment also analysed the requirements that shall be met to impose the penalty of winding up the company, arguing the following:

- Depriving sanctions (such as the winding up of a company) should be imposed, as a general rule, taking into account their 'economic and social consequences, especially for employees';

- It is necessary that the company has been used as an instrument for the commission of criminal offences in such a way that its legal activity becomes less relevant than the illegal one;
- Tribunals will have to consider adequately the consequences of applying this penalty. Aspects such as the relevance of the illegal activity of the legal entity in relation to the criminal offence committed or the interests of third parties which are harmed by the criminal offence will need to be analysed.

Judgment dated 16 March 2016

In this recent judgment, the Spanish Supreme Court analysed the right to the presumption of innocence in the case of legal entities, stating the following:

- Corporate criminal liability will not be automatically triggered when a criminal offence perpetrated by an employee of a company is detected;
- Prosecutions have the obligation to prove the commission of a criminal offence by the legal entity. This means that it has to be proved that the legal entity 'grossly breached supervisory, surveillance and control duties over activities, considering each case's specific circumstances'. Less serious breaches will be irrelevant from a criminal law perspective;
- Companies will be granted the same constitutional rights as natural persons. In this regard, it is not admissible to sentence a company without examining a valid representative. Having examined the employee who committed the offence is not sufficient to cover this requirement.

Undoubtedly, the Spanish Supreme Court and the General Public Prosecutor's Office have made an effort to take the first steps towards the clarification of corporate criminal liability in Spain. However, this new regulation is still full of imprecise aspects that will need to be analysed further. Time will help to shed light on all the unanswered questions that surround this issue because judges will have to approach each one of them on a case-by-case basis.

Notes

- 1 Organic Law 5/2010 provided that only a closed list of criminal offences could result in criminal liability of legal entities.
- 2 This is in fact the legal motive that has given way to the dissenting vote by seven out of the 15 magistrates.