

The scope of criminal liability of legal persons according to the Supreme Court

Ángel Carrasco Perera and Jesús Almarcha Jaime
Knowledge Management Department, Gómez-Acebo & Pombo

1. First two judgments in compliance matters

On 29 February 2016, the Supreme Court handed down the first judgment¹ to contain an in-depth analysis of several aspects related to the criminal liability of legal persons in the aftermath of the amendments implemented by Act 1/2015. The case concerned a drug trafficking and money laundering network composed of several natural persons who were *de facto* or *de jure* directors of several legal persons that were used to commit crimes. Only one of the three accused legal persons managed to not be wound up, mainly because there are a hundred employees on the payroll, although this does not exempt it from having to pay a fine of 775.6 million euros, which can be split into several payments (pursuant to art. 53(5) of the Spanish Criminal Code).

The Supreme Court handed down its second judgment² in these matters on 16 March 2016, in a case of embezzlement by a real estate agency in brokering the sale and purchase of a property. The seller set an asking price for the property, from which the agency's fees would be paid, while the agency in turn arranged a higher price with the buyer, keeping the difference between the asking price and the price actually paid by the buyer. The agency was released from criminal liability (temporary closure of its offices and payment of a 24,000 euro fine) because it was not informed of the accusation against it in the first stage of the proceedings.

2. The Supreme Court's doctrine

The Supreme Court's judgments do not contain a doctrine that can be clearly ascertained, and this occurs with regards to essential aspects of the problem of criminal liability of legal persons. In general, the doctrine of these judgments is as follows:

- *Legal equality*: the Supreme Court lays down the legal equality of natural and legal persons in respect of the observance of constitutional guarantees and rights as established principles of criminal law, having to treat both alike.
- *Independent liability*: the liability regime that governs in these cases is that of independent liability, i.e., the only relationship between the natural person and the legal person is the need for the former to commit the crime in order for the latter to be found guilty, although this does not mean, in and of itself, that the legal person must be convicted. It therefore becomes necessary to analyse whether the legal person diligently complied with all legal requirements.
- *Actus reus*: a legal person's liability depends on the adoption of effective control measures and methods that prevent the commission of certain criminal offences by individuals within the organisation.

¹Judgment no. 154/2016 of the Supreme Court (Criminal Division, First Chamber) of 29 February (JUR 2016\42685).

²Judgment no. 221/2016 of the Supreme Court (Criminal Division, First Chamber) of 16 March (JUR 2016\56612).

Therefore, the *actus reus* shall be the absence of appropriate control measures to prevent the commission of offences, which would denote the legal person's serious intention to reinforce the effectiveness of the rule and observance of the law.

- *"Direct or indirect benefit"*: with respect to the requirement of "direct or indirect benefit" under art. 31 *bis* of the Criminal Code, the court takes the view that such benefit is evidenced by any kind of advantage, including a mere expectation or an improvement in market position or, as the case may be, the continued subsistence of the legal person. The latter is particularly applicable to "front companies", where the benefit is evidenced by the existence thereof. Similarly, non-consummation of the attempted offence seeking to gain a benefit involves, in and of itself, mere expectation.
- *Release from liability*: Once the *actus reus* has been delimited, release from liability shall only be possible in cases where effective and appropriate control measures have been put in place. The court would probably not equate "control measures" with a required "compliance programme". In addition, the court nuances that this does not accommodate the idea of requiring a "compliance culture" (i.e., that the members of the organisation truly observe the compliance programme or the law) contained in the Public Prosecutor Office's Rules Instrument 1/2016, as this lays down an objective liability regime that has no place in our system.
- *Burden of proof*: the prosecution has the burden of firstly proving the concurrence of the circumstances that are necessary for the legal person to be criminally liable. Therefore, simply showing evidence that the natural person has committed the crime does not lead to a rebuttable presumption of the existence of an organisational failure.
- *Rights of the defence*: the Supreme Court is of the opinion that the confusion of the exercise of these rights by the natural

person who committed the original criminal offence is a well-known and important problem. This is due to the fact that the natural person can use this position to his own benefit, seeking to shift all liability to the legal person (for example, by not collaborating with the legal system, by enjoining that the bulk of the compensatory redress fall to the legal person, by exerting influence on the defence strategy, etc.).

This problem has not been resolved by lawmakers, nor can it be resolved by the court, although the latter has appealed to the former for a solution (for example, by introducing a "court-appointed advocate" for the legal person or assigning the defence to the compliance officer or a collegial body), requiring judges during the trial to protect from violation the legal person's rights of the defence, the contrary meaning a denial of defence³.

However, the defence of the natural person and the legal person by the same individual does not automatically give rise to a violation of the rights of the defence, having the legal person to show evidence of and prove the prejudice it has suffered as a result of such situation.

- *Front or shell companies*: in respect of legal persons created exclusively for committing criminal offences which thus have no legal activity, the Supreme Court clarifies that such companies are automatically devoid of internal compliance measures, given that their purpose is precisely the opposite. The very purpose of such companies dictates their termination under 31 *bis* of the Criminal Code. They may not be assigned criminal liability; rather, the most appropriate measure is to directly wind up the legal person, declaring its non-existence and notifying the appropriate register for the purpose of being struck off, pursuant to art. 129 of the Criminal Code.

Therefore a front company, as it does not exist, has neither rights of the defence nor

³ Probably the easiest way to solve the problem is the assignment of a lawyer other than the natural person, rather than a court-appointed advocate or a collegial body.

liability. Only companies with sufficient substance can be criminally liable.

- *Determination of the applicable sentence:* in respect of the determination of the applicable sentence, specifically the winding up of the legal person and payment of the fine, both related to the possible dissolution of the legal person, the Supreme Court avails itself in the first judgment of art. 53(5) of the Criminal Code to ponder the sentence handed to the legal person that, aside from its illegal activity, also had a legal activity that gave employment to around a hundred people. The court holds that in these cases the protection of the employees or the public interest should be ensured, as they would otherwise have to bear the consequences of the unlawful act. In addition, it leaves open the possibility of resorting to the court intervention under art. 33(7)(g) of the Criminal Code.

3. Controversy beyond the court's doctrine

- 3.1. Does a company bear objective liability in the event of the commission of a crime by a natural person pursuant to art. 31bis(1)(a) of the Criminal Code?

The Supreme Court's judgment, as opposed to the Public Prosecutor Office's Rules Instrument 1/2016, makes no distinction in the exemption of a legal person from liability as to whether the crime was committed by a director or legal representative (art. 31bis(1)(a) of the Criminal Code) or a subordinate (art. 31bis(1)(b) of the Criminal Code). To the contrary, it always refers to the natural person in general terms, begging

the question of whether the compliance programme would have the same exculpatory effect in both cases.

Our reading of the judgments leads us to believe that the application of a different and independent, albeit cumulative, liability system, coupled with the lack of differentiation between both cases, implies that the natural person's status in the legal person makes no difference and that the exculpatory effects of the compliance programme are the same in both cases⁴. Furthermore, the first case involves several directors of various legal persons, which lends further credence to this interpretation.

- 3.2. *Does a compliance programme automatically release from liability in the event of meeting the requirements of art. 31bis(5) of the Criminal Code?*

We believe that the court's implicit answer to this question is in the negative, given that the judgment emphasizes the obligation of legal persons to implement effective and adequate control measures to prevent the commission of crimes within their organisations. However, this does not imply that the existence of a compliance programme entails, *per se*, an automatic exclusion of criminal liability, as such programme must be the subject of a subjective value judgment by the court in order to determine whether the measures contained in such programme are effective and adequate. Moreover, for logistical and financial reasons, it is difficult to implement a compliance programme in small and medium-sized legal persons, meaning that

⁴ "Thus, the determination of the conduct of the legal person, relevant for the purposes of finding it criminally liable (...), must be established on the basis of an analysis of whether the crime committed by the natural person within the same has been rendered possible, or facilitated, by the absence of a culture of respect for the law, as a source of inspiration for the conduct of its *organisational structure* and independent of that of each of the natural persons that make it up, which ought to reveal itself in some kind of concrete forms of monitoring and control of the conduct of its *senior managers and subordinates*, conducive to prevention of their commission of offences".

"(...) the criminalisation of the intervention of the appellant legal person, that does not lie solely on the commission of a crime against public health attributed to its *de facto or de jure directors*, an infringement operating as a prerequisite precedent for an ulterior pronouncement on the legal person's own criminal liability in terms of a breach of its obligation to provide the means to prevent crimes within, but also on the existence of the infringement committed by the natural person together with the absence of proper control by the legal person".

any existing control measures must be examined, even if they do not make up a true compliance programme⁵.

3.3. Must small and medium-sized legal persons have a compliance programme?

We believe that the court's response is in the negative. The Supreme Court is aware that in certain cases there are legal persons that, due to their small size or lower financial capacity, are unable to properly implement a compliance programme. To this we need to add the idea that a programme does not objectively release from liability; instead, the court must subjectively assess whether not only the programme but also the control measures are sufficient to prevent the commission of crimes in general⁶.

3.4. What happens if you do not know who committed the crime within the legal person?

The Supreme Court bases the legal person's regime of criminal liability precisely on the content of art. 31*ter* of the Criminal Code, which clearly states that it is not necessary that the perpetrator of the criminal act be individualized for the legal person to be held criminally liable. This also applies to cases where the natural person dies, the natural person is removed from the right to judicial action or circumstances apply that affect such natural person's guilt.

Thus, in the second of the judgments, the Supreme Court emphasizes that "two are, therefore, the subjects of the accusation, each liable for their own wrong and each

called to defend themselves on the basis of a constitutional regime that cannot be hollowed out to the detriment of one or another of the accused".

However, although the judgments are silent on this matter, it is not enough that an anonymous member of a possible group of no matter what perpetrators commits the offence. The crime must have been committed by someone to whom the subjective elements of accusation to which art. 31*bis* of the Criminal Code refers apply. For instance, it must be proved that it was (necessarily) committed by a representative and by someone on behalf or account of the company. And in the case of art. 31*bis*(1)(b) of the Criminal Code, it must (demonstrably) involve someone who was acting in the exercise of functions or company activities and from whom a direct or indirect benefit for the company could be derived.

4. Does it make sense?

The practicality of the imposition of the penalty of a fine is at the very least questionable in a case such as that tried in the judgment of 29 February. Wound up companies will not have to pay it, precisely because they are "fronts" and because they have been wound up. The only company that remains as a going concern will have to deal with a pecuniary amount that rarely does not imply a *de facto* dissolution for financial reasons and the reputational damage it will sustain. *Cui prodest?* Because it is clear that *de facto* or *de jure* directors were convicted for their own crime, and it is not conceivable that they may suffer further distress for the fine imposed on the company, which could very well have been imposed on them as ancillary measures. Those who suffer from the

⁵ "And this beyond the possible existence of organisational and management models that, meeting the requirements specifically listed in the current art. 31*bis*(2) and (5), could indeed lead to the concurrence of the exemption expressly provided in that provision, of a questionable nature inasmuch as related to the exclusion of guilt, which seems wrong, with the concurrence of grounds of justification or rather, with the *actus reus*, which perhaps would be more appropriate since the exoneration is based on the proof of existence of suitable and efficient control tools, the absence of which would integrate, on the contrary, the core of the legal person's criminal liability, supplementary to the commission of the offence by the natural person".

⁶ "Core of the legal person's liability that, as we have said, is none other than the absence of adequate control measures to prevent the commission of crimes, which demonstrate a serious willingness to strengthen the effectiveness of the provision, regardless of those requirements legally concretized in the form of 'compliances' or 'models of compliance' for the application of the exemption that, moreover, certain legal persons, because of their small size or lower financial capacity, could not dutifully implement".

sentence are not the shareholders, no longer with any interest in the company, but other stakeholders, mainly its workers.

5. Highlights of the dissenting opinion in the judgment of 29 February 2016

The judgment is followed by a dissenting opinion held by seven of the fifteen judges who, despite sharing the finding of the court's decision, disagree on several points, summarised as follows:

- *The absence of a culture of control as an element of the actus reus*: for those subscribing to the dissenting opinion, the "culture of compliance", expressly mentioned by the Public Prosecutor Office's rules instrument, constitutes a central (not additional) element of the *actus reus* that is based on negligence *in vigilando* or *in instruendo*.
- *The privileged burden of proof regime for legal persons*: it is not in accordance with the law that the prosecution must prove, in any case, the liability of the legal person, since legal doctrine has advocated that evidence must be shown of exculpatory circumstances as much as of the criminal act and, therefore, it falls to whoever alleges such circumstances to provide a sufficient rational basis to determine the same. In the absence of this rational basis, the consequence is the assumption of liability (e.g., judgment of the Supreme Court no. 1068/2012 of 13 November).

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