Global Investigations Review

The Guide to International Enforcement of the Securities Laws

Editors
John D Buretta, David M Stuart and Lindsay J Timlin

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Publisher's Note

Global Investigations Review is delighted to publish *The Guide to International Enforcement of the Securities Laws*. For those who don't yet know, Global Investigations Review is the online home for everyone who specialises in investigating and resolving suspected corporate wrongdoing. We tell them all they need to know about everything that matters.

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Being at the heart of the corporate investigations world, we often become aware of gaps in the literature before others – topics that are crying out for in-depth but practical treatment. Recently, the enforcement of securities laws emerged as one such fertile area.

Capital these days knows no borders, but securities-law enforcement regimes very much do. In that juxtaposition lie all sorts of questions. The book you are holding aims to provide some of the answers. It is a practical, know-how text for investigations whose consequences may ring in securities law. Part I addresses overarching themes and Part II tackles specifics.

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I would like to thank the editors of *The Guide to International Enforcement of the Securities Laws* for helping us to shape the idea. It's always a privilege to work with Cravath, Swaine & Moore. I'd also like to thank our authors and my colleagues for the elan with which they've brought the vision to life.

We hope you find it an enjoyable and useful book. If you have comments or suggestions please write to us at insight@globalinvestigationsreview.com. We are always keen to hear how we could make the guides series better.

David Samuels
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Part II

Expert International Perspectives

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Spain

Enrique Rodríguez Celada and Arianna Vázquez Fernández[1]

What are the relevant statutes and which government authorities are responsible for investigating and enforcing them?

In Spain, the main set of rules governing the functioning of the securities market and investment services is Royal Legislative Decree 4/2015 of 23 October, approving the Consolidated Text of the Securities Market Act (LMV).[2] Since this area is, to a large extent, subject to European harmonisation, the LMV has been amended on various occasions to implement European directives on financial markets (e.g., the Markets in Financial Instruments Directives, the Transparency Directive and the Market Abuse Directive). In terms of its scope of application, the LMV applies to any financial instruments issued, traded or marketed in Spain, as well as any investment activities or services carried out by domestic or foreign companies in the Spanish market.

In addition to the LMV, there are various sectoral rules on specific matters pertaining to the securities and financial markets, which are mainly implemented through (1) royal decrees issued by the Spanish government, (2) orders issued by the Ministry of Economy and Competitiveness and (3) circulars issued by the National Securities Exchange Commission (CNMV).[3] The following are examples of these sectoral rules:

- Royal Decree 2119/1993 of 3 December on the sanctioning procedure applicable to securities-market operators;

1 Enrique Rodríguez Celada is counsel and Arianna Vázquez Fernández is an associate at Uría Menéndez Abogados, SLP.

2 The CNMV's website provides an English translation of the LMV. The text is available at the following link: https://www.cnmv.es/Portal/legislacion/legislacion/tematico.aspx?id=1.

3 The website of the Spanish Official Gazette contains a compendium of the relevant rules on securities markets under the section title 'Stock Market Code', which is periodically updated and available at the following link: https://www.boe.es/biblioteca_juridica/codigos/codigo.php?id=076_Codigo_del_Mercado_de_Valores&modo=2.

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- Royal Decree 948/2001 of 3 August on the compensation system for investors;
- Royal Decree 1310/2005 of 4 November on public securities offerings and admission to trading of securities on official secondary markets;
- Royal Decree 1066/2007 of 27 July on takeover bids;
- Royal Decree 1362/2007 of 19 October on transparency requirements;
- Royal Decree 217/2008 of 15 February on investment services companies;
- Circular 10/2008 of 30 December on financial advisory firms;
- Order EHA/1717/2010 of 11 June on the regulation and control of marketing activities involving investment services and products;
- Order ECC/461/2013 of 20 March on corporate governance information to be published by listed entities;
- Circular 1/2018 of 12 March on warnings relating to financial instruments; and
- Royal Decree 739/2019 of 20 December on payment services and payment institutions.

Other sources of norms on securities and financial markets include the Spanish Corporation Act, consumer protection legislation (such as Law 22/2007 of 11 July on the distance marketing of financial services for consumers) and the Spanish Criminal Code (SCC).

The main supervisory body on matters pertaining to securities and financial markets is the CNMV, which is a public entity with independent legal personality. Its functions are to:

- ensure transparency of securities markets, the correctness of price formation and the protection of investors;
- monitor and oversee the functioning of securities markets, with the authority to punish any infringement committed by legal or natural persons operating in them;
- advise the Spanish government and the Ministry of Economy in connection with the exercise of their respective regulatory powers;
- issue circulars to elaborate on and enforce specific matters established in legislation (i.e., the CNMV is not itself entitled to create new duties or obligations but develops specific provisions approved by the Spanish government and the Ministry of Economy); and
- publish guidelines for market operators with the goal of promoting sufficient compliance with the rules and standards of conduct on securities and financial markets.

Notwithstanding the above, the following domestic institutions also participate in the enforcement of securities obligations: the Bank of Spain, which oversees the public debt market and activities carried out by credit institutions; the Ministry of Economy and the departments of economy of specific Spanish autonomous regions; and the Public Prosecutor's Office and investigative courts,[4] which also play a decisive role in the prosecution and punishment of potentially criminal infringements.

What conduct is most commonly the subject of securities enforcement?

Litigation related to the enforcement of securities laws has significantly increased over the past decade as a result of the challenges caused by the financial crisis of 2008–2012.

4 In Spain, the investigation stage of criminal proceedings is led by criminal judges rather than by the Public Prosecutor.

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The types of conduct subject to securities enforcement depend on the specific area of law. The following are three different approaches from administrative, criminal and civil law perspectives.

Administrative liability

Any breach of regulations related to the organisation or control of securities markets may give rise to liability under administrative law (Article 271 LMV). This will involve not only infringements of the provisions of the LMV but also those of any other legal framework on the matter approved by the European Union, the Spanish government, the Ministry of Economy and the equivalent bodies of the Spanish autonomous regions, as well as circulars issued by the CNMV.

Consequently, the range of conduct that is potentially punishable in the area of administrative law is exceedingly broad. For example, misconduct may relate to breaches of registration and licensing duties; classification and evaluation of clients; implementation of proceedings on corporate governance; and disclosure obligations regarding relevant facts, periodic financial information, the acquisition of significant stakes and treasury stock, etc.

Depending on the specific circumstances of the case, misconduct may qualify as a minor, serious or very serious infringement (Articles 277 to 300 LMV) and there is a corresponding range of sanctions (see 'What remedies and sanctions are available to government authorities?').

Pursuant to Article 271 of the LMV, administrative sanctioning proceedings may target the specific companies[5] that infringed the regulations on securities markets and, in cases of serious and very serious infringements, natural persons holding (*de jure* or *de facto*)[6] the positions of director, chief executive and any other similar position entailing the highest management functions in the legal person. Nevertheless, those legal persons will only be held liable when it is proven that the infringement was caused as a result of their wilful misconduct or negligence.[7]

The CNMV has the authority to initiate sanctioning proceedings, conduct investigations and impose sanctions whenever it considers it appropriate to do so.[8] The CNMV is vested with expansive powers of inspection, including the right to: access documents in any format and copy them; request information and hold hearings of natural persons; perform inspections of any offices or premises; request the freezing of assets or order the temporary closure of businesses; and monitor the implementation of remediation measures.

5 The Ministry of Economy and Competitiveness may forgive or postpone payment of fines imposed on legal persons when such entities became controlled by new shareholders after committing the infringement, are involved in insolvency proceedings or any other exceptional circumstances exist where imposition of the sanction would be potentially unfair or harm general interests.

6 This implies that sanctioning proceedings can be directed not only against the natural persons holding these positions but also anyone who, in practice, actually performs the corresponding acts or duties.

7 The absence of wilful misconduct or negligence will be presumed when (1) natural persons participating in a governing body did not attend the corresponding meeting on justified grounds, or if the natural person voted against or abstained from voting on resolutions or decisions that gave rise to an administrative infringement and (2) infringements can be exclusively attributed to specific executive committees, managing directors, general managers or to other natural persons with similar duties in the company (Article 271.3 LMV).

8 Serious infringements must be communicated to the Ministry of Economy.

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Administrative actions are time-barred five years (for serious and very serious infringements) or two years (for minor infringements) from the day on which the punishable act was committed.

Criminal liability

Although a broad range of criminal offences can potentially be committed in connection with listed companies and financial markets (such as public and private corruption, money laundering, fraud, false accounting and negligent insolvency), the main securities-related offences are the following.

- Investment fraud (Article 282 *bis* SCC): directors of an issuer of securities who forge the economic-financial information contained in a prospectus or any other information that the company must make public pursuant to securities regulations with the goal of attracting investors or obtaining financing by any means. The mere possibility of causing damage is punishable under this criminal offence (i.e., it is not necessary to prove actual damage for a conviction).

  Although only company directors can commit the criminal offence of investment fraud as perpetrators, third parties that contribute to the misconduct can also be held criminally liable as necessary collaborators or accomplices.
- Market manipulation (Article 284 SCC): whoever alter prices (1) by means of violence, intimidation or deceit, (2) through the spread of rumours that provide false or misleading economic information about securities issuers or natural persons linked to them, or (3) by means of carrying out transactions or issuing trading orders that provide false or misleading information about the supply, demand or price of a financial instrument.

  The actions described in points (2) and (3) will be punishable under criminal law if any of the following circumstances exist: the profit earned or the damage caused exceeds €250,000; the value of the funds used exceeds €2 million; or the integrity of the market was significantly impacted.
- Insider trading (Article 285 SCC): whoever, directly or through an intermediary, (1) acquires, transfers or assigns a financial instrument, or cancels or modifies a securities order by means of using inside information, or (2) recommends that a third party use the inside information to carry out any of the above acts, subject to the condition that at least one of the following circumstances occurs: the profit earned or the damage caused exceeds €500,000; the value of the funds used exceeds €2 million; or the integrity of the market was significantly impacted.
- Unlawful disclosure of inside information (Article 285 *bis* SCC): whoever has legitimate access to inside information and discloses it outside the normal course of his or her functions, endangering the market's integrity or investors' trust.

All the above criminal offences require intent – or at least knowledge – to meet the requirement of *mens rea*; a mere lack of diligence is not penalised under Spanish criminal law.

In recent years, various high-profile criminal proceedings related to breaches of securities laws were initiated in connection with major Spanish financial institutions, their directors and executives. The *Bankia* case, which concerned alleged securities fraud related to Bankia's initial public offering in 2011, was one of the most widely covered by the press. A

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judgment was given in 2020, which resulted in the acquittal of all the defendants.[9] Another high-profile ongoing criminal investigation is the *Banco Popular* case, which concerns allegations of investment fraud and market manipulation.

Generally, these types of criminal proceedings generally target corporate directors, top executives and any other collaborators who significantly contributed to the commission of the crime. However, pursuant to the principle of culpability, individuals may only be held criminally liable for their own acts or omissions – the SCC does not recognise vicarious or strict criminal liability. As such, in practice, the actual defendants would depend on the specific circumstances of the case.

Auditors and audit firms are often involved in the most high-profile proceedings pertaining to investment fraud (e.g., the *Bankia*, *Banco Popular* and *Banco de Valencia*[10] cases, where the allegedly false information had been subject to – and not flagged by – an external audit prior to public disclosure). In this regard, criminal judges emphasise that financial audits are essential for the functioning of the economy and consider that audited documents are those that are most likely to deceive investors given that investors invariably rely on the accuracy and truthfulness of the financial information they contain.[11] As a result, there is a risk that auditors may be deemed as necessary collaborators in these situations.

In the *Bankia* case, top officials in the CNMV and the Bank of Spain were also investigated in the preliminary stage of the criminal proceedings (they were alleged to have authorised Bankia's initial public offer despite being aware that the prospectus was factually misleading). However, the judge decided to dismiss the proceedings against them and they were ultimately not charged with any crime.

Companies can be held liable for the securities-related offences indicated above if it is proven that the misconduct was committed on their behalf – and for their direct or indirect benefit – by their directors, executives, employees or collaborators (Articles 288 and 31 *bis* SCC). It is important to take into consideration that corporate criminal liability is not alternative to (but is instead cumulative with) that of the natural persons who committed the criminal offence.

The limitation period for the criminal offences of market manipulation and insider trading is 10 years and for the criminal offence of investment fraud it is five years (although potential aggravating circumstances could lead to a lengthier limitation period).

It is also worth noting the use of cryptocurrencies in financial markets given the highly topical nature of the issue and the possibility of it resulting in numerous issues. The CNMV and the Bank of Spain published two joint press statements (on 8 February 2018[12] and 9 February 2019[13]) warning about the risks resulting from investor fundraising initiatives based on virtual currencies. Specifically, the supervisors highlighted that:

9 See the Criminal Chamber of the Spanish National High Court's judgment No. 13/2020 of 29 September.

10 The *Banco de Valencia* case is an ongoing criminal investigation that concerns allegations of investment fraud and forgery of accounts.

11 See, among others, the Criminal Chamber of the Spanish Supreme Court's judgment No. 94/2018 of 23 February.

12 The press statement dated 8 February 2018 can be accessed at: https://www.bde.es/f/webbde/GAP/Secciones/SalaPrensa/NotasInformativas/18/presbe2018_07en.pdf.

13 The press statement dated 9 February 2021 can be accessed at: https://www.cnmv.es/portal/verDoc.axd?t={52286f9f-c592-4418-9559-b75bf97115d2}.

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- cryptocurrencies are unregulated instruments and are therefore not backed by any public authority and do not benefit from the legal guarantees and safeguards associated with regulated financial instruments (e.g., customer-protection mechanisms);
- loss of capital investment is highly likely as cryptocurrencies lack intrinsic value and are not fiat money – they are highly speculative investments subject to extreme volatility;
- most fundraising schemes (initial coin offerings) are based on unaudited and biased information, which make minimal references to the risks and may hamper investors' decision-making processes; and
- resolution of conflicts and prosecution of offences related to cryptocurrencies may be difficult to handle in practice given that the issuance, custody and marketing of cryptocurrencies usually occur in multiple jurisdictions.

As an example of the risks related to the lack of administrative control over cryptocurrencies, Spain's National Court is currently investigating various apparent pyramid schemes that ostensibly affected thousands of investors.

The LMV was amended on 12 March 2021 to grant the CNMV the authority to oversee the advertising of cryptocurrencies for investment purposes (including warnings on the corresponding risks and characteristics), despite them not being assets covered by the scope of the LMV. The CNMV is currently drafting a circular aimed at developing the standards, principles and criteria applicable to advertising activities related to cryptoassets.

Civil liability

Any investor or third party injured as a result of a breach of securities regulations has standing to bring a civil action to recover its losses on the basis of general civil law rules. That being said, the LMV establishes two specific civil actions.

The first relates to offerings in the primary securities market. In particular, the LMV states that civil liability will arise as a result of any damage caused to investors whose investment decision was made having relied on false information in – or material omissions from – the prospectus or any other document that the guarantor prepares. With regard to addressing the parties that may be potentially liable, Article 38 of the LMV refers to (1) the issuer, offeror or natural person who requests the securities' admission to trading, (2) the directors or board members of the legal person, (3) any other legal or natural person that has accepted liability for all or part of the prospectus and that circumstance is stated in the prospectus, (4) the guarantor of the securities and (5) the leading entity.[14]

The second civil action relates to the secondary securities market and, particularly, to the financial information that issuers must periodically report (i.e., annual and half-yearly financial reports). According to Article 124 of the LMV, issuers and their directors are liable for any damage caused to holders of the securities as a result of information that failed to provide an accurate, fair assessment of the issuer.

The damages awarded to holders of securities would be for actual losses suffered, given that punitive damages are not generally recognised under Spanish law.

14 Liability resulting from the content of the prospectus is further addressed in Articles 32 to 37 of Royal Decree 1310/2005 of 4 November on public securities offerings and the admission to trading of securities on official secondary markets.

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These two civil actions would be time-barred three years after the date that the investor became aware – or should have become aware of – the inaccuracy of the prospectus or the periodical financial information published by the issuer, respectively.

What legal issues commonly arise in enforcement investigations?

There are several issues that may arise in the framework of securities law enforcement investigations depending on the nature and characteristics of the concrete investigation at stake. We analyse below some aspects that, in our view, are particularly relevant when dealing with these types of investigations, namely (1) management of potential conflicts of interest between legal and natural persons being investigated in criminal proceedings, (2) the duty to cooperate with authorities and the right against self-incrimination, and (3) the scope of legal privilege in Spain and its suitability to shield the information produced within the context of internal investigations.

Conflicts of interest among legal and natural persons

Since 23 December 2010, legal persons may be held criminally liable for specific offences, provided that the following requirements are met:

- one of the company's directors, executives, employees or collaborators is convicted in connection with the facts under investigation;
- the convicted director, executive, employee or collaborator acted on behalf of the company (i.e., the act or omission was connected to his or her corporate duties);
- the offence was committed for the company's direct or indirect benefit (i.e., if the offence harms the corporate interest, the entity would not be deemed criminally liable); or
- the company lacked a culture upholding business ethics. In this regard, the company could be exempt from criminal liability if it had in place an effective compliance programme prior to the commission of the criminal offence.[15]

Taking the above into account, if a company is deemed to be a suspect in criminal proceedings, it may, as in the case of natural persons, exercise its right of defence in various ways. The path of defence the legal and natural persons choose would determine whether or not a conflict of interest exists among them.

By way of example, the company could attempt to prove that no criminal offence was committed or that the natural person acting on its behalf did not participate in the commission of the crime (with the goal of excluding the first requirement listed above). In that

15 Compliance programmes must fulfil the requirements under Article 31 *bis* of the SCC in order for the company to be exempt from criminal liability. In particular, compliance programmes must (1) designate an internal body (with decision-making power) to supervise and control the crime-prevention model (a compliance officer or committee), (2) identify activities in connection with which the crimes to be prevented are most likely to occur (a risk map), (3) set out the protocols and procedures to be followed to adopt and implement decisions within the entity, (4) establish appropriate financial-resource-management procedures to prevent the commission of crimes, (5) impose the obligation to report infringements of the prevention model to the compliance officer or supervisory body (a whistle-blowing channel), (6) establish a disciplinary system that appropriately punishes those who infringe the compliance programme, and (7) be periodically reviewed and amended when significant infringements are detected, or when necessary as a result of a change in the entity's organisation, control structure or activities.

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scenario, it is highly likely that no conflict of interest would arise between the natural and legal persons under investigation, except if the natural person's defence strategy was to confess the facts to authorities in order to reduce his or her sentence.

By contrast, in certain cases the best defence for the legal person could be to argue that the natural person did not commit the offence in the course of his or her corporate functions but in his or her personal capacity (with the goal of excluding the second requirement); that the offence caused damage to the corporate net worth (to exclude the third requirement); or that the natural person circumvented the internal rules and controls implemented in the company to prevent such offences (to exclude the fourth requirement). In those cases, a conflict of interest would likely arise between the legal and natural persons under investigation.

As a result of the above, the Spanish Supreme Court's case law has carved out two main caveats to prevent conflicts of interest between legal and natural persons in the course of criminal proceedings:

- the specially designated representative of the legal entity (i.e., the specific individual who gives deposition on behalf of the company in the criminal proceedings) cannot be the person who allegedly committed the crime, with the purpose of ensuring that the defence strategy taken by the company truly pursues its best interest;[16] and
- when conflicts of interest exist between legal and natural persons, they should not be defended by the same lawyer or represented by the same court representative in criminal proceedings.[17]

Should those situations occur and criminal courts consider that the defendants' fundamental right to defence was breached, they may declare a mistrial and order to retry the case.

Cooperation with authorities and the right against self-incrimination

Article 118 of the Spanish Constitution establishes a general obligation to collaborate with judicial authorities in the course of judicial proceedings. However, Article 24 of the Constitution grants citizens the fundamental right against self-incrimination, meaning that no one can be compelled to testify against oneself or confess guilt. Likewise, the Spanish Criminal Procedural Act states that defendants have the right to remain silent and not answer any or all questions asked by authorities. Since legal persons may also be held criminally liable in Spain, companies under investigation in criminal proceedings are afforded the same right against self-incrimination as natural persons (Article 786 *bis* of the Spanish Criminal Procedural Act).

In this context, when companies are under investigation in criminal or administrative proceedings, a historical (and not entirely resolved) debate in Spain has been whether legal persons are obliged to answer information requests issued by authorities (a typical investigation method used in sanctioning proceedings) or may assert the right against self-incrimination on the grounds that the delivery of documentation could hinder the legal defence of the company in those proceedings.

16 Criminal Chamber of the Spanish Supreme Court's judgment, No. 154/2016, dated 29 February 2016.

17 Criminal Chamber of the Spanish Supreme Court's judgment, No. 123/2019, dated 8 March 2019.

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The European Court of Human Rights has taken the position that the right against self-incrimination does not protect documents that exist 'irrespective of the suspect's will' that are subject to a request by the corresponding authorities.[18] It is, nevertheless, unclear how that phrase should be interpreted in practice and Spanish courts have not yet developed an unanimous stance on this matter. As such, there is a lot of legal uncertainty.

In the administrative arena (and particularly in connection with tax issues), the scale generally leans in favour of the obligation to cooperate with authorities. Article 236 of the LMV states that legal entities and individuals that fall under its scope of supervision are obliged to provide the CNMV with any books, records or documents requested, regardless of their format. Failure to comply with that duty would be considered a (minor) infringement under the LMV.

In the area of criminal law, courts typically took greater efforts to reconcile the right against self-incrimination with their legal right to subpoena information, although highly disparate approaches are taken in case law. One of the most supported approaches is that the phrase 'irrespective of the suspect's will' means that authorities can subpoena documents that are required by law (e.g., annual accounts) but cannot request documents that had been voluntarily drafted by the company (i.e., those that are not created as a result of a legal obligation).

By way of example, the recent decision of the Criminal Chamber of the National High Court 391/2021 dated 1 July 2021 partially reversed a decision at first instance on the grounds on this stance. On the one hand, it upheld the request of certain documents considered mandatory in light of corporate and securities laws (specifically the minutes of the meetings held by internal governing bodies and disclosure of relevant facts to the CNMV). On the other hand, the National High Court rejected the possibility of requesting from the defendant a copy of its compliance programme since, in Spain, the non-existence or ineffectiveness of a crime-prevention programme does not itself constitute a criminal offence or administrative infraction (with the National High Court therefore holding that it falls within the investigated companies' defence strategy to decide on 'their voluntary delivery in order to achieve an exemption from – or mitigation of – criminal liability' under Article 31 *bis* SCC).

Scope of legal privilege in internal investigations

Internal investigations, which lack specific regulation in Spain, have not traditionally played an important role in the Spanish legal system as compared with other jurisdictions. However, there has been a change in this tendency following Spain's recognition of corporate criminal liability, and it is increasingly common for companies to conduct internal investigations as a means to carry out a thorough assessment of risks and outline the best defence strategy in the context of potential sanctioning proceedings.

This new scenario has given rise to concomitant new legal issues, such as the necessity of defining the exact scope of legal privilege in the context of internal investigations (whether it includes all work-product documents drafted exclusively for internal purposes, such as notes of the meetings and minutes of interviews, or if it only protects the final deliverable document with the outcome of the investigation).

18 *Saunders v. United Kingdom*, 17 December 1996.

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In Spain, legal privilege (known as professional secrecy) is conceived of as both a right and a duty of lawyers to guarantee the client's right of defence and the scope of its definition is quite broad. Article 542.3 of the Basic Law on the Judiciary refers to 'all facts and news' known as a result of the lawyer's professional activities. Likewise, Article 22.1 of the Lawyers' General Statute dated 2 March 2021 states that legal privilege encompasses 'all facts, communications, data, information, documents and proposals' known, issued or received in lawyers' professional practice. Lastly, Article 5 of the Lawyers' Deontological Code[19] dated 6 March 2019 clarifies that legal privilege specifically protects any confidential information received not only from clients but also from counterparties and other colleagues, as well as any communication exchanged between lawyers (whether written or oral).

Spanish courts have tended to limit the scope of legal privilege to that enshrined in Article 22 of the Anti-Money Laundering Law (the AML Law), which exempts lawyers from reporting obligations under certain circumstances. Specifically, according to the AML Law, legal privilege would protect any information known by lawyers with the purpose of (1) ascertaining the legal position of a client and (2) providing advice to a client with regard to ongoing or prospective legal proceedings.

Another historical grey area is whether in-house lawyers benefit from privilege. In the past, the European Court of Justice[20] ruled against recognition of legal privilege in favour of in-house lawyers on the basis of their lack of independency given their direct tie to their client (i.e., the company) through a labour relationship. However, this restrictive approach by the European Court of Justice always referred to antitrust cases and it is therefore unclear whether it will apply to other areas. In addition, the Lawyers' General Statute, which entered into force in 2021, expressly acknowledges the right (and professional duty) of legal privilege in favour of in-house lawyers (Article 39). Although this new regulation represents an important step toward achieving legal clarity on the issue, it remains to be seen how Spanish courts will interpret the provision in practice.

What remedies and sanctions are available to government authorities?

From the perspective of public enforcement, Spanish authorities may decide to pursue administrative sanctioning proceedings against those who have committed an infringement or, in the event the infringement potentially constitutes a criminal offence, report them to the Public Prosecutor or criminal courts to carry out a criminal investigation of those facts.

The following are descriptions of potential sanctions that could apply in either administrative or criminal proceedings.

Sanctions under administrative law

As explained above, the violation of securities laws may qualify as a very serious, serious or minor infringement, which in turn leads to different degrees of sanctions. All administrative sanctions are published on the CNMV's website and, in the case of serious and very serious infringements, also in the Spanish Official Gazette.

19 The Lawyers' Deontological Code was approved by the General Council of the Spanish Bar and sets the binding professional standards for lawyers. Courts are not obliged to apply these standards in their interpretation of the law.

20 See *AM&S Europe Limited v. the European Commission* dated 18 May 1982 and *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v. the European Commission* dated 14 September 2010.

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Very serious infringements

According to Article 302 of the LMV, very serious infringements incur a fine of up to the highest of the following amounts:

- five times the gross profit earned as a result of the infringement;
- 5 per cent of the infringer's shareholder equity;
- 5 per cent of total funds, whether owned or borrowed, used in furtherance of the infringement;
- 10 per cent of the total annual turnover of the infringer, as calculated based on the most recently available accounts;[21] or
- €5 million.[22]

Other sanctions may also be imposed, such as:

- suspension or limitation of the type or volume of transactions that may be undertaken by the offender in the securities market for up to five years;
- suspension from membership of an official secondary market or multilateral trading facility for up to five years;
- removal of a financial instrument from trading;
- withdrawal of trade authorisations;
- removal of directors and executives for up to five years;
- professional debarment for up to 10 years, or permanently in the event of repeat infringements;
- restitution of profits; and
- suspension of the right to exercise voting rights.

Serious infringements

According to Article 303 of the LMV, serious infringements incur a fine of up to the highest of the following amounts:

- three times the gross profit earned as a result of the infringement;
- 2 per cent of the infringer's shareholder's equity;
- 2 per cent of total funds, whether owned or borrowed, used in furtherance of the infringement; or
- €300,000.[23]

Other sanctions may also be imposed, such as:

- suspension or limitation of the type or volume of transactions that may be undertaken by the offender in the securities market for up to one year;

21 If the infringer is a company that is required to prepare consolidated financial statements, the annual amount of total turnover from its most recently available consolidated financial statements should be taken into consideration.

22 These are the generally applicable fines to very serious infringements; however, the LMV establishes specific fines under certain circumstances (e.g., infringements of specific European securities regulations).

23 These are the generally applicable fines to serious infringements; however, the LMV establishes specific fines under certain circumstances (e.g., infringements of specific European securities regulations).

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- suspension from membership of an official secondary market or multilateral trading facility for up to one year;
- withdrawal of authorisations to trade for up to five years;
- suspension of directors and executives for up to one year;
- professional debarment from office for up to seven years or 10 years in the event of repeat infringements; and
- restitution of profits.

Minor infringements

According to Article 305 of the LMV, minor infringements incur a fine of up to €30,000.

Sanctions under criminal law

Natural persons who commit the securities-related offences described in this chapter[24] may be subject to the following penalties.

- Investment fraud is punishable by imprisonment of up to four years. If the damage caused is serious, the offence can be punishable by one to six years of imprisonment and a fine of up to €144,000.
- Market manipulation is punishable by imprisonment of up to six years, fines of up to €720,000 or three times the profit earned if the resulting amount is higher, as well as debarment from trading on the financial market as a principal, agent or broker, or analyst for up to five years.
- Insider trading is punishable by imprisonment of up to six years, fines of up to €720,000 or three times the profit earned if the resulting amount is higher, as well as debarment from the exercise of a profession or activity for up to five years.
- Unlawful disclosure of insider information is punishable by imprisonment of up to four years, fines of up to €288,000 and debarment from the exercise of a profession or activity for up to three years.

For legal persons, the penalty would be a fine of between €21,600 and €9 million or, if the resulting amount is higher, a fine ranging from three to five times the profit earned (the final amount would depend on the company's economic capacity).

In addition to the general penalties outlined above, companies could face additional penalties established in Article 33.7 (b) to (g) of the SCC, including:

- the winding up of the legal person;
- suspension of its activities for up to five years;
- closure of the business premises and establishments for up to five years;
- temporary or permanent debarment from carrying out the activity that aided or concealed the criminal offence;
- prohibition from receiving public subsidies, contracting with Spanish public authorities or obtaining Spanish tax or social security benefits and incentives for up to 15 years; and

24 Although we focus on the analysis of securities-related offences in this chapter, it should be taken into consideration that many other types of offences could be committed in connection with listed companies or financial markets.

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- the judicial intervention of the company to safeguard employees' and creditors' rights for up to five years.

However, pursuant to Spanish case law, the harshest of such penalties (such as winding up the legal person) is generally restricted to exceptional cases, primarily those concerning criminal organisations.

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Enrique Rodríguez Celada joined Uría Menéndez in September 2008. He had previously worked in the Superior Court of the District of Columbia in Washington, DC and in the Permanent Mission of Spain to the United Nations in New York.

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Appendix 1

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Shelby R du Pasquier is considered a leading lawyer in banking and financial services in Switzerland. He is the head of the banking and finance group of Lenz & Staehelin in Geneva. Shelby R du Pasquier advises a number of Swiss and international financial institutions and has developed in this context a practice in investigations and enforcement matters, as well as Swiss and offshore private equity, hedge funds and fund managers. He is a frequent speaker at professional conferences and has contributed to a number of scientific publications on banking and financial law issues, as well as investment funds. Shelby R du Pasquier is a board member of the Swiss National Bank. Professional directories (including *Chambers*, *The Legal 500* and *Who's Who Legal*) repeatedly single him out as a leading individual in the fields of banking and finance, and investment funds.

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Capital these days seems to knows no borders, but securities laws very much do. In that juxtaposition lie all sorts of challenges for those charged with investigating whether any law has been broken.

GIR's *The Guide to International Enforcement of the Securities Laws* aims to make practitioners' lives easier. Written by contributors with a wealth of experience, and edited by lawyers from Cravath, Swaine & Moore, this handy desktop reference guide seeks to address the most pressing questions in securities law enforcement.

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