The International Investigations Review

Editor

Nicolas Bourtin

Law Business Research

The International Investigations Review

This article was first published in The International Investigations Review, 1st edition (published in September 2011 – editor Nicolas Bourtin).

For further information please email Adam.Sargent@lbresearch.com

The International Investigations Review

Editor
Nicolas Bourtin

Law Business Research Ltd

PUBLISHER
Gideon Roberton

BUSINESS DEVELOPMENT MANAGER
Adam Sargent

MARKETING MANAGERS
Nick Barette, Katherine Jablonowska

MARKETING ASSISTANT
Robin Andrews

EDITORIAL ASSISTANT
Lydia Gerges

PRODUCTION MANAGER
Adam Myers

PRODUCTION EDITOR
Joanne Morley

SUBEDITORS
Sarah Morgan, Caroline Rawson

EDITOR-IN-CHIEF
Callum Campbell

MANAGING DIRECTOR
Richard Davey

Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK

ISBN 978-1-907606-19-9

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: +44 870 897 3239

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following law firms for their learned assistance throughout the preparation of this book:

BOFILL MIR & ÁLVAREZ JANA

BOWMAN GILFILLAN INC

CAVALCANTI & ARRUDA BOTELHO ADVOGADOS

CHAVES AWAD CONTRERAS SCHÜRMANN

DLA PIPER UK LLP

DR KAI HART-HOENIG RECHTSANWÄLTE

GILBERT + TOBIN

LINKLATERS

SCHELLENBERG WITTMER

SJÖCRONA VAN STIGT

STUDIO LEGALE PULITANÒ ZANCHETTI

SULLIVAN & CROMWELL LLP

SZECSKAY ATTORNEYS AT LAW

URÍA MENÉNDEZ

VON WOBESER Y SIERRA SC

WONGPARTNERSHIP LLP

CONTENTS

EDITOR'S PREFACE

It's a rare day when US newspaper headlines do not announce criminal or regulatory investigations or prosecutions of major financial institutions and other corporations. Foreign corruption. Financial fraud. Tax evasion. Price fixing. Environmental crimes. Export controls and other trade sanctions.

US and non-US corporations alike, for the past several years, have faced increasing scrutiny from US authorities, and their conduct, when deemed to run afoul of the law, has been punished severely by record-breaking fines and the prosecution of corporate employees. Already complex interlocking legal and regulatory regimes have become even more labyrinthine with the passage of new laws in the wake of the recent economic crisis, and the compliance burdens imposed on corporations have grown ever more onerous.

This trend has by no means been limited to the US; while the US government is at the forefront of the movement to globalise the prosecution of corporations, the scenes in Europe and Asia are similar, as non-US authorities appear determined to adopt the US model. Parallel corporate investigations in multiple countries increasingly compound the problems for companies, as conflicting statutes, regulations, and rules of procedure and evidence make the path to compliance a treacherous one. What is more, government authorities forge their own prosecutorial alliances and share evidence, further complicating a company's defence. This trend shows no sign of abating.

As a result, corporate counsel around the world are increasingly called upon to advise their clients on the implications of criminal and regulatory investigations outside their own jurisdictions. This can be a daunting task, as the practice of criminal law – particularly corporate criminal law – is notorious for following unwritten rules and practices that cannot be gleaned from a simple review of a country's criminal code. And while nothing can substitute for the considered advice of an expert local practitioner, a comprehensive review of the corporate investigation practices around the world is undoubtedly long overdue and will find a wide and grateful readership.

The authors of this volume are acknowledged experts in the field of corporate investigations and leaders of the bars of their respective countries. We have attempted to distil their wisdom, experience and insight around the most common questions

and concerns that corporate counsel face in guiding their clients through criminal or regulatory investigations. Under what circumstances can the corporate entity itself be charged with a crime? What are the possible penalties? Under what circumstances should a corporation voluntarily self-report potential misconduct on the part of its employees? Is a trial a realistic option? And how does a corporation manage the delicate interactions with the employees whose conduct is at issue? *The International Investigations Review* answers these questions and many more and will serve as an indispensible guide when your client faces criminal or regulatory scrutiny in a country other than your own. And while it will not qualify you to practise criminal law in a foreign country, it will highlight the major issues and critical characteristics of a given country's legal system and will serve as an invaluable aid in engaging, advising and directing local counsel in that jurisdiction. We are proud that in its first edition, this volume provides impressive coverage for 15 countries.

This volume is the product of exceptional collaboration. I wish to commend and thank our publisher and all the contributors for their extraordinary gift of time and thought. The subject matter is broad and the issues raised deep, and a concise synthesis of a country's legal framework and practice was in each case challenging.

Nicolas Bourtin
Sullivan & Cromwell LLP
New York
August 2011

Chapter 13

SPAIN

*Ismael Clemente and Belén Alonso de Castro**

I INTRODUCTION

In Spain, corporate conduct may give rise to liability both in private law (regulating relationships between individuals or companies) and in public law (regulating relationships between the government and individuals or companies).

In the field of private law, in the event that a company affects the rights, assets or interests of any other party, regardless of whether they are contractually bound, the company could bear civil liability and be ordered to pay damages;[1] that civil liability is assessed by civil proceedings in a civil court. Corporate conduct may also (and frequently does) produce consequences in the public law. There are two main manifestations of the punitive power of the state: criminal law and administrative law. The most serious infringements or offences are regulated by criminal law (particularly, the Criminal Code), punished by criminal penalties, and investigated and tried by criminal courts. Apart from criminal offences, the law regulates other infringements of a less serious nature, which are set out in administrative law, punishable by non-criminal penalties (i.e., administrative penalties, typically fines) imposed by the government and can be challenged before the administrative courts.

Since criminal offences are more serious in nature than administrative offences, criminal penalties are (or should be) more severe. Traditionally, in Spain criminal offences were not able to be committed by companies: criminal law was only intended for individuals, so corporate infringements were generally punished under administrative law. This situation changed recently: Basic Law 5/2010, which came into force on 23 December 2010, implemented corporate criminal liability in Spanish law. Now, companies may commit specific criminal offences and incur criminal penalties.

---

* Ismael Clemente is a partner and Belén Alonso de Castro is an associate at Uría Menéndez.

1 Articles 1.902 and 1.101 of the Civil Code.

In Spain criminal investigations are conducted by judges. Criminal proceedings are divided in two main stages: the investigation stage and the trial stage, both of which are conducted by different criminal courts. The investigating criminal court has wide investigatory powers; it has the ability to request documents, hear depositions, order dawn raids and communications tapping, request expert reports, *et cetera*. Two other types of government authority are also entitled to conduct criminal investigations prior to the investigating criminal court's intervention: the Public Prosecutor's office and the various police agencies. As a general rule, however, both the Public Prosecutor and the police need a court order to perform investigatory acts that may affect constitutional rights (with exceptions, such as the ability to arrest suspects and the ability to dispense with a court order in cases of *flagrante delicto*).

It is still soon to determine and evaluate the repercussions of the recent implementation of criminal corporate liability into Spanish criminal law. In practice, administrative law still plays (and will probably continue to play) a leading role in punishing illegal corporate conduct. A great deal of administrative law regulating different sectors of business activity provides for administrative offences or infringements that are punished with administrative penalties. These include tax law, securities market law, labour health and safety provisions, competition law and data protection law. Accordingly, there are a number of specialist government agencies with jurisdiction over these areas including the National Tax Administration Agency, the National Securities Market Commission, the Labour and Social Security Department (dealing with health and safety in the workplace and other labour issues), the Competition Commission ('the CNC') and the Data Protection Agency. These agencies are also usually granted broad investigatory powers (together with the ability to impose penalties on discovery of administrative offences). Essentially, nearly all of those agencies are entitled to: (1) request documents and information from companies or individuals under investigation; (2) carry out interviews with witnesses or potentially responsible individuals or companies; and (3) inspect the companies' premises.[2,3]

One of the main principles of Spanish criminal law is the privilege against self-incrimination, established by Articles 24.2 and 17.3 of the Spanish Constitution and Article 520.3 of the Law on the Criminal Procedure (and also by Article 6 of the European Convention on Human Rights of 1950, which grants the right to a fair trial, as interpreted by various judgments of the European Court of Human Rights). The court has repeatedly stated that criminal law principles also apply to administrative law,

2 A court order would be required in the event that such premises could legally be considered as a 'domicile' and the owner of that domicile refuses to grant access to the inspectors. Again, as a general rule, the court order would also be necessary when any government agency or authority carries out an investigatory act that may harm or affect the constitutional rights of the individuals or companies under investigation.

3 Article 40 of Law 15/2007 of 3 July on Competition Defence; Article 5 of Law 42/1997 of 14 November on Work Inspection and Social Security, Article 85 of Law 24/1988 on the Securities Market, Article 142 of Law 58/2003 on General Tax.

but to a lesser degree.[4] Nevertheless, along with the privilege against self-incrimination, Spanish law also includes a number of provisions that force companies and individuals to collaborate with the courts (including criminal courts) and during investigations conducted by criminal or administrative authorities.

When the Constitutional Court has addressed the issue of how these two apparently conflicting principles can both be respected, the Constitutional Court has held that: (1) the privilege must be honoured; but (2) the privilege has limits, since, pursuant to the court's doctrine, no constitutional right is limitless. Two of those limits may be highlighted:

a The scope of the privilege is limited to oral statements; the company or individual under investigation is not able to invoke the privilege in order to avoid submitting documentation (or any other evidence) requested by criminal or administrative authorities.[5] The majority of academics have strongly criticised this restriction established by the Spanish Constitutional Court, pointing out that the European Court of Human Rights does not support such a limit.[6]

b The party protected by the privilege is only the suspect. No other party may claim such protection. Traditionally, courts and investigating government agencies forced companies to submit documents and other evidence on the basis that legal entities could not be considered suspects pursuant to criminal law (only individuals could be considered as such). The recent amendment to the Criminal Code, which introduces legal entities as potential criminally liable parties, means this topic will likely have to be revisited.

As a result, companies in Spain may face public investigations conducted by the criminal and government agencies. In both cases, and as a general rule, the company under investigation is protected by the rights and principles of criminal law and procedure, including the privilege against self-incrimination. Nevertheless, this privilege is not unlimited and specific obligations to collaborate with the investigating authorities must still be fulfilled.

II CONDUCT

i Self-reporting

It has been already stated that the Constitution recognises the privilege against self-incrimination. Commentators infer, according to this privilege, that there generally is no obligation upon companies to self-report when they discover internal wrongdoing: companies are not obliged to confess their own unlawful behaviour.

The only provision in Spanish law that obliges the reporting of criminal offences upon discovery[7] establishes a remarkably out-of-date and insignificant

4 Constitutional Court Judgment 197/1995, *inter alia.*

5 Constitutional Court Judgment 76/1990, *inter alia.*

6 *Saunders v. United Kingdom*, *Funke v. France* and *JB v. Switzerland* are usually cited in this regard.

7 Article 259 of the Law on the Criminal Procedure.

pecuniary sanction in the event of a breach of the duty (less than €1) and refers to crimes committed by others.[8]

It must be noted that, although Spanish law does not punish individuals or companies for failing to report their own offences – neither does it establish any real sanctions for failing to report the crimes of others – this does not mean that acts carried out for the purpose of concealing crimes or helping other offenders profit from their crime are lawful; on the contrary, such acts that can be labelled as concealment of a crime or money laundering are themselves considered criminal offences.

Despite the foregoing, Spanish law in some cases grants benefits to those companies that do self-report any legal infringements that have been committed internally. This could be considered as contradictory: on one hand the system recognises the privilege against self-incrimination, but on the other it provides incentives to those individuals or companies that do self-report.

From a criminal law point of view, a company that confesses an offence to the authorities before it is aware that legal proceedings are being brought against it will benefit from a reduction in penalties in determining its criminal liability.[9] Other examples of acts by self-reporting businesses that may be taken into considerably are (regarding tax offences) the full settlement of unpaid liabilities, leading to the extinguishing of any criminal liability, provided that no requirement to pay this tax has been imposed by the tax authorities,[10] and (regarding civil liability arising from a criminal offence) the reparation of any damages inflicted on the victim during criminal proceedings.[11]

The benefits of self-reporting may also be granted by the corresponding public authorities under administrative law. Such benefits are particularly relevant in the area of antitrust law. In accordance with EU law, Spanish antitrust law has adopted 'leniency policies'.[12] If a corporation that is involved in a cartel is the first to inform the CNC of an undetected cartel by providing sufficient information to allow the CNC to launch an inspection of the companies allegedly involved, said corporation may be exempted from payment of the fine. In all cases, the company must also fully cooperate with the CNC throughout the procedure, provide it with all evidence in its possession and immediately put an end to its participation; however, if the company took any steps to coerce other undertakings to participate in the cartel, it may not benefit from immunity. Further, companies that do not qualify for total immunity may benefit from a reduction of fines if they provide evidence that represents 'significant added value' to that already in the Commission's possession and have terminated their participation in the cartel.

8 It should be noted that, when considering criminal offences committed by companies, what constitutes 'a crime committed by others' is subject to debate. Since, as explained below, the crime of the director or employee is 'transferred' to the company, it could be argued whether the crimes committed by such individuals are, from the company's standpoint, 'crimes of others' or 'crimes of the company itself'.

9 Article 31*bis* of the Criminal Code.

10 Article 305.4 of the Criminal Code.

11 Article 21, Paragraph 5, of the Criminal Code.

12 Article 65 of the Competition Defence Law.

ii Internal investigations

There is no general obligation under Spanish law for corporations to run investigations for any internal wrongdoing. Furthermore, if a corporation voluntarily decides to investigate any irregularities detected, there is no express obligation to share such results with the public authorities (pursuant to the aforementioned privilege against self-incrimination).[13]

Internal investigations usually include some measures (e.g., CCTV, the inspection of employees' professional e-mails or their computer files) that may have an impact on employees' constitutional rights. The Constitutional Court has stated that employees still have their constitutional rights when at their workplaces but that such rights also operate within limits. Therefore, internal investigations carried out by the employer have usually led to another conflict between two legally protected rights: the right of employers to monitor employee's performance[14] and the constitutional rights of employees, especially the right to privacy and the right to the secrecy of communications.

Traditionally, Spanish courts, particularly the Constitutional Court, have resolved this dilemma on a case-by-case basis and through the application of a balancing test; in each specific case, one of these rights involved must be tempered when interpreted in light of the other, and the restriction will only be justified if the surveillance and control measures can successfully overcome the constitutional proportionality test (in brief, the potentially harmful measure is only justified when there are no alternative or less aggressive means of investigation available).[15]

Even with the general rules of conflict resolution, this remains an area of legal uncertainty. A good example is the debate about the ability of the employer to access e-mails and computer files of employees. Although the Supreme Court judgment (Social Chamber) of 26 September 2007 established some criteria on this subject – essentially, that a company needs to have an established policy prohibiting the personal use of information technology in order to carry out lawful monitoring of employees' e-mails – the fact is that doubt and uncertainty remain.

Therefore, when carrying out an internal investigation, it is advisable to ensure its legality by establishing policies and seeking the express consent of workers before starting the investigation.

iii Whistle-blowers

There is no explicit legal obligation for corporations to establish whistle-blowing procedures that enable and encourage employees to disclose suspected or actual criminal offences, violations of law or questionable business practices under Spanish law. However, with the introduction of criminal corporate liability and the debate regarding the effectiveness of compliance programmes, most legal academics consider that the implementation of such whistle-blowing channels constitute a good example of

13 Exceptionally, regarding health and safety in the workplace, when a work accident occurs, corporations should investigate the circumstances under which the accident took place and prepare a written report that may be requested by the public authorities.

14 Article 20 of the Workers Statute.

15 Constitutional Court Judgement 98/2000, *inter alia*.

a diligence measure that may be adopted by a company in order to avoid or extenuate criminal liability: whistle-blowing channels have been considered as a good way of exercising 'due control' by corporations. However, in the event that the company or its directors fail to properly react to the infringements reported by the whistle-blower, such failure may result in liability both for the company and its managers.

Once a procedure is implemented, if any employee reports an offence and the company does not investigate the reported facts, it could be considered that it has not exercised due control and, therefore, be considered criminally liable. Similarly, if an offence is reported and the directors or legal representatives do not adopt any measures, they could be held criminally liable under certain criminal offences that are based on the premise of intent (*mens rea*).

It should be noted that the Data Protection Agency has adopted an interpretation of the data protection law in which reports made by anonymous whistle-blowers should not be admitted by the employer company (i.e., the whistle-blower needs to identify him or herself).

III ENFORCEMENT

i Corporate liability

As previously mentioned, unlawful corporate conduct may give rise to civil, administrative punitive or criminal liability.

The purpose of civil liability for damages is to compensate the financial loss suffered by the victim rather than to punish the person who caused the damage; the notion of punitive damages does not exist in Spanish law. The main purpose of administrative and criminal law is to prevent or punish infringements in order to ensure the protection of the public interest; administrative and criminal liability imply the imposition of certain sanctions or penalties that are intended to punish or deter any illegal behaviour.

Civil corporate liability

Apart from the liability arising out of contractual obligations, corporations may be held civilly liable for any damages caused by the company itself or by its employees when the requirements stipulated in Article 1.902 of the Civil Code are met. Pursuant to said article, the obligation to indemnify exists whenever damage is caused to another by a party with intent or, at least, through reckless or negligent behaviour. Spanish case law has repeatedly held that parties performing dangerous activities must bear damages typically deriving from such activities even if there is no negligence on their part (strict liability).

Damages arising out of criminal offences have a special legal regime under the Criminal Code. In brief, the perpetrator of the crime is the direct and main individual liable for the damages but his or her employer or principal (company or individual) is also vicariously liable for the damages in the following cases: (1) when the crime was committed by its employees or representatives in the course of his or her duties at work and (2) when the crime was committed on the premises of the corporation and the persons in charge of the premises, or their employees or assistants, have infringed the applicable control regulations or any rule laid down by the authorities that would have avoided the illicit act taking place had it been complied with.

As a general rule, civil liability arising out of a criminal offence is assessed within criminal proceedings unless the victim or aggrieved party expressly preserves the civil right to exercise it in a separate civil procedure, to be initiated after the judgment in the corresponding criminal proceedings is handed down.

Administrative corporate liability

Administrative law has traditionally recognised the possibility of attributing liability to corporations for any infringements committed regarding this area of the law. In fact, Article 130.1 of Law 30/1992, dated 26 November, on the Legal System for Public Administrations and the Common Administrative Procedure expressly stipulates that legal entities may be penalised when they are liable for any administrative infringements.

Criminal corporate liability

Historically, the old maxim *Societas delinquere non potest* (corporations cannot commit criminal offences) governed the Spanish legal system. As a consequence, criminal liability could only be attributed to individuals, based on intention or recklessness. Recently, Basic Law 5/2010 of 22 June, entering into force on 23 December 2010, has changed that situation, amending the Criminal Code to introduce corporate criminal liability. Companies are now able to commit an exhaustive list of criminal offences.[16]

Nevertheless, identifying the crime of an individual will still be a necessary basis on which to subsequently 'transfer' criminal liability to the company. The general rule is that an individual (top manager or subordinate) personally performs the crime, and then, the company, under specific conditions, is charged with criminal liability arising from the individual's criminal offence. Both natural and legal persons can be simultaneously held criminally liable for a particular crime (the liability is cumulative). Specifically, the new regime establishes that a company would be committing one of the criminal offences set out in the aforementioned list when:

a the criminal behaviour has been carried out in the company's name or on its behalf, and to the benefit of the legal person, by its managers or legal representatives in fact or at law (criminal offences by top managers); or

b the offences have been committed in the course of the corporate activities and on the account and to the benefit of the legal person, by those who, subject to the authority of the natural persons mentioned in the preceding point, have been able

16 The criminal offences that a company may commit are illegal trafficking of human organs, human trafficking, prostitution crimes and corruption of minors, fraud, illegal disclosure of information, criminal offences against the rights of foreign citizens, criminal offences involving land planning, environmental crimes, criminal offences involving ionising radiation, criminal risks produced by explosives or other agents, manufacture or traffic of toxic drugs, forgery of credit cards, debit cards or travellers cheques, bribery, undue influence, private corruption, corruption regarding international transactions, terrorism, fraudulent insolvency, criminal damages, criminal offences against intellectual and industrial property, against the market and against consumers, money laundering, offences against the tax and social security authorities, criminal offences involving land planning and environmental crimes.

to act with a lack of due control, taking into account the specific circumstances of the case (criminal offences by subordinates).

However, there is an exception: when the court deems that a certain criminal offence 'must have been committed' by any of the top managers, such company may be held criminally liable, even if the individual offender has not been identified (or when the proceedings could not be initiated against an individual).

The legal person will be found criminally liable regardless of any changes it may undergo. In accordance with Article 130 of the Criminal Code, this will apply to companies involved in mergers, takeovers and divestitures. In our view, that should obviously persuade legal practitioners to reinforce the guarantees of the due diligence procedures in commercial transactions.

As previously established, an employee and a company may be defendants in criminal proceedings. Although there is no precedent as to whether the same counsel may represent both parties, in our view there would only be a conflict of interests if the corporation admits the existence of a criminal offence committed by an employee and its defence is based on the existence of diligence measures adopted by the company ('due control') that were infringed by the employee. If the corporation's defence is based on the lack of a criminal offence, it appears that no conflict of interest will be found. To date, it has in fact been relatively common for an employee accused of committing a criminal offence to have the same counsel as the company called to the proceedings on the basis of its vicarious civil liability; the interest of both parties is the same in such cases: to prove that there was no criminal offence committed.

ii Penalties

From an administrative law point of view, the sanctions that may be imposed on corporations are mainly of a pecuniary nature: fixed or proportional fines. However, a wide range of non-pecuniary sanctions may be imposed depending on the specific area of administrative law; for example, the temporary prohibition against entering into public contracts, the withdrawal of licences to carry out certain activities or temporary closure of the company's premises.

From a criminal law point of view, the catalogue of criminal penalties specifically designed for legal persons includes the following:

a daily fines (up to a maximum of five years and €5,000 per day) or proportional to the advantage obtained or damage caused;

b winding-up, which includes the loss of the legal personality of the company and the prohibition against continuing its business;

c suspension of the business for a term not exceeding five years;

d closure of premises for a maximum period of five years;

e permanent or temporary prohibition (up to a maximum of 15 years) against conducting business, commercial transactions or dealings related to the offence;

f disqualification from obtaining public subsidies or dealing with the public sector, as well as the loss of tax and social security benefits; and

g placement of the entire legal person under judicial administration, or only those activities that are related to the offence committed (the latter seems to be aimed

at large corporations where the legal representatives may perpetrate criminal offences that do not affect the whole of the company).

The same crime could entail different cumulative fines both for the individual and the company. In order to reduce potential *non bis in idem* issues, the law allows the court to be proportionate in the fine amounts.

iii Compliance programmes

Administrative law

Certain areas or activities are subject to administrative laws, which stipulate clear and specific obligations for corporations in order to prevent administrative infringements.[17] While it is true that these laws do not expressly require companies to adopt compliance programmes as such, the set of obligations that they do include mean that corporations will necessarily implement certain measures to enable them to comply with said obligations; thus, these measures can be considered as a form of compliance programme. In fact, specifically regarding health and safety in the workplace, Law 31/1995 primarily addresses the planning of preventive activity in order to avert risks in corporate activity.

Criminal law

Unlike the solutions adopted in other countries, there is no express obligation for companies in Spain to adopt measures or compliance programmes aimed at preventing criminal offences within their scope. No such rules have been approved by the Spanish legislator and no governmental policies have been created.

Although Spanish law does not expressly require businesses to adopt criminal compliance programmes, most legal academics have inferred this obligation from the system of incrimination introduced by Basic Law 5/2010. In particular, this is based on two arguments:

a When establishing the criminal liability of a legal person for the criminal offences committed by its subordinates, Article 31.2*bis* of the Spanish Criminal Code makes reference to those acts that have been carried out in the absence of due control. Consequently, the attribution of liability of such offences committed by employees will depend on the success of the legal person when exercising due control over its employees.

b The implementation of internal rules to prevent and identify future criminal behaviour within the structure of the legal person constitutes an extenuating circumstance according to Article 31.4*bis* of the Spanish Criminal Code.

Although these provisions neither specify the meaning of due control nor stipulate any guidelines or measures to be adopted by the legal person in order to avoid criminal liability, most legal academics have concluded that compliance programmes will have a relevant role in this regard.

17 For instance, Law 24/1988 of 28 July on the Securities Market, Law 10/2010 of 28 April on Anti-money Laundering, Law 15/1999 on Data Protection, Law 15/2007 of 3 July on Antitrust, Law 31/1995 of 8 November on Health and Safety at Work.

Notwithstanding the foregoing, it must be noted that the Public Prosecutor's Office has recently published a document (Circular 1/2011 of 1 July, which will be analysed in depth in Section V, *infra*) with the purpose of interpreting the new regime applicable to corporations. The Circular expresses doubts about the notion of compliance programmes in the field of criminal law. The Public Prosecutor's Office has clearly stated that the mere implementation of a compliance programme will not guarantee immunity *per se* for companies (moreover, the Public Prosecutor's Office even displays a form of distrust towards such programmes, warning that they could become merely 'cosmetic' efforts). In the Public Prosecutor's view, the notion of 'due control' must be assessed on a case-by-case basis, by deciding whether the preemptive measures were effective in each case.

iv Prosecution of individuals

Until this year, when corporations were called to criminal proceedings on the basis of its vicarious civil liability for offences committed by an employee, it was relatively common for the same counsel for the defence to represent both parties, and the corporation bore the expenses.

However, as has already been previously indicated, the introduction of criminal liability for corporations in the Spanish legal system has changed this situation. Given that according to the new regime, corporations may be called to the proceedings not only as civilly liable but also as criminally liable (for not exercising 'due control' over its employees), a conflict of interest between the corporation and employee may result. More specifically, it will occur when a corporation decides that the best way of defending itself is by recognising the existence of a criminal offence and attempting to prove that the employee infringed the control measures adopted by the company. In this way, the company would attempt to prove that it had complied with all its obligations and exercised due control over its employees, although one of them had occurred despite corporate control.

IV INTERNATIONAL

i Extraterritorial jurisdiction

As a general rule, the territoriality principle governs ordinary jurisdiction. In fact, Article 21 of Basic Law 6/1985 of 1 July on the judiciary establishes that Spanish courts has jurisdiction over all judicial proceedings initiated in Spain between Spanish nationals, foreign nationals or between Spanish nationals and foreign nationals. Spanish law generally applies within its borders, although there are some exceptions.

Spanish courts have extraterritorial jurisdiction regarding certain criminal offences. More specifically, Article 23 on the aforementioned Law on the Judiciary establishes that Spanish courts have jurisdiction over crimes committed by Spanish nationals outside Spain if (1) the act is punishable in the territory where it took place; (2) the aggrieved party or the Public Prosecutor has filed a criminal complaint; and (3) the perpetrator of the crime has not been punished, has not been found guilty or has not been acquitted in a foreign country. Furthermore, Article 23 also states that Spanish courts have jurisdiction over crimes committed outside Spain when according to Spanish criminal law they are considered to be genocide, terrorism, or any other form of violent activity, as well as any other crime that, according to international treaties or conventions, must be prosecuted

in Spain. Nonetheless, in these cases, there must be some link to the Spanish legal system (the perpetrator of the crime is in Spain, the victim is Spanish or any other relevant link). Spanish courts also have jurisdiction over acts that affect the fundamental interests of the state, such as treason, insurrection and crimes against the Crown, even if the act was committed by foreign nationals in a foreign territory.

In addition to these general rules, it is worth mentioning that the Spanish Criminal Code foresees a specific offence regarding corruption in international business transactions (Article 445 of the Criminal Code). In this respect, Spanish courts can prosecute individuals or corporations that 'corrupt' foreign civil servants. However, in practice, criminal proceedings initiated for this kind of criminal offence are rare as it is difficult to discover its commission and to obtain evidence of the unlawful behaviour. Unlike other countries, Spanish law does not foresee any rewards for whistle-blowers, thus individuals tend to be reluctant to report any irregular conduct.

ii International cooperation

Cooperation with international agencies and organisations, as well as with the competent authorities of foreign states is common in Spain. From an administrative law perspective, this cooperation is important in tax and antitrust matters. However, it is within the scope of criminal law that international cooperation is particularly important.

International judicial assistance

In criminal matters, police and judicial cooperation comes usually in the form of bilateral agreements between Member States. However, within the EU, this cooperation is governed mainly by the Convention of 29 May 2000 on Mutual Assistance in Criminal Matters,[18] which aims to ensure rapid and effective methods of judicial cooperation without affecting the fundamental rights granted by national law. This cooperation includes the spontaneous exchange of information, the transfer of criminal reports, assistance when carrying out investigations in foreign countries, interception of communications, *et cetera*.

Extradition

Extradition is one of the most frequent ways of cooperation between states, and Spain has signed bilateral extradition treaties with many countries. As a general rule, these treaties are governed by two principles: mutual recognition and the requirement that the act for which extradition is sought constitutes a punishable crime in both the requesting and the requested countries. In addition, within the EU territory, the European arrest warrant ('EAW') was adopted by the European Council in June 2002. This new system aimed at speeding up and easing the extradition process throughout EU countries; the EAW was introduced in Spain through Law 3/2003 of 14 May. In practice, the new system means an automatic extradition, as virtually all the requests under this process have been accepted by the Spanish judicial authorities, even when the offender is a Spanish national.

18 This Convention came into force in Spain in August 2005.

iii Local law considerations

When an investigation is taking place in another jurisdiction, two possible situations could arise.

First, the investigating foreign authorities could formally request the cooperation of the Spanish authorities. Even in the absence of any treaty between the countries, in practice, when a formal request is issued, Spanish authorities rarely refuse to cooperate, provided that there is a reciprocity. In these cases, local laws should not stand in the way of an investigation as, according to Spanish law, when the request for information is issued by a Spanish public authority, entities such as banks, public registries, *et cetera*, are generally obliged to cooperate.

Alternatively, the investigating foreign authorities could request certain information from a national company (that is, a company whose headquarters are based in the state carrying out the investigation) regarding a subsidiary in Spain. In this case, the headquarters, when cooperating in the investigation and providing the information requested, will have to comply with the restrictions established under Spanish law. More specifically, as previously mentioned, when providing information regarding the employees of the Spanish subsidiary, their constitutional right to privacy and secrecy of communications must be respected. Furthermore, personal data cannot generally be transferred to countries that do not provide protection comparable with that provided by Spanish law. The adequacy of the level of protection afforded may be assessed by the Data Protection Agency after analysing all the circumstances surrounding the data transfer. In particular, the Data Protection Agency will consider the nature of the data, the purpose and duration of the treatment, the country of destination and the data protection law in force in the requesting country.

V YEAR IN REVIEW

The introduction of criminal corporate liability by Basic Law 5/2010 has led to great uncertainty. On the one hand, this new system requires a broad amendment of the Criminal Procedure Law in order to resolve some of the issues that have arisen. On the other hand, as it has only very recently been implemented, there is no case law or ongoing judicial cases involving a corporation that has been directly accused, so how the Spanish courts will apply the new Article 31*bis* remains to be seen. Under these circumstances, two public initiatives have been important in clarifying some of these issues.

Circular 1/2011 of 1 July 2011, drafted by the Public Prosecutor's Office, was recently published to analyse the broad amendment of the Criminal Code, specifically regarding the attribution of criminal liability to corporations. This Circular is of great value as it is the first interpretation of the new regulations given by an official body, and because it provides the criteria that will be followed by the Public Prosecutor when investigating criminal proceedings initiated against corporations. In fact, the Circular thoroughly covers from the criminal policy reasons justifying this reform to the procedural issues that may arise in proceedings against legal persons.

With regard to compliance programmes, the Circular also states that the mere adoption of such does not imply that a corporation has exercised 'due control' over its employees and that the implementation of these programmes will necessarily prevent

the attribution of liability to the legal entity for the offences committed by its employees. Furthermore, it confirms that the managers or the corporate management body have the obligation to control and supervise their subordinates and severely criticises the increasingly widespread view that the mere formalisation of standards of performance is sufficient *per se* to avoid the criminal liability of corporations. In this regard, the Circular states that 'what matters is not the implementation of a self-regulatory code', but documentary evidence that 'managers or governing bodies of the legal person have exercised by themselves or by delegating to others all reasonable measures for the prevention, detection and response to potential crimes'.

A new law regarding the implementation of certain measures for the streamlining of judicial procedures is also being discussed in the Spanish parliament. This law will introduce important amendments to the Criminal Procedure Law regarding the implications of introducing the criminal liability of corporations from a procedural law point of view. In particular, the new law will regulate the competence of Spanish courts when criminal proceedings are initiated against corporations, the rights of defence of these corporations, their involvement in the different stages of the criminal proceedings, *et cetera*.

At present the proposed text affords the same rights to corporations as to individuals (that is, the right to remain silent, the right against self-incrimination, and the right not to plead guilty) and foresees the appointment of a representative of the corporation who will appear in court with the corporation's lawyer.

The approval of this new law is essential to solving many of the practical problems arising as a consequence of the introduction of the criminal liability of legal persons. This new system will require a significant effort to adapt Spanish procedural law and practice in order to ensure an adequate defence for legal persons in criminal proceedings.

VI CONCLUSIONS AND OUTLOOK

Historically, companies could not bear criminal liability in Spain (their only role in the criminal proceedings was a party vicariously responsible for civil damages arising out of the crimes committed by employees or representatives). That *status quo* has been modified by Basic Law 5/2010 which entered into force on 23 December 2010. From now on, companies will be able to bear criminal responsibility (1) when one of their top managers commits a crime within the scope of his or her duties and (2) when the offender is a subordinate employee who managed to perpetrate the criminal offence precisely because the top manager failed to display the 'due control' over the subordinate. The new regime of corporate criminal liability has raised a vast deal of questions with regard to 'due control', compliance programmes and the rights of potentially criminally liable companies in criminal proceedings. Only future case law will be able to answer these and other questions, which will of course take time.

Appendix 1

ABOUT THE AUTHORS

ISMAEL CLEMENTE

Uría Menéndez

Ismael Clemente is a partner in the Madrid office of Uría Menéndez. He joined the firm in 1999 and became a partner in 2010.

He specialises in white-collar crime and has represented clients in some of the most significant criminal proceedings conducted in Spain in recent years concerning large-scale commercial and bank fraud, corporate crime and corrupt practices, bankruptcy fraud, tax fraud (especially VAT fraud and 'missing trader' investigations), environmental crime and work-related accidents. He has also advised on civil litigation matters (most notably, damages claims).

Mr Clemente is a member of the Madrid Bar Association. He has been included in the 2011 edition of *Chambers Europe* (Spain).

BELÉN ALONSO DE CASTRO

Uría Menéndez

Belén Alonso is an associate in the Madrid office of Uría Menéndez. She joined the firm in 2009 and focuses her practice on criminal law and especially on white-collar crime.

Ms Alonso has degrees in law and economics from the Universidad Autónoma de Madrid and is a member of the Madrid Bar Association.

URÍA MENÉNDEZ
187 Príncipe de Vergara
Plaza de Rodrigo Uría
28002 Madrid
Spain
Tel: +34 915 860 400
Fax: +34 915 860 403/4
madrid@uria.com
www.uria.com