

Application of Spanish criminal law abroad to offences of corruption between private individuals and corruption in international business transactions

Last Friday, 14 March 2014, the Official State Gazette published Act 1/2014, of 13 March, which amended Judiciary Act 6/1985, of 1 July ("**LOPJ**"), in relation to universal justice.

One of the reforms introduced by the Act in **article 23.4** of the LOPJ is the possibility, given certain circumstances, for offences of corruption between private individuals and corruption in international business transactions being heard and judged by Spanish courts, even if committed by Spaniards or foreign nationals outside of Spain.

I. Offences of corruption between private individuals

Offences of corruption between individuals are sanctioned in **article 286 bis** of the Spanish Criminal Code ("**CC**"), which covers three types of conduct:

- (i). That of "*whosoever, acting directly or through an intermediary, offers or grants to managers, administrators, employees or collaborators of a commercial undertaking or company, association, foundation or organisation, an unjustified benefit or advantage of any kind so that he or a third party is favoured over others, implying a failure to comply with their obligations in the acquisition or sale of goods or in the contracting of professional services*", which is punished with between six months' and four years' imprisonment, disbarment from involvement in industry or trade for a period of between one and six years and a fine equivalent to three times the value of the benefit or advantage.
- (ii). That of "*managers, administrators, employees or collaborators of a commercial undertaking or company, association, foundation or organisation who, either themselves or through an intermediary, receive, request or accept an unjustified benefit or advantage of any kind, in order to favour the person granting the benefit or advantage or from whom it is expected, over third parties, implying a failure to comply with their obligations in the acquisition or sale of goods or in the contracting of professional services*", which is subject to the same punishment.
- (iii). That of "*managers, administrators, employees or collaborators of a sports entity, regardless of its legal form, as well as athletes, referees and judges, in relation to any conduct designed to predetermine or deliberately and fraudulently alter the result of a professional sports race, meet or competition*", also subject to the same punishment.

A legal person may also be responsible for such offences (**article 288 CC**).

II. Offences of corruption in international business transactions

Meanwhile, the offences of corruption in international business transactions are punished in **article 445 CC**, with the conduct comprising the behaviour of those who "*by offering, promising or granting any undue benefit, pecuniary or otherwise, corrupt or attempt to corrupt, directly or through an intermediary, foreign public officials or those of international organisations, for their benefit or that of a third party, or heed a request made, so that they act or refrain from acting in relation to the exercise of public functions in order to obtain or maintain a contract or other improper benefit in the performance of international business activities*" (**art. 445.1 CC**).

In this regard, a foreign public official is considered to be: "*a) Any person holding a legislative, administrative or judicial post in a foreign country, due either to appointment or election; b) any person exercising a public function in the foreign country, including a public body or public company; c) any official or agent of a public international organisation*" (**art. 445.3 CC**).

In this case, the punishment imposed is between two and six years' imprisonment and a fine of between twelve and twenty-four months, unless the benefit obtained was worth more than the resulting amount, in which case the fine will be twice the amount of said benefit. Moreover, the person responsible will be barred from contracting with the public sector and will lose the possibility of obtaining public subsidies or aid and the right to enjoy tax and social security benefits or incentives, in addition to the prohibition on intervening in commercial transactions with public repercussions for a period of between seven and twelve years.

The punishments will be in the upper half of the scale if the object of the transaction was humanitarian or other essential goods or services.

Likewise, a legal person may also be considered responsible for this offence (**article 445.2 CC**).

III. Application of the above offences abroad

As already indicated, the new text of **article 23.4** of the LOPJ establishes the possibility, given certain circumstances, for offences of corruption between individuals and corruption in international business transactions to be heard and judged by Spanish courts, even if outside of Spain.

To be precise, section n) of the new content of said rule establishes the following mandatory circumstances for this possibility to become a reality:

- 1º the proceedings are brought against a Spanish national;
- 2º the proceedings are brought against a foreign national habitually resident in Spain;
- 3º the offence was committed by a manager, administrator, employee or collaborator of a commercial undertaking or a company, association, foundation or organisation whose seat or registered address is in Spain; or, finally,
- 4º the offence was committed by a legal person, company, organisation, group or any kind of entity or grouping of persons whose seat or registered address is in Spain.

As such, if just one of the above conditions are met, a court of the Spanish criminal justice system can hear the case.

For example, it would be possible for a Spanish court to hear a case of corruption committed by a Spanish national, or a foreign national habitually resident in Spain, who offered a manager of a company based in a foreign country, in its own country, an unjustified benefit or advantage of any kind so that the latter would favour him or a third party over others, implying a failure to comply with his obligations on the acquisition or sale of goods.

It would also be possible for Spain to judge the conduct of the manager, employee or collaborator of a commercial undertaking whose seat or registered address is in Spain who, for example, sought an unjustified benefit or advantage of any kind from a local resident of a foreign country in order to favour him over third parties, implying a failure to comply with his obligations in the acquisition or sale of goods.

Or, finally, Spain can now prosecute the conduct of a Spanish national, or a foreign national habitually resident in Spain, or of a manager, employee or collaborator of a commercial undertaking whose seat or registered address is in Spain, or of a legal person, company, organisation, group or any other kind of entity or grouping of persons whose seat or registered address is in Spain, who, by making an offer, corrupts or attempt to corrupt a foreign public official, for their own benefit or that of a third party, or heeds a request in this regard, so that he acts or refrains from acting in relation to the exercise of his public functions to obtain or maintain a contract or other improper benefit in the execution of international business activities.

With this reform, Spain, apart from complying with the recommendations of Phase 3 of the OECD Working Group on Bribery (December 2012), adopts a position that is comparable to that of other countries such as the United Kingdom or the US, who have extraterritoriality clauses in their anti-corruption criminal legislation.

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