

The Spanish Public Prosecutor's Office's Circular 1/2016 on the criminal liability of companies and compliance programmes

1. Introduction

The long-awaited Circular 1/2016, of 22 January, issued by the Spanish Public Prosecutor's Office (Fiscalía General del Estado, "FGE"), on the criminal liability of legal entities, following the reform of the Spanish Criminal Code pursuant to Organic Act 1/2015, dated 22 January 2016 (the "Circular"), has finally been published.

It is important to note that FGE Circulars have no regulatory force, nor are their interpretations binding upon Spanish Courts. However, they are still very valuable tools which serve to unify criteria for acting on and interpreting the legislation for all members of the Public Prosecutor's Office, throughout Spain, and thus contribute to the principle of legal certainty, acknowledged in Article 9.3 of the Spanish Constitution, by guaranteeing citizens that they will be treated equally before the law and by ensuring the predictability of the response by the bodies in charge of applying it.

The document is therefore of great interest, especially since no body of even vaguely relevant case law yet exists, which has applied and interpreted the rules contained in the Criminal Code on determining the criminal liability of legal entities. We can be certain that the Circular will be taken very much into account by Spanish judges, as they begin to apply these rules.

In terms of its structure, the Circular is divided into two very distinct halves. The first half, which consists of the first four sections, is devoted to analysing and interpreting the legal premises required in order for criminal liability to be attributed to a legal entity; and the second half, which consists of section five, addresses the analysis and interpretation of the requirements for applying the exemption from this criminal liability.

2. The legal premises for attributing criminal liability to companies

a) Conduct entailing the transference of liability to the legal entity (known as "related events")

Pursuant to the provisions of Article 31 bis, 1, paragraphs a) and b), of the Criminal Code, legal entities will be criminally liable:

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- (i) for offences committed in their name or on their behalf, and for their direct or indirect benefit, by their legal representatives or by those who, acting individually or as part of a body of the legal entity, are authorised to take decisions on the entity's behalf or hold organisational and supervisory powers within it, as well as
- (ii) for offences committed, in the course of their business and on their behalf and for their direct or indirect benefit, by those who, being subject to the authority of the individuals referred to in the preceding paragraph, may have committed the acts on account of having committed a serious breach of the duties of supervision, surveillance and monitoring of their activities, given the specific circumstances of the case.

With that text of the legislation as a starting point, wherein "related events" are defined as the criminal conduct of the legal representatives or executives of the legal entity and that of its employees or subordinates which will determine whether the legal entity itself will be held criminally liable, the Circular we analyse here attempts to pin down the FGE's official stance, in terms of its interpretation of this, by clarifying any issues in the text of the law and taking a position on some of the controversial aspects or those not entirely clear in the law.

b) Perpetrators of the "related events"

Thus, in terms of this "circle" to which the perpetrators of the related events belong, the FGE's interpretation is as follows:

1. That the concept of "*legal representative*" must be confined to only those organic representatives, although it understands that, in the case of voluntary representatives (whether these be general or specific representatives), these can be placed in the category of those who are "*authorised to take decisions on the company's behalf*".
2. That the concept of those who, "*acting individually or as part of a body of the legal entity, are authorised to take decisions on the entity's behalf*" includes de jure directors, also de facto directors albeit with some uncertainty, as well as specific representatives and other individuals who have been appointed to perform specific duties.
3. That the concept of those who "*hold organisational and supervisory powers within it*" comprises a potentially high number of middle management posts which are attributed with such powers, including measures for surveillance and monitoring for the prevention of offences.
4. Lastly, with regard to those "*being subject to the authority of the individuals referred to in the preceding paragraph*" (employees or subordinates), that it is not necessary that they be formally associated with the company by means of an employment or commercial agreement, as this would include self-employed and sub-contracted persons, provided they are included within the perimeter of the entity's corporate domain.

c) The requirement that the legal entity directly or indirectly benefit

Meanwhile, the requirement that the perpetrator be acting for the direct or indirect benefit of the *legal entity* must be interpreted as follows, according to the FGE:

On the one hand, in the sense that it suffices for the action to have the aim of obtaining a benefit, but without it being necessary for such benefit to be effectively obtained, and

On the other hand, in the sense that it is not necessary that the action have the aim of obtaining an economic benefit; since cost savings, strategic advantages, intangible profit and reputational gains are also considered benefits. In addition, the potential aim may be to benefit through a third party or intermediary (in the case of chains of companies), which would also fulfil the premises for the legal entity being considered criminally liable.

Thus, the only cases which would be excluded from the possibility of entailing the criminal liability of the legal entity would be when the perpetrator has acted using the corporate structure, but with the aim of obtaining its own and exclusive benefit, or that of third parties, but without this entailing any direct or indirect benefit whatsoever for the legal entity itself.

d) Possibility of the legal entity being held criminally liable for the imprudent actions of its executives or employees

The fact that the perpetrator must be acting "for the benefit" of the legal entity –and this clarification regarding the interpretation of the Circular is extraordinarily relevant when setting the scope of criminal liability of legal entities— is not incompatible with the legal entity potentially being considered criminally liable for offences consisting of imprudent or reckless actions committed by its representatives, executives or employees⁽¹⁾, provided, of course, that the offence in question can take the form of imprudence; this is the case, in particular, of insolvency offences –Article 259.3—, offences against natural resources and the environment –Article 331—, money laundering –Article 302— and the financing of terrorism –Article 576.5—.

e) Serious breach of the duties of supervision, surveillance and monitoring, and criminal liability of the legal entity and of the individual in breach

Turning to the case of offences committed by employees or subordinates, the Criminal Code requires that the perpetrators mentioned in Article 31 bis, 1.a) have seriously breached the duties of supervision, surveillance and monitoring of their activities, given the specific circumstances of the case.

Therefore, non-serious breaches could only be sanctioned, as the case may be, through administrative channels.

This requirement, in turn, determines that, together with the legal entity, the individual in breach of the duty of monitoring can also be held liable for an offence, whether committed in bad faith, by omission, or serious imprudence, which shifts the conduct so that it falls under Article 31 bis, 1.a). Thus, according to the Circular, this entails the simultaneous occurrence of the two criteria for attributing liability to the legal

¹ The existence of these types of clauses ("in benefit of", "to the detriment of"), contained in some offences of the Criminal Code, have always been interpreted as evidence of the requirement of wilful misconduct in the actions of the perpetrator, since someone having a specific aim can only be acting with wilful misconduct

entity: on the one hand, the criterion stated in paragraph b), for the offence committed by the subordinate, and on the other, that in paragraph a), for the implicit offence in the serious breach of their duties by the persons included in this section.

However, if there has been no breach of the duties of supervision, surveillance and monitoring, or if the breach was not serious, the possibility always exists that the legal entity may be declared subsidiarily publicly liable (Article 120.4, Criminal Code).

f) Legal entities to which liability can and cannot be attributed

Going somewhat further than what the text of the Criminal Code would seem to permit, the Circular makes a distinction between three types of legal entities, in terms of their organisational liability; because, when considering the possibility of attributing liability to the legal entity, it must be required that it have sufficient material substrate.

First, there are those legal entities which operate normally on the market and to which the provisions on organisational and management programmes set out in sections 2 to 5 of Article 31 bis of the Criminal Code exclusively refer, whereby they can be attributed criminal liability, regardless of their degree of organisation.

Second, there are legal entities which carry out a certain activity, for the most part illegal, which rule 2 of Article 66 bis refers to as those used “instrumentally to commit criminal offences” and to which liability can also be attributed, even if their legal activities are less relevant than their illegal activities.

Third, there are legal entities of which it can be said that liability cannot be attributed to them, because they are companies whose illegal activities greatly exceed their legal activities, the latter being merely residual and apparent for the criminal purpose itself. In these cases, it would not be appropriate to attribute liability to the legal entity.

It seems as though the tedious and, most times, insurmountable procedural problems raised by these corporate structures (due to the impossibility of duly summoning them, of there being a legal representative, of a lawyer being appointed to defend them, etc.) has forced the creation of this peculiar institution, which, by the way, lacks firm legal protection.

That being the case, it is only appropriate to attribute liability to an individual when the manager and the legal entity are absolutely and materially the same, whereby their wishes appear in practice to fully overlap, or in which legal status becomes irrelevant to the specific category of offence, thereby avoiding a double incrimination. This risk is particularly present, in the opinion of the FGE, in the case of small businesses, to the point where the liability regime created by the Spanish Criminal Code is more focused on medium-sized and large enterprises.

3. The requirements for applying the exemption from criminal liability

a) Implementation of compliance programmes

Without a doubt, the most important reform in this regard is the inclusion, for the first time, of an express cause for exempting legal entities from criminal liability, based on the company demonstrating it has effectively implemented a crime prevention plan or compliance programme.

The premises for the exemption are as follows:

- (i) The management body must have adopted and effectively executed, prior to the commission of the offence, organisational and management programmes which include suitable means for performing surveillance and monitoring, so as to prevent offences of the same type or to significantly reduce the risk of an offence being committed;
- (ii) The supervision of the operation of, and compliance with, the prevention plan implemented must have been entrusted to a body of the legal entity having independent powers for taking initiative and control, or to which the function of supervising the effectiveness of internal controls of legal entities has been legally entrusted (in small companies, this function can be directly assumed by the management body);
- (iii) Individual perpetrators must have committed the offence by fraudulently eluding organisational programmes; and
- (iv) The body responsible for ensuring compliance with rules must not have made any omission or insufficiently exercised its surveillance and monitoring duties.

If in these circumstances can only be proven in part, the effects of mitigating the penalty can be considered.

Meanwhile, the compliance programmes must meet the following requirements:

- (i) Identify the activities in relation to which the offences to be prevented can be committed;
- (ii) Establish the protocols and procedures involved in the formation of the legal entity's wishes, in decision-making and the execution of the same in relation to the former;
- (iii) Set out appropriate management programmes for financial resources in order to prevent the commission of the offences to be avoided;
- (iv) Impose the obligation to inform the body responsible for overseeing operation of the compliance programme of possible risks and breaches;
- (v) Establish a disciplinary system that duly penalises any non-compliance with the measures established in the programme;
- (vi) Periodically verify and, potentially, modified when relevant infringements of its provisions come to light, or when changes in the organisation, the control structure or the activity performed make it necessary.

The FGE considers that companies should have not just a criminal compliance programme but also management programmes to comply with the law in general, promoting a true culture of business ethics and, in that way, leading to a situation in which the commission of offences constitutes an accidental event

and exemption from the penalty is the natural consequence of said culture. Because it is a mistake to view compliance programmes as designed to serve as a kind of insurance policy against criminal action.

b) Scope of the exemption regime

Despite the fact that the Criminal Code is confusing, for the FGE it is clear that the exemption regime applies both to cases of criminal liability of the legal entity for offences by their legal representatives and managers and to offences by employees and subordinates, regardless of the fact that, in the case of the former, who can be said to form part of the organisation itself, this is less justified and, as such, must be interpreted in such a way that it does not render the liability of the legal entity pointless.

The requirements in both cases are the same, although there is an essential difference and that is that in the case of offences by employees and subordinates, condition 3 of number 2 of Article 31 bis cannot be applied, namely that the individual perpetrators have committed the offence, fraudulently evading the organisation and compliance programmes. This is because, in the programme established, it must be proven that the person responsible for surveillance and monitoring committed a serious breach of his/her duties, but the legal entity cannot be reciprocally required, in order to exonerate itself, to prove that the dependent person fraudulently evaded the monitoring programme

c) Explicit and implicit requirements of the compliance programmes

The FGE considers that the programmes must be clear, precise and efficient, drafted in writing and perfectly adapted to the company in question and its specific risks. The fact that a company merely copies a programme prepared by another, with a view to not having to assume or to reducing the cost of preparing its own programme, is a concern.

The company has to properly identify and manage the risks, establishing measures to neutralise them and, in companies of a certain size, it is important that there be IT applications that control the company's internal business processes as thoroughly as possible.

The protocols and procedures in which the wishes of legal entity are formed, the adoption and execution of decisions, must guarantee high ethical standards, particularly when it comes to hiring and promoting managers and appointing the members of the management bodies.

The suitability of the compliance programme for preventing the commission of offences does not need to be absolute, as the Criminal Code itself considers that a programme is effective if it just "significantly reduces" the risk of an offence being committed.

The compliance programme must serve not only to prevent the offence, but also to make it possible to detect criminal conduct, because the existence of channels for reporting internal breaches or unlawful activities in the company is one of the key elements of prevention. However, it is necessary that the entity have specific rules designed to protect whistleblowers, with systems that guarantee the confidentiality of communications, ruling out the risk of suffering reprisals.

The obligation to establish an appropriate disciplinary system that penalises any breach of the measures adopted in a programme implies the existence of a code of conduct that clearly sets out the obligations of managers and employees.

An appropriate compliance programme must expressly establish the terms and procedures for review, aside from the need for immediate review if certain circumstances arise that can influence risk analysis.

d) The body responsible for regulatory compliance

The Circular considers that the body that supervises the compliance programme must be created specifically to perform that role, except in those entities in which, by law, such a body is already envisaged to verify the effectiveness of the internal risk controls for the legal entity (for example, the case of investment services companies, obliged parties in relation to the prevention of money laundering or listed companies).

Depending on the size of the legal entity, this body may be comprised of one or more persons, with sufficient training and authority.

The Criminal Code does not design the content of its functions specifically, but it seems clear that it will have to participate in the preparation of the programmes and risk management and ensure proper operation, establishing appropriate audit, surveillance and monitoring systems, comprising personnel with sufficient knowledge and professional experience, equipped with appropriate technical means and access to the internal processes, necessary information and activities of the entities in order to guarantee that the function attributed to it is properly covered. Rule 5 of CNMV Circulars 6/2009 and 1/2014 can serve as a reference to define the content of these functions.

It must be a body of the legal entity, but this does not mean that it must perform all the tasks that regulatory compliance entails itself, as some of them can be carried out by other bodies or units apart from the specific regulatory compliance one (risks unit, risk monitoring unit, labour risk prevention service or money laundering prevention service) or they can even be outsourced (for example the training of managers and employees, or the reporting channels). The important thing is that there be a supervisory body overseeing the general operation of the programme, which must clearly establish who is responsible for the different functions and tasks.

The management body, which –according to the Circular— must also be watched over by the body responsible for regulatory compliance, must establish the company policy on risk monitoring and management, and supervision thereof, a non-delegable function in the case of listed companies [Article 523 ter, section b) LSC], but the programmes must envisage the mechanisms for the proper management of any conflict of interest that may result from the performance of the functions of the compliance officer, ensuring that there is an operational separation between the management body and the members of the control body who should preferably not be directors, or at least not all of them.

e) Criminal liability of the body responsible for regulatory compliance

According to the criterion of the FGE, the body responsible for compliance can, by acting unlawfully, transfer the criminal liability to the legal entity in a scenario envisaged in section a) of Article 31 bis, no. 1, of the Criminal Code, because by holding powers of organisation and monitoring, it falls within said scenario.

Meanwhile, if it is seriously negligent in failing to monitor a subordinate, it also transfers criminal liability to the legal entity, because the omission can lead it itself to be criminally liable for the offence committed by the subordinate. Moreover, if the body responsible for regulatory compliance fails to fulfil its monitoring obligations, it will under no circumstances be exempt from criminal liability.

This notwithstanding, according to the Circular, the exposure of the body responsible for compliance to criminal risk is no higher than that of the other managers of the legal entities; the increased criminal risk resides only in the fact that, due to its position and functions, it may have more frequent access to knowledge of the commission of criminal acts, that the compliance officer can prevent by performing his/her duties.

f) The special regime for small legal entities

The only special condition that the legislator stipulates for them is to exempt them from having to design a specific body responsible for regulatory compliance.

However, according to the Circular, the characteristics of the organisation and monitoring programmes must be adjusted to the entity's own organisational structure, which cannot be compared with that of companies whose organisation is more complex.

g) Criteria for assessing the effectiveness of the compliance programmes

It is interesting to note the importance that the Circular attributes to setting out the criteria for determining whether the compliance programmes comply with the conditions established by the law. Although the FGE acknowledges that it is not easy to establish uniform criteria applicable to different types of companies, due to different forms of organisation, business models, the nature and import of their transactions, products or services or of their clients, it does consider it appropriate to attempt to give the members of the Public Prosecutor's Office some basic interpretative criteria to assess the suitability and effectiveness of the organisation and management programmes, with a view to providing uniform solutions that guarantee the principle of unity of action of the Public Prosecutor in such a novel and transcendental area. These criteria are the following:

1. The regulation of the organisation and management programmes must be interpreted in such a way that the criminal liability regime of the legal entity is not rendered meaningless and impossible to assess in practice. As such, it is important to prevent the mere adoption of these programmes, so widely available on the specialist market, constituting a get out of jail free card for legal entities, protecting them not just against acts of persons with less responsibility in the company, but also against those of the persons who manage and represent it and even design and oversee observance of such programmes.
2. The purpose of the organisation and management programmes is not just to prevent criminal penalties for the company, but to promote a genuine culture of business ethics. Therefore, the key when assessing their true effectiveness is not so much the existence of a compliance programme but the importance of the same in decision-making by managers and employees and the extent to which it is a true expression of their compliance culture.
3. Certificates on the suitability of the programme issued by companies, corporations or associates devoted to assessing and certifying compliance with obligations, stating that the programme complies with the legal conditions and requirements, may be taken as an additional element with regard to observance but never as proof of the effectiveness of the programme or as a substitute for the exclusive power to assess them same that corresponds to the courts.
4. Any effective programme depends on the unequivocal commitment and support of the senior management of the firm. The behaviour and involvement of the Board of Directors and the main executives are key for transferring a culture of compliance to the rest of the company. On the other

hand, any hostility on their part towards these programmes, ambiguity, mixed messages or indifference to their implementation gives the impression in the company that non-compliance is a risk worth taking in order to obtain greater financial benefit. This means that the company's liability cannot be the same if the offence is committed by one of its directors or a senior executive, as opposed to one committed by an employee.

5. Even if there is an indirect benefit for the legal entity, corporate liability should not be viewed the same way in those cases where the criminal conduct largely generated a benefit for the company as in cases where the benefit is secondary or tangential to that sought by the perpetrator. In these cases, the best way to prevent such conduct is proper selection of managers and employees, meaning that special care must be taken to ensure that companies' organisation and monitoring programmes establish high ethical standards for hiring and promoting managers and employees and application of the same in the specific case.
6. While the detection of offences is not expressly included in the articulation or in the requirements of the organisation and management programmes, it forms part, together with prevention, of the essential content, as the capacity to detect cases of non-compliance will stand out as a substantive element of the validity of the programme.
7. The commission of an offence does not automatically invalidate the compliance programme, although it is no less true that it can be seriously compromised depending on the seriousness of the criminal conduct and the extent of the same in the corporation, the high number of employees involved, the low intensity of the fraud used to evade the programme or the frequency and duration of the criminal activity. All these circumstances will have to be taken into account when assessing the effectiveness of the programme.
8. The behaviour of the corporation in relation to past conduct is relevant when it comes to deducing the legal entity's intentions regarding compliance and the extent to which the offence represents a one-off event, not representative of its ethical culture or, on the other hand, evidence of the absence of such a culture, revealing the organisation programme to be nothing more than an exculpatory façade.
9. The actions taken by the legal entity following the commission of the offence must also be evaluated; for example, the adoption of disciplinary measures against the perpetrators or the immediate review of the programme in order to detect possible weaknesses, introducing the necessary modifications, if necessary, are a sign of the commitment of the managers of the corporation to the compliance programme. Likewise, reimbursement, immediate reparation of the damage, active collaboration with the investigation or contributing to the process with an internal investigation, notwithstanding the consideration of the same as mitigating factors, provide prima facie signs of the company's ethical commitment and can even lead to exemption from the penalty.

Finally, the Circular reminds us that the legal entity is responsible for showing that the organisation and management programmes met the legal conditions and requirements and that, on the other hand, it will be for the prosecution to prove that the offence was committed in the circumstances established in Article 31 bis, section 1, of the Criminal Code.

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