

# The Supreme Court addresses several aspects of the criminal liability of legal persons

## I. Introduction

More than 5 years after the entry into force of Organic Act 5/2010, of 22 June, which introduced the criminal liability of legal persons into the Spanish legal system, on 29 February last, the Supreme Court sitting in plenary session addressed significant aspects of the criminal liability of legal persons for the first time, in a decision –Judgment no. 154/2016 (the "**Judgment**")— which found three companies guilty of participating in public health offences, thus confirming the National Court Judgment, except in relation to the dissolution order imposed on one of them.

The mission of the Judgment –as it itself explains— is to "*comply with its nomophylactic duty and ensure the unification of doctrine*" for which the Court is responsible and for that reason it goes further that what the specific matter required, but it also highlights the enormous complexity of the topic, giving rise to an individual opinion by 7 of the 15 senior judges comprising the Criminal Division in plenary session.

One of the most controversial aspects has to do with a fundamental matter, namely the elements that comprise the offence in order to be able to decide on the criminal liability of a company.

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- The absence of a culture of regulatory compliance as an element of the offence
- The concept of "*advantage*" or "*direct or indirect benefit*"
- The right of defence of the legal person and representation by a natural person, also accused, in the same proceedings
- Distinction between an artificial legal person or "*front*" and one with actual activity
- Lack of grounds for imposition of a penalty of dissolution of one of the entities found guilty

## II. The elements of the offence in the criminal liability of legal persons

- Majority position

The Court analysed the conditions necessary to find legal persons criminally liable, which, according to the provisions of Article 31 bis of the Criminal Code ("**CP**"), are: (i) the commission of one of the crimes included in the catalogue of offences liable to generate criminal liability for the legal person within which it is committed; and (ii) that the natural persons responsible for said crime form part of the legal person (representatives, directors, managers, employees or dependents).

The novel aspect of this Judgment is that it adds an **additional condition as an element of the offence: the absence of appropriate monitoring mechanisms that belie the lack of a culture of regulatory compliance, a culture of respect for the law, or a culture of business ethics in the company, which facilitated the commission of the crime.**

The justification for its inclusion can be found –according to the majority opinion of the Court— in the fact that the core and ultimate basis for the liability of the legal person lies precisely with the lack of appropriate monitoring measures. What the Judgment does not clarify is **what should be understood as the absence of a culture of business ethics and whether this absence is confirmed by non-compliance with the requirements stipulated in Article 31 bis, sections 2 et seq, or by the absence of any mechanism of supervision and monitoring.**

This statement transcends the strictly theoretical plane and has the important practical consequence of obliging the prosecution to prove the non-existence of appropriate and effective instruments to prevent the commission of crimes and, as such, the absence of this culture of regulatory compliance.

- The criterion of Circular no. 1/2016, of the State Prosecutor's Office (the “Circular”)

The Circular stresses repeatedly the need to implant a *"culture of business ethics"* or a *"corporate culture of respect for the law"* in business management, as an essential benchmark when explaining that the legislator has established corporate criminal liability and, as such, when it comes to complying with the requirements envisaged in the CP so that the company can be exempted from liability (sections 2 et seq of current Article 31 bis), it considers that they must be the expression of the culture of respect for the law.

But the State Prosecutor's Office does not share the majority opinion of the Court, regarding the absence of a culture of regulatory compliance being a requirement for the offence, its understanding is that exemption from criminal liability on the basis of the existence of regulatory compliance programmes is an absolute excuse that, as such, must be proven by the person invoking it; i.e. the company. The prosecution merely has to prove the crime of the natural person in accordance with Article 31 bis, section 1.

- The criticism of the dissenting Senior Judges

The senior judges who signed the individual opinion reject the idea that the *"absence of a culture of respect for the law"* constitutes an additional element of the offence.

Considered thus, the rules on proof generally applicable to the acceptance of defences would be altered, creating a privileged exception regarding proof for legal persons that could even generate *"a voidance of the criminal liability of legal persons"*, without mentioning the practical difficulties that the burden of proving a negative fact would represent for the prosecution.

The only elements that have to be proven by the prosecution are those set out in paragraphs a) and b) of section 1 of Article 31 bis, and the inclusion of such vague and imprecise elements as *"the absence of a culture of respect for the law"* is contrary to the principle of certainty which *"requires that the scenarios to which the law attributes criminal liability be described in the text of the law as precisely as possible"*.

Finally, the individual vote criticises an internal inconsistency committed by the majority judgment, which uses *"the complete and unquestionable lack of instruments for the prevention of crimes"* as an argument to find the existence of criminal liability of legal persons, when this is something that has not been debated in cassation. Meanwhile, if the prosecution had indeed been required to prove the absence of a culture of monitoring, as the majority of the Court suggests, the final decision would have had to absolve the accused.

Obviously, future case law will have to clarify what the final position will be in this regard, but one thing that is clear is how important crime prevention programmes are when it comes establishing, one way or another, companies' exemption from liability.

### III. The concept of “advantage” or “direct or indirect benefit” as a requirement to find a legal person criminally liable

The commission of an offence by a natural person belonging to a legal person, within the latter, does not automatically render the legal person criminally liable.

An additional element to find that this liability exists is that the crime have been committed “*to the advantage*” of the legal person (according to the wording of the CP following the reform introduced by Organic Act 5/2010, of 22 June) or “*for its direct or indirect benefit*” (according to the current wording of CP).

The Judgment interprets the two concepts together and reaches the conclusion, which coincides with the one contained in the Circular, that they refer to a “**any kind of advantage, even a mere expectation**” or something “**beneficial in terms of profit or mere subsistence of the legal person within which the crime is committed**”.

Moreover, in order to find the existence of this advantage or benefit, it is not necessary that it actually materialise, “*it is sufficient that the action of the natural person be designed to directly or indirectly benefit the entity*”.

In any event, the Supreme Court states that this aspect will have to be resolved on a case-by-case basis and by looking for the existence of a genuine relationship between the crime committed and the direct or indirect advantage or benefit obtained.

What is clear is that extremist approaches are rejected, such as those that maintain that benefit exists purely due to the fact that there was a financial saving for the legal person derived from the absence of appropriate monitoring mechanisms.

### IV. Right of defence of the legal person and representation by a natural person, also accused, in the same proceedings

With regard to an alleged nullity of proceedings, due to one of the legal persons not being given the last word in the same, represented at the trial by a natural person, who was also accused, the Supreme Court has had the chance to reflect on the problem of conflicts of interest in proceedings between the natural persons accused of the crime and the legal persons being represented by those same natural persons.

Indeed, in the majority of cases, the natural person and the legal person investigated or accused have divergent and contradictory interests in the trial, meaning that it is not appropriate “*to leave in the hands of someone who is known to be the perpetrator of the original crime, the possibility of carrying out actions such as seeking a rapid acquiescence of the legal person, paying indemnification to any injured parties using the funds of the legal person and, obviously, not collaborating with the authorities in obtaining a full clarification of the facts*”, with the possible outcome of the effective violation of the legal person's right of defence.

This problem was not resolved by Organic Act 37/2011, of 10 October, on measures to streamline proceedings, which left it for the investigated or accused entity to designate its representative in the criminal proceedings. Therefore, the Supreme Court issues a warning to the investigating and examining bodies in order to try to prevent, where possible, that the representative of the legal person in criminal proceedings be a person in a position that is opposed or contradictory to the same.

The fact is, however, we still do not know who should represent legal persons in court and how to address cases of conflicts of interest, which must be remedied by the legislator in the form of regulations.<sup>1</sup>

## V. Distinction between an artificial legal person or “front” and one with actual activity in order to attribute criminal liability

The majority opinion of the senior judges of the Supreme Court coincides with that of the Circular in that the strictly artificial legal person or “front” (understood as one that has no lawful activity and was created exclusively in order to commit an offence) must be left outside the regime of liability under Article 31 bis.

Thus, only those legal persons who have sufficient material substance will be criminally liable, and not those created purely as vehicles to commit crimes, which also lack an organisational structure and regarding which it is *“impossible to consider the existence of internal monitoring mechanisms and a culture of respect or defiance regarding regulations”*.

## VI. Lack of grounds for imposing a dissolution order on one of the entities found guilty

Finally, the Supreme Court revokes the dissolution order imposed on one of the entities, finding that the National Court failed to properly apply the rules for determining the penalties applicable to legal persons, having imposed said penalty without considering *“its economic and social consequences, and the effects for the workers in particular”* [Article 66 bis 1<sup>a</sup> b) CP].

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1) In this regard, the Court has indicated some of the solutions envisaged in comparative law: (i) the appointment of a kind of “judicial defender” of the legal person by the corresponding court body; (ii) the appointment of a “collegiate body comprised of independent persons together with others representing the interests of the third parties affected by possible penalties derived from the unlawful conduct of the legal person”; or (iii) that the “compliance officer” represent the legal person in proceedings.

## CONTACT

### **Clifford Chance**

Paseo de la Castellana, 110  
28046 Madrid  
Tel.: +34 91 590 75 00

### **José Antonio Caínzos**

Head of Litigation and Arbitration  
E: [joseantonio.cainzos@cliffordchance.com](mailto:joseantonio.cainzos@cliffordchance.com)

### **Bernardo del Rosal**

Of Counsel responsible for Criminal Law  
E: [bernardo.delrosal@cliffordchance.com](mailto:bernardo.delrosal@cliffordchance.com)

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