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Practical cross-border insights into business crime law

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1 General Criminal Law Enforcement

1.1 What authorities can prosecute business crimes, and are there different enforcement authorities at the national and regional levels?

Examining magistrates (*Juzgados de Instrucción*) institute criminal proceedings and conduct criminal investigations. They also decide whether there are reasonable grounds to bring the defendant to trial. Then, the prosecution can be brought by the Public Prosecutor's Office, a private prosecutor (*Acusación Particular*) or a popular prosecution (*Acusación Popular*).

1.2 If there is more than one set of enforcement agencies, how are decisions made regarding the body which will investigate and prosecute a matter?

Government agencies are only empowered to impose fines for administrative offences. Once they establish that a crime has been committed, the case is referred to the competent examining magistrate in accordance with the Spanish Organic Act on the Judiciary (**LOPJ**) and the Spanish Criminal Procedure Code (**CPC**).

In addition, there are two specialised prosecutors: the Special Public Prosecutor for Corruption and Organised Crime; and an Anti-Drug Special Public Prosecutor.

1.3 Is there any civil or administrative enforcement against business crimes? If so, what agencies enforce the laws civilly and which crimes do they combat?

Some agencies have the authority to investigate and conduct administrative proceedings whereby they can impose administrative fines. For instance, the following agencies have administrative authority concerning business crimes:

- (1) The National Securities Market Commission deals with infractions against the security market such as securities fraud.
- (2) The National Competition Authority deals with infractions of competition law and cartels.
- (3) The National Tax Authority deals with infractions such as tax fraud.
- (4) The Bank of Spain deals with infractions against the financial system.
- (5) The Commission for the Prevention of Money Laundering and Money Offences deals with money laundering.

1.4 Have there been any major business crime cases in your jurisdiction in the past year?

The latest major business crime cases include: the alleged blackmail and corruption by Spain's ex-police chief; and the (ongoing) case against Spain's former King for corruption and fraud. With regard to the latter, it is worth mentioning that Spain's national prosecutor's office has dropped two investigations against the former King due to a failure to find sufficient evidence of criminal activity.

2 Organisation of the Courts

2.1 How are the criminal courts in your jurisdiction structured? Are there specialised criminal courts for particular crimes?

Spanish Criminal Courts have jurisdiction over crimes committed within the Spanish territory, notwithstanding when it is provided by international treaties to which Spain is a party. Under the LOPJ, jurisdiction is also recognised, under certain circumstances, over crimes committed abroad by Spanish citizens (active personality principle). Likewise, Spanish Criminal Courts have jurisdiction over specific crimes (including corruption between individuals or in international transactions and counterfeit medicines) committed by Spanish citizens or foreigners, under specific circumstances.

Competence is attributed to courts under territorial (*forum delicti commissi*) and material (*ratione materiae*) criteria. In addition, investigations are conducted by examining magistrates (*jueces de instrucción*), whereby trials are conducted by a different court from that which conducted the investigation (*juzgados de los penal*). Criminal Courts are organised as follows:

The ordinary courts with *national jurisdiction* in criminal matters are:

- (1) The Second Chamber of the Supreme Court (*Sala 2ª del Tribunal Supremo*) – apart from hearing cassation appeals, the Supreme Court is competent to investigate and prosecute the high-ranking officials specified in the LOPJ (Arts 57.2 and 3).
- (2) The Criminal Matters Chamber of the National Court (*Sala de lo Penal de la Audiencia Nacional*) – tries serious crimes specified in Art. 65 LOPJ and crimes committed abroad, and hears appeals against judgments issued by Central Criminal Courts, the Central Examining Magistrates Court and Central Minors Courts.
- (3) Central Criminal Courts (*Juzgados Centrales de lo Penal*) – hear cases for offences with a penalty of imprisonment of less than five years.

- (4) The Central Courts of Instruction (*Juzgados Centrales de instrucción*) – investigate cases to be heard in either the National Court or the Central Criminal Courts.

The ordinary courts with *limited territorial jurisdiction* in criminal matters are:

- (1) High Courts of Justice (*Tribunales Superiores de Justicia*) – are the highest courts in the autonomous communities (*comunidades autónomas*) and have jurisdiction to investigate and prosecute cases against certain high-ranking officials and appeals against judgments issued by Provincial Courts.
- (2) Provincial Courts (*Audiencias Provinciales*) – adjudicate cases for offences with a penalty of imprisonment of more than five years.
- (3) Criminal Courts (*Juzgados de lo Penal*) – adjudicate cases for offences punished with less than five years of imprisonment.
- (4) Examining magistrates (*Juzgados de Instrucción*) – investigate crimes that should be adjudicated by Provincial Courts and Criminal Courts and adjudicate misdemeanour cases.

In addition, there are *specialised Criminal Courts*:

- (1) Courts with special duties in the matter of criminal sentencing (*Juzgados de Vigilancia Penitenciaria*) – deal with all matters relating to prison inmates.
- (2) Juvenile courts (*Juzgados de Menores*) – have jurisdiction over crimes committed by persons aged between 14 and 18.
- (3) Courts dealing with violence against women (*Juzgados de Violencia sobre la Mujer*) – have jurisdiction over crimes committed against a woman in particular family situations.

2.2 Is there a right to a jury in business crime trials?

Art. 1.2 of Organic Act 5/1995 of the Jury Court establishes that a jury is competent to adjudicate the following crimes committed by civil servants not attributed to the National High Court: (1) disloyalty in the custody of documents; (2) corruption; (3) influence peddling; (4) embezzlement; (5) fraud and illegal taxation; (6) negotiations prohibited to civil servants; and (7) disloyalty in the custody of prisoners.

3 Particular Statutes and Crimes

3.1 Please describe any statutes that are commonly used in your jurisdiction to prosecute business crimes, including the elements of the crimes and the requisite mental state of the accused.

• Securities fraud

Securities fraud administrative infractions are provided by the Securities Market Law.

Concerning the criminal aspect, Art. 282 *bis* of the Spanish Criminal Code (SCC) provides the criminalisation of “fake investments in the stock market”. A penalty of imprisonment is provided for *de facto* or *de jure* managers of a company issuing securities and listed on the stock market who falsify financial information used in the stock market in order to: (1) attract investors; (2) place any kind of financial asset; or (3) obtain any form of financing.

• Accounting fraud

Accounting fraud is punishable by imprisonment under Art. 290 SCC. It punishes *de facto* or *de jure* directors of a company incorporated or under formation who falsify the annual accounts or other documents recording the legal or financial status of the company causing financial damage to the company, any shareholders, partners or third parties.

• Insider trading

Insider trading is regulated under the Securities Market Law (administrative law) and criminalised under Art. 285 SCC. The offence requires: (1) the use of privileged information for one’s own benefit; or (2) the provision of insider information for use by a third party.

Moreover, one of the following circumstances must be presented:

- (1) the benefit obtained by the insider or the third party or the damage caused must exceed €500;
- (2) the value of the financial instruments used was more than €2 million; or
- (3) serious damage was caused to the market’s integrity.

Insider trading applies to any of the following persons who possess privileged information: (1) members of the managerial or supervisory boards of the issuer; (2) individuals with participation in the capital of the issuer; (3) individuals who obtain information through the exercise of her/his profession or duties; and (4) individuals who obtain information via criminal activity.

• Embezzlement

Art. 252 SCC provides for the penalty of imprisonment for the person who, with power to administer the assets of others, exceeds her/his powers, causing damage to the assets administered. Moreover, Arts 432 to 435 punish the acts of embezzlement committed by a public official concerning public funds.

• Bribery of government officials

Bribery of government officials is defined by Art. 419 *et seq.* SCC. It occurs when a public official, for its own benefit or the benefit of a third party, receives or requests a gift, favour or payment to carry out or omit to carry out an act in breach of her/his duties or in relation to her/his duties. This criminal offence may also be committed when the conduct is carried out by an intermediary. Both passive and active corruption are criminalised in Spain.

• Criminal anti-competition

Anti-competition infractions are, in Spain, administrative offences and not criminal. They are sanctioned under the Spanish Competition Law and Arts 101 and 102 of the Treaty on the Functioning of the European Union.

• Cartels and other competition offences

In Spain, cartels are sanctioned under Art. 1 of the Spanish Competition Law and Art. 101 of the Treaty on the Functioning of the European Union. These infractions are of an administrative nature.

The SCC, however, provides some offences that could be committed through a cartel and hence punishable criminally (very rarely applied). Thus, the following acts are punishable by imprisonment: (1) manipulation of raw materials or essential goods in order to limit supplies or distort prices (Art. 281 SCC); (2) price tampering (Art. 284 SCC); and (3) bid-rigging in auctions and public tenders (Art. 262 SCC).

• Tax crimes

Tax fraud is punished under Art. 305 SCC. The offence consists of avoiding the payment of taxes by cheating a tax agency (national, autonomous, or local authorities) when the defrauded amount exceeds €120,000.

• Government-contracting fraud

Government-contracting fraud mainly concerns influence peddling criminalised under Arts 428, 429 and 430 SCC. The SCC covers both the influence of a public officer over another public officer and the influence from a private individual over a public officer for the purpose of one’s own or a third party’s financial benefit.

• Environmental crimes

Environmental crimes are covered in Arts 325 to 331 SCC. The SCC punishes various conducts that cause or may cause significant damage to the quality of the air, soil, water or to animals or plants.

• Campaign-finance/election law

Illegal funding for political parties is provided under Art. 304 *bis* SCC. It is illegal to receive or deliver donations or contributions to political parties that are (1) anonymous, finalist or revocable, (2) exceed €50,000 per year from the same person, or (3) made by entities without legal personality.

• Market manipulation in connection with the sale of derivatives

As stated above, price tampering is provided under Art. 284 SCC.

• Money laundering or wire fraud

Money laundering is punished by imprisonment, provided under Arts 301 to 304 SCC. It constitutes the following acts being knowingly committed: (1) acquisition, possession, use, conversion or transmission of illegally obtained assets; (2) acts aimed to hide or conceal the illegal origin of the asset; or (3) aid provided to the individual who participated in the prior criminal offence.

• Cybersecurity and data protection law

The SCC provides several cybersecurity offences, among others:

- (1) Hacking (Art. 197 *bis* SCC): punishes individuals who, without being authorised, breach security measures and access or facilitate access to an information system.
- (2) Phishing (Art. 284.2 SCC): punishes individuals who, without authorisation and using informatic manipulation, obtain informatic data.
- (3) Denial-of-service attacks (Art. 264 *bis* SCC): punishes individuals who cause unauthorised hinderance or interruptions to a third-party informatic system.

• Trade sanctions and export control violations

Trade sanctions and export control violations are criminalised by Organic Law 12/1995 on the Suppression of Smuggling (Art. 2). Law 12/1995 also deals with actions that do not constitute a criminal offence and are only financially sanctioned administrative offences. Generally, the difference between a criminal and an administrative offence lies in the value of the goods that are the object of the violation of trade sanctions or export controls.

• Any other crime of particular interest in your jurisdiction

Spanish legislation also criminalises, among others: (1) corruption in business (Art. 286 *bis* and *ter* SCC); (2) administrative corruption (Art. 404 SCC); (3) corruption in sport (Art. 286 *bis* SCC); and (4) swindling (Arts 248, 250 and 251 SCC).

3.2 Is there liability for inchoate crimes in your jurisdiction? Can a person be liable for attempting to commit a crime, whether or not the attempted crime is completed?

The SCC punishes completed crimes and attempted crimes (Art. 16 SCC). Criminal liability for attempted crimes is exempted when the completion of the crime has been voluntarily desisted or hampered. Likewise, conspiracy, proposition (Art. 17 SCC), and provocation (Art. 18 SCC) also entail criminal liability when the law expressly so provides.

Perpetrators and accessories of crimes are criminally liable. The SCC defines perpetrators (Art. 28 SCC) as: (1) those who perpetrate the act themselves, alone, jointly, or by means of another used to aid and abet; (2) whoever directly induces another

or others to commit a crime; and (3) whoever cooperates in the commission of the crime by an act without which the crime could not have been committed. Accessories are defined (Art. 29 SCC) as those that are not considered perpetrators but cooperate in carrying out the offence with prior or simultaneous acts.

4 Corporate Criminal Liability

4.1 Is there entity liability for criminal offences? If so, under what circumstances will an employee's conduct be imputed to the entity?

Spain introduced corporate criminal liability into the SCC in 2010. Under Art. 31 *bis* 1) SCC, a legal entity – with some exceptions such as the State – may be found criminally responsible for crimes committed in their name or on their behalf, and for their benefit, directly or indirectly. Legal entities are criminally responsible for acts committed by their legal representatives or by those who, acting individually or as members of a body of the legal entity, are authorised to take decisions in the name of the legal entity or hold organisational and managerial authority.

Legal entities shall also be criminally liable for offences committed by those under the authority of the aforementioned persons. Acts have to be committed in the course of the corporate activities, on their behalf and for their benefit, directly or indirectly, provided that the legal representatives or those with managerial authority have seriously failed to observe their supervision, oversight and control duties.

Exemption of criminal liability of legal entities is provided in certain circumstances; for instance, if the corporation shows that it adopted and effectively implemented a compliance programme to prevent the crime in question. Even if all the conditions exempting the corporation are not met, compliance programmes may be used to mitigate the penalty.

4.2 Is there personal liability for managers, officers, and directors if the entity becomes liable for a crime? Under what circumstances?

Administrators *de facto* or *de jure* of a legal entity are personally responsible for crimes committed by the legal entity or the person they represent, even if there are not enough elements to consider him or her the perpetrator.

4.3 Where there is entity liability and personal liability, do the authorities have a policy or preference as to when to pursue an entity, when to pursue an individual, or both?

There is no official policy or preference on pursuing criminal cases against an entity or an individual. That being said, it should be noted that the first judgment (STS154/2016) of the Supreme Court of Spain convicting a legal entity is relatively new (2016). Thus, nowadays the number of criminal proceedings against individuals is still higher than the number of criminal prosecutions against legal entities.

4.4 In a merger or acquisition context, can successor liability apply to the successor entity? When does successor liability apply?

According to Art. 130.2 SCC, the “transformation, merger, absorption or demerger” of a legal entity does not extinguish criminal liability, which is attributed to the successor entity or

entities. However, the judge may moderate the transfer of the penalty to the legal entity according to the proportion that the original responsible legal entity retains.

In addition, neither does the concealed or apparent dissolution of a legal entity extinguish criminal liability.

5 Statutes of Limitations

5.1 How are enforcement-limitations periods calculated, and when does a limitations period begin running?

Art. 131 SCC provides for the limitations period, which depends on the penalty set for the crime, determined as follows:

- (1) 20 years when the maximum penalty for the crime is a prison sentence of 15 years or more;
- (2) 15 years when the maximum penalty for the crime is a disqualification for more than 10 years or a prison sentence of more than 10 years and less than 15 years;
- (3) 10 years when the maximum penalty is a prison sentence or disqualification for more than five years and less than 10 years; and
- (4) five years for all other criminal offences, except minor criminal offences, slander, and defamation, which have a limitations period of one year.

Moreover, when the penalty imposed is a composition of several penalties, the limitations period applicable shall be the longest term. Likewise, in case of a combination of offences or similar offences, the limitations period applicable shall be that corresponding to the most serious crime.

The limitations period starts running on the date on which the offence is committed (Art. 132.1 SCC).

5.2 Can crimes occurring outside the limitations period be prosecuted if they are part of a pattern or practice, or ongoing conspiracy?

Art. 132.1 SCC provides that in case of continuous offences, permanent offences or offences that are part of a practice, the limitations period begins running only once the last offence has been committed or the last criminal act was undertaken.

5.3 Can the limitations period be tolled? If so, how?

The limitations period may be interrupted according to Art. 132.2 SCC. The limitations period starts anew following the interruption. Art. 132.2 SCC provides for the circumstances when the limitations period may be tolled. For instance, this will happen when proceedings are brought against a person deemed to be responsible.

6 Initiation of Investigations

6.1 Do enforcement agencies have jurisdiction to enforce their authority outside your jurisdiction's territory for certain business crimes? If so, which laws can be enforced extraterritorially and what are the jurisdictional grounds that allow such enforcement? How frequently do enforcement agencies rely on extraterritorial jurisdiction to prosecute business crimes?

Art. 23 LOPJ establishes the rules for Spanish extraterritorial prosecution, including the principle of universal jurisdiction.

Spanish courts can investigate acts abroad if: (1) committed by Spanish citizens or foreigners who have acquired Spanish

nationality after the crime was committed; (2) the act is punishable at the place of execution or there is a treaty providing the contrary; (3) a criminal complaint has been filed by the Public Prosecutor or the aggrieved party; and (4) the defendant has not been sentenced abroad.

In addition, Art. 23.4.n LOPJ allows extraterritorial prosecution for corruption in business and in economic international transactions committed by Spanish individuals or foreigners outside the national territory if:

- (1) criminal proceedings have been brought against a Spanish individual;
- (2) criminal proceedings have been brought against a foreigner who resides in Spain;
- (3) the crime has been committed by the executive, administrator, employee or collaborator of a corporation, company, association, foundation or organisation that has its headquarters or registered address in Spain; or
- (4) the crime was committed by a legal person, company, organisation, groups or any other kind of entity or groups of people that have their headquarters or registered address in Spain.

However, Art. 23.5 LOPJ states that the crimes will not be prosecuted in Spain in some circumstances, such as when an international court has initiated a proceeding for the investigation and prosecution.

Finally, Art. 23.3.h LOPJ establishes extraterritorial jurisdiction for crimes against the public administration committed by Spanish or foreign nationals outside the national territory.

Spain has mostly used extraterritorial jurisdiction to prosecute crimes against humanity, genocide, torture or terrorism (Art. 23.4.a, b, d and e LOPJ). However, increasingly, Spain is relying on this jurisdiction to prosecute corruption and money laundering (for instance, see Supreme Court Resolution n° 974/2016 on extraterritorial jurisdiction for the crime of money laundering).

6.2 How are investigations initiated? Are there any rules or guidelines governing the government's initiation of any investigation? If so, please describe them.

Investigations are opened by examining magistrates upon receiving a criminal complaint by the Public Prosecutor or by a third party. They can also be initiated *ex officio*. However, the Prosecutor's Office may also conduct a preliminary investigation. Following its investigation, the Prosecutor's Office decides whether to:

- (1) dismiss the case because there is not adequate evidence of a criminal offence; or
- (2) refer the case to the competent examining magistrate to institute a criminal proceeding.

6.3 Do the criminal authorities in your jurisdiction have formal and/or informal mechanisms for cooperating with foreign enforcement authorities? Do they cooperate with foreign enforcement authorities?

Cooperation with foreign enforcement authorities is frequently used by Spanish authorities in, *inter alia*, tax evasion, fraud, corruption and money laundering. This cooperation takes the form of joint investigations or exchange of information via international judicial and police cooperation.

According to Spanish legislation, authorities are not allowed to exchange information directly with a foreign agency unless:

- (1) established by law, i.e., set forth in bilateral or multilateral treaties and conventions on mutual assistance; or
- (2) with the prior approval of the competent court.

Formal cooperation is frequent, but the processes take significant time. Cooperation not established by law or without a court's permission is not permitted and may not be used as evidence.

Art. 205 *et seq.* CPC establishes the procedure for European investigation orders.

7 Procedures for Gathering Information from a Company

7.1 What powers does the government have generally to gather information when investigating business crimes?

The Public Prosecutor and the judicial police have limited investigating power, whereas the examining magistrate possesses full power of investigation. The Prosecutor's Office can open its own investigation and order to produce evidence (Art. 773.2 CPC). However, it cannot adopt precautionary measures or limit fundamental rights, except from the detention of the suspect (Art. 5 EOMF).

The examining magistrate has a broad range of tools to investigate, such as witness interviews, questioning of defendants, arrest and search warrants, seizure of documents, wiretapping and dawn raids.

Document Gathering:

7.2 Under what circumstances can the government demand that a company under investigation produce documents to the government, and under what circumstances can the government raid a company under investigation and seize documents?

Under the CPC, the examining magistrate can order the production of documents relevant to an investigation or dawn raids, issue search warrants on a company under investigation and seize documents, including electronic devices and information therein when there are serious indications that important facts can be discovered or evidenced (Art. 573 CPC). This can also be done upon the demand of any party to the criminal proceedings. The examining magistrate, however, has to verify that the measure is justified and proportional. The Prosecutor's Office has no authority to issue search warrants.

Other government agencies, such as the Executive Service of the Commission for the Prevention of Money Laundering and Monetary Offences (Sepblac) or tax authorities, have limited authority to gather information. However, they can conduct inspections and request relevant information.

7.3 Are there any protections against production or seizure that the company can assert for any types of documents? For example, does your jurisdiction recognise any privileges protecting documents prepared by in-house attorneys or external counsel, or corporate communications with in-house attorneys or external counsel?

In application of the right of defence, attorney-client communications are confidential and covered by the attorney-client privilege. However, the privilege does not exist when there are objective indications that the lawyer has committed a crime along with the defendant (Art. 118.4 CPC). Confidentiality of communications does not extend to in-house lawyers unless the communication is made in preparation for a defence.

7.4 Are there any labour or privacy laws in your jurisdiction (such as the General Data Protection Regulation in the European Union) that may impact the collection, processing, or transfer of employees' personal data, even if located in company files? Does your jurisdiction have blocking statutes or other domestic laws that may impede cross-border disclosure?

No, labour or privacy laws do not impact the collection, processing or transfer of employees' personal data ordered in criminal investigations. The use of documents, submitted by the parties or required by the court, in criminal proceedings is exempt from the requirement of consent (Art. 236 *quater* LOPJ). Concerning privacy laws, the General Data Protection Regulation (EU Regulation 679/2016) is in force in Spain.

After the sanction imposed by the Supreme Court of an amount of €15 million, on April 15, 2021 the Congress of Deputies approved a law that regulates the protection of personal data in criminal cases.

7.5 Under what circumstances can the government demand that a company employee produce documents to the government, or raid the home or office of an employee and seize documents?

See question 7.2.

7.6 Under what circumstances can the government demand that a third person or entity produce documents to the government, or raid the home or office of a third person or entity and seize documents?

Examining magistrates can order such measures on any third party or entity if it is necessary for the investigation (Art. 575 CPC). The examining magistrate must comply with the proportionality principle. All parties to a criminal proceeding can also request the examining magistrate to take such measures.

Questioning of Individuals:

7.7 Under what circumstances can the government demand that an employee, officer, or director of a company under investigation submit to questioning? In what forum can the questioning take place?

Examining magistrates can order anybody, including employees, officers or directors of a company under investigation to submit to questioning as a witness (Art. 410 CPC), suspect or defendant as many times as considered appropriate to elucidate the case. Suspects and defendants have the right to remain silent and not to answer questions (Art. 118.g CPC). A fine may be imposed on a witness that fails to comply with a summons or to answer questions.

The questioning can also be performed by the Public Prosecutor or by the police when conducting preliminary investigations.

7.8 Under what circumstances can the government demand that a third person submit to questioning? In what forum can the questioning take place?

Any person must submit to questioning at the request of the police or the examining magistrate as a witness.

7.9 What protections can a person assert upon being questioned by the government? Is there a right to be represented by an attorney during questioning? Is there a right or privilege against self-incrimination that may be asserted? If a right to assert the privilege against self-incrimination exists, can the assertion of the right result in an inference of guilt at trial?

Art. 17.3 of the Spanish Constitution enshrines the right of suspects to remain silent and the assistance of a lawyer during police, Prosecutor's Office or judicial investigations. The CPC reaffirms those rights and also recognises the right against self-incrimination (Arts 118.g and 520.2 CPC) as part of the right of defence.

Pursuant to the right to presumption of evidence, the assertion of the privilege against self-incrimination cannot be considered a guilty statement at trial.

8 Initiation of Prosecutions / Deferred Prosecution / Civil Dispositions

8.1 How are criminal cases initiated?

Criminal cases can be initiated through a criminal complaint (*denuncia o querrela*) by the victim, a citizen, the prosecutor, or the police after a preliminary investigation (*atestado*). It can also be initiated *ex officio* by the examining magistrate. Finally, any individual can exercise what is called the "popular criminal action".

8.2 What rules or guidelines govern the government's decision to charge an entity or individual with a crime?

As explained, the criminal investigation is conducted by an examining magistrate. Once the magistrate considers that there are reasonable grounds that the crime has been committed by a defendant and no more evidence is needed, he or she shall issue a decision closing the investigation, formally charging the defendant and inviting the prosecution to request a trial and issue an indictment.

The Prosecutor's Office is obligated to prosecute when he or she considers it appropriate (Art. 105 CPC). Prosecutors are governed by the legality and impartiality principles. They are obligated to prosecute regardless of any political considerations and the personal circumstances of the person being investigated. However, in the case of juvenile criminal proceedings and proceedings for misdemeanours, prosecutors may not prosecute if they consider that there is no public interest, the victim and perpetrator have reached a conciliation agreement or the crimes committed are not sufficiently serious.

8.3 Can a defendant and the government agree to resolve a criminal investigation through pretrial diversion or an agreement to defer prosecution? If so, please describe any rules or guidelines governing whether pretrial diversion or deferred prosecution agreements are available to dispose of criminal investigations.

Spanish legislation does not recognise pretrial diversion or deferred prosecution agreements.

8.4 If deferred prosecution or non-prosecution agreements are available to dispose of criminal investigations in your jurisdiction, must any aspects of

these agreements be judicially approved? If so, please describe the factors which courts consider when reviewing deferred prosecution or non-prosecution agreements.

This is not applicable.

8.5 In addition to, or instead of, any criminal disposition to an investigation, can a defendant be subject to any civil penalties or remedies? If so, please describe the circumstances under which civil penalties or remedies may apply.

Victims of crimes may choose to claim damages caused by the commission of the crime within the criminal proceedings or after the final judgment has been issued therein (Art. 111 CPC). Civil remedies include restitution, reparation and compensation (Art. 100 CPC).

8.6 Can an individual or corporate commence a private prosecution? If so, can they privately prosecute business crime offences?

Victims of crimes may commence private prosecutions. They may prosecute even if the Public Prosecutor decides not to prosecute the criminal offence.

Citizens that are not victims of the criminal offence may commence popular prosecutions.

9 Burden of Proof

9.1 For each element of the business crimes identified above in section 3, which party has the burden of proof? Which party has the burden of proof with respect to any affirmative defences?

Under the presumption of innocence principle, the prosecution, either public, private or popular, has the burden of proof of the crime's elements, whereas the defendant has the burden of proof with respect to affirmative defences.

9.2 What is the standard of proof that the party with the burden must satisfy?

As a result of the application of the principle of presumption of innocence and *in dubio pro reo*, the commission of crimes must be proved beyond any reasonable doubt. Art. 741 CPC provides that the judge appreciates the evidence on the basis of his conscience.

9.3 In a criminal trial, who is the arbiter of fact? Who determines whether the party has satisfied its burden of proof?

Judges and magistrates are the arbiters of fact and determine whether the party has satisfied its burden of proof.

10 Conspiracy / Aiding and Abetting

10.1 Can a person who conspires with or assists another to commit a business crime be liable? If so, what is the nature of the liability and what are the elements of the offence?

Conspiracy exists when two or more persons agree on the execution of a crime and decide to execute it (Art. 17.1 SCC).

Conspiracy is only punishable when it is expressly provided in the Criminal Code (Art. 17.3 SCC).

Art. 28 SCC attributes the same criminal liability of those who aid and abet to that of the principals of the crime; hence the same penalty shall be imposed. Accomplices are defined as those who: (1) directly instigate another to perform the act; or (2) cooperate in the execution of an act without which it would not have been carried out.

Accessories are defined as those who, not being considered as aiding and abetting, cooperate in the execution of the act with previous or simultaneous acts (Art. 29 SCC). An accessory will be subject to a lower penalty (Art. 63 SCC).

Instigation must meet several requirements: (1) be prior to the event; (2) be direct (on a specific person and aimed at the commission of a specific act); (3) be effective (sufficient to move the will of the induced person); (4) the instigator must have the intention to instigate and the intention of the perpetrator to commit the act (*dolus eventualis* is sufficient); and finally (5) it is necessary that the one induced to commit the crime begin to execute the act (attempt) or that he or she completes the crime.

To be considered aider and abettor (*cooperador necesario*), two elements must be met: an agreement of wills; and a contribution, an act or omission, but always effective and transcendent to reach the objective of committing the crime.

11 Common Defences

11.1 Is it a defence to a criminal charge that the defendant did not have the requisite intent to commit the crime? If so, who has the burden of proof with respect to intent?

Sentences can only be imposed if the defendant committed the crime intentionally (*dolus*) or through negligence (Arts 5 and 10 SCC). A defendant cannot be found guilty if the intent is not proved. Crimes committed unintentionally (by negligence) are only punished if it is specifically provided in the Criminal Code. It is usually determined based on circumstantial evidence.

The prosecution has the burden of proof with respect to intent.

11.2 Is it a defence to a criminal charge that the defendant was ignorant of the law, i.e., that he did not know that his conduct was unlawful? If so, what are the elements of this defence, and who has the burden of proof with respect to the defendant's knowledge of the law?

The ignorance of the law defence is governed by Art. 14.3 SCC, which provides that an essential error of the unlawfulness of the fact constituting a crime is a defence. If it could be avoided, it excludes criminal liability and the crime shall be punished as being committed through negligence. If it could not be avoided, the crime shall not be punished. The defendant has the burden of proof.

11.3 Is it a defence to a criminal charge that the defendant was ignorant of the facts, i.e., that he did not know that he had engaged in conduct that was unlawful? If so, what are the elements of this defence, and who has the burden of proof with respect to the defendant's knowledge of the facts?

Ignorance of the facts can also constitute a defence (Art. 14.2 SCC). If the crime could be avoided, it excludes criminal liability and the crime shall be punished as being committed through negligence. The defendant has the burden of proof.

12 Voluntary Disclosure Obligations

12.1 If a person or entity becomes aware that a crime has been committed, must the person or entity report the crime to the government? Can the person or entity be liable for failing to report the crime to the government? Can the person or entity receive leniency or "credit" for voluntary disclosure?

Those who witness a crime (Art. 259 CPC) or those who become aware of the commission of a public criminal offence (Art. 262 CPC) because of their position, profession or job, have the obligation to report the crime. A fine may be imposed if they fail to do so.

Voluntary disclosure of the commission of a crime is established as a mitigating circumstance, either as a person (Art. 21.4 SCC) or an entity (Art. 31 *quater a* SCC).

13 Cooperation Provisions / Leniency

13.1 If a person or entity voluntarily discloses criminal conduct to the government or cooperates in a government criminal investigation of the person or entity, can the person or entity request leniency or "credit" from the government? If so, what rules or guidelines govern the government's ability to offer leniency or "credit" in exchange for voluntary disclosures or cooperation?

Disclosing criminal conduct or cooperation with the investigation may be considered by the court as a mitigating circumstance in accordance with Art. 31 *quater* SCC.

13.2 Describe the extent of cooperation, including the steps that an entity would take, that is generally required of entities seeking leniency in your jurisdiction, and describe the favourable treatment generally received.

The following steps are recognised as mitigating circumstances (Art. 31 *quater* SCC):

- (a) confessing the crime to the authorities before learning that the court proceedings are directed against her/him;
- (b) if the legal entity cooperates in the investigation, bringing new and decisive evidence to elucidate the persons criminally responsible;
- (c) reparation or reduction of the damage caused by the crime; and
- (d) establishing effective measures to prevent and discover the crimes that might be committed in the future.

If one mitigating circumstance is recognised, the lower half of the punishment provided by law will be applied (Art. 66.1.1 SCC). If two or more mitigating circumstances are recognised, or one or more is deemed qualified, the sentence shall be reduced by one or two degrees as provided by law (Art. 66.1.2 SCC).

14 Plea Bargaining

14.1 Can a defendant voluntarily decline to contest criminal charges in exchange for a conviction on reduced charges, or in exchange for an agreed-upon sentence?

In practice, the prosecutor may offer a more lenient crime and sentence in exchange for the defendant to plead guilty, usually in

court at the beginning of the trial. If the defendant pleads guilty and it is accepted by the court, the trial would not take place and the judge would issue the judgment, imposing the accepted sentence (Arts 781 and 655 CPC). Defendants can only plead guilty if the sentence does not exceed six years of imprisonment.

Legal entities can only plead guilty through a specially designated representative with a special power of attorney.

14.2 Please describe any rules or guidelines governing the government's ability to plea bargain with a defendant. Must any aspects of the plea bargain be approved by the court?

No rules are provided concerning the government's ability to plea bargain. The court may order the trial to continue if the sentence should be higher for the crime, in the case of minor sentences (Art. 655 CPC), or to correct the qualification of the crime and impose an appropriate sentence in accordance with the law prior to acceptance of the pleading (Art. 787.3 CPC) in cases of prison sentences.

15 Elements of a Corporate Sentence

15.1 After the court determines that a defendant is guilty of a crime, are there any rules or guidelines governing the court's imposition of a sentence on the defendant? Please describe the sentencing process.

Sentences are imposed by Criminal Courts at the time they issue the judgment. Rules to determine the appropriate sentence are provided by the SCC (book I, Title III, Chapter II). The SCC establishes the rules to impose a sentence to perpetrators of a completed offence, perpetrators of an attempted offence, accomplices, aggravating and mitigating circumstances for crimes committed with intent and how to determine the sentence in case the circumstances concur. The SCC also distinguishes cases where the defendant has committed more than one crime, where the same act amounts to different crimes or when one crime has been committed as a means to commit another one. In case of crimes against patrimony, the sentence will be imposed taking into account the total damage caused.

15.2 Before imposing a sentence on a corporation, must the court determine whether the sentence satisfies any elements? If so, please describe those elements.

Art. 66 *bis* SCC refers to the same rules provided for crimes with intent, taking into account aggravating or mitigating circumstances. It also establishes the following criteria: (a) the need to prevent a continuing criminal activity or its effects; (b) the economic and social consequences, particularly for employees; and (c) the position of the person that failed to fulfil her/his overseeing duties. In case of penalties of limited duration, they cannot exceed the duration of imprisonment that would

be imposed on a natural person. Sentences of more than two years can only be imposed should the corporation be: (a) a repeat offender; or (b) used as an instrument for the commission of crimes. Permanent sentences or sentences of more than five years can only be imposed if the corporation is: (1) a repeat offender convicted for at least three crimes of the same nature provided in the same Title of the Criminal Code; or (2) used as an instrument to commit crimes.

16 Appeals

16.1 Is a guilty or a non-guilty verdict appealable by either the defendant or the government?

Judgments can be appealed either by any of the parties to the proceeding, the prosecutor or the person condemned (Arts 790 and 846 *bis* b) CPC).

16.2 Is a criminal sentence following a guilty verdict appealable? If so, which party may appeal?

The last section of judgments (*fallo*) includes both the verdict and the sentence imposed. Both can be appealed at the same time either by the prosecutor, the person condemned or any other party to the proceeding. Likewise, the judgment can be appealed by the person exempted of criminal liability if he or she has been sentenced to a security measure or declared civilly responsible.

16.3 What is the appellate court's standard of review?

Appellate courts examine whether there have been (Art. 790 CPC): (1) a breach of procedural rules and guarantees leaving the party defenceless; (2) an error in weighing evidence; and (3) a breach of rules. The CPC also establishes that judgments issued by the Jury Tribunal can be appealed on grounds of: constitutional or legal provisions in the qualification of the facts and determination of the sentence, security measures or civil responsibility; violation of the right to presumption of innocence; and other issues concerning the jury (Art. 846 *bis* c CPC).

16.4 If the appellate court upholds the appeal, what powers does it have to remedy any injustice by the trial court?

Appellate courts can acquit, condemn or increase the sentence. It cannot condemn or increase the sentence on grounds of error in weighing evidence. The judgment can also be nullified. Should that be the case, it will be returned to the court that issued the judgment either to issue a new one or to celebrate a new trial. In case of a grave breach of procedural rules, the court will order a return to the State when the violation occurred for the breach to be corrected.



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