



Criminal liability of legal persons: case of transnationality

The criminal liability of legal persons is generating a growing jurisprudential body that develops the legal provisions in this regard, since these are not always enough to respond to all questions raised.

One of these issues is the case of transnationality: what happens in cases in which the legal person prosecuted is a foreigner?

Article 23.1 of the Organic Law of the Judiciary (LOPJ) states that *"In the criminal order, the Spanish jurisdiction shall conduct the causes for offenses committed in Spanish territory (...), without prejudice to the provisions of the international treaties in which Spain is a party"*. In the case of a foreign legal person that committed a crime in Spain, the Supreme Court, sentence 583/2017 of July 19, confirmed the conviction that the National Court had previously imposed on a company in Mali that had committed a money laundering offence in Spain.

However, the National Court, sentence 23/2016 of July 18, showed a dissenting interpretation based on article 9 of the Civil Code. According to this sentence, it was not appropriate to agree on the dissolution of a specific limited liability company *"as it is not a Spanish national company"*. In this context, it should be remembered that the aforementioned article 9.11 CC provides that *"The personal law corresponding to legal persons is determined by their nationality, and will govern anything related to capacity, constitution, representation, operation, transformation, dissolution and extinction. In the merger of companies of different nationality, the respective personal laws will be taken into account"*.

Of course, it should be borne in mind that we are talking about the criminal liability of organisations with legal personality, even if certain aspects have civil and/or administrative repercussions (such as, for example, their hypothetical dissolution in the event of a conviction, which should be registered in the corresponding Mercantile Register). Therefore, the contradiction between both rules must be resolved, as the Supreme Court does, in favour of criminal provisions, although in cases where the domestic law of a foreign State is affected, the provisions of that other State must necessarily be taken into account.

Another issue that may be raised is the opposite one, that is, what happens when a Spanish legal person commits

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a crime in a foreign State.

In this case, we must comply with the provisions of article 23.2 LOPJ which states that the Spanish courts shall deal with *"crimes that have been committed outside the national territory, provided that the criminally responsible parties were Spanish or foreigners who had acquired Spanish nationality after the commission of the offense and the following requirements concur:*

- a) *That the offense is punishable at the place of execution, unless, by virtue of an international treaty or a normative act of an international Organisation to which Spain is a party, the said requirement is not necessary, without prejudice to the provisions of the following paragraphs.*
- b) *That the aggrieved party or the Public Prosecutor have instituted criminal proceedings before the Spanish Courts.*
- c) *That the offender has not been acquitted, pardoned or sentenced abroad, or, in the latter case, has not served a sentence. If he has only served part of his sentence, it shall be taken into account in order to reduce proportionately the amount corresponding to him".*

Therefore, and not forgetting the other provisions of this same article, a Spanish legal person who commits a crime abroad (for example, by means of a representative who travels abroad) may be convicted according to the rules of article 31 *bis* of the Spanish Criminal Code, if the criminal act was considered a criminal offense in the other State.

Finally, it should be remembered that in cases of groups of companies that operate at multinational level, the Compliance Program of the parent company does not necessarily have to serve also their subsidiaries, the latter should have their own Compliance Programs adapted to the legislation of each one of the states in which they operate. Notwithstanding the foregoing, the parent company's Compliance Program may be used for some general lines, but it is of paramount importance, for everything explained up until now, that the Compliance Programs of the subsidiaries are adapted to their corresponding domestic laws.



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