SPAIN
Compliance Programs at the light of the 2015 Criminal Code Reform

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Criminal liability of Corporations under Spanish Law
History

– Introduced in Spanish Criminal Code 2010 – uncertainty
– Reform of Criminal Code 2015
– Ministry of Public Prosecution Guidelines January 2016
– Supreme Court Judgements: February and March 2016
Corporations might be held criminally liable for acts committed, in their (direct or indirect) benefit, by:

a) the legal representatives or by those with authorised decision making authority or control authority (senior Management)

b) individuals under the management of others (a), if the commission of the offence was possible due to the lack of surveillance and control by a)

Criminal Liability of Corporations

- Restricted number of crimes capable of generating the criminal liability of corporations
- Italian Decr. Leg 231/2001 approach

- Money Laundering
- Bribery
- Crimes relating to corruption in international commercial transactions
- Influence peddling
- Fraud/Swindling
- Forgery of credit and debit cards and travellers cheques
- Illegal political party funding
- Fraud in subsidies
- Against the rights of aliens
- Crimes concerning the organization of the territory and town planning
- Protection of the historic heritage and the environment
- Crimes against the natural resources and the environment
- Crimes relating to nuclear energy and ionizing radiations
- Risks caused by explosives and other such agents
- Offences against public health, drug trafficking
- Crimes relating to terrorism, criminal organisations and groups
- Trafficking of human organs, human beings, prostitution and corruption of minors
- Discovery and revelation of secret information
- Swindling, punishable insolvency, IT and IP damages
- Against the market and consumers
- Against the Tax Authorities and Social Security
Compliance Programs as attenuating or exonerating factors

Corporations could be exempted/attenuated from criminal liability if:

- The Board of Directors has, prior to the perpetration of the crime, adopted and implemented an Organizational, Management and Control Model suitable to prevent offenses of the type committed.
- The supervisión of the model is entrusted to a Supervisory Body with independent powers of initiative and control – In SME, might be the Board.
- The autors of the crime committed it fraudulently eluding the Model.
- The Supervisory Board has not neglected its duties of supervisión and control.

Elements of the Organizational, Management and Control Model:

1. Risk Assessment
2. Policies, procedures and controls
3. Financial Management system
4. Obligation to report
5. Disciplinary system
6. Periodic verification and changes to the Model if:
   - Significant violations are discovered
   - Significant changes in the organisation, control structure or activities of the corporation

Do you miss anything?

US Sentencing Guidelines
UK Bribery Act

Maria Hernández - 2016

- To have an effective compliance program an organisation shall:
  
  a) exercise **due diligence** to prevent and detect criminal conduct and
  
  b) promote an **organisational culture** that encourages ethical conduct
  and a commitment to compliance with the law

- Requires the following:

  1) **Standards and procedures** to prevent and detect criminal conduct
  2) **Organization’s Leadership and Culture**
     - High level individual(s) shall be assigned overall responsibility
     - Adequate resources, authority and direct access to the governing authority
  3) Reasonable efforts to exclude “**bad personnel**” from managerial roles
  4) **Periodic Communication and Training** – includes agents
  5) **Monitoring, auditing and evaluation** of Program effectiveness –
     including whistleblowing channels
  6) **Incentives and Discipline**
  7) Appropriate **Remedial action**
  8) **Risk Assessment**

UK Bribery Act 2010

- Conformed around 6 Principles

  1. **Proportionate Procedures**
  2. **Top Level Commitment**
  3. **Risk Assessment** (periodic, informed and documented)
  4. **Due Diligence** third parties
  5. **Communication & Training** (including confidential channels-whistleblowing)
  6. **Monitoring and Review**

     - Training and Communication
     - Due Diligence on Third Parties
     - Incentives
Circular 1/2016 Ministry of Public Prosecution

Highlights

- **Culture of Compliance**: Compliance programs *per se* are not a 100% guarantee.
- The “direct or indirect benefit” may exist even in the absence of financial gain (reputational, organizational, competitive).
- Liability of **Compliance Officer** (material author, lack of supervision, gross negligence?) – Company will not benefit from the exemption.
- Failure of supervision and control by senior Management must be of *serious* nature.

Circular 1/2016 Ministry of Public Prosecution

Highlights

- **Subsidiary Civil liability** in addition to the criminal liability.
- **Professional Associations**, Chambers of Commerce, Trade Unions and Political Parties.
- Extremely difficult to substantiate the effectiveness of the Program if it has been *ignored* by the senior management or where infringements have been *rewarded*.
- Corporate **Compliance Certifications** value.
- **Externalising Functions** of Compliance Officers.
Circular 1/2016 Ministry of Public Prosecution
Highlights (cont.)

− The following will be looked at positively:

• **Detection** of offenses by entity and **reporting** to authorities
• Firm **organisational response** to earlier wrongdoing or absence of prior criminal proceedings US Sentencing Guidelines?
• **Imposition of disciplinary measures**
• Implementation of **Strict Selection processes** for Management and employees – US Sentencing Guidelines?
• **Redress of any damages** in cooperation with authorities

Spanish Supreme Court 1st Judgement
Sentence 154/2016 February 29 2016

**Confirms the First Instance sentence in which three companies were convicted for their involvement in crimes against public health.**

**Facts:** Traffic of over 6.000 kg cocaine hidden in machinery subject to import/exportation between Spain and Venezuela.

**Requirements** for the existence of criminal liability under article 31 bis CP:

1. sufficient proof and verification that the crime was committed by an **individual that forms part of the company** concerned.
2. the company has **breached its duty to establish control and monitor measures** to prevent the commission of the crime
3. **Warning for future:** **conflict of interest** in case that the material authors of the crime are also the representatives of the company concerned. Right of defense for the corporation should be protected.
“to assess a company’s conduct for the purpose of ascertaining its criminal liability, an analysis must be made to decide whether or not the crime committed by the individual within the company was made possible or facilitated by the absence of a corporate culture that encourages respect for the law; one that is a source of inspiration for the actions of its organizational structure and which is independent from the culture in each of the companies that form part of the organization, such a culture would be manifested in some sort of precise means of supervision and control of the conduct of the companies’ executives and their subordinates so that they do not commit such crimes”.

Particular vote of 7 out of the 15 judges
It should be the company who proves the existence of the eximent, not the duty of the accusation to demonstrate its non-existence

Spanish Supreme Court 2nd Judgement
Sentence 221/2016 March 16th 2016

Supreme Court upheld the appeal on the basis of legal defenselessness

Facts: Real Estate agency obtained commission from both the Buyer and the Seller for the same sale without them knowing. The appealed sentence imposed fines both to the owner of the agency and another person and to the company

Requirements for existence of criminal liability under article 31 bis:

1. The liability of corporations cannot be established (iuris tantum) by just proving the crime that was committed by the individual. The corporation cannot be held criminally liable for all and every of the crimes committed by individuals in its benefit.

2. The corporation will only be liable if it has seriously breached its duties of supervision and control.

3. The right to the presumption of innocence (legal entities) imposes that the attorney proves a serious breach of the supervision duties.
Multinational doing business in Spain
a) With existing Corporate Compliance Programs

• Corporate Risk Assessment: not enough
• Engage into comprehensive Risk Assessment of their local operations
  • Criminal Code crimes
  • Reputational Exposure
• Review their existing policies and Procedures and Control mechanisms (include the investigation policies)
  • Approval of the Compliance Program by the Board of Directors
  • Re-issue training based on the new local Compliance Program. Language
• Appoint local Compliance Officer or Supervisory Board
• Review whistleblowing procedures under Spanish Data Privacy Regulations
• Review Disciplinary Procedures under Employment legislation
• Ensure regular monitoring

Multinational doing business in Spain
a) Without existing Corporate Compliance Program

• Engage into comprehensive Risk Assessment of local operations
  • Criminal Code crimes
  • Reputational Exposure
• Map and Implement policies and Procedures and Control mechanisms
• Write Disciplinary Code or measures
  • Approval of the Compliance Program by the Board of Directors
  • Appoint local Compliance Officer or Supervisory Board
• Conduct training and communication
• Implement whistleblowing procedures respecting Spanish Data Privacy Regulations
• Ensure regular monitoring
...Compliance Programs being looked at as “just” criminal liability prevention tools

THANK YOU

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