

# Corporate criminal liability: similarities and differences between Spain and Philippines

## Abstract

This paper focuses on the topic of corporate criminal liability and the common and opposite aspects that regimes of Spain and The Philippines have. On the one hand, in Spain, criminal liability of legal persons has suffered a deep reform with the organic law 1/2015, after being introduced in year 2010. This reform has brought important modifications and news, as the creation of an exemption of liability through the adoption of compliance programs. On the other hand, corporate criminal liability is more limited in The Philippines, being criticized by the doctrine that, rather to impose this kind of liability to companies, natural persons as directors, officers or employees of the corporation are the only ones considered responsible for some crimes. The analysis of both regimes, the Spanish and the Philippines one, will comprise different aspects of the issue as the crimes for which companies can be criminally liable, the ways to require to them criminal liability or their exemption of it and the possible sanctions that can be imposed. The comparative study will bring out the positive and the negative points of both regimes.

**Keywords:** corporate criminal liability, legal persons, compliance programs, exemption of liability, Spanish criminal code, legal system of the Philippines

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## Introduction

In Spain, the criminal liability of legal persons was introduced with the reform of the Criminal Code of year 2010 (Organic Act 5/2010, of June 22, which modifies the Organic Act 10/1995, of 23 of November, of the Criminal Code). Until then the principle that had governed was the one that establishes the Latin locution *societas delinquere non potest*, although there was already somehow accepted certain criminal liability for legal persons, mainly through the accessory consequences foreseen in Article 129 of the Spanish Criminal Code (hereinafter, SCC). This Article settles as follows:

- I. In the case of felonies or misdemeanours committed within, in collaboration with, or through or by means of firms, organizations, groups or any other kind of entities or groups of persons that, due to not having legal personality, are not included in Article 31 bis of this Code, the Judge or Court of Law may hand down a reasoned resolution ordering on those companies, organizations, groups, entities or groups one or several ancillary consequences of the relevant punishment imposed on the principal, with the content foreseen in Sections c) to g) of Article 33.7. The Judge or Court may also order definitive prohibition to carry out any activity, even if lawful.
- II. The ancillary consequences referred to in the preceding Section may only be applied to firms, organizations, groups, entities or assemblies mentioned therein when this Code specifically foresees this, or in the case of any of the felonies or misdemeanours for which it allows criminal accountability of legal persons to be demanded.
- III. Temporary closure of premises or establishments, suspension of the corporate activities and judicial intervention might also be ordered by the Investigating Judge as a provisional measure during the investigation proceedings for the purposes established in this Article and within the limits stated in Article 33.7>>. In Spain, the requirement that legal persons had to be liable for certain offences was imposed by international texts of the European Union, although they did not always required a criminal nature of such responsibility, except in some cases.

The contemporary criminal policy debate on the corporate criminal liability was built on the consensus that criminal law should pay attention on legal persons>>, given their leading role in the commission of some crimes, and the point of the reference of this debate was socio-economic and financial crimes.<sup>1</sup> However, after the immediate need to punish companies that emerged in 2010 and despite the limited presence in Spanish case-law related to the corporate criminal liability, in July 2015, Organic Act 1/2015, of March 30, carried out a deep reform in the SCC, which modified the regulation introduced in 2010 in this field. This fact was criticized by the doctrine, given the short time span of just five years, in which there was no time to assess the suitability of said regulation.<sup>2</sup> The criminal liability of legal persons is also being gradually introduced into the **Philippine** legal system. Nonetheless, this has taken place in a different way than in Spain. The felonies penalized under the *Revised Penal Code of the Philippines* do not provide corporate criminal liability. Corporate criminal liability is settled in various special laws, which makes especially difficult to collect all the relevant information needed to check how its regime is settled in their legal system.<sup>3</sup>

## Crimes for which companies can be criminally liable

In **Spain**, the corporate criminal liability regime is governed by the principle of exceptionality, by virtue of which it only arises when crimes are committed where it is expressly provided for. Thus, in Spain offences that foresee the possibility to be committed by legal persons are numerous,<sup>4</sup> such as: (1) *offenses against socio-economic legality*

<sup>1</sup>Díez Ripollés José Luis. Spanish criminal law General part. 4<sup>th</sup> edition. Valencia: Tirant lo Blanch. 2016. p. 866.

<sup>2</sup>González Cussac José Luis. Criminal liability of legal persons. arts. 31 bis, ter, quater and quinquies. In: Comentarios a la reforma del Código penal de 2015. Valencia: Tirant lo Blanch. 2015. p. 151–210.

<sup>3</sup>Galvez M. Corporate Liability in Philippines. Baker McKenzie. Global Compliance News. 2017.

<sup>4</sup>Despite this, some authors consider that some should still be included, unduly excluded Gómez Tomillo Manuel. Introduction to the criminal liability of legal entities. 2<sup>nd</sup> ed. Navarra: Thomson Reuters Aranzadi. 2015. p. 29. While others argue, even, for extending this responsibility to all the crimes foreseen in the Code for natural persons (Rodríguez RL, Gabriel RRL, Miguel RRJ. Criminal code agreed and commented with jurisprudence. 5<sup>th</sup> edn. Madrid: The law. 2015. p. 363).

*protected goods* (IP offenses, money laundering, offenses against natural resources and the environment, urban offenses, pharmaceutical and food offenses, public finances and social security offenses); (2) *offenses related to organized crime* (financing of terrorism, drugs traffic, offenses against the rights of the citizens, trafficking of human beings, illegal traffic of organs, prostitution and sexual exploitation and corruption of minors); (3) *Patrimonial or related offenses* (computer damage, falsification, scams, insolvencies); (4) *Offenses against public administration or institution of the State* (bribery, illegal financing of political parties); (5) *Other isolated offenses* (discovery and disclosure of secrets, offenses of discrimination, some offenses of catastrophic risks, counterfeit currency).

In **The Philippines**, some of the offenses foreseen in special laws are evasion of the laws on the nationalization of certain rights, franchises or privileges, failure of an trustee to turn over the proceeds of the sale of the goods, documents or instruments covered by a trust receipt or to return the said goods, documents or instruments if they were not sold or disposed of in accordance with the terms of the trust receipt, illegal recruitment and other violations of the Labour Code, insurance-related offenses, election-related offenses, discrimination against disabled persons, consumer-related offenses, malicious reporting of money laundering, violations in relation to dangerous drugs, trafficking in persons, tobacco-related offenses, violations of data privacy, cybercrimes, among many others.

### Ways to require criminal liability to companies

In **Spain**, Article 31 bis of the Criminal Code is the one that regulates the criminal liability of legal persons and the one that establishes the ways to attribute said responsibility. In the Spanish regulation, as Professor Díez Ripollés points out, it operates a mixed system by which a legal person can be held criminally liable. In this sense, on the one hand, a company is held responsible for the criminal acts committed by a natural person, that is to say, its directors, administrators or employees according to the transfer model. However, on the other hand, this model exempts or graduates the responsibility of the corporate body based on its own behavior, before or after the criminal act that was transferred, being especially relevant the existence of *compliance programs* to prevent, clarify or react to those individual criminal acts committed. In this model, therefore, exemptions from liability or attenuating and aggravating liability are foreseen. Consequently, Spanish regimen would be a mixed model, based on the transferred responsibility but also, on a responsibility based on the own behavior of the legal person.

In this sense, following the mixed model of corporate criminal liability, there would be an unfair act committed by the natural person who is transferred to the legal person. Nonetheless, this transfer is not enough to hold criminally liable a legal person, but:

- I. On the one hand, the reproach (*culpability*) is referred to an unfair that, after the transfer, is considered proper to the legal entity,<sup>5</sup> that is to say, not having avoided or reduced the risk of committing an unlawful behavior, by adopting prevention programs.<sup>6</sup>

<sup>5</sup>Nieto Martín Adán. The criminal liability of legal entities: a legislative model. Madrid: Iustel. 2008. p. 354.

<sup>6</sup>Gómez Jara Díez Carlos. The criminal guilt (own) of the legal entity: challenge for theory, necessity for practice. In Jesús María Silva Sánchez et al (ed.). The theory of crime in economic criminal practice. Madrid: The Law. 2013. p. 580.

- II. On the other hand, the penalty would be attenuated if certain circumstances are given from the corporation after the offence (*punishability*), such as, confessing the offence, collaboration on the investigation of the facts, repairing or diminishing the damage caused by the offence and to settle effective measures to prevent future offences, always that these acts are performed before the oral trial.

Therefore, the attribution of criminal liability to the legal entity occurs through a “transfer” of an unlawful act made by one of its directors or employees. Thus, there are two transfer assumptions, that is, two modalities through which the act committed by the individual can be transferred to the legal entity, which may be:

**Managers or executives** (Article 31 bis 1 a) SCC): <<their legal representatives or those who, acting individually or as members of a body of the legal person, are authorized to make decisions on behalf of the legal entity or they have faculties of organization and control within it>>.<sup>7</sup>

- I. *Legal representatives*: these <<will be those natural persons who exercise the representation of the company with respect to all the acts included in its corporate purpose>>. This criterion has not changed and responds to the requirements of European regulations.
- II. *Those who act individually or as members of a body of the legal entity, are authorized to make decisions on behalf of the legal entity*: González Cussac considers that these would be equivalent to the substituted term of *legal administrators*, but only partially, since he considers that avoiding new regulation these terms goes beyond the concept of *legal administrator*. As Díez Ripollés points out, these will be those natural persons to whom directive functions of the corporation have been attributed by the representative bodies, provided that they are in direct dependence on such bodies.
- III. *Those who hold organizational and control faculties within the legal entity*: the latter group, according to González Cussac, could be equated to the *de facto* administrator, but, since the new regulation avoids a key concept, such as the reference to power of command or managerial capacity, it also extends this concept. Díez Ripollés considers that these will be those individuals who are able to manage the legal entity in a similar way to the administrators or executives referred to above, and who are usually identified with those who de facto exercise the management of the company.

Finally, the norm foresees that for the legal person to respond criminally for the acts committed by its managers or executives, it is required that those acts are committed with two requirements:

<sup>7</sup>Before the reform of 2015, here reference was made to “de facto or de jure administrators”. Its deletion and replacement, even is considered as more mercantilist and organizational, is criticized because it excludes de facto administrators from its literalness (Quintero Olivares, Gonzalo. The reform of the criminal liability regime of legal entities. In Gonzalo Quintero Olivares (ed.). Commentary on the penal reform of 2015. Navarra: Thomson Reuters Aranzadi. 2015. p. 90) and because they were relatively clear and consolidated terms in criminal and commercial legislation (see, for example, Article 31 of the Criminal Code and Article 133 of the Commercial Code) and widely interpreted by the Courts ... “. However, the reform in its new definition also includes them.

- I. “*In the name or on behalf of them* - the legal entities-”: this means that criminal acts have to be committed pursuing interests of the company and exercising social functions.
- II. “*For their direct or indirect benefit*”: this provision includes a benefit of an immediate or direct economic nature, but also indirect, such as, for example, a competitive advantage that is materialized in a medium or long-term patrimonial benefit,<sup>8</sup> in an increase in income, in savings of expenses or costs, in an improvement of its position in the market or in any other benefit that translates into economic terms.

**Employees** (article 31 bis 1 b) SCC): <<who, being subject to the authority of the physical persons mentioned in the previous paragraph>>.

The legal person can respond criminally for the unlawful acts committed by its employees, who have been able to do them <<because physical persons of the previous paragraph have seriously breached the duties of supervision, surveillance and control of their activity>>, attending to the concrete circumstances of the case. It is to verify that the unlawful act committed by the employee has taken place by a serious breach by the persons of letter a) (managers or executives) of the duties of supervision, monitoring and control of their activity. Considering this, and as pointed out by Díez Ripollés, if these duties had not been breached, no criminal liability would be transferred to the legal entity, without prejudice to the employee’s responsibility for the specific offence committed. Among the employees, not only those subjects linked to the company by an employment contract are included, but also self-employed workers linked by a work or service contract, by a temporary contract, etc. In order to hold criminally liable to companies for the unlawful acts committed by employees, these must have been done *in the exercise of social activities and for the direct and indirect benefit of them*.

In **The Philippines**, as Galvez points out, Philippine law generally does not impose corporate liability for the commission of crimes.

Rather, only the directors, officers or employees of the corporation are held liable for crimes and therefore also charged and punished for their commission. Thus, the emphasis so far has been to charge the directors and managers of companies rather than the company itself, except for money laundering and tax evasion cases.<sup>9</sup> Nonetheless, as case-law has declared, if the law creates an offense for which a corporation may be punished and then prescribes a fine, or both fine and imprisonment as penalty, a corporation may be prosecuted and, if found guilty, may be fined (*Ching vs. Secretary of Justice*, G.R. 164317, 6 February 2006). This judicial decision keeps saying that the statute shall not only define a crime that may be committed by corporations but also to prescribe the penalty for them, because if the statute defines a crime that may be committed by a corporation but prescribes that the penalty would be imposed on the officers, directors or employees of such corporation or other persons responsible for the offense, only such individuals will suffer such penalty.

### Exemption of corporate criminal liability

The reform that took place in the SCC in 2015 brought with it an important novelty in the field of corporate criminal liability. After

<sup>8</sup>Del Rosal Blasco, Bernardo (2015). Chapter four. Criminal liability of legal entities: charges and requirements for exemption. In Lorenzo Morillas Cuevas (ed). *Studies on the Reformed Penal Code (Organic Laws 1/2015 and 2/2015)*. Madrid: Dykinson. 2015. p. 99.

<sup>9</sup>Hubert MC. *Corporate Crime and the Criminal Liability of Corporate Entities*. 137<sup>th</sup> International Training Course. Participants’ papers. Resource Material Series No. 76. 2007.

having been introduced this type of responsibility in 2010, five years later the Spanish legislator decided to introduce the possibility that companies have a *legal way to exempt themselves from it, if they had before the commission compliance programs*, when certain conditions are met (article 31 bis, paragraphs 2, 3, 4 and 5), which will vary depending on whether the acts have been committed by managers (paragraph 2) or by employees (paragraph 4), or if they are small companies (paragraph 3). That is to say, in Spain two systems of exemption of corporate criminal liability are regulated differently, depending on who is the natural person who committed the offence.

A) Conditions required for the company to be exempt from criminal liability when the acts are committed by managers (Article 31 bis 1 a) SCC):

- I. The administration body *has adopted and executed effectively*, before committing the offense, models of organization and management (compliance programs) that include the appropriate surveillance and control measures to prevent crimes of the same nature or to significantly reduce the risk of their commission.
- II. The *supervision* of the functioning and compliance with the prevention model implemented has been *entrusted to a body of the legal entity with autonomous powers of initiative and control* or that has the legal responsibility to supervise the effectiveness of the internal controls of the legal entity.

This requirement introduces the need for a *compliance officer*, who supervises the compliance with the prevention model, as an internal audit, who should have a training according to the content of the risks to be prevented<sup>10</sup> and with an autonomous nature with regard to the administration body, which does not always occur.

III. The individual authors have committed the offence by fraudulently evading the organization and prevention models, and

IV. There has been no omission or insufficient exercise of its supervisory, monitoring and control functions by the body referred to in the 2<sup>nd</sup> condition.

The Spanish criminal doctrine is skeptical to corporate criminal liability in these cases, considering that this clause makes the purpose of the reform to protect the interests of the companies and always exempt them from liability, since that autonomous oversight body would be selected by the same subjects that could potentially commit the transferable criminal act. This aspect makes it difficult to believe that they are subject to any control.

B) Conditions required for the company to be exempt from liability when the criminal acts are committed by employees (Article 31 bis 4 SCC):

In the case of employees, <<the legal person shall be exempt from liability if, before the commission of the offense, it has effectively adopted and executed a model of organization and management that is adequate to prevent offenses of the nature of which it was committed or to significantly reduce the risk of its commission>>.

The regulation is more flexible in the event that employees are the perpetrators of the offense, requiring fewer requirements in this case, which seems correct, since the unlawful acts committed by employees escape more to the control of the company, unlike the facts committed by the corporate board. In both modalities, if all these conditions

<sup>10</sup>Gallego Soler José Ignacio. *Criminal Compliance and criminal proceedings: initial reflections*. In Santiago Mir Puig, et al (eds.). *Company responsibility and compliance: Criminal prevention, detection and response programs*. Montevideo-Buenos Aires: Edisofer. 2014 p. 217.



are met, the legal person will be exempt from liability, while if only some of them are given, the penalty may be mitigated (incomplete exemption).

### Content of the compliance program

The compliance program will have as its main purpose the settlement of accordance of business activities to the criminal normative mandates in order to avoid the commission of offenses.<sup>11</sup> Said program will consist, therefore, in a set of measures that seek to guarantee that all the members of a company - regardless of their hierarchical level - comply with the mandates and legal-criminal prohibitions, and that in the event of the commission of an offense its detection and sanction is possible.<sup>12</sup>

In order to comply with said objectives, the SCC, in its article 31 bis 5, contains the necessary content of the organization and management models, which could be summarized in two categories: aspects of a material or substantial nature and aspects of a formal or procedural nature.

**Aspects of a material or substantial nature**, addresses to the direct prevention of offenses:

- I. To identify risk activities for the commission of offenses.
- II. To establish protocols and decision and action processes to avoid, in such activities, risks and damages.

**Aspects of a formal or procedural nature**, addressed to be able to carry out effectively those of a material nature, so they have an instrumental nature, but equally necessary:

- I. To establish processes or management models for financial resources aimed at preventing the commission of offenses and their use for that purpose.
- II. Implementation of a whistleblowing system to report risks and breaches of the prevention model.
- III. Creation of a disciplinary system that imposes internal sanctions in cases of non-compliance.
- IV. Review of the model, its knowledge and compliance, especially when there are serious infractions or substantial changes in the company.

Each compliance program must be **unique and specialized** according to various criteria, such as the size of the company, the market sector in which it operates or the business risks it faces. Each company and the activity it develops have their own qualities that the program must take into account. In no case, therefore, the adoption of a model will require pre-established, hermetic or elaborated with a general nature compliance programs, even for a market sector, being its suitability, therefore, relative and compelling the criminal judge to examine the effectiveness of these measures.

In **The Philippines** the Corporation Code, Section 31, foresees the liability of directors, trustees or officers who knowingly and willfully vote for or assent to unlawful acts of the corporation or who are guilty of a great negligence or bad faith in directing affairs of the corporation.

<sup>11</sup>García Caveró Percy. Criminal compliance. Lima: Palestra. 2014a. p. 62; Hurtado Pozo José. Compendium of economic criminal law: general part: university course. Lima: Editorial Fund of the Pontifical Catholic University of Peru. 2015. p. 212.

<sup>12</sup>Coca Vila, Ivó. Compliance programs as a form of regulated self-responsibility? In Jesús María Silva Sánchez (dir). Corporate crime and Compliance. Prevention and corporate reactions. Barcelona: Atelier. 2013. p. 54-55.

As Galvez continues, there are also certain crimes that impose the criminal penalty on: (1) officers who failed to prevent the commission of a crime, such as malicious reporting of money laundering (Section 14[c], *Anti-Money Laundering Act*) or (2) officers who, due to the lack of supervision or control, made possible the commission of a crime, such as cybercrimes (Section 9, *Cybercrime Prevention Act*).

### Sanctions that can be imposed to companies

In Spain, the penalties that may be imposed on legal persons are provided for in Article 33.7 of the Criminal Code and are the following:

#### I. Fine

The penalty par excellence that is imposed on legal persons is the penalty of proportional fine, that is, the one that takes into account in particular the value of the damage caused.

#### II. Dissolution of the legal entity

It supposes the liquidation and extinction of the company, being therefore the most serious penalty. It is also called the death penalty for the society so its imposition is restrictive. It is usually imposed when it comes to screen societies, that is, those whose existence is based exclusively on the commission of crimes.

**III. Suspension of their activities** for a term that may not exceed five years.

**IV. Closure of its premises and establishments** for a period that may not exceed five years.

**V. Prohibition to carry out in the future the activities in which the offense was committed, favored or covered up.** This prohibition may be temporary or definitive. If it is temporary, the term may not exceed fifteen years.

**VI. Special barring (inability) to obtain subsidies and public aid, to contract with the public sector and to enjoy benefits and tax incentives or Social Security**, for a period that may not exceed fifteen years.

**VII. Judicial intervention** to safeguard the rights of workers or creditors for as long as deemed necessary, which may not exceed five years. All these penalties are considered **serious** in the Spanish criminal legal system.

In **The Philippines**, fines are generally imposed on the corporation in statutes providing criminal or administrative liability. However, other laws also prescribe other kind of penalties, similar to those that can be imposed in the Spanish Criminal Code, such as (1) the dissolution of the corporation (as foreseen under Section 3 of The Anti-Dummy Law); (2) the forfeiture of a right, franchise, privilege and the property or business enjoyed or acquired in violation of the law (as provided under Section 2-A, The Anti-Dummy Law); or (3) the suspension or revocation of the rights acquired under the law (as provided under Section 34, the Data Privacy Act).<sup>1,2</sup>

### Conclusion

The regulations on the criminal liability of legal persons in the Philippines and in Spain are similar in many of their provisions, as in the case of penalties or responsibility for lack of surveillance, among others. However, both regulations present critical aspects.

In **The Philippines**, the problem in the regulation results from the scattered provisions in different special penal laws. This has a double effect. On the one hand, it makes difficult to have a general idea of

the regime foreseen for the corporate criminal liability. On the other hand, it prevents that some measures that could be useful to be applied for many offenses, can only be imposed to those cases where they are expressly foreseen. Therefore, perhaps it would be convenient for the Philippine regulation to focus its legal provisions in a similar way to the Spanish regulation, that is, collecting in a single law all the provisions related to the criminal liability of legal persons, including the catalogue of offenses, the forms of demanding responsibility, the ways of exempting it and the penalties that can be imposed on them.

In **Spain**, it is striking that a reform of the regulation of criminal liability of legal persons has taken place, only five years after it came into force, without having yet been able to consider its suitability. In addition, it is even more surprising that the reform has introduced the possible exemption from this responsibility, which leads us to believe that we are dealing with a case of symbolic criminal law in which it is difficult to believe that a company will be criminally liable. Nonetheless, the possibility of exempting the legal person from criminal liability if it had implemented a compliance program to prevent offenses is a legal tool that, while it can lead to impunity for a large number of companies, it occurs at the price of promoting

prevention of crimes in the most efficient way possible, that is, from within the company. Criminal law arrives late to this problem if it is limited to impose penalties to companies and this regulation leads, instead, to focus in previous moments to the commission of the offense, which hopefully will reduce them using the legal person as a mean to do so.

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## Conflicts of interest

The author declares there is no conflict of interest

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