

Admission of Guilt in Economic Crimes, Money Laundering, and Criminal Responsibility of Legal Persons

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ABSTRACT

Admission of guilt in economic crimes in the Spanish system of criminal law can be an element of reconciliation with the victim and society through mitigating factors of confession of the crime and reparation of the damage, suspension of the execution of the penalty or probation and plea bargaining. In addition, the reform of 2010 introduced in Spain the criminal liability of legal persons and incorporated money laundering to this innovative model of criminal responsibility. Soon after, Organic Law 1/2015 modified the hitherto barely applied regulation. It is quite surprising that Organic Law 1/2015 boasts of making "a technical improvement", as it incurs obvious contradictions by exempting criminal liability to legal persons for a money laundering that should not have existed due to the adoption and effective execution of suitable or adequate compliance programs to prevent it. Even when an interpretation in accordance with the principle of validity requires understanding suitability, adequacy or effectiveness in a relative sense, the exemption is condemned to "insignificant use", demonstrated by the Italian experience. In the majority of cases the mitigating factor, provided for the "partial accreditation" of the prevention systems, will be applied. This is also the case in the USA, cradle of compliance. The most frequent will be that the mitigating factor is "skillfully combined with plea bargaining". This is the case in the USA, cradle also of the sentence bargaining. The Crime and Courts Act introduce these informal agreements on 2014 in English law. These plea bargaining are also possible in Spain for legal persons. Finally, admission of guilt by legal persons after the commission of crime can be an element of reconciliation with the victim and society through four mitigating factors: confess the crime, collaborate with the investigation, repair or lessen the damage and adopt an effective compliance program.

Keywords: *admission of guilt, money laundering, criminal liability of legal persons*

1. ADMISSION OF GUILT IN ECONOMIC CRIMES

What I want to do this afternoon, first of all, is to tell you about my great pleasure to speak for the first time in the largest country in the world and in the wonderful city of Yekaterinburg.

Admission of guilt in economic crimes in the Spanish system of criminal law can be an element of reconciliation with the victim and society through mitigating factors of confession of the crime and reparation of the damage, suspension of the execution of the penalty or probation and plea bargaining.

Specifically, the fourth circumstance of article 21 of the Spanish Criminal Code contains a mitigating factor that reduces the penalty if the offender confesses the crime to the authorities "before knowing that the judicial procedure is directed against him". In the event that any requirement

of this mitigating factor is missing it is possible to apply the seventh circumstance of article 21: the analogue mitigating factor.

Secondly, the fifth circumstance of article 21 contains another mitigating factor related to the admission of guilt: if the offender repairs the damage caused to the victim or decreases its effects before the oral judgment. This mitigating factor can also be applied as analogical mitigating factor of article 21.7th.

In addition, the payment of civil liability is a requirement for the suspension of the execution of prison according to the third condition of article 80.2, although Organic Law 1/2015, of March 30, considers the payment commitment sufficient and adds a new requirement: confiscation or commitment to facilitate confiscation. Organic Law 1/2015 also requires a new condition in article 80.3 of Spanish Criminal Code for substitute suspension: "the effective repair of the damage or the compensation of the

harm caused” or comply with the mediation agreement. Thus, for the first time the word mediation is incorporated into the Penal Code in article 84.1 (Abel Souto, 2017b, pp. 1-170).

Finally, plea bargaining or sentence bargaining is also admitted in the Spanish system of criminal law and allows to reduce the penalty in a third (Ferré Olivé and Morón Pendás, 2019, pp. 716-751).

2. CRIMINAL RESPONSIBILITY OF LEGAL PERSONS AND MONEY LAUNDERING

Regarding criminal responsibility of legal persons and money laundering, the penal reform of June 22, 2010 introduced in Spain the criminal liability of legal persons and incorporated money laundering, together with other crimes, to this innovative model of criminal responsibility provided in article 31 bis of the Criminal Code (Fernández Teruelo, 2010, p. 319).

Soon after, Organic Law 1/2015, of March 30, modified the hitherto barely applied regulation of criminal liability of legal persons, because the first judgment of the Supreme Court on the criminal liability of legal persons did not occur until September 2, 2015 (Gómez-Jara Díez, 2015, pp.1-8).

First of all, it is quite surprising that Organic Law 1/2015 boasts of making "a technical improvement" (Preamble), as it incurs in obvious contradictions by exempting, in the second and forth sections of article 31 bis, criminal liability to legal persons for a money laundering that should not have existed due to the adoption and effective execution of suitable or adequate compliance programs to prevent it, as well as taking into account to limit the punishment, in the third paragraph of the second rule of article 66 bis, non-serious breaches of supervisory, monitoring and control duties, when letter b) of the first section of article 31 bis only takes into consideration serious breaches of those duties (Abel Souto, 2018, pp. 13-27).

Secondly, already in 2010 in order to introduce the criminal liability of legal persons, the Spanish legislator invoked the alleged "need to comply with international commitments" (Bermejo and Agustina Sanllehí, 2012, p. 460). However this model of responsibility was not mandatory (Mata Barranco, 2015, pp. 126 and 129), because international agreements normally only require "effective, proportionate and dissuasive" sanctions, that is to say, administrative sanctions, security measures and other legal consequences other than penalties in the strict sense of the term were enough (Silva Sánchez, 2010a, p. 3).

In addition, managers and executives who have not adopted an effective compliance program will be held liable together with the company (Díaz-Maroto y Villarejo, 2011, p. 460), given that now all act "as guarantors of the non-commission of money laundering offenses in their organization, in other words, as police

officers" (Silva Sánchez, 2010b, p. 9). and in case of non-cooperation the Damocles sword hangs over them for a money-laundering penalty (Arzt, Weber, Heinrich and Hilgendorf, 2014, §29).

Thus, the evaluation and monitoring by the obliged subject or legally bound party of the danger of money laundering with respect to its clients, through compliance programs (Bonatti Bonet, 2017; Gómez Tomillo, 2016; Nieto Martín, 2015; Reyna Alfaro, 2018), plays an important role in determining the criminal liability of legal persons (Bermejo and Agustina Sanllehí, 2012, pp. 446 and 459-461). However, the mere existence of a protocol of good practices "will not be enough" (Rosal Blasco, 2015, p. 1), in order "to mitigate or exclude the liability of a legal person or avoid the liability of certain individual obligors" (Díaz y García Conlledo, 2013, p. 292), despite the fact that Organic Law 1/2015 introduces in a contradictory manner a new second (first condition) and fourth sections in article 31 bis of the Criminal Code that exempts from criminal liability legal entities that effectively adopt and execute a model of organization and management suitable or adequate for the prevention of crimes of the nature of the committed or for the significant reduction of the risk of their commission, because in the majority of cases the latter money laundering will prove the inefficiency of the model, its unsuitability or inadequacy to prevent it and that the danger of the commission of a criminal act has not been significantly reduced.

Even when an interpretation in accordance with the principle of validity requires understanding suitability, adequacy or effectiveness in a relative sense, the exemption is condemned to "insignificant use" (González Cussac, 2015, p. 189), demonstrated by the Italian experience. This is important to note here because the penal reform of 2015 literally reproduces a criticized Italian Legislative Decree of June 8, 2001; in the majority of cases, as in the country cited, the mitigating factor, provided for the "partial accreditation" of the prevention systems, will be applied. This is also the case in the United States of America, cradle of compliance. In the USA legal persons are not usually exempted from punishment.

Of course, the mitigating factor provided in the Spanish Criminal Code for the "partial accreditation" of the prevention systems cannot refer to an inadmissible alleviation of evidence.

The most frequent will be that the mitigating factor is "skillfully combined with plea bargaining" (González Cussac, 2015, p. 189), which has the powerful stimulus of the fear to suffer closures of premises or suspension of activities that entail a much greater loss for the company. This is the same way the case in the United States of America, cradle also of the sentence bargaining. In the USA deferred prosecution agreements and non prosecution agreements for the benefit of the company and the prosecutor's office are possible. For example, the recent and controversial agreement between the Justice Department and the Swiss bank HSBC, which paid a historic fine to continue operating in the USA. The Crime and Courts Act introduce these informal agreements on February 24, 2014 in English law. These plea bargaining

are also possible in Spain for legal persons and involve the acceptance of a minor penalty negotiated with renunciation of the oral judgment and the practice of the evidence.

Also admission of guilt by legal persons after the commission of crime can be an element of reconciliation with the victim and society in the Spanish system of criminal law through four mitigating factors provided for in article 31 quater: a) confess the crime before knowing that the judicial procedure is directed against the legal person; b) collaborate with the investigation; c) repair or lessen the damage caused by the crime before the oral judgment; d) adopt an effective compliance program before the oral judgment to prevent and discover future crimes.

Organic Law 1/2015 also contradicts itself in "the only novelty" (Borja Jiménez, 2015, p. 279), that it incorporates to article 66 bis. The reform limits for legal persons, in the third paragraph of the second rule of the aforementioned article, to a maximum duration of two years the penalties in the crimes committed by those subject to the authority of the legal representatives, to those authorized to decide on behalf of the legal entity or those who have powers of organization and control, when the liability of the legal entity "derives from a breach of the duties of supervision, monitoring and control that is not of a serious nature". The truth is that the forgetful legislator of 2015 forgot that in the same reform the criterion of "due control", which was contained in article 31 bis, in the second paragraph of its first section, was modified by the "less demanding" (Fiscalía General del Estado, 2016, pp. 20 and 59), formula "Serious breach ... of the duties of supervision, surveillance and control" of the current letter b) of 31 bis, following the recommendation made by the OECD to the Spanish authorities of "greater precision" in the "duty of control". Thus, Organic Law 1/2015 is incongruous (Blanco Cordero, 2015, p. 1017), given the fact that it stops punishing, in accordance with letter b) of the first section of article 31 bis, the less serious and minor breaches of due control and at the same time, contradictorily, takes into account to limit the penalty, in the third paragraph of the second rule of article 66 bis, non-serious breaches of supervision, monitoring and control duties that are now atypical.

Last but not least, the second rule of article 66 bis refers to legal persons used "instrumentally for the commission of criminal offenses", which offers an authentic interpretation of instrumentalization, "that the legal activity of the legal entity is less relevant than its illegal activity", although the identical wording of the two letters b) of the second rule of article 66 bis raises problems. This poses problems, given the fact that the same hypothesis serves to overcome the two- and five-year term limit or allows the permanent imposition of sometimes coinciding certain penalties. The afore said legislative negligence must be resolved with "a systematic interpretation" and in accordance with the principle of validity that allows to distinguish "a greater intensity of the criminal instrumentalization of the legal person" (Borja Jiménez, 2015, p. 280). Therefore for example if a tax consultancy firm is dedicated to the laundering of money something more than to its legal

work the two year limit in the penalty of prohibition of carrying out activities could be exceeded. It would be possible to exceed the five year ceiling for this penalty if the company is much more engaged in money laundering than providing advice and it would be possible to impose the aforementioned prohibition on a permanent basis when "the company is almost exclusively dedicated to money-laundering" (Borja Jiménez, 2015, p. 281).

3. CONCLUSION

In conclusion, the use of dummy corporations for money laundering is frequent, as is evidenced by the judgments of the Supreme Court of June 26, 2012 and February 4, 2015, which make reference to some fifteen companies, some domiciled in tax havens such as Belize, the Bahamas, the Virgin Islands, Panama, Liberia, Jersey or Liechtenstein, which concealed the ownership of a huge volume of properties "which are listed twenty-three pages of the ruling of the Court of first instance". Until recently the accessory consequences and the doctrine of piercing the corporate veil were sufficient. Said doctrine prohibits the prevalence of the created legal personality if fraud is committed or third parties are harmed, as is reflected in the Supreme Court judgments of March 2, 2016 and 5 December 2012, which confirmed the involvement of 14 companies -including four from Delaware that participated in three limited liability companies, a couple of companies domiciled in Gibraltar and two other companies domiciled in the United Kingdom- of a lawyer, whose assets were clearly and unjustifiably confused with the assets of the companies, to the payment of costs, fines and civil liabilities derived from their crimes of money laundering and against the Treasury, civil liability with regard to which, of course, there was no problem that it corresponded to legal persons, as noted in the judgment of the Supreme Court of April 9, 2012 (Abel Souto, 2019).

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