

**International
Comparative
Legal Guides**



Business Crime

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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?

Criminal proceedings in the Spanish Legal System follow a very basic threefold scheme: the preliminary investigation stage; the intermediate stage; and the trial. The investigation stage, which is under the Investigating Judges' jurisdiction, consists of undertaking the investigation in order to prepare for the trial; that is to say, the Investigating Judge will collect evidence and clarify the facts to charge the alleged perpetrators. Then, during the intermediate stage, it is decided whether there are reasonable grounds to bring the accused to trial. The prosecution can then be instigated either by the Public Prosecutor's Office, the private prosecution or the popular prosecution (which stands for any citizen or legal entity, even if these aforementioned entities are not injured or harmed by virtue of the alleged crime). The main authority that can prosecute crimes is the Public Prosecutor's Office, which has special divisions specialised in business crimes, such as the financial crime division.

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

Criminal law punishes the most serious misconduct with penalties, while administrative law punishes less serious misconduct with administrative sanctions. However, during an administrative proceeding, there could be evidence that points to the fact that a crime has been committed. In those cases, administrative proceedings must be suspended, since criminal law prevails in accordance with the Spanish Organic Law on the Judiciary and the Spanish Criminal Procedure Code (SCPC). Therefore, if there are grounds to believe that a crime was committed, law enforcement agencies have priority, among others. Criminal law matters can be subject to preliminary investigation by different law enforcement agencies, such as the National Police (*Policia Nacional*), the Civil Guard (*Guardia Civil*) or regional police in some regions (*Mossos d'Esquadra* in Catalonia or *Erzaintza* in the Basque Country). The Public Prosecutor's Office may also conduct preliminary investigations, but only the Investigating Judges have jurisdiction to properly investigate and make a decision to charge and try the suspect. In these preliminary investigations, usually the body that began the investigation takes the lead, normally following territorial and specialised criteria.

1.3 Can multiple authorities investigate and enforce simultaneously?

Public Administrations (*Administraciones Públicas*) must always respect the priority and precedence of the Criminal Justice System, as has been previously mentioned. Therefore, Public Administrations would refrain from acting on what is under investigation by the courts. Furthermore, the principle of *ne bis in idem* (double jeopardy) is enforced, which restricts the possibility of a defendant being prosecuted repeatedly on the basis of the same offence, act, or facts. Only one authority can be in charge of the investigation, but there are, of course, formulas for cooperation between authorities, and the Investigating Judge may seek the cooperation of more than one of them, again, based on criteria of specialisation.

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

Public Administrations may investigate and conduct proceedings when administrative infractions are committed. In fact, there are many Public Administrations that supervise certain economic sectors or specific activities. The following administrations should be highlighted: the Spanish Data Protection Agency, which oversees compliance with the legal provisions on the protection of personal data; the Spanish National Markets and Competition Commission, which promotes and ensures the proper functioning of all markets in order to protect consumers and businesses; the National Securities Market Commission, which is responsible for supervising and inspecting the primary and secondary market; the Bank of Spain, which supervises solvency and compliance with the specific rules of credit institutions; the Commission for the Prevention of Money Laundering and Monetary Offences, which promotes and coordinates the implementation of measures to prevent money laundering; and, finally, the National Tax Authority, which detects non-compliance through control actions.

1.5 What are the major business crime cases in your jurisdiction in the past year?

Over the past year, the most prominent business crimes in Spain have been the following:

- The "Pescanova case", in which the Supreme Court upheld the conviction of the former CEO and the directors of a major seafood processing company who were found guilty of manipulating the company's annual accounts and

defrauding investors. At the same time, the Court overturned the conviction of the auditing company that had approved the accounts, effectively acquitting the company and the partner overseeing the auditing process.

- In the “*Bankia* case”, the Supreme Court has recently upheld the acquittal of the defendants who decided to list the Spanish bank, Bankia, on the Spanish stock market, since it had the approval of the Bank of Spain, the National Securities Market Commission, the Spanish Executive Resolution Authority (FROB) and the European Banking Authority (EBA).
- Finally, after six years of investigation, Central Investigating Court no. 4 has decided to conclude the investigation phase of the “*Popular* case”. This case involves several individuals, including two former presidents of the bank, who have been under investigation for their alleged involvement in the events that led to the administration of Banco Popular, followed by its subsequent acquisition and absorption by Banco Santander. Now the judge in charge of the investigation must determine whether the amassed evidence is substantial enough to proceed with a trial against the defendants or whether the case warrants dismissal.

2 Organisation of the Courts

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

Investigating Judges investigate crimes that may be heard by the Criminal Courts (offences with a sentence of imprisonment of less than five years) or by Provincial High Courts (offences with a sentence of imprisonment of more than five years). In addition, the Provincial High Courts have jurisdiction to hear appeals against judgments issued by the Criminal Courts. On the other hand, the appeals against judgments issued by the Provincial High Courts are heard by the High Courts of Justice, which also have jurisdiction to investigate and prosecute public servants of the Autonomous Communities. The Second Chamber of the Supreme Court hears the *casation* appeals and investigates and prosecutes public servants of the Spanish State.

Furthermore, there is a special court, called the National High Court, with special jurisdiction, and in its structure we find, essentially, three kinds of courts. The Central Investigating Courts investigate crimes of terrorism, crimes against the Crown, large-scale drug trafficking, economic crimes that cause serious damage to the national economy, crimes committed by Spaniards abroad, as well as extraditions and Euro-orders. Then, the above crimes are heard by the Central Criminal Courts (offences with a sentence of imprisonment of less than five years) or by the Criminal Chamber of the National High Court. The Criminal Chamber of the National High Court is also in charge of reviewing decisions adopted by the Central Criminal Courts, as an appeals chamber.

And last, but not least, there are the following specialised courts: Prison Supervision Courts (similar to a Parole Board), which execute sentences of imprisonment; Juvenile Courts, which investigate and prosecute offences committed by persons aged over 14 and under 18; and, finally, Courts for Violence Against Women, which investigate cases involving gender-based violence.

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

Article 1.2 of Organic Law 5/1995 on the Jury provides that

a jury shall be competent to hear and hand down a verdict on the following offences: disloyalty in the custody of documents; bribery; influence peddling; embezzlement; and fraud and tax fraud, among others. It should be noted that crimes whose prosecution is attributed to the National High Court and those whose competence has been assumed by the European Public Prosecutor’s Office (EPPO) are excluded from the competence of the jury.

2.3 Where juries exist, are they composed of citizens members alone or also professional jurists?

Spanish juries are composed of citizens members alone, without the help of any professional jurist (article 3 of Organic Law 5/1995 on the Jury). The verdict is issued by the jury, and a professional judge, who is bound by the verdict, issues the judgment (article 4 of Organic Law 5/1995 on the Jury).

3 Particular Statutes and Crimes

3.1 Please describe the 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.

With a few minor exceptions, all criminal offences are provided for in the Spanish Criminal Code (SCC).

Under articles 5 and 10 of the SCC, all criminal offences entail intentional or negligent actions, i.e., no criminal offence can be committed in the absence of intent or negligence. However, negligence is not punishable in all cases; punishment for negligent criminal offences is contingent upon explicit reference in the SCC. In fact, most business crimes (e.g., fraud, tax evasion, bribery) require a deliberate intent for their commission.

• Securities fraud

Under article 282 *bis* of the SCC, the criminal offence of securities fraud is defined as falsifying the economic and financial information contained in prospectuses for the issuance of any financial instruments or the information that a listed company must publish under securities market regulations about its present or future resources, activities, or businesses, with the intention of: (a) attracting investors or depositors; (b) placing any type of financial asset; or (c) obtaining any kind of financing.

This criminal offence cannot be committed by negligence. Intent is always required.

• Accounting fraud

Under article 290 of the SCC, the criminal offence of accounting fraud is defined as falsifying the annual accounts or any other corporate documents that a company must keep to document its financial or legal condition. Such falsification must be conducted in a manner that has the potential to inflict harm upon the company, its shareholders, or third parties.

This criminal offence cannot be committed by negligence. Intent is always required.

• Insider trading

Under articles 285 and 285 *bis* of the SCC, the following actions constitute insider trading:

- Engaging in transactions using inside information to the benefit of the perpetrator or a third party. This is only deemed a criminal offence when certain conditions are met.
- Illegally disclosing inside information to a third party for their use.

This criminal offence cannot be committed by negligence. Intent is always required.

• Embezzlement

Article 252 of the SCC punishes those who, possessing the authority to manage another person's assets as provided by law, entrusted by an authority, or assumed through an agreement, breach those powers by exceeding their scope and thereby causing harm to the managed assets.

This criminal offence cannot be committed by negligence. Intent is always required.

• Bribery of government officials

The definition of bribery under articles 419 to 427 of the SCC (with respect to domestic officials) is remarkably broad. Thus, virtually any gift (except for minor tokens of courtesy) or monetary offering extended to a public official may be deemed a bribe. This includes facilitation payments as well as gifts or payments given to public officials without anticipating any reciprocal favour.

With respect to foreign officials, the definition of bribery is significantly narrower. Under article 286 *ter* of the SCC, only payments or gifts given with the purpose of obtaining or retaining a public contract, business or any other competitive advantage in international economic activities are considered criminal offences. Facilitation payments are commonly considered to be excluded from this definition.

These criminal offences cannot be committed by negligence. Intent is always required.

• Criminal anti-competition

Under article 284 of the SCC, the following conducts are constitutive of market abuse:

- (i) Altering the prices that should result from free market competition of financial instruments or any other product through violence, threat, deceit or artifice.
- (ii) Disseminating rumours or false economic information with the intention of generating deceptive signals or altering the trading value of a financial instrument.
- (iii) Engaging in transactions, providing inaccurate or deceptive signals to the market, or issuing trade orders that are likely to create false or misleading impressions about the supply, demand, or price of a financial instrument.
- (iv) Attaining a dominant position within the financial instruments market with the intent of engaging in price-fixing practices.

These criminal offences cannot be committed by negligence. Intent is always required.

• Cartels and other competition offences

Historically, cartels have been subject to penalties under public antitrust law rather than criminal law. Yet, with the transposition of the European Market Abuse Directive into Spanish legislation and the amendment of article 284 of the SCC in 2019 (see above), legal scholars are divided on the potential classification of cartels as a market abuse criminal offence. To date, there are no judicial rulings on this issue.

• Tax crimes

Tax evasion is regulated under articles 305 to 310 *bis* of the SCC. It qualifies as a criminal offence when it exceeds the amount of EUR 120,000 within a single fiscal year. Cases where the amount defrauded is below EUR 120,000 are dealt with in appropriate administrative proceedings led by the tax authorities, as they do not constitute criminal offences.

This criminal offence cannot be committed by negligence. Intent is always required.

• Government-contracting fraud

Government contracting fraud is criminalised under article 262 of the SCC. There are several conducts that constitute

government contracting fraud, including requesting or offering gifts in order to avoid a public tender or auction or colluding to alter the price of a public tender or auction.

This criminal offence cannot be committed by negligence. Intent is always required.

• Environmental crimes

Environmental crimes are provided for in articles 325 to 331 of the SCC. In essence, these criminal offences consist of serious breaches of environmental regulations that pose a substantial threat to the environment.

Environmental crimes can be committed either intentionally or by gross negligence.

• Campaign-finance/election law

Engaging in any form of unlawful financing of political parties constitutes a criminal offence as per article 304 *bis* of the SCC. The legal parameters for the financing of political parties are provided for by Organic Law 8/2007, which sets forth very strict conditions and requirements.

Additionally, electoral crimes are regulated under articles 135 to 152 of Organic Law 5/1985 of the Electoral System. The misappropriation of electoral funds is categorised as a criminal offence under article 150 of the same Law. None of these criminal offences can be committed by negligence. Intent is always required.

• Market manipulation in connection with the sale of derivatives

See "*Criminal anti-competition*" above.

• Money laundering or wire fraud

Under article 301 of the SCC, money laundering consists of engaging in any conduct intended to conceal the origin of funds or assets that were acquired through a previous criminal offence, committed in Spain or abroad, either by the perpetrator of money laundering or by any other person. Money laundering can be committed either intentionally or by gross negligence.

• Cybersecurity and data protection law

Article 249 of the SCC punishes those who engage in cyber fraud, defined as intentionally interfering with the operation of any electronic device, leading to an unauthorised transfer of funds or assets. The production, use, sale, or possession of any instrument, computer program or device specifically designed or adapted to commit cyber fraud is also considered a crime.

The unauthorised access to another person's electronic devices and/or the theft of their personal data are considered crimes against privacy rights under article 197 and 197 *bis* of the SCC.

None of these criminal offences can be committed by negligence. Intent is always required.

• Trade sanctions and export control violations

The unlawful import or export of goods is categorised as a criminal offence of smuggling pursuant to Organic Law 12/2995 for the Suppression of Smuggling. Typically, smuggling becomes subject to criminalisation only when it exceeds a specific value threshold (EUR 15,000, EUR 50,000, or EUR 150,000 depending on the unlawfully traded goods).

Smuggling can be committed either intentionally or by gross negligence.

• Any other crime of particular interest in your jurisdiction

Other relevant business crimes include illegal bankruptcy, forgery of documents, private corruption and crimes against copyrights and trademarks.

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? Can a person be liable for “misprision” by helping another avoid being located or discovered?

Article 16 of the SCC specifies that an attempted crime occurs when the perpetrator initiates the execution of an offence; however, the offence does not take place due to reasons independent of the perpetrator’s will.

Furthermore, article 451 of the SCC states that whoever has knowledge of an offence being committed and, without having intervened in it as a principal, subsequently intervenes, aiding the suspected criminals to avoid investigation or to escape search or capture, shall be punished whenever either of the two following circumstances occur:

- (a) the act covered up amounts to treason, regicide, the homicide of any of the King’s ascendants or descendants, the Queen Consort or the Consort of the Queen, the Regent or any other member of the Regency, or the Heir to the Throne, genocide, crimes against humanity, crimes against protected persons and assets in the event of armed conflict, rebellion, terrorism, homicide, piracy, trafficking in human beings or trafficking in human organs; or
- (b) when the person abetting has acted in abuse of his public functions.

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? Are there ways in which an entity can avoid criminal liability for the acts of its employees or agents?

Article 31 *bis* of the SCC states that entities will be criminally liable when offences are committed in their name or on their behalf, and for their direct or indirect benefit, by their legal representatives or by those acting individually or as members of a body of the entity, who are authorised to make decisions in the name of the company or hold organisational and control powers within it.

The entity will be exempt from liability if the following four conditions are met:

- When the governing body has effectively adopted and executed a compliance system before the crime was committed. For the exemption to be applicable, the compliance system must meet the requirements set out in section 5 of article 31 *bis*.
- When the supervision of the operations and compliance with the implemented compliance system has been entrusted to a body of the entity with autonomous powers of initiative and control.
- When the individual perpetrators have fraudulently committed the crime circumventing the compliance systems.
- When there has not been an omission or insufficient exercise of the functions previously explained.

Moreover, entities will be criminally liable for the crimes committed by those who have been able to carry out the acts because they have seriously breached their duties of supervision, vigilance and control of their activity. The entity will be exempt from liability if, before the commission of the crime, it has adopted and correctly executed a compliance system.

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

Criminal liability is personal, autonomous and independent, so if the entity becomes liable for a crime, it does not follow that a manager, officer or director will also be found guilty, just as, if one of these individuals is found guilty, it does not mean that the company will be convicted.

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? Has the preference changed in recent years? How so?

The authorities do not have a policy or preference to pursue an entity rather than an individual, or *vice versa*, and they should (and will) prosecute both of them if they consider that there is reasonable cause for it. The principle of legality does not allow a different solution, nor policies.

Notwithstanding the above, it is true that corporate criminal liability is relatively fresh (dates from December 23, 2010) and it therefore took time for the authorities to be aware of their potential liability and to go forward with it, but in the last five years the situation has become normal and companies are prosecuted very often.

4.4 In a merger or acquisition context, can successor liability apply to the successor entity? When does successor liability apply? When does it not apply?

As per article 130.2 of the SCC, the criminal liability of the target company may be transferred to the successor entity. Nonetheless, courts commonly interpret this stipulation as applicable only under circumstances where the merger or acquisition is conducted with the intent to deceitfully evade the criminal liability of the dissolved entity (see judicial decision of the National High Court no. 246/2019 dated April 30, 2019 – *Banco Popular* case).

5 Statutes of Limitations

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

The SCC sets forth different limitations periods depending on the seriousness of the offences. Specifically, article 131 of the SCC provides that crimes expire within one to 20 years after their perpetration.

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

No, they cannot, but we should bear in mind that when they are part of a pattern or practice, or ongoing conspiracy, the limitations period will not start running until the perpetration of the last act in the chain. That is to say that even one or more offences could clearly be outside the limitations period if there are ulterior practices that may be considered part of a pattern or taking advantage of the same occasion; article 74.1 of the SCC considers it a continued crime and, therefore, the only relevant date will be the one of the last conduct.

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

No, the limitations period cannot be tolled.

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?

Yes, article 23 of the Spanish Judiciary Act provides for the conditions and requirements governing the prosecution of offences committed beyond Spain's borders by both Spanish nationals and foreign individuals. As a general rule, Spanish courts wield jurisdiction over the prosecution of crimes committed abroad by Spanish nationals when the acts are deemed criminal both in Spain and the jurisdiction where they were committed, as long as the accused individual has not undergone trial, conviction, or acquittal within the jurisdiction of the offence, and the affected party or the Public Prosecutor's Office has filed a complaint before the Spanish courts.

6.2 How are investigations initiated? Are there any rules or guidelines governing the government's initiation of any investigation? Can third parties learn how the investigation began or obtain the initial file documents? If so, please describe them.

Criminal investigations may be initiated on a report or criminal complaint by a citizen or just by the competent law enforcement agencies themselves. It is important to point out that in Spain in particular and in the Continental European system in general, there is no window for guidelines on whether to initiate an investigation or not, since the principle of legality obliges the law enforcement agencies to take action.

Third parties may learn how the investigation began or obtain the initial file documents from the court only if they prove a legitimate and direct interest (article 234.2 of the Organic Law on the Judiciary).

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?

Yes, they have mechanisms for cooperation with foreign enforcement authorities (judicial international cooperation) and, within the European Union, this cooperation is especially swift and efficient due to the principle of mutual recognition, which governs this matter. Thanks to this philosophy, as a requesting State, our judges may issue arrest warrants (European Arrest Warrant, EAW) and investigative measures (European Investigation Order, EIO) so that the corresponding authorities in every EU jurisdiction, as requested States, will execute Spanish rulings.

7 Procedures for Gathering Information from a Company

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

Investigating Judges, who are competent to investigate business crimes (just like any other crime), with the aid of the Public Prosecutor's Office and law enforcement agencies, wield extensive investigative powers and can take any measure they deem necessary, provided they act in accordance with the law and with respect for the rights of suspects and third parties and in compliance with the principle of proportionality. The array of investigative measures at their disposal includes, but is not limited to: issuing subpoenas for the production of documents to any individuals, authorities or entities; dawn raids; wiretapping; summons of experts and witnesses; and, in general, any other measure deemed necessary to seek the truth.

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?

While still under scholarly debate, there is a broad consensus that the constitutional right against self-incrimination shields any suspect, whether an individual or a legal entity, from being compelled to produce documents before an Investigating Judge during criminal proceedings.

Notwithstanding, an Investigating Judge can authorise dawn raids on corporate premises, provided that they have reasonable cause to believe that it will lead to the discovery of relevant evidence and that the raid satisfies the "proportionality test" – i.e., that the raid is proportionate, necessary, and suitable based on the circumstances.

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?

Despite the very limited and somewhat ambiguous nature of Spanish regulations on this issue, there is a prevailing understanding that documents created by both in-house attorneys and external counsel, specifically for the company's defence, hold privileged status and, if seized during a raid, cannot be presented as evidence in court.

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?

Yes, this matter is regulated under Organic Law 7/2021, of May 26, for the protection of personal data processed for the purposes

of prevention, detection, investigation and prosecution of criminal offences, and the enforcement of criminal sanctions.

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?

An Investigating Judge possesses the authority to require an employee to produce documents, provided that these documents are not of a privileged nature and that the compelled disclosure respects the rights of both the employee and the company to avoid self-incrimination. The issuance of both a disclosure order and a home raid can be sanctioned by an Investigating Judge, contingent upon their adherence to the proportionality test criteria and the presence of reasonable cause to suspect that evidence pertaining to a criminal offence can be located within the documents subject for disclosure or the premises targeted for the raid.

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?

The circumstances are the same as explained in question 7.5. However, these kinds of measures are seldom imposed on third parties (i.e., persons not considered suspects in the proceedings).

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?

Under Article 410 of the SCPC, an Investigating Judge can summon any person to testify as a witness if they have grounds to believe that person might have relevant information on the criminal offence under investigation.

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

See question 7.7.

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?

Spanish law recognises a variety of testimonial privileges (i.e., exceptions to the general duty of bearing testimony), such as: (i) royal privilege (article 411 of the SCPC); (ii) diplomatic privilege (article 411 of the SCPC); (iii) professional privilege, granted to lawyers, religious ministers, health professionals and certain public officials (articles 416 and 417 of the SCPC); and (iv) spousal/family privilege (article 416 of the SCPC). Witnesses are also exempt from this duty when testifying might infringe upon their right not to incriminate themselves.

When questioned as a defendant, whether during the investigation phase or in trial, any person possesses a constitutional right

against self-incrimination. This right can be exercised without the need for formal invocation. It is also widely understood that this right not only includes the right to remain silent, but also to lie in court, as defendants cannot be held liable for perjury. In contrast, under this broad concept of the right against self-incrimination, courts are allowed to draw adverse inferences from the defendant's silence, always within the limits established by the European Court of Human Rights (ECHR) landmark decision *John Murray v. United Kingdom* (February 8, 1996).

Defendants are always entitled to have an attorney present during questioning, but witnesses are not.

8 Initiation of Prosecutions / Deferred Prosecution / Civil Dispositions

8.1 How are criminal cases initiated?

Criminal cases are initiated by a report or criminal complaint filed by individuals or by law enforcement, but investigating criminal judges also have the power to initiate cases by themselves, without any previous motion or request. It is important to highlight that, in Spain, Investigating Judges rather than prosecutors are in charge of the criminal investigation, which is a peculiarity of our system. Therefore, only judges can initiate cases. Only they have the power to charge and try.

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

There are no guidelines, as the Spanish authorities simply follow the principle of legality.

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.

Pretrial diversion or an agreement to defer prosecution are not regulated by the SCPC.

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 that courts consider when reviewing deferred prosecution or non-prosecution agreements.

This does not apply in Spain.

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.

The Spanish system has the peculiarity that criminal and civil actions are joined in criminal proceedings unless the victim decides to reserve the civil action before the intermediate stage, which rarely happens. Moreover, in the case of an acquittal, the victim always has the chance to instigate civil proceedings.

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

Individuals and corporations can commence a private prosecution before an investigating court, and the public prosecutor decides whether to join it or not (the public prosecutor might decide to apply to drop the case or seek the acquittal of the defendant at trial). They can privately prosecute business crime offences, which is actually very common in practice. There is a private prosecutor in most financial crimes in Spain.

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?

The prosecution always has the burden of proof for each element of any crime. With respect to any affirmative defences, it is sufficient for the defence to lay out the reasonability of their thesis to obtain an acquittal since, if the defence's thesis is indeed reasonable, a lack of certainty in the prosecution's theory is implied.

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

Beyond any reasonable doubt is the standard of proof required.

9.3 In a criminal trial, who is the arbiter of fact? Who determines whether the party has satisfied its burden of proof? If a jury or group of juries determine the outcome, must they do so unanimously?

In most criminal cases, professional judges are the arbiters and therefore determine whether the party has satisfied its burden of proof. They then apply the law to decide whether the facts constitute a crime or not.

In a few cases (bribery, embezzlement), a jury composed of nine citizens determines the outcome by majority (they need seven votes to find facts against the defendant and just five facts in favour of the defendant). The singularity of the Spanish jury is that, unlike an Anglo-Saxon jury, they must justify their verdict. It is a brief justification, but otherwise the verdict will not be valid.

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 is very rarely punished in the SCC, but our concept of conspiracy is different. According to article 17.1 of the SCC, conspiracy exists when two or more people agree to the execution of a crime and execute it. As mentioned above, article 17.3 states that the conspiracy to commit an offence only will be punished in cases expressly envisaged in the SCC. In business crime, there are a few examples of punishable conspiracy: fraud and misappropriation of funds (article 269); and money laundering (article 304).

When someone assists another to commit a business crime, he is liable to the same extent as the perpetrator, according to article 28. This article envisages relevant cooperation (necessary

cooperation) and complicity (article 29) (not necessary cooperation), which is less serious and, therefore, the punishment will be less severe.

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?

The lack of intent to commit the objective elements of the crime is a possible defence in those cases where it is not possible to commit the offence by negligence, which very rarely happens in business crime. The burden of proof with respect to intent belongs to the prosecution, who usually use circumstantial evidence to prove it.

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?

No, it is not a common defence to a criminal charge that the defendant was ignorant of the law. In this case, the burden of proof with respect to the defendant's knowledge of the law stands with the defence.

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?

As above, it is not a common defence and the burden of proof is with the defence.

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?

There is a general duty that applies to all citizens to report any crime that they may become aware of (article 259 of the SCC). However, this is more of a symbolic duty, as the sanction for its breach is immaterial, being a monetary fine of less than EUR 2. For this reason, this obligation is never enforced.

The newly introduced Whistleblower Protection Act (Law 2/2023, of February 20) mandates that companies with over 50 employees establish a whistleblowing channel, compelling them to report any instances of criminal offences that come to their attention to the appropriate authorities. Nevertheless, to date, no penalties have been imposed for failing to comply with this obligation. The constitutionality of this provision is highly questionable, as it potentially violates corporations' right against self-incrimination.

Furthermore, self-reporting is considered a mitigating circumstance both for companies (article 31 *quater* of the SCC) and for individuals (article 21.4 of the SCC).

However, the SCC does not provide for any form of prosecutorial immunity as “credit” for self-reporting. There are certain exceptions to this rule, applicable in cases of bribery (article 426 of the SCC), perjury (article 462 of the SCC), rebellion (article 480 of the SCC), and, most importantly (since 2023), in crimes of withdrawal of raw materials or necessary goods from the market (article 281 of the SCC) and market abuse (article 284 of the SCC), as stipulated in article 288 *bis* of the 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?

See question 12.1.

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.

See question 12.1.

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?

Yes, it is a legal possibility and very common in practice.

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?

Article 787 of the SCPC envisages that the defence and the prosecution may reach a plea bargain, which must always be approved by the court, which shall control the legality of the bargain, and which can only be entered into when the sentence is not over six years.

15 Sealing

15.1 Are there instances where the court proceedings or investigation files are protected as confidential or sealed?

We should distinguish between the investigation stage and the trial stage. Every single criminal investigation is reserved, which means that its content cannot be disclosed to third parties. However, there is also the possibility of having the investigation sealed, which implies that only the Investigating Judge and the prosecutor have access to the case file. It is an exceptional measure, envisaged in article 302 of the SCPC, and requires a serious risk to the life, freedom or physical integrity of an individual, or the serious compromise of the investigation.

The trials must be public, under pain of nullity. However, the judge may agree that the trial be held *in camera* when it is deemed to be required for national security reasons or for the protection of the fundamental rights of the parties. When the victim is underage, the disclosure of information regarding their identity is prohibited (article 681 of the SCPC).

16 Elements of a Corporate Sentence

16.1 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.

Within the sentencing ranges established by the SCC, the judge must determine the sentence, taking into account the mitigating and/or aggravating circumstances. However, it is possible to go above or below the specified range. For instance, in cases such as attempted crimes, a sentence below the mandatory minimum may be inchoate. In other cases, such as continuing offences, the statutory range may be exceeded. In either of these situations, the judge must follow the SCC rules (articles 61 to 79 of the SCC).

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

Article 66 *bis* of the SCC provides that before the judge imposes the penalties that are set out for corporations, the following circumstances must be taken into consideration: the need to prevent the continuation of the criminal activity or its effects; the economic and social consequences, especially the effects on employees; and the position in the corporation structure occupied by the person who has failed to comply with the duty of control. Of course, this penalty may under no circumstances exceed the penalty of imprisonment set forth for a natural person who commits the same offence.

In addition, a penalty of over two years must exclusively be imposed in the following contexts: where the corporation is a persistent offender; or where the corporation has been used instrumentally for the commission of the crimes. If the penalty imposed is of a permanent nature or exceeds five years, the offender must be a persistent offender charged with at least three counts of the same crime provided for in the same Title of the SCC or the corporation must be used instrumentally for the commission of criminal offences.

16.3 Do victims have an opportunity to be heard before or during sentencing? Are victims ever required to be heard? Can victims obtain financial restitution or damages from the convicted party?

Any victim, according to Law 4/2015, of April 27, on the standing of victims of crime, has the right to actively participate in the legal process. Indeed, the victim can instigate both criminal and civil actions.

17 Appeals

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

Yes, both verdicts are always appealable by either the defendant or the prosecution.

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

Yes, both the defence and the prosecution have the right to appeal.

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

The review of the first decision is always broader, and the appeal courts then have a wide power to review the lower court's judgments. However, appeals to the Supreme Court, after the first appeal, are extraordinary, which means that the appellant may only base its appeal on a restricted number of grounds and, therefore, the court is very limited in its review.

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

There are different remedies, depending on the ground for upholding the appeal, but typical remedies could be to declare the previous judgment, or even the trial itself, null and void, which would imply repeating the trial before a different (unbiased) court. Another solution could be to quash the judgment and oblige the lower court to redraft it, covering any evidence they might have omitted, or to strengthen their level of justification. A common limit, incorporated into Spanish law due to the precedents of the ECHR, is the general prohibition of conviction of the previously acquitted defendant in the appeal stage.



Jaime Campaner Muñoz is an accomplished legal professional renowned for his expertise in handling high-profile criminal cases, with a particular focus on white-collar crime in Spain. His reputation is built on a series of resounding successes in some of the country's most prominent fraud and corruption cases, including his involvement in the renowned *Nóos* case, which implicated the Royal Family. Jaime's consistent delivery of robust defences for prominent individuals facing complex international money laundering and embezzlement allegations has solidified his position as a leading figure in the field.

Extending his expertise to extradition cases, Jaime navigates intricate international legal matters with finesse, offering expert opinions before esteemed international courts on matters related to extradition and improperly obtained evidence. Notably, he has achieved favourable outcomes through appeals to both the Supreme Court and Constitutional Court, establishing himself as a specialist in jury trials.

Beyond his courtroom prowess, Jaime boasts an illustrious academic background, serving as an associate professor in procedural and criminal law at ISDE Law Business School in Madrid. His scholarly contributions regularly grace the pages of prestigious legal journals in Spain and abroad, while he has also authored five influential books on criminal procedure, further solidifying his status as an authority in his field. Jaime's influence extends beyond the academic and legal realms, as he is a sought-after speaker at conferences and congresses both nationally and internationally, where he imparts his expertise in procedural and criminal law. Moreover, he dedicates his time as a tutor, nurturing the talents of trainee judges, prosecutors, and lawyers.

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Guillermo Galbe Traver joined Campaner Law's legal team in January 2023 and has brought a wealth of experience and expertise in the field of white-collar crime, corporate compliance, and internal investigations. Prior to joining Campaner Law, Guillermo honed his skills at Uría Menéndez Madrid and Cuatrecasas Madrid, where he handled a wide range of white-collar crime proceedings and provided counsel to major companies in Spain, particularly in the banking and technology industries.

His specialisation lies in corruption-related matters, with a particular focus on transnational corruption cases involving Spanish companies allegedly engaging in bribery of foreign officials. Additionally, Guillermo has extensive knowledge in money laundering, tax crimes, and corporate crimes. Throughout his career, Guillermo has been involved in some of the most significant criminal proceedings in recent decades. His expertise extends to drafting successful extraordinary appeals before the Supreme Court.

Beyond litigation, Guillermo is well versed in guiding companies in designing effective corporate compliance programmes to prevent criminal activities and conducting internal investigations when necessary. He has authored numerous legal opinions on various matters related to white-collar criminal offences, tax crimes, and the criminal liability of corporations for both national and foreign clients.

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At Campaner Law, our practice is defined by an unwavering commitment to white-collar crime defence, setting us apart from other firms in the field. With a singular focus on criminal law, specifically white-collar crime, we have built a legacy of success, representing companies and individuals facing charges defined in the Criminal Code. Our dedication to this specialised area allows us to offer expert legal advice and top-notch defence services that consistently exceed client expectations.

What sets us apart is our comprehensive approach to criminal law representation. We not only excel in representing clients in court during criminal proceedings but also adopt a preventive stance, designing tailored compliance programmes for companies. These proactive measures empower companies to establish robust guidelines for the detection and prevention of potential law breaches within their organisations. Our preventive strategies demonstrate our commitment to protecting our clients' interests beyond the courtroom.

With offices in Madrid, Palma, and Ibiza, Campaner Law offers nationwide legal services and advice of the highest calibre. Our extensive reach is further bolstered by collaborations with esteemed partner law firms worldwide. This collaborative network enables us to coordinate

defence strategies for clients involved in proceedings in other jurisdictions, providing a seamless and effective international legal support system.

Additionally, our expertise extends beyond Spanish borders, as we regularly collaborate with British law firms in European Arrest Warrant and extradition proceedings. We furnish expert legal opinions before the UK courts, showcasing our ability to navigate complex international legal matters with finesse. Furthermore, our distinguished experience includes representing clients in some of Spain's most intricate corruption cases, such as those involving FC Barcelona, the *Pujol* case, and the 3% scandal in Barcelona. This track record highlights our prowess in handling high-profile and complex cases, cementing our position as a premier white-collar crime defence firm in Spain.

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