

## The Supreme Court Issues Its First Ruling on the Criminal Liability of Legal Entities

### Supreme Court Ruling, dated 29 February 2016.

Pursuant to the appeal filed by several companies, the Supreme Court has issued its first ruling in regard to the criminal liability of legal entities and the requirements of said liability, in accordance with the latest changes to the Criminal Code 2015.

In this case, the Court confirmed the sentences imposed by the National Court on three companies for their involvement in crimes against public health and, more specifically, for the drug trafficking of more than 6,000 kilos of cocaine hidden in machinery for export to Venezuela.

As the Court explained, for a legal entity to be held liable, it is necessary:

- For it to be proven that a crime was committed by a physical person belonging to the legal entity (as is the case in the matter examined by the Court, since the criminals were the directors of the company).
- For the physical persons committing the crime not to have fulfilled the vigilance and control requirements established by law, which would tend to prevent crimes from being committed. In other words, for the company not to be held criminally liable, it must prove that it had suitable and efficient control instruments in place in order to prevent crimes from being committed. Conversely, the Court understood that the absence of such instruments could integrate the typical core of criminal liability of the legal entity.

The Court went on to state that the criminal liability system for legal entities is based – starting with the initial assumption of said liability, which is merely prior notice of the crime having been committed by the physical person belonging to the company – on the requirement of the establishment and proper application of efficient control measures that prevent and are ultimately aimed at avoiding a potential crime being committed by persons belonging to the company. Accordingly, the potential existence of organisational and management models in a legal entity could result in a grounds for exoneration of criminal liability, as provided expressly in the Criminal Code. As the Court reiterated, the absence of a culture of control is a decisive element that would imply the typical core of criminal liability of the legal entity.

Along the same lines, the Court explained that the absence of the adequate control measures that would tend to prevent a crime from being committed evidenced a “serious intention of strengthening the

‘virtuality’ of the rule” which is why it highlighted the importance of implementing compliance models at the legal entity.

Consequently, the absence of adequate and efficient instruments to prevent crime are essential to rule against the legal entity when a physical person belonging to it commits a crime. Hence, the legal entity will be criminally liable for crimes committed by its representatives or dependants to the extent that its representatives may commit a criminal act in its name and on its behalf and benefit, which is where the culpability of the legal entity resides.

The Court also ruled regarding the aforementioned exemption of criminal responsibility and proof thereof, since, following the 2015 reform of the Criminal Code, the legal entity's having certain efficient instruments to prevent crimes being committed may count as exonerating grounds. Accordingly, the Supreme Court indicated that an exoneration of criminal liability is consistent with the ultimate ground for criminal liability examined here, and explained that if criminal liability of the legal entity is based on the inculpatory basis of permitting or somehow encouraging the commission of crimes by persons belonging to it because it had eluded implementing the pertinent preventive measures, it is reasonable that proof of having implemented said measures should produce the exclusion of criminal liability.

Moreover, this case led the Court to question what happens when, in criminal proceedings, the physical person representing the legal entity in court is the same physical person accused of committing the crime generating criminal liability for the legal entity. In respect of this, the Supreme Court stated that it should be avoided to the extent possible that the company's representative in court be simultaneously one of the accused, since the latter will seek to protect his own interests, to the detriment of those of the company, thereby breaching the company's right to proper defence.

Lastly, with regard to the specific case and the sentence applicable, the Court indicated that it was necessary to distinguish between real companies and “front companies” (companies with fictitious corporate purposes), so that while the sentence for a “front company” would be its dissolution, for the real company it would be necessary to take into account its legal activity and the crime committed in it, so as to offer a proportionate solution between its culpable action and the interests of third parties.