

**Judgment of the Supreme Court,
Chamber Two, number 221/2016, 16
March 2016**

In this case the Supreme Court decided on the criminal liability of legal persons following the reform of the Criminal Code, in an attempt to advance the interpretation of Article 31 bis, in other words, those cases in which the legal person should likewise be held criminally liable for offences committed by the natural persons comprising it.

In the case under analysis by the Supreme Court, the Provincial Court had convicted two representatives of a real estate agency as perpetrators of an offence of fraud, for having collected commissions by way of deception. Specifically, as part of a sale and purchase transaction, commissions were collected from the seller and the buyer, when the commissions were already included in the price of the sale (duplicate payment). The deception consisted of preventing reciprocity in the exchange of information, concealing decisive data in the process of forming the will of both contracting parties, by manipulating from whom and how much of the commission was to be collected by the real estate agency.

In addition to the two representatives who committed the fraud, the Appeal Court convicted the real estate agency itself, by virtue of the provisions of the aforementioned Article. The real estate agency had not been formally charged and this conviction failed to respect the rights likewise recognised to legal persons, resulting in its defencelessness.

In light of the decision, the convicted parties filed an appeal for annulment, leading to the judgment of the High Court which, in addition to trying to clarify grey areas with respect to the criminal liability of legal persons, reiterated some aspects already indicated in prior decisions, such as that the criminal liability of legal persons may solely be declared following a criminal proceeding with all guarantees (including those of the legal person, in this case, the real estate agency).

This being the case, the Supreme Court understood that the real estate agency's right had been infringed – having been convicted without a formal charge. The Court considered that the legal person, just like the natural person, has a right to the presumption of innocence, so that its rights as defendant in the proceeding could not be ignored, nor should they be considered any different from those of the natural person charged with the perpetration of a criminal act.

On the other hand, the Court considered that the criminal liability of the legal person was not a purely objective liability and that, since the natural and legal person have distinct spheres of liability with respect to the perpetration of an offence by the former, it was not possible to resort to formulas by means of which the liability of natural persons was objectively transferred to legal persons, but that it should instead be proven that the criminal act is “distinctive” of the legal person, in other words, that the offence was committed owing to a structural defect in the crime prevention mechanisms legally required of all legal persons. In this manner, the real estate agency cannot be considered criminally liable for all actions carried out by its representatives, even though these are committed, as stated in Article 31 bis of the Spanish Criminal Code, in the exercise of corporate activities and in direct or indirect benefit of the legal person, but that in order for the latter to be criminally liable, it must instead have seriously breached the prevention mechanisms as well as the obligations of supervision, surveillance and control of its activity. In this sense the Court recalled that, in order to gauge the foregoing and attribute criminal liability to the legal person or otherwise, it was necessary to address each specific case.

Furthermore, the Court commented on the evidence and the burden of proof in this context, and indicated that it cannot be taken for granted that an organisational defect exists in the legal person or that it is lacking the mechanisms envisaged by law, but that the accusation must instead prove that it is not respecting the obligations of supervision, surveillance and control of its activity. In this manner, the evidence for the legal person works in the same way as for the natural person, and the imposition of a conviction or sentence on a legal person requires the same burden as for a natural person.

The Supreme Court absolved the real estate agency, since the guarantees of the proceeding were not respected and, specifically: the real estate agency was not duly charged, causing defencelessness, the legal representative of the agency was not heard in court, etc.

In conclusion, the Supreme Court endeavoured to analyse various points relative to the enforceability of criminal liability of the legal person and, hereinafter, it must be taken into consideration that the criminal liability of the legal person should be based on the perpetration of an offence by the natural person and that this offence is proclaimed as distinctive of the legal entity, and in accordance with imputation criteria that are differentiated and adapted to the specific circumstances of each legal person.