



SPAIN

SURVEY QUESTIONS & RESPONSES¹

Survey conducted as part of *Commerce, Crime, and Conflict: A Comparative Survey of Legal Remedies for Private Sector Liability for Grave Breaches of International Law And Related Illicit Economic Activities*.

I. Disclosure requirements for business entities

1. What sort of material information are business entities required to provide to their shareholders and/or public under your jurisdiction's company law or securities laws that may be relevant to potential litigants? For example, are such entities required to provide information about:

- **material civil litigation?**
- **risk factors that would impact a shareholder's investment in the company?**
- **any reported violations of law or pending proceedings arising from such violations?**
- **revenues received from, or amounts paid to or on account of, a government or its officials or agents?**

The Mercantile Register is an official institution ensuring that the public has access to mercantile information, and as such strengthens legal trade security. The registration in the Mercantile Register is compulsory for any company operating in Spain (it is voluntary for individual entrepreneurs). Companies must register their constituent act or memorandum of association ("escritura y estatutos") in the "open information form", and every single

¹ The initial responses to this survey of Spanish law were provided by Ana Libertad Laliena, Attorney-at-law, Spain. This draft is being further expanded in cooperation with Olga Martin-Ortega, Lecturer, School of Law, Napier University, the United Kingdom. The contents of this survey response are intended for research purposes only and continue to be revised in light of peer review. The contents of this survey response are in no way intended as comment on specific cases or judgements, nor are they intended as legal advice on any of the issues covered. Due to constraints of space, many responses in this text provide only a basic introduction to the issue and the complexities of specific cases or provisions may not be fully explicated. Readers seeking practical legal advice should consult a lawyer in the relevant jurisdiction. Citations and references to this survey response should adhere to the following format: "Survey Response, Laws of Spain (Ana Libertad Laliena and Olga Martin-Ortega), 'Commerce, Crime and Conflict: A Survey of Sixteen Jurisdictions' Fafo AIS, [date accessed] 2006". The contents of this survey response are published by Fafo AIS under a Creative Commons Attribution-Share Alike 2.5 License.

change in their original organisational regime, including change of domicile, joint or separation, representation and administration changes, etc.

It is governed by:

- General norms contained in the Code of Commerce of 1885.
- Registry of Commerce regulations of 19 July 1996.
- Special norms regulating different kinds of entities (like the Law of Public Limited Companies (US: public corporations), Law of (Private) Limited Companies (US: limited corporations) etc.)

The answer to the question is negative, in accordance with Article 94 of the Registry of Commerce Regulations:

“1. Every company must provide the following information in its “open information form”:

- 1. The setting-up of the company, which must necessarily be the first inscription.*
- 2. Modifications of the contract and of the articles of association, as well as increases or reductions of the capital.*
- 3. The extension of the term of duration.*
- 4. The appointment and resignation of administrators, liquidators and auditors. In addition, the appointment and resignation of secretaries and vice-secretaries of the associated organs of administration, even if they aren't members of the company. The inscription shall include permanent members as well as their substitutes.*
- 5. The general powers and the delegation of authority, as well as their modification, revocation and substitution. Inscription of general powers for lawsuits, and powers delegated for carrying out concrete actions, is not obligatory.*
- 6. The opening, closing and other actions and circumstances relating to branch offices, in accordance with the terms included in article 295 and following.*
- 7. The transformation, fusion, division, partial termination, dissolution and liquidation of the company.*
- 8. The designation of the entity charged with the financial accounts in the case that the securities are represented through writing on account.*
- 9. The inscribable judicial resolutions relating to declaration of bankruptcy, be it voluntary or necessary, principal or accumulated, and the administrative measures of intervention.*
- 10. Judicial or administrative resolutions, in accordance with the terms established in the laws and these Regulations.*
- 11. In general, the actions and contracts that modify the content of the entries made, or whose inscription is ordered by the laws or these Regulations.*

2. The issuance of bonds or other negotiable securities by public limited companies or authorized entities are also of obligatory inscription in the said “open information form”; grouped by issue. This includes all acts and circumstances relating to such issuances whose inscription are established by law.

3. The admission or exclusion of any class of securities in an official, secondary market.”

Those private limited liability companies that participate in the Stock Market have the obligation to make public an annual corporate governance report (art. 116 of the “Ley del Mercado de Valores”, Stock Market Act). This report must contain:

- the property structure of the company, including the relevant information on the significant shareholders,
- the administrative structure of the company, including the composition, rules of organisation and functioning of the governing body, identity and remuneration of its members, etc.
- company operations linked to its shareholders, officers and executives
- risk management systems
- functioning of the general assembly
- compliance with the corporate governance and explanations in case of non-compliance

There is a specific body for the monitoring of those reports, the Commission on the Stock Market (Comision del Mercado de Valores), with competence to impose sanctions in case of omission of date, misleading or faulty information. The Commission can make its findings public.

Rights of the shareholders of private limited liability corporations: The rights of the shareholders (art. 48 Private limited liability corporations act, “Ley de Sociedad Anonima” - LSA) include the right of information. The right of information of the shareholders include:

- the right to demand reports or clarifications on any matter to be discussed in the general shareholders assembly, as well as during the assembly, on any matter on the agenda. The officers of the company can only deny the information if it’s publicity poses a risk for the interests of the company. Such denial would not be possible when the shareholders demanding the information represent a forth of the share capital (art. 112 LSA);
- the right to obtain information on annual accounts and modifications of the memorandum of association, joints or divisions (arts. 212, 144, 238, 254 LSA)
- the right to access the annual report on the corporate governance (art. 117 Stock Market Act, the company must have a web whre the shareholders can exercise their right to information.

2. Is there a right to know statute enabling one to obtain information from your government?

If the question refers to whether it is possible to get access to the Mercantile Register, the answer is affirmative, in accordance with Article 12 of the Regulations of the Mercantile Register:

- “1. *The Mercantile Register is public and the Mercantile Registrar is responsible for ensuring the professional treatment of the information contained in the registries, in order to make the information public and guaranteeing the impossibility of its manipulation or erasure.*
2. *The information is made public trough certification or by informative notification of all or some of the data contained in the particular registry, in the form determined by the Registrar.*
3. *When dealing with mass applications for information or applications that affect personal data contained in the registries, the Mercantile Registrars are particularly responsible for upholding all legal norms in force.”*

II. Status of business entities under criminal law.

3. Does your penal code (or judicial interpretations thereof) provide that business entities may be prosecuted criminally for violations of such code?

In Spanish criminal law it is not possible to sanction legal entities, as it upholds the traditional principle of Roman law, “*societas delinquere non potest*”. This means that imputation of culpability must be individual, thus legal entities cannot be held responsible for violations of the penal code. Individuals are seen as the only possible perpetrators of crimes, based on the impossibility of action, culpability or punishment of legal entities. This principle is in full force in our country as the current Penal Code is based on it, and it is frequently used in the jurisprudence of the Supreme Court.

Although there is no precept in our Penal Code that specifically establishes the criminal capacity or incapacity of legal entities, all its precepts are written based on the understanding that only individuals may be active subjects of crime.

The Penal Code (LO 10/1995, modified by LO 15/2003) in Title II (on the criminally responsible persons) states: art. 27: criminally responsible are the authors and the accomplices. The definition of both authors and accomplices (art. 28 and 29 PC) is not restricted to natural persons, but it does not explicitly include legal persons. However, art. 31 refers explicitly to the responsibility to those acting in representation of the company and restricts the jurisdiction to natural persons, only for subsidiary civil liability the legal person is taken into account (see question 5 below).

4. What type sanctions are applied to business entities, as opposed to natural persons?

Legal entities and, in general, “supra-individual” entities, cannot be punished with the penalties envisaged in Article 33 of the Penal Code and imposed by the Courts of Justice. Rather, at most they can be punished by security measures, administrative sanctions and civil sanctions.

The PC always refers to natural persons when defining those subject to criminal sanctions. Art. 31 PC refers to the joint liability of the company where the punishment of the officer, administrator, representative or person acting in the name of the company is of pecuniary nature. The only sanctions envisaged for legal persons are of civil nature.

However, Article 129 envisages the possibility of imposing certain accessory sanctions applicable to legal entities. Nevertheless, the legal nature of these measures does not correspond to neither criminal punishment nor security measures. They are civil responsibility measures (called “accessory measures”).

Article 129:

“1. The judge or tribunal may, in the events described in this Code and without detriment to what was established in Article 31, after a Court hearing with the public prosecutor’s office and the defendant or his representatives, impose the following sanctions:

- *Closure of the company, its premises or establishments, on a temporal or permanent basis. Temporal closure may not exceed 5 years.*
- *Dissolution of the company, association or foundation.*
- *Suspension of the activities of the company, firm, foundation or association for a term not exceeding 5 years.*

- *Prohibition of future engagement in activities, commercial operations or business of the sort in the exercise of which the crime was committed, aided or covered up.*
- *The intervention of the company to safeguard the rights of the employed or the creditors, for the time necessary and not exceeding a maximum period of 5 years.*

2. *Temporal closure and suspension may also be decided by the Examining Magistrate during the Court proceedings.*

3. *The accessory consequences envisaged in this article will be oriented to prevent the continuity of the criminal activity or its effects.”*

5. What are the standards applied in your jurisdiction for attributing liability to a business entity for the actions of individual servants? For example:

Under the mentioned principles of personal criminal responsibility and piercing the corporate veil, in Spanish law business entities are not attributed liability for the actions of individual servants.

The examples provided are an example of attributing liability to individual persons for the actions of the legal person he/she represents or the organisation he/she belongs to.

- **Acting in the name of another**

First we must point out that the concept “acting in the name of another” is used by the legislature to determine particular forms of participation acted out through the representation of a legal entity.

Article 31 of the Penal Code (PC) reads:

“1. The person who formally or in reality acts as administrator of a legal entity, or in name or legal or voluntary representation of another, will be held personally responsible, even if that person should not fulfil the conditions, characteristics or relations that the corresponding crime demands for someone to be considered an active subject of such crime, as long as those circumstances are present in the entity or person in representation of which the person acts.

2. In this case, if a fine is imposed on the perpetrator of the crime, the legal entity in whose name and on whose account the perpetrator acted shall be held equally responsible for the payment of the fine.”

Article 31 of the Penal Code is intended to fill lacunas of punishability in cases of special crimes. With this article the representative (a physical person) is held to assume the personal conditions required to be perpetrator of a special crime.

Article 31 is *not* an introduction of objective responsibility into the Penal Code, which would amount to a violation of the principle of culpability (article 1 PC). In accordance with a sentence of the Supreme Court of 3 July 1992 *“the case envisaged in article 15 bis PC necessarily implies the execution of a typical act in a direct or indirect manner (in cases where it is possible to have indirect responsibility). The provision doesn’t compensate the lack of action, but rather the absence of typical characteristics of responsibility in the perpetrator’s person.”*

In this way, directors and representatives of legal entities respond exclusively for their own fraudulent or imprudent actions (whether directly carried out by themselves or through others), but there is no responsibility without action or culpability, and the absence of any of the two may not be substituted through invocation of article 31.

The Constitutional Court, in the Third Juridical Foundation of its sentence of 20 July 1993 [RTC 1993\253], in reference to the old article 15 *bis* PC, said the following:

“Its incorporation into the Penal Code did not in any way amount to introducing a rule of objective responsibility that would apply indiscriminately and automatically, in cases of fraudulent conduct committed under the protection of a legal entity where it is impossible to determine who among its members are the real perpetrators, because that would be contrary to the right to presumption of innocence and the object and purpose of the principle. On the contrary, the provision is intended to prevent the impunity of criminal actions carried out under the veil of a legal entity by individual members of the same, in cases where, because they are special crimes, meaning a crime the responsibility for which necessarily requires the presence of certain characteristics, these characteristics only come together in the legal entity and not in its integrating members. The introduction of Article 15 bis PC was meant to legally extend the scope of penal responsibility to directive organs and legal or voluntary representatives of the legal entity, in those cases only, where the characteristics of responsibility of the particular crime do not come together in any one individual, but only in the legal entity in whose name they act. But, having overcome in this way the initial obstacle to consider them perpetrators of the typical conduct, it may not be inferred from the cited precept that the real participation in the events referred to and their culpability need not be proved.”

Illicit association

Now we must address the crime of illicit association, regarding cases in which the legal entity is a mere instrument in the hands of individual subjects with criminal designs.

The first section of article 515 of the Penal Code is applicable to cases of individuals constituting a company or association with the aim of committing or promoting crimes, and hiding behind the legal entity in order to escape their penal responsibilities. In such cases the consequence for the legal entity is the application of article 520 of the Penal Code, amounting to the dissolution of the entity or, where applicable, any of the accessory sanctions of the Penal Code’s article 129.

The Penal Code’s norms on the crime of illicit association, as contained in the chapter dedicated to “crimes committed through the exercise of the fundamental rights and freedoms guaranteed by the Constitution” are the following:

Article 515

“Illicit associations are punishable, being considered as such:

- 1. Those that have the objective of committing a crime or, after being created, promote their commission, as well as those that have the object of committing or promoting offences in organized, coordinated and reiterated manner.*
- 2. Armed groups and organizations and terrorist groups.*

3. *Those that, although having a licit aim, employ violent means or practices that alter or control the personality in order to achieve those aims.*
4. *Organizations of paramilitary character.*
5. *Those that promote or incite to discrimination, hate or violence against persons, groups or associations on account of their ideology, religion or beliefs, ethnic, racial or national identity, sex, sexual orientation, family situation, health condition or handicap.”*

Article 516:

“In the cases envisaged in numeral 2 of the previous article, the following punishments shall be applied:

1. *To the promoters and directors of armed groups or terrorist organizations, and to those leading any such group:*
 - *Prison for 8 to 14 years.*
 - *Disqualification from holding public office or employment for a time between 8 to 15 years.*
2. *To the members of such organizations:*
 - *Prison for 6 to 12 years.*
 - *Disqualification from holding public office or employment for a time between 6 to 12 years.”*

Article 517:

“In the cases envisaged in numerals 1 and 3 to 6 in article 515, the following punishment shall be applied:

1. *To the founders, directors and presidents of such associations:*
 - *Prison from 2 to 4 years.*
 - *A fine from 12 to 24 months.*
 - *Special disqualification from holding public office or employment for a time between 6 to 12 years.*
2. *To active members:*
 - *Prison for 1 to 3 years.*
 - *A fine from 12 to 24 months.*

Article 518:

“Those that through economic or any other kind of cooperation, in any relevant way, favours the foundation, organization or activity of the associations described in numerals 1 and 3 to 6 of article 515, shall have imposed on them the following punishment:

- *Prison from 1 to 3 years.*

- A fine from 12 to 24 months.
- Disqualification from holding public office or employment for a time between 1 to 4 years.

Article 519:

“Provocation, conspiracy and proposals to commit the crime of illicit association shall be punished with a penalty reduced by 1 or 2 degrees to that which corresponds respectively to the situations described in the previous articles.”

Article 520:

“The judges or Courts, in the situations envisaged in article 515, shall decide the dissolution of the illicit association and, where applicable, any of the accessory sanctions of the Penal Code’s article 129.”

Article 521:

“If the person charged with illicit association should belong to the authorities, be an agent of the authorities or a public servant, he shall have imposed on him, in addition to the indicated penalties, absolute disqualification for 10 to 15 years.”

6. Under your criminal law (penal code) what is the legal standard for convicting someone of being an accomplice to or aiding and abetting the commission of a crime by another (complicity)? What is the legal standard for convicting someone of plotting with another to commit a crime (criminal conspiracy)?

Complicity

The PC distinguishes between direct inductors, necessary collaborators and accomplices. Both inductors and collaborators are considered perpetrators of the crime, not mere accomplices.

The conviction of an accomplice is independent of the final perpetration of the act, it is an independent crime and the accomplices are sanctioned separately.

Concept

Article 28:

“Perpetrators are those who carry out the act alone, together with others (joint responsibility) or by using someone else as an instrument (mediate responsibility).

The following shall also be considered perpetrators:

- *Those that directly induce someone to carry out the crime.*
- *Those that cooperate towards the execution of the crime in such a way that without their cooperation the crime wouldn’t have been carried out.”*

Article 29:

“Accomplices are those who, not being included in the previous article, cooperate towards the execution of the crime with prior or simultaneous actions.”

Punishment

Article 63:

“The accomplices to a consummated or intended crime shall be punished with a penalty one degree lower than that which the law establishes for the perpetrator of the same crime.”

However, **article 64** holds that:

“The previous norm shall not apply in those cases where the complicity is held by the law to be especially punishable.” (for specific crimes such as harm on minors –art. 192 PC- and economic cooperation in the foundation of illicit organisations –art. 515 PC-)

Criminal conspiracy

Article 171:

“Conspiracy occurs when two or more persons agree to execute a crime and decide to carry it out.”

Requisites:

- The joint presence of two or more persons fulfilling the necessary conditions for being perpetrators of the planned crime.
- Agreement between them or “*pactum scaeleris*” (which is what connects it to the joint presence of criminals).
- A common will materializing in an executive resolution or shared and firm decision, reflexively directed to the violation of a legal asset or item.
- That such a decision have the objective of carrying out a concrete crime, which allows express sanction of conspiracy to commit such a crime.
- That a period of time should pass between the agreed decision to commit the crime and the actual commission, to allow establishment of a minimum firmness of the decision.
- That the criminal act has not commenced.

The Supreme Court has decided that:

- Where there is agreement to carry out a crime, if one of the persons involved in the pact later abstains from performing any executive acts, his involvement is to be considered as limited to conspiracy.
- If the conspirator desisting from execution of the crime does so voluntarily, he shall not be considered part of the conspiracy.
- It is not possible to speak of conspiracy after the execution of the crime has been initiated, even if it’s only in its inception, from then on it is rather a question of degree of tentative execution of the crime.

Finally we introduce the concepts of **criminal proposal and provocation:**

Article 17.2:

“Criminal proposal occurs when the person who has decided to commit a crime invites one or more other persons to execute it”.

Article 18:

“1. Provocation occurs when direct incitement to the perpetration of a crime is given to a group of people or through the use of the printed press, radio or any other means of similarly efficient dissemination.

“Apologia” denotes acts of spreading, to a crowd or through any means of dissemination, ideas or doctrines that praise a crime or extol the perpetrator. Apologia is only to be considered criminal as a form of provocation and if its characteristics and circumstances constitute a direct incitement to commit a crime.

2. Provocation shall only be punished in cases specified by the law. Provocation that leads to the execution of the crime shall be punished as inducement.”

7. Are there any other practical considerations or factors that must be present when the defendant in a criminal proceeding is a business entity rather than a natural person?

A future version of this response will provide an answer this question.

III. Status of International Law/International Humanitarian Law in your Country's Legal Framework

8. Which international crimes have been incorporated into your domestic criminal law? Please include any crimes enumerated in the Rome Statute of the International Criminal Court such as genocide, war crimes, crimes against humanity, and other relevant instruments.

With authorization from Organic Law 6/2000 of 4 October 2000, on 19 October 2000 Spain decided to ratify the Statute of the International Criminal Court adopted in Rome on 17 July 1998. The ratification was deposited on 25 October 2000. Said Statute entered into force, in accordance with its article 126, on 1 July 2002.

Subsequently, on 10 December 2003, Organic Law 18/2003 on cooperation with the International Criminal Court (ICC) was created.

Title 24 of the Penal Code was modified by Organic Law 15/2003 of 25 November 2003, which defines and regulates the crimes the treatment of which our domestic legislation shall coordinate with the competencies of the ICC.

Title 24 is titled “Crimes against the international community” and the following is its content:

- Chapter 1: Crimes against the Rights of Peoples (Arts. 605 and 606).
- Chapter 2: Crimes of Genocide (Art. 607).
- Chapter 2 *bis*: Crimes against Humanity (Art 607 *bis*).
- Chapter 3: Crimes against Protected Persons and Objects in case of Armed Conflict (Arts. 608 and 614 *bis*).

9. Do your country’s laws modify the provisions of the ICC Statute, such as concepts of aiding and abetting and conspiracy or liability of business entities rather than only natural persons?

No

10. Do your criminal courts have jurisdiction over those international crimes that have not been incorporated into your domestic law?

They have all been incorporated.

11. May a business entity be prosecuted for international crimes in the courts of your country, whether under domestic law or with reference to international law? If yes, under what circumstances?

A future version of this response will provide an answer this question.

V. Jurisdiction and related issues

13. On what bases do the courts of your country assert personal jurisdiction over criminal and civil defendants?

Organic Law on Judicial Power, article 21:

“1. Spanish courts and tribunals shall try the court cases that originate on Spanish territory between Spanish citizens, between foreigners and between Spanish citizens and foreigners, in accordance with the precepts of this Law and those of international treaties and conventions ratified by Spain.

2. Exempt from this precept are cases of immunity of jurisdiction and enforcement established by norms of public international law.”

Civil cases

Article 22: *“In civil law cases, Spanish courts and tribunals shall have competence in the following cases:*

- 1. With exclusive character, in cases of tax law and rental of real estate located in Spain; in cases of constitution, validity, nullity or dissolution of companies or legal entities with domicile in Spain, including the agreements and decisions taken by their management organs; in cases of validity or nullity of inscriptions in Spanish registers; in cases of inscription or validity of patents and other rights subject to deposit or register when such deposit or register has been applied for or been carried out in Spain; and in cases of recognition and implementation in Spanish territory of international judicial resolutions and decisions of arbitrators.*
- 2. With general character, when the implicated parties have expressly or tacitly accepted the jurisdiction of Spanish courts or tribunals, as well as when the accused has his residence or domicile in Spain.*
- 3. Where the preceding criteria do not apply; in cases of declaration of a person as missing or deceased, when the disappeared person’s last residence was in Spanish territory; in cases of legal incapacitation and protection measures for persons or for the assets of minors or legally incapacitated, when their regular residence is in Spain; in cases of personal and patrimonial relations between spouses, matrimonial nullity, separation and divorce, when both spouses have regular residence in Spain at the time of the lawsuit or when the plaintiff is Spanish and has regular residence*

- in Spain, as well as when both spouses have Spanish nationality, irrespective of their residence as long as they put forward their legal request by mutual accord or consent; in cases of paternal-filial relations, when the son or daughter has residence in Spain at the time of the lawsuit or when the plaintiff is Spanish and has regular residence in Spain; in cases of adoption, when the adopting person or the adopted is Spanish and residing on a regular basis in Spain; in cases of alimony, when the recipient person has regular residence in Spanish territory; in cases of contractual obligations, when these have arisen or must be fulfilled in Spain; in cases of extra-contractual obligations, when the event from which they originate has occurred in Spanish territory or the victim and the person responsible for the damage both have residence in Spain; in cases concerning movable property, if the assets are to be found in Spanish territory at the time of the lawsuit; in cases of succession, when the originator or deceased's last residence was in Spanish territory or he or she possessed immovable property in Spain.*
4. *Further, in cases of contracts of sale and purchase, when the buyer has residence in Spain if it's a case of purchase on instalments of movable objects or of loans destined to finances their acquisition; and in the case of any other contract of service provision or concerning movable property, when the contract agreement is preceded by an offer made personally or through publicity in Spain, or the consumer has carried out the acts necessary to enter the contract in Spanish territory; and in litigation concerning the operation of a branch office, agency or commercial establishment, when this is located in Spanish territory. Cases of bankruptcy shall be resolved in accordance with the law specifically regulating the matter.*
 5. *In cases of adopting protective or provisional measures, to be fulfilled in Spain, for persons or assets in Spanish territory.”*

Criminal cases:

This issue is regulated in article 23 of the Organic Law on Judicial Power, in which four principles are distinguished for doctrinal clarification:

Principle of territoriality:

Article 23.1: *“In the penal order it corresponds to Spanish jurisdiction to try cases of crimes and offences committed in Spanish territory or aboard Spanish ships or airplanes, without detriment to the international treaties ratified by Spain.”*

Principle of personality:

Article 23.2: *“Spanish criminal jurisdiction includes all the acts and events considered by Spanish criminal law to be crimes, even if they are committed outside the national territory, as long as the criminally responsible persons are Spanish or foreigners having acquired Spanish nationality after the commission of the crime, and as long as the following requisites are fulfilled:*

- a. *The act must be punishable in the place of execution, unless an international treaty or a normative act by an international organization of which Spain is member dispenses with this requisite.*
- b. *The aggrieved or the Public Prosecutor's office must take legal action with the Spanish court system.*
- c. *The criminal must not have been absolved, pardoned or convicted outside Spain or, in this last case, must not have served the sentence in full. If the*

sentence has only been served in part, it will be taken into account to reduce the sentence proportionally.”

Principle of protection

Article 23.3: *“Spanish jurisdiction shall include acts committed by Spanish citizens or foreigners outside the national territory, when the acts may be categorized in Spanish law as any of the following crimes:*

- a. Treason and crimes against the peace and the independence of the State.*
- b. Crimes against the King or Queen, his or her consort, the successor to the Crown or the regent.*
- c. Rebellion and sedition.*
- d. Falsification of the royal signature or seal, the seal of the State or the ministers and public and official seals.*
- e. Falsification of Spanish currency and issuing of false currency.*
- f. Any other falsification which directly harms the credit or interests of the State, as well as introduction or issuing of the falsifications.*
- g. Attacks on Spanish authorities or public servants.*
- h. Crimes committed in the exercise of their functions by Spanish public servants residing abroad, and crimes against the Spanish Public Administration.*
- i. Crimes related to control of foreign exchange.”*

Principle of universality:

Article 23.4: *“Spanish jurisdiction shall also have competence to try acts committed by Spanish citizens or foreigners outside the national territory, when the acts may be categorized in Spanish law as any of the following crimes:*

- a. Genocide.*
- b. Terrorism.*
- c. Piracy and hijacking of airplanes.*
- d. Falsification of foreign currency.*
- e. Crimes related to prostitution and the corruption of minors or incapable persons.*
- f. Illegal traffic of psychotropic and toxic drugs and narcotics.*
- g. Crimes related to female genital mutilation, providing that the responsible are located in Spain.*
- h. Any other crime that in accordance with international treaties or conventions should be prosecuted in Spain.*

Article 23.5: *“In the situations envisaged in numerals 3 and 4 of this article (principles of protection and universality), the condition established under point c of numeral 2 of this*

article. (That the criminal must not have been absolved, pardoned or convicted outside Spain or, in this last case, must not have served the sentence in full.)”

It is worthwhile to mention sentence 237/2005 of the Constitutional Court’s Second Chamber, of 26 September 2005², which endorsed that Spain should investigate the crime of genocide in Guatemala, even where the victims were not Spanish. It was asserted that the principle of universal jurisdiction has priority over the existence or not of national interests. In this way the Constitutional Court overturned the decision of the High Court’s Penal Chamber of not accepting the competence to investigate these events, and the decision of the Supreme Court to limit the investigation to Spanish victims.

14. When parent and subsidiary entities are involved in a multinational setting, how does a court assert personal jurisdiction over parents or subsidiaries located out of country? What are the standards for overcoming limitations on jurisdictions over business entities within a multinational corporation?

A future version of this response will provide an answer this question.

15. How may a court attribute the actions of a subsidiary to a parent business entity, i.e. “pierce the corporate veil”?

In Spain the doctrine of “lifting the veil” is applicable. It was first admitted in the sentence of the Supreme Court on 28 May 1984 concerning extra-contractual responsibility, and has later been applied also in other fields.

The use of this technique is based on the defence of three fundamental principles:

- Prohibition of secrecy in commercial dealings.
- Principle of transparency in trade operations.
- Principle of prohibition of confusion of patrimony.

The purpose of this lifting of the veil is to bring to justice people hiding from their legal responsibility. In accordance with this theory the events come to be revealed as they really are, avoiding that a person may escape his legal obligations through the use of intervening persons.

In civil law this technique is much used. It is based on resolving the conflict between legal security and justice in accordance with the facts and circumstances of each case, by way of equity and acceptance of the principle of good faith, employing the practice of penetrating the personal substratum of companies with status as legal entities in order to avoid damage to private or public interests and prevent the use of that independence from doing harm to third parties, which in accordance with article 10 of the Constitution is the foundation of the public order and social peace.

In criminal law this principle is equally applicable, meaning that it isn’t necessary to use article 31 of the Penal Code in cases where the real substratum is a physical person in total

² <http://www.tribunalconstitucional.es/Stc2005/STC2005-237.htm>

control of the situation. If the existence of a legal entity is simply an external front which doesn't involve independence of patrimony but is rather merely a commercial modality of the operations of one or more individual subjects, it is not a case of acting in the name of another but rather of acting on one's own behalf but using a legal entity as a front in external relations. In this situation it is permitted to investigate what is "behind" this façade, and any illicit activities committed under the cover of the legal entity may be attributed directly to the individual controlling the same. However, this possibility is to be used only in extreme cases and in a subsidiary manner.

16. What types of actions (civil and criminal) might be asserted against a business entity with respect to activities taking place outside of your jurisdiction by a business entity over which your courts have jurisdiction?

A future version of this response will provide an answer this question.

17. If plaintiffs wanted to sue a business entity in your jurisdiction, what are some of the jurisdictional and procedural obstacles that they (and their lawyers) might face?

A future version of this response will provide an answer this question.

18. Do the civil courts of your country sometimes decline to exercise jurisdiction over matters where the events occurred in another country and/or the majority of witnesses and the bulk of other evidence is outside of your country, thereby making it more convenient for the parties to litigate in the courts of another jurisdiction (sometimes referred to as the doctrine of *forum non conveniens*)?

No.

Article 36 of the Law on Civil Indictment 1/2000 of 7 January 2000 establishes that:

"1. The scope and limits of the jurisdiction of Spanish civil courts shall be determined by the Organic Law of Judicial Power and the international treaties and conventions to which Spain are a party.

2. Spanish civil courts shall abstain from trying cases that are brought to them, when any of the following circumstances apply:

- When a lawsuit is brought against subjects or assets enjoying immunity of jurisdiction or enforcement in accordance with public international law.

- When an international treaty or convention to which Spain is a party declares the issue to belong exclusively to the jurisdiction of another State.

- When the defendant doesn't appear in court, in cases where the international competence of Spanish courts depends entirely on the tacit acceptance of the parties."

19. Are there any checks and balances on prosecutorial discretion or decision making (e.g. when a prosecutor declines to prosecute a case, are there any measures in place to review his or her decision or an appeals mechanism?)

In the case of the "Ministerio Fiscal", which corresponds to the Public Prosecutor's Office:

The decision to prosecute is NOT discretionary. By virtue of the principle of legality and in accordance with Article 105 of the Law on Criminal Indictment³, the prosecutor is obliged to initiate penal action against any act or event that has the character of crime or offence in accordance with the substantive penal law.

Article 5 of the Organic Statute of the Public Prosecutor's Office 50/1981 of 30 December 1981 speaks to the same effect:

“The Public Prosecutor's Office shall receive complaints and reports of criminal acts and conducts and forward these to the judicial authority or, when it doesn't find any basis for initiating legal action, close the file. In the last case, the party having reported the case or made the complaint shall be notified of the decision.”

The Public Prosecutor's Office has no authority or capacity to decide on the convenience or opportunity of persecuting a particular case. The criterion of accusation is always and exclusively the law.

Some writers, however, hold that there exist certain manifestations of the principle of opportunity, such as the regulation on the conformity of the defendant, the necessity of formal complaints (in cases of semi-public crimes) and filing of lawsuits (in cases of private crimes), pardon by the offended etc.

None of these cases are applicable to international crimes, and neither is the “abbreviated procedure”.

Hence, the Public Prosecutor's possibilities for making transactions (not in the strict sense of the term) seem limited to the those envisaged in legal regulations, as in article 171.2 of the Penal Code:

“If anyone should demand from another a ransom or recompense under the threat of revealing or spreading facts related to his or her private life or familiar relations that are not publicly known and may affect his or her reputation, credit or interests, the culprit shall receive the following punishment:

- *Prison for 2 to 4 years, if the whole or part of the demanded ransom has been received.*
- *Prison for 4 months to 2 years, if no ransom has been received.*

3. If the act described in the previous numeral should consist in revealing or reporting the commission of a crime, the Public Prosecutor may, in order to facilitate the punishment of the extortion, abstain from bringing legal action against the crime the revelation of which was part of the threat, except where this crime would have been punished with a prison

³ Article 105 Law of Criminal Indictment: Civil servants of the Public Prosecutor's Office have the obligation to carry out, in accordance with the regulations of the law, any penal action that they deem legitimate, irrespective of whether there is any particular plaintiff in the cases, with the exception of those cases which the Penal Code reserves exclusively for private lawsuits. Penal actions must also be initiated in cases of crimes against honesty which, in accordance with the Penal Code, must be previously reported by the interested parties, except in cases where such crimes affect helpless persons or persons lacking legal personality, when the Public Prosecutor's Office must initiate proceedings directly.

sentence of more than two years. In this last case, the judge or court may reduce the sentence by 1 or 2 degrees.”

On the possibility of revising the Public Prosecutor’s decision through the “abbreviated procedure”:

Article 773.2 of the Law on Criminal Indictment establishes the possibility of repeating the complaint or report to the competent judge:

“When the Public Prosecutor’s Office is informed of an act or event of apparent criminal nature, be it directly or by way of a complaint or report, it shall carry out, or order the Judicial Police (Policía Judicial) to do so, the proceedings it deems pertinent to prove the existence of the fact and determine the identity of those responsible.

The prosecutor shall close the case file when the fact or event doesn’t have the characteristics of a crime, communicating and explaining the reasoning behind this decision to the party who complained of being offended or harmed, to allow this party to repeat its complaint to the Examining Magistrate.”

For the intermediate phase, Article 782.2 adds:

“If the Public Prosecutor’s Office should ask for the case to be dismissed and the complainant hasn’t appeared in Court to manifest his will to sustain the accusation or complaint, before agreeing to the dismissal the judge may do the following:

- a. *Order the Public Prosecutor’s Office to communicate its intention to dismiss the case to the offended persons that haven’t appeared in Court, so that these may appear in Court within 15 days to defend their claim if they so should wish. If they don’t do so within the established time limit, the dismissal requested by the Public Prosecutor’s Office shall be granted, without detriment to what is established in the following paragraph.*
- b. *Remit the case to the prosecutor’s superior for him or her to decide whether the accusation should continue or not. The superior must communicate his or her decision to the Examining Magistrate within 10 days. Upon agreeing to dismissal, the Examining Magistrate declares prison and any other precautionary measures to be henceforth without effect.”*