

RECOVER – Grant Agreement No. 101091375**III RESEARCH QUESTIONNAIRE - IV WORKPACKAGE****Assessing the possibility to apply the REG to legal persons and enterprises***December 2023 – March 2024***Section I – The models of confiscation against legal persons: harmonisation**

In Spain, companies can be held criminally responsible for the offences committed by their employees if those actions were carried out in the course of the employees' work duties and were intended to benefit the company. This is known as corporate criminal liability.

As of 2010 under Spanish Criminal law (herein after SCC) latterly clarify in 2015, legal persons can be charged with a wide range of criminal offenses, including fraud, corruption, environmental crimes, and other illegal or unethical activities. If a company is found guilty of a crime, it may face fines, asset confiscation, and other penalties. In addition, to prevent criminal liability, companies in Spain are encouraged to implement compliance programs that aim to prevent illegal or unethical behavior. These programs may include training for employees, policies and procedures to ensure compliance with the law, and systems for reporting and addressing any potential wrongdoing. By taking proactive steps to prevent criminal behavior, companies can help to protect themselves from criminal liability.

As highlighted in Instruction 1/2016 and Circular 1/2011 of the GPO Article 31 bis of the SCC establishes a two-fold normative mechanism for the attribution of liability based on the so-called vicarious liability regime combined with a *numerus clausus* system of crimes listed in the SCC.

1. **How was the Directive 2014/42/EU transposed in Your national legal order and how did this affect national law in relation to legal persons?**

As stated in our First National Report, Spain did notify the Commission the timely transposition of the Directive 2014/42/EU into its national legal system by mean of the Organic Law nº 1/2015 amending the Spanish Criminal Code (hereinafter SCC). This implementation triggered relevant changes at national level in relation to several legal concepts, clarifying the criminal liability of legal person´s regime previously introduced by mean of Law 5/2010.

Indeed, five years before, criminal liability of legal persons was introduced in the SCC, by mean of the Organic Law nº 5/2010. Criminal liability introduced by this Act as a result of both the process of international approximation of criminal law and the need to tackle the growth of corporate criminality, especially in the context of economic crime (as underlines GPO Instruction 1/2016 on the reform of 2015 and Circular 1/2010).

Criminal liability introduced by the Act turns around a principle according to which criminally punishable conduct as committed by natural persons acting **on behalf of** (in the name), **in the capacity, for the direct or indirect benefit of** or **within the scope of the activities of** a legal person will be directly imputable to that legal person (this is the so-called criminal responsibility by transfer, indirect, derivative, or vicarious or by representation, based on the principle of immutability of a crime to a legal person or vicarial principle, differing from the unconstitutionally objective liability). Under the Spanish legal system, the legal person itself does not commit the crime but becomes criminally liable for the crimes committed by others (natural persons). So this system is not based on the autonomous liability of the companies. This approach is in line with EU legal framework¹

However, it is worth mentioning that spite of the vicarious model of the SCC, there are elements that feature a certain autonomy to the company's liability as the possible liability of the legal person does not depend on the prior declaration of criminal liability of the

¹ Art. 5 of Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA. Article 10 of Directive 2013/40/EU of the European Parliament and of the Council of 12 August 2013 on attacks against information systems and replacing Council Framework Decision 2005/222/JHA or Article 6 of Directive 2014/62/EU of the European Parliament and of the Council of 15 May 2014 on the protection of the euro and other currencies against counterfeiting by criminal law, and replacing Council Framework Decision 2000/383/JHA

natural person (e.g., an employee or member of the statutory body). Failure to identify the perpetrator of the crime or the impossibility of conducting the proceedings against him does not exclude the liability of the legal person (art. 31 ter.1 SCC). . The latter may be held fully liable despite the existence of circumstances that affect the defendant's or whether he or she passed away or flight from justice (art. 31 ter.2).

In addition, the expression "crimes committed" also allows to include, in addition to the different forms of perpetration and the different forms of participation, any attempted crime.

Furthermore, legal persons liability has specific modifying circumstances and its own system of penalties, with particular rules of application (arts. 31 quater and 66 bis SCC). With respect to fines, art. 31 ter SCC links the liability of the legal person with that of the natural person, by establishing a sort of compensation rule of both liabilities. Finally, the autonomy of the liability of the legal person is considerably reinforced by the exculpatory value granted to "*organizational programs*", which merits a more detailed separate study.

LO 1/2015 maintains the essential basis of attribution of criminal liability to the legal person on the basis of the so-called vicarious or representative system provided for in letters a) and b) of art. 31 bis 1° SCC. Both titles of imputation require, as before the reform, the prior commission of a crime by a natural person in the specific circumstances under the specific circumstances legally established. According to the SCC, two conditions have to be fulfilled in order for criminal liability of a legal person to be established. First, a crime has to be committed by a natural person (the SCC introduces an exhaustive list of crimes imputable to a legal person, see below). Secondly, there must be a causal link between (i) the interest or activity of a legal person and (ii) the illegal conduct of a natural person whose conduct is imputable to that legal person. Finally, the SCC set out the scheme distinguishing between acts committed by the persons with greater responsibilities within the entity and those generated by persons unduly controlled by first ones.

However, 1/2015 made step forward towards the recognition of the autonomous liability of the legal person by means of the regulation of the *organizational and management programs*, to which it attributes an exonerating value under certain conditions.

In general terms, SCC introduces three “categories” of natural persons whose illegal conduct is imputable to a legal person:

- statutory body or a member of the statutory body of the legal person,
- persons vested with supervisory powers in the legal person or
- other person legally authorized to represent or decide on behalf of the legal person

According to the SCC State, Regional and Local Administration entities and certain legal persons established by law are exempt from criminal liability. However, it should be stressed that the fact that these entities may hold shares in other legal persons does not shield such legal persons from being equally criminally liable under the adopted framework. Actually, Organic Law 1/2025 extends the liability regime to public corporations (new Article 31 quinquies SCC),

Extra-territorial effects

The SCC enables to assess the criminality of conduct which occurred outside of the Spanish national territory but was committed by a legal person established under Spanish law. The framework may similarly apply to conduct which occurred outside of the national territory, was not committed by a legal person established under Spanish law, but was committed in the interest or for the benefit of a legal person established in Spain. Further, the framework applies also to a foreign legal person’s branch registered in Spain.

Catalogue of crimes imputable to legal persons

The SCC aims to punish crimes occurring predominantly in areas such as international drug trade, human trafficking, sexual abuse, counterfeiting and money laundering, data security and system integrity, preservation of the environment, terrorism, corruption and extremism. In this regard, it should be noted that the scope of the catalogue is a clear indication that compliance with international obligations has been the priority of the legislator. It appears that the pressures of international organizations to achieve compliance served as main drivers for the introduction of the Act and to a great extent

pre-determined the scope of the final catalogue. The Spanish legislation so far has held legal persons liable only indirectly or under a *numerus clausus* regime which allows confiscation of finances or assets of a legal person only re listed offences.. Namely, confiscation of assets in Spain is possible when one of the following crimes has been committed:

1. Money laundering (Article 302 (2) SCC). Criminals who use complex bank transfers and business transactions to conceal proceeds of crime.
2. Illicit trade in human organs (Article 156 bis (7) SCC)
3. Torture and other crimes against moral integrity (Art. 173 SCC)
4. Trafficking in human beings, (Article 177 bis (7) SCC)
5. Prostitution/Sexual exploitation (Art. 189 bis SCC)
6. Sexual harassment (Article 184 (5) SCC)
7. of children and child pornography
8. Swindling and frauds (Art. 251 bis SCC)
9. Bankruptcy (Arts. 258 ter y 261 bis SCC)
10. Damages (Art. 264 quarter SCC)
11. Intellectual Property related crimes (Article 288 SCC)
12. Crimes against the foreign citizens (Art. 318 bis (5) SCC as of 2015)
13. Urban planning related offences (Art. 319 (4) SCC)
14. Environmental offences (Article 328 SCC)
15. Crimes against animals (Article 340 quarter SCC as of April 2023)
16. Nuclear energy related offences (Article 343 SCC)
17. Risk offences triggered by explosives (Article 348 SCC)
18. Crimes against public health (Article 366 SCC)
19. Drug trafficking (Article 369 bis SCC)
20. Counterfeiting of currency (Article 386 (5) SCC)
21. Forgery of documents and any payment mean (Article 399 bis SCC)
22. Offenses committed within a criminal organization, including terrorist groups and organized crime gangs. (Article 580 bis SCC).
23. Computer-related crimes: when computer systems or digital devices are used to commit Cyber-based/related crime like
 - Computer hacking (Article 264 quarter SCC)

- online Fraud (Art. 251 bis SCC)
- Discovery and disclosure of secrets and computer trespassing or personal data theft (or identity theft) (Art. 197 quinquies SCC)
- Solicitation of a minor
- IPTV crimes (Article 288 SCC)

24. Corruption-related offences

- Bribery (Art. 427 bis SCC)
- trafficking with influences (Article 430 SCC)
- Embezzlement of public funds (Article 435 SCC)
- illegal financing of political parties (Art. 304 bis (5) SCC)

25 Tax and Social Security related offences (Article 310 bis SCC) where the thoughtful misrepresentation by a person or company of economic information – such as income and expenditure– to the Spanish Tax Authority, in an attempt to evade taxes, may result in assets being confiscated. Likewise attempting to pay less social security than they legally owe, or who is unlawfully claiming benefits from social security that they are not entitled to.

The only four reckless behaviors committed by natural persons under the circumstances of art. 31 bis SCC able of producing a criminal liability of the legal person are those related to punishable insolvencies or bankruptcy (art. 259.3 SCC), crimes against natural resources and/or environmental offenses (art. 331 SCC), money laundering (art. 331 SCC) and financing of terrorism (art. 576.5 SCC).

In relation to the specific offences listed in the SCC, Article 31 bis of the SCC provides for the following general requirements for the corporate criminal liability to be considered:

“1. In the cases foreseen in this Code, legal persons shall be held criminally liable for:

a) The criminal offences committed on their behalf of or at their own risk/account, and to their direct or indirect benefit, by its legal representatives or those that acting either individually or as members of a body of the legal person are authorized to take decisions in their behalf or have organizational and/or regulator powers over such legal person. (it

refers to the factual link committed by persons with greater responsibilities in the entity, within criminal liability of legal persons by transfer or vicarious model)

b) Legal persons shall be criminally liable for the criminal offences committed when carrying out their corporate activities and, at their risk/account, and to their direct or indirect benefit, by those who, being subject to the authority of the natural persons mentioned in the preceding paragraph, were able to commit the relevant offences due to the serious breach of supervision, surveillance and control of their activities by the natural persons mentioned in the preceding paragraph, given the specific circumstances of the case. (factual link generated by other employees not properly monitored within the same criminal liability of legal persons by transfer or vicarious model)

2. If the criminal offence was committed by the persons indicated in paragraph a) of the previous Section, the legal person shall be exonerated from any criminal liability if the following conditions concurs:

1th The management body has adopted and effectively implemented, before the offence is committed, organizational and management models that include appropriate measures of surveillance and control to prevent criminal offences of the very same nature or to significantly reduce the risk of perpetration thereof.

2nd . The supervision of the functioning and compliance with the implemented prevention model has been entrusted to a body of the legal person with self-governing powers of initiative and control or has been legally entrusted with the function of supervising the effectiveness of the legal person's internal controls.

3rd The individual offenders have perpetrated the criminal offence fraudulently eluding the organizational and prevention models; and

4th An omission or insufficient exercise of the function of supervision, surveillance, and control on the part of the body to which the second condition refers has not occurred.

When compliance with the preceding circumstances has been only partially proved, a reduction of penalty should be considered by the Courts.

3. In the case of a legal person of small size, the functions of supervision to which the second condition of Section 2 refers may be taken on directly by the relevant management

body. For this provision, legal persons of small size shall be deemed those that are authorized to submit an abbreviated profit and loss statement.

4. If the criminal offence were perpetrated by the persons indicated in Subparagraph b) of Section 1, the legal person shall be exempt from liability if, before the commission of the offence, it has adopted and effectively implemented an organizational and management model adequate to prevent criminal offences of the very same nature of the given one or to reduce in a significant way the risk of the perpetration thereof.

In these cases, the attenuation foreseen in the second Paragraph of Section of this Article shall also be applicable.

5. The organizational and management model mentioned in this provision shall comply with the following requirements:

1st Identifying the remit of activities related to the relevant offences to be prevented

2nd Set up of protocols or internal rules of procedures describing the concrete making process for shaping the will of the legal person, the adoption of decisions and correspondent implementation.

3rd Proper Management models for financial assets shall be available aimed at preventing the relevant offences.

4th Obligation of notifying possible risks and cases of noncompliance to the body entrusted with the surveillance of the functioning of and compliance with the prevention model.

5th A disciplinary regime to adequately punish not complying with the measures established in the model shall be put in place.

6th Carrying out a periodic audit of the model and, eventually, its amendment whenever material violations of its provisions occur or whenever changes in the organization, control structure or the activity make this necessary.

New definition of natural persons in paragraph 1 a) of Article 31 bis SCC significantly broadens the ring of subjects of this vicarious imputation criterion, which makes it possible to include those who, without being properly speaking administrators or legal representatives of the company, are part or members of its corporate bodies with the

decision making capacity, as well as middle management, individual with power-of-attorney, and other persons to whom certain functions have been delegated, including the risk control functions held by the compliance officer.

In parallel, Article 129 SCC provides for a complementary/double punishment regime in relation to concrete offences committed by entities without legal personality. Namely, offences related to genetic manipulation (Art. 162 SCC); alteration of prices in public procurement tenders or public auctions (Article 262 SCC); obstruction to inspection activities (Art. 294 SCC); offences against the worker's rights (Art. 318 SCC); counterfeiting of money (Article 386 (4) SCC); criminal organisations and groups (Art. 570 quarter SCC) In any case, Courts in Spain will always need to determine that, when it comes to confiscation, given assets should be the outcome of the above mentioned criminal categories.

Being said this, art. 129 of the SCC set up:

“1. In case of offences committed within, in collaboration with, through or by means of companies, organizations, groups or any other kind of entities or groups of persons without legal personality, which are not comprised by Article 31 bis of this Code, the Court may issue a decision applying to them one or several ancillary consequences to be imposed on the perpetrator with the content provided for in paragraph 7 [c) to g)] of Article 33 of this Code (on penalties applicable to legal persons)². Final banning or prohibition to carry out any activity, even if lawful, can also be decided.

2. Ancillary consequences mentioned before may only be applied to firms, organizations, groups or entities or associations when it is specifically foreseen in this Code or in relation to offences for which criminal accountability of legal persons is legally provided.

² c) Suspension of its activities for a term that may exceed five years;

d) Closure of its premises and commercial establishments for a term that may not exceed five years;

e) Prohibition to carry out the activities through which it has committed, favoured or concealed the criminal offence in the future. Such prohibition may be temporary or definitive. If temporary, the term may not exceed fifteen years;

f) Banning of participation in public procurement tenders; disqualification from the ability to receive grants, subsidies or other benefits (such as contributions from EU structural funds); to enter into contracts with the public sector and to enjoy tax or Social Security benefits and incentives, for a term that may not exceed fifteen years;

g) Judicial intervention/administration to safeguard the rights of the workers or creditors for the time deemed necessary, which may not exceed five years.

3.- Temporary closure of premises or commercial establishments, suspension of the corporate activities and judicial management supervision (judicia intervention) might also be ordered by the Investigating Judge as a precautionary measure during the investigation phase.

Though the combined effect of fines and confiscation is recommended as EFFECTIVE, PROPORTIONATE, AND DISSUASIVE SANCTION REGIME (e.g. principle 9 of 2017 *High Level Principles on the Liability of Legal Persons for Corruption*), the criteria by which the Spanish Legislator allocates one or the other regime to certain offenses is not always clear. Circular 1/2011 of the GPO already criticized the defective legal construction of this dual sanctioning route provided in arts. 31 bis and 129 SCC. Particularly striking is the case of the crime of counterfeiting of currency (art. 386 SCC) where, after the legal amendment of 2015, coexists both regimes provided in art. 129 and art. 31 bis.

Difficulties to fit this double sanctioning conduit for legal persons and entities not endowed with legal personality are to be found in the irrelevance of the given distinction between legal and illegal entities in today's real life of business, where other more relevant criteria of imputation would be best placed and used, such as the economic unit (followed in tax matters to determine the groups of companies) or the existence of an autonomous patrimony of the collective entity, in order to prevent that, for instance, temporary joint enterprises (UTEs) which do not have legal personality could be outside this tailor-made repressive framework for legal persons.

In any case, there is some confusion in the Criminal Code as to which offenses are referable to legal persons, which in the current selection does not even extend to all economic crimes that can be committed by them. Outside of economic crime, other offenses such as crimes such as injury, illegal detention or even homicide are not included in the catalog of crimes foreseen for legal persons, probably for reasons of criminal policy, although it is possible to imagine this type of violent offences committed for the clear and direct benefit of an entity in the context of a severe business competition.

- 3. Which models of confiscation applicable against natural persons, can affect indirectly the assets of legal persons? E.g. If the proceeds are got by the legal persons or when the confiscation involves the share in legal entity held by the convicted person.**

For forms of confiscation also applicable to natural persons, you may refer to the answers to the previous questionnaire, highlighting particular issues related to the application of confiscation to legal persons.

In Spain, each model of confiscation (see our first National Report) is only applicable to natural persons but they could indirectly affect the assets of legal entities.

In this situation, the main problem is when beneficial owners or shareholders of a company are not clear enough and investigations must be conducted to clarify this relevant aspect. Spanish Criminal Procedure Act (hereinafter SCPA)'s lack of adequate rules and this lack of legal basis is not the steady scenario we need in relation to financial investigations. It is unclear whether the Judge can order law enforcement authorities to conduct an investigation on its own. Additionally, it is also unclear whether the Prosecutor must be consulted before conducting this type of investigations when the Investigating Judge acts *ex officio*.

- 4. Which models of confiscation can be applied directly against legal persons? Please, provide us with the related legislative provisions. Does your country provide for criminal liability of legal persons?**

See answer to question 1.

According to the Organic Law 1/2015, the extended confiscation was also established under the *numerus clausus* system in article 127 bis of the SCC³ however confiscation models are only applicable to natural persons.

³ Article 127 bis

1. The Court shall also order the confiscation of the goods, assets and gains pertaining to a person convicted of any of the following criminal offences when it is determined, based on well-founded objective evidence, that the goods or assets were obtained from a criminal activity, and their legal origin cannot be accredited:

- a) offences involving trafficking in human beings;
- b) offences related to prostitution and the sexual exploitation and corruption of minors and criminal offences of sexual abuse and aggression against minors under the age of sixteen;
- c) Computer-related criminal offences set forth in Sections 2 and 3 of Article 197 and Article 264;

5. Which is the object of the confiscation and its meaning/interpretation? (Proceeds – gross or net of expenses -, products of the crime, instruments of the crime, etc.). Clarify if and in which case it is possible to confiscate the ‘value equivalent’.

As can be seen in our first national Report, according to art. 127 SCC, all penalties imposed as punishment for an intentional criminal offence shall lead to the confiscation of all criminal assets and goods, means or instrumentalities used when preparing or executing the offences, as well as the ill-gotten gains, whatever the transformations these may have undergone.

In a case scenario where legal persons or bodies without legal personality are used to conceal the ownership or any power of disposal over the goods or effects in order to hide or hinder the identification of the true ownership of the assets, added-value confiscation

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- d) offences against property and against the socio-economic order of a reiterated nature and in case of recidivism;
 - e) offences related to punishable insolvency;
 - f) offences against intellectual or industrial property;
 - g) private or business corruption;
 - h) offences of receiving stolen goods set forth in Section 2 of Article 298;
 - i) offences of money laundering;
 - j) offences against the Inland Revenue and the Social Security;
 - k) offences against workers’ rights set forth in Articles 311 to 313;
 - l) offences against the rights of foreign citizens;
 - m) offences against public health set forth in Articles 368 to 373;
 - n) offences of counterfeiting of currency;
 - o) bribery;
 - p) misappropriation;
 - q) terrorism;
 - r) participation in a criminal organisation or group.

2. To the effects outlined in Section 1 of this Article, the following aspects shall be evaluated in particular, among others:

- 1. The disproportion between the goods and assets in question and the lawful income of the convicted individual.
- 2. The concealment of the ownership or any power of disposal over the goods or effects via the use of natural or legal persons or bodies without legal personality, or tax havens or territories with no taxation that hide or hinder the identification of the true ownership of the assets.
- 3. The transfer of the goods or assets via transactions that hinder or prevent ascertaining their location or destination and that have no valid legal or economic justification.

3. In these cases, the provisions set forth in Section 3 of the preceding Article shall also apply.

4. If the individual is subsequently convicted of criminal offences similar to those committed previously, the Court shall assess the extent of the previous confiscation upon resolving the confiscation ordered in the new proceedings.

5. The confiscation referred to in this Article shall not be ordered when the criminal activities from which the goods or assets were obtained have prescribed or have already been subject to criminal proceedings, resulting in an acquittal or a ruling for acquittal with the status of res judicata.

shall also apply on mandatory basis (Article 127 bis (3) in relation to Article 127 (3) SCC).

- 6. Which are the elements to be realised and/or to be assessed for its application? e.g., conviction for a crime, property or availability of the confiscation object, link -between the crime and the proceeds/instruments/products, etc., disproportionality (“*the value of the property is disproportionate to the lawful income of the convicted person*”), illegal origin (suspects/presumption of illegal origin), temporal connection with the crime, the lack of a justification of the legal origin by the owner, etc.**

According to article 127 (1) of the SCC, as far as intentional crimes are concerned (art. 127.1 SCC), Spanish courts shall order the confiscation of goods, instrumentalities and proceeds of crime. Confiscation requires a final conviction sentence for any intentional crime. Meanwhile, a freezing order would be available to seized both effects and direct or indirect proceeds of crime as well as goods, means or instrumentalities used when it was committed, whatever changes it may have experienced. It refers to goods of any kind and of any nature (furniture, real estate, expendable, non-expendable, etc.). As regards reckless crimes (art. 127 (2) SCC), for which a custodial sentence over the threshold of one year imprisonment is foreseen, confiscation is a possibility (not mandatory, as in the case of intentional crimes, but under the discretionary criteria of the Court in a motivated decision assessing proportionality in accordance with Art. 128 SCC). Since legal entities cannot be incarcerated confiscation should be always mandatory.

As mentioned before, the only four reckless behaviors committed by natural persons under the circumstances of art. 31 bis SCC entitle of producing a criminal liability of the legal person involved are those related to

- punishable insolvencies or bankruptcy (art. 259.3 SCC),
- crimes against natural resources and/or environmental offenses (art. 331 SCC),
- money laundering (art. 331 SCC) and
- financing of terrorism (art. 576.5 SCC).

Lack of proportionality and presumption of illegal origin are in place for the extended confiscation provided under art. 127. Quinquies (1) SCC. In these cases, the Judge needs to assess whether the defendant is or has been convicted for any of the criminal offences referred to in Article 127 bis.1 SCC double checking the *numerus clausus* system in place for those offences that can be only committed by a legal person. In addition the judicial authority has to assess whether that the criminal offence was committed in the context of a continuous, prior criminal activity and that there is well-founded *prima facie* evidence that a significant part of the defendant's assets was obtained through prior criminal activity and that the gains are over 6,000 euros.

Authentic interpretation of these concurrent circumstances is set out in the SCC for the purpose of assessing *prima facie* evidence. E.g. Disproportionality between the goods and assets and the lawful income of the defendant; the concealment of the ownership or any power of disposal over the goods or effects via the use of natural or legal persons or bodies without legal personality, or tax havens or territories with no taxation that hide or hinder the identification of the true ownership of the assets; and finally the transfer of the goods or assets via transactions that hinder or prevent ascertaining their location or destination and that have no valid legal or economic justification.

7. Which are the elements to demonstrate in order to apply the *freezing order* against the legal persons?

In accordance with Article 31 ter (1) of the SCC criminal liability of legal persons shall be applicable whenever there is record of a criminal offence being committed by a person who holds office or carries out the duties referred to in Article 31 bis SCC, even if the specific natural person responsible has not been individually identified, or it has not been possible to prosecute that person.

When fines are handed down to both (natural and legal persons) as a consequence of the committed criminal offences, the Courts shall modulate the respective amounts, so the resulting sum is not disproportionate in relation to the seriousness of such offences.

Art. 31 (2) SCC provides that “Whenever there is a concurrence, in the persons who have actually perpetrated the acts (or those who have made these possible due to lack of

supervision), of circumstances that affect the culpability of the defendant or aggravate his responsibility, or the fact that those persons have died or flight, shall not exclude or modify the criminal liability of legal persons, without prejudice to circumstances that mitigate criminal liability of a legal person provided in article 31 quinquies SCC.

Thus, once again, the only limitation stems from the *numerus clausus* system established in SCC for the criminal liability of legal persons.

8. Can this model of confiscation be applied when the crime is statute barred (i.e. after the prescription) or somehow (in particular circumstances) without the conviction?

The SCC applies the same prescription rules to crimes committed by legal or natural persons.

However, NCBC seems to pave the way for natural persons as far as the separate confiscation proceedings is concerned, since art. 803 b. v. 2. b) of SPCC reads: “In particular, this procedure will be applicable in the following cases: (...) b) Where requested as a result of the commission of a punishable act whose culprit has died or cannot be tried as they are in default or unable to appear at the trial.”

Failure or inability to appear in Court can occur for a legal entity in a criminal proceeding. The mentioned art. would have been clearer if it had regulated terms strictly associated with legal persons, such as liquidated or bankrupt. Even though the Act was passed in 2015, we are unaware of any case law interpreting this art., since only about 10 cases have been conducted by NCBC in Spain since then.

9. Which is the legal nature of the confiscation against legal persons? (a criminal sanction - accessory or principal criminal penalty -, a preventive measure - ante delictum criminal prevention measure -, security measure in a broad sense, administrative measure, civil measure in rem, a civil consequence of committing an offense - provided for by criminal law -, another type of autonomous - sui generis - instrument, etc.)

The legal nature of the confiscation in Spain is an ancillary consequence and is the same for legal and natural persons, as we have stated on several occasions in this report.

The very recent Supreme Court judgment 81/2024, passed on 25th January 2024, establishes that confiscation – even before the reform implemented by LO 1/2015, on 30th March 2015, transposing Directive 2014/42/EU- is a *sui generis* consequence of a plural nature, distinct from punishment and security measures.

The Court also held that it is "a third class of criminal sanction, thus following Germanic Law's model of regulation of criminal sanctions (Swiss Penal Code or German Penal Code), the SCC establishes a third kind of penalties under the heading of legal consequences or ancillary consequences. Accordingly, we have noted in STS 1528/2002, 20th September, among others, that confiscation, although not included in article 33 of SCC catalogue of penalties, constitutes a sanction based on the principles of culpability, proportionality, relevance and legality." (STS 299/2019, on 7th June 2019)".

10. For each model of confiscation against legal persons:

- a. Which is the procedure for its application? (the qualification/nature, the competent authority, the different steps, etc.)**

The procedural regime provided for the application of freezing and/or confiscation orders is the same for natural and legal persons as described in our First and Second National Reports.

- **Which is the standard of the proof/is the reversal of the burden of the proof admitted?**

In our First National Report, we also explained the standard of the proof. The Supreme Court Judgement n° 81/2024 states that: “... concerning the illicit origin of the property to be confiscated, this illicit origin may be established through indirect or circumstantial evidence and demonstration of the criminal origin - an essential prerequisite for ordering the confiscation which does not require the identification of the specific criminal operations, being enough that the criminal activity is sufficiently proven generically. It cannot be claimed that probation of this origin is the same as the fact discovered and deserving of punishment. In fact, that evidence must necessarily be of a different type. It deals with the specific criminal operation detected as well as the activity carried out by the convicted individual (or owner of confiscated property) before arrest. Police investigations about the accused's long-term involvement in the activity for which he was ultimately convicted may constitute circumstantial evidence. Rational suspicion can be derived if the property to be confiscated does not have a lawful and accredited source of acquisition, or, to put it another way, there is no wealth, sales, business activities, or economic activities to justify the increase in assets. When these data evidence are proven and counterbalanced, it is understood that the property found in the possession of the convicted person is illicit, even if the property does not properly arise from the operation by which the Judge convicts him or her, and therefore, the proceeds of crime could be confiscated.”

b. Which are the safeguards (limitations e.g. proportionality clauses, relevant legal remedies)?

Proportionality clause provided in Art. 128 SCC is also applicable to legal person’s criminal liability and allows the relevant judicial authority to decide on the proportionality of the confiscation of assets and instrumentalities of legal trade considering the nature or seriousness of the criminal offense at stake or whether the civil compensation owed to victims has been fully satisfied.

Article 33 “in fine” of the SCC as regards to judicial intervention/management of companies provides “The intervention may affect the whole of the organisation or be limited to some of its premises, sections or business units. The Court shall determine exactly the content of the intervention and shall determine who shall take charge of the

intervention and within which regularity monitoring reports must be submitted to the judicial body, in the sentence, or subsequently by a preliminary ruling. The intervention may be modified or suspended at any times, following a report by the receiver and the Public Prosecutor. The receiver shall be entitled to access all the installations and premises of the company or legal person and to receive as much information as he/she may deem necessary to exercise his/her duties. The implementing regulations shall determine the aspects related to the exercise of the duties of the receiver, as well as his remuneration or necessary qualifications.

Temporary closure of premises or commercial establishments, suspension of corporate activities and judicial intervention may also be adopted by the Investigating Judge as a precautionary measure during investigation of the case.”

The Spanish Supreme Court also interpreted the application of temporary closure precautionary measure provided in paragraph 3 of Article 129 in its judgment n° 613/2016 setting up that “the fact that the lawful structure and task of the legal person were used by the natural person to commit the offence [does not] necessarily means, as well as the absolute absence of crime prevention measures, that the [legal person] must be dissolved under the terms of [SCC] art 33.7 b). It would be required, at least, to give reasons on a case-by-case basis on the different relevance of its legal activity and the crime committed, looking for a proportionate response both in terms of the seriousness of the offence and to the consequences of its actions [and to the] interests of affected third parties not subject to any kind of liability.”

Legal remedies regime: The confiscation order adopted in the conviction sentence may be challenged on the general legal basis provided for in arts. 790 and followings and 803 of the SCPC. Likewise precautionary measures adopted by the Investigating Judge during investigation phase are subject to the general regime of legal remedies provided under SCPC.

- c. Is the trial in absentia possible in your legal system in order to apply the confiscation?**

Trial in absentia is possible in Spain in relation to confiscation with the following conditions:

- Direct confiscation and confiscation of value.

Trial in absentia is possible whereas the unjustified absence of the defendant, who had been summoned personally, or at his/her provided address or in the person he/she designated person (as mentioned in article 775 SCPC), will not be cause for the adjournment of the trial if the Court considers that there are sufficient elements for prosecution and the requested penalty does not exceed two years of imprisonment or, being of a different nature, when its duration does not exceed six years. Given that the penalties to be imposed to legal persons in Spain as established on art. 33.7 SCC⁴ are lower than 6 years, the trial in absentia will also be possible against legal entities.

As regards to extended confiscation, being the listed crimes under art. 127 bis SCC mostly serious crimes, the trial in absentia would not be ordinarily possible.

The unjustified absence of the duly summoned civil liable third party will not by itself cause suspension of the trial.

- NCBC.

With regards to trial in absentia, if the defendant's absconding is declared by the Court and he/she does not appear in the separate/autonomous confiscation proceedings (Article 803 b. xi. of SCPC), a solicitor/barrister will be appointed *ex officio* and will represent and defend them before the Court.

- Third-party confiscation.

According to the Spanish Criminal Procedural Code, art. 803 ter a to 803 ter d SCPC, non-appearance of the third party affected by the confiscation who was summoned in

⁴ Fine by installments or proportional (to the benefit obtained). Dissolution of the legal person, losing its legal personality definitively, its capacity to act in the legal traffic of carrying out any type of activity, even lawful. Suspension of its activities for a maximum period of 5 years. Closure of its premises and establishments for a maximum period of 5 years.

accordance with the provisions of this law will have the effect of them being absconding declared.

d. For the confiscation without conviction: can this form of confiscation be applied also in case of acquittal?

NCBC cannot be considered as an accessory/ancillary consequence of the criminal penalty since penalties are imposed to the owner of the criminal assets. Furthermore, the Spanish Legislator in the Preamble of Law 1/2015 made a reference to ECHR case-law on NCBC pointing out that "it is not based on the imposition of a sanction attuned to the guilt/culpability of a concrete act, but " it is more comparable to the restitution of unjustified enrichment than to a fine imposed under criminal law, since the confiscation is limited to the real (illicit) enrichment of the beneficiary for the commission of a crime, this does not show that it is a sanction regime". Therefore, considering the above-mentioned authentic interpretation included by the Spanish legislator in the Preamble of LO 1/2015 in line with the Spanish Civil Code, the civil nature of NCBC leads us into the assumption that is not conditioned by the criminal principles of culpability, legality, or presumption of innocence. Thus, the legal nature of NCBC is mainly a civil nature, as the vast majority of the Spanish Academia rightly points out. Additionally, the Supreme Court in Judgment n° 400/2022 passed on the 9th February 2022, stated that NCBC's rule of proof is based on preponderance of the evidence and not on the conviction beyond reasonable doubt.

Non conviction-based confiscation (NCBC) legally needs the concurrence of three successive requirements:

- a) the unlawful patrimonial situation of the goods must be proved in an adversarial proceeding.
- b) when the owner of the assets has died, suffers from a chronic illness that prevent his/her prosecution, there is a risk of prescription of the facts, an **absconding situation** of the investigated person (in absentia), which prevents prosecution of the facts within a reasonable period, or whenever he/she is exempted from criminal responsibility, or it has been extinguished.

- c) that the owner of the assets referred to in the previous requirement has been formally accused, existing rational indications of criminality against him.

The SCC goes beyond the scope foreseen in art. 4 Directive 2014/42/UE, which limited it to the illness or flight of the suspect. It is a *numerus clausus* list of assumptions that does not admit its extensive interpretation to others.

Is worth mentioning that the Spanish legislator did not include the dissolution of the legal entity as an equivalent case to the death of the natural person. In his case, the principle of legality and the prohibition of analogical application of criminal provisions (art. 4.1 SCC) would prevent extending NCBC to assets hold by ended-up legal persons. On the contrary, the actual closure of a legal person (not covert or merely apparent) does operate as a cause for extinction of criminal liability, in accordance with Art. 130.2 SCC, so NCBC could be redirected through art. 127.1.c) SCC.

In addition, in accordance with art. 803.b.v.2. SCPC, NCBC in Spain applies to the following cases:

“a) Where the prosecutor has limited their statement of case to requesting confiscation of assets, expressly reserving their determination for this procedure.

b) Where requested as a result of the commission of a punishable act whose defendant has died or cannot be tried as he/she flight or is unable to appear at the trial.

3. In the event that the prosecutor reserves the action, separate confiscation proceedings may only be initiated when the criminal proceedings has concluded with a final judgment.”

As SCPC requires a previous final judgment, NCBC may apply in case of acquittal when the prosecutor has reserved the action for the NCBC procedure.

Analysing the alternatives, acquittals for statute of limitations violation or any other reason of exclusion from criminal accountability do not pose any additional problems. In the event of an acquittal based on lack of evidence, the NCBC Judge must consider the different standards of proof mentioned before.

10. For each model of confiscation against legal persons, does it comply with the principles of:

- o **legality? legal specificity of a statute?**
- o **non-retroactivity of the /more severe/statute?**
- o **the right to private property?**
- o **the proportionality?**
- o **the right to a fair trial?**
- o **the right to defence?**
- o **the presumption of innocence?**
- o **the ne bis in idem principle?**
- o **and other relevant rights – what sort of?**

As described in our Second National Report and taking in account that apart from the differences that derivate from the *numerus clausus* system for liability, there are no differences between freezing and confiscation for natural or legal persons, we can provide you with the following answers:

- Non-retroactivity principle.

Supreme Court Judgment of 9th February 2022 (n° 400/2022) states in general terms that non-retroactivity principle is applicable to NCBC. However, it distinguishes between punishment and procedural aspect. In principle, it is not possible to apply the confiscation retroactively, but according to the case-law of the Supreme Court (quoting ECHR case-law to support its thesis), NCBC could be enforced if another kind of confiscation was applicable to the person targeted at the time the crime was committed.

- **Proportionality**

Proportionality clause (Art. 128 SCC) allows the relevant judicial authority to decide on the proportionality of the confiscation of assets and instrumentalities of legal trade considering the nature or seriousness of the criminal offense at stake or whether the civil compensation owed to the victim has been fully satisfied.

In addition Article 31 ter (1) SCC provides: When fines are handed down to both (natural and legal persons) as a consequence of the committed criminal offences, the Courts shall modulate the respective amounts, so the resulting sum is not disproportionate in relation to the seriousness of such offences.

- **Right to a fair trial.**

ECHR's Judgment *Sardón Elvira against Spain* was passed on 24th December 2013. In this case the applicant was convicted by the Audiencia Nacional to seven years' imprisonment and a fine of EUR 100 per day during fourteen months for misappropriation of funds as well as two years' imprisonment and a fine of EUR 100 per day for ten months for the offence of forgery of commercial documents.

Spanish Supreme Court reversed this sentence and acquitted him but maintained the NCBC decision. The Supreme Court stated that the Audiencia Nacional had breached the applicant's right to the presumption of innocence. It found that there was no evidence for the conclusion reached by the Audiencia Nacional as regards to the unlawful management of funds invested in a company through which the misappropriation took place. However, the Supreme Court ordered the applicant to reimburse the amount of EUR 88,671.78

ECHR first analyzed if NCBC had a criminal or a civil nature according to the Engels criteria and ECHR reached the conclusion of the civil nature of that kind of confiscation.

Once that civil nature was established, ECHR stated that the Contracting States have greater margin of maneuver when dealing with civil cases concerning civil rights and obligations than they have when dealing with criminal cases. Nevertheless, certain principles concerning the notion of a "fair hearing" in cases regarding civil rights and obligations emerge from the Court's case-law. In so far as is relevant for the instant case, that notion includes the right of the parties to civil proceedings to submit any observations

that they consider relevant to their case. It also includes the principle of equality of arms, which requires a “fair balance” between the parties: each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent or opponents (see *Gorraiz Lizarraga and Others v. Spain*, no. 62543/00, § 56, ECHR 2004-III). This in turn includes the opportunity for the parties to comment on all observations filed, even by an independent member of the national legal service, with a view to influencing the court’s decision.

In view of the first instant case, the ECtHR spots that the Supreme Court found that the arguments put forward by the applicant had fully served to defend him in respect of both criminal and civil liability and that if the applicant’s criminal responsibility could be excluded, the same could not be said of his civil liability under that provision ECHR did not find that there were any compelling reasons to depart from that conclusion.

- Presumption of innocence.

The Spanish Constitutional Court case-law on this particular issue (judgement n° 219 and 220/2006, of 3 July) set up clearly the limits of the right to the presumption of innocence in relation to confiscation, justifying the confiscation of property dealt on regular basis (*a fortiori* applicable to extended confiscation) does not refer to the principle of presumption of innocence, since this rule means that no one can be held criminally responsible for an offense without valid prosecution evidence, which must be referred to the essential elements of the offense and be evaluated by the courts under the rules of logic and experience (...). The presumption of innocence operates "as the defendant's right not to be convicted unless the culpability has been established beyond reasonable doubt" (JCC 81/1998, of April 2nd, LC 3; 124/2001 of June 4th; 17/2002 of January 28th). Having noted the existence of evidence from which the courts considered reasonably proven the guilt of the accused the right to presumption of innocence is no longer in question. " As for the presumption of innocence, the Constitutional Court judgement n° 125/2014 passed on 19th April rejected an application on the basis that the right to the presumption of innocence includes the right to be convicted with valid evidence obtained with respect to the fundamental rights, displayed in trial and stated by the Court beyond reasonable doubt. As this was a case where the confiscation order was based on the ownership of the asset

by the convicted individual and having the judgment respected his presumption of innocence, the allegations of *bona fide* possession of the company were irrelevant because we are not dealing with a third-party confiscation but a direct one". The convicted person was also proven to own the asset through evidence beyond reasonable doubt. Consequently, the Constitutional Court states that there had not been a reversal of the burden of the proof.

As in the majority of European legal systems, in Spain, assets recovery legal instruments are necessarily integrated in criminal proceedings and therefore forfeiture injunctions and confiscations orders must be issued in the framework of a criminal *in personam* proceedings, although it is not necessarily linked to the presumption of innocence and the principle of culpability, considering likewise the proportionality principle and its nature as an "incidental consequence" of the punishment or penalty at stake.

- *Ne bis in idem* principle.

Mentioned Judgment n° 400/2022 issued by the Spanish Supreme Court the 9th February 2022 considers confiscation as a criminal sanction on the sense of the art. 4 of the 7th protocol to the ECHR and consequently establishes that the case-law of the ECHR on the *ne bis in idem* principle would be also applicable. However, as we have seen in the earlier point regarding the non-retroactivity principle, Supreme Court rejects that it could be applicable in that specific case.

11. For each model of confiscation:

- Are there constitutionality issues which have been detected in the legal doctrine and is there any relevant jurisprudence ruling on the constitutionality (or not) of the confiscation measure against legal persons?**

No.

Is there any significant national case law of your Supreme Court on the application of freezing or confiscation measures against legal persons?

No.

12. Are there European Court of Human Rights cases in relation to “Your” model of confiscation against legal persons? Please, explain the position of the ECHR about “Your” model of confiscation against legal persons.

No.

13- Is there any CJEU decision concerning “Your” confiscation model against legal persons?

No.

14. In Your system of law are there other efficient measures to prevent the or react against the involvement of corporations in crime (and in particular in organised crime), in other words alternatives to freezing and confiscation (e.g. in Italy judicial administration or judicial control) for targeting the illegal assets of legal persons?

15. Do you have statistical data on the application of confiscation measures against legal persons at national level? And could you compare them with those against natural persons?

Regarding this matter, there are two statistical sources in Spain, as we mentioned in our second national report. The CGPJ’s⁵ Judicial Statistics Service and the Spanish Public Prosecution Office (PPO) case management system (CRIS)

We do not have data from the CGPJ’s Judicial Statistics Service.

⁵ General Council of the Judiciary (CGPJ).

From the Spanish Public Prosecution Office (PPO) case management system (CRIS), between 2021 and 2024 we observe that Madrid PPO received two freezing orders against legal persons (one in 2021 and one in 2023) and Barcelona PPO one in 2024. As for confiscation orders, Barcelona PPO received one in 2023 and the UCIF⁶ also received one in 2023.

Our second National Report shows that between 2021 and 2023, Spanish PPO received 250 certificates without distinguishing between freezing and confiscation certificates. Regarding 2024, 35 certificates have been received until 20th February.

SECTION II. The application of the Regulation 1805/2018 for the mutual recognition of freezing and confiscation orders against the legal persons.

Article 23 (2) of the REG provides that a freezing or confiscation order issued against a legal person shall be executed even where the executing State does not recognise the principle of criminal liability of legal persons. This provision makes easier the issuance of a certificate by the Spanish issuing authority. However, the Spanish issuing authority (the Investigating Judge), should verify in advance double criminality requirements (art. 3.2 REG) before sending the certificate to another Member State (hereinafter MS) in those cases.

⁶ International Cooperation Unit at the General Prosecutor's Office (UCIF).

As executing authority, when assessing double criminality, the Spanish competent authority should verify whether the factual elements underlying the given criminal offence, as reflected in the certificate, fulfills the double criminality test provided in Article 3.2 of the REG. In addition, due to the equivalence principle it would be also double checked whether it is one of the offences covered by the Spanish *numerus clausus* regime for the confiscation of legal persons.

1. Can You give some statistical data about the application of the Regulation in case of freezing or confiscation orders in regard to legal persons (e.g.: how many cases, which models of confiscation)?

As far as the cases mentioned above, we only have information about the two cases in the Madrid PPO. Both cases involved direct confiscation.

2. Which are the problems encountered in applying the Regulation (both in executing requests from foreign authorities in Your country and in obtaining the execution of Your requests abroad) in cases of freezing orders and confiscation orders related to legal persons? And which are the grounds for refusal applied in the praxis in this sector?

An agreement should be reached between Spain as executing MS and the issuing MS according to Recitals (35)⁷ and (41)⁸.

In terms of lack of formalities we have detected at the International Cooperation Unit at the General prosecution of the Kingdom of Spain (which is the competent executing authority for receiving the certificates when there is a lack of territorial nexus and when the assets included are in different localities as declared by Spain in the notification made

⁷ Before deciding on the recognition or the execution of a freezing or confiscation order bearing in mind existing grounds for non-recognition or non-execution, the Spanish executing authority should open a consultation process with the issuing authority in order to obtain any necessary additional information.

⁸ Where the law of the executing State renders the execution of a freezing order or confiscation order legally impossible, the executing authority should contact the issuing authority to discuss the situation and to find a solution. Such a solution could consist in the issuing authority withdrawing the order concerned.

to the COM the 18th December 2020) a number of cases where the issuing authority used Art. 9 of the 2003 FD or Art. 4 of 2006 FD Annexes instead of the proper Annex I or Annex II of the REG. Also Spain stated in the same declaration the need to attached the underlying freezing/confiscation order or a certified copy and this document is missing. In those cases, we register the correspondent file and ask the issuing authority to send via email the proper Annex and/or the mission judicial decision asap.

3. Do you have any proposals of harmonization of MS legislation, also in consideration of the new proposal of a directive (May 2022) on freezing and confiscation orders involving legal persons?

4. Could you give your inputs about possible guidelines on the practical implementation of the Regulation in relation to legal persons?

A new handbook replacing and updating existing Handbook for judges, prosecutors and other Competent authorities on how to issue and Execute a request for enforcement of a freezing Order, in accordance with Council Framework Decision 2003/577/jha of 22 July 2003 is really needed.

5. Do you have any further reform proposals, at a national or international level, in this sector?

Proposal for legal reforms in Spain as reflected in the General Prosecutor's Office 2022 Annual Report (upon the report submitted by the International Cooperation Unit)

In view of the projected reforms and in relation to the functional scope of Public Prosecutors, The PPO upcoming Annual Report submits the two following proposals:

a/- The reform of the LRM in order to designate the Public Prosecutor as single judicial authority (SPoC) for receiving seizure and confiscation certificates.

Justification: The reform that we propose, in line with the Proposal for a Directive on confiscation and recovery of assets of May 25, 2022 in order to facilitate the recovery of assets as an effective mechanism to fight organized crime, guaranteeing that the crime is not profitable, by strengthening the capacities of the Public Prosecutor's Office, as the key judicial authority in the early phases of the asset recovery cycle. In this way, once an OEI has been executed by the PP (as SPoC -Single Point of Contact- for EIOs and main financial investigation actor in Spain), for the sake of due efficiency and taking into account its status as a EU judicial authority, it should also be legally empowered to receive the freezing certificate from the same issuing authority, maximizing the cooperation contacts already established and the consultation procedures already opened with the issuing Member State, while making it easier for the issuing authority to choose the right authority to which the certificate should be sent, optimizing reception timing.

The designation of the prosecutor as SPoC in relation to freezing certificates, would facilitate the practice of the simultaneous issuance of both OEI form and 2018 Regulation Annex I certificate, (that possibility already existed with the previous mutual assistance regime), avoiding the dysfunctions of the current "twofold process" whenever the Directive and the Regulation has to be coordinated, preventing the freezing order from having to be subsequently and necessarily be shipped separately to the Dean Court of the territorially competent Investigating Judge in Spain for its allocation (which normally ignores the previous financial-patrimonial investigation coordinated by the Public Prosecutor who has already executed the EIO issued with view to obtaining banking information or the relevant patrimonial investigation). This solution could considerably reduce any delay and the subsequent risk of disappearance of assets, namely by the withdrawal of funds from the investigated accounts, which actually, makes impossible the execution of any freezing order.

The proposed reform is in line with the approach which inspired the declaration notified by Spain to the European Commission on December 18, 2020, in relation to article 2 (9) of the Regulation's executing authorities, which includes the International Cooperation Unit of the general Prosecutor's Office as centralized receiving judicial authority within the Spanish PPO in relation to freezing and confiscation "for the sole purpose of determining the location of the asset to be seized", only when the issuing authority does not know the place of its location and/or when the issuing authority does not know the location of the asset to be frozen "nor the place of residence or registered office of the

person in front of whom issued the resolution”, for the sole purpose of determining the location of the property. We understand that the proposed legal reform should extend and dig in the approach of said declaration to the rest of the International Cooperation PPs at a district level, recognizing them as the sole receiving authority for freezing certificates to be sent to Spain.

Said provision would also make it possible to overcome the current dysfunctions derived from the existing triple competence for the recognition of resolutions that are clearly interrelated (prosecutor for the OEI, Investigating Judge for freezing certificates and First Instance Criminal Court for confiscation certificates), which generates enormous confusion in the European issuing authorities. In addition, the reception of freezing and confiscation certificates by the Public Prosecutors would also ensure the coordination needed in the execution of these instruments at the national level.

Finally, the proposal to designate the PPs as receiving authority would facilitate the need to fully account for the statistics, in accordance with article 35 of Regulation 2018/1805, which obliges Member States to collect data on seizure and confiscation that have been received and executed, and statistics must be sent annually to the Commission. Indeed, in view of the difficulty in complying with the provisions of Article 6 of the LRM, in relation to the mandatory notification to the Ministry of Justice, the assumption by the Public Prosecutor of receiving the freezing and confiscation certificates, would make it possible to register such resolutions within the PPO’s case management system (so-called CRIS/CJI), which is a complex and complete computerized management system for international cooperation files at the national level that the International Cooperation Public Prosecutors have at their disposal and it is working very well. Thus the precise and reliable statistics available at PPO level in relation to OEIs as well as other relevant information on the issuing Member States, type of offences and case-related life feedback, could be extended to the assets recovery field in relation to incoming freezing and confiscation certificates received in Spain.

b/. The reform of the LRM to designate the Public Prosecutor's Office as the authority for the execution of freezing resolutions in urgent cases.

Complementary to the previous proposal, in order to advance in the strengthening of the capacities of the Spanish judicial authorities in the first phases of the asset recovery cycle and its greater national cohesion and coordination; exceptionally and for cases of urgency,

PPO proposes the recognition of Public Prosecutor as an authority, not only for receiving, but also for executing freezing orders extending to the scope of mutual recognition, the approach of art. 53 of the Spanish Law 9/2021 which assigns the Spanish European Delegate Prosecutor the power to freeze assets. In addition, Art. 11 of the Proposal for a Directive on asset recovery and confiscation requires Member States to take the necessary measures to ensure that illicit assets can be frozen quickly and, where necessary, with immediate effect to avoid their dissipation. These measures include – in addition to the measures set out in the Confiscation Directive - the possibility for AROs to take temporary urgent freezing measures until a formal freezing order can be issued. As the Spanish ARO is hosted in the Ministry of Justice and it is not a judicial authority, the Spanish PPO considers a reasonable reform to provide PPs with this competence beforehand with an specific safeguard establishing that the freezing order shall remain in place only for as long as necessary and that the property should be returned immediately if it is not confiscated.

Justification: First of all, it is important to highlight that there are no obstacles of a constitutional nature that prevent the recognition of this competence on patrimonial precautionary measures to the Spanish Public Prosecutor, since, as occurs in relation to financial investigation (see Supreme Court judgement no. 986/2006 of June 19), the freezing of assets for the purpose of confiscation does not limit fundamental rights, provided that the right to effective judicial protection, due process and defense is respected.

Proposals for legal reform: Thus, we propose the following wording of articles 144(2) and 158(2) of the Law 23/2014 on mutual recognition of EU judicial decisions (LRM).

Article 144 (2) LRM: "2. The Public Prosecutor's Office is the competent authority in Spain to receive freezing certificates issued by the competent authorities of other Member States.

Once registered and after having acknowledged receipt to the issuing authority, the Public Prosecutor's Office of the place where the assets are located is entitled to recognize and execute the freezing certificate in urgent cases.

After the execution of the urgent freezing orders, the Public Prosecutor will inform the Decree issued in recognition and execution, to the extent possible and without delay, to

the affected persons of whom it is aware, in accordance with the provisions of our legal system. legal. In the event that the affected person opposes the freezing order recognized by the Public Prosecutor, the Decree will be communicated immediately to the First Instance Criminal Court and, in any case, within a maximum period of twenty-four hours, stating the reasons that justified the adoption of measure, the action carried out, the way in which it has been carried out and its result. The Criminal Judge, also in a reasoned manner, will revoke or confirm said Decree within a maximum period of seventy-two hours from when it was issued.”

Article 158 (2) of the LRM: "2. The Public Prosecutor is the competent authority in Spain to receive confiscation certificates issued by the competent authorities of other Member States. Once registered and after having acknowledged receipt to the issuing authority, the Public Prosecutor will send the certificate of confiscation to the First instance Criminal Court of the place where any of the assets subject to confiscation are located.

6. Do you have any further policy recommendations, at a national or international level, in this sector?

Practical application of criminal liability of legal persons legal framework in Spain initially prove problematic due to lack of experience and training of legal practitioners and law enforcement agencies. Furthermore, it remains to be seen whether more consideration could have been given towards inclusion of a wider range of crimes, especially crimes occurring in trade and commerce.