

LEGAL MEANS OF COMBATING ORGANIZED CRIME IN SPANISH CRIMINAL LAW

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ABSTRACT: *The fight against organized crime has represented, lately, one of the most visible concerns at the level of both the European and the Spanish criminal policy. This study analyzes the evolution of the legal means which tackle the problem from the perspective of the substantive and criminal procedure law, especially the criminalization of the association with the aim of committing crimes and the organized criminal group, as well as the institution of confiscation.*

KEYWORDS: *Organized criminal group, criminal organization, association with the aim of committing crimes, confiscation.*

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1. INTRODUCTION

The international context, namely the legal instruments adopted at the EU level, specifically the Palermo Convention¹, forces the Member States to incriminate the organized criminal groups. The Palermo Convention defines in its Article 2, letter (a) the organized criminal group as a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit.

The Spanish legislation lacked the necessary procedural mechanisms in the field of the prevention and repression of the organized crime phenomenon, so evolved in recent decades. The Spanish legislation preceding the 2010 reform did not allow for the sanctioning of the organizer or of the person ordering the commission of a crime, but solely that of the indirect – mediated - author. In this context, the need for change, as well as the necessity to punish all those having a causal contribution to committing of the

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¹ Ratified by Spain on 01.03.02 published in the Official Journal no. 233 of 29.09.03.

offense could not be neglected by the Spanish legislator, despite “the risk of hypertrophy of the criminal liability” (de la Cuesta, (Pradel & Dallest, 2012)).

The ratification of the Palermo Convention, but also the Council’s Joint Action (98/733/JHA) on making it a criminal offence to participate in a criminal organisation in the Member States of the EU have determined the Spanish legislator to incriminate, alongside the association with the aim of committing crimes, the organized criminal group as well.

The Spanish legislator has understood, nevertheless, to address this issue differently, unlike other European legislations and to distinctly incriminate the criminal organization and the organized criminal group. These two offenses were incriminated by Law 5/2010² and were introduced in a separate chapter, Chapter VI, in Title XII, alongside crimes against public order. Thus, the Criminal Code gets to contain, for the very first time, a definition of the organized criminal group and the incrimination of those activities which are specific to criminal organizations.

Therefore, as a result of the 2010 reform, two new articles were introduced in the Spanish Criminal Code, namely Article 570 bis, which defines the notion of criminal organization, and Article 570 ter, which defines the notion of criminal group.

2. ASSOCIATION WITH THE AIM OF COMMITTING CRIMES

The regulation of the association with the aim of committing crimes is very comprehensive as it does not impose any conditions regarding the structure or the scope of the association. The only requirement is the existence, when forming the association, of the intention to commit crimes.

The offense “association with the aim of committing crimes”, in its current form, was introduced in the Spanish Criminal Code by Law no. 10/1995³ in Title III, Chapter IV - Crimes related to the exercise of fundamental rights and public freedoms, in Article 515 para.(1), alongside other regulations regarding illicit associations. The previous criminal codes, namely the Spanish Criminal Code of 1822⁴ and the one from 1944, incriminated the illicit association, with explicit reference to those associations affecting the political regime, this regulation being included, incidentally, in Title II – Crimes against state security, Chapter II - Crimes committed during the exercise of individual rights recognized by law.

Therefore, according to Article 515 para.(2) of the Spanish Criminal Code, the association acquires an unlawful nature when aimed at committing crimes or, subsequent to its establishment, incitement to commit crimes, as well as in the case it is aimed at committing misdemeanours in an organized form, coordinated and continuous. Also, according to Article 515 para.(4), the organizations having a paramilitary nature are also deemed as illegal.

According to para.(3) of the same article, the association is unlawful if, although it has a lawful purpose, it is using means such as violence or coercion.

² Law no. 5/2010 of 22.06.2010, published in the Official Journal no. 152/23.06.2010.

³ Law no.10/1995 of 23.11.2005, published in the Official Journal no. 281/24.11.2005.

⁴ In the Criminal Code from 1822, the association with the aim of committing crimes was regulated in the chapter entitled – From criminal gangs to those who steal public funds or intercept messages or cause damages to the state or common people.

The legal object of the crime is, therefore, the constitutional right to association, which is obviously breached by means of its abusive exercise, far beyond the constitutional limits⁵.

In the absence of specific references of the legislator regarding the structure of the association, in the books of authority (Garcia de Paz, in (Perez Alvarez, 2002)) it is considered that the rule laid down in Article 515 of the Spanish Criminal Code imposes three requirements: plurality of persons, organized structure, and stability. With regard to these requirements, drawn from the text of the law, the doctrine considers that the minimum number of persons is 3 (three), since a relatively complex association, and not just a transitory one, supposes the acting in concert of several people, certainly more than just two.

The Spanish legislator establishes the cases where an association is unlawful and, respectively, if it aims at committing offenses or if it aims at committing misdemeanours in an organized fashion, coordinated and continuous, without describing the structure of the association or the illicit conduct of the group's members. Moreover, the Spanish legislator, in the case of the association, does not incriminate the crimes related to association by explicitly stipulating the amount of penalty or their specific name.

Instead, the Spanish legislator distinguishes, as far as the sanctions are concerned, between the different forms of participation, so that the founders, directors and presidents of the association shall be punished with a sentence ranging between 2 and 4 years imprisonment, plus a fine, to be paid within 12 to 24 months and the prohibition of the right to hold a public office for a period of time between 6 and 12 months. The active members of the association shall be punished with a prison sentence ranging between 1 and 3 years, plus a fine, which shall be paid within a period of 12-24 months. It is worth mentioning that, according to the Spanish criminal law, the fine shall be paid in instalments, within the interval of time stipulated in the incrimination rule for each offense separately, as determined by the court.

Regardless of the amount of the sentence, we note that the Spanish law, just like other European legislations, does not sanction only the person who commits the act directly, but also the members of the association, regardless of the position occupied by them, be it organizers, leaders or simply participants, since the liability is caused by the unlawful conduct of the organization itself (Zúñiga Rodríguez, in (Zúñiga, et al., 2002)).

3. THE CRIMINAL ORGANIZATION

The regulation of the criminal organizations and of the organized criminal group in a distinct chapter, and not alongside the crime of association with the aim of committing crimes was perceived, in the specialty literature, as absolutely natural, given the fact that the offense of association rather sanctioned "the abusive exercise of the right of association enshrined in Article 22 of the Constitution". Secondly, the organized criminal groups "are not mere associations with the aim to committing crimes, but groups having

⁵ Supreme Tribunal, Decision no. 421/2003 pe <http://derechoynormas.blogspot.ro/2012/04/activismo-asociaciones-ilicitas-grupos.html>

an intrinsic criminal nature and which, in most cases, lack legal form, precisely in order to mislead as regards the activities which they are conducting" (Gonzales Rus, 2012).

According to Article 570 bis, the Spanish legislator defines the criminal organization as "a stable group formed by one or more persons, for an indefinite term, in collusion and co-ordination to distribute diverse tasks or duties in order to commit felonies, as well as to carry out reiterated commission of misdemeanours". It should be noted that, according to Article 13 in conjunction with Article 33 of the Criminal Code, the Spanish legislator distinguishes among felonies (serious offenses), misdemeanours (less serious offenses) and contraventions, depending on the penalties provided for them, respectively prison sentence exceeding five years, prison sentence ranging from 3 to 5 years, and, in the case of contraventions, other penalties, such as fines, community service, permanent location between one and 3 months, the prohibition to drive, etc.

Therefore, the criminal organization distinguishes itself from other criminal associations through the stability of the group, as well as the *modus operandi*, namely the division of labour and functions through a concerted and coordinated manner, with the aim of committing crimes. The complexity of the structure consists in the number of the members and the coordination of activities by the division of labour. Regarding the *modus operandi*, in the case of criminal organizations, the books of authority (Moreno, in (Steinko, 2013)) show that their members' actions are rather individual, "as a form to guarantee a greater benefit, which might reduce the costs and the risks". The same author states that "the cyclic process of organized crime consists in its continuity". Also, we may note that the Spanish legislator does not explicitly refer to the purpose of the association, namely obtaining advantages or material benefits.

In the case of the criminal organization, the active subject of the crime is not only the organizer, leader, funder or author of the crime-purpose, but also the person who, knowing the fact that he/she is part of such organization, is aware that through its presence or deed, he/she helps the organization to maintain its organizational structure.

In case of such crime, the Spanish legislator distinguishes the quantum of the penalty according to the nature of the participation to the organization, as well as the seriousness of the deeds committed. Thus, according to Article 570 bis, "whoever promotes, constitutes, organises, co-ordinates or directs a criminal organisation shall be punished with a sentence of imprisonment from four to eight years, if it has the purpose or object of committing serious felonies, and with a sentence of imprisonment from three to six years in other cases; and whoever actively participates in the organisation, forms part thereof or co-operates financially or in any other way therein, shall be punished with imprisonment from two to five years if its purpose is to commit serious felonies, and with a sentence of imprisonment from one to three years in other cases".

According to para.(2) of the same article, the penalties provided in para.(1) shall be increased, by applying the special maximum, in the situation in which the organization: a) is formed by a large number of persons; b) possesses weapons or dangerous instruments; c) has advanced technological resources for communication or transport that, due to their characteristics, are especially fit to facilitate commission of the offences or the impunity of the offenders. Also, according to para.(3), "the upper half of the penalties respectively foreseen in this Article shall be imposed if the offences are against the life or integrity of persons, liberty, sexual freedom and indemnity, or involve trafficking in human beings".

4. THE ORGANIZED CRIMINAL GROUP

According to the prevailing view from Spanish case-law, the organized criminal group is defined as “a structure of assets and persons, with various functions within the criminal plan, aiming to obtain financial gain or, where applicable, power, an aspect which, moreover, differentiate the crime of participating to an organized criminal group from other preparatory acts criminalized by the Spanish legislation” (De la Cuesta-Arzamendi).

According to Article 570 ter of the Spanish Criminal Code, a criminal group shall be construed as the collusion of more than two persons who, without fulfilling any or a number of the characteristics of a criminal organisation defined in the preceding Section, has the purpose or object of perpetrating felonies in collusion, or co-ordinated, reiterated commission of misdemeanours.

From the analysis of the above mentioned two laws, we find that the difference between the criminal organization and the criminal group consists in the organizational structure of the group, specifically the criminal organization is characterized by stability and hierarchy of the functions and tasks, while the organized criminal group has a rather transitory nature and among its group members there is no hierarchical relationship of subordination. Despite the relatively fragile appearance of the structure, in comparison with the criminal organization, the organized criminal group aims at committing concerted crimes or concerted misdemeanours.

At the same time, we note that, in terms of the sanctions, in the case of the organized criminal group, the Spanish legislator does not differentiate the penalty according to the nature of the participation, so that the one who is funding the group, as well as the person who is or has the quality of simple participant, receive the same penalties, in relation to the same limits.

The legislator's omission to differentiate the sanction regime, related to the participant's role within the group, highlights the difference in organizational nature between the two structures. While in the case of the criminal organization the initiators, organizers and leaders are punished more severely than the mere participants, in the case of the organized criminal group those who constitute, participate in or finance the group shall be punished starting from the same penalty limits.

Consequently, in terms of sanctions, whoever constitutes, finances or forms a criminal group shall be punished: a) if the purpose of the group is to commit the felonies mentioned in para.(3) of Article 570 bis, with the punishment of two to four years imprisonment for one or more serious felonies and with that of one to three years imprisonment for less serious felonies; b) with the punishment of six months to two years imprisonment if the purpose of the group is to commit any other serious felony.

According to Article 570 ter para.(3), whoever constitutes, finances or forms a criminal group shall be punished with the punishment from three months to a year of imprisonment when the aim is to commit one or several less serious felonies not included in letter (a) or reiterated commission of misdemeanours, in the latter case the punishment must be imposed in the lower half provided by the law.

Moreover, in the case of criminal organizations, the Spanish legislator incriminates several acts, namely, the initiation, establishment, organization, coordination, leadership, participation and financing, while in the case of the organized criminal group, the

legislator incriminates only three types of conduct, namely the establishment, financing or participation in an organized criminal group.

In terms of aggravating circumstances, they are identical to those stipulated in the case of criminal organizations. Thus, the penalties shall be imposed in the upper half when the group: a) is formed by a large number of persons; b) has weapons or dangerous instruments; c) has advanced technological resources for communication or transport that, due to their characteristics, are especially fit to facilitate commission of the offences or the impunity of the offenders.

5. CONFISCATION

The institution of confiscation, or seizure, is considered by the Spanish criminal law as an ancillary of the principal penalty, being distinctly regulated in Title VI - On ancillary consequences, and not together with other criminal sanctions.

The placement of this sanction in a distinct chapter was appreciated in the books of authority as being necessary since “the institution presents common elements with both criminal liability and civil liability, and the measure represents a reaction towards the crime; not a consequence of the guilt or personality of the subject, but a consequence of the object's degree of danger or towards unjust enrichment” (Medina & Alberto, 2007).

The same author also shows that, despite its distinct name and incrimination, it still remains a penalty, a fact which supports the majority opinion according to which the confiscation should not be included among the goals of the penalty, but it remains nevertheless an ancillary to the principal penalty (Medina & Alberto, 2007).

The institution used to have, in the previous criminal codes, a limited incidence and only regarded those instruments which served the committal of crimes and the crime's products.

A first significant change in the institution of the extended confiscation was brought by means of Law no. 15/2003 (from November 25th), regarding the confiscation of the means or instruments that were used to prepare the offense, as well as of the goods produced as a result of the offense, regardless of the changes undergone by them or of their content following the laundering of the crime's product, unless they are in the possession of *bona fide* third parties.

Article 127, in its original form provided by the Spanish Criminal Code of 1995, regulated the possibility of confiscation of those instruments which served to commit the crimes or misdemeanours, as well as of the crime's products, regardless of the transformations undergone by them.

Law no. 15/2003 amends the text of the law, in the sense of extending the confiscation not only over the instruments which served to commit the crimes, but also over the goods or means that were used to prepare or commit the crimes, as well as the crime's products, whatever form they might take, if the punishment provided for the respective offense is imprisonment of more than 1 year.

Moreover, by Law no. 15/2003 was introduced the institution of confiscation by equivalent. Furthermore, according to Article 127 para.(4), the judge or court of law may order the confiscation even when no punishment is imposed on any person due exemption from criminal accountability or due to the statute of limitations, in the latter case, as long as the unlawful status of the assets is proven.

In the year 2010, following the transposition in the national legislation of Framework Decision 2005/212/JHA of 24th February 2005 and, hence, the amendment of Article 127 of the Criminal Code, the institution of the extended confiscation was introduced into the Spanish legislation. Thus, according to Article 127 para.(1), the judge or court of law shall extend the seizure of assets, goods, instruments and gains for criminal activities committed within the setting of a criminal or terrorist organisation or group, or for an offence of terrorism. For these purposes, the property of each and every one of the persons found guilty of felonies committed within the criminal or terrorist organisation or group or for an offence of terrorism that is disproportionate in relation to the revenue lawfully obtained by each one of those persons shall be deemed to have been obtained by the criminal activity.

In the Explanatory Memorandum of Law no. 5/2010, it is stated that in this case “it shall operate a presumption of illicit origin of goods” (Peces, 2010). Consequently, in this case we shall encounter a reversal of the burden of proof, and the proof of the lawful origin of the goods lies with the defendant, the latter having the right to rebut the presumption on the basis of the adversarial principle and of the fundamental right to defend oneself.

Thus, the main changes introduced by Law no. 5/2010 regard the possibility of confiscation of all goods whose lawful origin cannot be proven, not just of those goods representing the proceeds of the crime, as well as the incrimination of the possession of goods whilst knowing their unlawful origin⁶.

6. CONCLUSIONS

The Spanish legislation distinguishes itself, in the international context, by the incrimination, by means of Law no. 5/2010, of two criminal structures, namely the criminal organization and the organized criminal group, capable of covering all forms of organized crime, whether homogeneous or less homogeneous, without however having the effect of decriminalization of the crime of association with the aim of committing crimes, covered by Article 515 of the Spanish Criminal Code. This dual incrimination is considered in the books of authority as necessary since “the organized crime is defined not by the crimes it commits, but by the way they are committed... The many manifestations of organized crime makes it difficult to characterize the phenomenon by means of a general term, since, in reality, it takes the shape of several forms of organized crime, of various degrees, sizes, shapes and specializations” (Rodriguez, 2009).

Before the reform of 2010, the membership to a criminal organization was incriminated by the Spanish legislator as aggravating circumstance in the case of certain crimes, such as drug trafficking, human trafficking, money laundering, prostitution, child pornography, tax fraud. Despite the incrimination in the Criminal Code of the three forms of illicit association, the Spanish legislator does not waive the existing aggravating circumstances, preferring to settle the conflict by referring, in Article 570 quarter para.(2), to Article 8 of the Spanish Criminal Code, which states that the principles governing this relationship are, in preferential order, the principle of specialty, of subsidiarity and of

⁶ Art. 301.1, Spanish Criminal Code.

absorption. In case the conflict cannot be settled on the basis of these principles, one shall apply the rule which provides the most serious punishment.

According to Article 570 quater para.(3), the provisions shall be applicable to all criminal organisations or groups that perpetrate any criminally relevant act in Spain, even if they have been formed, are based or perpetrate their activity abroad.

The common elements to all three incriminations regarding criminal associations are the following: organizational structure, more or less complex, depending on each incrimination, the plurality of perpetrators and the final element of the establishment, namely committing crimes, felonies, misdemeanours or contraventions, as appropriate.

The differences between them, however, consist in the consistency of the structure, stable or transient character of the organization, the nature of the active subject's participation in the crime and the severity of the crimes-purpose. Therefore, from an objective point of view, in the case of criminal associations, the contribution of the subject is occasional and strictly related to committing the crime, whilst in the case of the criminal organization, the subjects' interest is common, their will is common and their interests, in most of the cases, coincide.

The institution of confiscation has been the subject of several important amendments in the Spanish criminal law as well, in line with the EU requirements, able to represent a repressive measure adapted to the new forms of manifestation of organized crime. In this respect, 2003 witnessed the introduction in the Spanish legislation of the institution of the confiscation by equivalent, and in 2010, of the institution of extended confiscation.

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