



Capsulas

The transfer of administrative and criminal liability in mergers and acquisitions

Judgement of the Constitutional Court of Spain of 11 December 2023 (n. 179/2023)

Background

This important judgment of the Constitutional Court of Spain (“TC” by its Spanish acronym) rules on the constitutional appeal filed by Banco Santander against a 2019 sanctioning resolution of the Council of Ministers. This resolution imposed on the bank Banco Santander, the successor entity of Banco Popular, a fine for the commission of a very serious infringement of Law 10/2010, on the prevention of money laundering.

The sanction was imposed following an inspection of Banco Popular in 2017, in which it was concluded that the bank had failed to comply with its duty to report transactions suspicious of money laundering identified by its employees.

The sanction was subsequently confirmed by the Supreme Court. Before the TC, Banco Santander argued that the sanction contravened the principle of culpability and the principle that penalties are personal.

The Constitutional Court’s stance

The Constitutional Court dismissed the appeal on the grounds that the sanctioning resolution is based on a consolidated jurisprudential doctrine established by the Supreme Court and the Court of Justice of the European Union.

According to this doctrine, liability for administrative infringements is transferred

in cases of mergers by absorption, as well as in other cases of restructuring between companies, if there is a “substantial economic identity” between the legal entities. To meet this criterion, the economic activity of the legal entity that committed the infringing conduct must continue in the legal entity that succeeds it.

In its judgement, the TC confirms that the criterion of substantial economic identity cannot be contrary to the principle of culpability and the principle that penalties are personal, because these principles must be applied differently in the case of legal entities. A contrary reasoning, the TC points out, would be equal to allowing legal entities to escape liability by continuing the same activity under a different legal form.

The TC concludes that there is a substantial economic identity between Banco Popular and Banco Santander because a block transfer of all the business lines was conducted, including those activities in which the infringing conduct had taken place. This circumstance justifies the succession of liability for the infringement. According to the TC, the compliance measures subsequently implemented by Banco Santander may have a mitigating effect, but they are not sufficient to exclude liability.

The TC emphasises that transfer of liability between legal persons is fully present in article 130.2 of the Spanish Criminal Code. Criminal liability is not extinguished by the transformation,



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merger, absorption or division of a legal entity, but is transferred to the resulting entity/es.

Conclusion

The TC ratifies the possibility of transferring liabilities between companies in the event of mergers or other restructuring operations. This transfer may relate both to the commission of administrative infringements as well as to criminal offenses. This would include, for instance, non-compliance with money laundering regulations, competition law infringements, or business corruption offenses. The TC also confirms that this is compatible with the constitutional principles of culpability and that penalties are personal.

The judgement highlights the importance of considering this risk in the design and implementation of an adequate compliance model, as well as in due diligence processes in mergers and acquisitions, which are very common in the pharmaceutical sector.

Both in the criminal field and in the field of administrative sanctioning law, the adoption of adequate surveillance, control and prevention actions can be key to mitigate liability and even act as an exonerating circumstance of the company's criminal liability.

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