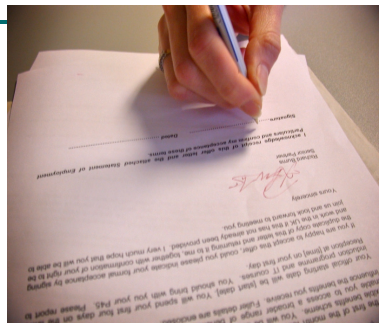
Spanish Legal Update

# Review



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## In this issue:



## On the personal liability of the signer of a promissory note

The Supreme Court (First Civil Division), in the Judgement issued on 9 June 2010, established the doctrine that "the signer of a promissory note is personally bound if he does not include the power of attorney or proxy by which he is acting or at least it contains the rubber stamp with the details of the company on whose behalf he is acting".

This judgement is based on the lawsuit brought by the holder of a promissory note, where the defendant acted as the drawer, after payment had been denied when it was submitted for payment. The defendant argued his lack of standing to be sued as he was acting as a sole director of a company.

First and Second Instance cases dismissed the challenge as they found that even though the directors are not required to have a power of attorney, they have to mention the capacity in which they are intervening, otherwise they will be personally liable.

Article 9 of the Exchange and Cheques Act seeks to protect the holder of the note who may not be aware of the status of the signer of the document.

Although that article literally establishes that the holders of bills of exchange are entitled to require the signatories to show the power of attorney, it is sufficient to mention the capacity in which they are involved, and should they not do so (either by means of the title of the signatory or at least with the signature of the representative and the stamp of the company on whose behalf they are acting), they are personally liable for the payment pursuant to the principle of good faith and in order to ensure secure commercial trading. The principle is always to protect the holder of the credit.

Regarding the exceptio in personam alleged by the defendant, it only operates between the parties of the causal relationship, i.e. the contract between the two companies, and the defendant cannot resort to it as it comes from an underlying contract in which he did not intervene as an individual.

The Supreme court upheld the above and therefore the breach of the obligation to state the title of the signatory means that the signatory will be personally liable for payment, similar to the case envisaged in Article 10 of the Exchange and Cheque Act when signing as a representative of a person without authority to do so.

The Supreme Court Judgement of 5 April 2010 established the doctrine that if the individual signing the promissory note does not state the title of the signatory or make another reference to the fact that he is acting as a representative or director of a company, it does not relieve the latter from their liability as acceptor of the note, unless the signer was not so authorised. Likewise, the person who accepts the note under those conditions is not personally liable but binds the entity that appears as a drawee of the note if he had power or representation of the company. This doctrine (concludes the judgement of 9 April 2010 which is analyzed in this article) does not apply to those cases where it is impossible to deduce from the terms of the note that he is acting as a director of a company as he could have chosen to act on his own behalf, which would go against secure commercial trading.

Therefore, the judgment ends by establishing the doctrine with which we began so that “the signer of a promissory note is personally bound if he does not include the power of attorney or proxy by which he is acting or at least it contains the rubber stamp with the details of the company on whose behalf he is acting”.

*Silvia Ara*

# Indiscriminate application of a private copying levy did not comply with directive 2001/29

The Decision of the Court of Justice dated 21 October 2010 in Case C-467/08 dealt with different questions referred by Barcelona Provincial Court for a preliminary ruling in the proceedings between Padawan, SL, and the General Society of Authors and Editors of Spain (SGAE) on the "private copying levy” supposedly owed by Padawan for the CD, DVD and MP3 players it sells. In particular, Padawan had refused to pay as it argued that the application of the private copying levy regardless as to whether the devices are to be used for private copying is not compatible with Directive 2001/29.

The preliminary ruling concerns the interpretation of the concept of 'fair compensation' in Article 5, paragraph 2, letter b) of Directive 2001/29/EC, which stipulates that Member States may provide for exceptions or limitations to the reproduction right on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that the rightholders receive fair compensation.

This exception was enacted in national law by Article 25 of the consolidated version of the Intellectual Property Act (Texto Refundido de la Ley de Propiedad Intelectual: 'TRLPI') entitled "Equitable compensation for private copying", which provides that the reproduction made exclusively for private use will lead to a single equitable compensation.

The primary issue raised by Barcelona Provincial Court within the five questions and which has been widely discussed, is as follows:

Should a fee system be necessarily linked to the presumed use of reproduction equipment and materials benefit from the private copying exception? Therefore, does the system adopted by the Spanish government to apply the private copying levy to all computers, devices and digital reproduction materials given their mere suitability for copying, regardless of whether the companies and professionals buy them for purposes other than private copying, counteract Directive 2001/29/EC?

The Court found that it is necessary that the reproduction equipment, devices and media to which the levy applies, are presumably used for private copying. The Court thus concluded that the indiscriminate application of a private copying levy is not compatible with the Directive 2001/29, and cited the example of the digital reproduction devices and media for purposes other than private copying.

Last 2 March 2011 Barcelona Provincial Court has estimated the appeal filed by PAPANAN SL absolving it from all the claims. It, therefore, seems that it is now time to modernize the system of fair compensation for private copying for two reasons:

- First, as the ruling itself so requires it. Some meetings have therefore been held between the Ministries for Industry and Culture, Ametic (Electronic Multi-Sector Association) and the eight management institutions in Spain.
- Second, due to the imperfection of an "equitable compensation for private copying" system that only takes into account hardware and distribution mechanisms associated with them, ignoring other increasing realities, such as "streaming" where audio or video is distributed by Internet and stored in the buffer of computer but without the contents being downloaded or copied. If the system of "fair compensation for private copying" is based on the copy, how will it survive in a future where no copies are made?

*Ignacio Gurpegui*

# Three practical issues arising from the recent Spanish Criminal Code amendment relating to the duty of active surveillance by companies and attorney-client privilege.

The latest reform of the Spanish Penal Code has introduced significant changes in areas such as finance, corporate and intellectual property. This article focuses on three aspects of the reform: the criminal liability of companies, money laundering crimes and corruption in international business transactions. In particular, this article considers the duty of active surveillance by companies to avoid being charged for crimes committed by their employees and lawyers who have assets derived from money laundering offences being unable to claim attorney-client privilege.

## Criminal liability of legal entities

The new Code introduces the possibility of a company being found guilty, provided that the offence is committed for the benefit of the company and on its behalf and by a manager or agent or person under the authority of the director or representative.

It should be stressed that the crime is committed by the absence of organization, i.e. as preventive measures required to prevent such crime were not duly taken.

A company can only be held guilty when it commits any of the offences specifically listed in the Criminal Code, which include fraud, punishable insolvency, intellectual property crime and money laundering.

One of the most important aspects of a company becoming liable is in relation with a lack of proper control over the conduct of an employee. There is no defined criterion in the Criminal Code regarding a crime prevention standard to be met by the company. The Code merely states that control has to be considered on a case by case basis. This implies a special duty of care by the company. And it is doubtful that a plan to establish crime prevention surveillance measures is sufficient to avoid a conviction against the company. It should be determine on a case by case basis. For example, in the event of a crime of money laundering, the company must not only have a manual on prevention, but also adopt effective surveillance measures regarding the people most likely to be exposed to the committing of that crime.

## Money laundering

The reform introduces the specific crime of money laundering and punishes not only those who acquire or convey property derived from illegal activities, but also those who merely possess or use it. This has resulted in great controversy, led by the General Council of the Judiciary that expressed serious doubts in its report on the reform that the possession of property derived from money laundering may constitute criminal activity.

The truth is that reform punishes the mere possession of goods if it is known that the goods are of criminal origin.

It should be noted that lawyers can be incriminated but they may not invoke attorney-client privilege.

Therefore, a lawyer who knows that his or her assets were obtained from a crime of money laundering may be indicted as the perpetrator of a crime of money laundering. As they can not invoke the privilege, they must give evidence in court should they be charged.

## The crime of corruption in international business transactions

The reform introduced this new offence in Spain which consists of obtaining and retaining an irregular contract when conducting international economic transactions.

The Code establishes that companies can be charged with these crimes. Therefore, businesses operating in several countries have to be particularly careful to avoid conduct that can lead to these crimes. As mentioned above, it is not sufficient to develop a plan to prevent corruption, but active surveillance measures should be adopted for those individuals most exposed to the scope of this crime. Thus, the OECD Convention to Combat Corruption deems corruption in a public tender offer to be bribery. Therefore, those companies bidding on international tenders must give particular emphasis to monitoring their employees involved in such activities.

*Fernando González*

# The fining by the Spanish Data Protection Agency (AEPD) of a private gynaecological clinic alter patient medical records of patients appeared in a public container upheld.

In its decision dated 2 June 2010, the Supreme Court, Third Division of Administrative Litigation, SECTION 6, upheld the 2005 fining by the Spanish Data Protection Agency (AEPD) of a private gynaecologic clinic after different patient medical records had been thrown away in the street.

As background to the present case, after 150 patient medical records from a private gynaecologic clinic were found in a waste container in a public thoroughfare and the event was published in the National Press, the AEPD initiated disciplinary proceedings on 4 March 2005 resulted in the clinic being fined € 300,506.05.

The ruling issued by the AEPD Director establishing the fine to be paid by the Clinic was appealed by the latter as it considered the penalty to be completely disproportionate. The appeal was fully rejected by the decision in question, which fully upheld the penalty imposed.

The Supreme Court found that the clinic had committed two infringements, each of which were interdependent. The first consisted of the breach of security measures required of an entity entrusted with processing personal data, which were particularly sensitive in this case. Second, the clinic had been in breach of its duty of secrecy. The Court therefore found the infraction to be very serious and that the penalty duly reflected that.

The sanctioned entity defended itself by claiming that the medical records had been deposited in the container by a third party. In any event, the Court considered that the liability of the clinic as a legal entity could not thus be avoided, particularly when person turned out to be an employee.

Finally, with regard to the clinic's petition to the Court to moderate the fine imposed based on the principle of proportionality that it argued had been broken; the Court dismissed the claim as it found that the minimum penalty had been applied given all the circumstances. Thus Court therefore found that there were no grounds for the alleged breach of the principle of proportionality and upheld the fine of € 300,506.05 imposed on the entity.

*Paula Casado*

# Ryanair found guilty of unfair competition and defamation towards online travel agencies: Ryanair had changed the general terms and conditions of use and threatened that all plane tickets purchased through these agencies would be cancelled.

Two judgments from Nº1 Commercial Court of Madrid and Nº4 of Barcelona, upheld both lawsuits against Ryanair for defamation and unfair competition arising from Ryanair threatening two specific online travel agencies (Atrápalo and Rumbo) to cancel all plane tickets purchased through them.

In fact, the case dated back to the summer of 2008, when Ryanair launched a campaign against these agencies when it accused them of being "fraudsters/crooks", "bloodsuckers", and of "charging hidden fees". Ryanair likewise proceeded to announce that it would proceed to modify its General Terms and Conditions of Use, and announced the cancellation of all tickets purchased through these agencies: "Any flights purchased through a website that is not Ryanairs' own website will be cancelled without notice or reimbursement."

In response to the campaign instigated by the airline, two of the leading online travel agencies in Spain, Atrápalo and Rumbo, brought proceedings against Ryanair for defamation and unfair competition, pursuant to Articles 5 and 9 of the Spanish Unfair Competition Act No. 3/1991. It should be clarified that even though they were two current judgments, the amendments introduced by the Reform of the Spanish Unfair Competition Act approved by the Spanish Parliament on 30 December 2009, (Act No. 29/2209), were not applied as the events date back to 2008.

With regard to Article 5 of the Unfair Competition Act and despite the principle of a free enterprise established in Article 38 of the Spanish Constitution being recognised, this article bans the cancellation of plane tickets correctly purchased by users through agencies or brokers. Notwithstanding the above, Nº4 Commercial Court of Barcelona stated that it was the duty of the agencies to dissipate any fears regarding the validity of these tickets and therefore proceed only to partially rule for the claim.

Pursuant to Article 9 of the Unfair Competition Act, regarding inaccurate and deflamatory statements, the Judgment found that these statements are not covered by the "exceptio veritatis" concept or by the principle of self-governance. Even though the airline argued that the endeavours of the agencies had gone against its own interests, the Legal Spanish System contains effective defence mechanisms in the Unfair Competition Act.

Notwithstanding the above, Nº4 Commercial Court of Barcelona found partially for the claim and recognised that an average consumer would know how to interpret statements and how to value the services offered by these brokers. According to the Court, the agencies should be ready to be at the receiving end of these types of the statements, as the higher prices directly undermine Ryanair's purpose which is to offer low cost flights.

Analyzing the nuances in the findings of both rulings is likewise of interest. According to the reform of the Unfair Competition Act by act No. 29/2009, Article 32.2 implies that the publication of the ruling in national newspapers is a self-perpetuating remedy. However and as we have argued, these provisions are not ratione temporis that can be applied to the case in question as the facts occurred prior to the reform. Permission for publication is thus required. Therefore, as it had been expressly sought in the preliminary hearing, the ruling issued by Nº4 Commercial Court of Barcelona was published in the national editions of the El País, ABC and El Periódico de Cataluña newspapers.

However, as the claimant had omitted said "petitum" when petitioning Nº1 Commercial Court of Madrid, the Court did not find for the self-perpetuating remedy as would currently be the case given the aforementioned reform.

*Ignacio Triguero*

# Floor clauses in mortgage loans annulled.

The Seville Commercial Court (Spain) issued a Judgment on 30 September 2010 that found the "floor clauses" (cláusulas suelo) that several Spanish banks and savings banks include in their mortgage loans to be null and void.

Spanish banks and savings banks frequently include clauses in mortgage loans clauses that prevent the interest rate on the loan falling below a certain threshold, even when the benchmark rate used for the calculation drops (EURIBOR in most cases).

The Consumer Association of Banking Services in Spain (AUSBANK) filed a class action seeking the annulment of such clauses in the mortgage loans of the Spanish BBVA bank, and the LA CAIXA and CAJAMAR savings banks. The Consumer Association argued that these clauses were abusive General Conditions and detrimental to consumers.

In their response to the claim, the defendants argued that the "floor clauses" are not General Conditions, but are negotiated with each client and not included in all loan agreements. They further claimed that in addition to the floor clauses, the contracts include ceiling clauses that limit any upward change in interest rates, and therefore the rights of the parties are balanced in the contract.

The Court accepted the arguments put by the Consumer Association and ruled that floor clauses are General Conditions as banks and savings banks impose them on Consumers. The latter are not offered the option of negotiating or to eliminating such terms and merely have to accept them or not sign the agreement.

As regards the contents of the clauses, the Court considered that there was a disproportionate difference between the floor and ceilings clauses in place, as the high ceiling levels put in place are unlikely to be reached. Therefore, floor clauses in the contracts range from 2.75 to 3.50% and ceiling clauses from 12 to 15%.

The Court found that the clauses only cover the risk of one of the contractual parties, the Bank, but the risk assumed by the consumers is not covered in in similar terms. Therefore, the clauses are abusive and detrimental to the consumers.

The Judgment, which has been appealed by the bank and saving banks in question, found that floor clauses in the mortgage loans of BBVA, LA CAIXA and CAJAMAR are null and void. It likewise ordered these entities to remove them from their contracts and refraining from their use in the future. However, should consumers wish to seek the reimbursement of the overpaid amounts in question, the Judgment found that they would have to file new actions against the bank and savings banks.

*Jesús Carrasco.*

## EDITORIAL

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