



COMPLIANCE- SPECIALIZED EXPERTS (PERITOS) ARE COMING

By Felipe García Hernández, World Compliance Association Board member

The multiplication in recent years of criminal proceedings against legal persons has been exponential. After hesitant beginnings, the framework of corporate criminal liability, designed by Organic Act 5/2010 and, later, 1/2015, has literally taken over large processes, especially those dealing with economic crimes. The investigation or accusation of legal persons places the accreditation of the strength of its compliance programs under the focuses of the criminal investigation. Although technical doubts persist about its procedural approach, no one questions that, upon a criminal act arising in an organization, checking whether the company had a solid and truly implemented compliance program plays an essential role. Only this will allow the achievement of the acquittal, or a mitigation of its criminal liability. The judicial practice of the last years already has good examples of dismissed proceedings against legal entities, after having highlighted that - despite the fact

that an isolated act or slip could have occurred - the companies had well-conceived criminal prevention plans. However, the difficulties that the evaluation of the benefits or shortcomings of a criminal compliance program within the proceeding are evident, -especially if it is a complex organization-, and this reality has put on the table the need for the Courts have compliance-specialized experts who can assist them in assessing their conviction as they do daily with another class of experts, engineers, computer scientists, appraisers, etc., for the investigation of different crimes. These are attractive expert evidence with a promising future, but to become one of those compliance-specialized experts who assist the Courts in these matters? Over the last weeks, information has appeared in the press and on social networks that may have created confusion, regarding the training required by experts and ways to access the appointments made by the Courts. It is not

superfluous to make these two questions clear. As is known, in the Criminal Jurisdiction, just as -with certain nuances- in civil law, two classes of experts mainly intervene. The private or party expert and the judicial expert. The latter, the judicial expert, is the expert par excellence. It is drawn by lot, it has, in principle, no previous relationship with the parties and its fees are regulated by the Jurisdictional Body. They therefore enjoy a presumption of impartiality and are therefore preferred by the Courts. When it comes to regulated professions, architects, engineers, etc., these experts are drawn by lot among the lists provided by the Professional Associations. In non-regulated professions, such as the compliance-specialized expert, the lists of experts must be formed from the relationships sent by associations, unions or entities that group these professionals, as established in the article 341 of the Civil Procedure Act. The procedure, then, is the draw. There is no shortcut or restricted access to be appointed as a judicial expert.




This neutrality does not, of course, affect the convenience of those who are part of these lists having optimal preparation, nor the enormous usefulness of the specific trainings that provide the experts –in this case, compliance experts–, better knowledge of the Courts, of the process and, of course, of the matter itself on which they will have to report, if appointed.

On the other hand, there are the private experts. Any party, accusation or defence, can use them, if they want. They are experts of their choice and whose fees are freely agreed with them. For this reason, the Courts tend to give them less credibility –at least in the investigative phase–, which is logical, since they are chosen and paid by the party that hopes to benefit from their report. Therefore it is essential that the private expert has a good technical base,

experience and prestige, to give light to the Courts, and create a counterweight to that kind of “original sin” derived from having been appointed by one of the parties.

Naturally, it often happens that judicial experts (that is to say, appointed by the Court) concur with private experts to testify on the same facts. In that case, the declarations of all of them are made jointly, as ordered by Article 724 of the Criminal Procedure

Act, so that the Court can directly contrast their opinions and contradictions. In this kind of “hand-to-hand” between experts, the quality and solvency of one of them in front of his colleagues, can be decisive, even in the case of the private experts.

In short, there are no privileges to be appointed expert compliance expert, but there are many good reasons for those who want to be, to take careful care of their training. 

ABOUT FELIPE GARCÍA

Felipe García is a lawyer, partner at Circulo Legal and Member of the Board of Directors of World Compliance International. Law degree from the University of Salamanca.

Master in Corporate Legal Consultancy at the IE Business School of Madrid. He specializes in compliance. Regular speaker at seminars and conferences. Author of legal articles in general and specialized press.

Arbitrator of the European Association of Arbitration. 