National Report. Spain

The DRAMP Project

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Abbreviations

APLECrim: Anteproyecto de Ley de Enjuiciamiento Criminal / Preliminary Draft of the Criminal Procedure Law

ATS: Auto del Tribunal Supremo / Supreme Court Order

CP: Código penal / Criminal Code

CGAE: Consejo General de la Abogacía Española / General Council of Spanish Lawyers

CGPJ: Consejo General del Poder Judicial / General Council of the Judiciary

EOMF: Estatuto Orgánico del Ministerio Fiscal / Organic Statute of the Public Prosecutor's Office

FGE: Fiscalía General del Estado / State Prosecutor's Office

IVA: Impuesto sobre el valor añadido / Value Added Tax

LECrim.: Ley de Enjuiciamiento Criminal / Criminal Procedure Act

LEVD: Ley Estatuto de la víctima del delito / Law on the standing of victims crime

LO: Ley Orgánica / Organic Act

LOPJ: Ley Orgánica del Poder Judicial / Organic Act on Jury Court

LORPM: Ley Orgánica reguladora de la responsabilidad penal de los menores / Organic Law regulating the criminal responsibility of minors

LOTJ: Ley Orgánica del Tribunal del Jurado / Organic Act of the Jury Court

LORC: Ley Orgánica de Represión del Contrabando / Organic Act for the Repression of Smuggling

MF: Ministerio Fiscal / Public Prosecutor

OAVD: Oficina de asistencia a las víctimas de delitos / Crime Victims Assistance Office

PA: procedimiento abreviado / Abbreviated procedure

PIF: Protección de los intereses financieros / Protection of financial interests

RPPJ: responsabilidad penal de las personas jurídicas / Criminal liability of legal persons

STC: Sentencia del Tribunal Constitucional / Constitutional Court Judgement

STS: Sentencia del Tribunal Supremo / Supreme Court Judgement

UE: Unión Europea / European Union

1. Measures adopted to implement the PIF Directive in the domestic legal system and other criminal rules on financial crimes adopted at the domestic level

1.1. Description of the measures adopted to implement the PIF Directive at the national level

Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law.	Organic Act 1/2019, of 20 February, which amends Organic Act 10/1995, of 23 November, on the Criminal Code, to transpose European Union Directives in the financial and terrorism fields, and to address international issues.
Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO').	Organic Act 9/2021, of 1 July, implementing Council Regulation (EU) 2017/1939 of 12 October 2017 establishing enhanced cooperation on the establishment of the European Public Prosecutor's Office.

1.2. Comment on domestic criminal rules on financial crimes relevant to EPPO

Directive (EU) 2017/1371 has been transposed by Organic Act 1/2019, which has focused on the reform of offenses against public finances and, particularly, subsidy fraud. However, no specific attention has been paid to the provisions related to fraud in public procurement.

1.2.1. Fraud in respect of non-procurement-related expenditure (subsidies)

1.2.1.1. Art. 308 CP

The most important precept is art. 308 CP, which, in accordance with the principle of assimilation, protects jointly the fraud of subsidies whose budgetary origin is Spanish (Inland Revenue, that of the Autonomous Communities, special provinces or local authorities) or European. In the case of co-financed subsidies, the total amount of the subsidy is considered, regardless of the amounts specifically contributed by each administration.

Art. 308 CP collects the conducts referred to in art. 3.2 a) of Directive (EU) 2017/1371.

It is a special offense, so its perpetrators can only be the beneficiaries of the grant.

The criminal liability of the legal person is provided for (art. 310 *bis* CP).

The criminal type, for its consummation requires the final obtaining of the funds. It is possible to punish the attempt.

Subsidy fraud is punished as a crime when the amount of the subsidy exceeds €10,000. The penalties are increased if the subsidy exceeds €100,000. This amount refers,

according to the majority doctrine and jurisprudence, to the amount that has been improperly obtained and not to the total amount of the subsidy obtained.

The reimbursement of the amounts defrauded before the initiation of an investigation into the fraud results in exemption of penalty.

The initiation of criminal proceedings does not prevent the Administration from demanding repayment of the amounts through administrative channels.

1.2.1.2. Art. 306 CP

Prior to the 2019 reform, EU subsidy fraud was punished by special criminal offenses. The main objective of the 2019 reform has been, in accordance with the principle of assimilation, to equate subsidy fraud regardless of its budgetary origin, hence the special precepts of European subsidy fraud have been repealed. Consequently, the subsistence of art. 306 CP, which refers exclusively to funds coming from the EU, is an oversight by the legislator.

The doctrine, in accordance with the principle of preservation of rules, proposes to apply it to residual cases of subsidy fraud. In this way it could be applied to punish the concealment of relevant facts or the communication of false relevant facts that concern, not the phase of granting the subsidy, but the possibility of continuing to enjoy a subsidy to which one is no longer entitled or a periodic subsidy that is automatically renewed.

1.2.1.3. Crime of fraud (art. 248 CP).

The case law maintained, in a first phase, that between the crime of subsidy fraud and fraud there was a concurrence of rules to be resolved in favour of subsidy fraud based on the criterion of specialty (art. 8.4 CP, STC no. 13/2003, of 28 January), in such a way that the non-existence of subsidy fraud prevented the application of the crime of fraud. However, the important STS no. 105/2013, of 28 November has corrected this criterion by stating that the crime of fraud should be applied as a priority, and only in the absence of its assumptions, subsidy fraud would enter the scene as a subsidiary precept. The doctrinal and jurisprudential discussion is not, however, closed.

The criminal liability of the legal person is foreseen (art. 251 *bis* CP).

1.2.2. Fraud with respect to procurement-related expenditure

The Spanish legal system does not contain any specific provision to punish fraud with respect to expenses related to public tenders and that includes the behaviours described in art. 3.2.b) Directive (EU) 2017/1371. The first two behaviours referred to in the Directive can be sanctioned through the offense of fraud. It is true that, with regard to the second of them (failure to comply with an express obligation to communicate) there may be doubts. Most of the doctrine and jurisprudence, however, consider that when there is an express obligation to communicate, silence is equivalent to an affirmation that could be considered as a conclusive action. Beyond this point, in Spain, the sanction of fraud by omission is still under discussion. It is widely held that the failure to mislead cannot amount to deception, nor is it a conduct that falls within the literal meaning of the offence of fraud.

The conduct described in the last clause of art. 3.2 b) in relation to expenditure related to public tenders (the misuse of such funds or assets for purposes other than those for which

they were originally granted, and which damages the financial interests of the Union) can be punished through the crime of misappropriation of public funds (art. 432 CP). Extensively reformed in 2015, this precept criminalizes behaviours constituting either unfair administration (art. 252 CP) or misappropriation (art. 253 CP), committed by public officials in charge of public funds.

European public officials and of other EU states are considered active subjects of the crime of embezzlement (art. 435 *bis* CP in relation to arts. 24 and 427 CP). Private individuals involved in the crime of embezzlement can be considered as instigators, accomplices, and necessary co-operators. In these cases, the penalties may be mitigated (art. 65.3 CP).

The criminal liability of legal persons is established (art. 435.5º CP).

1.2.3. Fraud with respect to revenues other than VAT

Fraud involving revenue other than VAT, and which basically corresponds to the common customs tariff is punishable through the smuggling offenses provided for in the LORC. The structure of these offenses bears no relation to the behaviours described in art. 3. 2 c) Directive (EU) 2017/1371.

Art. 2.1 LORC contains the smuggling offenses in relation to lawfully traded goods that are applicable to Common Customs Tariff fraud. The typical conducts that are punished constitute tax evasion, although their description is adapted to the peculiar typology of customs tariff fraud.

The most common fraudulent behaviour is clandestine import or export. Tax evasion occurs by physically evading customs control of the goods by not presenting them for clearance at the customs offices or at the places authorized by the customs administration [art. 2.1.a)]. On other occasions, although the goods have in principle been placed under customs control, the circumvention occurs through their "concealment or removal" within the premises or places authorized [art. 2.1.a), second paragraph].

As in the case of tax fraud, taxpayers liable for customs duties are obliged to inform the Tax Authorities truthfully and fully all the circumstances relevant to the determination of the customs debt. Customs duties depend on the quality or composition of the product (it is not the same to export first category meat as waste) and sometimes on its origin, since with certain countries there are preferential agreements that imply the reduction or even the elimination of the duty. Inaccurate declarations on these aspects constitute the conduct described in articles 2.1.e) and 2.2.d). The administrative act referred to in this provision - release - determines the tariff treatment of the goods (art. 123 of Regulation 450/2008, establishing the Community Customs Code).

A singular form of tariff fraud, derived from the peculiarities of the internal market and the disappearance of fiscal customs between EU countries, is the one described in art. 2.1.c). To prevent non-EU goods entering through the customs office of one EU country, but destined for another country, from being subject to controls at all the customs offices through which they must pass, the EU has regulated the transit procedure (internal transit). This procedure also applies when the goods must pass through or are destined for a third country (external transit, regulated by the TIR Convention of 15 November 1975). Goods under this procedure pay customs duties in the country of destination and not in the first country through which they were introduced into the EU. The fraud in these cases is that the goods, introduced legally, are "lost" along the way, before the duty is paid at the customs office of destination, and are destined for consumption.

1.2.4. VAT fraud

VAT fraud is punished through the tax offense provided for in art. 305.3 CP, which expressly assimilates taxes from the EU. The main purpose of art. 305.3 CP in relation to VAT fraud is that it punishes fraud when the amount exceeds €10,000. Fraud against national taxes, on the other hand, is only criminally relevant when the amount exceeds

€120,000. These amounts refer to the total amount defrauded in a calendar year. Art. 305.2, a) CP expressly provides that when the fraud is carried out within a criminal organization or by means of front companies, it is not necessary to wait until the end of the calendar year to prosecute the fraud.

The various conducts provided for by Art. 3.2.d) Directive (EU) 2017/1371 are typical. The criminal liability of legal persons is foreseen in art. 310 *bis* CP. Attempt and all forms of participation referred to in the Directive are punishable.

1.2.5. Money laundering

Under Spanish law, money laundering (art. 301 CP) is a criminal offense regardless of the crime in which the assets originate. Therefore, there is no doubt that the commission of crimes is to the detriment of the financial interests of the EU. The crime of money laundering is also applicable, even if the assets come from crimes committed in other EU countries or third countries, provided that the principle of dual criminality is respected (art. 301.4 CP).

Criminal liability of legal persons is foreseen (art. 302.2 CP). Attempt and all forms of participation referred to in Directive (EU) 2017/1371 are punishable.

1.2.6. Corruption

The arts. 24, 427, 431 and 435 *bis* CP assimilate EU officials and from other EU countries to Spanish public officials for the purposes of all types of bribery offences (arts. 419 and following CP) and even influence peddling offences (art. 428 CP) and embezzlement (art. 435 *bis* CP). For this reason, in addition to sanctioning the behaviours described in art. 4.2 Directive, Spanish law also sanctions others, regardless of whether the purpose of the corruption or influence peddling is to harm the EU's financial interests.

Criminal liability of legal persons is foreseen (arts. 427a and 430 CP). Attempt and all forms of participation referred to in the Directive are punishable.

1.2.7. Embezzlement

Embezzlement referred to in art. 4.3 Directive (EU) 2017/1371 is punishable by the offence provided for in art. 432 CP (*vid. supra*).

2. Relevant provisions on ADR-Alternative Dispute Resolution in Criminal Matters and on simplified procedures for the non-judicial settlement of disputes

2.1. Alternative dispute resolution

2.1.1. Regulatory principles of the criminal process

2.1.1.1. Adult criminal procedure

The Spanish criminal process is governed by the principle of legality. In accordance with this, the Public Prosecutor is obliged to exercise all criminal actions it deems appropriate or to oppose those improperly acted to the extent and in the manner established by law (art. 124 EC and art. 6 EOMF). Otherwise, failure to do so could result in an offence of omission of the duty to prosecute such offences (art. 408 CP).

Even so, the Organic Act 1/2015 introduced a diversion mechanism based on the opportunity principle. The judicial body may agree, at the request of the Public Prosecutor, to dismiss the procedure and file the proceedings when (a) the reported minor crime is of very little seriousness in view of the nature of the fact, its circumstances and the author's personal circumstances and (b) there is no relevant public interest in the prosecution of the act (art. 963.1.1ª LECrim). In view of its application conditions, the opportunity principle does not apply to the crimes within the jurisdiction of the EPPO.

Currently, the Spanish legal system does not regulate restorative justice instruments that operate as alternative mechanisms to criminal action. A provision of this nature is contemplated in the APLECrim, still in parliamentary process, in which the PP is empowered so that, after evaluating the agreements reached by the parties, the concurrent circumstances and the status of the procedure, may decree the file by opportunity of plea agreement, imposing as rules of conduct the agreements reached by the parties (arts. 181 to 185 and art. 773)[1].

Nowadays, art. 15 LEVD limits itself to stating that the victims will be able to access restorative justice services, in the terms determined by regulation, to obtain adequate material and moral compensation for the damages derived from the crime. Restorative justice will be subject to the principles of voluntariness, free of charge, officiality, confidentiality, flexibility and bilaterality (Practical Guide for intra-judicial mediation of the CGPJ).

2.1.1.2. Juvenile criminal proceeding

Although the criminal procedure for minors is not the natural field of the EPPO, its approach is interesting not only because its application in the cases under analysis is not totally ruled out, but also because, in Spain, it represents the starting point of existing or projected diversion instruments for adults.

Thus, the regulation of the LORPM grants a primary role to the purposes of special prevention. In response to this, it places special emphasis on the idea of non-desocialization through the establishment of various diversion mechanisms that make it possible to resolve conflicts without submitting them to a criminal proceeding or at an early stage of it and, in any case, without a sentence, thus avoiding the declaration of criminal responsibility of the minor. The LORPM differentiates between (a) the withdrawal of the initiation of the file (art. 18 LORPM) and (b) the dismissal of the file for conciliation or reparation between the minor and the victim (art. 19 LORPM).

[1] Available in: https://www.mjusticia.gob.es/es/AreaTematica/ActividadLegislativa/Documents/210126%20ANTEPROYECTO%20LECRIM%202020%20INFORMACION%20PUBLICA%20%281%29.pdf

2.1.2. Objective scope

2.1.2.1. Adult criminal proceeding

A) Opportunity principle

The power of the Public Prosecutor to request the judicial body to agree on the dismissal of the procedure and the filing of the proceedings, based on the opportunity principle, is limited to minor crimes (art. 963.1.1ª LECrim). The demand for this requirement leads us to conclude that its operability in the field of PIF crimes is null, because those are considered, in our legal system, as serious or less serious crimes.

B) Restorative justice

In principle, the commission of any criminal act may be subject to a restorative justice procedure (art. 15.1.e LEVD), except those crimes that fall within the scope of jurisdiction of the courts of violence against women (art. 87 ter LOPJ). In the Practical Guide for Intra-judicial Mediation of the CGPJ, it is required in all cases that the positions of victim and aggressor be specified by the Court and the Public Prosecutor does not object to this, regardless of the protected legal right. In practice, in those Autonomous Communities that have a Restorative Justice Service, the judicial body in charge of the investigation, prosecution or execution can refer to said service without consulting the Public Prosecutor.

2.1.2.2. Juvenile criminal proceeding

A) Withdrawal of the initiation of the file

The Public Prosecutor may desist from initiating the file when the reported facts constitute less serious crimes (without violence or intimidation) or minor crimes (art. 18 LORPM). Those cases in which the minor had previously committed other acts of the same nature are excepted.

B) Dismissal of the file for conciliation or reparation

The dismissal of the file initiated by the Public Prosecutor, because of the conciliation or the reparation of damage between the minor and the victim, will only be possible when the act that is imputed to the minor constitutes a less serious or minor crime (arts. 13.2 and 3 in relation to with articles 33.3 and 4 CP). Likewise, the seriousness and circumstances of the facts will be taken into consideration, paying special attention to the lack of serious violence or intimidation in their commission.

2.1.3. Restorative process

2.1.3.1. Restorative justice for adults

In the Spanish criminal system, there is no specific legal regulation regarding the restorative justice procedure, beyond what is stipulated in art. 15 LEVD. This precept is still pending regulatory development. The art. 5.1.k) LEVD establishes that the victim has the right to be informed, from the first contact with the competent authorities and officials, including the moment prior to filing the complaint, about the "available restorative justice services". On the contrary, the procedural legislation does not provide specific information duties to the defendant or investigated person regarding these services.

In accordance with the provisions of the Practical Guide for Intra-judicial Mediation of

the CGPJ, at any time during the processing of the procedure, the Judge, *ex officio* or at the request of the Public Prosecutor or the VCAO[2], in any case without opposition from the Public Prosecutor, the victim, of the person under investigation or their legal representatives, may resolve to submit the procedure to mediation if the person under investigation does not deny the existence and/or participation in the act. The referral must be agreed by court order.

The Court will notify the judicial resolution of referral to the person under investigation and to the victim, indicating the reasons that support the decision to refer to mediation and that the professionals in charge of carrying it out will contact them, in writing or by telephone, to fix the appointment of the informative meeting, where they will be accompanied by their lawyers. After notification of the referral, the LAJ will inform the specific Restorative Justice Service of the start of the process and will send it the referral form and any documentation deemed appropriate. It will up to this Service to determine, in the light of the principles contemplated in art. 15 LEVD, whether it is feasible to carry out the restorative process, informing the parties about it. If it is not feasible, the specific motivations will not be included in the record prepared by the restorative justice service to inform the judicial body, in order not to compromise its impartiality.

The time limit for the conclusion of the restorative process will be that established by the Judge, without prejudice to the fact that, if the procedural phase is a trial phase, a date will be set for the oral trial in accordance with the time needs of the mediation process. However, the Judge may extend the time limit, at the request of the Restorative Justice Team, when there are serious possibilities of reaching an agreement and for this purpose it is necessary to extend it (principle of flexibility), subject to a report to this effect presented by the mediators/facilitators.

Once the process is completed with a restorative agreement, the team will draft the reparation document that will be sent to the lawyers of the parties, if they request prior approval, before proceeding to its signature by the parties. Once the reparation document has been signed, the Restorative Justice team will transfer it to the parties so that they can proceed with their procedural management and will notify the Court the completion of the process with a restorative agreement.

If the restorative process does not start after the briefing or, once started, does not end, the team will communicate these extremes to the Investigative Court, continuing the investigation in accordance with the provisions of the LECrim.

In practice, in those Autonomous Communities that have Restorative Justice Services attached to the Crime Victims' Assistance Office, the Investigative Court, either by judicial resolution or by decree of the LAJ, can refer *ex officio* to said service to start the process, or the victim or the alleged offender may initiate the restorative process, without having the approval of the Public Prosecutor. The first step in the restorative process is to contact with the victim. If the victim agrees to participate once he/she has been fully informed of the process, the consent of the alleged offender will be obtained from the facilitator. The process will begin once both parties have given their consent. If an agreement is reached between the parties, the facilitator will draft the restorative agreement which will be transferred to the lawyers of the parties for their approval, signature and subsequent presentation before the Court or Tribunal.

[2] Art. 37.b Royal Decree 1109/2015.

2.1.3.2. Restorative justice for juveniles

The technical team is responsible for carrying out mediation or conciliation functions between the minor and the victim. However, according to art. 8.7 of Royal Decree 1774/2004, these functions may also be performed by public and private entities. For this purpose, the minor, his/her legal representative, and his/her lawyer will be called to a meeting in which the Team will explain them the possibility of participating in a restorative process. This requires, in an inexcusable way, the recognition of the act, as well as the assumption of the consequences of his/her actions.

The technical team will then contact the victim so that they express, personally or by any other means that leaves a record, their consent to participate in a mediation procedure.

Immediately, the technical team will contact the victim who must state, personally or by any other means that leaves a record, his/her consent to participate in a mediation procedure.

If they agree to undergo a restorative justice procedure, the facilitator will interview them jointly or in a private way as many times as he/she deems necessary to reach a conciliation or reparation agreement. This agreement may include compensation for damages. In this case, the legal representatives of the minor must give their consent because they are responsible for the payment of said compensation.

If conciliation or direct repair is not possible, or when the technical team considers it more appropriate to the interest of the minor, the facilitator will propose to the minor the execution of socio-educational tasks or the provision of services for the benefit of the community.

2.1.4. Powers of the Authority that triggers the settlement procedure

2.1.4.1. Restorative justice for adults

In most cases, the judicial bodies are those who refer the case to a restorative justice procedure. This fact does not interrupt the evolution of the criminal process. Likewise, they must ensure the adequacy of the legal assessment that both, the Public Prosecutor and the criminal defense attorney, grant to the restorative agreements reached by the parties. When it be appropriated, the judge will pronounce a sentence plea bargaining and will decide about the suspension of the execution of the sentence. The repair may be carried out in the manner agreed upon by the parties in the "Repair Plan", which the Judge may include as content of civil liability —art. 110 CP—, or as an obligation in case the suspension execution of the sentence will be adopted (art. 84.1.1ª CP).

In the APLECrim, restorative justice is configured as an alternative mechanism to the exercise of criminal action. In this regard, it is established that it will be the Public Prosecutor -depending on the circumstances of the act-, the offender and the victim, who may, *ex officio* or at the request of a party, refer the parties to a restorative procedure (art. 182.1 APLECrim). Once the process is concluded, the restorative justice service will issue a report on the positive or negative result of the activity carried out, accompanying, in the positive case, the reparation certificate with the agreements reached by the parties (art. 183.1 APLECrim). The Public Prosecutor, assessing the agreements reached by the parties, the circumstance, and the status of the procedure, may order the file by opportunity in accordance with the provisions of arts. 175 and 176 of this law, imposing as rules of conduct the agreements reached by the parties.

2.1.4.2. Restorative justice for juveniles

The direction of the investigation in the juvenile criminal proceedings corresponds to the Public Prosecutor. For this reason, the Public Prosecutor is who may desist from the initiation of the file (art. 18 LORPM) or send the file to the judicial body with a proposal for dismissal for conciliation or reparation between the minor and the victim (art. 19 LORPM) if the legal requirements are appreciated in that case.

2.2. Simplified procedures

2.2.1. Nature and regulation of the measure

In current Spanish legislation, plea agreement is regulated in the following articles of the LECrim:

- Ordinary procedure for the prosecution of serious crimes[3] (arts. 655 and 688 LECrim), *a priori*, of no interest for the matter in question.
- Abbreviated procedure[4] (arts. 779, 784, 787 LECrim), which is of greater interest for crimes under the jurisdiction of the EPPO.
- Fast-track procedure[5] (arts. 800 and following LECrim), in principle not applicable to crimes under the jurisdiction of the EPPO, except the institution of the awarding of plea bargains, which may benefit less serious crimes (arts. 779.1, 5º, 800 and following LECrim). Thus, for example, fraud against the EU Treasury that do not exceed €100,000.
- Proceedings before the Jury Court[6] (art. 50 LOTJ), applicable to some of the crimes under the jurisdiction of the EPPO (such as bribery, influence peddling or embezzlement).
- Proceedings by acceptance of a decree[7] (arts. 803 *bis* and following LECrim), for which the condition of the minor nature of the criminal act should be added to the fact that no private or popular accusation has been filed in the case, which in principle will not happen in cases of tax fraud or against the Public Administration.
- Procedure for minors[8] (arts. 32 and 36 LORPM), applicable in the few cases in which the minor is charged with any of these crimes, which, although not frequent, cannot be completely ruled out.

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[3] Imprisonment of more than 9 years of abstract punishment (art. 757 LECrim), except crimes under the jurisdiction of the Jury.

[4] Applicable to offences punishable by imprisonment for up to 9 years, or other penalties (art. 757 LECrim).

[5] Applicable to offences of lesser gravity (punishable by a custodial sentence not exceeding five years, or others not exceeding ten years) and complexity that meet the requirements of art. 795 LECrim.

[6] Applicable to the list of offences in art. 1 LOTJ. On the rules of connection determining jurisdictional competence, see the ATS of 9 March 2017.

[7] For cases in which: the offence is punishable by a fine or community service or a prison sentence not exceeding one year, which may be suspended in accordance with the provisions of art. 80 CP.

[8] For any offence committed by minors (art. 2 LORPM).

To the above, arts 109.1.b) and 110 of Organic Act 9/2021 should be added, which expressly provide for plea agreements for cases within the jurisdiction of the EPPO.

2.2.2. Requirements

For its viability it is necessary that the penalty requested by the prosecution does not exceed six years of imprisonment, which is the case for most economic crimes and in any case for those that are the object of the EPPO. It is also necessary that the defendant accepts the facts and the penalty. There is no limitation due to the nature of the crime, although this may determine the type of criminal procedure to be followed and the consequent particularities of the plea agreement foreseen for it. The fact that the accused is a repeat offender is not an obstacle either, if this does not result in the imposition of a sentence exceeding the maximum limit.

For the purposes of the maximum penalty threshold, it should be borne in mind that:

- the penalty of reference is not the one abstractly provided for in the law, but the one specifically requested by the prosecution.
- it will be the one resulting from the application of the rules for the determination of the penalty provided for in the Criminal Code, with the sole exception of the cases rewarded or benefited with a plea agreement for which the LECrim provides for the reduction of the penalty by one third.
- in case of plurality of crimes, the maximum penalty limit refers to each one of them, except for the rewarded plea agreement cases that considers the total amount.
- according to the criteria of the State Attorney General's Office, the subsidiary personal liability for non-payment of fines does not compute in the calculation of the maximum penalty (State Attorney General's Office Consultation 4/1999).

Nothing is specified in the law about the maximum penalty limit when it is not a custodial sentence, which raises many interpretative problems, although it is generally understood that crimes punished with non-custodial sentences admit a plea agreement. This criterion is considered pro-defendant and seems to fit with the generic idea that non-custodial sentences are always minor. However, this is not always the case, because while absolute disqualification or penalties applicable to legal persons are serious penalties, prison sentences not exceeding five years are less serious. Therefore, in the absence of a legal table of equivalences, it would be desirable for the legislator to indicate which non-custodial sentences admit a plea agreement, which is currently only partially provided for in the case of a rewarded plea agreement, opening a major interpretative problem for the rest. However, if a future reform of the procedural law were to admit a plea agreement for any type of crime with no maximum penalty limit (as envisaged in the current Preliminary Draft), the problem would cease to be of interest.

According to art. 110 LECrim, the only limit for a plea agreement in EPPO cases is imposed by the prison sentence, which cannot exceed six years. There is no limit for the other sentences, with respect to which the problem just described will arise. Thus, for example, in the case of bribery under art. 419 CP, for which four years of imprisonment and twelve years of disqualification could be requested. Formally, a plea agreement would be possible, although the seriousness of the penalty of disqualification might make it advisable to hold a trial.

2.2.3. Plea agreement and mediation

In consideration of the need for the accused to accept the sentence requested by the prosecution, in the negotiation of the plea agreement is of special importance, the agreement on the application of mitigating factors that can considerably reduce the sentence, as well as on the suspension of the execution of the prison sentence. For both, the reparation of the damage caused by the crime will be relevant. On the one hand, because it will allow the application of the mitigating factor of reparation, which, if highly qualified, can reduce the sentence by up to two degrees, which could be added to other grounds for mitigation, such as undue delay; on the other hand, because it helps to support the suspension of the sentence.

Consequently, the process of a plea agreement can be associated with an extra procedural mediation process that facilitates both recognition of the facts and reparation of the damage. This is neither necessary nor frequent.

In this case, the follow-up of a mediation process could be translated into the presentation of a joint statement of qualification (art. 779.1.5ª LECrim, with reference to arts. 800 and 801 for the plea agreement awarded before the Examining Magistrate in the abbreviated procedure; 784.3, para. 1º LECrim for the plea agreement in the intermediate phase of the abbreviated procedure; art. 787 LECrim; art. 787.1, 2nd paragraph LECrim for the plea agreement in the oral hearing of the abbreviated procedure; art. 50 LOTJ for the plea agreement in the procedure before the Jury) that would seal the maximum limit of the sentence that could be imposed by the Judge.

2.2.4. Procedure and competent judicial bodies for plea agreement

Since there is no specific procedure foreseen for the cases subject to the EPPO, the plea agreement must be processed in accordance with the general regulations that admit it in the following procedures:

a) Ordinary procedure for the prosecution of serious crimes:
    i. sentencing court, in the intermediate phase (art. 655 LECrim).
    ii. sentencing court, at the beginning of the oral trial sessions (art. 688 LECrim).

b) Abbreviated procedure:
    i. Examinig Magistrate (art. 779.4 LECrim with reference to arts. 800 and following LECrim), in the case of awarding a plea agreement.
    ii. Sentencing body - Criminal Court Judge or Magistrate of the Provincial Court -, in the intermediate phase (art. 784.3 LECrim).
    iii. Sentencing body - Criminal Court Judge or Magistrate of the Provincial Court -, at the beginning of the oral trial sessions (art. 787 LECrim).

c) Rapid procedure: arts. 800 and following LECrim.
    i. The Examining Magistrate on Duty, in the case of awarding a plea

agreement (arts. 800 and following LECrim).

ii. Sentencing body - Criminal Judge or Magistrate of the Provincial Court - , in the intermediate phase (art. 784.3 LECrim, of subsidiary application, by virtue of art. 795 LECrim).

iii. Criminal Court Judge, at the beginning of the oral trial sessions (art. 802 LECrim, with reference to art. 787 LECrim).

d) Procedure before the Jury Court: art. 50 LOTJ.

i. Presiding Magistrate, in the plea agreement in the provisional qualification by supplementary application of the LECrim (art. 24 LOTJ).

ii. Presiding Judge, at the beginning of the oral trial sessions (by supplementary application of the Criminal Procedure Act, according to art. 24 LOTJ).

iii. Presiding Judge, at the time of the definitive conclusions (art. 50 LOTJ).

e) Juvenile proceedings: arts. 32 and 36 LORPM.

i. Juvenile Judge (art. 32 LORPM), after the opening of the hearing phase.

ii. Judge for minors (art. 36 LORPM), at the beginning of the hearing sessions.

3. The accused and the damaged party in the ADR procedure

3.1. The accused and the damaged party in the restorative justice

The victim and the offender may access restorative justice services, as determined by the regulations, to obtain adequate redress for the material and emotional harm arising from the offence, where the following requirements are met (art. 15 LEVD): a) the offender has acknowledged the relevant acts from which his or her liability arises; b) the victim has given his or her consent, after receiving exhaustive and impartial information about their content, the possible outcomes and the procedures for enforcing them; c) the offender has given his or her consent; d) the mediation process does not pose a risk to the victim's safety and there is no danger that it could cause new material or emotional harm to the victim; e) it is not prohibited by law for the offence committed.

The victim and the offender may revoke their consent to participate in the mediation process at any time, without implying any negative consequence in the criminal process.

The discussions which take place during the mediation process shall be confidential and must not be divulged without the consent of both parties.

The parties can freely decide the content of the mediation agreement (Practical Guide for intra-judicial mediation of the CGPJ). In this sense, according to the principle of bilaterality that governs restorative justice processes, both parties will have the opportunity to express their claims without any other limitation other than that established by the mediator/facilitator for the proper development of the sessions. They must express their positions and willingness to repair, as well as their acceptance, before the judge in the act of the oral trial, or at any other time that ends the criminal procedure. The parties

can seek advice from a lawyer when agreeing on what is most appropriate for their interests. In no case, they have the power to order or establish criminal sanctions that are not expressly contemplated for the crime that is the object of the restorative process.

The Judge must ensure the adequacy of the legal assessment that both the Public Prosecutor and the criminal defense attorney grant to the restorative agreements reached by the parties. When it is appropriate, the judge will pronounce a sentence plea bargaining and will decide about the suspension of the execution of the sentence.

3.2. The defendant and the victim in the plea agreement proceedings

3.2.1. The defendant and the victim in the plea agreement proceedings

In the case of a plea agreement, it is the defense counsel who must inform the defendant of the possibility of a plea agreement and the existence of the Protocol of Action.

Given the very personal nature of the plea agreement, the defendant's participation is an essential requirement. Thus, although conviction in absentia is possible in cases involving minor crimes, this is not the case with sentences of a plea agreement, which require the presence and approval of the defendant, with variations depending on the type of proceeding and the time at which it takes place.

In general, the intervention of the victim is not required, which is only guaranteed when he/she becomes a party to the criminal proceedings, without prejudice, otherwise, to his/her right to be informed, as well as the possibility that the prosecutor may hear him/her. The victim has a central role within the restorative process, but not in the plea agreement.

In any case, in tax fraud cases, the systematic participation of the State Attorney's Office in the process means that the victim is always present.

From the above it can be deduced that there is a lack of symmetry in the conditions of representation of the victim and the accused in the negotiation of the agreement, because while the intervention of the latter is a *conditio sine qua non*, the participation and consent of the former is not a necessary condition when he is not a party to the process.

Another thing is that the accused does not have a central role in the negotiation of the "pact" in which he or she may feel to remain silent. The leading role in the negotiation falls on the Public Prosecutor and the lawyers, as can be deduced from the Action protocol for conformity lawsuits signed between the State Attorney General's Office and the General Council of Spanish Lawyers and the Plea Agreements Protocol Execution Agreement between the Barcelona Bar Association and the Provincial Prosecutor's Office. The defendant's intervention is reduced to authorising the negotiation and approving its outcome. In this context, all the guaranteeing effort is concentrated on verifying the clarity of the terms of the agreement and the voluntary and express nature of the defendant's declaration of intent, in addition, of course, respect for the principle of legality, under the dual control of the defence counsel and the judge.

3.2.2. Plurality of defendants

In the case of the plurality of defendants, as may happen in cases of corruption and tax fraud, if any of the defendants does not agree, there is no plea agreement with respect to any of them. This is established for the ordinary procedure, in art. 655, para. 4 LECrim for the intermediate phase and art. 695 LECrim for the oral trial. There are no analogous

provisions for the abbreviated procedure (arts. 784 and 787 LECrim), although the principle of subsidiarity of the ordinary procedure allows the previous provisions to be transferred to it.

The possibility of autonomous plea agreement is only foreseen in the case of legal persons (*infra*), who can conform independently of the refusal of the others (art. 787.8 LECrim).

If the discrepancies between the various participants only affect civil liability, the procedure could continue until the oral trial only for these purposes (art. 655, para. 5 LECrim for the intermediate phase of the ordinary procedure).

3.3. The legal person

3.3.1. Criminal liability of legal persons

Since 2010, the Spanish Penal Code regulates the criminal liability of legal persons in the following articles: art. 31 *bis* (criteria for attributing the offence committed by the natural person to the legal person); art. 31 *quáter* (catalogue of mitigating circumstances); art. 33.7ª (catalogue of specific penalties to the legal person); arts. 50, 52.4, 53.5 and 66 *bis* (specific rules for the application and determination of penalties), art. 116.3 (joint and several civil liability with the natural person convicted for the same acts); art. 130.2 (grounds for extinction of the criminal liability of the legal person) and art. 136 (cancellation of criminal record). Subsequently, Organic Act 1/2015 introduced a detailed regulation of the organisation and management programmes for the prevention of corporate crime (arts. 31 *bis* 2, 3, 4, 5 and 6 CP).

The criminal liability of legal persons shall be applicable whenever there is a record of a criminal offence being committed by a person who holds office or carries out the duties referred to in art. 31 *bis* 1 CP, even if the specific natural person responsible has not been individually identified, or it has not been possible to prosecute that person. Concurrence, in the persons who have materially perpetrated the deeds or those who have made these possible due to not having exercised due control, of circumstances that affect the culpability of the accused or aggravate their responsibility, or the fact that those persons have died or have escaped the action of justice, shall not exclude, or modify the criminal liability of legal persons (art. 31 *ter* CP).

For the purposes we are interested in here, legal persons may be liable for private corruption in business and corruption of foreign public officials (art. 288.1 CP); money laundering (art. 302.2 CP); the crime of unlawful financing of political parties (art. 304 *bis*. 5 CP); offences against the Public Treasury (Inland Revenue, that of the Autonomous Communities, special provinces, local authorities, and European Union) and against the Social Security (art. 310 *bis* CP); active bribery (art. 427.2 CP); influence peddling (art. 430 CP); embezzlement of public funds (art. 435.5 CP). Also, for the crime of smuggling (art. 2.6 LORC).

Exceptions to the direct criminal liability of legal persons:

a) The provisions related to criminal liability of legal persons shall not be applicable to the State, to territorial and institutional Public Administrations, to Regulatory Bodies, to Public Agencies and Corporate Entities, to international organisations under Public Law, or to others that exercise public powers of sovereignty or administration. The exemption from direct criminal liability no longer applies to

political parties and unions (since Organic Act 7/2012) and extends to foundations and entities with legal personality linked to them (art. 31 *quinquies*.1 CP).

b) In the case of State Mercantile Companies that implement public policies or provide services of general economic interest, only the imposition of a fine and/or the judicial intervention of the company or any of its facilities, sections or business units is allowed (art. 31 *quinquies*. 2 CP).

c) The criminal offences committed within, in collaboration with, or through or by means of companies, organisations, groups or any other kind of entities or groups of persons that, due to not having legal personality, are not included in the general regime of art. 31 *bis* CP (art. 129 CP). This is a characteristic feature of Spanish criminal law.

   The crimes for which the accessory consequences of art. 129 CP are all those for which legal persons respond by way of art. 31 *bis* CP and some more. For the purposes that interest us here, these other crimes are those of altering prices in tenders and public auctions (art. 262 CP), the crime of obstruction of the inspection and supervision activity (art. 294 CP), the crime of counterfeiting currency (art. 386 CP) and crimes committed within criminal organizations and groups (arts. 570 *bis* and *ter* CP).

   The material content of the accessory consequences of art. 129 CP is practically the same as the penalties envisaged in art. 33.7 CP for entities with legal personality.

The hearing and ruling of the case against the legal person are determined by the severity of the penalty applied for the crime committed by the natural person (art. 14 *bis* LECrim).

3.3.2. Legal person and restorative justice

3.3.2.1. The legal person as a victim

Art. 2 LEVD refers only to natural persons, which seems to exclude legal persons from its subjective scope of application. However, it must be borne in mind that its purpose is to offer victims the widest possible protection, not only legal but also social, from public authorities. In this sense, protection goes beyond the framework of criminal proceedings to extend to other areas. And so, in the LEVD, the general catalogue of procedural and extra-procedural rights of all crime victims is established (and in this sense, the legal entity can be considered part of a criminal mediation procedure or restorative process, although the LEVD does not expressly refer to legal persons as victims).

Also, art. 103 *bis*. 3 LECrim expressly indicates the possibility of criminal action being instituted by associations of victims or legal entities to defend their rights.

The Practical Guide for Intra-judicial Mediation of the CGPJ recognizes the possibility of intervention of the legal person as a victim in criminal mediation processes. Specifically, it states that: “if the victim were a legal person, the interviews will be held with whomever they designate, previously ensuring his/her ability to make decisions and sign reconciliation agreements that give legal certainty to the process, ensuring that the representative does not coincide as a possible subject investigated under the provisions of art. 31 *bis*”. Despite the use of the term victim in the above-mentioned Guide, it would

be more correct to refer to legal persons as injured parties since, according to the provisions of art. 2 LEVD, victims are only natural persons.

3.3.2.2. The legal person as an offender

Art. 15 LEVD speaks of "offender" to participate in the restorative process, so it does not seem applicable to legal persons. However, we believe that there is no obstacle to mediation between the legal entity and the injured parties, given the type of crimes that can be committed by legal entities.

Thus, for example, it would be possible in those semi-private crimes, where the forgiveness of the offended party extinguishes the criminal liability of the legal person (crime of discovery or revelation of secrets of art. 197 CP). Also, in crimes where there are provisions of criminal award law derived from the reparation of the damage (in crimes against the Public Treasury and Social Security of arts. 305.6, 307.5 and 307 *ter*.6 CP) or in the crime of embezzlement of public funds (arts. 434 and 435 CP). In all of them, the reparation of the damage caused can lead to a reduction of the sentence by one or two degrees which represents a remarkable penological improvement.

In practice, restorative processes are already being carried out -through their legal representatives- with legal entities -both public and private-. For the time being, it is more usual for the legal person to participate as a victim (or harmed in response to the observations made above) than as an offender.

3.3.2.3. Criminal procedure status of legal persons in the criminal proceedings

In the case of legal persons, the only possibilities of avoiding criminal charges, disqualification, deprivation of rights or reducing the amount of the fine are the followings: a) the file of the proceedings in the pre-procedural phase; b) the plea agreement of the legal person. The reference in art. 84.1.1ª CP to the suspension of the custodial sentence does not, by its very nature, affect legal persons.

If the denounced legal entity effectively complies with a criminal prevention model, confesses the criminal offences to the authorities and collaborates in the investigation of the deeds providing evidence in the sense required by the mitigating circumstances (art. 31 *quáter* CP), the Public Prosecutor can issue a decree agreeing to close the case in the phase of pre-procedural investigation proceedings. This possibility is extracted from the combined reading of art. 5.1 EOMF, art. 773.2 LECrim and the exegetical guideline 19. 6ª contained in State Prosecutor's Office Circular 1/2016. In this case, if criminal proceedings are subsequently opened (because the victims or injured parties have appealed against the closure of the case), the disclosure and collaboration of the legal entity before the Public Prosecutor would serve as a mitigating circumstance (art. 31 *quáter* CP).

If a reparation agreement is reached with the victim, depending on the procedural moment and the seriousness of the facts, this would open the possibility of the dismissal or closure of the case during the investigation phase (art. 782.1 LECrim), the privileged plea agreement (art. 779.1.5º LECrim) or the plea agreement with a substantial reduction in the sentence during the oral trial (787.8 LECrim).

The Act 37/2011, of 10 October, on procedural streamlining measures introduced the plea agreement for legal persons into the LECrim (arts. 784.3, 787.8 and 801 LECrim).

In this case, it is possible to reach an agreement without any objective penalty limit -whatever the amount of the fine or disqualification requested- and regardless of the position adopted by the other defendants.

The plea agreement must be given by their specifically appointed representative if they have a special power of attorney. Such a plea agreement may be given regardless of the position taken by the other accused and its content will not be binding in the trial held in relation to the latter. This constitutes an exception to the general rule established in art. 697 LECrim, whereby if there are several defendants jointly accused in the same proceedings, all of them must agree to obtain a sentence plea bargaining from the court. In this case, it is possible to reach an agreement without any objective penalty limit -whatever the amount of the fine or disqualification requested-. Once the agreement has been reached, the judge, provided that he/she concludes that the accepted qualification is correct and that the sentence is appropriate in accordance with this qualification, issues a sentence plea bargaining. This brings the proceedings to an early end without the need to continue with the oral trial.

4. Observations on the functioning of the *ne bis in idem* principle

4.1. Adult criminal procedure

Restorative justice mechanisms take place outside the criminal process. Currently, they are not an alternative to the exercise of criminal action. In view of this, the restorative agreements reached between the parties cannot be taken into consideration to decree the file of the criminal procedure for reasons of opportunity. In those cases where the restorative agreements are incorporated to the verdict of a sentence plea bargaining, they will have the res judicata effect of the judgment itself.

4.2. Juvenile justice system

The file decrees of the preliminary proceedings do not constitute jurisdictional decisions, so they do not entail a final judgment on the merits of the matter (art. 18 LORPM).

The order of dismissal of the case due to conciliation or reparation between the minor and the victim (art. 19 LORPM) puts a definitive end to the proceedings with the full effect of res judicata.

5. Evaluation of the concrete impact of the ADR procedures

5.1. Restorative justice for adults

5.1.1. Effects on the form of termination of criminal proceedings

Restorative justice mechanisms take place outside the criminal process, not currently constituting an alternative to it. In view of this, the restorative agreements reached between the parties will not be taken into consideration to decree the file of the criminal procedure for reasons of opportunity. However, these may have effects in the form of processing and termination of the criminal process (*vid. supra*)

5.1.2. Penological consequences

The lawyer and Public Prosecutor will define and discuss the legal consequences (exact determination of the sentence and possible measures suspending the prison sentence) taking into consideration the restorative agreement reached. Thus, the reparation of the damage caused to the victim, or the reduction of its effects, at any time during the proceedings and prior to the oral trial, allows for the appreciation of the mitigating circumstance of reparation of the damage (art. 21.5ª CP, or art. 305.6 CP for the crime of

tax fraud). If it is carried out after the oral trial has been held, it can be assessed for the purposes of establishing the analogue mitigating circumstance of repairing the damage (art. 21.5 in relation to art. 21.7 CP). It is also legally viable to promote the possibility of promoting the application of an analogue mitigating circumstance of confession (art. 21.4 in relation to art. 21.7 CP) in cases of symbolic reparation and late confessions. In this sense, STS no. 427/2017, of 14 June, has raised the need to reform the mitigating circumstance of confession to accommodate cases of collaboration and confession in "unofficial" environments with express reference to criminal mediation.

On the other hand, in certain criminal offences that fall within the jurisdiction of the EPPO, the acknowledgement of the facts and reparation are recognised as being specifically attenuated (art. 305.6 CP for the offence of tax fraud, art. 426 for the offence of bribery and art. 434 CP for the offence of embezzlement of public funds) and, in some cases, may even give rise to the application of an acquittal (art. 305.4 for the tax offence and art. 308.6 CP for the offence of subsidy fraud).

5.1.3. Execution of the restorative agreement

The content of the restorative agreement is never of a punitive nature. The restorative agreement may be executed in the form that the parties have agreed in the "Reparation Plan". The judicial body may include it, in a sentence, as the content of the civil liability derived from the offence and be taken into consideration in the framework of the suspension of the execution of the sentence.

5.1.3.1. Civil liability

In the Spanish Criminal Code, civil liability can be satisfied through three different modalities: restitution of the property, reparation of the damage and compensation for damages (art. 110 CP). These modalities can be accumulated so that the injured party is compensated for all the negative results suffered by the commission of the offence, provided that this does not involve double reparation

From the procedural point of view, civil liability derived from a crime can be substantiated in the criminal proceedings themselves, without the need to resort to subsequent civil proceedings, but it continues to be subject to the rules of civil law (art. 111 LECrim).

It is also important to note that Organic Act 9/2021 stipulates that both the EPPO and the private prosecutors are actively legitimised for the joint exercise of the civil and criminal action. In this sense, our procedural model offers the possibility of recovering the defrauded funds immediately and in parallel to the successful completion of the criminal prosecution (Consideration 107 and Art. 41.3 of the Regulation).

If it does not proceed voluntarily, the Court of First Instance of the place where the agreement was signed will be competent for the enforcement of the formalised agreements derived from a restorative procedure (art. 545.2 LEC).

5.1.3.2. Suspension of execution of sentence

The suspension of the execution of the sentence is an alternative regime to the material enforcement of custodial sentences, mainly short prison sentences, applicable to convicted persons who have a favourable prognosis of not reoffending. Among other legal requirements, its concession demands the prior satisfaction by the convicted person of civil liability *ex delicto*, unless the victim and injured parties expressly waive this (art. 80.2.3 CP). This requirement will be understood to be fulfilled when the convicted person

assumes the commitment to satisfy the civil liabilities in accordance with his or her economic capacity. In the case of those convicted of committing a crime against public finances or social security (Title XVI of Book II of the Criminal Code), the granting of this benefit requires the offender to have paid the tax or social security debt or, where applicable, to have repaid the subsidies or aid unduly received or used, or to have undertaken to do so (art. 308 bis CP). This provision constitutes an unequivocal means of pressure on the convicted person which undoubtedly has repercussions for the benefit of the victim, insofar as compliance with the civil duty of compensation is being forced by criminal means.

The suspension of the execution of the sentence is not a benefit that is automatically granted once the above-mentioned legal requirements have been met. It is a regulated discretionary power that the legal system grants to the judicial body as an exception to the general principle that sentences must be complied with in their own terms (art. 18.2 LOPJ). The reasoned decision adopted by the sentencing court using this power must also "weigh up the individual circumstances of the convicted person, as well as the values and legal interests involved in the decision, taking into account the main purpose of the institution, re-education and social reintegration, and the other general prevention purposes which legitimise the custodial sentence". Among the parameters to be assessed, express mention is made of "his or her conduct after the act, in particular his or her efforts to repair the harm caused" (art. 80.1 CP). This generic allusion to reparation makes it possible to include, on the other hand, any measure, even those of a symbolic nature (e.g., participation in restorative justice programmes, restorative agreements reached between the parties, etc.), which entails a restoration of the harm caused to the victim.

Likewise, the judge or court may make the suspension of the execution of the sentence conditional upon compliance during this period with the agreement reached by the parties by virtue of a mediation process previously held (art. 84.1.1ª CP).

5.2. Restorative justice for juveniles

5.2.1. Effects on the form of termination of criminal proceedings

5.2.1.1. Withdrawal of the initiation of proceedings (art. 18 LORPM)

The decree that is issued agreeing to the withdrawal of the initiation of the proceedings must contain a succinct motivation and express its legal cause. This will be communicated by the Public Prosecutor to the offended and injured parties. The purpose of this communication is to make them aware of their right to bring a civil action before the civil courts, as this withdrawal does not exclude the civil claim.

5.2.1.2. Dismissal of the proceedings for conciliation or reparation (art. 19 LORPM)

Once the conciliation has taken place, the Public Prosecutor will conclude the investigation, desisting from continuing with the proceedings and will request the judicial body, without interruption, after sending the proceedings back, to dismiss and close the proceedings. On the other hand, the simple commitment of the minor to repair the damage caused or to carry out the educational activity proposed by the mediation team is only sufficient for the Public Prosecutor to agree to the provisional suspension of the proceedings. However, he/she will only be able to desist from processing the case when he/she verifies the effective fulfilment of the obligations assumed by the minor and request, at the same time, the juvenile judge to dismiss the case. The art. 19.4 LORPM also empowers the Public Prosecutor to conclude the investigation when the effective

conciliation or reparation has not been able to take place "for reasons beyond the minor's control". The dismissal of the case due to conciliation or reparation between the minor and the victim puts a definitive end to the proceedings with the full effect of *res judicata*.

5.3. Plea agreement

5.3.1. The impact on the reparation of damage

The reparation of the damage is not a condition of a plea agreement, since the possibility of an agreement is admitted only over criminal liability excluding civil liability, for which the procedure can continue until the oral hearing for these sole purposes (art. 655, para. 5 LECrim).

Nevertheless, in certain crimes such as, for example, tax fraud (art. 305 CP), the public and private prosecution impose this condition, although the law does not oblige them to do so.

In such a case, in general terms, the reparation of the damage does not avoid the fulfilment of the penalty, although it can reduce it (arts. 21.5, 305.6 for tax fraud, 308.8 for subsidy fraud, 434 for embezzlement CP), and, being less than two years of imprisonment, it allows the suspension of the execution of the sentence (arts. 80 and following CP).

Only exceptionally, the reparation of the damage determines the lifting of the penalty, as in the case of temporary tax regularization in the case of tax fraud (art. 305.4 PC) or subsidy fraud (art. 308.6 PC). However, the time limit to which it is subject impedes it from reaching the cases of and intra-procedural plea agreement.

5.3.2. The impact of the plea agreement on suspended sentences

The main incentive for the accused to comply is to seek a suspension of the execution of the prison sentence, which is possible when the application of the rewarded plea agreement (art. 800 and following LECrim) or the crossover of attenuating circumstances (arts. 21 and 66 CP), a prison sentence of no more than two years is achieved, as required by art. 80 CP.

This is, therefore, the main impact that agreement can have on the application of alternatives to prison aimed at benefiting re-socialisation. However, the agreement cannot ensure the suspension of the sentence, which is a discretionary competence of the judge.

5.3.3. The impact of the plea agreement on shortening the duration of the process

At present, the main advantage of plea agreement is the shortening of court times and the eventual saving of the oral hearing and all the negative consequences it entails for the offender (penalty on the bench) and the victim (re-victimisation).

In this sense, the State Prosecutor's Office Instruction 2/2009 expressly states: “Thus, from the point of view of efficiency in the form of a more agile Justice, a plea agreement makes real sense to the extent that it not only serves to avoid the unnecessary prosecution of the accused who confesses guilt, but also the cost, in terms of work and time for the different subjects involved in the process, which may involve the completion of all the actions leading to the holding of the trial. Once time has been allocated in the agenda of the judicial body and the Prosecutor, witnesses and experts summoned, and they -as well as the Prosecutor and the Lawyers- are present at the judicial headquarters, the plea agreement in the courtroom shows the absolute uselessness of all that effort, obviously to

the detriment of other equally or more priority issues. At the same time, the efforts of other public officials (members of the State Security Forces and Corps, forensic experts, experts and technicians), who waste in vain their working day on journeys and waiting, and the witnesses are especially affected; victims and injured parties summoned to the hearing who, were forced to alter their normal daily activity, end up experiencing -with explicit manifestations of protest, in many cases- a justified frustration upon learning that, the defendant having agreed at the last minute, his/her effort has also been wasted."

That is precisely the main objective of the Action protocol for plea agreements signed between the State Attorney General's Office and the General Council of Spanish Lawyers of 2008, which states in point 1 of its preamble that "the purpose of this Protocol is to update the means of consensual solution of the criminal process that are oriented primarily to promote speed and simplify the necessary steps to reach the sentence".

The case in which the agreement allows to shorten the process to the maximum and to obtain a special punitive benefit is that of the fast trial, in which the agreement can lead to conclude the process in Urgent Diligences before the same Duty Court, and to obtain the reduction of the penalty in a third. However, in view of the conditions for the application of art. 795 LECrim, it is not of interest to the European Public Prosecutor's Office, without prejudice to the possibility of applying the institution of the award of plea agreement regulated in art. 801 LECrim to cases initiated as Preliminary Proceedings of art.- 779.1.5º LECrim.

In the rest of the cases, the plea agreement can be adopted at two moments:

> On the one hand, in the intermediate phase, which when it happens, shortens the procedure considerably. This is the reason why the Protocols of action promote its adoption at this procedural moment, as can be seen in the Protocol of action for plea agreement trials signed between the State Attorney General's Office and the General Council of Spanish Lawyers and Plea Agreement Protocol Execution Agreement between the Barcelona Bar Association and the Provincial Prosecutor's Office. However, it is not frequent that the plea agreement is adopted in this phase.
>
> On the other hand, in the oral trial phase, in the same act or at the doors of the same, which unfortunately, is the most frequent.

In short, there are mechanisms for reducing procedural times, but of all the possible ways, the most used is the one that has the least practical impact.

5.3.4. The impact of the plea agreement on the achievement of the resocialization goal

Insofar as plea agreements requires acknowledgement of the facts (plea agreement with a claim of innocence as in the American system is not possible), it can contribute to the realization of the positive special preventive function. However, the fact that a plea agreement is not necessarily - in fact, almost never - associated with restorative processes means that the acknowledgement of the facts can be a mere formality to achieve pragmatic ends that do not involve any reflection on the significance of the crime committed and the harm caused with an impact on future behaviour.

6. Further observations and comments

Strictly speaking, the Spanish legal system does not regulate alternative restorative justice instruments to criminal proceedings.

Art. 15 LEVD gives legal coverage to channels of dialogue and damage repair of an extra-procedural nature (such as mediation or other restorative justice instruments), the result of which can be incorporated into the criminal process. However, they do not allow criminal proceedings to be avoided or archived, except for those semi-public crimes in which the forgiveness of the offended party extinguishes the criminal action (such as the crimes of discovery and disclosure of secrets, art. 197 and subsequent CP). This possibility is only planned for juvenile justice, with minimal impact for crimes under the jurisdiction of the EPPO.

Plea agreements do not guarantee reparative dialogue either, since they do not even assure the presence of the victim, nor alternative ways of resolving conflicts. They are subject to the principle of legality that requires the application of the penalties provided for the crime in the criminal law. However, it is the only space that currently exists for the insertion of the result of the mediation or restorative agreements. It can serve to shorten procedural times. Its statistical impact is considerable and grows over time, although not so much in tax fraud crimes. So far, it has not yet been achieved that, instead of processing the consent at the gates of the oral hearing, it is done in the intermediate phase, which would allow the workload of the Administration of Justice to be reduced much more, contributing to carrying out one of its main goals.

With all its limitations, the Spanish regulation of a plea agreement can be used to apply the provisions of art. 109 Organic Act 9/2021 creating the EPPO. The provision that a joint qualification brief must be presented to pronounce a sentence plea bargaining could be facilitated through the implementation of restorative justice procedure.

In any case, it should be noted that the principle of legality greatly restricts the negotiation margin, which opens the danger that the prosecution aims higher than it otherwise would for the sole purpose of gaining negotiating space. For this reason, the proposal to expand the scope of application of the award-winning plea agreement makes sense, so that the negotiation serves to benefit those who freely want to negotiate and not to sanction those who reject it.

7. List of national cases (optional, if available)

No data available

8. Bibliographical references

S Barona Vilar, *Mediación penal. Fundamento, fines y régimen jurídico (*Tirant lo Blanch 2012).

Centro de Estudios Jurídicos y Formación Especializada, http://cejfe.gencat.cat/es/recerca/cataleg/tema/mediacio-penal/index.html

M Cugat Mauri, 'La conformidad en los delitos socioeconómicos' in M García Arán (dir), *Justicia restaurativa y delincuencia socioeconómica* (Tirant lo Blanch 2021) 313-366.

L F Gordillo Santana, *La justicia restaurativa y la mediación penal* (Iustel 2007)

Mª J Guardiola Lago, 'Fundamentos de la justicia restaurativa en la delincuencia socioeconómica' in M. García Arán (dir), *Justicia restaurativa y delincuencia socioeconómica* (Tirant lo Blanch 2021) 29-86.

N Pérez Rivas, 'El derecho de la víctima a olvidar' (2016) La ley penal: revista de derecho penal, procesal y penitenciario 1-20

N Pérez Rivas, *Los derechos de la víctima en el sistema penal español* (Tirant lo Blanch 2017)

N Pérez Rivas, 'Justicia juvenil restaurativa: aplicación práctica' in Mª F Vásquez Palma (dir), *Mecanismos alternativos de solución de conflictos: estado actual, problemas existentes y propuestas de soluciones* (Thomson Reuters 2018) 871-893

N Pérez Rivas, 'El cumplimiento del acuerdo mediatorio como condición de la suspensión excepcional de la pena' in C Alonso Salgado and R Castillejo Manzanares (dirs), *El nuevo proceso penal sin Código Procesal Penal* (Atelier 2019) 561-575

J. C. Ríos Martín, E Pascual Rodríguez, A Bibiano Guillén, *La mediación penitenciaria. Reducir violencias en el sistema carcelario* (Colex 2005)

J Mª Tamarit Sumalla (coord), *La justicia restaurativa: desarrollo y aplicaciones* (Comares Granada 2012).

I Valeije Álvarez, 'La prohibición de contratar con el sector público y otras consideraciones accesorias' (2018) Estudios Penales y Criminológicos 481-545

I Valeije Álvarez, *De las penas accesorias a las penas complementaria: la descripción de un proceso legislativo inacabado* (Tirant lo Blanch 2021)

F Vázquez-Portomeñe Seijas, 'Presunción de inocencia, mediación y conformidad algunas observaciones críticas sobre los programas españoles de mediación penal de adultos', in JC Carbonell Mateu, JL González Cussac, E Orts Berenguer & MªL Cuerda Arnau (coords), *Constitución, derechos fundamentales y sistema penal: (semblanzas y estudios con motivo del setenta aniversario del profesor Tomás Salvador Vives Antón)* (Tirant lo Blanch 2009) 1951-1972

F Vázquez-Portomeñe Seijas, 'La Mediación entre la víctima y el agresor como forma de resolución de conflictos en el derecho penal de adultos' (2010) Boletin da Facultade de Dereito. Universidade de Coimbra 315-339

F Vázquez-Portomeñe Seijas, 'Vorgehensweisen und Vermittlungsstandards zur Bearbeitung von TOA-Fällen bei häuslicher Gewalt in Deutschland un Österreich. Ein Modell für Europa? '(2012) Monatsschrift für kriminologie und strafrecht.

F Vázquez-Portomeñe Seijas, 'A propósito de la suspensión ampliada de la pena: algunas notas sobre el acuerdo alcanzado en virtud de mediación', in E Pillado González and T Farto Piay (dirs), *Hacia un proceso penal más reparador y resocializador: avances desde la justicia terapéutica* (Dykinson 2019)

9. Annex: text of the relevant laws/acts/ provisions

National Laws implementing the PIF Directive (Directive EU 2017/1371)	See national transposition measures communicated by the Member State in https://eur-lex.europa.eu/legal-content/EN/NIM/?uri=CELEX:32017L1371	
National criminal rules on financial crimes relevant to EPPO	**Law in original language** **Selección de delitos competencia de la Fiscalía Europea** 1) Ley Orgánica 9/2021, de 1 de julio, de aplicación del Reglamento (UE) 2017/1939 del Consejo, de 12 de octubre de 2017, por el que se establece una cooperación reforzada para la creación de la Fiscalía Europea, para los delitos del art. 4 (arts, 2 y 4) https://www.boe.es/buscar/pdf/2021/BOE-A-2021-10957-consolidado.pdf **Regulación sustantiva de las tipicidades objeto de competencia de la Fiscalía Europea** 2) Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal (arts. 24, 248, 252-253; 301s.; 305 ss.; 419 ss.; 428 ss.; 432 ss.). https://www.boe.es/buscar/pdf/1995/BOE-A-1995-25444-consolidado.pdf 3) Ley Orgánica 12/1995, de 12 de diciembre, de Represión de Contrabando (art. 2) https://www.boe.es/buscar/	**English translation of the title or topic** **Selection of offences within the jurisdiction of the EPPO** 1) Organic Act 9/2021, of 1 July, on the application of Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO') (arts. 2 and 4) **Substantive regulation of the offences for which the EPPO has jurisdiction** 2) Organic Act 10/1995, of 23 November, of the Criminal Code (arts. 24, 248, 252-253; 301s.; 305 ss.; 419 ss.; 428 ss.; 432 ss.). https://www.mjusticia.gob.es/es/AreaTematica/DocumentacionPublicaciones/Documents/Criminal_Code_2016.pdf 3) Organic Act 12*/1995, of* 12 December*, on the* repression *of* smuggling (art. 2).

	pdf/1995/BOE-A-1995-26836-consolidado.pdf.	
	Regulación procesal básica	**Main procedural laws**
	4) Real Decreto, de 14 de septiembre, de 1882 por el que se aprueba la Ley de Enjuiciamiento Criminal https://www.boe.es/buscar/pdf/1882/BOE-A-1882-6036-consolidado.pdf	4) Royal Decree of 14 September 1882 approving the Criminal Procedure Act https://www.mjusticia.gob.es/es/AreaTematica/DocumentacionPublicaciones/Documents/Criminal%20Procedure%20Act%202016.pdf
	5) Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial https://www.boe.es/buscar/act.php?id=BOE-A-1985-12666	5) Organic Act 6/1985, 1st July, on the Judiciary https://www.legal-tools.org/doc/881df4/pdf/
Other relevant national provisions on ADR (diversion, restorative and mediation procedures)	**Law in original language**	**English translation of the title or topic**
	Regulación sustantiva	**Substantive regulation**
	1) Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal (arts. 21.4ª, 5ª y 7ª, 80-89, 109 ss., 305 ss., 426, 434). https://www.boe.es/buscar/pdf/1995/BOE-A-1995-25444-consolidado.pdf	2) Organic Act 10/1995, of 23 November, of the Criminal Code (arts. 21.4ª, 5ª y 7ª, 80-89, 109 ss., 305 ss., 426, 434). https://www.mjusticia.gob.es/es/AreaTematica/DocumentacionPublicaciones/Documents/Criminal_Code_2016.pdf
	Regulación procesal	**Procedural laws**
	1) Real Decreto de 14 de septiembre de 1882 por el que se aprueba la Ley de Enjuiciamiento Criminal, (arts. 655, 688, 779, 784,	1) Royal Decree of 14 September 1882 approving the Criminal Procedure Act (arts. 655,

	787, 800 ss, 803 bis, 963.1.1ª). https://www.boe.es/buscar/pdf/1882/BOE-A-1882-6036-consolidado.pdf.	688, 779, 784, 787, 800 ss, 803 bis, 963.1.1ª). https://www.mjusticia.gob.es/es/AreaTematica/DocumentacionPublicaciones/Documents/Criminal%20Procedure%20Act%202016.pdf
	2) Ley Orgánica 5/1995, de 22 de mayo, del Tribunal del Jurado (arts. 13, 19, 40, 50 y 53) https://www.boe.es/buscar/pdf/1995/BOE-A-1995-12095-consolidado.pdf.	2) Organic Act 5/1995, dated May 22, On Jury Court (arts. 13, 19, 40, 50 and 53) https://www.mjusticia.gob.es/es/AreaTematica/DocumentacionPublicaciones/Documents/ORGANIC%20ACT%205-1995%2C%20DATED%20MAY%2022.pdf
	3) Ley 4/2015 de 27 de abril del Estatuto de la víctima del delito (arts. 5.1.k y 15) https://www.boe.es/buscar/pdf/2015/BOE-A-2015-4606-consolidado.pdf	3) Law 4/2015, of 27 April, On the Standing of Victims of Crime (arts. 5.1.k and 15) https://rm.coe.int/168070ac7f
	4) Real Decreto 1109/2015, de 11 de diciembre, por el que se desarrolla la Ley 4/2015, de 27 de abril, del Estatuto de la víctima del delito, y se regulan las Oficinas de Asistencia a las Víctimas del Delito (art. 37) https://www.boe.es/buscar/pdf/2015/BOE-A-2015-14263-consolidado.pdf	4) Royal Decree 1109/2015 of 11 December, implementing Law 4/2015 of 27 April on the standing of the Victim of a Crime and laying down provisions for the regulation of the Aid to Victims of Crime Offices (art. 37)
	5) Ley Orgánica 5/2000, de 12 de enero, reguladora de la responsabilidad penal de los menores (arts. 18, 19, 27.4, 32, 36 y 40) https://www.boe.es/buscar/	5) Organic Act *5/2000, of 12* January, regulating *the* criminal liability *of* minors (arts. 18, 19, 27.4, 32, 36 and 40)

	pdf/2000/BOE-A-2000-641-consolidado.pdf	
	6) Real Decreto 1774/2004, de 30 de julio, por el que se aprueba el Reglamento de la Ley Orgánica 5/2000, de 12 de enero, reguladora de la responsabilidad penal de los menores (art. 8.7) https://www.boe.es/buscar/doc.php?id=BOE-A-2004-15601	6) Royal Decree 1774/2004, of 30 July, which approves the Regulation of Organic Act 5/2000, of January 12, regulating the criminal liability of minors (art. 8.7)
	7) Ley Orgánica 9/2021, de 1 de julio, de aplicación del Reglamento (UE) 2017/1939 del Consejo, de 12 de octubre de 2017, por el que se establece una cooperación reforzada para la creación de la Fiscalía Europea, para los delitos del art. 4 (arts. 109 y 110) https://www.boe.es/buscar/pdf/2021/BOE-A-2021-10957-consolidado.pdf.	7) Organic Act 9/2021, of 1 July, on the application of Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO') (arts. 109 and 110)
Other relevant rules and guidelines	• Protocolo de actuación para juicios de conformidad suscrito entre la Fiscalía General del Estado y el Consejo General de la Abogacía española (Protocolo FGE-CGAE de 2009) https://www.poderjudicial.es/cgpj/es/Temas/Relaciones-institucionales/Convenios/Protocolo-de-actuacion-para-juicios-de-conformidad-suscrito-entre-la-Fiscalia-General-del-Estado-y-el-Consejo-General-de-la-Abogacia-espanola	• Action protocol for conformity lawsuits signed between the State Attorney General's Office and the General Council of Spanish Lawyers

	• Conveni Execució Protocol Conformitats de Barcelona, de 26/03/2010, entre el Colegio de Abogados de Barcelona y la Fiscalía Provincial de Barcelona https://www.icab.es/export/sites/icab/.galleries/documents-contingut-generic/conveni-execucio-protocols-conformitats-de-barcelona.pdf	• Execution Plea Agreements Protocol between the Barcelona Bar Association and the Provincial Prosecutor's Office
	• Circulares e Instrucciones de la Fiscalía https://www.fiscal.es/gl/documentaci%C3%B3n Circular FGE 1/1989, de 8 de marzo, sobre el procedimiento abreviado introducido por la Ley Orgánica 7/1988, de 28 de diciembre. Circular FGE 2/1996, de 22 de mayo, sobre el régimen transitorio del nuevo Código Penal: incidencia en el enjuiciamiento de hechos anteriores. Consulta FGE 4/1999, de 17 de septiembre, sobre algunas cuestiones derivadas de la regulación de la suspensión de la ejecución de las penas privativas de libertad.	• Prosecutor's Office Circulars and Instructions State Attorney General's Office Circular 1/1989, of 8 March, on the abbreviated procedure introduced by Organic Act 7/1988, of 28 December. State Attorney General's Office Circular 2/1996, of 22 May, on the transitory regime of the new Penal Code: incidence in the prosecution of previous acts. State Attorney General's Office Consultation 4/1999, of September 17, on some issues arising from the regulation of the suspension of the execution of custodial sentences.

	Circular FGE 1/2003, de 7 de abril, sobre procedimiento para el enjuiciamiento rápido e inmediato de determinados delitos y faltas y de modificación del procedimiento abreviado.	State Attorney General's Office Circular 1/2003, of 7 April, on the procedure for the rapid and immediate prosecution of certain crimes and misdemeanors and the modification of the abbreviated procedure.
	Instrucción FGE 1/2003, de 7 de abril, de la Fiscalía General del Estado, sobre aspectos organizativos de las fiscalías y sus adscripciones con motivo de la reforma parcial de la Ley de Enjuiciamiento Criminal.	State Attorney General's Office Instruction 1/2003, of 7 April, of the State Attorney General's Office, on organizational aspects of the prosecutor's offices and their assignments due to the partial reform of the Criminal Procedure Law.
	Instrucción FGE 8/2005 sobre el deber de información en la tutela y protección de las víctimas en el proceso penal	State Attorney General's Office Instruction 8/2005 on the duty of information in the guardianship and protection of victims in criminal proceedings.
	Instrucción FGE 2/2009 sobre aplicación del protocolo de conformidad suscrito por la fiscalía general del estado y el consejo general de la abogacía española.	State Attorney General's Office Instruction 2/2009 on the application of the compliance protocol signed by the State Attorney General's Office and the General Council of Spanish Lawyers.
	Circular FGE 4/2010, de 30 de diciembre, sobre funciones del Fiscal en el ámbito del proceso penal.	State Attorney General's Office Circular 4/2010, of 30 December, on the functions of the Prosecutor in the field of criminal proceedings.

	Circular 1/2015, de 19 de junio, sobre pautas para el ejercicio de la acción penal en relación con los delitos leves tras la reforma penal operada por la Ley Orgánica 1/2015.	State Attorney General's Office Circular 1/2015, of 19 June, on guidelines for the exercise of criminal action in relation to minor crimes after the criminal reform operated by Organic Act 1/2015.
	Circular FGE 1/2016 de 22 de enero sobre responsabilidad penal personas jurídicas	State Attorney General's Office Circular 1/2016, of 22 January, on criminal liability of legal persons.
	• Guía para la práctica de la mediación intrajudicial del Consejo General del Poder Judicial (07/11/2016). https://www.poderjudicial.es/cgpj/es/Temas/Mediacion/Guia-para-la-practica-de-la-Mediacion-Intrajudicial/	Practical Guide for Intra-Judicial Mediation of the General Council of Judiciary