

# Training Sessions in the Organization and Its Impact on the Procedural System<sup>1</sup>

Jordi Gimeno Beviá  
Castilla – La Mancha University

*The criminal liability of legal entities brought with it a need for self-regulation in the business environment, so organizations are increasingly adopting criminal enforcement programs. Within them, training and communication are fundamental for a correct implementation, considering that the professionals of the entity are the ones who shape the will and/or the action of the legal entity. If they are well trained in regulatory compliance, it will allow the company to reduce criminal risk, as well as establish a true compliance culture. Thus, if the company is involved in criminal proceedings, both must be analyzed from an evidentiary perspective since, as will be seen, they are very relevant in terms of conviction, acquittal or mitigation of the organization's criminal liability.*

*Keywords: training, communication, compliance, evidence, criminal*

## INTRODUCTION

"If you think education is expensive, try ignorance." The sentence expressed by Derek Bok, former Rector of Harvard, is very appropriate to illustrate the problem of disregarding the training of professionals in regulatory compliance. The lack of organizational models is often used as an excuse for their non-implementation. It is true that not so much large companies but SMEs, as well as facing many ordinary expenses and taxes, must, in not a few cases, legally adapt their businesses to the prevention of occupational hazards, data protection, money laundering, etc. and that, therefore, investment in regulatory compliance - which, however much one may try to convince people to the contrary, is not currently mandatory from a criminal law perspective - is being postponed based on the hackneyed philosophy which says that "in my company no crimes are perpetrated, nothing has ever happened". Until it happens.

Training in regulatory compliance is of primary importance. And this is because, when the Supreme Court refers to the existence of a true "corporate culture" as a basis for the company to be exempted from criminal liability, this does not involve endorsing or "*checking*" the list of requirements of the organizational models, since achieving some minimums with a cosmetic purpose would become programs of compliance "of mere appearance" or "*window dressing*." It is essential, therefore, that for regulatory compliance be top-down throughout the organization so that *compliance* policies are known to all, training becomes fundamental.

Communication is also another very important element of successful regulatory compliance. Although they are closely related and can even be analyzed from a unitary perspective, in this study, given certain particularities that require differentiated treatment, they will be dealt as separate issues.

Before analyzing training and communication in the business context, it is important to determine its position in the organizational models or *compliance programs*. Taking into consideration the content of the Penal Code as well as the different ISO-UNE standards related to the subject, training and communication are within the implementation phase. They would therefore be placed as follows<sup>2</sup>.

1. Analysis/self-assessment of the legal entity
2. Criminal risk evaluation
3. Code of Conduct
4. Implementation
  - Compliance Body Leadership
  - Complaints channel
  - Training and communication
  - Sanctions and incentives
5. Monitoring and evaluation

It is therefore an essential activity in the implementation of compliance policies. As will be seen throughout the work, there is no point in having carried out an exhaustive risk analysis or having drawn up a useful code of conduct if it is not well communicated and learned - also understood - by the entity's professionals.

In this research work, firstly, training and communication in the legal and/or normative reference frameworks will be dealt with, and then both will be analyzed exhaustively in order to finally assess their incidence throughout the criminal process.

## REFERENCE FRAMEWORK

Article 31 bis 5 of the Criminal Code, which sets out the minimum requirements for an organization and management model, makes no mention of the need for training and communication on regulatory compliance within the organization. Its omission, however, is understood as the penal reform implemented in 2015, not being influenced, but practically a "copy-paste" of the Italian Dlgs. 231/2001, which also does not expressly include it in its articles.

Although not expressly contemplated in the PC, the Prosecutor's Office, in its Circular 1/2016, does refer to training. Perhaps because it could be inferred that the legislator contemplates it there, it is in section 5.4 regarding the compliance officer where the Circular addresses it, also betting on its externalization. Therefore, it indicates that "*many of them (tasks) will even be more effective the higher their level of outsourcing, as is the case for example with the training of managers and employees...*". (page 41 Circular 1/2016).

Unlike criminal legislation, the ISO-UNE 19601 standard on criminal *compliance* management systems does provide for *compliance* training and awareness in section 7.4, as well as communication in section 7.5. As it is known, ISO-UNE 19601 is a certifiable standard, carried out by compliance specialists, who have logically been aware of the importance of training and communication. It will be referred to under the specific sections.

Finally, and although it is obvious that in Spain it is not applicable -although it should be taken into account by Spanish legal entities operating in the United States- the reference to training and communication made by the "*United States Sentencing Guidelines*", specifically in paragraph 8B2.1 (b) (4) is very illustrative where, it states that "*the organization shall take reasonable steps to communicate periodically and in a practical manner its standards and procedures, as well as other aspects of the compliance program to the individuals contained in sub-paragraph b, through an effective training program and other appropriate means to disclose information to such individuals regarding their roles and responsibilities*"<sup>3</sup>.

## THE TRAINING

### Concept and Foundation

According to the definition given by the RAE, training means "*the intellectual, moral or professional preparation of a person or group of persons*". This is a very accurate definition and in line with the requirement of a true corporate culture. It is a paradigm that often refers to the "business ethic" when a society lacks both *psiqué*, that is, "soul", and *ethos*, understood as "conduct". But the fact that it lacks such elements does not mean that those who make it up also lack them; on the contrary, natural persons are the ones who form the will and the action of the juridical one. Therefore, whether the training is intellectual, moral or professional, even combining all three together, is relevant in order to successfully implement the organization's compliance policy.

The training is mainly based on the extension or dissemination of the culture of compliance and knowledge of the code of ethics at all levels of the organization. But that is not all, since adequate training also helps to prevent and detect crime, improves the professional's competence and has a positive impact on the company's reputation (*ad intra* and *ad extra*), among other advantages.

When considering training in regulatory compliance within the organization, it is important to decide whether this should be done through a continuous training plan or through specific actions. In this regard, it is obvious that the two are not mutually exclusive. It is preferable, in the first place, to draw up a training plan so that there is a coherent line in the contents but, during its development, concrete actions may occur that, due to their quality or relevance, add value to the training. Think, for example, about a company that has a ready-made plan but has the possibility that a certain Professor specialized in regulatory compliance can offer a session given his/her particular relationship with a manager of the entity. It would not be logical to waste such an opportunity. On the other hand, training action outside the plan may also be necessary for unforeseen reasons such as a new legal reform or the opportunity to open a new line of business.

Therefore, the training plan, in addition to a coherent structure and content line, must have a dynamic approach to deal with actions to be carried out outside the initial planning.

### The Trainer's Profile

The person providing the training must, on the one hand, be an accredited expert in the topic to be addressed (*hard skills*) and, on the other hand, have the necessary social skills to carry out effective communication (*soft skills*). In addition, given that FGE in the aforementioned Circular 1/2016 encourages the outsourcing of training to support the work of the compliance body, there will be no impediment for the legal entity to seek such a profile outside the organization.

It is essential, therefore, that the trainer has a suitable profile (*hard* and *soft* skills) from a double aspect that is set out below.

*Ad intra*: the greater the reputation and the greater the communication skills of the issuer, the more seriously the training will be taken by the company's professionals. Compliance training is not an easy task and can even be alien to the professionals of many entities. Therefore, if the company can bring a profile that, in addition to having the required knowledge, is capable of motivating groups, conducting dynamic sessions, etc., this will greatly help the learning of the contents among the organization's members.

*Ad extra*: although it will be explained in more detail in the last section, it is sufficient here to point out that the fact that whoever carries out the training sessions is an accredited expert in the field will be very relevant for evidential purposes.

Finally, it is also very important that, after the training, the professionals who receive it can carry out a valuation survey in which they measure both the quality of the training received and the skills of the trainer in transmitting the content. It is important to emphasize that the results of this should be studied and subsequently filed by the compliance body, on the one hand, to consider future training with the evaluated trainer and, on the other hand, in case it is necessary to examine them in a subsequent hypothetical criminal process.

## Training Types

When determining the training types, two classifications can be made. The first, regarding the format, that is, in person or *online*, and the second, regarding the audience or *target*, employees or managers. They are then exposed.

### *Face-to-Face or On-Line Training*

Face-to-face training is very important to "humanize" the company's *compliance* policy. Likewise, among its advantages, it is closer - cinema is not the same as theatre - but it is also convenient that this is done avoiding the "master lecture" format as it must be dynamic, participative and exemplary.

Concerning *on-line* training, particularly if the company has several locations, and sometimes even outside Spain, conducting training sessions in all workplaces can be very expensive. Therefore, the use of videoconferencing systems represents a significant saving of resources for the legal entity. But it is not only digital sessions that must be held due to the lack of face-to-face ones, nowadays the *software* is increasingly better and the use of *blackboard* systems or specialized *on-line* training allows to go beyond the traditional televised conference, as they even ensure teacher-student interaction. Another advantage of telematic training is that it reaches a greater number of professionals and at the same time facilitates individualized control of the use of the sessions by each employee.

Therefore, it would be ideal to combine both systems, taking advantage of the control offered by telematic training and the humanization of the *compliance* policy implied by face-to-face training.

### *Employees or Managers*

A good method for employee training is the simulation of "*compliance* problems"<sup>4</sup> and how they should be solved, as well as the "*scared straight*" exercise, in which they are shown the consequences of a possible conviction for the legal entity and for themselves.<sup>5</sup>

But employees shouldn't be the only ones who know about the compliance program. It is also convenient to carry out *training* sessions for the Board of Directors and responsible members within the legal entity. Their training should address the actions they take that may lead to criminal activity, the meaning of crime prevention by their employees and the need for them to monitor and supervise compliance with the law in the company. It is also feasible to use dissuasive training, which shows executives the consequences of a crime for their company, such as the loss of control and disruption of business affairs due to criminal proceedings, the reactions of investors and clients of other convicted companies, the severity of the sentence in other cases for socio-economic or *white-collar crime*, etc.

## Content and Development

As stated at the beginning of the work, the Criminal Code makes no reference to training. Circular FGE 1/2016, although it considers it a task to be carried out and is prone to outsourcing, does not pronounce itself regarding its content. Thus, it is in the ISO-UNE 19601 standard on criminal *compliance* management systems where we find some indications about the content of the training.

Specifically, in section 7.4 titled "Compliance training and awareness", the standard states that "*The organization must encourage the members of the organization to be adequately and proportionally aware of and trained in criminal risks, with the aim of avoiding them, detecting them or knowing how to manage them in accordance with the criminal compliance management system*".

It is important to note that the certification of the standard is not mandatory for the legal entity, nor is it binding on the judicial authority. However, there is no doubt that it will add value to the image and reputation of the entity as well as, in forensic practice, it may be an indication that it has striven for true corporate ethics.

The content of the training reflected in the UNE-ISO 19601 is perhaps a little unclear - or if you prefer, too open, since the quality of the writing is not helpful in some points either - and must be dealt with in the subjects listed below.<sup>6</sup>

- a) The criminal *compliance* policy, the rest of the criminal *compliance* management system and the procedures related to it, and their obligation to fulfill the requirements associated with it

- b) The criminal risk and the damage, both to the staff and to the organization, in the event of its materialization;
- c) The circumstances in which, in the course of their work, a criminal risk may materialize, and how to recognize such circumstances;
- d) How they can help prevent and identify criminal risks, avoiding their materialization and recognizing the main risk factors;
- e) The contribution to the effectiveness of the criminal *compliance* management system, including the benefits derived from the improvement of criminal *compliance*, as for the rest of the criminal *compliance* management system
- f) The implications and potential consequences of non-compliance with the requirements established by both the criminal *compliance* policy and the rest of the criminal *compliance* management system;
- g) How and to whom they should report their doubts and concerns in this matter, as established in section 8.7 of this UNE standard

Perhaps it would have been easier to group the topics contained in the UNE into 1) training on the regulatory compliance program (e.g. what is the complaints channel, code of conduct, etc.), 2) how to deal with criminal risks and 3) non-compliance and liability.

Based on the above, and leaving behind the referred UNE standard, to program the development of the training it is appropriate to elaborate a plan or teaching guide. It must show a consistent line of content which, in turn, must be up-to-date and understandable to the *target* audience.

On the other hand, the organization must ensure that the training does not involve any interruptions that affect excessively the business or take up too much of the professional's time, i.e. it must be considered an important activity within the company but must not affect the achievement of its corporate purpose or excessively the professional's working hours.

### **Evaluation and Monitoring**

Once the training has been developed, the achievement of the competences proposed in the training plan must be evaluated so that *compliance* is understood by the professionals. The trainings, consequently, must be "measurable" and then the entity must make a critical analysis on the global results, in order to adapt and improve it in future editions.

Firstly, the attendance of professionals at training sessions must be monitored. While this is usually not a problem in online training, where assistance is provided with access to the application, it will be necessary in face-to-face training.

Secondly, and even more important than the assistance, the entity must carry out checks or evaluation tests on the actual acquisition of the contents by the audience. There are different formulas, such as carrying out controls or progress tests by unit or thematic blocks; the performance of some kind of digital *quiz* or other "gamification" techniques<sup>7</sup>; even through oral debates, colloquiums, etc. in which the comprehension of the contents can also be evaluated.

Beyond the evaluation type, it is essential that the compliance body collects documentation of both the attendance and the results of the training in case it is necessary to provide it as documentary evidence in a criminal proceeding.

## **THE COMMUNICATION**

### **Concept and Foundation**

Communication is a fundamental pillar for the entity to inform the organization's professionals, as well as interested third parties, about its regulatory compliance policies. From the *compliance* point of view, it is a reflection, or rather, the flag of the company's compliance culture.

Unfortunately, even today, communication policies - including advertising - are still one of the weak points of many companies, which do not invest resources in it. There is also the case of companies that

make a great effort of self-regulation, implement compliance programs but, for example, they do not have the code of conduct accessible on their website.

As Gabriel García Marquez said, "*what is not communicated, does not really exist*" and a good communication policy, besides being essential for the success of the criminal *compliance* program, helps significantly to improve reputation. For all these reasons, it is important for companies to have good communication departments or professionals, or the support and assistance of specialized external agencies.

### **Content and Development**

When determining the content and development of the communication plan, within the reference framework, UNE 19601 (7.5.1) states that the organization must determine the need for internal and external communications relevant to the effectiveness of the criminal management system. Taking into account the UNE, the issues to be considered when making the communication are as follows<sup>8</sup>:

- a) To define the scope: not only company professionals, but also *stakeholders* (suppliers, customers,...)
- b) Channels to be used: from *mailing*, social media, *newsletters*,... and even informal discussions (*networkings coffee, lunch seminar...*)
- c) To set the message: clear, concise, direct, understandable, ... better to reflect ideas strength than a long newsletter
- d) Issuer's relevance: from the compliance body or *compliance officer* upwards, showing the relevance of the communication from the *tone from the top*. Also, to have collaborations, testimonials of employees for the vertical integration of the entity.
- e) Frequency of communication: try to define consistent deadlines for communications. It is important to reach a middle ground, i.e. neither that communication is absent nor that it is constant, because the message loses effectiveness. It also allows for the fitting of unforeseen but relevant communications
- f) Languages: take into account as many languages as the company's target audience

It is important, consequently, to take these factors into consideration as a whole so that the entity's communication policy is effective.

### **Evaluation and Monitoring**

As with training, communication is also subject to evaluation and monitoring.

On the one hand, it is necessary to measure the communication's scope, that is, that it has been known by the previously intended audience. On the other hand, its impact must also be evaluated by means of indicators that make it possible to ensure that the content of the message reaches the audience.

Notwithstanding the above, although the relationship is close because there is a message that must be received by professionals and interested third parties, it should not be confused with training. Communication is not as intense as training and what is evaluated is not the acquisition of skills, but the awareness in the reception of a particular message.

Finally, the entity, through the compliance body or the communications department - in the event that it has delegated such powers - must draw up a report regarding the communications policy in order to critically analyze, in terms of monitoring and impact, which aspects are susceptible to improvement.

## **ITS IMPACT ON THE CRIMINAL PROCEEDINGS**

### **General Aspects of Evidence in Corporate Crime**

As the Supreme Court has reflected through its still limited but valuable jurisprudence, for the legal entity to be able to see his/her criminal liability exempted or mitigated it will be necessary to demonstrate the existence of a true culture of compliance. This is not achieved, as the Court itself and the majority doctrine warn, by merely aligning the model with the requirements of the Criminal Code - or even of UNE 19601 - since there is a risk of producing purely cosmetic or appearance *compliance*, but rather through a proactive attitude of the organization in effectively achieving self-regulation.

This being so, it is not uncommon for the development of an organizational model to lose the perspective that it is ultimately going to be reviewed by a judge. Once again, a judge, a specialist in law who has passed a tough opposition, not by an auditor, not by a psychologist, but by a judge. And although it may seem obvious, both the language used -in many cases full of anglicisms-, the wording, the specification, etc. should be elements to take into account from a judicial perspective. It is therefore necessary for *compliance* to be "empathetic" towards the judicial authority.

This being the case, the program of penal enforcement must make its own the proverb that Plutarch brings to us about honesty and Caesar's wife. It must not only be effective - of course - but also appear so. Although *compliance* should not be cosmetic, it should be aesthetic, that is, it should have an order and agreement in its presentation to the authorities.

Therefore, any action related to the program must be focused on future review by the judicial body and the simpler and better explained it is, the better. It is also essential that the actions carried out are correctly traceable, leaving a documentary record from the beginning to the end of the organizational model's implementation, as well as all the periodic reviews or corrective actions carried out. And the fact is that, if I may use the expression, *compliance* is evidence from the "first minute" but given the breadth of the term, we must value the suitability of the means of proof for its introduction into the criminal proceedings.

In an examination from the general to the particular, the judicial authority will descend from the Code of Conduct, the program's cornerstone, to the risk map, disciplinary code, design of the complaints channel, etc. However, since it is not only a question of formal compliance with a series of requirements but also of the establishment of a genuine compliance culture<sup>9</sup>, it will be necessary to provide the documentation generated as a result of the correct development of the program, e.g. analysis of the complaints received, internal investigations, application of the disciplinary code, etc. The *compliance officer* will be in charge of this documentary archive which must have, as mentioned above, a clear systematic approach as an element of conviction before the judicial authority.

### **Incorporation of Training and Communication as an Evidence**

Training and communication are one of the most relevant pieces of evidence to prove the exoneration -or culpability, in the absence of it- of the legal entity in the criminal proceedings. This is because, as mentioned at the beginning of the work, both are essential for the correct implementation of the organizational model.

By focusing on its incorporation as evidence in the criminal proceedings, this can only happen through the existing means of proof, in this case through documentary and testimonial evidence.

First of all, both the training plan and the communication plan will be provided as documentary evidence. It would be interesting that, as is the case with some protocols, the plan would have one person/department for its elaboration, another for the review and a final one for its approval in order to ensure the quality, coherence and relevance of the proposal made.

Another test that will certainly be conducted in the oral trial will be the examination of the entity's professionals as witnesses (arts. 700 and ss. LECrim) to evaluate their knowledge concerning the compliance program and thus for crime prevention. This is a relatively definitive test to determine whether the program has been implemented correctly<sup>10</sup>. Therefore, it is very important to emphasize the need for the organization to periodically evaluate the regulatory compliance knowledge of its professionals<sup>11</sup>.

But for practical purposes, the fact that whoever carries out the training sessions is a certified expert in the field will be very relevant from an evidential point of view. For example, if a prominent professor of criminal or procedural law is conducting the training, the judge hearing the case may even have read some of his or her academic work. Therefore, if the real intention is to demonstrate and convince the judge that the company has made an effort to create a culture of compliance and to avoid committing crimes, the fact that the training is provided by a professional of recognized reputation in the field, is a symptom or clear indication that the legal entity has opted for a solid training of employees. Consequently, the outsourcing of training to expert professionals, a possibility also contemplated by the FGE in its Circular 1/2016 (p.48), is a very relevant evidence element.

It is also possible for him/her to intervene in the trial as an expert witness, which is not contemplated in the LECrim but in Article. 370.4 LEC that, ex art. 4, is supplementary in the criminal proceedings. Indeed, the dual status of training author as well as compliance expert can provide coverage to his/her declaration through this figure for the accreditation of the training's relevance.

Beyond the intervention of personnel involved in the training, i.e. professionals and/or trainers, it would not be strange to call on independent third parties who, as experts, would value the quality of the training plan (723 et seq. LECrim). Authors such as MAGRO SERVET have pointed out the possibility of creating a registry of *compliance* experts to evaluate the quality, effectiveness and suitability of the criminal compliance program. This could be a *de lege ferenda* solution but, in the meantime, the appointment of experts in this field is not limited by any restrictions.<sup>12</sup>

In conclusion, a good training and communication policy, as we have seen, in addition of being essential for the prevention of crime in the organization, will be very important for the exoneration and/or mitigation of the criminal liability of the legal entity. Not investing in training, therefore, can be very expensive.

## ENDNOTES

1. This contribution is part of the R+D+i Research Project titled "Investigation and evidence of money laundering. The 4th Directive" (Reference DER2016-80685-P) co-financed by the MICINN/Funds ERDF, of which I am a member of the research team.
2. This is the proposal that I usually make and that is described and explained in detail in GIMENO BEVIA, J. *Compliance and criminal proceedings*. Thomson Reuters, 2016.
3. The translation is mine. The English text is as follows: U.S.S.G. § 8B2.1(b)(4): "*The organization shall take reasonable steps to communicate periodically and in a practical manner its standards and procedures, and other aspects of the compliance and ethics program, to the individuals referred to in subparagraph (B) by conducting effective training programs and otherwise disseminating information appropriate to such individuals' respective roles and responsibilities.*"
4. By "compliance issues" we mean situations that may occur after the adoption of a compliance program; for example, the detection of an alleged computer crime and its detection and reporting by the employee to the program manager(s).
5. KAPLAN, J.F., "The Corporate Sentencing Guidelines: Making "compliance" Programs Effective", *Corp. Conduct Q.*, año 1991, pág 1, quoted by GRUNER, S.R. "Evaluating "compliance" and ethics programs under the new federal sentencing guidelines standards", *Corporate Law and Practice Course Handbook Series*, Practising Law Institute nº6214, march-june 2005
6. For a better understanding of the standard's content, it is advisable to read the original version because it is important to handle the language and definitions it uses. There are also references to other paragraphs - as in this section 7.4(g) - which therefore require the full text.
7. By "gamification" we can understand the technique of learning based on games.
8. The content of the UNE has been taken as a starting point, although with its own categorization and explanation in order to make it more illustrative.
9. Also in a critical sense with the mere formal compliance with the content of the Criminal Code, see. NEIRA PENA, A. "The effectiveness of criminal *compliance programs* as evidence in criminal proceedings," *Polit. crim.* Vol. 11, Nº 22 (December 2016), Art. 5, pp. 467-520., pág. 488.
10. Thus, for example, in *Miller v. Kenworth*, the U.S. Court found three indicators that revealed the failure to communicate "equal employment opportunity" (EEO) rules and practice: failure to distribute documents describing the company's EEO policies, failure to publish those documents, and failure to maintain a record confirming the distribution of those policies to new employees. In order to see an example of successful compliance communication, see *Jaudon vs Elder Health*.
11. For example, as happened in the Turkish branch of SIEMENS after the well-known world corruption scandal, see. GARRET, B.L *Too big to jail*, Harvard University Press, 2014, pág. 185 y ss
12. MAGRO SERVET, V. "Feasibility of the compliance expert to validate the adequacy of the regulatory compliance program for legal entities" in *Diario La Ley*, No. 9337 dated January 15, 2019