



# Proposed changes to the Spanish Criminal Code

The Spanish government's proposed amendments to the Spanish Criminal Code have significant implications for companies doing business in Spain. The amendments impose criminal liability on companies in certain circumstances and, for the first time, classify bribery between individuals as a criminal offence. These amendments will directly affect governance issues within companies, as well as their day-to-day activities.

## Introduction

The bill modifying Law 10/1995, of 23 November, of the Criminal Code (*Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal*) (the Bill), was presented by the Spanish government on 27 November 2009. It appeared in the Official State Bulletin on 23 June 2010 and will enter into force on 23 December 2010.

In making amendments to the Criminal Code the government aims to:

- increase the fight against organised crime;
- boost criminal prosecution of real estate crimes;
- respond to new types of criminal activity; and
- adapt Spanish legislation to commitments under the Framework Directive or other European Community instruments.

Some of the Bill's amendments will have a direct impact on companies and their activities. For the first time in the Spanish criminal system, companies can incur criminal liability, bribery between individuals becomes a criminal offence, and a criminal offence of bribery of foreign public officials in international commercial transactions is introduced.

## Criminal liability for companies

The Bill extends criminal liability to companies. This liability is in addition to any criminal liability that may be incurred by those:

- managing a company;

- committing a crime acting expressly on the authority of those managing the company; or
- who failed to exercise adequate control so as to avoid liability.

Under the Bill the classic principle of *societas delinquere non potest* (that is, that companies cannot commit crimes) no longer exists.

Criminal liability for companies is not new – it already exists in the UK, Germany, France and Italy – so Spanish legislation has now been brought into line with the laws of these countries.

Companies will now be criminally liable in the following cases.

- For crimes committed in their name and for their benefit by people authorised to act on their behalf.

The Bill does not take into account who committed the offence when imposing penalties. For example, the same penalty will apply whether the offence was committed by a company director or an employee acting on the company's behalf.

- For offences where there has been inadequate control over persons with authority to act on the company's behalf.

Criminal liability for the individual and for the company resulting from a particular criminal conduct, remain independent of each other. The fact that an individual has no liability does not *per se* rule out potential liability for the company.

Lastly, the Bill provides that where a company implements controls to prevent crime, this will be a mitigating factor in any finding as to the company's criminal liability.

Similarly, failure to have adequate controls to prevent crime may result in the company being found liable for the criminal offence.

In light of this, companies should consider adopting the following:

- prepare and publish codes of good governance for all companies within the group;
- create a body or committee responsible for preventing white collar crime;
- train employees on anti-bribery and corruption laws; and
- have funds set aside to cover potential corporate criminal liability.

## Corruption between individuals

The new criminal offence of corruption between individuals stems from the implementation of Framework Directive 2003/568/JAI, of 22 June 2003, on combating corruption in the private sector.

This new offence seeks to punish any person who promises, offers or grants an advantage to managers, directors, employees of the company or person or corporate entity associated with (*colaborador*) any company, association, foundation or organisation. The recipient of the advantage is also guilty of an offence.

The inclusion of the concept of associated person is noteworthy, although the Bill does not specify what this term actually means. This may give rise to uncertainty over the scope of the offence and how exactly it will apply.

The purpose of this new offence is to ensure transparency and to remove unfair commercial practices in markets.

## Corruption in international commercial transactions

The Bill modifies the existing article in the Spanish Criminal Code that addresses corruption in international commercial transactions. It will now include criminal

liability for companies that bribe foreign public officials (*funcionario público extranjero*).

The criminal offence is committed when there is an offer, promise or grant of any undue benefit, or there is an attempt to corrupt, directly or via an intermediary, foreign public officials or officials in international organisations, for the benefit of the company or a third party.

The offence also includes requests made of foreign public officials, that they act or refrain from acting in respect of their public functions, in order to gain or maintain a contract or other unusual benefit when participating in international commercial transactions.

The definition of foreign public official included in the new drafting comprises:

- any person holding a legislative, administrative or judicial position in a foreign country, whether by appointment or by election;
- any person carrying out a public function for a foreign country (including those acting for a public body or a public company); or
- any public official or agent of an international public organisation.

## Potential penalties

The penalties for this offence vary from six months' to six years' imprisonment, and fines (which may be 10 times the amount of the benefit gained).

Companies may also be barred from obtaining subsidies and public grants, from entering into civil administration contracts, and from having tax benefits or social security advantages. These are different from the current penalties, which include dissolution of the company, suspension of activities, or the closure of offices.

For further information please contact

Vicente Sierra  
T +34 91 700 3700  
E [vicente.sierra@freshfields.com](mailto:vicente.sierra@freshfields.com)

Rafael Murillo  
T +34 91 700 3700  
E [rafael.murillo@freshfields.com](mailto:rafael.murillo@freshfields.com)

Christian Castellá  
T +34 91 700 3700  
E [christian.castella@freshfields.com](mailto:christian.castella@freshfields.com)