

Spain recently became the latest European country to modify its anti-corruption laws. This is intended to bring the country further into line with the Organisation for Economic Cooperation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions". Legal changes reflect an increasing focus on anti-corruption policy in Spain which is likely to make it a central theme in the 2012 elections.

In December 2010, both houses of the Spanish Parliament, the Cortes Generales, approved changes to Law 10/1995 of the Criminal Code (Ley Orgánica 10/1995, de 23 de Noviembre, del Código Penal), which reforms the country's anti-corruption laws. The reforms, which have been hailed as "a major legislative change" by the OECD, introduce the principle of criminal liability for companies involved in corruption and establish two new criminal offences: bribery between private individuals and criminal liability for companies that bribe foreign public officials in international commercial transactions.

Criminal Liability

The reforms to Law 10/1995 mean that companies will incur criminal liability when crimes are committed in their name, whether by an employee or an associate. Though individual and company liability remain independent of each other, if an individual engages in a corrupt activity, the criminal liability may fall upon the company.

Secondly, as with the UK Bribery Act, the Spanish reforms have criminalised the act of offering or accepting a bribe to or from private individuals rather than focussing exclusively on bribery of public officials. There is some degree of ambiguity as to how this will be interpreted and an individual acting on behalf of a company or a corporate entity associated with a company, a *colaborador*, may also be liable.

The third reform involves criminal liability for companies that bribe foreign public officials in an international commercial transaction. A foreign public official - *funcionario público extranjero*- is defined as an individual who holds a legislative, administrative or judicial position, whether by appointment or by election.

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Political Background to the Reforms

In April 2010, the lower house, the Congreso de los Diputados, approved major changes to the Spanish Criminal Code proposed by the Minister of Justice, Francisco Caamaño Domínguez. The changes modified 150 clauses and created new criminal offences in areas including terrorism, sexual offences and corruption. The measures were pushed through by the centre-left Socialist government of José Luis Rodríguez Zapatero with the support of three regional parties from Cataluña and Navarra.

The measures were overwhelmingly supported despite the abstention of the main opposition party, the Partido Popular (PP), which claimed that there were “too many holes, too many gaps, and too many concerns”, for the reforms to have their support. In February 2011, the PP declared that “the fight against corruption had become one of the central aims” of the party. *El País* reported that the PP, if elected, would “expand and tighten the criminal code on corruption, toughening the penalties for public officials and employees”. These new commitments from the Spanish opposition come at a time when Francisco Camps, the Partido Popular President of Valencia’s Regional Government, is at the centre of a bribery scandal and is likely to stand trial in the coming months. With the next parliamentary elections scheduled for March 2012 and polls from January suggesting that the opposition Partido Popular have a ten point lead over the incumbent Partido Socialista Obrero Español (PSOE), issues of corruption and accompanying legislation are likely to form a key part of all parties’ campaigns.

The Problem of Corruption in Spain

Spain ranks the third lowest of the pre-2004 accession EU member states on Transparency International’s Corruption Perception Index with a score of 6.1 out of 10. In recent years, Spain has been rocked by numerous corruption scandals involving politicians and public officials at local and regional levels. Notable examples include civil servants working for the Madrid regional government taking bribes ranging from EUR 6,000 to 30,000; the Mayor of Camas bribing a Councillor to vote in favour of reclassifying land as suitable for construction; and the implication of the Mayor of Mazarrón in a corruption scandal involving the payment of a EUR 33,000 bribe to facilitate the building of 43,000 new properties on rural land.

Yet these instances of bribery only scratch the surface and are not limited to the construction sector. The most notorious scandal in recent years ultimately resulted in the dissolution the entire City Council of Marbella in 2006. Juan Antonio Roca, the Head of Urban Planning at Marbella City Council, along with two former mayors and several civil servants, developers and lawyers were accused of siphoning off EUR 512 million from the public finances. Illegal building licences were allegedly issued to developers in return for various benefits, from cash to cars. Press coverage of these accusations has suggested that the bribes accumulated by Roca amount to millions of Euros with the council operating as his “personal fiefdom”. Roca and the 94 other co-accused are currently on trial in Spain accused of crimes ranging from bribery to embezzlement.

Latin America - Implications for Spanish Companies Operating Abroad

The reforms have raised Spanish domestic anti-corruption standards to a new level. However, these changes are also likely to have implications for Spanish companies operating internationally, particularly in Latin America. Spain and Latin America have long established historical, cultural and economic ties. Over recent decades, Spanish companies such as Telefónica, Repsol, Santander, BBVA, Endesa and Iberdrola have entrenched their presence in the region, with total Spanish investments reported to be worth over EUR 170 billion.

Spain: Law Reform Reflects Wider Changes in Attitudes to Corruption April 2011

As a region Latin America is widely considered by experts to have high levels of corruption. The Transparency International Corruption Perceptions Index gives all countries in the region (with the exception of Chile and Uruguay) a score 3.7 or less, with Argentina scoring only a 2.9, placing it on a par with Kazakhstan, Moldova and Algeria. In a 2010 report, *The Financial Times* highlighted that “doing business in Argentina can be fraught – the rules of the game are apt to change; transparency is often woeful”. In a recent survey by the World Economic Forum, corruption ranked seventh on a list of top problematic factors of doing business in Brazil, higher than inflation, political instability, workforce education and public health. A recent survey carried out by the World Bank’s International Finance Corporation concluded that over 70% of businesses surveyed considered corruption in Latin America to be a “major constraint”.

Many Spanish companies have faced these constraints and difficulties whilst operating in Latin America. In September 2010, it was alleged that the Spanish state-owned railway companies, Renfe and Ferrocarriles Españoles de Via Estrecha (FEVE) had paid “political costs” to the former Argentine Transport Secretary, Ricardo Jaime and his associates, as part of a deal to purchase used trains and heavy machinery from Spain.

In recent years, Argentine and Spanish press have reported that Spanish companies such as Santander, BBVA, Prosegur, Repsol and Telefónica were approached by the late Argentine President, Nestor Kirchner, for campaign donations during the 2005 mid-term elections. The former Spanish owners of Aerolíneas Argentina, Grupo Marsans, also alleged that they were approached for USD 1.5 million in campaign contributions in 2007 by the electoral team of President Cristina Fernández de Kirchner. Grupo Marsans maintain that they refused to donate funds. In 2008, Aerolíneas Argentina was re-nationalised by Kirchner’s ruling coalition.

With the latest reforms, Spain has joined a growing list of countries which have sought to update and expand the scope of its bribery and anti-corruption legislation. With a general election scheduled for March 2012 and an increasingly popular opposition party signalling its intention to strengthen anti-bribery legislation yet further, a stricter anti-bribery and corruption environment in Spain looks set to remain.

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