

# CORPORATE LIABILITY – A DECADE IN THE MAKING - CLIFFORD CHANCE

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**New laws aim to crack down on white collar crime and bring the issue of compliance to the forefront of Spanish company agendas.**

La reforma del código penal, ha permitido que se actualice el código de 1995, dice Bernardo del Rosal, de Clifford Chance. La reforma ha introducido nuevos conceptos como la responsabilidad penal corporativa, una idea que se llevaba tiempo valorando.

Recent changes to Spain's Criminal Code are helping to modernise the previous 1995 law, says Bernardo del Rosal, Litigation Counsel with Clifford Chance in Madrid.

They introduce new concepts, including that of corporate criminal liability, in a process that has been over a decade in the making.

For the first time, the amendments to the Code establish an express provision on the criminal liability

of legal entities for crimes committed on their behalf by their representatives, de facto and de jure administrators, employees or workers.

"The changes are very significant, but continue a growing momentum of reform and greater scrutiny of companies' financial and accounting affairs – including major changes in areas of tax, money-laundering and fraud policy," says del Rosal. "But that does not mean it is a perfect law nor that the new rules are necessarily easy to apply."

The credit boom of the last decade that led to the bursting of the real estate bubble proved to be an environment in which frauds were readily covered up by rising profits and asset values, he says. And in the 1990s, the benchmark Banesto case is often regarded as a reference for domestic fraud investigations, he adds. "It is an example of where an allegation of fraud does not necessarily follow with a straight forward prosecution."

The bank collapsed in 1993 despite raising \$700m from the international markets just weeks before a 600bn peseta (\$4.3m) hole was discovered in its accounts.

It nonetheless took two years before the bank's Chief Executive, Mario Conde, and seven other Directors were finally charged with fraud, unlawful appropriation and the use of false procedures, and another five years before any were convicted.

More recently, a deeper analysis of, and due diligence in, the subsequent collapse, nationalisation or rescue merger of a number of cajas (savings banks) has revealed financial and accounting irregularities along with undeclared or mis-labelled loans and payments to and by directors.

"The property boom, particularly along large areas of Spain's coastline, saw developers grow rich and many of the underwriting cajas make huge profits," del Rosal explains.

"The collapse of the real estate sector has, however, led to recurring allegations of mis-management and multiple reforms of the financial system," he adds, "which have driven the number of cajas down from over 40 before 2008 to closer to ten institutions remaining today".

And the depth of the downturn is driving the authorities to look closely at companies' affairs right across the economic spectrum.

"The crisis and a reduced tax base have inevitably seen a much greater focus on the tax planning of companies and individuals," he says. "That is why crime is going to be a major concern over the next years."

Significant too has been a targeting of corruption and illegal payments by executives and employees of private companies, echoing earlier measures aimed at tackling fraud by public officials.

The introduction of the concept of corporate criminal liability is therefore a measure that has been a long time coming and effectively on 'stand by' for some time, says del Rosal.

Nonetheless, multinationals operating in Spain and those Spanish companies with a strong international profile already take the issue very seriously, he believes.

The extra-territorial reach of legislation, such as the UK Bribery Act and the US Foreign Corrupt Practice Act, now weigh heavily on corporate minds. The unknown, therefore, is how most domestic Spanish companies will react.

"Although there may still be some businesses that would rather invest the money required for compliance and training programmes in other areas," he says.

It is inevitable, adds del Rosal, that in the coming years compliance should seriously be taken into account if those businesses do not want to face corporate charges as the new rules begin to be applied.