

# CRIMINAL CODE REFORM CAUSES INVESTOR CONCERN - BAKER & MCKENZIE

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## **Company directors concerned about liability for corruption and bribery**

In the last 12 months, Europe, Asia, the US and Latin America, have been the main investors in Barcelona, with the European and Asian investment led by Germany and Japan respectively, according to Rafael Jiménez-Gusi, Partner at Baker & McKenzie. The investment has mainly been in hotels, resorts and the food industry, but also in the technology, information and communications (TIC) industry, pharmaceuticals, bio technology and private hospitals. "My impression is that this trend will be sustained, or may even increase in the coming year, partly because during the recession companies in Barcelona become more international by increasing their exports and therefore became more attractive to investors, and partly because the city is well known and an attractive place for multinational companies to establish their businesses," Jiménez-Gusi says. Most of the investment has been led by non-Spanish companies, but there have been sizeable transactions involving Spanish companies buying other Spanish businesses, particularly in instances where companies have undergone restructuring or bankruptcy proceedings. "Spanish investors are

more effective when it comes to buying companies under stress," Jiménez-Gusi says. "They are more aware of the potential of Spanish companies under stress, and they are more familiar with the legal framework – buying such companies always implies the assumption of greater risks."

From the perspective of company directors, the proposed changes to the Spanish Criminal Code is one of the main topics on boards' agendas. It relates to the criminal liability of legal entities and directors want to know how to manage that risk. Jiménez-Gusi says: "This issue may not have been a priority during the economic crisis, but it is now very important because the new draft of the Criminal Code introduces three new key elements. Firstly, it recognises that an effective compliance programme will exonerate the legal entity from criminal liability; secondly, it defines the content of compliance programmes, so brings legal certainty; and thirdly, introduces a new crime in which directors could be held liable for not having implemented a compliance programme."

Directors are concerned about how to proactively manage the risks, as well as the potential criminal liability of directors. "Compliance amounts to best practice and good management," says Jiménez-Gusi. "Companies should start by doing a risk assessment to find out where potential areas of risk are, so effectively map the risks of the operation." Based on the risk assessment, the companies need to review what measures and internal procedures are currently in place and how to adjust them to prevent the identified risks. Companies should also review their training programmes to make sure they include effective training on their internal regulations and codes of conduct. In addition, companies must ensure there are sanctions that can be imposed on employees who don't follow the regulations, as well as a whistle-blowing process for reporting wrongdoing. "There also needs to be clear messages on compliance conveyed by the company's leadership," Jiménez-Gusi says.

### **Corruption and bribery**

Public and private corruption are issues that could impact on most companies. Public corruption relates to bribery of public officials, while private corruption relates to bribery of clients, for example. Companies that are concerned about the impact of the new code should get in touch with a lawyer who has experience of how similar legislation has been introduced in other jurisdictions such as the UK, US and Germany. "For example, in Spain, unlike some other countries, we don't yet recognise the role of a compliance officer," Jiménez-Gusi says. He adds that companies involved in M&A activity – particularly international companies – are including a review of the compliance programmes of target companies in their due diligence processes because the lack of compliance in certain areas, like bribery, affects the value of the business to be acquired. If the target company has been running its business by paying bribes to officials or clients – this business will be unsustainable and therefore means the company will have been overvalued.

In such transactions, lawyers should carry out a review that analyses the substance of the transactions made by the company to detect if anything irregular has happened, such as illegal payments via agency or consultancy agreements. Lawyers will need to check if the substance of the transactions justifies the amount paid by the company.