

Prevention is better than cure

Iberia's expansion of corporate criminal liability means that safeguarding the business from corporate fraud and corruption scandals, and ensuring everyone is aware of the potential consequences of any illegal actions, is high on corporate agendas.

The economic downturn has not only brought challenges to Iberian businesses in the way in which they seek to develop and grow their operations, or even maintain market share, but also in how they are governed. Reduced revenues coupled with greater scrutiny over operating costs, expenses and commercial agreements have helped highlight an apparent increase in corporate fraud and corruption issues, say lawyers.

The challenge for businesses as a result, they say, is to build sufficient protections to safeguard against illegal behaviours by their employees, officers and directors.

The scale of the situation facing businesses has been particularly heightened in Spain with the introduction of new corporate fraud legislation. This has, for the first time, introduced the concept of corporate criminal liability as well as individual criminal liability for executives of private companies convicted of bribery and making unregistered payments to secure contracts. This is building on early legislative changes imposing stronger criminal sanctions for such behaviour by public officials.

Ongoing repercussions

For Florentino Orti, Head of the Criminal Practice at Garrigues since 1996, the current crisis may have seen the introduction of new legislative prohibitions, but the types of offences being committed are no different to those seen in earlier downturns.

"We see the same recurring issues across the decades, notably tax fraud, money-laundering, illegal payments and corruption by employees and directors," he

says. "These are not new concerns, but the way in which they are being dealt with is changing, and added to which is the liability of the companies themselves for wrongdoings."

It is, however, human nature and greed that is the hardest issue to combat, some say. Spain's financial sector has been hit by a number of high profile cases relating to directors' dealings at some of the now defunct cajas (savings banks). Closer inspection of institutions' accounts following the disclosure of sizeable holes in their balance sheets has revealed the payment of illegal loans and inducements both to and by top executives.

Portugal too has seen the collapse of high profile banking institutions, notably that of privately-owned Banco Português de Negócios (BPN), which was nationalised in 2008 after revelations of malpractice and debts of €1.8bn. That case, says Paulo Farinha Alves, a Partner with PLMJ, was itself the product of earlier investigations into the financial sector.

A major investigation – 'Operation Hurricane' – was launched by the authorities in 2005 to assess illegal tax schemes, which led to thousands of cases, he explains. "This subsequently prompted a deeper analysis of the operations of the banks themselves – the repercussions of which we are still seeing today."

Investigations were later launched against Banco Privado Português (BPP) and Millennium BCP shareholders, while the start of the year has seen insider-trading allegations levelled at senior Banco Espírito Santo (BES) executives. They



La expansión en la Península Ibérica de la responsabilidad social corporativa significa proteger a las empresas del fraude corporativo y de los escándalos de corrupción, y asegurar que son conscientes de las consecuencias de cualquier acción ilícita, lo cual supone algo clave para las mismas.

were already emerging out of the ongoing Monte Branco investigation into alleged tax fraud involving Switzerland – charges that they strenuously deny – but these have now brought investigations into the financial institutions and financial advisers of the recent privatisations of EdP and REN.

'Big Bang' theory

The drivers behind the legal changes in Spain and Portugal are inevitably connected to the uncovering of high profile frauds. Changes at a European Union (EU) level, however, are also driving legislative and behavioural change, say lawyers. The amendment of regulatory, supervisory and audit codes is having a knock-on effect across the EU.

But it is national developments that are having the most immediate impact. 2011 was marked by a reform of Spain's Criminal Code, the first major update since it was passed in 1995, which included the enactment of Organic Law 5/2010 (June 22nd, 2010) and new provisions establishing the criminal liability of legal entities for the first time.

"Such a development has a fundamental impact on the way businesses conduct their operations," says Orti at Garrigues, "requiring for many a deep analysis of the implications of the reforms, and, where necessary, the implementation of dedicated compliance programmes".

In some respects there has been a 'Big Bang' in terms of prohibitions, says Alfredo Guerrero, a Litigation Partner with SJ Berwin in Madrid. Companies and executives now face very severe criminal sanctions for behaviours – including the payment of bribes or payments – that might once have been tolerated as the cost of doing business.

"We have moved very rapidly from an era where there was an almost tacit acknowledgement, even acceptance, of such behaviour to the current zero tolerance approach," he says. "There has been an almost total reversal of the perception of certain types of conduct."

In contrast to the situation in Spain, the development of corporate criminal liability has been much more incremental in Portugal, say lawyers. The accession of the country to the EU in 1986 prompted several investigations into the distribution of development funds, which were followed in the 1990s by a series of others into the illicit use of offshore structures by companies.

"We have seen an ever-expanding reach of criminal sanctions to encompass new types of activities and behaviours," says Joaquim Shearman de Macedo, Litigation Partner with CMS Rui Pena & Arnaut in Lisbon. There are financial and tax prohibitions stemming from the 1980s, criminal sanctions for companies that now also apply to areas including environmental, cyber, IP, and employment issues, and on top of this there are the sanctions applicable to individuals.

A new paradigm

The consequence of such an extension of liability, say lawyers, is that there is now a much higher awareness of

the types of behaviours that will not be tolerated, and that may bring criminal sanctions. Companies need to be alert to the fact that the authorities will look more closely at issues, from both a criminal and fiscal perspective.

"What we have seen in Portugal is the tax authorities in particular taking a very close interest in companies' dealings, past and present," says João Maricoto Monteiro, Partner at Pares Advogado. "In part this has been related to statute of limitation pressures that in some cases has meant a virtual re-analysis of transactions – and not to the benefit of the companies."

Víctor Mercedes, Co-Head of Baker & McKenzie's Litigation & Insolvency Practice Group in Barcelona, sees a similarly aggressive focus by the authorities in Spain. "We sense that more resources are being committed to the investigation of tax issues on a personal and corporate basis." And he is beginning to see the fall-out from the recent tax amnesty on undeclared income, with the first cases coming to court, which is driving a very dramatic upturn in enquiries from private individuals and corporate clients alike.

In any event, the changing legislative situation presents a new paradigm for businesses in Spain, he adds. And for many there remains considerable uncertainty as to the depth of the reforms taking place and their reach. The introduction of criminal sanctions for illegal payments made by private companies, for example, now also applies to corporate dealings conducted both within and outside of the country.

"We are being asked much more frequently to assist companies in conducting audits of processes and behaviours, at home and abroad," says Mercedes at Baker & McKenzie, "and to draw up codes of conduct and compliance procedures, communicate more clearly that such behaviours will not be tolerated, and ensure they do not happen".

When a company comes under investigation, whether as a result of the company's or its employees' actions, executives need to understand the length of time it can take for issues to come to a resolution, say lawyers. In Portugal, many of the 'Operation Hurricane' investigations are still pending, as are a number of cases relating to BPN and BPP.

"These cases have involved literally thousands of people and in some senses have overwhelmed the authorities and the advising legal teams," says Farinha Alves at PLMJ. And as a result they are now seeing firms expand their white-collar teams.

There are obvious issues around the speed in which cases are investigated, but companies need to appreciate the depth of analysis that will be undertaken, he adds. The tax, regulatory and police authorities are often all involved and this leaves few places for the guilty to hide.

Law firms would be well advised to ensure compliance is instilled in their clients' DNA, both corporate and individual, to avoid the risk of penalties and even jail terms. Prevention, they say, is always better than cure.