# Spain

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**Brief overview of the law and enforcement regime**

In Spain, the public sector is the main sector where cases of criminal conduct occur that can be included under the notion of corruption. Strictly speaking, corruption is classified under the criminal offence of active/passive bribery (art. 419 *et seq*. of the Criminal Code). However, at present the concept of corruption extends to other forms of criminal conduct in the public sector engaged in by public officials, oftentimes with the connivance, participation or co-perpetration of private individuals. This is why, currently, the idea of corruption encompasses other offences such as: influence peddling (art. 428 *et seq*. of the CC) when it comes to decision-making in the public sector; abusive or unfair management of public funds (which in Spain is called misappropriation of public funds) (art. 432 *et seq*. of the CC); fraud against the administration (art. 436 *et seq*. of the CC); negotiations and activities forbidden to public officials; and abuse of public office (art. 439 *et seq*. of the CC).

This is how corruption in the public sector is broadly understood to be structured although, in recent years, it has tended to include other criminal offences by public officials, such as prevarication (leading to the issuing of manifestly unfair administrative resolutions), disloyalty in the custody of documents, or the disclosure of secrets by public officials. Moreover, the Spanish Criminal Code contemplates corruption offences in international commercial transactions (art. 445 of the CC) which extend to foreign private individuals and public officials or international organisations. In these cases, the corporate criminal liability clause may be applicable.

It should also be mentioned that crimes against the administration of justice perpetrated by judges and magistrates in the exercise of the jurisdictional function (art. 446 *et seq*. CC) should also be included under this extensive notion of corruption.

This broad conception of corruption in the public sector was reflected in the institutional reforms made in 1995, when a special prosecutor's office against corruption and organised crime was created. This special prosecutor's office has gradually extended its authority to finally take on responsibility for the investigation and indictment of financial crimes associated with corruption in the public sector. The jurisdiction of the special prosecutor's office against corruption in financial matters is dependent on the crime under investigation being classified as bearing "special significance". In practice, this concept has been subject to broad understanding, meaning that the investigation and prosecution of several financial crimes (fraudulent acts, tax frauds, money laundering, etc.) has been included under the functional jurisdiction of this prosecutor's office whenever a minimum association with the phenomenon of corruption in the public sector is identified. Similarly, the ties between

financial crime and transnational criminal organisations or groups have led to intervention from the aforesaid special prosecutor's office.

This trend of legislative and institutional organisation politics aimed at giving a global criminal response to the phenomenon of corruption has led to the idea of corruption in Spain extending to the private sector. The clearest reflection of this tendency can be found in art. 286 *bis* of the CC, introduced by Organic Law 5/2010, of 22 June. This legislative measure classifies corruption between private individuals as a crime, thus transposing the provisions of the Council of Europe Criminal Law Convention on Corruption (CETS no. 173, Strasbourg, 27.01.1999, ratified by Spain on 01.12.2009) to Spanish Law.

Nonetheless, the idea of transparency and control in business and economic activities in the private sector as a preventive guarantee in relation to corruption requires even more ambitious measures. In this respect, Spanish criminal doctrine has expressed its concerns regarding the effectiveness, usefulness and admissibility of said measures when it comes to the cost of legal guarantees. We are referring to the introduction of corporate criminal liability in the Spanish Criminal Code (art. 31 *bis* of the CC).

**Overview of enforcement activity and policy during the past two years**

The approach of legislative policy in Spain to the phenomenon of corruption is structured into two parts: firstly, the criminalisation of bribing public officials and other unlawful conduct by said parties as falling under the notion of crimes against the public administration and, secondly, corruption in the private sector, a field also including the so-called corruption in sport.

In Spanish jurisprudence there are several precedents of convictions due to corruption offences perpetrated by public officials involving businesspeople or other professionals from the private sector who have acted as corrupters. In recent years, significant convictions have been verified in large litigations such as the so-called *Operación Malaya* (Andalusia) and *Caso Palma-Arena* (Palma de Mallorca), the latter of which has been subdivided into several investigation and prosecution procedures. Some of these procedures have already led to convictions entailing the imprisonment of important figures in the political arena.

Many proceedings are currently underway in Spain that could be placed within the notion of corruption. According to official figures provided by the General Council of the Judiciary (CGPJ), in early 2013 there were 1,661 cases of corruption being followed. The region with the highest number was Andalusia with 656 criminal proceedings being pursued owing to crimes associated with corruption. In second place, the Valencian Community registered 280 cases, followed by Catalonia with 215 proceedings, the Community of Madrid with 185 and Galicia with 110.

According to the statistics of the CGPJ, the crimes most frequently observed in these proceedings are bribery (paying off public officials), prevarication, influence peddling and misappropriation of public funds. Likewise, the most frequent financial crimes associated with corruption are swindling and embezzlement.

**Law and policy relating to issues such as facilitation payments and hospitality**

Spanish criminal legislation and jurisprudence do not directly address a specific legal treatment of what could be deemed as facilitation payments and hospitality policies.

In terms of corruption, in Spain these concepts should be reclassified under the alleged criminal relevance of so-called hand-outs or gifts to public officials. Indeed, the criminal

code contemplates the offence of improper active/passive bribery (art. 422 of the CC), which classifies the conduct of acceptance by an authority or public official of a hand-out or gift offered on account of the position held or function exercised as an offence. This is the legal closure stipulation of the incrimination system for bribes in the public sector. This offence entails a problematic delimitation in relation to the idea of social suitability of the gift accepted. In order to determine the criteria of social suitability, the following is taken into consideration: uses and customs in a specific context, the nature of the hand-out or gift and the value thereof. These are unstable and changing criteria that depend on the interpretation of the judge in each case, which weakens the guarantees of the principle of legality. A famous precedent of acquittal relating to this crime was the so-called *Caso Camps*, where the controversial issue was whether acceptance of a gift in the form of suits by a president of a regional autonomous community could constitute an offence of improper bribery. Ultimately, the jury and the Supreme Court declared a judgment of acquittal.

**Key issues relating to investigation, decision-making and enforcement procedures**

In Spain, cases of corruption are addressed by means of the ordinary criminal proceedings set out in the Spanish procedural law (Law of Criminal Procedure). Nevertheless, two clarifications should be made, specific to cases of corruption. The first refers to the fact that some of the crimes included under the concept of corruption lead to the application of jury trial proceedings. Indeed, pursuant to art. 1 of the Organic Law on the Jury Court, offences of active/passive bribery in the public sector, influence peddling, misappropriation of public funds, fraud against the administration, and negotiations forbidden to public officials, among others, fall under the jurisdiction of the Jury Court (jury trial presided by a magistrate).

The second clarification refers to the fact that often the individuals accused in cases of corruption in the public sector are members of the Congress of Deputies or the Senate. In these cases, jurisdiction for investigating the case is directly awarded to the Supreme Court, the legal body that will subsequently also be in charge of prosecution, and the magistrate having investigated the case will not form part of the court in the oral proceedings. In this case, the situation arises whereby the right to second-instance trial proceedings by means of an appeal is lost. Members of Congress or Senators are entitled to waive the privilege of *aforamiento*[1] (parliamentary immunity) by withdrawing from their respective positions. In this instance, the case shall be investigated by an ordinary examining judge and then prosecuted by an ordinary court, whereby the right to second-instance trial proceedings by means of an appeal shall be preserved.

Similarly, cases of corruption involving people holding the position of members of regional parliaments have procedural singularities, since these members of parliament are also entitled to the privilege of *aforamiento*. As a result, investigation of the case shall correspond to the High Court of Justice of the respective regional autonomous community. In this case, the problem of losing the right to second-instance trial proceedings by means of an appeal does not apply as the ruling, if applicable, could be challenged before the Supreme Court. Regional autonomous members of parliament can also waive their privileged jurisdiction, with the aforesaid effects of submitting the case to ordinary judges.

Regardless of these singularities, cases of corruption in Spain in the public and private sector are investigated by an examining judge, who is responsible for the pre-trial stage. In other European countries by contrast, investigation is incumbent on the Public Prosecution

Service. In the Spanish legal system the public prosecutor is a public plaintiff representing the State and society, but it does not have a monopoly of prosecution, as the Spanish system is very open when it comes to admitting other possible parties for the prosecution. Thus, the full prosecution that the private prosecutor representing the victims of a crime can exercise is admitted, in the same way that conceptually it is also possible to exercise the public prosecution, as it is a mechanism for citizen participation in criminal proceedings, pursuant to the provisions of art. 125 of the Spanish Constitution.

**Overview of cross-border issues**

Organic Law 1/2014, of 13 March, amended the Organic Law on the Judiciary (art. 23) in relation to the principle of universal justice. This reform has been extremely controversial in the legal field, generating a debate in which more often than not, opinions of a political nature have been superimposed or given preference over legal arguments.

Traditionally in our criminal legal system the principle of universal justice, as an exception to the principle of territoriality of Spanish criminal law, has been broadly shaped – and subject to few requirements compared with other regulations seen in the comparative law of our European cultural and legal environment. The public prosecution institution had been in place, along with this loose configuration of an exception to the principle of territoriality of criminal law. This combination of factors, as expected, turned the National Court of Spain into a legal body with truly exorbitant functions regarding the prosecution of crimes committed abroad without any ties or links to Spanish interests. The judges and magistrates of the National Court of Spain were shrouded in this culture for many years and some publicly regret and criticise the reform of art. 23 of the Organic Law on the Judiciary made in 2014.

Indeed, in this context the Spanish State had seen its international relations with other countries compromised in some cases, not to mention the strong diplomatic tensions suffered and the threats that could affect the international trade relations in which Spain and its interests are immersed.

For those of us who do not champion the public prosecution (an institution with many followers, who see in this indictment mechanism a democratic-participative component in the criminal procedure), the problems arising with the previous regulation of the principle of universal justice were largely caused by this unwonted means (unknown in comparative law) of publicly opening the possibility to prosecute (art. 125 of the Spanish Constitution). This institution generates many problems and its suppression, with the pertinent constitutional reform, is an issue that no-one dares to directly address head-on in this day and age. Interpretative subterfuges keep emerging in the jurisprudence of the Supreme Court and the Constitutional Court aimed at taming the populist and justicialist component of the public prosecution, which thus unveils its roots in the Holy Office of the Inquisition.

The 2009 reform already introduced a first limitation of the principle of universal justice with the aim of submitting this jurisdictional exception of Spanish law to consolidated parameters and requirements in comparative law. The new regulation stipulated that crimes associated with the principle of universal justice should stem from facts identifying a connection with Spain. Indeed, the 2009 reform offered a balanced regulatory framework which, nevertheless, needed to address the aforementioned expansive inertia deeply rooted in a long tradition.

In the face of this situation, the Government hastily decided to promote a new reform of the

principle of universal justice in view of the international tensions arising with some of the major world powers on account of some of the proceedings under way. Haste makes waste in legislative reforms. However, the Government was compromised on the international stage and chose to carry out an urgent reform of the Organic Law on the Judiciary, paving the way for the huge debate referred to above as a result.

The new 2014 reform bounds the principle of universal justice by means of a system of successive demands aimed at ensuring a very restrained application of this exception to the principle of territoriality of Spanish law.

Firstly, the new drafting of art. 23 establishes the first parameter of conditions that must be met in order for the extension of Spanish criminal jurisdiction to apply. Accordingly, Spain will be able to hear crimes committed abroad, provided the parties responsible are Spanish nationals or foreigners having acquired Spanish nationality after committing the crime. In addition to this, other requirements may apply in relation to double incrimination (crime punishable in the place where it is committed unless an exception in international treaties or commitments applies), objective prosecutability conditions (the Public Prosecution Service or the aggrieved party should lodge a claim in the Spanish courts) and the principle of double jeopardy and *res judicata* (the offender has not been acquitted, accused or convicted abroad).

Secondly, as is the case traditionally in relation to the principle of universal justice, the 2014 reform limits the scope of the principle to certain crimes and cases. In this case, the 2014 reform has modified the list of crimes (expanding it in some cases), albeit subjecting each crime for which Spanish jurisdiction may apply to a specific system of requirements in order to be prosecuted in this manner. This opens up an interpretative labyrinth when it comes to understanding and applying art. 23 of the Organic Law on the Judiciary, which will undoubtedly give rise to interpretative controversy. Therefore, the regulation is complex and sometimes difficult to understand, meaning interpretative contradictions will occur and loopholes will be identified.

Art. 23 of the Organic Law on the Judiciary contemplates extending the jurisdiction of Spanish criminal law to hear crimes committed by Spanish nationals or foreigners abroad which can be classified as crimes committed by Spanish public officials living abroad and, in general, crimes of corruption against the Spanish public administration (art. 23.3 h of the Organic Law on the Judiciary).

Likewise, the principle of universal justice entails the application of Spanish criminal law to hear crimes committed by Spanish nationals or foreigners abroad which can be classified as crimes of corruption between private individuals or in international financial transactions. In this case, the extraterritorial application of Spanish criminal law is conditioned by one of the following alternatives:

1. The criminal procedure is followed against a Spanish citizen.
2. The procedure is followed against a foreign citizen regularly living in Spain.
3. The crime is committed by the manager, director, employee or partner of a company, partnership or any other legal entity with headquarters or registered office in Spain.
4. The crime is committed by a legal entity, company, organisation or any other entity with headquarters or registered office in Spain.

As a result, the crime of corruption among private individuals (art. 286 *bis* of the CC), introduced in the Spanish Criminal Code in the reform of 22 June 2010, is added to the list of crimes to which the principle of universal justice applies.

Nevertheless, it should be considered that the scope of the 2014 reform of art. 23 of the

Organic Law on the Judiciary is broad with respect to the list of crimes subject to universal justice, as it contemplates the possibility of extraterritorial prosecution of any other crime according to Spanish law, provided said prosecution is mandatory by virtue of the commitments taken on by Spain in international treaties or any other regulatory instrument from an international organisation of which Spain is a member.

In any case, in order to ensure the limitation of the principle of universal justice in Spain, the 2014 legislator refers to the principle of subsidiarity as a factor of exclusion of Spanish jurisdiction. Subsidiarity applies when an international court has initiated a proceeding for investigating or prosecuting a crime, as well as when an investigation or prosecution is underway in a State in which the crime has been committed or in the State of which the person accused is a citizen. Nonetheless, the principle of subsidiarity does not apply when there is an indication or evidence that, outside national territory, the State exercising its jurisdiction is in fact not willing to carry out the pre-trial investigation, or cannot actually do so. In these cases, Spanish legal bodies must refer the case to the Second Chamber of the Supreme Court to decide whether or not the principle of subsidiarity is applicable. The 2014 reform also establishes safeguard guarantees to avoid legal fraud pursuant to the principle of subsidiarity.

Lastly, the 2014 reform establishes a strict system of objective prosecutability conditions, whereby crimes subject to the principle of universal justice shall only be prosecuted in Spain following the lodging of a claim by the Public Prosecution Service or the aggrieved party.

The culmination of the reform is the controversial stipulation set out in the Sole Transitional Provision, by virtue of which the formalities and proceedings being processed at the time Organic Law 1/2012 comes into effect shall be dismissed until fulfilment of the conditions and requirements established in the new regulation is certified. There is no precedent in Spain of any similar legal stipulation that calls for the general stay of proceedings from the outset, unless it can be certified that there are regulating standards in a supervening law. It should be noted that the most immediate goal of the reform was to bring the prosecution of some of the proceedings underway to a close.

### Corporate liability for bribery and corruption offences

Corporate criminal liability was introduced into Spanish criminal legislation by Organic Law 5/2010, of 22 June, reforming the Criminal Code. The insertion of this new criminal liability system is not independent from the cultural legal phenomenon of the fight against corruption in the private sector, as the idea of opacity or disorganisation in the way companies and partnerships operate is a critical factor that can contribute to the phenomenon of corruption, the breaching of market operation rules, money laundering, tax fraud and, in short, the violation of the legitimate interests of investors in the economic and financial sector. The legislative technique applied in Spain raises doubts because the reform of the Criminal Code in this area was not accompanied by a reform of Spanish criminal procedural law addressing the complex criminal procedural status of legal entities in detail. As a result, in practice, Spanish courts see corporate liability with apprehension and great caution. This praxis can also be seen in the indictment approaches of the Public Prosecution Service which, to date, has applied a very restricted indictment policy when it comes to using the mechanism of corporate criminal liability. This is not the case with private and public prosecutors (which exist in Spain as indictment mechanisms in their own right compared to other European countries) which in practice usually use the

resource of corporate criminal liability in their charges. At present, Spain still has very limited jurisprudence on the issue.

The indictment approach of the Public Prosecution in the case concerning the signing of football player Neymar by Futbol Club Barcelona stands out, owing to its prominence and being the first precedent. In this case being followed at the National Court in Madrid, for the very first time the prosecutor's office chose to accuse the legal entity (FC Barcelona) without having previously accused any individuals. This case, still in the preliminary investigation stage at the time of drafting this paper, has subsequently led to other individuals representing the sports entity being accused. There is still not enough data or elements to assess whether this case entails a shift in the policy of the prosecutor's office in Spain.

Notwithstanding the aforementioned practical data, in relation to the grounds for corporate criminal liability in the Spanish Criminal Code, there are several opinions that can be grouped into two lines of reasoning: Spanish criminal doctrine by and large upholds the theory that corporate criminal liability is based on a lack of organisation and transparency, enabling the commission of the crime within the legal entity by its managers or employees over whom the pertinent control has not been exercised. This line of reasoning intends to safeguard the principle of guarantee summed up in criminal liability owing to the actual fact that the company would be liable. In addition, this approach also contemplates in the criminal procedure a right to a defence status which is independent from that corresponding to the individuals accused (directors, legal representatives or employees). In relation to this legal construction of the doctrine, the prosecutor's office has expressed its opinion in Circular 1/2011, issued by the State Prosecution Office. According to this document, the prosecutor's office establishes the principle of automatic transfer of liability of legal entities for the crime committed by individuals within the company.

**Proposed reforms / The year ahead**

At the time of preparing this publication, the draft Organic Law on the reform of the Criminal Code, of 4 October 2013, was subject to parliamentary discussion and so far it has been the subject of a long-drawn-out discussion in the Spanish Parliament.

As far as active/passive bribery of public officials is concerned, an amendment to the criminal definition of the concept of public official is introduced, adopting functional criteria, whereby any person holding public office can be the perpetrator of the crime. And this can be extended to any person holding positions or public office in a country of the European Union or any other foreign country, as well as people holding public office in the EU or abroad. This definition also encompasses public companies abroad.

One of the most important modifications to the subject examined herein refers to the change of name of the crimes grouped under the heading "Corruption among private individuals", which shall hereafter be called "Crimes of corruption in business activities". This section of the Criminal Code includes typical conduct of payment of bribes to obtain competitive advantage in the private sector (corruption among private individuals) which had already been introduced in the 2010 reform of the Criminal Code. Now the draft reform also incorporates conduct that may constitute corruption of authorities or public officials in carrying out economic activities and international business activities. Obviously, this last provision overlaps with offences of bribery of public officials already laid down in the Criminal Code, and the draft reform includes a stipulation of subsidiarity of the new figure of the crime of corruption in business activities when classic figures of the corruption offence contemplate more severe sentences.

In this section on corruption offences, the draft reform still preserves the criminalisation of the conduct of corruption in sport, pursuant to the provisions set out in the 2010 reform of the Criminal Code.

The draft reform contemplates aggravated crimes in cases of corruption in business activities which "are especially serious" based on the high value of the benefit or the unlawful advantage obtained, the repetition of the conduct of the perpetrator, the commission of the crime within a criminal group or organisation, or the object of business being associated with humanitarian or essential goods or services. These are excessively broad, undetermined liability, aggravation stipulations which deserve criticism in terms of the guarantees of the principle of legality.

The draft reform also contemplates the extraterritorial application of Spanish criminal law to crimes of corruption in business activities in relation to the new criteria set out in the applicable reform of the principle of universal justice from 2014 (art. 23 of the Organic Law on the Judiciary).

The corporate criminal liability clause is applicable to all crimes of bribery-corruption both in the public and private sectors. The legal system applicable to said clause is also modified in the draft reform of the Criminal Code under discussion in parliament. Mainly, the reform is aimed at giving legal acknowledgment for the interpretation made by doctrine whereby the basis for corporate criminal liability lies in shortcomings in organisation, oversight and control on companies. Therefore, it seems that the draft reform rules out the theory of automatic transfer of liability to legal entities for the crimes committed by individuals. This statement is made inasmuch as a criminal liability exemption system for legal entities is applicable if said parties have previously adopted organisation and management models including suitable oversight and control measures for preventing crime. The draft reform requires that the supervision of these preventive models be entrusted to a body of the legal entity with powers independent from the board of directors. However, the draft reform releases small and medium-sized companies from meeting this requirement. Accordingly, if a crime has been committed in a legal entity by means of the fraudulent elusion of the effective oversight and control model, provided that model sufficed and was effective, exemption of corporate criminal liability shall be established.

The draft reform regulates the requirements of organisation and prevention models so that the aforesaid acquittal pretext may apply. The philosophy of the draft reform focuses on the idea that the organisation and oversight model is a living being that must be regularly reviewed.

The pre-legislative text still adopts a model of corporate criminal liability which is independent from that of individuals in line with the 2010 reform.

An aspect discussed in Spain was the initial projection of the exclusion of political parties and trade unions from the corporate criminal liability clause. This shortcoming was already remedied in the 2012 reform of the Criminal Code, which included parties and trade unions in the liability scheme. Now, the 2013 draft reform extends the scope of corporate criminal liability to public companies executing public policies or providing economic services of general interest.

In direct relation to the corporate criminal liability system, with respect to which the 2013 draft reform grants relevance to the oversight and control models, the pre-legislator introduces a new heading of crimes associated with non-compliance with the said oversight or control duty in legal entities and companies. In particular, the draft reform fosters the inclusion of a crime for omission of adoption of oversight or control measures, which are

necessary in order to avoid the violation of duties or dangerous conduct that may constitute a crime. This provision is extended to the legal representatives and the *de facto* or *de jure* directors of any legal entity. In our opinion, this new crime presents overly broad scope for incrimination, which could entail the criminalisation of the infringement of merely formal duties, and only incorporates one limitation in relation to the typical scope of unlawfulness: when it comes to the requirement of an objective enforcement condition consisting of the initiation of the execution of the crime, which would have been avoided or seriously hindered if due diligence had been exercised. As we have been able to see, it is an *ex silentio* crime established in an excessively contrived manner.

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## Endnote

1. This notion does not exist in common-law systems. It may be considered as a form of or a privilege coming under parliamentary immunity.

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Fermín Morales is a partner-director of Gabinete Jurídico Fermín Morales, a law firm specialising in Criminal Law, founded in 1997. The company has built up an extensive track record, particularly in the sphere of economic criminal law and it was chosen by Chambers Europe and Best Lawyers in 2008 as one of the best law firms specialising in criminal defence. Moreover, in 2012 Fermín Morales was appointed "Lawyer of the year", the best criminal defence lawyer in Barcelona.

Dr Morales has been a full professor of Criminal Law at the Autonomous University of Barcelona for 20 years and a doctor in Criminal Law and professor of Financial Criminal Law at ESADE since 1998. He obtained his degree in Law from the University of Barcelona with the bachelor *summa cum laude* and he has been a lecturer at the University of Barcelona, as well as full professor at the University of Cantabria and the University of Lleida. In addition, he has been guest lecturer at the Italian universities of Parma and Trento and researcher at the Max Planck Institut (Germany). He is a member of the bar associations of Barcelona and Madrid and of the Spanish Union of Criminal Lawyers. He has been awarded the medal from Barcelona Bar Association in acknowledgment of his personal and professional track record. Fermín Morales takes part and gives lectures in various Master's degrees, conferences and seminars in Spain and abroad, and he has contributed with many publications, all in the field of criminal law. In addition, he has taken part as defence lawyer in the main cases of corruption and financial crimes in Spain.

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