

# Implementing the OECD Anti-Bribery Convention



## Phase 4 Report: Spain



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This Phase 4 Report on Spain by the OECD Working Group on Bribery evaluates and makes recommendations on Spain's implementation of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 2021 Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions. It was adopted by the OECD Working Group on Bribery on 8 December 2022.

The report is part of the OECD Working Group on Bribery's fourth phase of monitoring, launched in 2016. Phase 4 looks at the evaluated country's particular challenges and positive achievements. It also explores issues such as detection, enforcement, corporate liability and international co-operation, as well as covering unresolved issues from prior reports.

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# Table of contents

Executive summary	4
Introduction	6
1. Previous evaluations of Spain by the Working Group on Bribery	6
2. Phase 4 process and on-site visit	7
3. Spain's economic situation and foreign bribery risks	8
4. Foreign bribery cases in Spain	11
A. Detection of foreign bribery	14
1. Detection through Media information	15
2. Detection through information from foreign jurisdictions	16
3. Detection through whistleblowers and the adequacy of their protection	17
4. Detection through anti-money laundering	21
5. Detection and reporting by tax authorities	23
6. Detection through reporting by public officials and overseas missions	26
7. Detection through accounting and auditing	28
8. Detection through self-reporting by companies	29
9. Detection Official Development Aid and Export Credit	29
10. Other sources, including information from other court proceedings	30
B. Enforcing foreign bribery	31
1. The foreign bribery offence	31
2. Offences related to foreign bribery	38
3. Investigative and prosecutorial framework	40
4. Conducting foreign bribery investigations and prosecution	46
5. Concluding and sanctioning foreign bribery cases	57
6. International co-operation	64
C. Responsibility of legal persons	70
1. Scope of legal persons' liability for foreign bribery and related offences	70
2. Engagement with the private sector	79
3. Sanctions against Legal Persons for Foreign Bribery	82
D. Other Issues	85
1. Tax measures for combating bribery	85
2. Public advantages	87

<b>E. Conclusions: Positive achievements and issues for follow up</b>	<b>96</b>
1. Good practices and positive achievements	96
2. Recommendations of the Working Group on Bribery	97
3. Follow up by the Working Group on Bribery	102
<b>Annex A - Spain's Foreign Bribery Enforcement Actions since Phase 3</b>	<b>104</b>
<b>Annex B - Phase 3 recommendations and assessment of implementation by the Working Group in 2015</b>	<b>118</b>
<b>Annex C - List of participants to the on-site visit</b>	<b>124</b>
<b>Annex D - List of abbreviations and acronyms</b>	<b>125</b>
<b>Annex E - Excerpts of relevant legislation</b>	<b>128</b>

## FIGURES

Figure 1. Spain's Implementation of its Phase 3 Recommendations	7
Figure 2. Exports by main destinations and products in 2020	9
Figure 3. Spain's foreign bribery enforcement since 1999	11
Figure 4. Source of Spain's Foreign Bribery Cases since Phase 3	15
Figure 5. Stages and responsible authorities in the resolution of foreign bribery cases	47
Figure 6. ODA distribution in 2020	90

## TABLES

Table 1. Composition of the ACPO in 2012 and 2020	43
Table 2. Main Tools Used in Foreign Bribery matters since Phase 3	51
Table 3. Outgoing MLA Requests to Parties and non-Parties in Foreign Bribery Cases since Phase 3	65
Table 4. Incoming MLA requests from Parties and non-Parties to the Convention since Phase 3	66

## Executive summary

This Phase 4 report by the OECD Working Group on Bribery (Working Group) evaluates and makes recommendations on Spain's implementation and enforcement of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Anti-Bribery Convention or Convention) and related instruments. The report tracks progress made by Spain since the 2012 Phase 3 evaluation. It details Spain's achievements and challenges, including on enforcement of its foreign bribery laws, corporate liability and detection of foreign bribery.

Spain has taken important steps to increase enforcement of its foreign bribery laws. However, 20 years after the Convention's entry into force, only one case was successfully concluded with sanctions against two natural persons, and no legal persons have been sanctioned for foreign bribery. This is exceedingly low given the size of Spain's economy and the high-risk regions and sectors in which its companies operate. Since Phase 3, Spain has opened 46 new investigations into foreign bribery allegations. However, despite the efforts deployed, out of 25 cases currently ongoing, in only four cases the persons involved were indicted. The Working Group is particularly concerned with Spain's premature closing of cases, as 20 foreign bribery investigations were terminated without indictments since Phase 3, including 13 because no response was obtained from a mutual legal assistance (MLA) request, or because the information received relayed that no investigation involving Spanish individuals or legal persons was ongoing in the foreign country. Spain has been very proactive in deploying international co-operation mechanisms, but underutilises other investigative tools, including coercive measures such as search and seizure, as well as forensic auditing and information technology. Spain should also ensure that the evidentiary threshold to open a judicial investigation does not preclude the effective investigation and prosecution of foreign bribery allegations. This is all the more critical as the time to conduct a preliminary investigation is insufficient, and investigative acts initiated by prosecutors, including MLA requests, do not interrupt the limitation period. Better co-ordination and communication within the ACPO is also critical to ensure that appropriate expertise is being deployed and cases are not overlooked.

In order to enhance foreign bribery enforcement, Spain also needs to be more proactive in its detection processes and methods. Despite a welcome increase of detection through the Spanish financial intelligence unit, several key detection sources remain largely untapped. In particular, Spain must urgently enact regulation for the protection of whistleblowers. As regards the liability of legal persons for foreign bribery, Spain must ensure that the standard and level of proof to trigger such liability comply with the Anti-Bribery Convention and related instruments and urgently raise the five-year limitation period. Clearer rules on how self-reporting and co-operation with the investigation affect a legal person's liability would dissipate confusion among both law enforcement authorities and companies, and encourage such behaviours. Spain must also issue guidance on the "organisational and management model" for preventing and detecting foreign bribery, train enforcement authorities to assess the effectiveness of such models, and actively promote their development by Spanish companies, in particular Small and Medium Enterprises (SMEs).

The Working Group welcomes the substantive 2015 reform of the Penal Code that consolidated the foreign bribery offence and further aligned relevant provisions on legal persons' liability with the Anti-Bribery Convention and Recommendation, thereby addressing several outstanding Phase 3 recommendations. It will monitor its application in practice, in light of potential issues regarding the interpretation of certain elements of the offence. The increase in sanctions against natural persons in certain circumstances

through the introduction of an aggravated offence is also welcome, although the method for calculating the benefit obtained from foreign bribery lacks clarity. Finally, the Working Group welcomes the clarification of the prohibition to deduct bribes and sanctions across all Spanish tax systems.

The report and its recommendations reflect the findings of experts from Brazil and South Africa and were adopted by the Working Group on 8 December 2022. It is based on legislation, data and other materials provided by Spain, as well as research conducted by the evaluation team. Information was also obtained during an on-site visit to Madrid in May-June 2022, during which the evaluation team met representatives of Spain's public and private sectors, law enforcement, media, and civil society. Spain will provide an oral update in one year (December 2023) on the status of the bill to protect whistleblowers and progress on enforcement of foreign bribery, and a written report in two years (December 2024) on the implementation of all recommendations and on its enforcement efforts.

# Introduction

1. In December 2022, the OECD Working Group on Bribery in International Business Transactions (Working Group or WGB) completed its fourth evaluation of Spain's implementation of the Convention on Combating the Bribery of Foreign Public Officials in International Business Transactions<sup>1</sup> (Anti-Bribery Convention or Convention), the 2021 Recommendation of Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions<sup>2</sup> (Anti-Bribery Recommendation), and related anti-bribery instruments.<sup>3</sup>

## 1. Previous evaluations of Spain by the Working Group on Bribery

2. Monitoring of Working Group members' implementation and enforcement of the Convention and related instruments takes place in successive phases through a rigorous peer-review system. The monitoring process is subject to specific, agreed-upon principles. The monitoring process is compulsory for all Parties to the Convention, and on-site visits are mandatory in Phases 2, 3 and 4. The monitoring reports, which are systematically published on the OECD website, include recommendations to the evaluated country. These reports are adopted on a "consensus minus one" basis, which means that the evaluated Party may voice its views and opinions but cannot block the adoption of the final report and recommendations.

### Box 1. Previous Working Group on Bribery Evaluations of Spain

- 2015 [Follow up on Phase 3 Report](#)
- 2012 [Phase 3 Report](#)
- 2008 [Follow up on Phase 2 Report](#)
- 2006 [Phase 2 Report](#)
- 2000 [Phase 1 Report](#)

3. The Phase 3 evaluation of Spain took place in December 2012. During this evaluation, Spain received 35 recommendations. By the time of the two-year written follow up in 2015, the Working Group concluded that Spain had fully implemented 4 recommendations, partially implemented 10, and not implemented 21 recommendations.<sup>4</sup>

<sup>1</sup> [OECD Convention on Combating the Bribery of Foreign Public Officials in International Business Transactions.](#)

<sup>2</sup> [2021 OECD Recommendation of Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions.](#)

<sup>3</sup> On 26 November 2021, the OECD Council adopted the Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions (Anti-Bribery Recommendation), in order to strengthen the implementation of the OECD Anti-Bribery Convention and further enhance the fight against foreign bribery. The Anti-Bribery Recommendation updates and expands upon the original 2009 Anti-Bribery Recommendation. The Anti Bribery Recommendation was in force at the time of the visit in the Phase 4 evaluation of Spain. As a result, the recommendations that the Working Group formulated in this report refer to the Anti-Bribery Recommendation.

<sup>4</sup> See Annex B for a list of Spain's Phase 3 recommendations and the Working Group's assessment of their implementation, based on Spain's [Phase 3 Written Follow-up Report](#).

## Figure 1. Spain's Implementation of its Phase 3 Recommendations

(As of the 2015 Phase 3 Written Follow-up Report)



## 2. Phase 4 process and on-site visit

4. Phase 4 evaluations focus on three cross-cutting themes: detection; enforcement of the evaluated Party's foreign bribery offence; and corporate liability for the offence (liability of legal persons). They also address progress made in implementing outstanding recommendations from previous phases, as well as any issues raised by changes to domestic legislation or the institutional framework. Phase 4 considers each Party's unique situation, resulting in a report and recommendations that address the specific challenges and achievements of each Party in a more targeted manner than previous Phases. This result is largely achieved by focusing first and foremost on the recommendations from Phase 3 that were not fully implemented by the end of that cycle. This means that issues that were not problematic or were resolved by the end of Phase 3 may not be reflected in the Phase 4 Report, while wholly new issues that have arisen since that time may appear in this report for the first time.

5. The evaluation team for this Phase 4 evaluation of Spain was composed of lead examiners from Brazil and South Africa, as well as members of the OECD Anti-Corruption Division.<sup>5</sup> After receiving Spain's responses to the Phase 4 Questionnaire and supplementary questions, the evaluation team conducted an on-site visit to Madrid from 30 May to 3 June 2022. The team met with representatives of Spain's government, the Spanish Administration, public legal entities, law enforcement authorities, the judiciary, the private sector (business associations, companies, financial institutions, lawyers and external auditors), as well as civil society (non-governmental organisations, academia and the media).<sup>6</sup> The evaluation team expresses its appreciation to all the participants, including several high-ranking officials, for their contributions to the open and constructive discussions. The evaluation team is also grateful to the Spanish government, in particular the Ministry of Justice (MOJ), for their co-operation and level of engagement throughout the evaluation, their best effort to organise a well-attended on-site visit, and the provision of additional information following the visit. The evaluation team also extends its gratitude to the Special Public Prosecutor's Office against Corruption and Organised Crime (ACPO) for being so generous with their time during the on-site visit. Finally, it notes that the Spanish government was not present during the panel discussion with the private sector and civil society.

<sup>5</sup> **Brazil** was represented by Renato Machado de Souza, Director of Leniency Agreements, Anti-Corruption Federal Secretariat, Office of the Comptroller General, Rafael Ramos da Luz, Federal Auditor of Finance and Control, Office of the Special Advisor for International Affairs, Office of the Comptroller General, and Marcelo Ribeiro de Oliveira, Prosecutor, Federal Prosecutor Service (Marcelo Ribeiro de Oliveira did not participate to the on-site visit). **South Africa** was represented by Grace Moseitha, Senior State Advocate, Special Commercial Crimes Unit, National Prosecuting Authority and John Matroos, Brigadier and Section Head: Government Fraud, Serious Commercial Crime Investigation, Directorate for Priority Crime Investigation. The **OECD** was represented by Elisabeth Danon, Co-ordinator of the Phase 4 Evaluation of Spain and Legal Analyst, Alejandra Tadeu, Legal Analyst, and Louise Lecaros de Cossío, Legal Analyst, all from the Anti-Corruption Division, Directorate for Financial and Enterprise Affairs.

<sup>6</sup> See Annex C for the list of participants in the on-site visit discussions.



### 3. Spain's economic situation and foreign bribery risks

#### a. Economic background

##### i. General

6. Spain is a relatively strong economy by comparison to other WGB members, ranking 13<sup>th</sup> in terms of gross domestic product (GDP). In 2021, with a population of over 47 million people,<sup>7</sup> Spain's real GDP amounted to USD 1,929,760 million.<sup>8</sup> In the five years preceding the COVID-19 pandemic, the Spanish economy was growing significantly. In 2020, Spain's real GDP declined by 10.8% (against 3.4% in the world).<sup>9</sup> Exports and imports also declined strongly in 2020, dropping by 34% and 29%, respectively.<sup>10</sup> After a strong rebound by 5% in terms of real GDP in 2021, the Spanish economy is slowing down again due to the war in Ukraine, high inflation, and lingering pandemic. In this context, Spanish growth is set to slow to 4.1% in 2022 and 2.2% in 2023.<sup>11</sup>

7. The sectorial breakdown of Spanish economy for 2019 was as follows: services, including tourism (74.8% of the GDP), industry, including construction (22.3% of the GDP), and agriculture, forestry and fishing (2.9% of the GDP). The large service sector is mostly dominated by SMEs.<sup>12</sup>

8. Concerning international trade, Spain was the 17<sup>th</sup> largest export economy globally in 2020.<sup>13</sup> Merchandise exports (USD 192 644 millions) were over twice as large as service exports, with manufactured goods (mainly machinery, transport equipment, and chemicals and related products) accounting for 71% of Spanish exports, food items for 20%, and fuels for 4% (the remaining 5% covered other exports).<sup>14</sup> In 2021, Spanish export economy was ranked 27<sup>th</sup> among the WGB members in terms of percentage of GDP, with exports in goods and services representing 35% of Spain's GDP, seven points below the OECD average.<sup>15</sup> Spain's main export partners are European Union (EU) countries (mainly France, Germany, Italy, and Portugal), the United Kingdom (UK), the United States (US), China, Morocco, Switzerland, Türkiye, and Mexico.<sup>16</sup>

<sup>7</sup> OECD (2021), *OECD Economic Surveys: Spain 2021*, OECD Publishing, Paris, <https://doi.org/10.1787/79e92d88-en>.

<sup>8</sup> OECD (2022), *Gross domestic product (GDP) (indicator)*, <https://data.oecd.org/gdp/gross-domestic-product-gdp.htm#indicator-chart>.

<sup>9</sup> OECD (2021), *OECD Economic Outlook, Interim Report September 2021: Keeping the Recovery on Track*, OECD Publishing, Paris, <https://doi.org/10.1787/490d4832-en>.

<sup>10</sup> IMF (2020), "Spain : 2020 Article IV Consultation-Press Release; Staff Report; and Statement by the Executive Director for Spain", Country Report No. 2020/298, FMI, Washington, D.C., <https://www.imf.org/en/Publications/CR/Issues/2020/11/12/Spain-2020-Article-IV-Consultation-Press-Release-Staff-Report-and-Statement-by-the-Executive-49883>.

<sup>11</sup> OECD (2022), *OECD Economic Outlook, Volume 2022 Issue 1: Preliminary version*, OECD Publishing, Paris, <https://doi.org/10.1787/62d0ca31-en>.

<sup>12</sup> OECD (2021), *OECD Economic Surveys: Spain 2021*, *op. cit.*

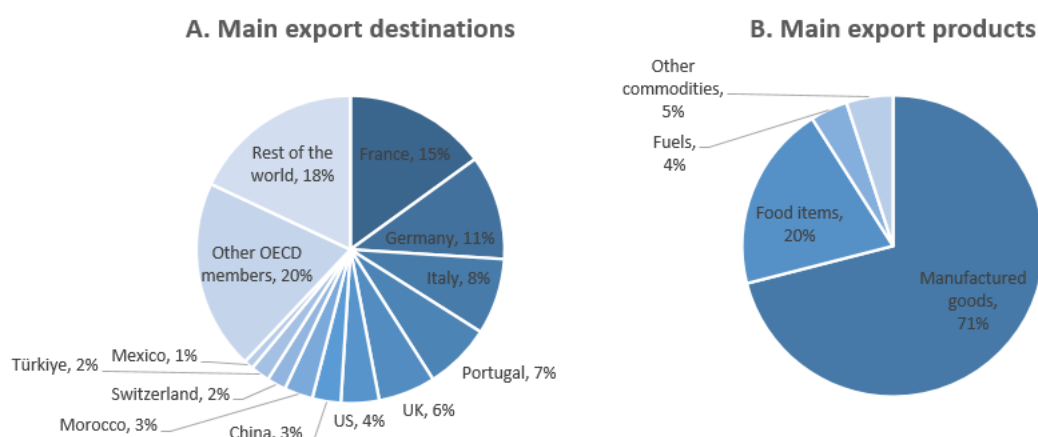
<sup>13</sup> Observatory of Economic Complexity (2022), *Spain*, <https://oec.world/en/profile/country/esp#latest-data>.

<sup>14</sup> UNCTAD (2020), *General Profile: Spain*, UNCTADstat, <https://unctadstat.unctad.org/countryprofile/generalprofile/en-gb/724/index.html>.

<sup>15</sup> OECD (2022), *Trade in goods and services (indicator)*, <https://data.oecd.org/trade/trade-in-goods-and-services.htm#indicator-chart>.

<sup>16</sup> OECD (2022), *International Trade by Commodity Statistics Volume 2021 Issue 6: Austria, Chile, Colombia, Costa Rica, Spain, OECD Total, EU28-Extra*, OECD Publishing, Paris, <https://doi.org/10.1787/32db41f7-en>.

Figure 2. Exports by main destinations and products in 2020



Source: OECD (2022), *International Trade by Commodity Statistics* and UNCTAD (2020), *General Profile: Spain*

9. Spain ranks 13<sup>th</sup> among WGB countries in terms of outward foreign direct investment (FDI) stocks, with USD 565 360 million invested as of 2021 (against USD 777 635 million of inward stocks), representing 40% of its GDP.<sup>17</sup> In terms of the destinations, in 2021, 73.9% of Spanish net outward FDI flows were invested in four countries: the UK (34.8%), the US (21.9%), Luxembourg (11.2%), and Mexico (6%). They mainly cover the telecommunication sector (40.3%), energy sector (18.8%), financial and insurance activities sector (13.4%), and the manufacturing industry (11.8%).<sup>18</sup>

#### ii. Exports of Spain's Autonomous Communities

10. The territorial organisation of Spain includes, besides the central government, 17 Autonomous Communities and two Autonomous Cities at the sub-national level. Autonomous Communities do not have separate jurisdiction and their courts are courts of the State. The Basque Country, Catalonia, and Navarra have developed regional police units. The Basque Country and Navarra have their own tax systems (*Haciendas Forales*). In 2021, the main exporting Autonomous Communities (corresponding to the headquarters' location of large Spanish investment groups) were the Community of Madrid (69.2%), the Basque Country (15.1%), and Catalonia (6.3%).<sup>19</sup> Exports from these three Autonomous Communities along with the Principality of Asturias (4.1%) and the Valencian Community (2.7%) represented almost the entire volume of Spanish exports in 2021 (97.4%), a total of EUR 21,477 million.

#### iii. Corporate structure

11. SMEs (companies with up to 249 employees) play a major role in Spain, generating 56.3% of the Spanish non-financial corporate sector's total gross value added and 68.4% of total employment in 2020. Between 2000 and 2021, the total number of SMEs increased by 2.4%. In terms of sectors, 73.2% of SMEs and 71.9% of big companies operated in services, 11.4% of SMEs and 2.4% of big companies in construction, 9.5% of SMEs and 3.2% of big companies in agriculture, and 5.9% of SMEs and 22.6% of

<sup>17</sup> OECD (2022), *FDI Stocks (indicator)*, <https://data.oecd.org/fdi/fdi-stocks.htm#indicator-chart>.

<sup>18</sup> Ministry of Industry, Trade and Tourism (2022), *Boletín de Flujos de Inversión Exterior Directa 2021 [Report on Foreign Direct Investment Flows 2021]*, Madrid, <https://comercio.gob.es/InversionesExteriores/Publicaciones/Historico%20de%20boletines/Ultimas%20publicaciones/Flujos-Inversion-Directa-Ultima-Publicacion.pdf>.

<sup>19</sup> Ibid.

big companies in industry.<sup>20</sup> As of September 2022, SMEs accounted for 99.8% of all Spanish companies.<sup>21</sup> In 2017, Spain adopted its “Internationalisation Strategy for the Spanish Economy 2017-2027”, with one of the objectives being to promote and help SMEs to export.<sup>22</sup> In 2018, more than 95,000 SMEs were exporting (3.3% of SMEs). On average, out of all exporting SMEs, exports represent 49.4% of their activities.<sup>23</sup> In the one foreign bribery case successfully concluded with sanctions, the company involved was an SME. The company was acquitted.

12. Regarding State-owned enterprises (SOEs), in 2012, the majority of Spain’s SOEs were regional and local (over 2,500 enterprises), and a number of these were operating abroad.<sup>24</sup> As regards SOEs with central government majority, Spain counted 51 in 2015, in contrast to 151 in 2009.<sup>25</sup> These 51 SOEs represented a total estimated value of USD 36.7 billion, operating in primary sectors, as well as electricity and gas, transportation, and manufacturing. As detailed in Annex A, a number of relevant foreign bribery cases involve Spanish SOEs operating in high-risk regions and industries.

### **b. Foreign bribery risks**

13. Spain’s businesses operating abroad have a relatively high exposure to foreign bribery. Mexico and Brazil were two of the top ten destinations for Spanish FDI in 2021, with an investment of EUR 1,319 million and EUR 569 million, respectively.<sup>26</sup> According to the 2021 Transparency International Corruption Perceptions Index, both countries ranked high in their perceived levels of public sector corruption.<sup>27</sup>

14. The manufacturing and extractive (including mining, quarrying, petroleum and gas) sectors are highly sensitive to foreign bribery, accounting for 27% of the concluded cases at the time of the 2014 OECD Foreign Bribery Report.<sup>28</sup> Relevant foreign bribery cases detailed in the current Phase 4 report concern the construction, transportation and defence sectors, which together represent 35 % of the concluded cases analysed in the Foreign Bribery Report. A significant number of these foreign bribery cases also involve high risk jurisdictions in Latin America, Africa, and the Gulf region.

<sup>20</sup> Ministry of Industry, Trade and Tourism (2022), “Marco Estratégico en Política de PYME 2030. 2o Informe de Seguimiento Annual 2021” [*Strategic Policy Framework for SMEs 2030. 2nd Annual Monitoring Report 2021*], Informe de Seguimiento Annual, Madrid, [https://plataformapyme.es/Publicaciones/Marco%20Estrat%C3%A9gico%20de%20la%20PYME/Informe\\_Seguimiento\\_Anuar\\_2021.pdf](https://plataformapyme.es/Publicaciones/Marco%20Estrat%C3%A9gico%20de%20la%20PYME/Informe_Seguimiento_Anuar_2021.pdf).

<sup>21</sup> Ministry of Industry, Trade and Tourism (2022), “Cifras PyME Datos septiembre 2022” [*SMEs data September 2022*], Cifras PyME, Madrid, <http://www.ipyme.org/Publicaciones/CifrasPYME-septiembre2022.pdf>.

<sup>22</sup> Ministry of Industry, Trade and Tourism (2017), *Estrategia de Internacionalización de la Economía Española 2017-2027* [*Internationalisation Strategy for the Spanish Economy 2017-2027*], Madrid, [https://comercio.gob.es/es-es/estrategia\\_internacionalizacion/Paginas/Estrategia-Internacionalizacion-2017-2027.aspx](https://comercio.gob.es/es-es/estrategia_internacionalizacion/Paginas/Estrategia-Internacionalizacion-2017-2027.aspx).

<sup>23</sup> Ministry of Industry, Trade and Tourism (2022), “Marco Estratégico en Política de PYME 2030. 2o Informe de Seguimiento Annual 2021”, *op. cit.*

<sup>24</sup> Spain [Phase 3 Report](#), para. 7.

<sup>25</sup> OECD (2017), *The Size and Sectoral Distribution of State-Owned Enterprises*, OECD Publishing, Paris, <https://doi.org/10.1787/9789264280663-en> and OECD (2011), “The size and composition of the SOE sector in OECD countries”, *OECD Corporate Governance Working Papers, No.5*, <https://www.oecd-ilibrary.org/docserver/5kg54cwps0s3-en.pdf?expires=1657209350&id=id&accname=quest&checksum=F5592264645C271BFF2EBDAC88047832>.

<sup>26</sup> Ministry of Industry, Trade and Tourism (2022), *Boletín de Flujos de Inversión Exterior Directa 2021*, *op. cit.*

<sup>27</sup> Transparency International (2022), *Corruption Perceptions Index 2021*, Transparency International, Berlin, <https://www.transparency.org/en/cpi/2021>.

<sup>28</sup> OECD (2014), [OECD Foreign Bribery Report: An Analysis of the Crime of Bribery of Foreign Public Officials](#), OECD Publishing, Paris, p. 22.

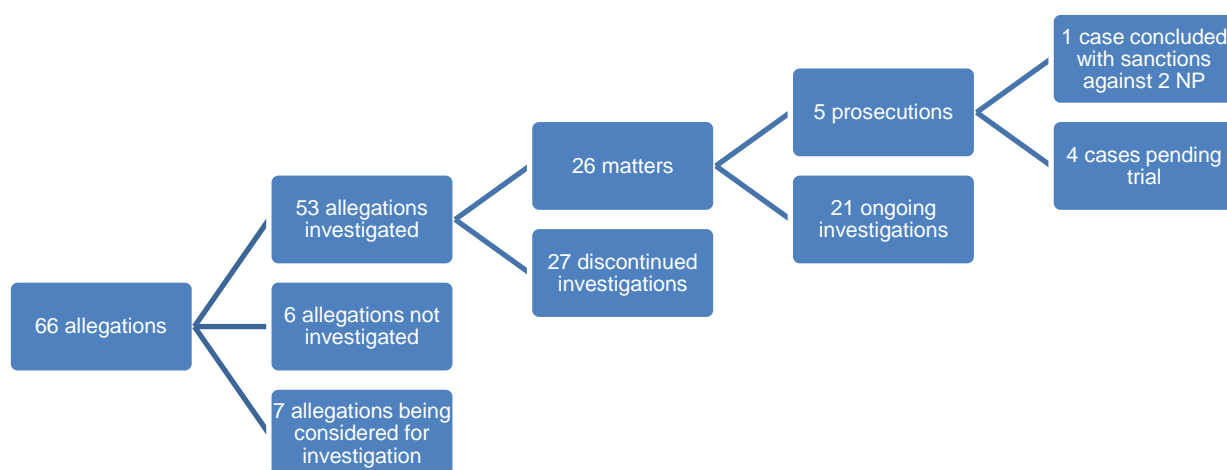
#### 4. Foreign bribery cases in Spain

15. In Phase 3, the Working Group expressed serious concerns over the low level of enforcement of foreign bribery laws in Spain. At the time, no individual or company had been prosecuted in connection with this offence and only seven investigations had been commenced, all of them closed by the time of the Phase 3 on-site visit. The Working Group therefore recommended that Spain review its overall approach to enforcement in order to effectively combat bribery of foreign public officials (Phase 3, recommendation 1). At the time of the Phase 3 Written Follow-up Report in March 2015, Spain still had no cases concluded with sanctions and only three ongoing investigations. The WGB reiterated its concerns and deemed this recommendation not implemented.

16. The number of foreign bribery allegations under investigation in Spain has significantly increased since Phase 3. Spain has opened 46 new investigations into foreign bribery allegations and is currently looking into seven additional ones, thereby denoting an increased proactivity from Spanish authorities. However, the level of enforcement remains exceedingly low. Of the 46 foreign bribery investigations, 20 were closed without prosecution. At the time of adoption of this report, Spain has 25 ongoing cases, but only in four of those, the persons involved were indicted. All four cases are pending trial. Since the enactment of its foreign bribery laws in 2000, Spain has only successfully concluded one foreign bribery case, which resulted in two individuals being sanctioned in 2017. No legal persons have been sanctioned for foreign bribery in Spain to date. This is particularly concerning considering the size of the Spanish economy and its significant commercial activity abroad, including in high-risk sectors and jurisdictions.

17. The ACPO was very forthcoming in providing the evaluation team with information on ongoing and closed investigations and responding to requests for clarification. However, there is no central database in Spain that compiles information on foreign bribery and foreign bribery-related offences, despite the Working Group reiterating the need to compile statistics in its recommendations to Spain since Phase 2.

**Figure 3. Spain's foreign bribery enforcement since 1999**



Note: Data as of July 2022.

Source: Phase 4 case data provided by Spain and the WGB detection of foreign bribery allegations.

**a. Only one case concluded with sanctions since the enactment of foreign bribery laws in Spain**

18. Since the enactment of its foreign bribery laws in 2000, only one case was concluded with sanctions in Spain. In 2017, the National High Court (*Audiencia Nacional*) convicted two individuals for foreign bribery and acquitted a third one and a legal person.

*Publishing Companies case*: The *Audiencia Nacional* concluded that, in 2009, the two sanctioned individuals transferred EUR 70,000 to senior public officials of the Ministry of Education of the Republic of Equatorial Guinea to maintain their commercial relationship with said state and enter new contracts for the edition of books. The amount was paid to the Deputy Minister of Education, Science and Sports as a fictitious donation for the curricular enablement of teachers of English and French in the country. This payment allowed the company to enter into four new contracts in the total amount of EUR 16,653,000. The amount of the profits derived from this transaction was not determined by the Court. The two individuals who were sanctioned confessed to the facts and were convicted through *conformidad* to one year of imprisonment and a special disqualification from the right to stand as candidates for any election during the time of the sentence. Additionally, the court imposed a six-month fine with a daily fee of EUR 6 (which corresponds to EUR 1,080), with a subsidiary liability in the event of default of three months of deprivation of liberty. The court also imposed a prohibition of entering contracts with the public sector, as well as the loss of the possibility of receiving subsidies and the right to enjoy tax and Social Security benefits or incentives, and the prohibition of partaking in business transactions of public significance for a period of three years and six months. Both the third natural person and the legal person were acquitted due to lack of sufficient evidence of their participation in the criminal conduct.

**b. Ongoing foreign bribery investigations and other foreign bribery allegations**

19. There are currently 25 ongoing foreign bribery cases in Spain. In four cases 53 natural persons and 14 legal persons were indicted. All four cases are currently pending trial. The Spanish authorities are currently investigating at least 110 natural persons and 34 legal persons in connection with 21 ongoing foreign bribery investigations. Seven foreign bribery allegations that the Spanish authorities became aware of through the Working Group are currently being analysed with a view to potentially opening an investigation procedure.

20. As further developed in this report, Spain demonstrates a lack of proactivity in the detection of potential foreign bribery cases and an overreliance on the Working Group's detection of allegations. Considering the significant size of the Spanish economy and its commercial activity, the number of foreign bribery allegations could be much higher.

**c. A very high number of investigations in Spain are closed without prosecution**

21. The encouraging number of ongoing foreign bribery investigations is offset by the high number of investigations that are closed without prosecution. Twenty-seven investigations were closed in Spain at the investigation stage, including 20 since Phase 3. Additionally, one of the cases currently pending trial involved proceedings regarding allegations in two other jurisdictions that were closed at the investigation stage. One investigation was closed due to the expiration of the statute of limitations and three investigations were discontinued due to the terms of a settlement agreement in a foreign jurisdiction preventing the sharing of evidence. However, the great majority of these 27 investigations were closed due to lack of sufficient evidence. These investigations were often discontinued either because no response was obtained from an MLA request to the country of the foreign public official, or because the information received relayed that no investigation was ongoing in the foreign country involving Spanish individuals or legal persons.

22. From analysing this case data, it would appear that there is an overreliance on the status of foreign criminal proceedings. While Spain is very proactive in deploying mechanisms of international co-operation, other investigative tools appear to be underutilised, in particular, special investigative means. The use of forensic auditing and information technology also appears to be very limited. These topics are further explored under [B.4.a.](#)

### **Commentary**

*The lead examiners are very concerned that, more than twenty years after the Convention's entry into force, Spain's conclusion of foreign bribery cases with sanctions remains particularly low. Only two natural persons were convicted for foreign bribery in one case that appears to have been successfully concluded. The lead examiners are also extremely concerned that since Spain introduced its corporate liability regime in 2010, no legal persons have been sanctioned for a foreign bribery offence. While the lead examiners are encouraged by the sharp increase in the number of foreign bribery investigations opened since Phase 3, this progress is offset by the high proportion of discontinued investigations. The lead examiners therefore recommend that Spain take all necessary measures to increase enforcement against both natural and legal persons and, in particular, they reiterate Phase 3 recommendation 3.c) that Spain take steps to effectively enforce its corporate liability regime in foreign bribery cases.*

*As further developed in this report, Spain needs to be more proactive in detecting potential foreign bribery cases, which could lead to an increase in the number of investigations. The underutilisation of investigative techniques and overreliance on the status and outcome of foreign criminal proceedings likely contributed to the termination of 20 investigations since Phase 3.*

*Given the longstanding recommendation by the Working Group regarding the compilation of data on foreign bribery enforcement, the lead examiners urge Spain to create a database to maintain statistics, including on investigation, prosecution and termination of cases involving the foreign bribery offence and related offences of money laundering and false accounting.*

## A. Detection of foreign bribery

23. More than half of the foreign bribery allegations since Phase 3 were uncovered through the Working Group, which denotes an over-reliance on the WGB's media monitoring by law enforcement authorities. The number of allegations uncovered by the financial intelligence unit (FIU), SEPBLAC, is increasing, while other sources remain largely untapped. Only one allegation of foreign bribery has been detected by the tax authorities and no allegations have ever been detected by other government agencies.

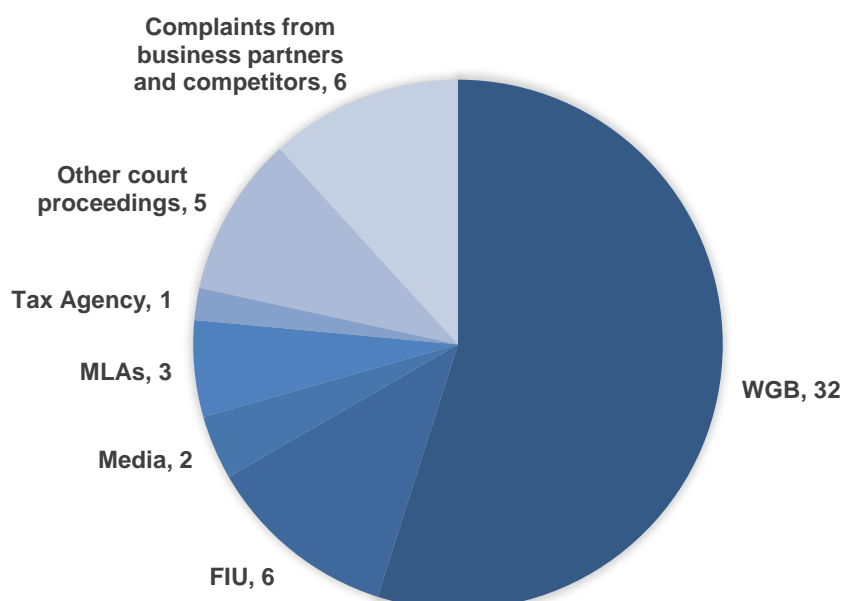
24. Three allegations were detected through requests for MLA and five investigations were initiated from facts uncovered in the context of other criminal proceedings. Six allegations were uncovered by complaints lodged by individuals such as business partners, creditors and competitors. The lack of detection from other sources may be partly due to a lack of regulation in areas such as whistleblower protection and self-reporting, but also lack of awareness from diplomatic missions abroad and the fact that Spain has yet to implement reporting channels for public officials to report misconduct.

25. In Phase 3, the Working Group recommended that Spain take proactive steps to gather information from diverse sources of allegations and enhance investigations (Phase 3 recommendation 5.e)(i)). This recommendation was deemed not implemented in Spain's Phase 3 Written Follow-up Report.<sup>29</sup> The Anti-Bribery Recommendation VIII prompts member countries to encourage law enforcement authorities to proactively gather information from diverse sources to increase detection of foreign bribery and enhance investigations, such as the media, reporting persons, public agencies, etc. The following sections address how law enforcement authorities in Spain have utilised varying sources to detect foreign bribery allegations.

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<sup>29</sup> Spain [Phase 3 Written Follow-up Report](#), para. 3.

Figure 4. Source of Spain's Foreign Bribery Cases since Phase 3



Note: Data includes discontinued investigations. Some allegations had two different sources which were counted separately, which accounts for 55 sources for 53 foreign bribery allegations.

Source: Spain's responses to the Phase 4 Questionnaire and additional information provided after the on-site visit.

### Commentary

**The lead examiners are concerned that overall, Spain's detection of foreign bribery cases is low. The lead examiners thus reiterate Phase 3 recommendation 5.e)(i) that Spain take proactive steps to gather information from diverse sources of allegations.**

## 1. Detection through Media information

26. Media reporting and investigative journalism are an important source of public awareness and detection of potential foreign bribery allegations. Spain ranks number 32 in the 2022 Reporters Without Borders' World Press Freedom Index, three steps down from the position it held in 2021. According to the publication, public mistrust of journalists has been fuelled by the polarisation of a segment of the media, and the government has been accused by some media of a lack of transparency in its handling of information about the pandemic. Spanish journalists are rarely subjected to pressure from the authorities, but the media are subjected to gag suits and judicial proceedings that could infringe on their right to protect the confidentiality of their sources.<sup>30</sup>

27. To date, two cases were detected through news articles in the Spanish press. According to prosecutors met during the on-site visit, media reports are sufficient for the ACPO to initiate a criminal investigation. Law enforcement authorities present at the on-site visit reported that they sometimes receive reports from investigative journalists and that they monitor the media. The ACPO in particular reported that they receive daily press information from the Public Prosecutor's Office and the Council of the Judiciary. According to Spain, international press is monitored by diplomatic missions overseas and all news articles

<sup>30</sup> Reporters Without Borders, [2022 World Press Freedom Index: Spain](#).



affecting Spain and/or Spanish companies are analysed and sent for information to the Ministry of Foreign Affairs. However, it is unknown whether relevant information is forwarded to the ACPO.

28. Despite reporting that media is regularly monitored, Spain relies heavily on the Working Group's media monitoring, citing it as a source of detection in a total of 32 allegations of foreign bribery. Although it is very positive that Spain makes use of the WGB's detection capacity, Parties to the Convention are expected to proactively detect foreign bribery allegations in the media, instead of merely relying on the WGB. Spain's over-reliance on the WGB for this purpose could point to a lack of resources dedicated to the detection of foreign bribery allegations through monitoring domestic and international media. The ACPO appears to only conduct monitoring of the media through press information it passively receives from other agencies. Spain should enhance law enforcement's capacity to detect foreign bribery cases by allocating appropriate resources to monitoring media in the country and abroad by, for example, allocating human resources to the task, adopting a monitoring software and investing on its officials' expertise, foreign language skills and training.

### **Commentary**

***The lead examiners positively note that Spain has opened two foreign bribery investigations based on media reports. However, even though Spain reports that its law enforcement agencies frequently monitor the media, the main source of detection in Spain is the Working Group, with 32 of the 53 foreign bribery allegations that have surfaced since Phase 3 having been detected through the WGB. Spain's efforts to monitor the media failed to identify these allegations.***

***The lead examiners therefore recommend that Spain enhance the ACPO's capacity to detect foreign bribery cases by deploying additional means for monitoring Spanish and international media for foreign bribery allegations involving Spanish companies or individuals, including appropriate human resources, expertise, foreign-language skills, training and potentially software.***

## **2. Detection through information from foreign jurisdictions**

29. Information provided by foreign law enforcement authorities through incoming MLA requests has been an important source of detection since Phase 3, with three ongoing cases having been detected through MLA. Spain also referred to a case in 2021 where the ACPO initiated an investigation based on information provided by the Belgian authorities in response to a European Investigation Order (EIO). The ACPO interrupted its investigation in favour of Belgium after the countries agreed that Belgium was the most appropriate jurisdiction for prosecution.

30. Spain reported that if the MLA request "is clearly referred to a foreign bribery case it will be forwarded to the ACPO." The fact that the ACPO analyses incoming requests on foreign bribery to determine whether the information provided justifies the opening of a parallel investigation in Spain is very positive. However, in addition to foreign bribery cases, it is also important that MLA requests for related offences and other corporate crimes that might indicate a foreign bribery pattern by Spanish companies be considered by the ACPO. Furthermore, while Spain is part of several networks of law enforcement officials, no foreign bribery cases have been detected through these channels.

31. In the first stage of this Phase 4 evaluation, and in accordance with the Phase 4 monitoring procedures, WGB member countries were consulted on their experience with Spain concerning international co-operation in foreign bribery cases (2021 WGB Survey). Two out of six countries that

responded to this survey expressed concerns regarding the lack of follow up after sharing spontaneous information that could be useful to initiate a foreign bribery investigation in Spain.<sup>31</sup>

### Commentary

***The lead examiners welcome Spain's positive reaction to incoming MLA requests through the opening of investigations, and commend Spain for forwarding MLA requests that clearly involve foreign bribery to the ACPO. They recommend that the Working Group follow up on this practice to ensure that Spanish authorities receiving MLA requests continue to systematically forward suspicions of foreign bribery to the ACPO, as well as related offences and other corporate crimes that might indicate a foreign bribery pattern involving Spanish companies or individuals.***

## 3. Detection through whistleblowers and the adequacy of their protection

32. Anti-Bribery Recommendation XXII recommends countries to establish strong and effective legal and institutional frameworks to protect and/or to provide remedy against any retaliatory action to persons working in the private or public sector who report on reasonable grounds suspected acts of bribery of foreign public officials in international business transactions and related offences in a work related context.

33. In Phase 3, Spain did not have a framework for the protection of whistleblowers in the private sector.<sup>32</sup> Regarding whistleblower protection in the public sector, the legislation in force did not comply with the Anti-Bribery Recommendation, and none of the applicable provisions related to protection from retaliatory action when reporting suspected crimes in good faith. Phase 3 recommendation 11 was deemed not implemented at the time of the Phase 3 Written Follow-up Report due to the persisting absence of adequate whistleblower protections.<sup>33</sup>

34. In its responses to the Phase 4 Questionnaire, Spain reported the existence of a whistleblower channel and a framework of protections against retaliation for employees of obliged entities under the anti-money laundering legislation. Spain also provided information on a number of channels for reporting illicit practices, such as non-compliance with labour regulations and anti-competitive practices, or communications related to public tendering. However, there are no channels through which suspected acts of bribery of foreign public officials can be reported. Spain still does not have a framework to protect public and private sector employees who report on reasonable grounds from discriminatory or disciplinary actions. To date, no foreign bribery cases have been detected through whistleblower reporting in Spain.

35. As a member State of the EU, Spain was due to transpose EU Directive 2019/1937 (“the Whistleblower Directive”)<sup>34</sup> by 17 December 2021. At the time that this report is being written, the draft law has been submitted to Parliament, with a request for urgent processing, and published in the Official Gazette of the Spanish Parliament.<sup>35</sup> Spain has advised the evaluation team that the content of the law is subject to change as the drafting procedure and discussions on the draft develop in the Parliament. The Working Group only takes into account legislation that has entered into force. However, the following paragraphs analyse the main aspects of the current draft law, with a view to emphasise some key

<sup>31</sup> Six WGB member countries responded to the survey, with three countries reporting on MLA regarding foreign bribery cases, as well as statistics or information for cases that did not involve bribery of foreign officials. The other three countries reported that they did not have MLA experience with Spain and did not provide information on co-operation regarding other corruption offences.

<sup>32</sup> Spain [Phase 3 Report](#), para. 170.

<sup>33</sup> Spain [Phase 3 Written Follow-up Report](#), para. 11.

<sup>34</sup> [Directive \(EU\) 2019/1937](#) of the European Parliament and the Council of 23 October 2019 on the protection of persons who report breaches of Union law.

<sup>35</sup> [Draft Law no. 121/000123](#) regulating the protection of persons who report on regulatory infringements and the fight against corruption.

weaknesses that were identified by the evaluation team. Spanish officials met during the on-site visit reported plans to launch an information campaign once the law is enacted. No further information was provided on what this campaign will entail.

**a. Elements of the draft law in line with the Anti-Bribery Recommendation XXII**

36. In terms of protected persons, Article 3 of the draft law establishes that it applies to whistleblowers both in the private and the public sector who have obtained information on offences in a work or professional context. This provision signals that Spanish legislators opted for a very broad definition of the concept of employee. For the purpose of the draft law, the definition of employee encompasses: public employees, private employees, independent workers, shareholders and holders of social participations, members of the administrative, management or supervision organs of a company (which includes non-executive members), and any person working under a contractor, subcontractor or supplier. The law is equally applicable to those who report information obtained in the context of a work or statutory relationship already terminated, volunteers, grant holders, workers in training, regardless of whether or not they receive a remuneration, as well as those whose work relationship has yet to commence, where the information is obtained during the selection process or pre-contract negotiations.

37. The protective measures established under the whistleblower protection draft law are equally applicable to legal representatives of workers, when exercising their advisory and support roles for whistleblowers; natural persons connected to the whistleblower who may suffer retaliation, such as colleagues or family members; and legal persons for whom the whistleblower works, or with whom they maintain any other type of relationship in a work context, or in which the whistleblower has significant participation (understood as capacity to influence the legal person due to the proportion of shares or voting rights).

38. Regarding reporting channels, the draft law includes provisions on the establishment of internal and external communication channels. Internal communication channels are mandatory for both private and public entities that employ a certain number of staff. Each entity must have a person responsible for the system and issue a clear policy that includes the general principles regarding the information system and the protection of whistleblowers, which must be appropriately publicised within the entity. Obligated entities must also implement a procedure for managing the communications received through the internal channel and establish measures for the protection of whistleblowers within the organisation. In parallel, the draft law also envisions the existence of an external channel of communication under the responsibility of the Independent Authority for Whistleblower Protection (“the Whistleblower Authority”, a new entity to be created following the adoption of the law, as further discussed below). Natural persons may use this channel and report to the Whistleblower Authority directly or by previously resorting to the internal channel.

39. Under the draft law, internal reporting channels must allow for both verbal and written communications and guarantee the confidentiality of the whistleblower and any third party mentioned in the communication, as well as the confidentiality of any actions taken in the processing of the communication. The external reporting channel of the Whistleblower Authority must also allow for verbal and written reporting, and anonymous communications. It should be noted that representatives from civil society present during the on-site visit expressed concerns that whistleblowers would not be granted full protection of the law if they were to report to a civil society organisation or an NGO, as reports to these entities are not foreseen in the current draft legislation.

40. The draft law includes a broad definition of retaliation, defining it as any action or omission prohibited by law or that directly or indirectly supposes an unfavourable treatment that places the individuals on its receiving end at a particular disadvantage in relation to another individual in a work or professional context, based on their role as a whistleblower or public informant. Such acts or omissions will be considered retaliatory when carried out during the investigation procedure, or in the two years following its conclusion or from the date of the public disclosure. Exception is made for actions or omissions

that may be objectively justified with a legitimate end, where the means to reach that end are necessary and adequate. The draft law includes a list of non-comprehensive examples of retaliation. In addition to termination or suspension of a work contract, negative performance evaluations, etc., it sets forth that acts which result in reputational damage, economic loss, coercion, intimidation, or ostracism, cancellation of licenses or permits, blacklisting, and barriers to future employment also constitute retaliation. Follow up on the interpretation of what constitutes an act or omission that “places the individuals on its receiving end at a particular disadvantage in relation to another individual in a work or professional context” is necessary to ascertain how this concept will be interpreted as practice develops.

41. An infraction of a whistleblower protection provision will result in sanctions for natural persons between up to EUR 10,000 (for minor infractions) and EUR 300,000 for very serious infractions. Legal persons will be sanctioned with a fine between up to EUR 100,000 (for minor infractions) and EUR 1,000,000 (for very serious infractions). In the case of very serious infractions, the Whistleblower Authority can also impose additional sanctions, including a public reprimand, a prohibition to obtain subventions or other fiscal benefits for a maximum period of four years, and the prohibition to contract with the public sector for a maximum period of three years.

42. Another very positive aspect that the draft law will introduce is the shift of the burden of proof for retaliation. In labour procedures before a jurisdictional body, the whistleblower will only be required to reasonably demonstrate that their communication or public disclosure was made in accordance with the law and that they suffered damages. This demonstration will create a legal presumption that the damage was a consequence of retaliation due to the communication or disclosure, and it will fall upon the person who adopted the measures to prove that such measures were justified and had no connection to the communication or disclosure.

43. Finally, and as alluded above, the draft law envisions the creation of an independent Whistleblower Authority, to which it attributes competence for the adoption of protective measures and for the exercise of sanctioning powers. The main functions of the Whistleblower Authority will be to (i) manage the external reporting channel, allowing whistleblowers to bypass internal reporting channels and report directly to this entity; (ii) adopt the measures to protect whistleblowers that are provided for by the law; and (iii) carry out the sanctioning procedures and impose sanctions that result from infractions of the whistleblower protection law. The Whistleblower Authority will also participate and be consulted regarding measures and norms that affect its scope of competences and that affect the law regulating the Authority and its functions.

44. Given the particular landscape of Spain and its organisation in Autonomous Communities, more than one authority will likely be competent under Spain’s framework for whistleblower protection. The preamble to the draft whistleblower protection law clarifies that communities have the possibility to establish external channels for reporting, which will be managed by independent authorities analogous to the Whistleblower Authority. This possibility stems from the Constitutional distribution of powers between the State and the Autonomous Communities and Constitutional Court decision 130/2013, whereby State rules that implement EU regulations in Spain have a supplementary nature to the ones that may be dictated by the Autonomous Communities for the same ends within their specific competences.

45. The (central) Whistleblower Authority will be competent to oversee procedures that relate to the local or autonomous institutional public sector where there is an agreement in that sense or when the respective Autonomous Community has not attributed competence to manage the external channel for whistleblowers to a body or authority of its own. Procedures pertaining to private sector entities will only fall within the Whistleblower Authority’s jurisdiction when the infraction affects or produces effects in the territory of more than one Autonomous Communities. The draft law regulates co-ordination between the different authorities regarding coherent application of the provisions, information sharing and creation of working groups where necessary and recognises the existence of external complaint channels already existing in some Autonomous Communities.

46. Representatives of civil society organisations present at the on-site visit expressed concerns over the independence of the Authority since it is under the authority of the Ministry of Justice. According to officials of the Ministry of Justice, the Authority is guaranteed independence by the law, in the same framework that regulates other existing independent authorities in Spain.<sup>36</sup> The Whistleblower Authority will have mixed funding, partly allocated by the government, and partly derived from sanctions once it begins operating.

***b. Elements of the draft law that do not align with the Anti-Bribery Recommendation or require clarification***

47. The draft law's territorial scope appears to be too narrow and create a potential loophole in the protection of whistleblowers in foreign bribery cases. The draft law establishes that whistleblowers are granted protection under its provisions where the work or professional relationship is regulated by Spanish law. However, companies that operate abroad often have employment contracts regulated by local legislation, even where their employees share nationality with the company's headquarters. Hence, an employee working for a Spanish company abroad, whether a Spanish or a foreign national, under a foreign law contract might be deterred from reporting on the company's activities since the protections available under Spanish law would not apply to their work relationship.

48. The current draft law also notably lacks anti-gag clauses. Anti-Bribery Recommendation XXII.v. recommends that Parties ensure that appropriate measures are in place to prohibit or render invalid any contractual provisions designed or intended to waive, terminate, diminish, or modify the claims and legal protections of reporting persons who qualify for protection. Under Spain's draft law, administrative acts to prevent or create obstacles to reporting, as well as those that constitute retaliation or cause discrimination will be void. However, it is unclear what would fall under the concept of administrative acts, and whether this refers to acts of authorities competent to receive reports, acts of public authorities towards its public officials, or both. The draft law does not, in any event, contain provisions extending such nullity to acts of private sector employers that may impede or create obstacles to whistleblower reporting or the access of whistleblowers to legal protections. As per Anti-Bribery Recommendation XXII.v., the absence of appropriate measures to ensure the nullity of contractual provisions that may impede access to reporting channels or legal protections may create a loophole in the protections afforded by the current draft law that may effectively constrain whistleblowers from reporting.

49. Additionally, the draft law also does not establish remedies for whistleblowers, in the form of compensation or interim relief pending the resolution of legal proceedings, as recommended in the Anti-Bribery Recommendation XXII.vii. It would appear that such remedies can only be obtained in the context of labour or civil proceedings. This may be cause for concern given that many whistleblowers may be deterred from reporting when faced with the prospect and uncertainty of a trial to exercise their rights.

50. Finally, the draft law does not provide an exemption from criminal liability to whistleblowers whose conduct falls under its scope, creating a further potential loophole in the available legal protections. Whistleblowers often face criminal charges for defamation as a consequence of their reports. The possibility to initiate criminal legal action against a whistleblower may deter whistleblowers from reporting information.

***Commentary***

***To date, Spain has not adopted a comprehensive framework to protect whistleblowers who report instances of foreign bribery on reasonable grounds from retaliation. Because of this, the lead***

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<sup>36</sup> Law 40/2015, of 1 October, on the Legal Regime of the Public Sector, which regulates the public bodies Independent Administrative Authorities.

**examiners are highly concerned about the delays in the enactment of the whistleblower protection legislation.**

**The lead examiners recommend that Spain adopt its draft law on whistleblower protection as a matter of urgency. Considering that Spain still has an opportunity to address a number of deficiencies in the draft law, they also recommend that Spain ensure that it adopts a strong and effective framework that protects whistleblowers in the public and private sectors and provides remedies against retaliatory action, in conformity with the Anti-Bribery Recommendation XXII.**

**The lead examiners also recommend that, once the law is enacted, Spain raise public awareness of the new framework for whistleblower protection, in particular (i) on the protections afforded to whistleblowers and the existing reporting channels, and (ii) on the utility of whistleblower reports with a view to bolstering the confidence of potential whistleblowers in the value of their reports.**

#### 4. Detection through anti-money laundering

51. The Phase 4 evaluation is concerned with anti-money laundering (AML) measures that are relevant to foreign bribery, in particular preventing and detecting foreign bribery and the laundering of the proceeds of this crime. The money laundering offence is discussed under [B.2.a](#).

52. The Spanish FIU, SEPBLAC, is an important source of detection of foreign bribery. Spain's only successfully concluded foreign bribery case to date (*Publishing Companies*), as well as five ongoing cases were detected through a referral from SEPBLAC. The intelligence provided by SEPBLAC came from multiple sources, including suspicious transaction reports (STRs), information collected during inspections, and received from foreign FIUs. Three of these reports were referred directly by SEPBLAC to the ACPO.

##### **a. SEPBLAC sustained its efforts to reach out to reporting entities and increase the quality of STRs**

53. Since Phase 3, SEPBLAC took measures to establish a dialogue with reporting entities, including through individual meetings to provide personalised feedback and guidance, periodical meetings with professional associations and, since 2018, yearly Sectorial Conferences which serve to provide feedback to obliged entities and inform them about the different aspects of the FIU functioning. During the 2018 and 2019 Sectorial Conferences, which were attended by representatives of obliged entities, SEPBLAC gave presentations on international corruption and foreign bribery.

54. SEPBLAC provides reporting entities feedback on STRs, as well as a yearly assessment on how the quality and quantity of STRs sent by the obliged entity compare to its peers'. According to SEPBLAC, this has had a positive impact on the analytical reports that it refers to law enforcement authorities. Spain contends that these efforts, combined with its continued supervision activity, have contributed to increasing the quantity and quality of STRs (2.5 times more STRs received in 2020 than in 2016).

55. In 2016, SEPBLAC issued a brochure on bribery risks in international economic activities.<sup>37</sup> Obligated entities from the financial sector met during the on-site visit were knowledgeable of this brochure, and appeared to have a strong knowledge of foreign bribery as a predicate offence to money laundering. Reporting of suspicious transactions is done through a detailed questionnaire in which the obliged entity indicates what they believe the underlying offence to be. Obligated entities met during the on-site visit

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<sup>37</sup> SEPBLAC (2016), *Corrupción en las actividades económicas internacionales, Indicadores de riesgo* [Bribery in International Business Transactions, Risk indicators], Madrid, [https://www.sepblac.es/wp-content/uploads/2018/03/corrupcion\\_en\\_las\\_actividades\\_economicas\\_internacionales\\_indicadores\\_de\\_riesgo.pdf](https://www.sepblac.es/wp-content/uploads/2018/03/corrupcion_en_las_actividades_economicas_internacionales_indicadores_de_riesgo.pdf).

explained that while the process is burdensome, it is somewhat alleviated by the guidance on process, and feedback received from SEPBLAC.

56. In the six foreign bribery cases detected through the AML system, the intelligence originally received from SEPBLAC came from an STR from an obliged entity, among other sources. In four of these cases, the obliged entity was a credit institution, thereby suggesting that SEPBLAC's efforts have borne fruit. Nonetheless, the evaluation team's understanding is that SEPBLAC's awareness raising efforts are essentially focused on the financial sector. Sectorial Conferences are targeted at financial entities, and even though Spain reports that meetings with other professional associations have been held, their content and frequency is unknown.

### *Commentary*

***The lead examiners commend SEPBLAC for its sustained efforts to reach out to reporting entities and increase the quality of STRs. They recommend that SEPBLAC put an increased emphasis on non-financial obliged entities, such as those in the real-estate and gambling sectors, tax advisors, and legal professionals.***

#### ***b. Continued improvements in regard to PEPs***

57. The number of STRs made in relation to Politically Exposed Persons (PEPs) has increased since Phase 3. Intelligence on PEPs originates from various sources, mainly STRs, but also increasingly from foreign FIUs. The large majority of intelligence reports involving PEPs processed by SEPBLAC are forwarded to law enforcement authorities. According to Spain, SEPBLAC's efforts to improve the quantity and quality of STRs related to PEPs has had a positive impact on the detection of bribery-related offences.

#### ***c. Feedback from the ACPO to SEPBLAC could be improved***

58. In Phase 3, the WGB considered that more feedback from the ACPO to the FIU on the use made of intelligence reports in ACPO investigations could be useful for the FIU to understand in what circumstances its reports may result in or contribute to criminal investigations. Unlike the other parts of recommendation 12, pertaining to outreach to reporting entities, and enhancing detection of foreign bribery through the money laundering system, the evaluation team thus found that this part of the recommendation had not been satisfactorily implemented.

59. In its responses to the Phase 4 Questionnaire, Spain reported that exchanges of information take place through various channels, including bilateral. It also appeared clear from on-site discussions that communication between the ACPO and SEPBLAC in the context of investigations involving foreign bribery is fluid. The ACPO provides feedback upon request to SEPBLAC, and vice versa, and direct contact is maintained throughout the most complex and relevant cases. Additionally, after receiving a financial intelligence report from SEPBLAC, the ACPO sends SEPBLAC an acknowledgment of receipt. According to Spain, in addition to confirming the receipt of the report, the following issues can be reported: that investigations proceedings have been started after the receipt of the report; that the report is linked to the current actions of the ACPO; or that there are no reasons for further actions concerning that report. However, it appears that the ACPO does not provide this feedback systematically. In addition, this information, when provided, does not focus specifically on the quality of SEPBLAC's intelligence report, and is thus likely insufficient to help SEPBLAC's staff adjust their intelligence reports based on the needs of the ACPO. After the on-site visit, Spain reported that SEPBLAC had initiated at the beginning of 2022 different meetings with law enforcement agencies, including the ACPO, in order to improve collaboration, in particular on the annual feedback on the quality of the reports. The outcome of this initiative remains to be seen.

### Commentary

**The lead examiners commend Spain for the increased co-operation between the ACPO and SEPBLAC, in particular through the open channel of communication between these two agencies. They recommend that the Working Group follow up on their co-operation to ensure that the ACPO systematically provides feedback to SEPBLAC about the outcome of specific cases generated or enriched by information transmitted by the FIU.**

#### d. Concerns regarding the adequacy of resources

60. SEPBLAC acts both as Spain's financial intelligence unit and supervisory authority of all reporting entities regarding money laundering and terrorist financing issues. A Phase 2 recommendation calling for Spain to ensure that SEPBLAC is sufficiently resourced was deemed implemented at the time of the Phase 2 Written Follow-up Report. In Phase 3, the WGB did not issue a recommendation on SEPBLAC's resources, noting that the number of SEPBLAC employees had remained stable since 2005 (80 on average), with an increase of the personnel in SEPBLAC's supervision department over the years. As the volume of analytical work to be delivered remained considerable, the report stressed the importance that extra human resources allocated to the supervisory work do not occur at the expense of the analytical functions, an issue that authorities should continue to "closely monitor".<sup>38</sup>

61. At the time of the Phase 3 Written Follow-up Report, the WGB was satisfied to note that the number of SEPBLAC staff assigned to analytical work had increased. In its responses to the Phase 4 Questionnaire, Spain reported "significant increases in SEPBLAC's budget (71%) and personnel (31%). Personnel increases have been especially devoted to the areas of Supervision, FTF [the Central Banks Accounts Registry] and Analysis", as well as "continuous employee training in new analytical tools and new developments and typologies related to ML/TF, including an internal seminar on foreign bribery held in 2018". Nonetheless, during the on-site visit, representatives of SEPBLAC shared concerns over human resources, noting an insufficient number of staff as an important challenge for SEPBLAC to efficiently perform its role as both financial intelligence unit and supervisor.

### Commentary

**Although Spain reports an increase in the budget and staff of SEPBLAC, concerns remain over whether these are sufficient for SEPBLAC to efficiently perform its role as financial intelligence unit and supervising entity. The lead examiners recommend that the Working Group follow up on whether SEPBLAC has sufficient human and financial resources to adequately perform its functions.**

## 5. Detection and reporting by tax authorities

62. Since Phase 3, only one foreign bribery case was detected through Spain's tax system. In 2020, Spanish authorities opened a criminal investigation into allegations that bribes were paid to public officials in Bolivia by a Spanish company to obtain a contract for the purchase of ventilators, which were purchased at an overcharge. The case was initially detected by Spain's Customs and Excise Department of the State Tax Agency. During the on-site visit, tax authorities stated that they became aware of media allegations reporting on large Spanish companies operating in Latin America. Authorities analysed the tax statements of the company in question in the *Ventilators* case and concluded, by comparing the amounts that were declared and that should have been declared, that there was evidence of a potential crime against the

<sup>38</sup> Spain [Phase 3 Report](#), para. 126.



public administration as well as foreign bribery. The tax authorities prepared a report that emphasised the involvement of third parties and was forwarded to the competent investigating court.

### **a. Analysis of suspicious deductible expenses**

63. Regarding the overall capacity of tax authorities to detect foreign bribery allegations, in Phase 3 the Working Group identified a potential loophole in the Spanish legal framework. Under article 305 of the Spanish Penal Code (PC), discrepancies in deductible expenses must exceed EUR 120,000 to meet the criminal threshold for tax fraud. Shortfalls below said amount are treated as an administrative infringement. The Working Group was concerned that bribes under EUR 120,000 would go undetected or that they would not be reported to law enforcement authorities due to them falling below the threshold for a criminal offence. The Working Group recommended that Spain ensure that suspicious expenses, irrespective of their size, are routinely analysed by Spanish tax officials (Phase 3 recommendation 8.d)). This recommendation was deemed only partially implemented at the time of the Phase 3 Written Follow-up Report, as the specific issue of the EUR 120,000 threshold was not addressed.<sup>39</sup>

64. The evaluation team raised this issue with representatives from the State Tax Agency (*Agencia Estatal de Administración Tributaria*, AEAT) present at the on-site visit. The tax authorities clarified that all suspicious expenses are analysed, regardless of whether the tax infringement is administrative or criminal in nature. Where tax authorities find suspicions that other crimes may have been committed, a report is prepared and sent to law enforcement officials, regardless of the amount of the expense.

### **b. Risk-based tax audits**

65. In Phase 3, the Working Group also decided to follow up on whether the system of risk-based tax audits is adequate in terms of the risks taken into account, including the risk of foreign bribery, when deciding which companies to audit, and how often (Phase 3 follow-up issue 16(j)).

66. In its responses to the Phase 4 Questionnaire, Spain explained that the AEAT developed a tool, HERMES,<sup>40</sup> which produces standardised risk reports, with the profiles of taxpayers for audit selection purposes. HERMES is fed by the AEAT's databases and allows for the incorporation of new risks and criteria and new data. The risk analysis carried out by the system allows tax authorities to detect anomalies and potential disproportionate or fake expenses by comparing the evolution of a company throughout the years and in relation to other companies of similar size operating in the same sector. Tax authorities also routinely analyse payments in cash in an amount exceeding the EUR 1,000 for business operations (article 7 of Law 7/2012, 29 October),<sup>41</sup> as well as cheques that exceed the amount of EUR 3,000. It remains to be seen whether the HERMES tool will contribute to enhancing detection of instances of foreign bribery.

67. Where the AEAT becomes aware of facts that may constitute foreign bribery, it verifies the existence of expenses and requests additional information from third parties, such as banks or notaries. Where tax officials find suspicions of a crime, a report is drawn up and the file sent to the public prosecutor's office or other competent authority. Although Spain appears to have an effective system for detection of suspicions of crime, it has thus far not translated into a significant increase in detection by tax authorities.

<sup>39</sup> Spain [Phase 3 Written Follow-up Report](#), para. 9.

<sup>40</sup> On HERMES, please see: OECD (2019), *Tax Administration 2019: Comparative Information on OECD and other Advanced and Emerging Economies*, OECD Publishing, Paris, <https://doi.org/10.1787/74d162b6-en>, p. 51.

<sup>41</sup> Law 7/2012, of 29 October, on the modification of tax and budgetary regulations and the adaptation of financial regulations for the intensification of actions in the prevention and fight against fraud, <https://www.boe.es/eli/es/l/2012/10/29/7/con#a7>.

### **c. Reporting Foreign Bribery**

68. The Phase 3 Report noted that it appeared that tax officials needed more than a mere suspicion of foreign bribery to report a matter to law enforcement authorities. The Working Group recommended that Spain ensure that its tax officials are trained on the applicable requirement for reporting suspected offences to law enforcement officials (Phase 3 recommendation 8.a)). In its Phase 3 Written Follow-up Report, Spain indicated that, to increase awareness on the risks and importance of bribery, it had made the OECD Bribery Awareness Handbook for Tax Examiners (translated into Spanish) available in the corporate intranet to the general knowledge of Tax Examiners. Spain also reported on a wide plan to change the training programme of the School of Public Finance (EHP) to include specific courses on bribery and money laundering. The OECD Awareness Handbook was already available at the time of the Phase 3 on-site visit and plans to review the EHP training programme had not materialised at the time of the Phase 3 Written Follow-up Report. Furthermore, Spain had not addressed the specific issue of training tax officials on reporting obligations. This recommendation was thus deemed only partially implemented.<sup>42</sup>

69. Representatives of the AEAT present at the on-site visit stated that they are aware of their obligation to report offences uncovered in the course of their work to law enforcement officials and that their training is sufficient for the performance of their functions. However, according to information provided by Spain after the on-site visit, no specific courses have been held in recent years on the obligation of tax officials to report suspicions of foreign bribery.

### **d. Tax System of the Autonomous Communities of the Basque Country and Navarra**

70. According to Spain's Constitution, there are four territories that have developed their own tax systems: Álava, Bizkaia, Gipuzkoa (in the Basque Country) and Navarra.<sup>43</sup> The tax authorities of the Basque Country and Navarra both have their own applicable rules and IT systems that allow them to carry out risk analysis and detect suspicious expenses, as well as take appropriate action. However, to date, no foreign bribery cases have been detected through the tax system of the Autonomous Communities. The evaluation team was unable to ascertain whether this lack of detection could be attributable to deficiencies in the systems to analyse risk and suspicious expenses, or to a lack of awareness and training.

#### **Commentary**

***The lead examiners note with satisfaction the recent foreign bribery case detected by the tax authorities and the apparent strong framework for risk-based audits and analysis of suspicious expenses. However, with only one case detected by the tax authorities since Spain became a party to the Anti-Bribery Convention, detection by tax authorities remains very low. They thus recommend that the Working Group follow up on the capacity of tax authorities, both the AEAT and the autonomous authorities of the Basque Country and Navarra, to detect foreign bribery.***

***The lead examiners also recommend that Spain provide training to its tax officials on the detection of foreign bribery, and they reiterate Phase 3 recommendation 8.a) that Spain ensure that its tax officials are trained on the applicable requirement for reporting suspected offences to law enforcement officials.***

<sup>42</sup> Spain [Phase 3 Written Follow-up Report](#), paras. 9 and 13.

<sup>43</sup> Referred to in Spain as "Haciendas Forales".

## 6. Detection through reporting by public officials and overseas missions

71. Officials posted abroad boast specific knowledge of the business opportunities in the host countries, as well as familiarity with the local environment and local media, and are therefore particularly well positioned to report foreign bribery to law enforcement authorities in their home country.<sup>44</sup>

72. The Anti-Bribery Recommendation recommends that member countries establish and publicise clear policies and procedures for reporting of suspicions of foreign bribery. In particular in respect to domestic public officials, member countries should encourage proactive detection and early reporting of suspected acts of foreign bribery, especially for those officials in public agencies that cooperate with companies operating abroad. Countries should also periodically review the effectiveness of reporting policies, procedures and channels and raise awareness through regular training about the foreign bribery offence and reporting obligations of public officials.<sup>45</sup> To date, no foreign bribery allegations have been detected by a report from a Spanish public official, or through overseas missions. There have been no significant changes to the reporting framework since Phase 3.

### a. Reporting obligations for public officials

73. In Spain there is a general reporting obligation under article 259 of the Criminal Procedure Code (*Ley de Enjuiciamiento Criminal*, CPC) by which any person who bears witness to a criminal offence must report it to law enforcement authorities. Article 262 CPC establishes a special reporting obligation for any person who learns of a public crime due to their position, profession or trade. If that person is a public official, and fail to report a criminal offence, they shall be reported to their superiors for the application of administrative measures, in addition to being sanctioned with a fine that shall be imposed as a disciplinary offence. Spain has no data available on whether a domestic official has ever been sanctioned for failing to report a foreign bribery allegation.

74. The amount of the fine, set out in article 259 CPC, is incomprehensibly low, ranging from 25 to 250 pesetas (EUR 0.15 to 1.50). During the on-site visit, officials from the Ministry of Justice explained that the Spanish CPC is an ancient statute due for a revision and actualisation, a process currently undertaken by a “special working group”. Following the on-site visit, Spain reported that the amounts of the fines need to be interpreted considering its “current values”, but provided no information as to the amounts of these values, or the basis of reference for an actualisation of the amounts. As such, the current amount of the fines effectively negates the consequences of a failure to report, undermining the obligation to report and eliminating any incentives for officials to do so.

75. Moreover, under article 408 CP, it is a criminal offence, sanctioned with barring from public employment for a term of six months to two years, for a public officer, in the obligations of their office, to intentionally cease to promote prosecution of the criminal offences of which they or their officers obtain knowledge. This criminal offence, as confirmed by representatives of the Ministry of Justice present at the on-site visit, is only applicable to officials to whom the promotion of prosecution is a part of the obligations of their office, for example law enforcement officials and investigative judges.

76. During the on-site visit, the evaluation team noted that representatives from different ministries had limited knowledge of the foreign bribery offence. Spain also does not appear to take measures to raise awareness and train public officials on their reporting obligation. These factors could possibly explain the inexistence of reports from public officials.

<sup>44</sup> OECD (2017), *The Detection of Foreign Bribery*, OECD Publishing, Paris, <https://www.oecd.org/corruption/anti-bribery/The-Detection-of-Foreign-Bribery.pdf>, p. 102.

<sup>45</sup> Anti-Bribery Recommendation XXI.i., iv., v., and vi.

### **b. Spain has yet to create reporting channels for public officials**

77. Despite the existing framework establishing an obligation to report suspected criminal offences, Spain never put in place a specific reporting channel for public employees. It remains unclear what procedures public officials must follow to report foreign bribery allegations uncovered in the course of their work. In its responses to the Phase 4 Questionnaire, Spain refers to the forthcoming transposition of the EU Whistleblower Directive, which will establish reporting channels for the public and private sectors. However, the whistleblowing framework is not designed to deal with reports of potential misconduct of companies that public officials may have contact with in the performance of their functions. Spain did not explain how the creation of a reporting channel under the law transposing the EU Whistleblower Directive would be adapted to report suspicions of foreign bribery arising from individuals or companies with which public agencies have dealings. It is also unknown whether such reports will have to be made to a supervisor and processed internally or whether they may be directly forwarded to law enforcement authorities.

### **c. Reporting by Overseas Missions**

78. To date, no foreign bribery case was detected through a Spanish overseas mission, and no referral was ever made from such missions to law enforcement officials. Spain takes the view that overseas missions are not in a position to detect potential foreign bribery allegations. In October 2013, the Ministry of Foreign Affairs (MOFA) issued a Circular that was sent to all Spanish embassies and consulates. This Circular stated that all public officials posted abroad must be familiar with the foreign bribery legislation and disclose it to companies and institutes with whom they may have any relation. The Circular also called for these public officials to be alert to suspicious activity related to Spanish companies “for which there may be solid evidence” and to report said suspicious activities to the central services of the MOFA that would in turn notify the ACPO.

79. It is unclear whether the Circular’s reference to “solid evidence” creates a threshold for reporting that may constitute an additional burden on public officials and a potential deterrent from reporting. Representatives from the MOFA met during the on-site visit claimed that this was not the case, but in the absence of reports, it is not possible to make such an assessment.

#### **Commentary**

***Spain has yet to establish appropriate reporting channels for Spanish officials to report suspected acts of foreign bribery. Public officials have no guidance on how to make a report, and awareness raising efforts and training have been minimal. Additionally, there are no effective consequences for a failure to report foreign bribery as the existing sanctions are so low that the practical effect would be the same as if they did not exist at all. In this context, it is not surprising that no foreign bribery cases were detected by a Spanish public official.***

***The lead examiners are concerned that public officials in Spain may be unaware of the foreign bribery offence and of the necessary steps to make a report on suspected misconduct. They note that Spain’s public sector will soon develop internal reporting procedures following the adoption of the legislation transposing the EU Whistleblower Directive. However, whistleblowing and reporting conduct of companies that an official may be in contact with in the course of its functions are not the same. Therefore, questions arise on whether and how the adoption of the internal reporting channels under the whistleblower protection legislation would address the problem.***

***The lead examiners urge Spain to take steps to increase its public officials’ reporting of foreign bribery by (i) issuing guidelines on the procedure for reporting a foreign bribery offence for staff in the public administration and posted abroad, (ii) clarifying the appropriate reporting channels to communicate a potential offence, (iii) raising awareness and providing regular training about the***

**reporting obligation, the guidelines and the reporting channels, and (iv) updating the applicable fines under article 259 CPC.**

**The lead examiners also recommend that Spain raise awareness among the personnel who are in a position to help with the detection and reporting of bribery of foreign public officials, and consider any additional means whereby the authorities in question might be encouraged to do so.**

## 7. Detection through accounting and auditing

80. To date, not one foreign bribery case was detected through a company's external audit, and neither the profession's regulator nor enforcement authorities have received a report of suspected foreign bribery by an external auditor since Phase 3.

81. Spanish external auditors are subject to Spain's Technical Standards on Auditing (the Technical Standards), which are based on International Standards on Auditing (ISA). Under the Technical Standards, external auditors have an obligation to report suspicions of fraud and non-compliance with laws and regulations to the management of the audited entity (internal reporting), and to the profession's regulator, the Accounting and Auditing Institute (ICAC), which is attached to the Ministry of Economic Affairs and Digital Transformation. External auditors are also subject to article 262 CPC, which require "those that due to their position, profession or trade" become aware of "any public crime" to report it to competent authorities.

82. Internal reporting obligations of external auditors were clarified since Phase 3. At that time, external auditors were not required to report to management infringements that were not significant and had no effect on the financial statements.<sup>46</sup> Revisions to the Technical Standards reflecting amendments to ISA 240 (auditor's responsibilities relating to fraud in an audit of financial statements) and ISA 250 (consideration of laws and regulations in an audit of financial statements) in October 2013 addressed concerns expressed by the Working Group in that regard. However, this was not followed by awareness raising measures to ensure that auditors know that they should identify, detect and report foreign bribery, as recommended by the Group. Since then, Spain did not take any measures in that direction.

83. Similarly, Spain did not take measures to train external auditors on their obligation to report suspicions of foreign bribery to competent authorities. In Phase 3, the Working Group commended Spain for clarifying the scope of this obligation, and recommended that it further publicise it and provide training to the auditing profession on the circumstances under which such reporting is required. External auditors met during the on-site visit seemed generally aware of this obligation.

84. At the time of Phase 3, the Working Group welcomed the requirement by the ICAC that the auditing and accounting professions develop specific training on foreign bribery and adopt "red flag indicators" to help detecting foreign bribery in companies' accounts, and decided to follow up on this obligation. Spain did not report relevant development in that regard since then. During the on-site visit, representatives of ICAC were unaware of initiatives to train the auditing profession on red flags to detect foreign bribery. Representatives of the top audit firms reported that they train their staff on the UK and US foreign bribery laws, but they do so in the context of their forensic accounting activity for the purpose of supporting foreign bribery investigations, rather than for detecting foreign bribery it in the context of external audits.

### Commentary

**The lead examiners are concerned with the lack of awareness raising and training of external auditors to detect and report suspicions of foreign bribery. The progress achieved on the rules on auditors' obligation to report was not followed by awareness raising and training. To date, there**

<sup>46</sup> Spain [Phase 3 Report](#), para. 32.

*has been no instances of a foreign bribery suspicion reported to the regulators or the authorities. Without tangible training and awareness raising measures, it is unlikely that external auditors will successfully detect foreign bribery while applying the auditing standards currently in force.*

*For these reasons, the lead examiners reiterate Phase 3 recommendation 13.b) and recommend that Spain (i) develop awareness-raising activities and training on the foreign bribery offence in the accounting and auditing profession to ensure that auditors are in a capacity to detect foreign bribery red flags; and (ii) encourage external auditors to take greater account of the risks of foreign bribery in the companies that they audit.*

## 8. Detection through self-reporting by companies

85. Self-reporting by a company has not led to the detection of a foreign bribery case to date. To the knowledge of the Spanish authorities and representatives from the private sector and legal profession met during the on-site visit, no company has ever self-reported instances or suspicions of foreign bribery.

86. As per the law, self-reporting is a mitigating factor (article 31quarter PC). The criminal liability regime for legal persons provides for an exemption from liability when certain specific conditions are met (articles 31 paras. 2 and 4 PC). Self-reporting is not listed as a condition. Nonetheless, prosecutors met on-site explained that in practice, it would be required. Spain's State Prosecutor (SPS) Circular 1/2016 on the criminal liability regime for legal persons does not provide that it is a requirement, but that self-reporting should preclude liability. As further analysed under C.1.b representatives of the legal profession met during the on-site visit explained that in the absence of clear rules on how self-reporting affects the determination of a company's liability, as well as a clear framework for self-reporting, they would not recommend their clients to self-report knowledge or suspicions of foreign bribery.

### Commentary

*As further explained under C.1.b., the lead examiners recommend that Spain clarify the extent to which self-reporting will be considered in resolving and sanctioning foreign bribery cases, and establish guidelines explaining the procedure for making self-reports.*

## 9. Detection Official Development Aid and Export Credit

87. The OECD Recommendation of the Council for Development Co-operation Actors on Managing the Risk of Corruption (2016 Recommendation)<sup>47</sup> calls on countries to encourage their international development agencies to ensure effective measures to manage risks of, and respond to, actual instances of corruption in development co-operation. Despite Spain's substantial engagement through ODA initiatives in corruption-prone countries, no foreign bribery cases have been detected to date by Spanish officials in relation to ODA. In addition, no suspicion of foreign bribery has been referred to enforcement authorities. This point is analysed in greater detail under D.2.b

88. Spain is a member of the OECD Working Party on Export Credits and Credit Guarantees (ECG) and, as an OECD Member, adhered to the OECD 2006 Recommendation of the Council on Bribery and Officially Supported Export Credits and its replacement, the 2019 Recommendation of the Council on Bribery and Officially Supported Export Credits (2019 Recommendation).<sup>48</sup> The 2019 Recommendation recommends that Adherents "take appropriate measures to deter bribery in international business

<sup>47</sup> [2016 OECD Recommendation of the Council for Development Co-operation Actors on Managing the Risk of Corruption.](#)

<sup>48</sup> [2019 OECD Recommendation of the Council on Officially Supported Export Credits.](#)

transactions benefiting from official export credit support, in accordance with the Anti-Bribery Convention (...). Spain's export credit agency, CESCE (*Compañía Española de Seguros de Crédito a la Exportación, S.A.*) has developed some measures to detect and report suspicions of foreign bribery occurring in the context of providing export credits. However, to date, no foreign bribery cases have been detected by CESCE or other Spanish officials involved in export credits. This issue is analysed in greater detail under [D.2.c](#)

### *Commentary*

***To date, no foreign bribery cases have been detected by Spanish officials involved in ODA and export credits. No suspicions of foreign bribery have been referred to law enforcement by such officials.***

## **10. Other sources, including information from other court proceedings**

89. Of the 53 foreign bribery allegations that have been detected by Spain since Phase 3, five were detected from information obtained from other ongoing criminal proceedings. This denotes a good practice of thoroughly examining the facts and evidence uncovered in a case and pursuing any potential suspicions that a different criminal type, in the case foreign bribery, might have been committed. Additionally, six foreign bribery allegations were detected following a complaint lodged with law enforcement authorities by a business partner, competitor or creditor.

## B. Enforcing foreign bribery

90. This section considers Spain’s enforcement of its foreign bribery and related offences. It begins by examining the foreign bribery offence itself and related offences. After explaining the investigative and prosecutorial framework, it analyses how foreign bribery cases are investigated, prosecuted and concluded, including sanctions and confiscation. It further examines international co-operation in foreign bribery cases. Corporate liability and sanctions applied to legal persons are covered in part C.

### 1. The foreign bribery offence

91. In Phase 3 the Working Group undertook an in-depth analysis of the legislative amendments introduced by Organic Law 5/2010 which, among other topics, revised the foreign bribery offence under article 445 PC. The Working Group concluded that the revision of the foreign bribery offence implemented most of the Phase 2 recommendations, bringing it in line with Article 1 of the Convention. However, the revised article 445 PC was only applicable to the bribery of non-EU foreign officials. Bribery of public officials from EU institutions and public officials from EU countries (hereafter referred together as “EU officials”) was covered by a separate legal provision – article 427 PC –, effectively creating two foreign bribery offences.

92. Article 427 PC stated that the terms applicable to bribery of domestic officials, as provided in article 424 PC, would apply as well to acts concerning EU officials. Hence, the regime for bribery of EU officials under article 427 PC was based on the provisions for active bribery in article 424 PC, rather than the revised elements of article 445 PC. This separate foreign bribery offence raised concerns of the Working Group, since most of the deficiencies identified in Phase 2 regarding the foreign bribery offence remained unaddressed in articles 424 (domestic bribery) and 427 PC (bribery of EU officials). The Working Group issued four recommendations for Spain to consolidate or harmonise its statutory framework in order to remove the inconsistencies created by the existence of two foreign bribery offences (Phase 3 recommendations 2.a) – d)). All four recommendations were deemed not implemented at the time of the Phase 3 Written Follow-up Report, as the reform to the Spanish Penal Code had yet to be finalised.<sup>49</sup>

#### **a. The 2015 PC amendments effectively consolidated the foreign bribery offence**

93. On 30 March 2015, the Spanish Parliament adopted Organic Law 1/2015, introducing amendments to the legal framework for the foreign bribery offence.<sup>50</sup> These amendments created a new section under Chapter XI of Title XIII of Book II of the Penal Code, entitled “Crimes of corruption in business”, which encompasses the paying of bribes to obtain a competitive advantage, be it in the private sector or bribery of a foreign public official. It entered into force on 1 July 2015.

<sup>49</sup> Spain [Phase 3 Written Follow-up Report](#), paras. 5 and 6.

<sup>50</sup> Organic Law 1/2015 also enacted amendments to the sanctions and corporate criminal liability regimes. These amendments are discussed in their respective sections under Part C.



94. Pursuant to these amendments, the foreign bribery offence is now defined under article 286ter PC. In a manner similar to article 445 PC in the previous version of the Penal Code, article 286ter PC uses language that is very close to Article 1 of the Convention:

*“Whoever, through offers, promises or granting of any undue benefit or advantage, either pecuniary or of any other kind, bribes or tries to bribe, whether directly or through intermediaries, an authority or public official, for their benefit or for the benefit of a third party, or whoever agrees with their demands in that respect, so that they act or refrain from acting in relation to the performance of official duties in order to obtain or retain a contract, business or other competitive advantage in the conduct of international business, shall be sanctioned, except if already punished with a more severe penalty under another precept of this Code, with three to six years’ imprisonment and fine from twelve to twenty-four months, unless the benefit obtained exceeds the resulting sum, in which case the fine will be from one to three times the value the profit obtained”.*

95. Article 427 PC, inserted in Chapter V (bribery offences) of Title XIX (crimes against the public administration) of Book II of the Penal Code, was amended and now refers to public officials of non-EU Member States, as well as EU officials.

96. The 2015 amendments thus clarified the respective scope of the two bribery provisions. As stated by Spain in its responses to the Phase 4 Questionnaire, within the new section of the Penal Code on “Crimes of corruption in business”, article 286ter PC regulates bribery of foreign public officials in the context of international business. Article 427 PC, in turn, applies to the bribery of foreign public officials in all instances that do not constitute bribery in international business. The evaluation team tested this interpretation with different stakeholders from the public and private sector at the on-site visit and were able to conclude satisfactorily that the scope of each provision is clear and appears not to cause any interpretative difficulties. However, it should be noted that the foreign bribery offence under article 286ter PC has never been tested in court, as the only foreign bribery case concluded with sanctions to date was assessed under the previous legal framework, and the facts pertained to bribery on a non-EU public official.

97. The 2015 PC amendments also introduced a new aggravated foreign bribery offence under article 286quater PC, which establishes a more severe penalty where the criminal conduct was of “particular gravity”, namely, where (i) the benefit or advantage had a particularly high value, (ii) the action of the perpetrator was not merely occasional, (iii) the deeds are committed within a criminal group or organisation, and (iv) the business in question relates to humanitarian goods and services or those pertaining to primary necessity.

98. The consolidation of the foreign bribery offence under articles 286ter and introduction of an aggravated offence under 286quater PC has positive implications for a number of outstanding Phase 3 recommendations that stemmed from the dichotomy between the elements of the offence under articles 427 and 445 PC prior to the 2015 amendments. These are further examined below, in the analysis of the elements of the foreign bribery offence, as well as in various sections, as the consolidation had an impact as well on sanctions, statute of limitations, and the corporate liability regime.

### **Commentary**

***The lead examiners had the opportunity to assess for the first time the new framework for the foreign bribery offence in Spain following the 2015 amendments of the Penal Code (article 286ter PC), which largely conforms to the requirements of Article 1 of the Convention. They commend Spain for carrying out the necessary amendments to consolidate the foreign bribery offence and address the concerns expressed by the Working Group in Phase 3, but note that the new foreign bribery offence has yet to be tested in court. The lead examiners thus recommend that the Working Group follow up on the interpretation and application of the foreign bribery offence in practice, to ensure that article 286ter PC applies to all foreign bribery cases, including those where the alleged bribe receiver is an official from an EU institution or country.***

**b. The EU Software case raises potential concerns over law enforcement's understanding of the legislative framework**

99. In its responses to the Phase 4 Questionnaire, Spain provided information on a case investigated by the ACPO for money laundering, following a suspicious transaction report received from a bank. This case was not listed by the Spanish authorities under ongoing foreign bribery investigations, but following further analysis of the facts, the evaluation team identified it as a potential foreign bribery case. The *EU Software* case involves the alleged payment of a bribe to an official of an EU body located in Spain by a foreign company that had entered into a joint venture with a Spanish company to submit a bid in a call for tenders for a software development contract. According to the information provided by Spain in its responses to the Phase 4 Questionnaire, at least some of the facts in this case resulted in the opening of preliminary investigation proceedings by a local Investigative Court. The same information in the Phase 4 Questionnaire indicated that the proceedings were pursued under the offence of corruption of officials of an EU body but were terminated on the grounds that the official involved had international immunity, and due to insufficient evidence.

100. During the on-site visit, the evaluation team raised this case with prosecutors from the central ACPO office. It was clear that they lacked information on the case, the offence that was being pursued in the proceedings, as well as their status. In addition to the questions that it raises regarding the co-ordination at the ACPO level between the central office and delegate prosecutors in local offices, which is discussed further in section B.3.b., this case raises concerns regarding law enforcement authorities' understanding of the foreign bribery provisions. The reference in the responses to the Phase 4 Questionnaire to an "offence of corruption of officials of an EU body" led the evaluation team to question whether the investigation had been pursued for the offence under article 427 PC, rather than the revised foreign bribery offence under article 445 PC / 286ter PC, even though some of the facts may have occurred after the PC amendment.

101. The week preceding this report's adoption, the evaluation team found, through a document provided by Spain, that the proceedings were forwarded to the regional ACPO offices to be investigated for the possible commission of an offence of bribery under articles 427 and 428 PC, i.e. bribery of EU officials and traffic of influences, respectively. Spain further clarified at the preparatory meeting that the legal framework applicable to the facts of the case would be the one in force prior to the 2015 amendments to the Penal Code, following the rules of the law most favourable to the defendant (article 2 PC and Articles 9(3) and 25(1) of the Spanish Constitution).

102. It is unclear from the available information whether the case was pursued for active bribery and, if so, why the proceedings were terminated based on the public official's immunity. The involvement of a Spanish company in the payment of a bribe to an official of an EU body to obtain a contract constitutes a crime of foreign bribery in the terms of the Anti-Bribery Convention, irrespective of the fact that the institution is located in Spain. The EU is an international organisation whose officials fall within the scope of Article 1(4) a) of the Convention defining foreign public officials. Furthermore, the potential immunity of the foreign public official in question should have no bearing on the criminal proceedings against the alleged bribe payer in a foreign bribery case.

103. The *EU Software* case points to a lack of expertise regarding the foreign bribery offence from delegate prosecutors in local ACPO offices, and regional investigative courts. This may be attributable to a lesser experience with foreign bribery cases, as the majority of them fall under the jurisdiction of the central ACPO and the *Audiencia Nacional*. After the on-site visit, Spain relayed that an appeal against the closure of this case was submitted by the ACPO and is pending at the time that this report is being written. The ACPO is reportedly seeking to continue the investigation for the offences of foreign bribery and money laundering.

### Commentary

***The lead examiners are very concerned about the closing of a potential foreign bribery case partly due to the alleged bribe recipient having immunity as an EU official. The potential immunity of the foreign public official in question should have no bearing on the criminal proceedings against the alleged bribe payer in a foreign bribery case. The closing of the investigation against the alleged bribe payers denotes a lack of expertise from prosecutors and judges and points to an urgent need for training on the requirements of the foreign bribery offence, as further detailed under B.1.d and B.3.d.***

#### ***c. Concurrence of the foreign bribery offence with other provisions in the Penal Code***

104. Under article 286ter PC, the offence will not be sanctioned where it is punished with a more severe penalty under another provision of the Penal Code. Given the two distinct foreign bribery offences that existed at the time of Phase 3 (articles 427 and 445 in the 2010 version of the PC), the evaluation team sought to clarify with panellists met during the on-site visit whether this mention had any practical consequences in the consolidation of the foreign bribery offence under article 286ter PC.

105. Prosecutors clarified that the reference to a more severe penalty under the Penal Code had no implications on the qualification of the facts as foreign bribery. Rather, the reference is intended as a rule for the applicable sanctions in a situation of concurrence of crimes. In other words, should the facts in a foreign bribery case also constitute another crime that has a higher sanction than the one established for foreign bribery, the higher sanction would be applicable.

#### ***d. Concerns remain regarding the interpretation of certain elements of the foreign bribery offence***

106. As was alluded to in the introductory part of this section, in Phase 3 the Working Group considered that the revision of article 445 PC (bribery of non-EU officials, in its 2010 redaction) effectively implemented most of the Phase 2 recommendations and covered all the elements of the offence under Article 1 of the Convention. Nevertheless, article 445 PC did not cover all instances of foreign bribery, since bribery of EU officials would fall under the scope of article 427 PC – which had not been revised and therefore still contained the deficiencies identified in Phase 2.

107. The consolidation of the foreign bribery offence under article 286ter operated by the 2015 legislative amendments to the Penal Code resolves these inconsistencies, given that the wording of article 286ter nearly replicates that of Article 1 of the Convention, while simultaneously clarifying that it would apply to bribery of foreign public officials regardless of their geographical location. The outstanding Phase 3 recommendations, as well as the elements of the offence, are addressed in the following paragraphs.

##### *i. Definition of foreign public officials and reference to foreign law*

108. Phase 3 Recommendation 2.a) called on Spain to clarify that the definition of a foreign public official encompasses “officers of the European Union or civil servants who are nationals of another Member State of the Union”; that this definition is in all cases autonomous; and that characterisation of the expected acts of foreign officials does not require recourse to foreign law in order to establish the offence. According to Commentary 3 to the Convention, Article 1 requires that the foreign bribery offence be autonomous, not requiring proof of the law of the particular foreign official’s country. Following the 2015 amendments to the Penal Code, article 286ter para. 2 PC, establishes that, for the purposes of this provision, a “public official” shall be considered all persons mentioned under articles 24 and 427 PC.

109. Under article 24 PC, for criminal purposes, persons who have a commanding post or exercise jurisdiction pertaining to a commanding post are considered as holding a status of authority. This will, in

any case, include members of the Congress of Deputies, of the Senate, of the Legislative Assemblies of the Autonomous Communities, the European Parliament and officers of the Public Prosecutor's Office and the Public Prosecutors of the European Public Prosecutor's Office. Those who participate in the exercise of public duties, by provision of the Law, election or appointment by an authority with relevant powers will be considered as holding a civil servant status.

110. Under article 427 PC, a public official is:

- any person holding a legislative, administrative or judicial job or position, either by election or appointment, in a country of the EU or another foreign country;
- any person exercising a public function for a country of the EU or another foreign country, including a public organisation or public company, for the EU or for any other international public organisation;
- any official or agent of the EU or of an international organisation; and
- any person who has been assigned and is exercising a public service function consisting of managing, in an EU member state or in third countries, the financial interests of the EU or taking decisions related to those interests.

111. Article 427 PC adopted wording very similar to Article 1(4) of the Convention and eliminated references to the legislation of the country of the foreign public official. Thus, it would appear to be sufficiently comprehensive to include all categories listed in Article 1 and meet the Convention's requirement that the definition of foreign public official be autonomous.

112. Finally, the Phase 3 Report noted that the terms set forth in article 427 PC (bribery of an EU official) required specific evidence of the foreign public officials' "expected acts" induced or to be induced by the bribe, in order to establish the offence. The need to consider foreign law would once again be in direct contravention of the requirement for autonomy of the foreign bribery offence under Article 1 of the Convention. The 2015 consolidation of the foreign bribery offence resolves this issue, by no longer making article 427 PC applicable to foreign bribery cases. Notably, article 286ter PC does not include any references to the specific acts of the foreign public officials. The elements of the offence are satisfied by the bribe or attempt to bribe.

*ii. The official's acts in relation to the performance of official duties*

113. A concern of the Working Group since Phase 2 was whether bribes to affect a foreign public official's exercise of discretion, including where the act induced by the bribe is in accordance with the official's duty, would constitute the basis for a foreign bribery offence.<sup>51</sup> This concern was reiterated in Phase 3 following a decision by the central investigating magistrate Court to stay proceedings on a foreign bribery case on the basis of absence of proof of an "irregular act" (Phase 3 recommendation 2.b)).

114. The facts in these stayed proceedings were covered by the foreign bribery offence in force prior to the 2010 amendments to article 445 PC that introduced the notion of "acting in relation to the exercise of public functions".<sup>52</sup> However, as mentioned above, article 427 PC (bribery of an EU official) did not adopt the same language. The concerns over a possible loophole in the Spanish legislation due to the narrower definition of foreign bribery under article 427 PC was resolved by the consolidation of the foreign bribery offence under article 286ter PC, which refers to "acting or refrain from acting in relation to the performance of official duties".

115. Although this matter has been resolved in the legislation, the only foreign bribery case concluded with sanctions to date in Spain raises concerns over the potential for courts to interpret the foreign bribery

<sup>51</sup> Commentaries 3 and 4 to Article 1 of the Convention.

<sup>52</sup> Spain [Phase 3 Report](#), paras. 28 and 29.

offence in a manner contrary to Article 1 of the Convention. The facts in the *Publishing Companies* case fall under the wording of former article 445 PC – which, as mentioned, had already been satisfactorily revised – and the decision quotes the requirements for the foreign bribery offence under Article 1 of the Convention. Nonetheless, the decision by the court expressly mentions the acts carried out by the foreign public official in reference to foreign legislation. Specifically, the court considered that foreign bribery will only arise where the briber intends that the foreign public official carries out in the performance of their office: i) an action or omission constituting a criminal offence under the law of the foreign public official's country; or ii) a non-delinquent unfair act, pursuant to the legislation of the foreign public agent.”

116. There are two concerning aspects in the court's reasoning. Firstly, the court characterises the typical conduct of the foreign bribery offence under article 445 as requiring that the act or omission carried out by the foreign public official is criminal in nature, or “unfair”, without clarifying what would constitute an “unfair” act. Secondly, the criminal or unfair nature of the act or omission is being determined against the law of the particular public official's country. This interpretation is inconsistent with paragraphs 3 and 4 of the Commentary to Article 1 of the Convention.

117. Considering that consolidated article 286ter PC adopted a similar wording to the one inscribed in article 445 PC, there is a risk that future foreign bribery cases that reach the trial stage may follow the same jurisprudence, in particular as the *Publishing Companies* case remains to date the sole concluded foreign bribery case in Spain.

### *iii. Irregular benefits and non-pecuniary benefits*

118. In Phase 3, the Working Group decided to follow up on the impact on the scope and effective enforcement of the foreign bribery offence of the use of the term “contract”, instead of “business”, in Spain's official translation of the Convention and in the foreign bribery offence under article 445 PC (bribery of non-EU officials, in its 2010 version) (Phase 3 follow-up issue 16(a)). The Working Group also decided to follow up on the coverage of non-pecuniary benefits under the then new 2010 framework (Phase 3 follow-up issue 16(b)).

119. The wording used in the foreign bribery offence under article 286ter PC following the 2015 legislative amendments refers not only to obtaining or to retaining a contract, but also “business or other competitive advantage in the conduct of international business”, which may be pecuniary or not in nature. According to Spain's responses to the Phase 4 Questionnaire, the inclusion of this reference was intended to avoid a more restrictive interpretation of the offence than the one in the text of the Convention. The revisions of the PC thus appear to have addressed the Working Group's concerns in both regards.

120. However, the application of this provision in practice raises questions as to whether the difference between “contract” and “business” is clear to law enforcement. In the *Russian Commissions* case, the ACPO stopped pursuing the case for foreign bribery after concluding, despite the evidence indicating that payments had been made to foreign public officials, that these did not constitute bribery payments, but rather “coercive payments”. In additional clarifications provided after the on-site, Spain explained that the payments were meant to “ensure the security of business” in the country of the foreign official, but were not for a “specific contract”. Without further information on the facts, the evaluation team cannot properly assess the situation. However, it appears that the payments in this case do constitute bribe payments as established by Article 1 of the Convention, but were not considered to be so because they were not made in the context of a contract.

### Commentary

**The 2015 amendments to the Penal Code rectified the wording of the Spanish foreign bribery offence, resolving, as per the law, issues identified in Phase 3. However, the lead examiners are highly concerned about the interpretation of the elements of the foreign bribery offence adopted by the Spanish authorities in two separate cases. In the Publishing Companies case, the court adopted a restrictive interpretation of the nature of the acts carried out by the foreign public official and tied it to the law of the public official's country. In the Russian Commissions case, the ACPO considered that a payment to secure business did not constitute a bribe in international business transactions because it was not made in the context of a contract. These cases point to issues regarding the autonomy of the foreign bribery offence, the performance of official duties by foreign public officials, and the interpretation of what constitutes "business".**

**Those issues appear to emanate primarily from a restrictive interpretation of the foreign bribery offence by prosecutors and judges, rather than from the revised and consolidated foreign bribery offence under article 286ter PC. Therefore, the lead examiners recommend that Spain carry out training and awareness-raising activities, for example by disseminating written information, to prosecutors and judges on the requirements of the foreign bribery offence under Article 1 of the Convention. These measures should, at a minimum, clarify that i) the foreign bribery offence encompasses acts that fall under the discretion of foreign public officials; ii) the foreign bribery offence is in all cases autonomous, not requiring proof of the law of the foreign public official's country; and iii) "obtaining or retaining business" should be interpreted broadly, in a manner consistent with Article 1 of the Convention.**

**They also recommend that the Working Group follow up on how Spanish courts interpret the elements of the foreign bribery offence in practice.**

#### *iv. Promise to bribe, intermediaries and third parties*

121. In Phase 3, the Working Group recommended that Spain ensure that the promise of a bribe; the use of intermediaries and bribes paid to a third party are covered in all cases of bribery of a foreign public official (Phase 3 recommendation 2.c)). As was the case with other Phase 3 recommendations on the foreign bribery offence, the Group's concerns stemmed from the fact that article 427 PC was applicable to bribery of EU officials, but its wording was not revised by the 2010 legislative amendments. The consolidated foreign bribery offence under article 286ter PC covers the promise of a bribe, whether directly or through intermediaries, for the benefit of a public official or for the benefit of a third party.

#### *v. Defence of effective regret*

122. The last of the four Phase 3 recommendations the Working Group issued in relation to the elements of the foreign bribery offence recommended that Spain clarify that the defence under article 426 PC in cases of corruption offences reported to law enforcement authorities (tantamount to "effective regret") does not apply to the foreign bribery offences (Phase 3 recommendation 2.d)).

123. In its responses to the Phase 4 Questionnaire, Spain reported that the defence under article 426 PC only applies to natural persons but it does not, in any event, apply to the foreign bribery offence. This interpretation was confirmed by prosecutors during the on-site visit. The 2015 PC amendments operated a relocation of the foreign bribery provision, which is now found in a different section of the PC than the general provisions on passive and active domestic bribery. Article 426 PC is applicable to the chapter on crimes of domestic bribery ("*cohecho*"), located under Title XIX on crimes against the Public Administration. The foreign bribery offence under article 286ter PC is located under Title XIII, crimes against property and the socioeconomic order, specifically section 4 on corruption in business. This reorganisation solves any

interpretative questions regarding the application of the defence of effective regret to the foreign bribery offence, thereby addressing the issue identified by the Working Group in Phase 3.

### *Commentary*

***The lead examiners are satisfied that the concerns expressed by the Working Group in Phase 3 regarding the coverage of non-pecuniary benefits, the promise of a bribe, use of intermediaries and bribes paid to third parties, as well as the defence of effective regret, were resolved by the consolidation of the foreign bribery offence under article 286ter PC.***

## 2. Offences related to foreign bribery

### **a. Money laundering offence and enforcement**

124. There has been no relevant changes to the framework for the money laundering offence in Spain since Phase 3. The money laundering offence is established under article 301 PC, which adopts an "all crimes" approach to defining predicate offences. Accordingly, foreign bribery is a predicate offence under article 301. Act 10/2010 on prevention of money laundering and terrorist financing, which entered into force on 30 April 2010, and transposed the European Directive 2005/60/EC (the Third Money Laundering Directive),<sup>53</sup> brought a number of significant changes, including the criminalisation of self-laundering. Money laundering is sanctioned with prison terms of six months to six years, fines of up to three times the value of the laundered assets, as well as exclusions from public office or from certain activities.

125. According to information on foreign bribery cases provided by Spain, money laundering is being investigated in 10 of the current 21 ongoing investigations and charges for money laundering were laid in all four of the cases currently under prosecution. As information on money laundering enforcement was not provided in Phase 3, it is not possible to assess whether this data constitutes progress. However, it suggests proactivity in enforcing money laundering predicated on foreign bribery. An assessment on the level of sanctions imposed for money laundering predicated on foreign bribery is also not possible, as the only foreign bribery case concluded with sanctions to date did not result in a conviction for money laundering offences.

### *Commentary*

***The lead examiners welcome the fact that Spanish law enforcement authorities show proactivity in pursuing money laundering predicated on foreign bribery, and that in all four foreign bribery cases undergoing prosecution, charges were also laid for this offence. They recommend that the Working Group follow up on the enforcement of the money laundering offence in foreign bribery cases to further assess this trend, as well as the successful conclusion and sanctioning of these cases.***

### **b. False accounting offence and enforcement**

126. Accounting standards and the legal framework for the false accounting offence have not changed since Phase 3. In Spain, the annual accounts of all companies should be prepared in compliance with the Commercial Code, the revised Companies Act, the Limited Liability Companies Act and the Spanish General Accounting Plan, approved by Royal Decree 1514/2007, notwithstanding the special rules inherent in the financial sector deriving from European legislation in this respect. All companies must apply the Spanish Generally Accepted Accounting Principles (GAAP) in their financial statements, which is

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<sup>53</sup> Act 10/2010 was also further amended to transpose the fourth and fifth EU AML Directives.

essentially based on the International Financial Reporting Standards (IFRS). Certain SMEs are subject to simplified accounting requirements and are exempted from external audit requirements.

127. False accounting is regulated by articles 290, 310 and 310bis PC. Article 290 PC criminalises the conduct of a company's director who drafts accounting documents or records containing false or incomplete information in a way that financially harms the entity, its shareholders or partners or a third party. The penalty for this offence ranges from one to three years of imprisonment and a fine from six to twelve months (from EUR 360 to EUR 144,000).

128. Article 310 PC punishes individuals who have an obligation under tax law to keep accounting books and records where they perform certain illicit acts such as double accounting, recording non-existing operations or failing to record existing operations. The penalty encountered is five to seven months imprisonment. Legal persons are punishable for the same offence under article 310bis PC, with a fine ranging from six months to one year.

*i. Insufficient statistics on enforcement of accounting offences*

129. In Phase 3, due to the lack of data, the evaluation team was not able to assess how article 290 PC was applied in practice, or at which frequency. It was also unclear what elements of proof were required to demonstrate that the misconduct intended to financially "harm the entity, partners or a third party" and in what circumstances such misconduct might lead to a sanction. In Phase 4, Spain reported 97 convictions between 2013 and 2022. However, information on sanctions remains unavailable, and statistics on prosecutions and investigations were only provided for 2020 and, a few days before the discussion of the report, for 2021. Data is thus incomplete for the evaluation team to assess enforcement of article 290 PC satisfactorily. The elements of the misconduct also remain unclear.

130. Regarding article 310 PC, in its responses to the Phase 4 Questionnaire, the Spanish authorities provided figures on the number of convictions of natural persons for false accounting between 2013 and 2022. A total of 48 natural persons were convicted, a decrease from the 81 convictions reported in Phase 3 for the shorter period between 2006 and 2012. As was the case in Phase 3, Spain did not provide data on the level of sanctions imposed and the status of the convicted persons (e.g. accountants, auditors, external auditors). No information was provided in relation to enforcement of the false accounting offence against legal persons under article 310bis PC. In the absence of sufficient data, the Working Group is not in a position to adequately assess the level of enforcement of the accounting offences in Spain.

*ii. Insufficient enforcement of the false accounting offence in relation to foreign bribery*

131. In Phase 3, the WGB recommended that Spain ensure that accounting offences are effectively investigated and prosecuted, particularly in connection with bribery cases (Phase 3 recommendation 13.a)), and agreed to follow up on the use of administrative penalties for false accounting against natural and legal persons. As Spain failed to demonstrate progress in its Phase 3 Written Follow-up Report, the WGB deemed recommendation 13.a) not implemented.

132. According to information provided by Spain, false accounting charges under article 310bis PC were laid against only one company in a foreign bribery case. In the case in question, which is currently being prosecuted and pending trial, the ACPO indicted three legal persons, including at least one private company and one public company. It was established that in both companies, bribes had been recorded as "business expenses". The public company is being charged with false accounting under article 310bis PC, while the private company is being charged with the offence of tax fraud under article 305 PC.

133. Regarding the private company in this case, Spain explained that the false accounting was instrumental to the commission of a tax fraud offence. Under article 8 PC, in cases where facts may qualify as two or more crimes, the broader and more complex criminal type will absorb the ones that punish the same actions contained within it, or if no other rules apply, the more serious offence will consume the least



serious ones. Article 305 (tax fraud) has a penalty of one to five years imprisonment and a fine that can go up to six times the amount defrauded. False accounting has a much lesser sentence. Hence, the offence of false accounting is subsumed by the tax fraud crime and the company is prosecuted under the latter. No other foreign bribery cases are currently being investigated or prosecuted for false accounting offences in Spain.

### **Commentary**

***Spain does not compile sufficient data on enforcement of false accounting. While Spain was able to provide the number of convictions under article 290 PC and 310 PC, data on sanctions imposed is not collected, and information on investigations and prosecutions is limited. Additionally, Spain could not provide the number of companies convicted under 310bis PC. In this context, the lead examiners cannot adequately assess enforcement of false accounting offences in connection with foreign bribery in Spain. They thus recommend that Spain maintain statistics on enforcement of the full range of false accounting offences, including investigations, prosecutions and sanctions.***

***The only conclusion that can be drawn from the limited data provided is that the number of convictions under article 310 PC has decreased since Phase 3. They reiterate Phase 3 recommendation 13.a) and recommend that Spain vigorously investigate and prosecute false accounting offences where appropriate, and, to this end, raise awareness and provide training to law enforcement authorities. Additionally, they recommend that Spain ensure that penalties against natural and legal persons for false accounting are effective, proportionate and dissuasive in practice.***

## **3. Investigative and prosecutorial framework**

### **a. Authorities responsible for investigating and prosecuting foreign bribery**

134. Spain's institutional framework for investigating and prosecuting foreign bribery remains unchanged since Phase 3. Criminal investigations are divided into two phases, the prosecutorial investigation and the judicial investigation. In foreign bribery matters, the prosecutorial investigation is conducted by the ACPO and the judicial investigation by investigating magistrates. Most foreign bribery investigations will fall under the remit of the investigating magistrates attached to the *Audiencia Nacional*, which has competence over a series of high profile offences as well as serious offences committed outside of Spain. Regional courts have jurisdiction over foreign bribery cases where the offence is committed in Spanish territory (see *EU Software* case).

135. The ACPO is a special prosecution service for economic crimes and corruption cases. It forms part of the State Prosecution Service (*Fiscalía General del Estado*, hereinafter "SPS"), which is comprised of prosecution services attached to various courts, as well as certain special prosecution services and general offices. The ACPO has delegate prosecutors in different cities across Spain. The ACPO has support units permanently assigned to it, including from the two national police forces, the National Police and the National Guard, as well as the State Tax Administration Agency and the General Intervention of the State Administration (IGAE).

136. The *Audiencia Nacional* is located in Madrid and composed of six central investigating magistrate courts in charge of the investigation of the cases. It is also comprised of four Criminal Divisions, each one made up, at a minimum, of five judges in charge of solving the appeals lodged against the resolutions of the investigating judges and trying the accused people in the cases in which the *Audiencia Nacional* has competence, and three Courts of Appeal.

## **b. Attribution of cases to the ACPO and interagency co-ordination**

### *i. Lingering issues regarding attribution of foreign bribery cases to the ACPO central unit*

137. The adoption of Direction 4/2006 established the ACPO's jurisdiction over serious cases of bribery of foreign public officials. According to ACPO prosecutors during the Phase 3 on-site visit, foreign bribery offences should generally be investigated and prosecuted centrally by the ACPO, with cases being referred to them as soon as elements of a potential foreign bribery offence emerge. Nevertheless, the Phase 3 Report identified two cases involving foreign bribery allegations that were discontinued without referral to the ACPO, thereby raising concerns of the Working Group regarding the co-ordination between various law enforcement authorities and, in particular, between other units of the SPS and the ACPO.

138. Spain has not taken specific measures to address the Working Group's recommendation that law enforcement authorities inform the ACPO of any foreign bribery allegations that come to their knowledge (Phase 3 recommendation 5.b)(iii)). In practice, it appears that all foreign bribery investigations since Phase 3 have been conducted by the ACPO. However, when the offence is committed in Spain, prosecutors outside of the ACPO may examine foreign bribery matters where the investigation starts under another offence and a foreign bribery suspicion further arises. According to Spain, in these cases, the matter would be referred to the ACPO. The evaluation team was unable to ascertain whether foreign bribery allegations were investigated by other prosecutions services and discontinued without the ACPO's knowledge, as it was unable to meet with such other prosecutors during the on-site visit. In its responses to the Phase 4 Questionnaire, Spain reports that the SPS and the ACPO have a permanent channel of communication that is effective, with the ACPO informing the SPS of the opening of new foreign bribery investigations.

139. An additional issue regarding the ACPO's jurisdiction pertained to the existence of two foreign bribery offences under the 2010 version of the Penal Code. The Group was concerned that bribery of EU officials would not be treated as foreign bribery and would, therefore, not fall under the ACPO's jurisdiction (Phase 3 recommendation 5.b)(i)). The consolidation of the foreign bribery offence under article 286ter PC resolves this issue.

140. Nonetheless, a recent foreign bribery case raises concerns on co-ordination and communication between the ACPO's central unit and its local offices. The *EU Software* case was reported by Spain in its responses to the Phase 4 Questionnaire as a money laundering case, but was not included in the list of foreign bribery cases. An analysis of the facts by the evaluation team revealed the likelihood that a foreign bribery offence had been committed, but it was unclear whether the investigation of this case had been conducted by the ACPO. When raised during the on-site visit, ACPO prosecutors clearly lacked information on the case and the status of proceedings. Follow-up information provided by Spain clarified that the case, which involves the bribery of an official of an EU institution located in Spain, was being conducted by a local ACPO office, seemingly without oversight by the central ACPO unit, where the foreign bribery expertise is concentrated.

### *ii. Missing statistics to assess interagency co-ordination in foreign bribery cases*

141. Spain did not provide data on the number of foreign bribery allegations that were first investigated by regional law enforcement authorities, neither regarding the Police's nor the ACPO's local office, because such data is not collected. There is also no data on the types of offences that are investigated by the Police or other units of the SPS. Therefore, although inter-agency co-operation exists across the board and communication channels are in place, it is not possible to assess this in practice.

142. This issue carries from Phase 3, when the Working Group recommended that Spain consider "the establishment of a national database for all ongoing cases with a view to ensuring co-ordination of foreign bribery investigations, including the offences of bribery of EU officials, nationally and to avoid intelligence

gaps” (Phase 3 recommendation 5.e)(iii)). The recommendation was deemed not implemented at the time of the Phase 3 Written Follow-up Report. Since then, Spain took no measures to address this recommendation. The *EU Software* case shows that maintaining a national database of ongoing investigations remains critical to keep track of foreign bribery cases and ensure efficient co-ordination.

### **Commentary**

***Given the necessary expertise that is required to investigate foreign bribery cases, the lead examiners are concerned that not all foreign bribery allegations are overseen by the ACPO’s central unit. This issue is particularly flagrant in light of the EU Software case, which was investigated by local ACPO prosecutors. Central ACPO prosecutors at the on-site visit clearly lacked information on the case and the status of proceedings, which reveals serious co-ordination and communication issues within the agency. The lead examiners recommend that the Working Group follow up on the co-ordination and communication between the ACPO’s central agency and delegate prosecutors in its local offices, as well as between the ACPO and other units of the SPS, in relation to foreign bribery allegations, investigations and prosecutions. Considering that non-ACPO prosecutors may be competent bribery matters when the offence is committed on Spanish territory, they also recommend that in such cases, prosecutors benefit from the support and expertise of the central ACPO unit.***

***The lead examiners also reiterate Phase 3 recommendation 5.e)(iii) that Spain establish a national database for all ongoing cases with a view to ensuring co-ordination of foreign bribery investigations nationally, and maintain statistical data on cases involving foreign bribery that may be carried out by law enforcement authorities other than the ACPO’s central office, including its local offices, other units of the SPS, and police units.***

### **c. Prioritisation of foreign bribery enforcement and resources of the ACPO**

143. In Phase 3, the WGB found that the Spanish prosecution showed little proactivity when it came to opening foreign bribery cases,<sup>54</sup> and recommended that Spain raise awareness at the national level about the need to prioritise the investigation of foreign bribery offences (Phase 3 recommendation 5.e)(ii)). Since then, Spain did not take measures in that direction. During the on-site visit, representatives of the Spanish government displayed limited knowledge of the foreign bribery offence and its enforcement in Spain.

144. In practice, the enforcement landscape has changed substantially since Phase 3. At that time, only seven investigations had been opened, and all of them had been closed by the time of the on-site visit. Since then, Spain has opened 46 new investigations into foreign bribery allegations and is currently looking into seven additional allegations. Four cases are at the prosecution stage and are being pursued against 53 natural persons and 14 legal persons. These developments clearly denote Spain’s more proactive stance in pursuing foreign bribery.

145. Nonetheless, this progress is measured over ten years, and suffers considerable limitations. In particular, since Phase 3, 20 cases were closed without prosecution, often solely due to the lack of or inadequate responses to Spain’s outgoing MLA requests. Additionally, only one case was successfully concluded with sanctions against two natural persons, and not one case was concluded against a legal person. By comparison, between 2013 and 2020, 697 cases of domestic bribery were concluded. While this figure likely includes both the active and the passive side, the comparison remains compelling.

146. During the on-site visit, the evaluation team asked the views of non-government panellists as to why enforcement of the foreign bribery offence remains low in Spain. According to civil society representatives and academics, possible explanations ranged from the lack of political will, which translates into a lack of resources dedicated to pursuing the offence, to the ACPO’s lack of expertise and

<sup>54</sup> Spain [Phase 3 Report](#), para. 107.

time to pursue such a complex offence. Several panellists considered that authorities focus their attention on financial crimes that have notable effects on society or receive significant media coverage, which is not the case for foreign bribery, especially by comparison to domestic bribery.

147. Information on the ACPO's staff and budget is encouraging but insufficient to determine if the investigation of foreign bribery is adequately resourced. ACPO staff has increased sharply between Phase 3 (2012) and 2020, with the number of prosecutors nearly doubling. Pursuant to Royal Decree 255/2019, 80 new positions for public prosecutors were created, including nine allocated to the ACPO. The number of police staff assigned to the ACPO increased from 20 to 31 in total (16 staff from the Attached Unit National Police and 15 from the Attached Unit Civil Guard). However, ACPO prosecutors met on-site explained that no specialised sub-group of prosecutors was formed to process foreign bribery cases. After the on-site visit, Spain explained that all ACPO prosecutors may be responsible for the investigation of foreign bribery allegations. The evaluation team could not obtain an estimate number of ACPO staff assigned to foreign bribery investigations.

**Table 1. Composition of the ACPO in 2012 and 2020**

Composition of the ACPO	2012	2020
Prosecutors (including Head of the Office)	15	29
Delegates Prosecutors	16	20
Temporary Delegates Prosecutors	unknown	10
Collaborating staff	unknown	31
Support Unit AEAT (State Tax Administration Agency)	10	12
Support Unit I.G.A.E. (General Intervention of the State Administration)	5	8
Attached Unit National Police	20	16
Attached Unit Civil Guard		15
TOTAL	Minimum of 66	141

Source: 2012 data: Spain Phase 3 Report, para. 88; 2020 data: information shared by Spain after the on-site visit.

148. As was the case in Phase 3, the ACPO's budget remains included in the overall MOJ budget. According to Spain, this system is based on practical considerations and provides the SPS with the flexibility and "administrative horizontal support" that it could not otherwise afford. During the on-site visit, the ACPO prosecutors said that they were satisfied with the level of resources allocated to their office, which they consider "exceptional". Nonetheless, in the absence of data, the evaluation team is not in a position to assess the adequacy of the ACPO's financial resources, or the budget dedicated to the investigation and prosecution of foreign bribery.

149. In recent years, the European Commission has questioned the adequacy of the ACPO's resources. In the Chapter on Spain of the 2021 and 2022 Rule of Law Reports, it emphasised that investigation and prosecution of high-level corruption continue to be lengthy and delayed. Based on information received from the Association of Prosecutors, the Commission attributes this lack of efficiency mostly to "shortage of adequate funding and expertise".<sup>55</sup>

<sup>55</sup> European Commission 2022 Rule of Law Report, Country Chapter on the rule of law situation in Spain, available at: [https://ec.europa.eu/info/sites/default/files/23\\_1\\_194017\\_coun\\_chap\\_spain\\_en.pdf](https://ec.europa.eu/info/sites/default/files/23_1_194017_coun_chap_spain_en.pdf), p. 12; and European Commission

### Commentary

**The lead examiners note with satisfaction that the enforcement landscape has changed substantially since Phase 3. The number of cases opened since Phase 3 denotes a more proactive stance from Spanish authorities to pursue foreign bribery cases.**

**The lead examiners also welcome the sharp increase of staff in the ACPO. However, there are currently no sub-groups specialising on investigating foreign bribery within the ACPO, and the authorities could not provide an estimation of the number of ACPO staff assigned to foreign bribery investigations. Additionally, since the ACPO's budget remains included in the overall budget of the Ministry of Justice, the lead examiners do not have information on the portion allocated to the ACPO, or the financial resources dedicated to the investigation of foreign bribery.**

**As a result, the lead examiners cannot ascertain the ACPO's capacity to adequately process the surge in foreign bribery cases that has taken place since Phase 3. Considering the sharp increase of domestic bribery cases concluded by comparison to foreign bribery, and the high number of foreign bribery investigations prematurely closed since Phase 3, they query whether a sufficient portion of ACPO staff and resources is assigned to the investigation of foreign bribery. They thus recommend that Spain take measures to ensure that the ACPO staff and resources dedicated to foreign bribery are sufficient to ensure that complaints of bribery of foreign public officials are seriously investigated and credible foreign bribery allegations are assessed.**

**More generally, they recommend that the Working Group follow up on Spain's efforts to raise awareness at the national level about the need to prioritise the investigation of foreign bribery offences.**

#### **d. Foreign bribery training and expertise**

##### *i. Training and expertise of the ACPO staff and non-ACPO prosecutors*

150. In Phase 3, the Working Group noted that despite an excellent level of awareness of the offence, the prosecutors in the ACPO lacked experience and training on its application. The WGB thus issued recommendation 5.a)(ii), which was deemed partially implemented at the time of the Phase 3 Written Follow-up Report, in light of Spain's limited efforts to address it. Since then, both the foreign bribery legislation and the liability regime for legal persons were amended following the 2015 PC revision.

151. During the on-site visit, the evaluation team met with representatives from the ACPO's central office, who appeared to have a strong knowledge of the revised foreign bribery legislation. Nonetheless, considering the substantial amendments brought about by the 2015 PC revision, training on the offence is largely insufficient. Since Phase 3, only one training focusing on the foreign bribery offence was delivered to ACPO prosecutors in March 2022, and it was not mandatory. As examined under **B.1.b**, the *EU Software* case revealed a blatant lack of expertise regarding the foreign bribery offence from delegate prosecutors in local ACPO offices.

152. As regards the regime for liability of legal persons, ACPO prosecutors met on-site appeared knowledgeable of the revised article 31bis PC and Circular 1/2016. Nonetheless, the need for guidance and training on the implementation of the corporate liability regime, and in particular the exemption of liability is critical. Indeed, as further examined under **C.1.b**, there appears to be confusion on the extent to which self-reporting contributes to exempt a legal person from liability. Additionally, this exemption is contingent on whether the company had implemented an efficient compliance programme, called "organisational and management model" (OMM), at the time of the offence. Training prosecutors on how

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2021 Rule of Law Report, Country Chapter on the rule of law situation in Spain, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021SC0710&from=EN>, p 10.

to assess the effectiveness of OMMs to prevent and detect foreign bribery is therefore equally critical. ACPO prosecutors met on-site themselves acknowledged the need to build their expertise on that subject.

153. Finally, considering that non-ACPO prosecutors may be competent to investigate foreign bribery matters when the offence is committed inside the Spanish territory, it is critical that non-ACPO prosecutors also receive training on the foreign bribery offence and means of investigating it.

### *Commentary*

***The lead examiners are very concerned that ACPO prosecutors do not receive mandatory training on the foreign bribery offence or the corporate liability regime, in particular considering the significant changes introduced by the 2015 PC amendment. As was the case in Phase 3, they worry about the disconnect between prosecutor’s theoretical knowledge of the offence, and its application in practice. The EU Software case raises serious concerns about the foreign bribery expertise of delegate prosecutors in local ACPO offices. The lead examiners therefore recommend that ACPO prosecutors receive regular training on the foreign bribery offence; the means to investigate and prosecute it; as well as legal persons’ liability for foreign bribery. Considering that non-ACPO prosecutors have jurisdiction to investigate foreign bribery matters when the offence is committed inside the Spanish territory, the lead examiners also urge Spain to ensure that non-ACPO prosecutors receive similar training.***

***As further examined under C.1.b they also recommend that prosecutors receive guidance and training to build the expertise necessary to assess the effectiveness of an “organisational and management mode” to prevent and detect foreign bribery.***

#### *ii. Training and expertise of police forces not attached to the ACPO*

154. The police might play an important part in detecting and enforcing the foreign bribery offence in the context of investigations that may start on the basis of another offence. Representatives from Police forces at the on-site visit explained that they could receive reports of foreign bribery allegations and initiate investigative measures, mainly of patrimonial nature to ascertain bank accounts and track financial flows. In that case, they would inform prosecutors of the allegations early on. They also explained that although most investigations will be centralised in the anti-corruption unit, other police units might carry out such investigations if they are reported to them and they have the necessary resources and expertise. Yet, none of the foreign bribery investigations to date was detected by police forces that are not attached to the ACPO, and such forces have never referred foreign bribery-related allegations to the ACPO.

155. In Phase 3, with the exception of the unit assigned to the ACPO, police forces had not received specific training on foreign bribery. Since then, Spain has made timid progress in that regard. Within the National Police, the Economic and Fiscal Crime Unit (UDEP) receives a yearly training of 50 minutes on a variety of corruption-related topics, including private corruption and corruption in international business transactions, liability of legal persons for corruption, and judicial issues arising in the context of corruption investigations. As regards the National Guard, training of the Central Operating Unit (UCO) staff appears limited to the investigation of economic crimes, without a specific focus on foreign bribery.

#### *iii. Training and expertise of the Investigating Magistrates of the Audiencia Nacional*

156. In Phase 3, the Working Group was seriously concerned about the expertise of investigating magistrates of the *Audiencia Nacional*, following its decision to terminate proceedings in a foreign bribery case (Phase 3 recommendation 5.a)(i)). The grounds for termination showed that the investigating magistrate’s interpretation of the foreign bribery offence disregarded Article 1(4) c) and several commentaries to the Convention regarding the interpretation of an act “in relation to the performance of

official duties". At the time of the Phase 3 Written Follow-up Report, Spain had only provided limited training and recommendation 5.a) was deemed partially implemented.

157. No progress was made in that regard. Each year, the General Council of the Judiciary draws a Continuous Training Plan, which includes specific training for judges in matters of economic crimes. However, none of these courses focus on foreign bribery, and is not mandatory. Investigating magistrates and judges from the *Audiencia Nacional* are thus not trained on the foreign bribery offence, despite the fact that the legislation was significantly revised in 2015. As examined above under B.1.d, the court decision in the *Publishing Companies* case raises serious questions regarding the knowledge and understanding of judges from the *Audiencia Nacional* of the foreign bribery offence. In the *EU Software* case, the judge in the first instance was not attached to the *Audiencia Nacional*, because the offence was committed in Spanish territory. Considering that local courts may also have jurisdiction over foreign bribery, training should be extended as well to their investigating magistrates and judges.

158. Additionally, judges do not receive training on the regime for liability of legal persons, as introduced by the 2015 PC amendment. This is all the more concerning as the regime introduces an exemption from liability. The exemption from liability is examined on further detail under C.1.b.

### Commentary

***The lead examiners acknowledge efforts to train officers from the National Police who are not attached to the ACPO on the foreign bribery offence, but regret that officers from the National Guard still do not receive such specific training. Police forces could be a valuable source of detection of foreign bribery. Yet, to date, not one case was referred from police forces to the ACPO.***

***The lead examiners are very concerned that despite the substantial issues identified in Phase 3, no measures were taken to develop the foreign bribery expertise of investigating magistrates of the Audiencia Nacional. In light of the EU Software case, the lead examiners are equally concerned about the lack of expertise of investigating magistrates and judges attached to local courts, since they have jurisdiction over foreign bribery offences committed on Spanish territory. This is all the more concerning as the legislative framework underwent important revisions in 2015.***

***The lead examiners therefore reiterate Phase 3 recommendation 5.a)(i) and recommend that the police forces and investigating magistrates and judges, both from the Audiencia Nacional and local courts, receive adequate training on the elements of the foreign bribery offence and on the investigative techniques adapted to this offence with a view to pro-actively detecting, investigating and prosecuting bribery of foreign public officials by both individuals and companies.***

## 4. Conducting foreign bribery investigations and prosecution

### a. Investigating and prosecuting foreign bribery cases

#### i. Phases of proceedings, and the respective roles of the ACPO and investigating magistrates

159. The phases of proceedings of a foreign bribery investigation and prosecution, as well as the respective roles of the ACPO and the investigating magistrates, have not changed since Phase 3. Spanish legislation determines that the direction of a criminal investigation is under the competence of investigating magistrates. During the Phase 4 on-site visit, the evaluation team was informed that Spain is currently conducting a revision of its criminal procedure that would shift the main competence over criminal investigations from investigating magistrates to prosecutors. The role of investigating magistrates would be modified to that of a judge of guarantees in the criminal proceedings. A draft law to reform the CPC has been under development by the government since November 2020. The process is thus in its early stages,

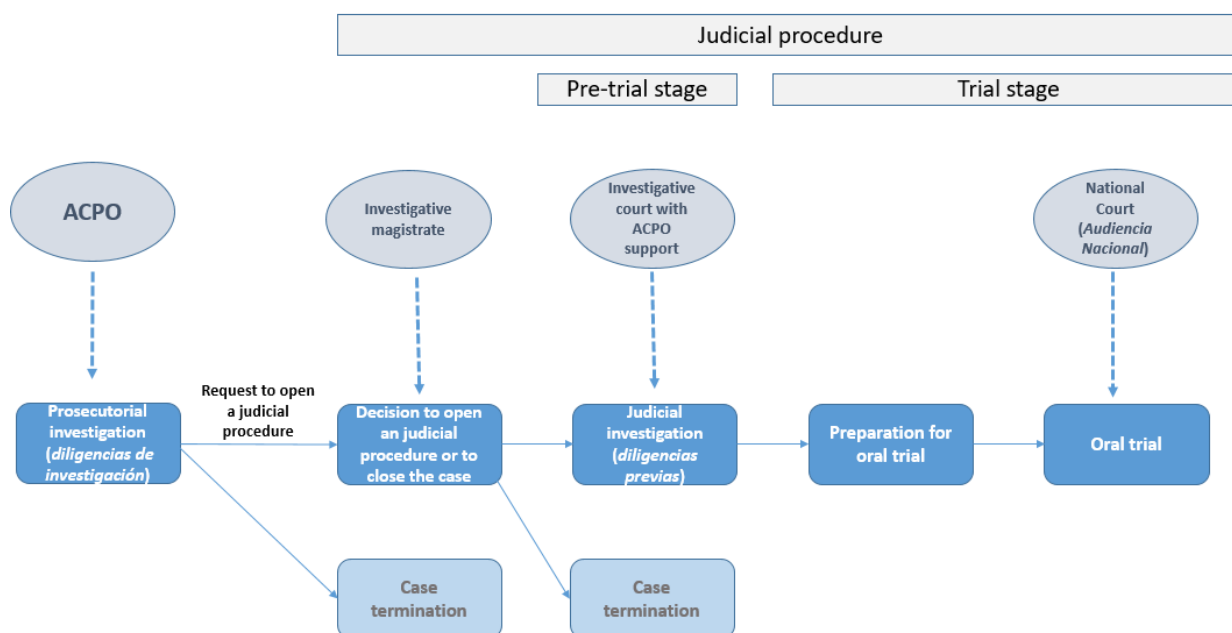
and there is no timeline for when this revision will be concluded.<sup>56</sup> After the on-site visit, Spain informed the evaluation team that the MOJ had created an *ad hoc* Working Group in October 2021, with the aim of “achieving a new text with the greatest possible consensus of the legal operators”. The conclusions of this Working Group will be presented in 2022, although a precise date is unknown.

160. Spain follows the principle of mandatory prosecution in accordance with the Organic Statute of the State Prosecution Service (EOMF) and articles 100 and 105 CPC. Corruption offences, including foreign bribery, can be prosecuted *ex officio*, i.e. a complaint is not necessary. In a foreign bribery case, media information is sufficient for the ACPO to open preliminary proceedings leading to a prosecutorial investigation.

161. Following this phase, the ACPO prosecutor must request the relevant investigating magistrate to open a judicial procedure. It can do so by submitting a “*querrela*”, which amounts to a complaint before the court, or a “*denuncia*”. Alternatively, if at the conclusion of a prosecutorial investigation, evidence of a criminal offence is considered insufficient, the prosecutor can file or close the proceedings.

162. Once the judicial procedure starts and a judge becomes involved, the criminal process has three stages: judicial investigation; preparing the oral trial; and the oral trial. The first stage is supervised by an investigating magistrate who is in charge of investigating the crime, with prosecutors continuing to play a central role in the investigation. Once the judge has completed their judicial investigation, they can decide, *inter alia*, (1) to file the case (*sobreseimiento*) if there is insufficient evidence or the facts do not reveal the commission of a crime; or (2) to issue a formal decision which opens the intermediate phase of proceedings (preparation of the oral phase). The intermediate phase similarly can end either with a transfer of the case to the relevant court for the oral phase, or with a filing of the case by the judge.

Figure 5. Stages and responsible authorities in the resolution of foreign bribery cases



56

[https://www.mjusticia.gob.es/es/AreaTematica/ActividadLegislativa/Documents/210126%20ANTEPROYECTO%20LECRIM%202020%20INFORMACION%20PUBLICA%20\(1\).pdf](https://www.mjusticia.gob.es/es/AreaTematica/ActividadLegislativa/Documents/210126%20ANTEPROYECTO%20LECRIM%202020%20INFORMACION%20PUBLICA%20(1).pdf)



### Commentary

**The lead examiners note that the government is drafting a revision of the Criminal Procedure Code that would shift the main competence over criminal investigations from investigating magistrates to prosecutors. The reform, if adopted, could contribute to addressing some of the deficiencies discussed in this report regarding the investigation and prosecution of foreign bribery. The lead examiners recommend that the Working Group follow up on the legislative process for the adoption of the draft law to reform the Criminal Procedure Code.**

#### ii. Rules and time limits regarding investigations

163. The time limit for the procedural investigation is insufficient. The Working Group has stated in evaluations of other countries that a two-year limit for preliminary investigations is inadequate in complex foreign bribery cases.<sup>57</sup> Since the 2010 reform of the EOMF, the ACPO has up to twelve months to conduct enquiries into the matters in which it is competent. Acts performed by the ACPO do not interrupt the limitation period, including requests for MLA. The EOMF provides that “where warranted, this period may be extended by a duly substantiated order from the Prosecutor General”.<sup>58</sup> According to Spain, there is no limit on the number of extensions that can be requested. However, the law does not provide the number of extensions that may be requested or their duration.

164. In its responses to the Phase 4 Questionnaire, Spain explained that no foreign bribery investigation had been terminated for this reason since Phase 3. Nonetheless, during the on-site visit, various panellists from both the public and private sector referred to the limited time allocated to ACPO prosecutors to conduct their investigation as an obstacle to the successful conclusion of cases. ACPO prosecutors explained that information obtained from MLA is essential to open a judicial investigation into foreign bribery allegations, which, in turn, is necessary to interrupt the statute of limitations. Given the delays incurred in practice to obtain MLA, this information is rarely received in time to conclude a prosecutorial investigation that would adequately support the progression toward the judicial stage. As a consequence, ACPO prosecutors “rush” to request the opening of a judicial investigation in order to interrupt the limitation period. They described one case in which prosecutors had to present a complaint without having completed their investigation because the limitation was about to lapse.

165. Once a judicial investigation is open, investigating magistrates have a limited time to conduct it and initiate trial. Law 2/2020 amended article 324 CPC to extend the time limit for the judicial investigation.<sup>59</sup> The judicial enquiry is conducted within a maximum timeframe of twelve months (instead of six) from the opening of the judicial procedure. If, before the end of the period, it is found that it will not be possible to complete the investigation, the judge, on his own initiative or at the request of a party, after hearing all parties, may agree to successive extensions for periods equal to or less than six months.

### Commentary

**The lead examiners are highly concerned that the ACPO does not have sufficient time to conduct a prosecutorial investigation. This serious problem is compounded by the fact that investigative acts by the ACPO do not interrupt the limitation period and, as further explained under B.4.c, information obtained from MLA is usually needed to obtain court authorisation to use special investigative means and to request the opening of a judicial investigation. The issue is all the more problematic considering the exceedingly low 5-year statute of limitations to pursue legal persons under the foreign bribery offence. The lead examiners therefore recommend that Spain urgently**

<sup>57</sup> [Italy Phase 4 Report](#), paras. 173-174 and recommendation 14(a); [Chile Phase 4 Report](#), paras. 84-86 and recommendation 4(a); [Hungary Phase 4 Report](#), paras. 87-90 and recommendation 6(b). See also [Peru Phase 2 Report](#), paras. 116-118 and recommendation 11.

<sup>58</sup> Article 5.2, paragraph 4 of the Organic Statute of Public Prosecution Service.

<sup>59</sup> <https://www.boe.es/buscar/act.php?id=BOE-A-2020-8633>.

**take necessary steps to ensure that ACPO prosecutors have sufficient time to effectively conduct prosecutorial investigations.**

**They also recommend that Spain ensure that the limitation period for judicial investigations is sufficient for proper investigation and prosecution of foreign bribery.**

*iii. Investigative means available and used by the ACPO in prosecutorial investigations*

### **Range of investigative means**

#### **Regular investigative means and access to banking information**

166. As was the case in Phase 3, the ACPO benefits from attached units from the National Police, the National Guard, as well as the support units of the AEAT and the IGAE. ACPO prosecutors can also request the assistance of the Police forces not attached to the ACPO in the context of foreign bribery investigations. The range of investigative measures accessible to ACPO investigators has not changed since Phase 3. They include the power to compel the attendance of the suspect or witnesses to answer questions, and instructing the police or public authorities to provide reports. Prosecutors may also carry out patrimonial assets investigations with the support of the relevant authorities, including specialised police forces and tax inspectors. Under article 773(2) CPC and articles 4 and 5 EOMF, the Public Prosecutor's Office has full legal standing under Spanish law to access banking information when it so requests it in the framework of its investigation proceedings. In its responses to the Phase 4 Questionnaire, Spain explained that “both the Public Prosecutor's Office and Courts can access such information without difficulty”. The ACPO also has access to taxpayer data held in the Tax Agency's Consolidated Database.

#### **Access to beneficial ownership information**

167. Information on beneficial ownership in Spain is not currently consolidated under a single database, but rather three: the Beneficial Ownership Database (BDTR), the Central Banks Accounts Registry (FTF) and the register of beneficial owners of mercantile companies (RETIR). Royal Decree-Law 7/2021, of 27 April, which transposes the 5th AML Directive,<sup>60</sup> foresees the creation of a single Register of Beneficial Ownership of legal entities and trusts by the MOJ, which Spain reports is currently underway. As per the Decree, when the register is implemented, all Spanish legal persons, as well as those resident in Spain acting as trustees of a trust or similar structure, will have to maintain their own beneficial ownership data and make it available to obliged entities when they maintain business relationships with them.

168. The ACPO currently has full access to information on beneficial ownership and this will not change with the implementation of the new central register. All information, including current and historical data on the beneficial ownership of the person or entity, as well as the nature and extent of the beneficial interest held, will be accessible to authorities responsible for the prevention and repression of money laundering and terrorism financing and their predicate offences, as well as to obliged entities under the anti-money laundering legislation.

169. Third parties, including the general public, other law enforcement authorities, and obliged entities under the AML legislation will be able to obtain data (name and surname, month and year of birth, country of residence, nationality, address, ground for the consideration of beneficial owner and, if it is the case, percentage of participation) on the current beneficial owners of a legal person or entity or structure without legal personality; as well as on the nature of such beneficial ownership. Representatives from civil society present at the on-site expressed concerns that the current project for the new central registry established that third party access to information in the database will be subject to a fee, which will be charged per access, potentially impeding these organisations from accessing this information for lack of funds.

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<sup>60</sup> Directive (EU) 2018/843 of the EU Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing.

– Special investigative means

170. Prosecutors do not have the authority to carry out investigative means that affect fundamental rights (hereafter “special investigative means”) without prior judicial authorisation. Therefore, investigating magistrates must authorise the interception of communications, searches and wiretapping, or use of undercover agents. In Phase 3, the ACPO representatives explained that they had sufficient investigative powers, but no information was provided on the frequency at which special investigative means were used in foreign bribery cases, and the ease to obtain authorisation to resort to these means. The Working Group thus decided to follow up on the investigative powers available to the ACPO prosecutors and whether the investigation tools available to them in the prosecutorial investigation phase, in particular the possibility to conduct searches and wiretapping, were sufficient (Phase 3 follow-up issue 16(i)). In the responses to the Phase 4 Questionnaire, Spain did not share any new information in regard to this issue.

**In practice, extensive use of MLA and limited use of other investigative means, including special investigative means**

171. In practice, Spanish authorities rely extensively on MLA. Out of the 46 investigations opened since Phase 3, MLA was requested in 42. As examined under B.6, Spanish authorities are very active and resourceful when it comes to requesting MLA, laying the ground through informal contacts, following-up regularly after sending the request, and, in a few instances, traveling to the country where MLA was requested. Despite these efforts, Spain identifies the lack of responses to MLA requests as the main challenge to collect sufficient evidence to successfully pursue foreign bribery cases.

172. The second most frequent form of evidence is information provided by financial institutions, which the ACPO can request without an authorisation from a magistrate. A noteworthy development since Phase 3 is also the fact that Police forces not attached to the ACPO provided support in three foreign bribery investigations in the form of “specialised reports”, which Spain clarified to be “reports on documentations, forensics and traceability of the funds”.

173. However, the ACPO appears to make limited use of some of the tools at its disposal. Out of the 10 cases currently at the prosecutorial investigation stage, corporate documentation was requested in only two cases, and individual statements in three cases. Additionally, it appears forensic auditing is not used in foreign bribery investigations, and that Spain makes very limited use of information technology.

174. ACPO prosecutors also appear not to use special investigative means during the prosecutorial investigation phase. During the on-site visit, they explained that investigating magistrates would usually not decline a request for special investigative means. However, in practice, search and seizures, wiretapping and undercover agents are not used in prosecutorial investigations of foreign bribery cases. This could be explained by a self-imposed limitation from ACPO prosecutors, due to the threshold to be granted use of those means. During the on-site visit, prosecutors explained that to support their requests for special investigative means, they would typically need to produce information obtained from MLA. After the on-site visit, when asked about the threshold to obtain special investigative means, Spain merely explained that requests must observe: (1) the proportionality principle (the measure is adequate for what is needed); (2) the speciality principle (the measure is requested to obtain a specific evidence); and (3) the subsidiarity principle (the evidence could not be obtained through a less invasive measure).

175. As further developed under B.5.a, the sole foreign bribery case sanctioned to date was only concluded because two of the three natural persons accused admitted to the facts and accepted sentences inscribed in the accusation through *conformidad*. During the on-site visit, prosecutors explained that the evidence that law enforcement was able to collect in connection with this case was insufficient to secure a conviction. This led to the acquittal of the third natural person that did not admit to the facts of the case. The investigative means in this case included MLA requests, statements from investigated persons, reports from the police and tax authorities and corporate documents as well as documents obtained from notarial and registry databases. It is concerning that the only foreign bribery case concluded to date had to rely on

the admission of the facts in the accusation by the individuals because the measures deployed did not allow to gather enough evidence to secure a conviction.

**Table 2. Main Tools Used in Foreign Bribery matters since Phase 3**

Investigative technique	Closed investigations (20)	Ongoing prosecutorial investigations (10)	Ongoing judicial investigations (11)	Cases at prosecution stage (4)	Concluded case (1)	TOTAL
Assessment of corporate documentation (publicly available)			1		1	2
Assessment of corporate documentation (requested or seized)	3	1		2		6
Bank enquiries	2	5	9	1		17
Comptroller co-operation				1		1
Databases search			1		1	2
FIU co-operation		2				2
MLA	19	7	11	4	1	42
Open source research		2	1			3
Police co-operation	4	4	6	2	1	17
IGAE co-operation				2		2
Request to private entities		1				1
Search and seizure	1		6	4		11
Suspect statements	3	3	8	4	1	19
Tax authority co-operation		3	4	1	1	9
Testimony/documents from other legal proceeding	1	1				2
Undercover operations						0
Wiretapping			1			1
Witness and expert statements	3		5	4		12
Number of tools used per category	35	29	52	25	6	

- Source: Information provided by Spain.

### Commentary

**The lead examiners commend Spain for their extensive use of MLA. However, they note that the ACPO appears to make limited use of other investigative measures. In particular, special investigative means such as wiretapping, search and seizure, and the use of undercover agents, are not used in prosecutorial investigations of foreign bribery. A high threshold to obtain court authorisation to use such means could be the explanation as, in practice, information received from MLA often appears to be necessary to obtain such authorisation. The lead examiners therefore recommend that Spain ensure that special investigative means, including search and seizures and wiretapping, are accessible to ACPO prosecutors from the early stage of foreign bribery investigations, including, if necessary, by adjusting the requirements to obtain judicial authorisation to use such means.**

**The lead examiners are very concerned that the only foreign bribery case concluded to date had to rely on the individuals' admission of the facts because the measures deployed did not allow to gather enough evidence to secure a conviction. They therefore recommend that Spanish prosecutors make extensive use of all investigative means at their disposal to gather sufficient evidence from the early stages of foreign bribery investigation, in particular by taking relevant**

**investigative steps as they await MLA from foreign counterparts. They also recommend that prosecutors conduct forensic audits when relevant.**

*iv. Serious concerns over premature closing of cases remain*

176. Since Phase 3, proceedings were closed in 20 foreign bribery cases, in circumstances that suggest that Spain continues to terminate cases prematurely. This concern had already been expressed by the Working Group in Phase 3, after it was reported at the on-site visit that all seven ongoing investigations had been terminated. The WGB thus recommended that Spain ensure that foreign bribery allegations are not prematurely closed (Phase 3 recommendation 5.c)).

177. In its responses to the Phase 4 Questionnaire, Spain explained that proceedings can only be closed after an appropriate investigation, noting that “a decision could be taken either because facts under investigation do not constitute an offence or because the perpetration of the offence or the identity of the offender has not been sufficiently established”. In practice, in the large majority of cases terminated since Phase 3, Spain appears to have relied exclusively on the outcomes of proceedings in foreign jurisdictions to close foreign bribery investigations. More specifically, out of the 20 terminated cases, at least 13 appear to have been closed solely on the grounds that proceedings were closed or never engaged in the demand side country, or did not show the implication of a Spanish person in the alleged bribery scheme. For instance, since Phase 3:

- The *Peru Construction* case was closed after the MLA response from the Peruvian authorities revealed that there was no criminal investigation in the country related to the Spanish construction company.
- In the *Cuzco Gas Field* case, a letter rogatory was sent to Peru inquiring about investigations into allegations of bribery of Peruvian officials by Spanish nationals. Peru informed Spain that no investigation was ongoing. Based on this information, Spain decided to close the case.
- The *Railway Equipment* investigation was closed after Spain found that proceedings in Argentina did not conclude that a Spanish state society had conspired with local officials to defraud the public, or had agreed to make undue payment to the officials.
- In the *Bolivia Construction Works* case, the Argentinian branch of a Spanish company allegedly bribed Bolivian officials to win a contract for the construction of a hydroelectric dam. Spain sent a letter rogatory to Argentina, who sent one to Bolivia. In February 2020, the Argentinian authorities informed Spain that they had not formalised an investigation because the MLA sought from Bolivia had not produced a positive result. Consequently, the preliminary proceedings in Spain were archived.
- In the *Mexican viaduct* case, the investigation was closed because the demand side country, Mexico, did not file a complaint against the company, which is majorly owned by a Spanish company, nor identified a Spanish individual or detected acts of corruption conducted from Spain. However, according to the Working Group’s monitoring of foreign bribery allegations, the Mexican FIU established the connection between the company in question and the bribed official.

178. This practice is very problematic. While information shared by foreign counterparts is critical in the fact-finding process of a foreign bribery investigation, the outcome of foreign proceedings can result from a broad range of legal or procedural factors and does not constitute facts. While Spain claims that all the cases closed since Phase 3 were closed for lack of sufficient evidence, this pattern shows grave limitations in the process to seek such evidence. The fact that prosecutors make limited use of other investigative means to gain first-hand knowledge of the facts shows that Spain continues to close cases prematurely. In at least three other cases, proceedings were closed because Spain did not receive responses to its MLA requests and no other measures were taken to collect the evidence needed to pursue them.

### Commentary

**The lead examiners are extremely concerned with Spain's record of prematurely closing foreign bribery investigations. More than half of the 20 cases closed since Phase 3 due to "insufficient evidence" were closed solely due to the lack of or inadequate responses to Spain's outgoing MLA. In most of these cases, Spain discontinued proceedings solely on the basis that no proceedings were underway in the country where MLA was requested. This trend shows grave limitations in the fact-finding process to seek evidence necessary to pursue foreign bribery cases.**

**The lead examiners therefore urge Spain to ensure that foreign bribery allegations are not prematurely closed, in particular by taking a proactive approach to collecting evidence, using a range of relevant investigative means, from the early stages of an investigation. They also recommend that prosecutors urgently receive training on the investigative techniques adapted to this offence with a view to proactively investigating it.**

#### v. Evidentiary threshold to open a judicial investigation

179. During the on-site visit, the evaluation team was not able to assess with certainty the evidentiary threshold that is required to open a judicial investigation into foreign bribery. When questioned on the extensive use of MLA over other investigative means, ACPO prosecutors explained that MLA is critical to collect the necessary evidence to submit a complaint to open a judicial investigation. While neither prosecutors nor the investigating magistrate met on-site provided clear indications on the requirement to open a judicial investigation, ACPO prosecutors explained that the case had to be "solid", and would typically require evidence obtained from foreign counterparts. Upon further enquiry on this point after the on-site visit, Spain provided the requirements for prosecutors to obtain a *querrela*, as provided by article 277 CPC. This information did not bring clarification on the evidentiary threshold. The threshold to obtain the authorisation to use special investigative means, and to open a judicial investigation, could explain why prosecutors' efforts focus extensively on MLA. In turn, this could also explain, at least in part, why several cases were closed prematurely based solely on inconclusive MLA requests.

### Commentary

**The lead examiners worry that the evidentiary threshold to open a judicial investigation might be too high and explain, at least in part, why a high number of investigations were closed prematurely since Phase 3. While the standard is not entirely clear, ACPO prosecutors explained that information from MLA would typically be necessary to support the opening of a judicial investigation. However, as explained under B.4.a, ACPO prosecutors have limited time to conduct their prosecutorial investigation before requiring the opening of a judicial investigation, and the investigative measures that they take to build their case, including MLA requests, do not suspend the limitation period. The lead examiners therefore are concerned that prosecutors are in a situation where they have insufficient time to collect evidence through MLA, but their chances of successfully requesting the opening of a judicial investigation are largely contingent on their ability to produce information received through MLA.**

**The lead examiners therefore recommend that Spain ensure that the threshold to open a judicial investigation into foreign bribery allows for the effective investigation and prosecution of foreign bribery allegations.**

#### b. Establishing jurisdiction

180. The provisions regulating territorial and national jurisdiction have remained unchanged since Spain became a Party to the Convention. Article 23(1) of the Organic Act of the Judicial Power (LOPJ) grants Spanish jurisdiction over criminal offences committed wholly or partially in Spanish territory. Article 23(2)

LOPJ establishes jurisdiction over crimes committed by Spanish nationals outside Spanish territory. Establishing national jurisdiction requires that “the act is punishable in the place where it was carried out”, unless such a requirement is not necessary by virtue of an international treaty to which Spain is a Party to, and that the “aggrieved party or the public prosecutor makes a complaint before the Spanish courts.”

181. In 2014, article 23 LOPJ was amended, adding a provision establishing Spanish jurisdiction over facts that can configure, under Spanish law, a crime of bribery in international business transactions (article 23(4)(n) LOPJ). Under this provision, Spain has jurisdiction to initiate criminal proceedings for foreign bribery committed outside of the Spanish territory where: (i) the proceedings are against Spanish individuals or foreigners residing in Spain; (ii) the offence was committed by a director, administrator, employee or agent of a company that is headquartered in Spain; and (iii) the offence is committed by a legal person headquartered in Spain.

### *Commentary*

***The Spanish rules on jurisdiction do not seem to raise issues in regards to Article 4 of the Convention. None of the cases terminated to date appear to have been closed due to a lack of jurisdiction by Spain.***

### **c. Statute of limitations**

#### *i. Consolidation of the statute of limitations for foreign bribery following the 2015 amendment of the Penal Code*

182. In Spain, the statute of limitations to pursue an enforcement action depends on the sanction applicable to the offence under which the action is being pursued. The existence of several offences setting out different penalties for foreign bribery in the 2010 version of the PC resulted in different limitation periods, ranging from five to 10 years. In Phase 3, the Working Group therefore recommended that Spain align the different limitations periods with the longest one (Phase 3 recommendation 5.g)(i)). At the time, five out of the seven cases of alleged foreign bribery investigated by the ACPO had been closed because they were time-barred. This recommendation was addressed by the consolidation of the foreign bribery offence under article 286ter PC following the 2015 revision of the PC.

183. The prison sentence for the foreign bribery offence under article 286ter PC is set at a maximum of six or nine years' imprisonment (for the basic and aggravated foreign bribery offence, respectively). In addition, a person found liable for foreign bribery may also be punished with suspension from public contracting and other public advantages for a period from seven to twelve years. Article 131(1) PC provides that crimes reach their limitation period after 15 years when “the maximum penalty provided by law is disqualification for more than 10 years, or imprisonment for more than 10 and less than 15 years” and after 10 years, when “the maximum penalty provided by law is imprisonment or disqualification for more than 5 and less than 10 years”.

184. According to Spain, the statute of limitations for foreign bribery is 15 years. Following the ACPO prosecutors' reading of the law, as shared during the on-site visit, the foreign bribery offence establishes multiple penalties and any of them may be used as a reference for the purposes of establishing the statute of limitations. However, they recognised that this reading has never been verified in court. It is all the more questionable as Article 131(1) was not amended since Phase 3 and, at the time, the WGB concluded that the statute of limitations was ten years, rather than 15. Since Phase 3, the statute of limitations was cited as the cause of termination in one foreign bribery case.

*ii. Insufficient statute of limitations applicable to legal persons*

185. In Phase 3, the Spanish authorities indicated that the same limitation period applies to legal persons where the related natural person committed a criminal offence, including bribery. In the absence of specific case law involving the criminal liability of a legal person, the Working Group recommended that Spain clarify the rules governing the statute of limitations applicable to legal persons (Phase 3 recommendation 5.g)(iii)), which had not been done by the time of Phase 3 Written Follow-up Report.

186. Following the 2015 revision of the PC, article 288 PC provides that a legal person convicted for foreign bribery will be sanctioned with a fine of two to five years, or three to five times the amount of the benefit obtained or that could have been obtained if the resulting amount is higher. Pursuant to article 131(1), the statute of limitations expires after five years for crimes for which the maximum penalty provided by law is imprisonment or disqualification for five years or less. Therefore, and as confirmed by Spain, the limitation period applicable to legal persons for the foreign bribery offence is five years.

*iii. Limited possibilities to suspend the limitation period hinders foreign bribery investigations*

187. In Phase 3, the Working Group was concerned about the limited possibilities for suspension and interruption of the limitation period in Spain, in particular in view of the time spent for initial prosecutorial investigations. The Working Group thus recommended that Spain review the possibilities for suspension and interruption of the limitation period (Phase 3 recommendation 5.g)(ii)). At the time of the Phase 3 Written Follow-up Report, the PC had yet to be revised, and this recommendation was deemed not implemented.

188. Rules regarding the suspension of the limitation period, provided under article 132(2) PC, have not changed following the 2015 amendment of the PC. Spain thus did not seize the opportunity of the amendments to address recommendation 5.g)(ii). Considering the exceedingly short statute of limitations applicable to legal persons and the uncertainty over the applicable statute of limitations for natural persons, and in light of challenges encountered by prosecutors as practice has developed since Phase 3, the issue still stands.

189. Investigative measures deployed by the Public Prosecutor's Office never interrupt the statute of limitations of the offence under investigation, including requests for MLA. This is problematic, considering the importance of MLA for ACPO prosecutors to be granted the use of special investigative means, as well as to request the opening of a judicial investigation.

**Commentary**

***The lead examiners are satisfied that pursuant to the 2015 amendment of the Penal Code, the statute of limitations for foreign bribery was consolidated. Despite Spain's assertion that the statute of limitations for natural persons increased from 10 to 15 years, this interpretation has never been tested at trial, and questions remain over whether the prison sentence or the supplementary sanctions serve as reference when determining the statute of limitations for foreign bribery. The lead examiners thus recommend that the Working Group follow up on the statute of limitations applied in foreign bribery cases as practice develops, in order to ascertain whether it has in fact been extended, and ensure that it allows for an adequate period of time for the investigation and prosecution of the foreign bribery offence.***

***The lead examiners are extremely concerned that pursuant to the same amendment, the statute of limitations applicable to legal persons is limited to five years. They urge Spain to revise the applicable rules and ensure that the limitation period is adequate to pursue a foreign bribery case against legal persons.***



***The lead examiners also regret that the amendment of the Penal Code was not seized as an opportunity to extend the situations in which the statute of limitations can be suspended. The critical importance of MLA to access special investigative means and open a judicial investigation underscore the importance of suspending the statute of limitations when this measure is taken. They reiterate Phase 3 recommendation 5. g)(ii) and recommend that Spain review the possibilities for suspension and interruption of the limitation period, in particular when awaiting MLA in the context of prosecutorial investigations.***

#### **d. Independence of foreign bribery investigations and prosecutions**

190. Article 5 of the Convention provides that foreign bribery investigations and prosecutions shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State, or the identity of the natural or legal persons involved. Investigations and prosecutions must also be conducted independently and free from interference from executive governments.

191. In Spain, the public prosecution service is integrated in the judiciary with functional autonomy. The relevant rules regarding the independence of foreign bribery investigations and prosecutions have not changed since Phase 3. Prosecutors do not receive instructions from the MOJ and do not have an obligation to inform the Ministry on the opening or closing of a case. The same is not true with regard to the *Fiscal General del Estado* (FGE, head of the SPS) as prosecutors, including the ACPO, are required to inform the FGE about significant cases and the FGE can give instructions on individual cases.

192. In Phase 3, in view of the limited number of investigations and the total absence of foreign bribery prosecutions in Spain, the Working Group recommended that the guarantees of independence from the other powers (i) of the FGE and indirectly those of the ACPO, as well as those (ii) of the investigating magistrates be followed up with a view to ensuring that a potential lack of independence of the prosecution combined with its increasingly prominent role does not lead to the consideration of factors prohibited under Article 5 of the Convention (Phase 3 follow-up issue 16(h)). In its Phase 3 Written Follow-up Report, Spain did not provide any new information on the subject.

193. According to Spain, principles of impartiality and independence established in article 117 of the Spanish Constitution, article 1 Organic Law 6/1985 on the Judicial Power, as well as the Spanish Penal Code, are “sufficient and strong tools to prevent interference such as that contemplated in Article 5 of the Convention”. During the on-site visit, ACPO prosecutors asserted that they had never been subject to any kind of interference from the government in the context of foreign bribery investigations and prosecutions. None of the cases terminated to date were closed based on an instruction and the ACPO reported that no cases have been closed by investigating magistrates against the position of the ACPO. Nonetheless, the limited progress on enforcement since Phase 3, and in particular the low number of prosecutions, does not allow the evaluation team to verify this assertion and conclude that prosecutions are conducted without undue interference.

194. In recent years, the European Commission and Council of Europe have emphasised issues pertaining to the perceived independence of prosecution in Spain. In July 2022, the European Commission published its 2022 Rule of Law Report on the rule of law situation in the EU and its respective Country Chapters.<sup>61</sup> The Chapter on Spain raises an issue that had already been signalled in the second compliance report of Spain’s fourth evaluation round from the Group of States against Corruption (GRECO) regarding the autonomy of the prosecution service from the government.<sup>62</sup> In particular, it relays concerns over the fact that the Prosecutor General’s mandate ends at the same time as the Government’s mandate,

<sup>61</sup> European Commission 2022 Rule of Law Report, Country Chapter on the rule of law situation in Spain, available at: [23\\_1\\_194017\\_coun\\_chap\\_spain\\_en.pdf](https://ec.europa.eu/ruleoflaw/document/eu-rule-of-law-report-2022-country-chapter-on-the-rule-of-law-situation-in-spain), p. 5.

<sup>62</sup> Council of Europe Group of States against Corruption, Fourth evaluation round, Second Compliance Report, Spain, available at: <https://rm.coe.int/fourth-evaluation-round-corruption-prevention-in-respect-of-members-of/1680a3fd50>.

which may affect the perception of independence. It stresses that in its Second Compliance Report, GRECO acknowledged that the recommendation addressed to Spain in that regard “had been considered by the Government”, but it resulted in no change in the method of selection and the term of tenure of the Prosecutor General. Finally, the Chapter on Spain reports that in 2020, the Prosecutor general publicly called on the need to reform the statute of the prosecution service.

### Commentary

**Relevant rules regarding the independence of foreign bribery investigations and prosecutions have not changed since Phase 3. In light of the limited progress on enforcement, the lead examiners recommend that the Working Group follow up to ensure that foreign bribery prosecutions are not subject to undue interference, as prohibited by Article 5. They also recommend that the Working Group continue to follow up on the guarantees of independence of the FGE and indirectly those of the ACPO, as well as those of the investigating magistrates.**

## 5. Concluding and sanctioning foreign bribery cases

### a. Resolution of foreign bribery cases through *conformidad*

195. Under article 787 CPC, before the evidence is produced in a criminal trial, the defence, with the agreement of the accused, may request that the judge dictates its sentence in the terms set out by the accusation. This variation of a guilty plea is called “*conformidad*” and can be used to resolve cases where the offence does not exceed six years of imprisonment. The judge must agree with the qualification of the facts and the penalty requested. Should the judge be in disagreement, they may ask that the accusation be modified and the accused’s agreement would be requested once more. Alternatively, the judge may opt to proceed with the trial, which will happen in any case if there is lack of consent from the accused.

196. *Conformidad* is applicable to the basic foreign bribery offence under article 286ter PC, as the maximum applicable sentence is six years. However, a resolution by *conformidad* will not be possible for the aggravated foreign bribery offence established in article 286quater PC, since the applicable penalty is nine years imprisonment. *Conformidad*, where allowed, is also applicable to legal persons, pursuant to article 747(8) PC. Where the defendant that is accepting the *conformidad* is a legal person, the resolution can take place independently from the position adopted by other accused, and the acceptance of the facts in the accusation will not have bearings on proceedings against other accused who did not agree to a resolution. Nevertheless, evidence gathered in the context of a *conformidad* can be used in a separate investigation and trial.<sup>63</sup>

197. The sole foreign bribery case concluded with sanctions to date was resolved through *conformidad*. In the *Publishing Companies* case, the ACPO indicted three natural persons and one legal person for foreign bribery. During the course of the trial, two of the individuals entered into a *conformidad* by agreeing to the facts in the accusation and the penalties requested and were sanctioned for a foreign bribery offence (for an analysis of the sanctions imposed, see section below). The third natural person and the legal person did not agree to enter a *conformidad*. However, according to the judgement, no further evidence was produced regarding their possible involvement in the facts during the trial, and both were acquitted. The judgement in this case includes the facts and legal basis for the *conformidad* but merely states that the third natural person and the legal person were acquitted, without providing the grounds for such decision. Prosecutors at the on-site visit explained that the evidence law enforcement was able to collect in

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<sup>63</sup> OECD (2019), Resolving Foreign Bribery Cases with Non-Trial Resolutions: Settlements and Non-Trial Agreements by Parties to the Anti-Bribery Convention [www.oecd.org/corruption/Resolving-Foreign-Bribery-Cases-with-Non-Trial-Resolutions.htm](http://www.oecd.org/corruption/Resolving-Foreign-Bribery-Cases-with-Non-Trial-Resolutions.htm).

connection with this case was insufficient to secure a conviction of said persons. They were able to resolve the case against two individuals because they accepted the *conformidad*.

198. The *conformidad* system was analysed by the Working Group in Phase 3. Despite the lack of concluded foreign bribery cases at the time, the evaluation team at the Phase 3 on-site visit heard that *conformidad* was increasingly used to resolve domestic bribery cases, but was not provided data to verify this information. Even though resolutions through a *conformidad* were published, little information was available on the terms of the resolution. In order to increase accountability and transparency, the Working Group issued recommendation 5.f) that Spain ensure that the decisions published include elements of the terms reached through *conformidad*. As Spain did not report any measure to address this recommendation in its Phase 3 Written Follow-up Report, the recommendation was deemed not implemented.

199. The decision in the *Publishing Companies* case lacks transparency. Although the *conformidad* was made public, and it details the facts of the case and penalties imposed, as agreed with the accused, the grounds for the acquittal of the persons who did not enter a *conformidad* are not mentioned.

### Commentary

***The use of a variety of forms of resolution is incentivised by the Anti-Bribery Recommendation as part of Parties' efforts to enforce their foreign bribery laws. Spain's conformidad system can be configured as one such tool, but it is not applicable to the aggravated foreign bribery offence under article 286quater PC. The lead examiners thus recommend that Spain, as part of its efforts to increase enforcement of the foreign bribery offence, consider introducing a system of non-trial resolutions for foreign bribery cases that follows the principles of due process, transparency and accountability under the Anti-Bribery Recommendation XVIII.***

***Considering the lack of transparency regarding the grounds for acquittal in the Publishing Companies case, the lead examiners reiterate Phase 3 recommendation 5.f) and recommend that Spain ensure the transparency of decisions reached through conformidad, including all the elements related to the acceptance of the facts and penalties in the accusation, as well as the conclusion of the case in regard to individuals and legal persons who did not enter into the conformidad.***

## **b. Sanctions and Confiscation against Natural Persons upon Criminal Conviction**

### *i. Criminal sanctions for natural persons*

200. As was the case for the elements of the foreign bribery offence, the sanctions regime for the foreign bribery offence was consolidated under article 286ter PC following the adoption of Organic Law 1/2015. In the 2010 redaction of the Penal Code, the existence of two foreign bribery offences under articles 427 (bribery of EU officials) and 445 (bribery of non-EU officials) PC also entailed the existence of two different sets of penalties. The Working Group thus recommended that Spain harmonise the regime of criminal and administrative sanctions for both natural and legal persons (Phase 3 recommendation 4.a)).<sup>64</sup> The Working Group considered that the sanctions available for natural persons needed to be increased in foreign bribery cases involving significant amounts of money (Phase 3 recommendation 4.b)).

201. Under consolidated article 286ter PC, the minimum prison term for foreign bribery offences was raised from two to three years, with a maximum of six years' imprisonment and a fine from 12 to 24 months,

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<sup>64</sup> As was also the case for the recommendations pertaining to the foreign bribery offence, recommendation 4.a) was deemed not implemented in the Phase 3 Written Follow-up Report because the legislation was pending adoption by the Spanish Parliament. See Spain [Phase 3 Written Follow-up Report](#), paras. 5 and 13.

unless the benefit obtained exceeds the resulting sum, in which case the fine will be set at one to three times the value of the profit obtained.

202. Pursuant to article 50(4) PC, fines applicable to natural persons have a minimum daily quota of EUR 2 and a maximum daily quota of EUR 400. Months are fixed as having 30 days and years as having 360 days. That means that the fines applicable to a natural person range from EUR 720 (12 months at a daily quota of EUR 2) to EUR 288,000 (24 months at a daily quota of EUR 400). The maximum limit of 24 months of fine is not applicable when the benefit obtained from the bribe exceeds the resulting sum (EUR 288,000). Article 286ter (1) PC provides that in such cases, the fine will correspond to an amount up to three times the amount of the benefit obtained.

203. The aggravated foreign bribery offence under article 286quater PC would result in the imposition of a penalty “in its upper half”, or a penalty of the following higher degree. Under article 70(1)(1) PC, the penalty of a higher degree will be the sum of the higher limit of the applicable penalty and half the higher limit. Hence, in the case of foreign bribery, as the higher limit of the applicable penalty is six years of imprisonment, half of this limit would be three, which would result in a maximum penalty of nine years imprisonment under article 286quater PC. The same rationale applies to fines, increasing the maximum fine applicable to a natural person to 36 months. This translates to a maximum applicable fine of EUR 432,000 (36 months at a daily quota of EUR 400).

204. In addition to the penalties of imprisonment and fine, under article 286ter (1)(2) PC the offender can also be sanctioned with (i) a ban from contracting with the public sector; (ii) the loss of the possibility of obtaining public subsidies or aid; (iii) forfeit of the right to tax or social security benefits and incentives; and (iv) a ban on participating in commercial transactions of public significance for a period of seven to twelve years. Courts are competent to communicate the judgement that imposes such fines to the administrative authorities responsible for executing these measures. As further examined under [D.2.a](#), courts do not systematically carry out these communications to public procurement authorities. No information was obtained regarding communication to other authorities responsible for the execution of these measures.

*ii. Only one case, resolved through conformidad, has led to sanctions against natural persons*

205. In Phase 3, given the lack of information on the practical use of this instrument, the Working Group decided to follow up on whether the level of sanctions imposed against natural and legal persons, including through *conformidad*, are effective, proportionate and dissuasive (Phase 3 follow-up issue 16(d)). To date, only one case of foreign bribery has been concluded with sanctions in Spain, and it was concluded through a *conformidad*. The case in question, the *Publishing Companies* case,<sup>65</sup> was concluded in 2017 but the facts predated the entry into force of the 2015 reform of the Penal Code, and the court hence applied article 445 PC.

206. In the *Publishing Companies* case, two individuals were found guilty of transferring EUR 70,000 to senior public officials of the Ministry of Education of the Republic of Equatorial Guinea, which allowed them to enter into four new contracts in the total amount of EUR 16,653,000. The court did not determine the amount of the profits obtained by the two individuals. The ruling convicted both natural persons to one year of imprisonment and a special disqualification from the right to stand as candidates for any election during the time of the sentence. Additionally, the court imposed a six-month fine with a daily fee of EUR 6 (which corresponds to EUR 1,080), with a subsidiary liability in the event of default of three months of deprivation of liberty. The court also applied administrative sanctions, as analysed below.

207. The practical assessment of the adequacy, proportionality and dissuasiveness of these sanctions is necessarily limited, considering that the amount of the profits obtained through the bribes was not

<sup>65</sup> Judgement nº 3/2017 of 23.02.2017 of the Criminal Division of the *Audiencia Nacional*, Abbreviated Proceedings no. 45/2014.

calculated by the court. It should be noted that the court took into consideration, as a mitigating factor, the fact that both defendants admitted to the facts. Under article 66 PC, the presence of one mitigating factor determines the sentence to be applied in the lower half of the range for the offence in question. This might explain, at least partially, why the amount of the fine imposed appears to be exceedingly low when taking into account the amount of the bribe (EUR 70,000) and the value of the contracts thus obtained (EUR 16,653,000). Mitigating factors are further analysed below under section iv.

208. The *Publishing Companies* case also resulted in the imposition of a penalty of prohibition to enter into public sector contracts, the loss of the possibility of receiving subsidies and the right to enjoy tax and Social Security benefits or incentives, and the prohibition of partaking in business transactions of public significance for a period of three years and six months.

### **Commentary**

***The lead examiners commend Spain for increasing the maximum statutory limit of the sanctions for natural persons by creating an aggravated foreign bribery offence through article 286quater PC following the 2015 PC amendment. However, no foreign bribery cases have been tried under the new sanctions regime, which limits the lead examiners' ability to assess it in practice. Additionally, only one foreign bribery case has been concluded through *conformidad* to date, providing a very limited sample for analysis of the sanctions imposed through this resolution mechanism.***

***The lead examiners thus recommend that Spain ensure that sanctions against natural persons in practice, in particular those imposed following a judgement through *conformidad*, are effective, proportional and dissuasive.***

***The lead examiners also recommend that the Working Group continue to follow up on the flow of information from the judicial authorities to the authorities responsible for the administrative sanctions systems.***

#### *iii. Calculation of the fine when the benefit obtained exceeds a certain amount*

209. Article 445 PC (in the pre-2015 amendments version) provided for a fine based on the amount of the profit where the profit exceeded the maximum fine of EUR 288,000. The Phase 3 Report noted the absence of guidelines to help investigators and prosecutors calculate the profit derived from the bribery and ensure a consistent approach (Phase 3 recommendation 4.c)). At the time of the Phase 3 Written Follow-up Report, recommendation 4.c) was deemed not implemented.<sup>66</sup> Article 286ter in the current version of the PC also provides that the fine may be increased, but the reference to “profit” was replaced with “benefit”. Foreign bribery is punished with “a fine of 12 to 24 months, unless the benefit obtained exceeds the resulting sum, in which case the fine shall be up to three times the amount of such benefit” (underline added).

210. The method for calculating the benefit obtained from foreign bribery is not clear. According to Spain’s responses to the Phase 4 Questionnaire, the benefit, whether obtained or intended, corresponds to the amount of the contract or business operation in the framework of which the bribery took place. Nevertheless, during the on-site visit, law enforcement officials alluded to a calculation of the actual profit obtained through bribery, which would contradict the information provided in the Questionnaire responses. It thus remains unclear which of the two methods – calculation of the profits or the gross benefit of the contract – is taken into account in practice as the basis for arriving at the amount of the fine imposed.

<sup>66</sup> Spain [Phase 3 Written Follow-up Report](#), paras. 7 and 13.

### Commentary

***The lead examiners note a lack of clarity on the method for calculating the benefit obtained from foreign bribery. As the benefit is the starting point for calculating the fine to be imposed when it exceeds a certain amount, the lead examiners reiterate Phase 3 recommendation 4.c) and recommend that Spain issue guidelines to help investigators and prosecutors assess the benefit from corrupt transactions to ensure consistency in the calculation of fines to be imposed under article 286ter PC.***

#### *iv. Mitigating factors, and suspension and conversion of prison sentences*

211. In Phase 3, the Working Group decided to follow up on the level of sanctions imposed against natural and legal persons, in light of (i) Spain's system of suspending and converting sentences of imprisonment; and (ii) the application of mitigating factors, especially in cases of solicitation of bribes by foreign public officials (Phase 3 follow-up issue 16(d)).

212. Article 66 PC allows for a substantial reduction of the applicable penalties if certain mitigating factors occur. The verification of one mitigating factor determines the sentence to be applied in the lower half of the range for the offence in question. The verification of two mitigating factors results in the applicable penalty to be inferior in one to two degrees to the one in the basic offence, as per the rules under article 70 PC.<sup>67</sup>

213. The Spanish legal system also allows for a suspension of prison sentences, where the sentence is imposed for less than two years, provided that it constitutes a first offence and the perpetrator has paid compensation to the victim (articles 80 and 81 PC). The Phase 3 Report noted that judicial practice appeared to consist of automatically granting a suspension to first offenders. Article 88 PC, which allowed judges to substitute prison sentences with fines or community work (with consent of the convicted party) in cases involving prison sentences of less than one year, was repealed by the 2015 PC amendment.

214. In the *Publishing Companies* case, both defendants admitted to the facts, which was taken into consideration by the court for the calculation of the fine, eventually set at the very low amount of EUR 1,080. As the sole foreign bribery case concluded to date, this case represents a very limited sample that does not allow drawing a firm conclusion on the application of mitigating factors in foreign bribery cases. However, even though this case was tried under the 2010 version of the Penal Code, since article 286ter PC did not change the amount of the fine, it raises the question of whether mitigating factors may prevent the imposition of effective, proportionate and dissuasive sanctions. In the absence of guidelines and additional case law, the scope of the mitigating factors and their full impact on the sanctions applicable to natural and legal persons remains to be determined.

### Commentary

***In light of the fine imposed in the *Publishing Companies* case, the lead examiners recommend that Spain take necessary measures to ensure that (i) suspension or conversion of sentences and (ii) mitigating factors do not prevent the imposition of effective, proportionate and dissuasive sanctions against natural and legal persons in foreign bribery cases.***

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<sup>67</sup> Article 70(2) PC provides that the penalty in an inferior degree will be formed starting from the minimum limit of the penalty in question and deducting half of its amount. The result will be the minimum limit of the penalty of inferior degree; the maximum limit of the penalty will be the minimum limit of the base offence reduced by one day of prison or one day of fine, depending on the nature of the penalty imposed.

#### v. *Statistics on sanctions*

215. In Phase 3, the Working Group recommended that Spain compile statistics on the criminal, civil and administrative sanctions imposed for domestic and foreign bribery in order to assess whether they are effective, proportionate and dissuasive. At the time of the Phase 3 Written Follow-up Report, Spain did not provide any data and recommendation 4.d) was deemed not implemented.

216. The General Council of the Judiciary collects judicial statistics, providing data on different types of judicial proceedings classified by crime. However, the information does not specify if the rulings resulted in acquittal or conviction, or the sanctions imposed. The General Prosecution Office publishes an Annual Report that provides data on indictments put forth by the ACPO, also categorised by crime. Finally, the Administrative Registry system to support the Administration of Justice (SIRAJ) includes data on the overall number of convictions in any given year. It is unclear how the information contained in different statistical databases interconnects, and none of these three entities record statistics on criminal, civil and administrative sanctions imposed in domestic and foreign bribery cases.

#### *Commentary*

***The lead examiners reiterate Phase 3 recommendation 4.d) that Spain compile statistics on the criminal, civil and administrative sanctions imposed for domestic and foreign bribery in order to assess whether they are effective, proportionate and dissuasive.***

#### vi. *Confiscation*

##### **Confiscation authorities**

217. The Asset Recovery and Management Office (*Oficina de Recuperación y Gestión de Activos*, “ORGA”) within the MOJ is the administrative body responsible for locating, recovering, conserving, and managing the products of criminal activities in accordance with the criminal and procedural legislation. ORGA is also the entity competent to exchange information with similar foreign authorities. ORGA is staffed with 52 civil servants with different professional backgrounds, including tax agents and law enforcement authorities.<sup>68</sup> Specialised units for asset tracing and confiscation have also been established within law enforcement authorities since 2010, with an average staff of 15 officials.

218. Spain reports that since the establishment of these units, assets traced have increased in 30% and confiscated assets in 15%. In 2020, ORGA obtained EUR 2,030,425 in confiscated assets. However, ORGA does not compile information on the amounts confiscated per offence and therefore data on confiscation of assets in corruption cases is not available.

219. According to Spain, ORGA provides training every year to judges and magistrates, public prosecutors, law enforcement officials and judicial counsellors. However, the training does not take into account the origins of the assets and, therefore, there is no specific training on proceeds of foreign bribery.

##### **Confiscation of the bribe and of the proceeds of bribe**

220. In Phase 3, the Working Group expressed concerns regarding the provisions for confiscation in foreign bribery cases, and whether these were applicable to legal persons. At the time of the Phase 3 Written Follow-up Report in March 2015, Spain was working on a proposal to reform the Penal Code. As the bill had yet to pass in Parliament, recommendation 4.e) was deemed not implemented.

<sup>68</sup>[https://www.mjusticia.gob.es/es/AreaTematica/OficinaRecuperacion/Documents/5.%202021\\_01\\_Datos%20estad%c3%adsiticos\\_memoria\\_orqa\\_2019\\_V03MAQUETADA.pdf](https://www.mjusticia.gob.es/es/AreaTematica/OficinaRecuperacion/Documents/5.%202021_01_Datos%20estad%c3%adsiticos_memoria_orqa_2019_V03MAQUETADA.pdf).

221. Following the 2015 amendments to the Spanish Penal Code, under the revised article 127bis(1)(g) PC, both the amount of the bribe and the proceeds of foreign bribery – or assets corresponding to those amounts – are subject to confiscation. The provisions under article 127 et seq. are equally applicable to legal persons. These provisions also allow for confiscation of gains or profits from foreign bribery, including on the basis of circumstantial evidence. The revision of articles 127 and 128 PC transposed EU Directive 2014/42/EU of the European Parliament and the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the EU. Provisional measures such as freezing or seizure of assets are available under Spanish legislation as precautionary measures under articles 589 and 764(1) and (2) CPC, and articles 726 and 727 of the Civil Procedure Act.

222. Where a third party is affected by a confiscation order, the rules on “autonomous confiscation” under article 803ter CPC apply, a procedure that allows deprivation of assets even in circumstances where the suspect cannot be tried. Confiscation of an equivalent value or by substitution is also envisaged under article 127(3) PC. Confiscation can also be extended to other assets belonging to the criminally liable party, even those of lawful origin, when confiscation is not able to be carried out in whole or in part (articles 127quinquies, 127sexies, and 127septies PC).

### **Confiscation in practice**

223. Spain reports that, in practice, the main investigative tool for tracing funds that has been used by the ACPO is the analysis of bank records, often traced through MLA requests. Such was the case in the *Angolan Police* case, where MLA requests received from Luxembourg and Switzerland allowed to establish the passage of the proceeds of bribes through other jurisdictions from which information could not be obtained (such as Singapore). Spain was also able to recover proceeds derived from bribery in the *Saudi Arabian Military Equipment* and the *Panamanian Tenders* cases. Spain has also received MLA requests from foreign law enforcement authorities requesting information on assets located in Spain. One such MLA request received from Peru is currently being processed. The decision in the *Publishing Companies* case did not impose confiscation on the two convicted individuals, which means there was no recovery of the amount paid as a bribe or the proceeds of bribery.

224. Regarding provisional measures, these have been enacted in only six ongoing investigations, mostly blocking of bank accounts and the imposition of a prohibition to dispose of real estate assets. Confiscation or provisional measures were imposed in all but one of the four cases currently pending trial (the *Angolan Wholesale Markets* case).

225. During the on-site visit, the evaluation team discussed with prosecutors and investigating magistrates their experience in calculating the proceeds of bribes for confiscation purposes. The benefit obtained from the contract is used as the reference to determine provisional measures such as blocking of bank accounts. Hence, at the investigation stage, enforcement authorities look into the gross amount of the benefit obtained from the bribe, and the real amount of the proceeds is calculated during trial, with all evidence gathered. If this calculation is not possible, the starting point for confiscation purposes will be the gross amount and the accused will have the onus to prove their spending to arrive at a net value.

### ***Commentary***

***The lead examiners commend Spain for the clarification of the rules on confiscation applicable to natural and legal persons, as well as their efforts to increase inter-agency co-operation. They however note that provisional measures have only been applied in a low number of cases and confiscation has not been pursued in one ongoing prosecution. The lead examiners thus reiterate Phase 3 recommendation 4.e)(iii) and (iv) that Spain take steps to ensure that law enforcement authorities actively seek confiscation in foreign bribery cases, whenever appropriate. The lead examiners also recommend that the Working Group follow up on method for calculating proceeds of bribery.***



## 6. International co-operation

### a. Mutual legal assistance

#### i. Changes in authorities in charge and legal basis for receiving and granting MLA

226. Following Spain's transposition in 2018 of the EU Directive 2014/41/EU regarding the EIO in criminal matters,<sup>69</sup> the MOJ, which had been acting as the Spanish central authority for incoming and outgoing MLA requests for the purpose of the Convention since Phase 2, manages only MLA involving non-EU Member States. As for MLA involving EU Member States, the SPS or the Spanish judge, depending on the nature of the request, is competent to receive and execute incoming requests, and to send outgoing requests.

227. The legal framework related to MLA was also amended. In addition to the 2018 amendments to Law 23/2014, which transposed Directive 2014/41/EU,<sup>70</sup> Spain amended the LOPJ in 2015.<sup>71</sup> In Phase 3, article 276 LOPJ provided that MLA requests were to be approved by the Chief Justice of the Supreme Court, the High Court, or the MOJ, and article 277 established that MLA were executed based on international treaties or reciprocity.<sup>72</sup> Following the amendments, both the approval and the reciprocity requirements were removed. The main bases for providing MLA in Spain are now EU law (for MLA requests among EU Member States), multilateral and bilateral treaties, and the LOPJ.

228. Incoming and outgoing MLA requests involving EU countries are recorded by the International Co-operation Unit of the SPS in an electronic filing system called "CRIS". CRIS allows the monitoring of the execution of MLA requests related to all matters, including foreign bribery cases. Incoming and outgoing MLA requests involving non-EU countries are recorded by the MOJ in a database. During the on-site visit, the MOJ explained that the database was recently updated in order to enable the digital transmission of requests.

229. MLA requests involving EU countries are made through EIOs, which are based on the principle of mutual recognition of judicial decisions between EU Member States. Directive 2014/41/EU recognises the requirement of dual criminality among the reasons for non-recognition or non-execution. However, the requirement of dual criminality is removed when the offence falls in one of the categories covered by article 11 of the Directive (article 20 of Spanish Law 23/2014), including corruption, and when the offence is punishable by a penalty of imprisonment of three years or more. Thus, the dual criminality requirement does not apply to foreign bribery (punished with three to six years' imprisonment). However, it could apply to the offences of money laundering (punished with six months to six years' imprisonment), tax fraud (punished with one to five years' imprisonment), the offence of false accounting committed by a director (punished with one to three years' imprisonment); and the offence of false accounting committed by other individuals (punished with five to seven months' imprisonment).

230. As regards MLA requests involving non-EU countries, the rules provided in the relevant treaties apply. Spain is a party to a number of multilateral MLA treaties (e.g. UNCAC and the Council of Europe Criminal Law Convention on Corruption) and has signed bilateral agreements with 30 non-EU Member States. In addition, Spain is part of international and regional networks, such as the European Judicial Network, Eurojust, and Conference of Ministers of Justice of Ibero-American Countries. In the absence of

<sup>69</sup> Law 23/2014, of 20 November, 2014 on the mutual recognition of criminal decisions in the European Union, regulating the European Investigation Order, as amended by Law 3/2018, <https://www.boe.es/buscar/act.php?id=BOE-A-2014-12029>.

<sup>70</sup> Ibid.

<sup>71</sup> Organic Law 6/1985, of 1 July 1985, on the Judicial Power, as amended by Organic Law 7/2015, of 21 July 2015, <https://www.boe.es/buscar/act.php?id=BOE-A-1985-12666>.

<sup>72</sup> Spain [Phase 3 Report](#), para. 155.

a treaty, the LOPJ applies. Dual criminality is generally not a condition for granting MLA.<sup>73</sup> However, the dual criminality requirement for seizure and confiscation, and coercive measures, remains in place.<sup>74</sup>

*ii. A new digital platform to process incoming and outgoing MLA requests*

231. Anti-Bribery Recommendation XIX.A.ix. recommends that member countries consider the use of technologies for greater efficiency of the MLA process, including adequate equipment to monitor the progress made on incoming and outgoing MLA requests, presentation of outgoing MLA requests in digital format, and presentation of information provided in response to MLA requests in a digital format suitable for use by the requesting country. In 2021, Spain introduced a general electronic transmission system within the Central Authority which allows the transmission of MLA requests in a digital format from any country. The Central Authority has informed its foreign counterparts of this new possibility and the system is expected to increase the efficiency of MLA process.

232. Additionally, in July 2019, Spain became a Party to the 2019 Treaty of Medellin, which regulates the use of the Iber@ platform for the electronic transmission of international legal co-operation requests between ten Central Authorities of Andorra, Argentina, Brazil, Chile, Colombia, Cuba, Spain, Paraguay, Portugal, and Uruguay. This platform should speed up the processing of requests for international legal co-operation, but it has never been used to date.

*iii. MLA in practice*

**Proactive and resourceful use of MLA in foreign bribery investigations**

233. Since Phase 3, the number of ongoing cases has grown considerably, and thus provides a larger sample to assess Spain's use of MLA in foreign bribery investigations. In Phase 3, Spain reported only five MLA requests related to bribery of foreign public officials.<sup>75</sup> Since then, out of 25 ongoing cases, Spain has requested MLA in 22. In total, between 2013 and 2021, 152 MLA requests were issued in relation to foreign bribery cases, with 94 to Parties to the Convention and 58 to non-Parties to the Convention. During the on-site visit, prosecutors and investigating magistrates confirmed that they frequently resort to this tool. The ACPO, in particular, explained that MLA requests are essential to open and pursue investigations in complex multijurisdictional cases, such as foreign bribery.

**Table 3. Outgoing MLA Requests to Parties and non-Parties in Foreign Bribery Cases since Phase 3**

	2013	2014	2015	2016	2017	2018	2019	2020	2021	Total
MLA requests to Parties	1	6	12	21	13	17	15	7	2	94 (85 executed / 7 non-executed / 2 ongoing)
MLA requests to non-Parties	0	2	3	15	10	9	8	8	3	58 (23 executed / 32 non-executed / 3 ongoing)

Source: Data provided by Spain in its answers to the Phase 4 Questionnaire.

234. In order to facilitate the execution of formal MLA requests, the SPS's International Co-operation Unit makes informal contacts with foreign counterparts prior to submitting such requests. Regular follow ups are made through different channels and, at times, prosecutors in charge of the investigation travel to

<sup>73</sup> Spain [Phase 1 Report](#), Spain [Phase 2 Report](#) and Spain [Phase 3 Report](#).

<sup>74</sup> Spain [Phase 3 Report](#), para. 156.

<sup>75</sup> Spain [Phase 3 Report](#), para. 159.

the demand-side country to accelerate the execution of the letters rogatory. To this date, this has been done in three foreign bribery cases.

235. Spain reports that 71% of its outgoing MLA requests were executed, 25.7% were denied, and the rest are in progress. The reasons for the denial and non-execution of requests are unknown to Spain, except for one request made in 2016 to the United Arab Emirates for which documentation was missing. The time taken by the requested country to reply to Spain's MLA requests varies between 1 month and 3 years and a half, although most of them were executed within a period of no more than 18 months. In the 2021 WGB survey, one WGB member country emphasised issues regarding the format and content requirements of Spanish requests, while another mentioned that the quality was good. One country further noted that the length of MLA Spanish requests resulted in additional work for its authorities.<sup>76</sup>

### Commentary

***The lead examiners commend Spain for its extensive use of MLA in foreign bribery cases. Out of 25 ongoing cases, Spain has requested MLA in 22. Formal MLA requests are often preceded by informal contacts, and followed up through both informal and formal channels. In three foreign bribery cases, Spanish authorities have travelled to the country from which MLA was requested with a view to accelerating the process. Therefore, the lead examiners consider that Phase 3 recommendation 6 is fully implemented.***

***Despite Spain's important efforts, a substantive number of outgoing requests are not being executed. Prompt responses to outgoing MLA requests are crucial for Spanish law enforcement authorities, given the importance of MLA to open a judicial investigation and problems arising from the statute of limitations for legal persons. Therefore, the lead examiners recommend that Spain continue to be proactive when following up outstanding requests, including by routinely contacting foreign authorities.***

### Delays in responding to incoming MLA requests

236. In Phase 3, Spain had only received four MLA requests related to foreign bribery, to which it had responded between three months to one year. Since Phase 3, a total of 35 MLA requests related to bribery of foreign public officials were received by the Spanish authorities from Parties to the Convention. Five requests are still pending and none has been denied, including concerning legal persons. Concerning MLA requests from non-Parties to the Convention, a total of 14 requests were received, of which two are still pending and none were denied. Spain informed that there is no maximum time limit for responding to MLA requests, varying from 20 days to 2 years, 6 months being the average time of response (18 MLA requests were executed in 6 months). The average time to execute MLA requests concerning bank information does not exceed six months.

**Table 4. Incoming MLA requests from Parties and non-Parties to the Convention since Phase 3**

	2013	2014	2015	2016	2017	2018	2019	2020	2021	Total
MLA requests from Parties	0	0	1	0	4	15	9	5	1	35 (30 executed / 5 ongoing)
MLA requests from non-Parties	0	0	0	0	6	1	2	3	2	14 (12 executed / 2 ongoing)

<sup>76</sup> As mentioned previously, six WGB member countries responded to the survey, including three countries reporting on MLA regarding foreign bribery cases, as well as statistics or information for cases that did not involve bribery of foreign officials. The other three countries reported that they did not have MLA experience with Spain and did not provide information on co-operation regarding other corruption offences.

Source: Data provided by Spain.

237. In the 2021 WGB survey, the overall co-operation with Spain was noted as good, but some concerns about their MLA processing time were raised. According to Spain, during the pandemic, MLA requests were processed on a fully electronic basis. However, one country highlighted that, during that time, Spain did not allow for the electronic transmission of its request.

238. Although delays regarding the electronic transmission could potentially be resolved by the new general electronic transmission system, its introduction is relatively recent, and Spain acknowledged during the on-site visit that delays in processing requests are still encountered. To date, there is no data on the use of electronic transmission concerning MLA requests for foreign bribery. In addition, during the on-site visit, the MOJ reported that urgent requests, marked as such or by their nature (e.g. in case of detention), are given priority, but it appears that no clear procedure is in place for this.

### **Commentary**

***The lead examiners commend Spain for the good level of international co-operation provided to its foreign counterparts, in particular banking information. However, delays have been identified in Spain's processing and execution of incoming MLA requests. The new electronic transmission system could speed up the processing of such requests, but has yet to be used for those related to foreign bribery. The lead examiners thus recommend that Spain make full use of the new electronic transmission system to ensure the prompt and effective provision of MLA to foreign counterparts in foreign bribery cases.***

#### **b. International co-operation in multijurisdictional cases**

##### *i. Spain's system for co-ordination through parallel investigations has yet to be successfully deployed in foreign bribery investigations*

239. Anti-Bribery Recommendation IXI. C. v. recommend member countries, where appropriate and in conformity with their national laws and relevant treaties and arrangements, to consider setting up joint or parallel investigative teams when conducting investigations and prosecutions of bribery of foreign public officials that may necessitate coordinated and concerted action with one or several other member countries.

240. Spain has established mixed commissions with France, Mexico, and Morocco, but these commissions have not been used in practice in foreign bribery cases to date. Moreover, while Spain took preliminary steps to establish a joint investigative team (JIT) with Brazil in the context of a foreign bribery case, the project fell through. During the on-site visit, the MOJ explained that the JIT must be grounded in an instrument to which both countries are a party, (e.g. based on international conventions such as the UNCAC), and further subject to an agreement by the Parties, a process that apparently delayed and contributed to the failure of the JIT.

##### *ii. International consultations on the most appropriate jurisdiction*

241. Article 4.3. of the Convention calls for member countries to consult with one another in case of competing jurisdiction over a same set of facts, with a view to determining the most appropriate jurisdiction for prosecution. This subject has gained importance in the last decade, as foreign bribery cases spanning multiple jurisdictions and accordingly, multijurisdictional resolutions, have significantly increased.

242. In Spain, when the country with competing jurisdiction is a member of the EU, the Spanish courts must enter into contact with its foreign counterparts with a view to determining which country should pursue proceedings. Factors taken into consideration include: (a) the residence or nationality of the investigated

person; (b) the place where the crime or the most important component part of the crime has been committed; (c) the competent jurisdiction to obtain evidence; (d) the place where the consequences of the crimes occurred; and (e) the stage of the procedure and penalty of the crime.<sup>77</sup> If both courts consider that they have jurisdiction, the case may be transferred to Eurojust, which can issue a non-binding opinion. When the country with competing jurisdiction over a foreign bribery case is not an EU Member State, prosecutors, as explained during the on-site visit, follow the EU factors detailed above. However, no mechanism for resolving conflicts of jurisdiction exists.

243. In practice, Spain provides two examples of foreign bribery cases where authorities consulted with foreign counterparts, both from members of the WGB, to determine which country should take the lead. The grounds of the decisions included, the nationality, the place where the evidence was obtained, the place where proceedings were at a more advanced stage, and the place where measures to secure the proceeds of the offence were ordered. During the on-site visit, the ACPO also mentioned a new case in which the question of the most appropriate jurisdiction would be examined. It appears that the process for deciding the jurisdiction would follow previous cases, based on consultations with foreign counterparts and the EU factors.

### *Commentary*

***The lead examiners recommend that Spain ensure that joint investigative teams with member countries can be effectively and efficiently established for the purpose of investigating foreign bribery, where appropriate, and that Spain take the necessary measures to strengthen its direct co-ordination in concurrent or parallel investigations and prosecutions of foreign bribery.***

***The lead examiners welcome Spain's consultations with its counterparts in two foreign bribery investigations. They recommend that the Working Group follow up on Spain's efforts to consult member countries in case of competing jurisdictions in foreign bribery cases.***

### **c. Extradition**

244. The framework for extradition has not changed since Phase 3. The framework for active extradition (extradition request from Spain to a foreign country) is set out in articles 824 to 833 CPC and the framework for passive extradition (extradition request a foreign country to Spain) is set out in Act 4/1985 on Passive Extradition. Under Article 13.3 of the Spanish Constitution, the extradition of a national may be granted only in compliance with a treaty or with the law, on the basis of the principle of reciprocity. For extradition between EU Member States, the European arrest warrant and the surrender procedures between Member States apply. In the absence of a specific treaty, Spain may consider the Anti-Bribery Convention as a basis for the extradition of its own nationals.<sup>78</sup>

245. In Phase 3, the Working Group was concerned that Spain had not pursued proceedings for foreign bribery against a Spanish national, after denying their extradition.<sup>79</sup> The Working Group recommended that Spain take measures to ensure that it can either extradite or prosecute its nationals for the offence of bribery of foreign public officials; and raise awareness among its judges, prosecutors and Central Authority of the obligations contained in Article 10 of the Convention (Phase 3 recommendation 7). By the time of its Phase 3 Written Follow-Up Report, this recommendation was not implemented.

246. Since Phase 3, Spain has not extradited an individual or requested extradition in the context of a foreign bribery case. During the on-site visit, prosecutors informed that Spain had denied extradition in two

<sup>77</sup> Article 32 of Law 16/2015, of 7 July, regulating the status of the Spanish national member of Eurojust, conflicts of jurisdiction, international judicial cooperation networks and the personnel of the Ministry of Justice abroad, <https://www.boe.es/eli/es/l/2015/07/07/16>.

<sup>78</sup> Spain [Phase 3 Report](#), para. 157 and [Phase 1 Report](#), p. 22.

<sup>79</sup> Spain [Phase 3 Report](#), para. 161 and [Commentary](#), p. 63.

cases, on the grounds of nationality and lack of reciprocity. However, Spain confirmed that in both cases, it opened its own investigation, both of which are still ongoing. In the 2021 WGB survey, one country raised the issue of poor reactivity of the Spanish authorities regarding extradition requests. However, the sample size does not allow to draw further conclusions.

#### *Commentary*

***The lead examiners welcome the fact that Spain opened its own investigation in two foreign bribery cases where extradition was denied. They recommend that the Working Group follow up on this practice to ensure that Spain continues to either extradite or prosecute its nationals for the offence of bribery of foreign public officials.***

## C. Responsibility of legal persons

### 1. Scope of legal persons' liability for foreign bribery and related offences

247. The Spanish regime for criminal liability of legal persons is set forth in article 31bis PC. In Phase 3, the WGB identified several deficiencies in the regime for criminal liability for legal persons, none of which had been addressed by the time of the Phase 3 Written Follow-up Report. Since then, the regime was amended and clarified by two materials:

- On 30 March 2015, Organic Act 1/2015 modifying the PC (Organic Act 1/2015)<sup>80</sup> amended article 31bis, which regulates to the criminal liability regime for legal persons. Legal persons' liability for foreign bribery is grounded in article 288 of the revised PC, which provides sanctions applicable to legal persons for a number of offences, including the ones foreseen in article 286ter PC (bribery to obtain a competitive advantage) and 286quater PC (aggravated foreign bribery offence).
- On 22 January 2016, Spain's State Prosecutor issued Circular 1/2016 on the criminal liability regime for legal persons, based on the 2015 reform of the PC (Circular 1/2016).<sup>81</sup>

248. The Phase 4 evaluation of Spain is the first opportunity for the Working Group to examine the revised regime for criminal liability of legal persons. The present section examines the standard of liability, including how liability is triggered, and how legal persons are exempt from liability. While it includes on-site panellists' interpretations of the regime and how it would apply in foreign bribery cases, it does not refer to case law since no legal person has been convicted for foreign bribery to date in Spain.

#### **a. Standard of liability and legal persons covered under the 2015 regime**

##### *i. The notion of "indirect benefit"*

249. Pursuant to Organic Act 1/2015, the regime of liability for legal persons no longer requires that the offence be committed "for the account" and "to the benefit" of the legal person. In Phase 3, the WGB was concerned that the combination of these requirements would exclude bribes indirectly resulting in an advantage, such as bribes to the advantage of a subsidiary, as well as bribes to obtain an indirect advantage, such as an improved competitive situation (Phase 3 follow-up issue 16(c)). The revised article 31bis PC refers to acts committed on the legal person's "behalf or for their account, and to their direct or indirect benefit", which appears to address, at least in part, the Working Group's concerns.

250. Section 2.4. of the Circular 1/2016, which provides guidance on the notion of "direct or indirect benefit", appears to take a broad approach, setting forth that "only those conducts that, under the protection of the corporate structure, are carried out by the natural person for their exclusive and own benefit or that of third parties, and are unsuitable to report any direct or indirect benefit to the entity will be excluded".

<sup>80</sup> Organic Law 1/2015 of 30 March 2015, amending Organic Law 10/1995 of 23 November 1995, on the Penal Code, <https://www.boe.es/boe/dias/2015/03/31/pdfs/BOE-A-2015-3439.pdf>.

<sup>81</sup> Circular 1/2016 of 22 January 2016, on the criminal liability regime for legal persons in accordance with the reform of the Penal Code by Organic Law 1/2015, [https://www.boe.es/buscar/abrir\\_fiscalia.php?id=FIS-C-2016-00001.pdf](https://www.boe.es/buscar/abrir_fiscalia.php?id=FIS-C-2016-00001.pdf).

However, it remains to be seen if in practice, an act committed by a related entity and indirectly resulting in an advantage for a company would trigger its liability. According to the Circular, the legal person's liability is triggered when benefits are "obtained through a third party (in the case of company chains)". Nonetheless, its wording in other places raises questions. In particular, the Circular purports that the new language dissipates the doubts expressed by the Working Group in Phase 3 by ensuring that bribes to obtain an advantage that is not "strictly economic" are covered, thereby discounting the other loophole identified by the WGB, regarding bribes indirectly resulting in an advantage.

251. Section 5.6., on criteria to interpret the effectiveness of the organisational and management models, casts further doubts by affirming that "although [...] there is an indirect benefit for the legal entity, corporate liability should not be valued the same in cases in which criminal conduct primarily benefits the company as in those others in which said benefit is secondary or merely tangential to that pursued by the offender." Additionally, the Spanish authorities indicated after the on-site visit that a parent company could be found liable for a bribe paid for the benefit of a subsidiary "if the funds used for the payment come from the parent company or if it is the managers of the parent company who direct the actions of the subsidiary [...]", thereby suggesting that the legal person would not be liable in the absence of a direct or indirect involvement from its part. In the absence of jurisprudence, it remains to be seen how the revised language will be interpreted by courts.

### Commentary

***The lead examiners welcome the amendment of article 31bis PC setting forth that acts committed on the legal person's "behalf or for their account, and to their direct or indirect benefit" are attributable to a legal person. The revised language dissipates the Working Group's concerns regarding indirect advantages, such as an improved competitive situation. However, in the absence of case law, it remains to be seen how courts will apply the revised standard in situations where the bribe was committed by a legal person's related entity, indirectly generating an advantage to the legal person. Circular 1/2016 and the interpretation of the Spanish authorities in that regard cast some doubt. The lead examiners therefore recommend that the Working Group follow up on the interpretation of an "indirect benefit", as case law develops.***

#### *ii. The requirement of a "serious breach" from a manager when the offence is committed by a subordinate*

252. Under the 2010 regime, article 31bis PC set forth that a legal persons' criminal liability would be triggered by offences committed by two categories of natural persons: those in senior positions (legal representatives and managers either *de facto* or *de lege* – article 31bis para. 1), and those subject to the management and control of natural persons in senior positions and over whom "due control" had not been exercised (article 31bis para. 2). The 2015 PC amendments retained the dual categorisation of persons who can trigger the legal person's liability, but introduced a higher standard when the underlying offence is committed by the second category of natural persons. Indeed, under the new article 31bis para.1 b), which replaces former article 31bis para. 2, the offence committed by a subordinate must result from a "serious breach" of a high-level person's "duty of supervision, vigilance and control". As further established in Circular 1/2016, the triggering of the legal person' criminal liability is thus contingent on the act of a manager, either because they committed the offence (31bis para.1 a)), or committed a serious breach of duty that caused a subordinate to commit the offence (31bis para.1b)).



253. Anti-Bribery Recommendation Annex I.B.3.b. states that in systems under which the legal person's liability is only triggered by acts of persons with the highest level of managerial authority, the following cases must be covered:<sup>82</sup>

- A person with the highest level of managerial authority offers, promises or gives a bribe to a foreign public official;
- A person with the highest level managerial authority directs or authorises a lower level person to offer, promise or give a bribe to a foreign public official; and
- A person with the highest level managerial authority fails to prevent a lower level person from bribing a foreign public official, including through a failure to supervise him or her or through a failure to implement adequate internal controls, ethics and compliance programmes or measures.

254. The standard of liability in the revised regime does not appear problematic in regard to the first two situations set forth in Annex I.B.3.b. However, it raises concerns regarding a “failure to prevent” from a person with the highest level managerial authority, which can take the form of a failure to either supervise, or to implement adequate internal controls, ethics and compliance programmes or measures.

**Coverage of the situation where a manager fails to “implement adequate internal controls, ethics and compliance programmes or measures”**

255. The Penal Code does not provide a definition of a “serious breach of duty of supervision, vigilance and control”, but Circular 1/2016 clarifies that the breach is one “of natural persons”, due to “intent or gross negligence”, rather than an “organisational defect of the legal entity”. Therefore, the offence of a subordinate resulting from an inadequate compliance programme due to a manager’s “failure to implement adequate internal controls, ethics and compliance programmes or measures” would not trigger the liability of the legal person, as required by the Anti-Bribery Recommendation. Whereas this cannot be verified in practice in the absence of case law, on-site visit discussions with prosecutors and representatives from the legal profession confirmed that an offence committed by a subordinate as a result of a failure of the company’s internal controls would unlikely constitute a “serious breach”. A few of them suggested that it could depend on the circumstances of the case, but one ACPO prosecutor stated that under article 31 PC and Circular 1/2016, inadequate internal controls would not be sufficient to establish guilt and therefore trigger the criminal liability of the company.

**Coverage of the situation where a manager fails to supervise a lower level person**

256. How a manager’s “failure to supervise” a lower-level employee would be demonstrated to establish the liability of the legal person also raises questions. Although, arguably, a failure to supervise could constitute a “serious breach” of a high-level person’s “duty of supervision, vigilance and control”, it is unclear how prosecutors would prove a serious breach of duty, as it is one that results from “intent or gross negligence”. Article 31bis para. 1.b) PC provides that the serious breach must be assessed “based on the circumstances of the case” which, according to prosecutors met on-site, would “include” a company’s efforts to prevent the offence. However, in Phase 3, it was established that an inadequate compliance programme and the conduct of those implementing it was merely incidental to demonstrate the lack of “due control”, which the Working Group considered would limit the possibilities for prosecutors to prove a “failure to supervise”. It is thus likely that a defective compliance programme would carry even less weight to demonstrate a “serious breach of duty of supervision, vigilance and control” under the revised regime. In

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<sup>82</sup> Alternatively, member countries’ systems for the liability of legal persons for foreign bribery can follow the approach under Anti-Bribery Recommendation Annex I.B.3.a. (“the level of authority of the person whose conduct triggers the liability of the legal person is flexible and reflects the wide variety of decision-making systems in legal persons”).

the absence of practice, it is unknown whether the revised standard of liability would allow to hold a company liable based on a manager's failure to supervise.

### **Commentary**

***The lead examiners are highly concerned that the 2015 amendments of the Penal Code have raised the standards to trigger the criminal liability of the legal person when the offence was committed by a subordinate. The requirement to demonstrate a “serious breach” of a manager’s “duty of supervision, vigilance and control” in such cases places a heavier burden on prosecution than the former rules, which required demonstrating a failure to exercise “due control”. This raises serious doubts regarding coverage by the revised regime of the full range of situations required under Annex I of the Anti-Bribery Recommendation, specifically the legal person’s liability in case of a manager’s “failure to prevent” an offence by a lower level person.***

***In particular, a “failure to implement adequate internal controls, ethics and compliance programmes or measures” would not trigger the liability of the legal person under the revised corporate liability regime, since an organisational defect would not be considered a “serious breach” of a manager’s duty. This loophole is a setback from the previous regime, which already raised the Working Group’s concerns in Phase 3. Additionally, it is unclear how a “failure to supervise”, which is the other form of “failure to prevent” envisioned under Annex I of the Anti-Bribery Recommendation, could be evidenced by prosecutors, considering that a deficient compliance model to prevent the offence would have limited bearing.***

***The lead examiners recommend that Spain take immediate steps to ensure that the standard and level of proof to trigger the liability of the legal person for foreign bribery covers the full range of situations required in Annex I of the Anti-Bribery Recommendation, in particular when the offence results from a failure to prevent the offence by a person with the highest level managerial authority.***

### *iii. One category of state-owned enterprises remains exempt from liability*

257. Organic Act 1/2015 only partially closed the loophole identified in Phase 3 regarding coverage of SOEs. Under the previous regime, “commercial public entities” and “public companies that implement public policies or provide services of general economic interest” were exempt from liability, which resulted in the exclusion of a large range of both SOEs, as well as private companies that remain largely state-controlled in a number of areas of “general economic interest”. Considering the importance of national and regional SOEs, as well as the global economic reach of several SOEs, the Working Group viewed this exception as a “major loophole”.<sup>83</sup> In 2021, the Working Group on Bribery codified a long-standing jurisprudence calling countries to ensure that state-owned enterprises can be held liable for the bribery of foreign public officials in international business transactions (Anti-Bribery Recommendation Annex I B).

258. Pursuant to Organic Act 1/2015, public companies implementing public policies or providing services of general economic interest no longer appear in the list of exempted companies, and can thus be held criminally liable, including for foreign bribery. However, “commercial public entities” remain included in the list, thus raising the question of why this specific category of companies remain exempt.

259. According to Spain, pursuant to article 84 of Law 40/2015,<sup>84</sup> “commercial public entities” are not SOEs but public bodies dependant on the State Public Administration that are part of the Spanish public sector and carry out specific competences and functions that need to be under public control. This contradicts the findings of the Phase 3 Report, which established that commercial public entities are SOEs, and contrasts with Phase 4 on-site visit discussions held with a company organised as a commercial public entity that provides for-profit consulting services on railroad maintenance both in Spain and abroad. It

<sup>83</sup> Spain [Phase 3 Report](#), paras. 44-46.

<sup>84</sup> Law 40/2015 of 1 October on the Legal Regime of the Public Sector, <https://www.boe.es/eli/es/l/2015/10/01/40/con>.

emerged from the discussion with this company that it responded to a call for tender in a high-risk foreign jurisdiction where Spain has two pending foreign bribery allegations and recently terminated an investigation into another. Two of these cases relate to contracts in the railway sector. This discussion therefore invalidated Spain's arguments regarding the outstanding exemption for commercial public entities, as it clearly showed that the company could commit an Article 1 offence.

*iv. Successor liability: adequate rules but questions on their applicability in practice*

260. “Successor liability” refers to doctrines that, under certain circumstances, can ensure that, when an entity (i) acquires or merges with another entity, (ii) divides into separate entities, (iii) dissolves, or (iv) undergoes another form of reorganisation, the successor entity or entities will assume liabilities of the predecessor entity or entities.<sup>85</sup> Anti-Bribery Recommendation Annex I B.5. provides that “Member countries should have appropriate rules or other measures to ensure that legal persons cannot avoid liability or sanctions for foreign bribery and related offences by restructuring, merging, being acquired, or otherwise altering their corporate identity”.

261. In Spain, rules regarding successor liability, as set forth in article 130 para. 2 PC, comply with the Recommendation. However, their application in practice raises questions. In one case, company “A” allegedly paid bribes to foreign public officials before it was bought by Spanish company “B” in 2011. Spain eventually closed the case on the grounds that MLA received from the United States had showed that no criminal proceedings had been opened, and that the United States were not aware of the involvement of any Spanish nationals. However, in the context of the evaluation, the Spanish authorities indicated on several occasions that the alleged bribery scheme had taken place before company “A” was bought by a Spanish company “B”, which could point to a misinterpretation of the rules regarding successor liability and, in practice, constitute a loophole.

**Commentary**

***The lead examiners regret that Spain only partially closed the loophole identified in Phase 3 in regard to state-owned enterprises, leaving commercial public entities exempt from liability. They consider that this is unjustified and recommend that Spain take immediate measures to ensure that all state-owned enterprises can be held liable for foreign bribery under the Penal Code.***

***In light of the statements made by the Spanish authorities regarding the liability of a Spanish company for offences committed by an entity before it was purchased by said company, the lead examiners recommend that the Working Group follow up on the application of rules regarding successor liability as practice develops.***

***b. Exemption of liability under the 2015 regime***

262. As a matter of law, a legal person can be exempt from liability if a certain number of requirements are met. Circular 1/2016 provides that the onus to prove these requirements is on the company. The present section examines the elements and extent of the exemption, with a view of assessing whether it complies with the Convention, and how it is interpreted by prosecutors. This section also examines issues raised by the Organisational and Management Model (OMM).

*i. Elements and extent of the exemption*

263. The requirements for a legal person to be exempt from liability vary depending on whether such liability is sought on the basis of article 31bis PC para.1 a) (offence committed by a legal representative or manager), or b) (offence committed by a subordinate, as a result of a high-level person's serious breach

<sup>85</sup> OECD (2016), *The Liability of Legal Persons for Foreign Bribery: A Stocktaking Report*, footnote p.9.

of their duty of supervision, surveillance, and control). In both cases, the company must prove that an adequate OMM, which includes surveillance and control measures to prevent or significantly reduce the risk of commission of the crime committed or of the same nature, was in place and effectively implemented at the time that the offence was committed. The OMM is analysed in further detail in sub-section 2.

264. Pursuant to article 31bis para. 4, when the liability of the legal person is sought on the basis of article 31bis para.1 b), the OMM adopted and effectively implemented is sufficient to exempt the legal person from criminal liability. When it is sought on the basis of article 31bis para.1 a), article 31bis para. 2 requires three additional elements, in addition to the OMM:

1. The supervision and implementation of the OMM has been entrusted to a body of the legal person with self-governing powers. In small and medium companies, this function can be directly assumed by the administration/managing body;
2. The individual offenders have perpetrated the criminal offence fraudulently eluding the OMM; and
3. An omission or insufficient exercise of the function of supervision, surveillance and control on the part of the body entrusted with the supervision and implementation of the OMM has not occurred.

### **The exemption remains to be tested in practice**

265. In Phase 3, driven by concerns about the previous liability regime the Working Group expressed, and recommended that Spain ensure that the implementation of compliance programmes and internal controls by a legal person cannot be used as a defence to avoid liability (Phase 3 recommendation 3.b)). The new regime introduces a clear exemption, thus raising the question of whether it complies with the Anti-Bribery Convention and Anti-Bribery Recommendation.

266. Anti-Bribery Recommendation Annex I.B.3 provides that when a person with the highest-level managerial authority commits bribery themselves, the liability of the legal person should be triggered. Whether the company had a compliance programme is immaterial. However, it can affect liability when the offence was committed by a lower level person:

“Member countries’ systems for the liability of legal persons for the bribery of foreign public officials in international business transactions should take one of the following approaches:

[...] b. the approach is functionally equivalent to the foregoing even though it is only triggered by acts of persons with the highest level managerial authority, because the following cases are covered:

A person with the highest level managerial authority offers, promises or gives a bribe to a foreign public official;

A person with the highest level managerial authority directs or authorises a lower level person to offer, promise or give a bribe to a foreign public official; and

A person with the highest level managerial authority fails to prevent a lower level person from bribing a foreign public official, including through a failure to supervise him or her or through a failure to implement adequate internal controls, ethics and compliance programmes or measures.”

267. Under the new regime, when the company’s liability is triggered following an offence committed by a subordinate, the effective implementation of an OMM exempts the company from its liability. However, an OMM is insufficient to fully exempt the company from liability when a manager committed the offence, as three additional requirements must be present. The evaluation team cannot fully assess the compliance of these provisions with Annex I.B.3, as they have yet to be tested in practice.

268. Since Phase 3, the Working Group’s jurisprudence on compliance incentives has developed. Anti-Bribery Recommendation XXIII. D. iii. provides that where law enforcement authorities incentivise companies to develop effective internal controls, ethics, and compliance programmes or measures in the

context of enforcement of the foreign bribery and related offences, member countries should ensure that the mere existence of such elements does not fully exonerate the legal person from its liability.

269. In the case of the OMM, the law and Circular 1/2016 put the emphasis on the practical effectiveness of the model, based on the specific risks that it aims to prevent and detect. During the on-site visit, ACPO prosecutors explained that in practice, an OMM in itself would be insufficient to exempt a legal person from liability, regardless of who committed the underlying offence. In particular, they referred to Circular 1/2016, which provides that the company should display a “true business ethic culture”. On its face, the new regime thus appears to comply with Anti-Bribery Recommendation XXIII. D. iii., as the development of the OMM is incentivised by law, but enforcement authorities would assess its efficiency to determine if in practice, it can exempt a company from liability. However, in the absence of case law, it cannot be said with certainty how judges would apply the exemption, and assess the effectiveness of an OMM for the prevention and detection of foreign bribery.

### *Commentary*

***Considering no foreign bribery cases have been concluded to date against legal persons, the lead examiners recommend that the Working Group follow up on its application in practice, to ensure that the mere existence of an OMM does not preclude a company from liability but, rather, that law enforcement assess the adequacy of an OMM to prevent and detect foreign bribery, as a prerequisite for the exemption to be operative.***

### **The prosecutors’ interpretation of the exemption is at odds with the law**

270. Prosecutors met on-site explained that self-reporting and co-operation with law enforcement authorities are required for a company to benefit from the exemption, which is at odds with the letter of the law. Indeed, these elements are not included as requirements of the exemption under article 31bis paras. 2 and 4 PC, but listed as mitigating factors under article 31quarter. The lack of clarity regarding the elements of the exemption by opposition to mitigating factors carries from the previous regime. Former article 31bis para. 4 PC listed four mitigating factors: effective preventive measures before the hearing, self-disclosure, co-operation with the investigation, and remediation. In Phase 3, in the absence of implementing rules, guidelines or case law, the exact scope of these mitigating factors and their impact on the liability of a legal person remained to be determined. Current article 31quarter PC replicates these mitigating factors. The fact that the revised version of the PC clearly outlines the elements of the exemption, while the previous regime did not, should, in principle, dissipate the Working Group’s concerns regarding a possible conflation between elements of the exemption and mitigating factors. However, on-site discussions showed that the problem persists.

271. Prosecutors’ assertion that self-reporting and co-operation are a requirement to the exemption also goes beyond Circular 1/2016, but the misunderstanding could in fact originate from it. Under the section on assessing the effectiveness of an OMM, the Circular provides that a model’s capacity to detect an offence demonstrates its validity and “consequently [...] once the criminal conduct has been detected by the legal person and brought to the attention of the authority, [prosecutors] must request the exemption from the penalty of the legal person”. The Circular thus does not provide that self-reporting is a requirement for exemption, as prosecutors suggest, but an indicator that an OMM is well functioning, and, as such, grounds for prosecutors to request the exemption. Prosecutors’ interpretation of the law thus denotes either a misunderstanding of the revised corporate liability regime, or a misinterpretation of the Circular 1/2016, and suggest that they should be better trained on both. At any rate, this situation shows a miscomprehension that should be addressed urgently through training and awareness-raising.

272. Notwithstanding the issue of prosecutors’ misinterpretation, the lack of clarity about how self-reporting affects a legal person’s liability is a source of confusion for practitioners, who consider that the law is not sufficiently clear in that regard. In their opinion, the Circular goes beyond the law, and they

do not know how it would be applied in practice by judges, since judges are not bound by the Circular. During the on-site visit, representatives of the legal profession explained that they would not recommend their clients to self-report suspicions of foreign bribery as they are unsure about the extent to which it would contribute to preclude them from liability and, in the absence of guidance, they would not be in a position to adequately advise them on how to do it. They claimed that clearer rules on the credit attributed to a company for self-reporting wrongdoing and cooperating with the authorities' investigation, as well as guidance on how to do so in order to obtain such credit, could significantly increase self-reporting and co-operation. This, in turn, could contribute to increasing enforcement. None of the panellists, public and private sector alike, were aware of any instances involving a company self-reporting knowledge or suspicion of foreign bribery to the authorities to date.

### **Commentary**

***The lead examiners are very concerned with the lack of clarity regarding conditions under which a company can be exempt from liability. In particular, inconsistent interpretations on how self-reporting and co-operation with law enforcement authorities affect the liability of a legal person is problematic. Prosecutors contend that these elements are required for a company to be exempt from liability, although they are described as mitigating factors in the law. This misinterpretation could originate from Circular 1/2016, which provides that self-reporting is an indicator of an efficient OMM, and should thus bring prosecutor to request an exemption of liability. In the absence of case law, the lead examiners cannot assess how judges, who are not bound by the Circular, would interpret the law in practice.***

***This situation understandably creates confusion among the private sector. While companies and their counsels are aware that self-reporting and co-operation would affect a company's liability, the lack of clear rules and of guidance on how to self-report and cooperate has a chilling effect. The lead examiners strongly believe that addressing these deficiencies would help increase detection through self-reporting and co-operation from companies, and, in turn, Spain's capacity to successfully resolve foreign bribery cases involving legal persons.***

***As mentioned under A.8, the lead examiners urge Spain to clarify in the law the extent to which self-reporting and co-operation with law enforcement authorities affect a legal person's liability, adopt and publicise guidelines for companies on how to self-report and cooperate with authorities, and train prosecutors on these rules.***

#### *ii. The "organisational and management model"*

### **Definition of an OMM and gap between large companies and SMEs in its implementation**

273. The implementation of an OMM is not mandatory as per the law. Article 31bis para. 5 PC sets forth that an OMM shall:

1. identify activities in whose field the crimes to be prevented may be committed;
2. establish protocols or procedures to define the process for establishing the legal person's will, the taking and implementation of decisions as regards the said protocols and procedures;
3. include processes for managing the financial resources appropriate to impede the commission of crimes that should be prevented;
4. impose the obligation to report on possible risks and non-compliance to the body in charge of monitoring the operation and enforcement of the OMM;
5. establish a disciplinary system to adequately sanction the non-compliance with the model established measures; and

6. carry out a regular verification of the model and of its possible modification whenever significant infringements of its provisions are discovered or whenever changes take place in the organisation, in the control structure or in the activity developed that make them necessary.

274. During the on-site visit, representatives from private sector companies, business organisations and the legal profession explained that a majority of large companies have developed an OMM, in contrast to SMEs, which are lagging far behind on that front. Business organisations described a “clear disconnect” in the level of awareness and implementation of an OMM between the two types of companies. The evaluation team, which was not able to meet with SMEs during the on-site visit, was all the more concerned to note that virtually every stakeholder questioned on the subject had a concurring account on the situation.

275. Various arguments were provided to explain the gap between SMEs and larger companies, including the resource-intensive nature of developing and implementing an OMM. Several panellists viewed this as the result of insufficient government efforts to raise awareness, as further examined under C.2. Others argued that when it comes to foreign bribery risks, the development of OMMs by SMEs is unwarranted, since SMEs are not exporters and thus not exposed to such risks, thereby exhibiting a misguided conflation between the size of companies and their presence on foreign markets. Indeed, official statistics show that in 2018, some 95 000 Spanish SMEs were exporters and, on average, exports represent 49.4% of exporting SMEs’ activities.

#### **Lack of guidance for an effective OMM to prevent, detect and remediate foreign bribery**

276. Guidance on the OMM is provided in Circular 1/2016. Section 5.3 provides “minimum reference guidelines” on each of the six requirements outlined in article 31bis PC, and clarifies at the onset that “it is not the purpose of this Circular to develop the content of the conditions and requirements of programmes included in the necessarily generic provisions of article 31bis PC”. Section 5.6 of the Circular provides nine “Criteria for evaluating the effectiveness of the organisational and management model”. During the on-site visit, representatives of the legal profession exhibited a good level of awareness of the Circular, but explained that while it is useful material, its doctrinal rather than practical nature makes it inadequate for practitioners. A few private sector representatives were familiar with the Circular, and one judge met during the on-site visit, although not attached to the *Audiencia Nacional*, knew of it.

277. The OMM, as outlined in the PC and Circular, is not specific to any particular corporate crime and therefore described in general terms. As such, it does not include some of the key elements to prevent, detect, and remediate foreign bribery. Of particular note is the fact that third-party due diligence is missing from the model. Indeed, while section 5.3. provides clarification on the second requirement of the OMM, noting that “procedures must guarantee high ethical standards, particularly in the hiring and promotion of executives and in the appointment of members of the administrative bodies”, nothing is said of engagement with third-party intermediaries.

278. The Circular refers users to “sectoral regulations of the entity for which a specific organisation and risk management is specifically provided”, but none of the private sector representatives met on-site knew of sectoral regulations that could serve as guidance for the purpose of preventing, detecting and remediating foreign bribery. Representatives from the legal profession, referring to guides released by the UK Serious Fraud Office or the French *Autorité Française Anticorruption* explained that government guidance on anti-bribery OMM would be particularly useful. They further explained that they would refer to anti-bribery standards developed by ISO and UNE, Spain’s Standardisation Organisation, as well as guidance from foreign authorities, to advise their client in designing OMM for preventing foreign bribery. Discussions with ACPO prosecutors showed that such guidance would also be useful to them, as they acknowledged the need to build their expertise in anti-bribery compliance and they, too, refer to ISO and UNE standards, and resort to the expertise of external experts to assess the adequacy of OMMs.

## Commentary

**The lead examiners are extremely concerned that Spain has not issued clear and unified guidance on OMMs for preventing foreign bribery. Circular 1/2016 provides general guidance on each element of the OMM as set forth in the law, but is not specific to foreign bribery. Further, while representatives of the legal profession are aware of the Circular, it is a lengthy material directed at prosecutors, rather than a practical tool readily usable by practitioners. More importantly, the Circular is not binding on judges, which reduces its practical value as guidance for companies.**

**Many companies have adopted OMMs since Phase 3, which is positive. However, and as further examined under C.2., SMEs are lagging far behind large companies. Additionally, given the lack of guidance, OMMs are likely of uneven quality and effectiveness. In order to design OMMs for preventing foreign bribery, companies and their counsels turn to materials issued by foreign governments, as well as international standards such as ISO. Prosecutors and investigators also need training on corporate investigations and OMMs, as examined in further detail under B.3.d. They, too, would therefore benefit from additional guidance.**

**The lead examiners therefore urge Spain to (i) adopt, publish and make accessible to companies of all sizes (especially SMEs) and in all sectors, guidance on an OMM for preventing foreign bribery, including by referring to Annex II of the Anti-Bribery Recommendation, (ii) disseminate the guidance to investigators, prosecutors, and the judiciary; and (iii) encourage Spanish companies, especially SMEs, to adopt models that conform to the guidance.**

## 2. Engagement with the private sector

### a. Spain's efforts to raise awareness of foreign bribery risks and promote anti-corruption compliance remain largely insufficient

279. In Phase 3, the Working Group recommended that Spain raise awareness among companies of all sizes and sectors of article 31bis PC and of the risk of corporate liability for bribery of foreign public officials (Phase 3 recommendation 9). It also recommended promoting, jointly with the relevant professional associations, internal controls, ethics and compliance programmes or measure in businesses involved in commercial transactions abroad, including SMEs (Phase 3 recommendation 14). Measures reported in Spain's Phase 3 Written Follow-up Report to implement these recommendations were deemed insufficient. Since Phase 3, raising private sector's awareness of anti-bribery compliance has become all the more important as Spain has adopted a more sophisticated corporate liability regime, under which a company can be exempt from liability provided that it had implemented an adequate organisational and management model prior to the offence.

280. During the on-site visit, Spain reported that companies' awareness of foreign bribery risks and the importance of developing anti-corruption compliance programmes had increased dramatically in the last ten years, referring to a "shift of perception". This was later confirmed by representatives of the private sector and the legal profession, although it clearly emerged that this shift does not result from government efforts to engage with the private sector. Rather, it has been driven by increased enforcement from other WGB countries of their foreign bribery laws, in particular the United States and the United Kingdom, as well as the widespread recognition of the reputational risks deriving from a foreign bribery conviction.

281. Spain made very limited efforts to raise companies' awareness of foreign bribery risks since Phase 3. The "Brochure on the OECD Convention" referred to in the Phase 3 Report was revised in 2019 and remains accessible on the MOJ and the Ministry of Industry, Trade and Tourism's webpages. The revised version reflects the 2015 amendments to the foreign bribery legislation and corporate criminal liability regime, but efforts to broadcast the Brochure since Phase 3 have been largely insufficient. While at the



time, Spain took steps to distribute it to companies and business associations, this effort was not sustained. Companies met during the on-site visit did not recall having received the Brochure, and were not aware of it. More generally, none of them could provide examples of government initiatives or materials to raise awareness of foreign bribery. The government's 2017 "Internationalisation Strategy for the Spanish Economy 2017-2027" provides for the dissemination to exporting companies of the OECD Guidelines for Multinational Enterprises, the Due Diligence Guidance, and the Anti-Bribery Convention, but in practice, no steps were taken to disseminate the Convention. One week before the adoption of this report, Spain reported that the Ministry of Industry, Trade and Tourism had resent the Brochure to Spanish Commercial Offices posted abroad.

282. The role of the MOFA has also been limited. Spanish officials in charge of economic and commercial affairs posted abroad in Spanish embassies, whose role is to support the internationalisation of Spanish companies, receive information on the Anti-Bribery Convention and are trained yearly on foreign bribery risks. However, while these attachés have direct contact with Spanish companies operating abroad, no specific activities or materials are developed to relay this knowledge to these companies.

283. During the on-site visit, the Spanish authorities appeared to justify this lack of efforts to raise awareness of foreign bribery risks by the heightened level of awareness among Spanish companies. They also pointed to the fact that business associations have an important role to play in that regard. Representatives of business organisations met on-site concurred that the level of awareness is high in large companies, but explained that the government had not engaged in initiatives or produced any new material in that regard since Phase 3. While they were aware of the Brochure, they do not publish it on their website or broadcast it.

284. On par with efforts to raise awareness of foreign bribery risks and the foreign bribery offence, Spain does not raise awareness of the corporate liability regime and the OMM, nor does it promote anti-corruption compliance. In particular, the Brochure makes no reference to Circular 1/2016, which the Spanish authorities justify by the fact that it is directed at prosecutors, rather than companies. While this is admittedly the case, the Circular provides guidance on the elements of a successful OMM and how its efficiency is to be assessed in practice, which is all the more relevant to the private sector as this is the only piece of guidance on the OMM.

285. Raising awareness of the Circular is all the more important as it clearly provides that certification of an OMM does not exempt a legal person from liability. During the on-site visit, private sector representatives explained that due to misleading marketing strategies from businesses delivering these certifications, some companies believe that certifying their OMM will preclude them from liability.

***b. The lack of engagement with the private sector has widened the awareness gap between large companies and SMEs***

286. One notable consequence of Spain's lack of effort to raise awareness is the widening gap between large companies and SMEs in that regard. In Phase 3, a difference on the level of awareness of foreign bribery and development of compliance programme between large companies and SMEs was noted. To date, Spain has not yet engaged in any specific awareness raising activities for SMEs. The Ministry of Trade explained that there is no "segmentation" of the material and initiatives based on the size of companies, and another participant explained that raising SME's awareness of foreign bribery risks and promoting anti-corruption compliance is "not the priority". Consequently, the gap between the two groups has been widening. While the evaluation team did not meet any SMEs during the on-site visit, it emerged from the discussions across the different panels that SMEs continue to have little to no awareness of foreign bribery and, as explained above, lag far behind large companies in the development of OMMs. Representatives of business associations explained that SMEs are "not assisted" by the government, in particular in the development of internal reporting systems.

287. Generally speaking, representatives of the Spanish government did not appear to see the value of enhancing awareness efforts regarding SMEs, considering that they are less exposed than larger companies to the risk of foreign bribery. This denotes a misguided equation between the size of a company and its presence abroad, as explained above, but also a general lack of knowledge on the reality of the foreign bribery risks to which Spanish companies are exposed. In that regard, it could be reminded that in the one successfully concluded foreign bribery case, the company involved was an SME. Whereas it was not sanctioned due to the absence of a liability regime when the offence was committed, this reinforces concerns regarding the government's limited knowledge in that regard.

### ***c. Measures could be taken to provide support to companies facing bribe solicitations abroad***

288. The Anti-Bribery Recommendation introduces standards for member countries to provide better support to their companies facing solicitation abroad. In particular, XII (ii) recommends that member countries provide training to their public officials posted abroad on information and steps to be taken to assist enterprises confronted with bribe solicitation, where appropriate, and provide clear instructions on the authorities to whom allegations of solicitation and foreign bribery should be reported.

289. None of the panellists met on-site, including the Spanish government, representatives from the private sector and the legal profession, were aware of an instance when a Spanish company operating abroad had approached the embassy or representatives of the Spanish government abroad to ask for support when confronted with bribe solicitation. Companies explained that they would not expect Spanish embassies to be able to provide support or guidance in such situations. Representatives of business organisations concurred, explaining that the personnel posted abroad did not have this type of expertise and would thus not be in a position to provide support. The Spanish government explained that government's efforts are focused on helping companies penetrating foreign markets.

#### ***Commentary***

***The lead examiners deeply regret the lack of government efforts to raise awareness of foreign bribery and to promote anti-corruption compliance programmes among the private sector, in particular SMEs. Since Phase 3, Spain has scaled back its engagement with the private sector, which the country appears to justify by a heightened awareness of foreign bribery risks among companies. Spain's largest companies are aware of foreign bribery risks and have developed robust anti-corruption compliance programmes because their activities abroad fall in the purview of anti-foreign bribery laws of other member countries that are recognised as top enforcers. In the absence of engagement from the Spanish government and a credible risk of being prosecuted, other companies are lagging behind.***

***The lead examiners are particularly concerned with the situation of SMEs, which continue to have little to no awareness of foreign bribery, even though a substantial number of Spanish SMEs do business abroad. Similarly, efforts to raise companies' awareness on the revised corporate criminal liability regime and promote anti-corruption compliance are very limited, which, again, chiefly affects SMEs.***

***The lead examiners therefore recommend that Spain raise awareness of the foreign bribery offence, in particular considering the substantive legislative changes following the 2015 PC amendments, and take measures to actively promote the development of the OMM to prevent and detect foreign bribery in companies of all sizes, in particular SMEs. The lead examiners also recommend that Spain take measures to raise awareness on the corporate liability framework among business organisations and professional associations, and further engage with them for the purpose of raising awareness of and disseminating the OMM among the private sector.***

**Finally, in line with the Anti-Bribery Recommendation regarding support to companies facing solicitation abroad, the lead examiners recommend that Spain raise awareness of bribe solicitation risks among Spanish officials posted abroad, with particular attention to high-risk geographical and industrial sectors of operation, and train these officials to provide guidance to companies when facing solicitation.**

### 3. Sanctions against Legal Persons for Foreign Bribery

#### a. General sanctions for legal persons

290. The existence of two foreign bribery offences under the 2010 version of the Spanish Penal Code (articles 445 and 427 PC) translated into the existence of two different sets of penalties for legal persons. As was the case for sanctions for natural persons (B.5.b), the enactment of Organic Law 1/2015 harmonised the sanctions for foreign bribery, including against legal persons. Under article 288(2)(a) PC, a legal person who is liable for a foreign bribery offence will be punished with a fine of two to five years. Pursuant to article 50(4) PC, fines applicable to legal persons will have a minimum daily quota of EUR 30 and a maximum daily quota of EUR 5,000. Months will be fixed as having 30 days and years as having 360 days. That means that the fines applicable to a legal person range from EUR 21,600 (24 months at a daily quota of EUR 30) to EUR 9,000,000 (60 months at a daily quota of EUR 5,000). If the benefit obtained or that could have been obtained through bribery is higher than the maximum statutory limit, a fine of three to five times such benefit will be applied (B.5.b).

291. Regarding the aggravated penalty under article 286quater PC, its application to legal persons is not clear. Article 288(2)(a) PC states that the penalty of fines of two to five years will be applicable to legal persons found responsible of the offences foreseen in articles 286bis to 286quinquies. This would mean that the same penalty of fine of two to five years would apply to legal persons for the conduct described under both article 286ter and article 286quater. However, the offence in article 286quater is an aggravated foreign bribery offence, which should suppose a higher penalty than the one provided for in the basic offence. A literal interpretation of the provision in article 288 PC could conclude that the fine for legal persons would be the same for the basic and the aggravated foreign bribery offences. Prosecutors during the on-site considered that the intention of the law by creating an aggravated offence was to raise the available sanctions for foreign bribery for both natural and legal persons, and therefore the aggravated factors should be taken into consideration when establishing fines for legal persons and the maximum limit of the available fine should be raised accordingly. These provisions have yet to be tested in trial.

292. As no sanctions have been imposed on legal persons in relation to a foreign bribery offence to date in Spain, the evaluation team was not able to assess whether the sanctions regime is in practice effective, proportionate and dissuasive. A comparison with sanctions imposed in domestic cases is not possible, since sanctions are lower than those established for foreign bribery as per the law, and Spain was unable to provide aggregated data on sanctions against legal persons, as statistics on convictions do not distinguish between sanctions imposed on natural or legal persons.

#### Commentary

**Considering that no foreign bribery cases was concluded with sanctions against legal persons to date, the lead examiners recommend that the Working Group follow up on the application of sanctions against legal persons in practice, to ensure that they are effective, proportional and dissuasive.**

**A literal interpretation of article 288 PC suggests that the fines applicable to legal persons are the same for the basic and the aggravated foreign bribery offences, which would mean that the increase in penalties deriving from the aggravated factors under article 286quater PC has no effect**

***on the sanctions imposed on legal persons. The lead examiners thus recommend that Spain take steps to clarify that the aggravated penalties are available for legal persons when the offence falls under article 286quater PC.***

### ***b. Supplementary Sanctions***

293. Pursuant to article 288(3) PC, legal persons may also be sanctioned with the following penalties established under article 33(7)(b)-(g) PC: (1) dissolution of the legal person; (2) suspension of its activities for a term that may not exceed five years; (3) closure of its premises and establishments for a term that may not exceed five years; (4) prohibition to carry out the activities through which it has committed, favoured or concealed the felony in the future; (5) debarment from public subsidies and aid, contracts with the public sector and tax or social security benefits and incentives, for a term that may not exceed fifteen years; and (6) judicial intervention to safeguard the rights of the workers or creditors for the time deemed necessary, which may not exceed five years (article 33 PC, section 7, b) to g)).

294. Article 66bis PC defines the criteria that must be taken into account when applying the penalties under article 33(7) PC: (a) the need to prevent the continuity of the criminal activity or its effects; (b) the economic and social consequences, especially the effects on employees; and (c) the position in the structure of the legal person occupied by the individual or body that failed its obligation of control. Article 66bis(2) PC also establishes that the supplementary sanctions can only be imposed for a period of more than two years where the legal person is recidivist or the legal person is being used instrumentally for the commission of criminal offences.

295. In Phase 3, as per the preamble of Organic Act 5/2010 and the State Prosecution Service Circular 1/2011, the sanctioning policy when it came to legal persons was to prioritise the application of fines, whereas additional measures would be an exception. Some of the criteria under article 66bis PC on the imposition of supplementary penalties, such as the consideration of the economic and social consequences and the effects of sanctions on workers, was deemed by the Working Group as constituting a potential deterrent for judges, which could prevent the application of effective, proportionate and dissuasive sanctions.<sup>86</sup>

296. Prosecutors during the on-site explained that it is debatable whether the judge can impose these sanctions independently or whether they would only do so when the accusation expressly requests that one of these sanctions be imposed on a legal person. It appears that there is no longer an express sanctioning policy that fines should be prioritised, but the lack of data does not allow for an assessment of the frequency at which these supplementary sanctions are requested.

297. Pursuant to the Anti-Bribery Recommendation XXIV, iii, where appropriate and to the extent possible, remedial measures developed by companies to address specific foreign bribery risks, as well as any gaps in their existing internal controls, ethics, and compliance programmes or measures, should be taken into account as mitigating or aggravating factors when making decisions on suspension and debarment. Prosecutors met on-site visit clarified that where mitigating or aggravating factors are taken into consideration for the application of fines, they also need to be taken into account in the determination of supplementary sanctions. As no sanctions have been imposed to legal persons in relation to a foreign bribery offence to date in Spain, the evaluation team was not able to assess the imposition in practice of supplementary sanctions.

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<sup>86</sup> Spain [Phase 3 Report](#), para. 75.

*Commentary*

*The lead examiners recommend that the Working Group continue to follow up on the use of supplementary sanctions under the conditions set out in article 66bis PC.*

## D. Other Issues

### 1. Tax measures for combating bribery

#### a. *Non-tax deductibility of bribes and sanctions*

298. The tax deductibility of bribes is explicitly prohibited under article 15 of Law 27/2014, of 27 November, regulating the Corporate Income Tax. Article 15 establishes the non-deductibility of all expenses derived from actions against any law. The Resolution of the Directorate General for Taxation from 4 April 2016 on the deductibility of interests on tax arrears clarifies that expenses derived from actions against any laws are those contrary to the legal order and thus penalised, as would be the case of foreign bribery. The Basque Country and Navarra authorities also explicitly prohibit the deductibility of bribes under their respective Foral Laws.<sup>87</sup>

299. Article 15, c), of the abovementioned Law on Corporate Income Tax also explicitly prohibits the deductibility of “fines and criminal and administrative penalties (...)”. According to Spain’s responses to the Phase 4 Questionnaire, confiscation is considered as a penalty in criminal procedure and is therefore encompassed by article 15. Regarding natural persons, Spain reports that the net income of economic activities carried out by natural persons is determined according to the rules under the Corporate Income Tax. The issue of a potential deductibility of bribes or sanctions under the Personal Income Tax does not arise, as this statute includes a closed list of expenses that can be lawfully deducted.

300. In Navarra, criminal and administrative penalties are also considered non-deductible expenses under article 23(1)(c) of the Foral Law 26/2016, 28 December, on Corporate Income Tax. In the Basque Country, the non-deductibility of criminal or administrative penalties is similarly regulated in the Corporate Tax regimes, specifically under article 31(1)(c) of Foral Regulation 37/2013, 13 December (Álava), Foral Regulation 11/2013, 5 December (Vizcaya), and Foral Regulation 2/2014, 17 January (Guipúzcoa).

301. The Phase 3 Report noted a lack of awareness of the prohibition to deduct bribes from the regional tax administrations and taxpayers in general (Phase 3 recommendation 8.c)). Information provided by Spain in the Phase 3 Written Follow-up Report did not pertain to the issues identified in the recommendation, and without any updated information on training of tax officials on the scope of the prohibition of deduction or awareness-raising activities for taxpayers, it was deemed not implemented.<sup>88</sup>

302. Spain did not provide any information on awareness-raising activities on foreign bribery carried out by its central or regional tax authorities targeting tax officials or taxpayers in general. Representatives of the AEAT present at the on-site visit stated that they hold forums for large companies, SMEs and financial advisors where there is an exchange of information with the tax administration.

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<sup>87</sup> Navarra: Foral Law 26/2016, of 28 December, on Corporate Income Tax. Basque Country: Foral Regulation 33/2013, of November 27, on Personal Income Tax and Foral Regulation 37/2013, of December 13, on Corporate Income Tax (Álava); Foral Regulation 13/2013, of December 5, on Personal Income Tax and Foral Regulation 11/2013, of December 5, on Corporate Income Tax (Vizcaya); and Foral Regulation 3/2014, of January 17, on Personal Income Tax and Foral Regulation 2/2014, of January 17, on Corporate Income Tax (Guipúzcoa).

<sup>88</sup> Spain [Phase 3 Written Follow-up Report](#), paras. 9 and 13.

### Commentary

**The lead examiners are satisfied that the deduction of both bribes and penalties are prohibited by law across the Spanish tax systems. However, no new information was obtained on awareness-raising of such prohibitions. As such, the lead examiners reiterate Phase 3 recommendations 8.c) to raise awareness of tax officials and taxpayers of these prohibitions, along with the types of expenses that are deemed to constitute bribes, including gifts and entertainment expenses.**

#### **b. Re-examination of tax returns**

303. Where a taxpayer is convicted of domestic or foreign bribery, the tax authorities should re-examine their tax returns for the relevant years to determine whether the bribes had been deducted. This is a practical way of enforcing the non-deductibility of bribes since the tax authorities do not have to prove that a deducted expense was a bribe; this has already been proven in court.

304. According to representatives from the AEAT met during the on-site visit, a tax return can be reopened up to four years after it was originally filed. The tax authorities participate in the criminal procedure as interested parties when the crime in question is tax fraud, and routinely reopen the tax returns of the parties involved in the case. However, for cases involving other criminal offences, the tax authorities rely on the referral of conviction data by the courts, which does not take place systematically.

### Commentary

**To facilitate the re-examination of tax returns and determine whether bribes have been claimed as tax deductions, the lead examiners recommend that Spain implement a mechanism for courts to systematically inform the tax authorities when natural and/or legal persons are convicted of foreign bribery.**

#### **c. Information Sharing**

##### *i. Information sharing with the ACPO*

305. Article 95(1) of the General Tax Law makes an exception to the general rule that tax information is confidential by allowing such information to be shared with law enforcement authorities for the investigation and prosecution of crimes. The regions of Navarra and the three territories of the Basque country provide for almost identical provisions in their Foral laws. Under article 16(1) of Law 19/1992, SEPBLAC has direct and immediate access to information held by Spanish tax authorities. Article 93(3) of the General Tax Law provides that bank secrecy is not an obstacle to tax investigations.

306. Spain does not have statistics regarding the sharing of tax information with law enforcement officials. However, the ACPO has a Support Unit from the AEAT that assists in its investigations. It is through this unit that the Prosecutor's Office has access to taxpayer data held in the AEAT's Consolidated Database (CDB). The CDB contains economic information provided by natural and legal persons, public or private, which is periodically provided to the tax authorities such as tax returns, bank accounts held, transfer of securities or foreign currency, or transactions, deposits, or withdrawals exceeding a certain amount in euros. The CDB also includes information on assets held abroad, as taxpayers have an obligation to declare them under the General Tax Law.<sup>89</sup>

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<sup>89</sup> Spain's responses to the Phase 4 Questionnaire.

## *ii. Information sharing internationally*

307. Regarding the sharing of information internationally, Spain has incorporated the optional language of Paragraph 12.3 of the Commentary to Article 26 of the OECD Model Tax Convention in its bilateral treaties, which allows, under certain conditions, the use of information received by a Contracting State for non-tax purposes, including corruption-related investigations.

308. Sharing of tax information for non-fiscal purposes with other EU member States is done in the framework of Council Directive 2011/16/EU, of 15 February 2011, on administrative co-operation in the field of taxation.<sup>90</sup> With non-EU countries, exchange of information requires a bilateral or multilateral instrument. In 2013, Spain's ratification of the Protocol amending the Convention on Mutual Administrative Assistance in Tax Matters entered into force, which allows the use of information received by a Party for non-tax purposes, including corruption-related investigations under certain conditions. The autonomous regional tax administrations are bound, under the Economic Agreements they concluded with the Spanish central authorities, to abide by the international agreements or treaties signed and ratified by the Spanish State, and are therefore required to provide tax information in accordance with Spain's international obligations.

309. The AEAT has sole jurisdiction in Spain to share tax information internationally and incoming requests must be channelled via this agency. The evaluation team did not receive data on information exchanged with foreign tax authorities in relation to foreign bribery allegations.

## **d. Tax Amnesties**

310. The Phase 3 Report noted the Royal Law-Decree 12/2012, of 30 March (Tax Amnesty Law), which introduced a range of tax and administrative measures, aimed at reducing the public deficit in Spain and regularising hidden income. Under this legislation, until 30 November 2012, individual and corporate taxpayers were permitted to voluntarily disclose unreported income or assets by paying a special 10% levy on the amount or acquisition value, with no criminal or administrative penalties, surcharges or interest. The Working Group decided to follow up on the impact of the Tax Amnesty Law on the effective prevention, detection and punishment of possible foreign bribery by tax officials (follow-up issue 16(k)).

311. During the on-site visit, Spain clarified that Royal Law-Decree 12/2012 only allowed for declarations to be submitted outside of the regular deadlines without sanctions. The amnesty did not extend to potential criminal acts that were uncovered in the analysis of tax returns submitted under its scope. Furthermore, tax authorities relayed that there were in fact criminal investigations that originated in returns submitted under the Tax Amnesty Law, although none relating to foreign bribery offences. Furthermore, the enactment of new tax amnesties was forbidden by Law 11/2021, 9 July, permanently resolving this matter.

## **2. Public advantages**

### **a. Public procurement**

312. Under article 286ter (1) PC, a person who is found liable for a foreign bribery offence will be debarred from future contracts with the public administration, and barred from receiving subsidies and public aids, tax and national insurance benefits and incentives, or take part in commercial transactions of public interest for a period from 7 to 12 years. Law 9/2017, 8 November, on Public Sector Contracts, also

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<sup>90</sup> Council [Directive 2011/16/EU](#) of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC.



contains a provision that prohibits persons convicted by final judgement for crimes of corruption in business to contract with public entities (article 71(1)(a)).

313. To date, there has been only one foreign bribery case concluded with sanctions against two natural persons, the *Publishing Companies* case. In its sentence, the court imposed on both individuals a prohibition to enter into public sector contracts under article 445 PC (applicable to foreign bribery at the time of the facts) for a period of three years and six months.

*i. Due diligence process in the context of public contracting*

314. Bidders in a public call for tender are required to declare that they do not fall under an exclusion clause, which includes a bribery conviction. Before awarding the contract, the procuring entity verifies the veracity of the information provided by the selected bidder.

315. As part of their due diligence, procuring entities are required to consult the Official Register of Tenderers and Classified Companies (the Register), which is publicly available. According to article 338(2) of the Law on Public Sector Contracts, prohibitions to contract imposed by court decisions must be recorded in the Register. Judicial authorities are responsible for communicating decisions imposing a prohibition to enter into public contracts to administrative authorities responsible for executing the administrative measures. Under the Law on Public Sector Contracts, “the body from which the ruling or resolution imposing the prohibition to contract emanates shall, ex officio, send a copy of the ruling or copy thereof to the State Public Procurement Advisory Board”.

316. During the on-site visit, it was confirmed that procuring entities systematically check the Register before awarding public contracts. However, representatives from the State Public Procurement Advisory Board explained that the judicial authorities do not systematically refer decisions imposing a prohibition to enter into public contracts. As a consequence, their knowledge of such prohibitions can be irregular, resulting in information missing from the Register.

317. As regards non-domestic debarment lists, procuring entities have access to the EU debarment list but are not required to consult it and would not systematically do so. Similarly, procuring entities would rarely consult debarments list of multilateral development banks before awarding a procurement contract.

*ii. Consideration of internal controls, ethics and compliance*

318. The Anti-Bribery Recommendation recommends that Parties incentivise their government agencies to consider internal controls, ethics and compliance programmes in their decisions to grant public advantages, such as procurement contracts.<sup>91</sup> Appropriate training and publicly available guidelines should be provided to government agencies on how internal controls, ethics and compliance programmes and measures are taken into consideration in the decision making process.<sup>92</sup>

319. Spain did not provide any information on whether internal controls, ethics and compliance programmes are considered in the process of a tender or adjudicating a public contract. During the on-site visit, representatives of the State Public Procurement Advisory Board explained that the existence of a compliance programme could be examined in the context of awarding a contract, but this is not done systematically. They appeared to doubt the relevance of this process, explaining that in practice, several companies that have been debarred had an anti-corruption programme. In addition, they do not receive training or have access to guidelines on assessing anti-corruption compliance programmes.

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<sup>91</sup> Anti-Bribery Recommendation XXIII.D.i.

<sup>92</sup> Anti-Bribery Recommendation XXIII.D.ii.

### Commentary

**The lead examiners note with satisfaction that Spanish procuring entities systematically consult the Official Register of Tenderers and Classified Companies before awarding public contracts. To ensure that the Register includes all prohibitions to enter into public contracts ordered by courts, they recommend that Spain develop mechanisms to ensure that the judicial authority systematically refer judgements imposing such prohibitions to the State Public Procurement Advisory Board, as currently required by the Law on Public Sector Contracts. Additionally, they recommend that procuring entities routinely check the debarment lists of the EU and multilateral financial institutions in the context of public procurement contracting.**

**The lead examiners also recommend that procuring entities consider, as appropriate, the existence of anti-corruption internal controls, ethics and compliance programmes of companies seeking procurement contracts. For that purpose, they also recommend the development of guidance and training for procurement staff to adequately assess such controls, ethics and compliance programmes, including through reference to Annex II of the Anti-Bribery Recommendation.**

#### **b. Official Development Assistance (ODA)**

320. This Phase 4 evaluation reviews for the first time Spain's ODA system in light of the Recommendation for Development Co-operation Actors on Managing the Risk of Corruption (2016 Recommendation), and in particular sections 6-8 and 10, which relate more directly to foreign bribery.

##### *i. Spain's ODA profile*

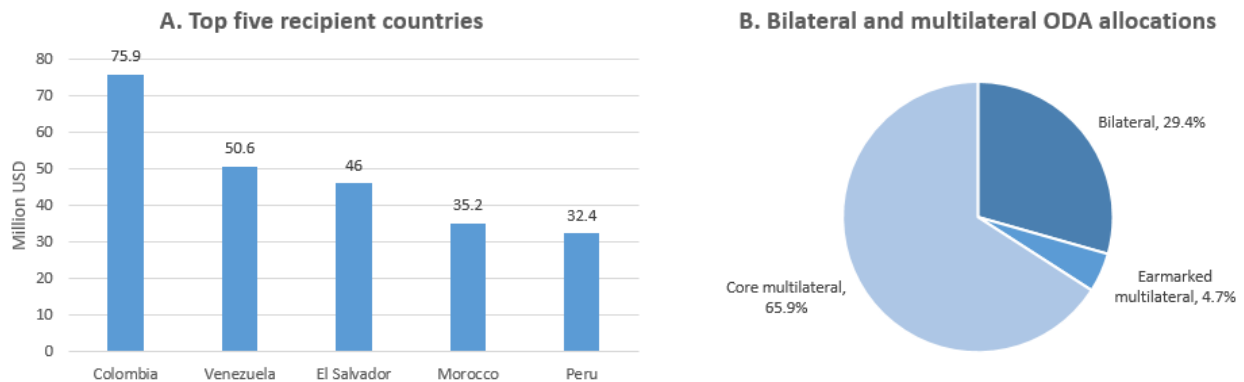
321. Based on preliminary data for 2021, Spain is the 12th largest Development Assistance Committee country provider by volume, allocating USD 3.5 billion to gross ODA, and ranked the 20th most generous country as a share of Gross National Income (GNI), with 0.25% of its GNI destined to ODA. With this allocation, Spain did not meet its national commitment to achieve a 0.4% ODA/GNI ratio by 2020. However, Spain is committed to increase its ODA budget to reach 0.5% ODA/GNI ratio by 2023 (national commitment) and 0.7% ODA/GNI ratio by 2030 (international commitment).<sup>93</sup>

322. The majority of Spain's ODA is multilateral (i.e. awarded to multilateral agencies), with 65.9% of ODA in 2020 mainly allocated to EU institutions and multilateral development banks. Direct bilateral ODA accounted for 29.4% of ODA in 2020, approximately USD 895 million, and bilateral ODA channelled through multilateral organisations (earmarked contributions) for 4.7%. Spain has identified 23 priority partner countries or territories for bilateral co-operation, of which 15 are middle-income partners and 7 are least developed partners. Most of Spain's bilateral ODA is primarily destined to the Latin America and Caribbean region. In 2020, the top five recipients were Colombia (USD 75.9 million), Venezuela (USD 50.6 million), El Salvador (USD 46 million), Morocco (USD 35.2 million), and Peru (USD 32.4 million). Regarding sectors of particular interest, bilateral ODA from Spain focuses on social infrastructure and services (USD 341.8 million) and humanitarian assistance (USD 110 million).<sup>94</sup>

<sup>93</sup> OECD (2022), *ODA Levels in 2021 – Preliminary data*, Detailed Summary Note, OECD, Paris, <https://www.oecd.org/dac/financing-sustainable-development/development-finance-standards/ODA-2021-summary.pdf>; OECD (2021), "Spain", in *Development Co-operation Profiles*, OECD Publishing, Paris, <https://doi.org/10.1787/2dcf1367-en>; and OECD (2022), *OECD Development Co-operation Peer Reviews: Spain 2022*, OECD Development Co-operation Peer Reviews, OECD Publishing, Paris, <https://doi.org/10.1787/eed71550-en>.

<sup>94</sup> OECD (2021), "Spain", in *Development Co-operation Profiles*, *op. cit.*

Figure 6. ODA distribution in 2020



Source: OECD (2021), "Spain", in *Development Co-operation Profiles*

323. Agencies involved in the distribution of Spanish ODA Spain has a range of central and regional development agencies. Autonomous governments and Spanish municipalities are responsible for their own development co-operation policies and decentralised co-operation represented on average 12% of Spain's total ODA in 2018 and 2019.<sup>95</sup> At a national level, the agencies responsible for bilateral ODA are the same as in Phase 3.<sup>96</sup> The Spanish Agency for Development Co-operation (AECID, *Agencia Española de Cooperación Internacional para el Desarrollo*) is the main entity in charge of administering Spanish ODA. It is attached to the MOFA.

324. AECID provides financial co-operation for sustainable development under ODA budgets (coming from the MOFA) via two funds: the Development Promotion Fund (FONPRODE) and the Co-operation Fund for Water and Sanitation (FCAS). FONPRODE offers loans and credits debt to national, regional and local authorities and local financial entities, as well as equities in the form of shares in collective investment companies. COFIDES (*Compañía Española de Financiación del Desarrollo*) serves as FONPRODE's financial adviser, performing risk analysis, due diligence, monitoring and evaluation, while the ICO (*Instituto de Crédito Oficial*) serves as FONPRODE's financial agent. FCAS, which works exclusively with grants, has a more limited remit, focusing on access to drinking water and sanitation for the populations most in need in the Latin America and Caribbean region.<sup>97</sup>

325. During the on-site visit, AECID reported that it does not provide bilateral ODA. Rather, it presented itself as a "junior partner" of multilateral banks and other countries, such as France, Germany, and Italy, leaving due diligence pre- and post-granting of ODA to its partners and COFIDES. AECID further explained that COFIDES is in charge of making the first assessment of a loan before its approval by the MOFA. Once the loan is approved, the ICO negotiates the terms of the contract with the borrowing government. These statements are contrary to the information provided by Spain in the Phase 4 Questionnaire and OECD data on development co-operation. Additionally, Spain only provided information on AECID in its responses to the Phase 4 Questionnaire, and AECID was the sole participant to the on-site visit for ODA purposes.

<sup>95</sup> OECD (2021), "Review of the development co-operation policies and programmes of Spain: A snapshot of Spain's development co-operation" (Peer Review), OECD, Paris, [https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DCD/DAC/AR\(2021\)4/6/FINAL&docLanguage=En](https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DCD/DAC/AR(2021)4/6/FINAL&docLanguage=En).

<sup>96</sup> Spain [Phase 3 Report](#), paras. 182-184.

<sup>97</sup> OECD (2021), "Review of the development co-operation policies and programmes of Spain: A snapshot of Spain's development co-operation" (Peer Review), *op. cit.*

Thus, the evaluation team is not in a position to fully assess Spain's implementation of the 2016 Recommendation and can only consider the responses given in relation to AECID.

*ii. Measures to detect and prevent corruption in ODA contracts*

326. According to Law 38/2003 on General Subsidies,<sup>98</sup> applicants who have been sentenced for bribery offences are excluded from ODA-financed projects. Prior to receiving ODA, applicants are required to certify that they have not been convicted for corruption. This information is then verified against the *Base de Datos Nacional de Subvenciones* (the National Subsidies Database, which comprises information on Spanish subsidiaries, including information on whether the applicant has been sentenced for bribery offences); the Spanish international sanctions list; the EU restrictive measures list; and the EU Exclusion Database. Implementing partners and sub-contractors are also subject to these exclusionary grounds. However, due diligence prior to the granting of ODA contracts does not include the evaluation of the applicant's corruption risk management system nor the analysis of the risk of corruption in the ODA recipient country. During the on-site visit, the evaluation team endeavoured to enquire further about the due diligence process, and in particular to determine whether it includes the consultation of multilateral development banks' debarment lists. As explained above, the representatives of AECID seemed unaware of the fact that Spain provides bilateral ODA, and thus asserted that all due diligence is outsourced to multilateral or majority partners in ODA projects.

327. Once financial aid is granted and the ODA-financed project is implemented, AECID monitors its implementation through mid-term evaluations, and conducts an audit when the contract ends. However, these evaluations are technical and do not include examining for possible indications of bribery. Nonetheless, AECID stated during the on-site visit that every two years the Court of Auditors verifies that AECID budget has been properly invested.

*iii. Reporting and whistleblowing mechanisms*

328. AECID staff are mostly public officials and are therefore subject to the administrative fines that apply to public officials who failed to perform their reporting obligations, as per article 262 CPC. In addition, the AECID Code of Ethics, adopted in 2019, as well as FONPRODE and FACS management procedures expressly contain an obligation to report. Section 3.1 of the AECID Code of Ethics provides that AECID staff is required "to immediately report illegal behaviour linked to money laundering, financing of criminal organisations, extortion, or any other illegal activity." The AECID Code of Ethics establishes an internal reporting channel covering "any illegal or improper behaviour" of any person included in the Code's scope of application (i.e. AECID staff and ODA-financed projects' beneficiaries). However, the AECID Code does not provide any instruction or threshold concerning the reporting of suspicions of foreign bribery, nor does it provide guidance on the offence.

329. Reports are confidential and can be made anonymously. Moreover, the AECID Code of Ethics explicitly protects whistleblowers from any reprisal, harassment or action against them. The AECID Ethics Committee is in charge of investigating the reports. To date, no foreign bribery case has been reported through this channel.

330. In Phase 3, no cases were reported from AECID to law enforcement. The Working Group was concerned about AECID's failure to report to the ACPO a case where salaries paid to officials from an AECID-funded NGO were inconsistent with those reported on the payroll.<sup>99</sup> During the Phase 4 on-site visit, AECID informed the evaluation team that one case of bribery had been reported to law enforcement authorities, but it did not concern foreign bribery.

<sup>98</sup> Law 38/2003, of November 17, 2003 on General Subsidies, <https://www.boe.es/buscar/act.php?id=BOE-A-2003-20977>.

<sup>99</sup> Spain [Phase 3 Report](#), para. 182.

*iv. Awareness-raising and training*

331. FRONPRODE provides an annual general anti-corruption training session to its staff and AECID new employees attend a training seminar promoting effective knowledge of the AECID Code of Ethics as well as the internal channel established for queries and complaints regarding conducts contrary to the code. AECID also provides training to its staff every other year. At the time of the on-site visit, AECID was preparing a training session on international financing that would include a section on foreign bribery.

*v. Sanctioning corrupt practices and information sharing with development banks*

332. The exclusion of a contractor based on a bribery conviction applies throughout the lifetime of a project. AECID will rescind the award of a contract or terminate a contract, asking the reimbursement of the prepaid funds, if a contractor is found guilty of bribery. The termination, suspension or reimbursement of an ODA contract in cases where the beneficiary or the implementing partner engaged in corruption during the course of the contract is established in Law 38/2013 on General Subsidies. Administrative sanctions, without prejudice of criminal sanctions, may also be imposed. Sanctions can be financial and non-financial penalties, i.e. ineligibility to participate in financed projects or prohibition from bidding on public procurement contracts for a period of up to five years. Spain reported that no cases have emerged so far in AECID.

333. Regarding information sharing, at the time of this report, the AECID, the World Bank and regional banks were preparing a memorandum of understanding for cases where foreign bribery has been detected or suspected. However, no information sharing policy or formal memorandum of understanding between Spanish law enforcement and AECID currently exists.

**Commentary**

***AECID is the main entity in charge of the administration of Spanish ODA, with the support of other entities, COFIDES and ICO. The lead examiners regret not meeting with representatives of COFIDES and ICO during the on-site visit. More importantly, the lead examiners struggle to understand why representatives from AECID met on-site asserted that Spain does not provide direct bilateral ODA. This assertion contradicts official statistics and the information provided by Spain before the on-site visit, according to which bilateral ODA accounted for 29.4% of ODA in 2020. Based on this seemingly wrong premise, representatives of AECID explained that any form of anti-corruption due diligence in ODA-funded project is outsourced to multilateral development banks or majority partners in jointly funded projects. As a result, on-site discussions were significantly limited, and the lead examiners were only able to conduct a desk review of Spain's system to prevent, detect, and sanction foreign bribery in ODA projects.***

***As regards the rules, the lead examiners are encouraged by several measures put in place, in particular the exclusion from ODA projects for corruption offences convictions, AECID's verification of Spanish and EU sanctions lists, as well as the adoption of AECID Code of Ethics, including the implementation of an internal reporting channel, and the sanctioning regime.***

***Nonetheless, the lead examiners consider that AECID could enhance its due diligence efforts prior to awarding aid and during its implementation. They therefore recommend that Spain (i) verify the accuracy of the information provided by applicants by consulting publicly available debarment lists of international financial institutions; (ii) analyse and consider the risk of corruption in an ODA recipient country before awarding ODA contracts; and (iii) undertake appropriate due diligence on the applicants' corruption risk management systems, prior to the granting of ODA.***

***Noting that not one foreign bribery case was detected through ODA to date, the lead examiners recommend that Spain take measures (i) to provide clear instructions or guidelines on how to detect foreign bribery in ODA projects and on the concrete steps to be taken if suspicions of***

**corruption should arise, including reporting the matter as appropriate to law enforcement authorities; and (ii) to ensure that ODA staff as well as contractors in high risk areas are regularly trained on the risks of foreign bribery.**

### **c. Officially Supported Export Credits and Credit Guarantees**

#### *i. Due diligence measures to prevent foreign bribery in the context of export credits*

334. CESCE is Spain's officially supported export credit and insurance agency. Spain also counts with a number of regional trade promotion agencies. Since Phase 3, CESCE has extended its rules regarding anti-corruption declarations by exporters. In addition to declaring awareness of the Anti-Bribery Convention and the Penal Code, and undertaking not to bribe, CESCE requires applicants to declare "the importance of developing, applying and documenting appropriate management control systems within its organisation to prevent and detect bribery" and that neither the applicant nor anyone acting on its behalf in relation with the transaction is blacklisted by a multilateral development bank.

335. The due diligence process regarding applicants has not changed since Phase 3. As part of the process, CESCE checks the information made public by the ACPO on a yearly basis. While they do not have a direct channel with the ACPO, CESCE explained during the on-site visit that it is able to confirm with the ACPO whether a company is under investigation. While due diligence is applied to a specific applicant, if relevant information on another client surfaces during the process, it is included in CESCE client database as a "red flag". As a result, since Phase 3, CESCE has uncovered that several of its clients are under investigation for bribery. In such cases, the contract guaranteed by CESCE cannot be terminated, as termination is contingent on a court decision, but it is suspended.

336. Rules regarding enhanced due diligence have been strengthened since Phase 3. CESCE conducts an enhanced due diligence process in situations where: (1) an applicant appears on the debarment list of a multilateral development bank; (2) an applicant is currently under investigation for bribery; (3) an applicant has been found guilty of bribery by a judicial or administrative court in the last five years; (4) "commercial commissions" represent more than 5% of the price of the contract; or (5) there are reasons to suspect that a crime has occurred in connection with the export transaction. Additionally, companies with more than EUR 10 million guaranteed are systematically required to provide yearly information, including on their anti-bribery policies and the international guidelines followed.

337. In the context of enhanced due diligence proceedings, applicants are required to complete a questionnaire informing whether they have a compliance system in place and how the system works in practice, including information on anti-corruption training and regular reviews of the compliance programme. CESCE reviews the information provided and conducts interviews with compliance officers to verify that the system is implemented effectively. During the on-site visit, CESCE explained that they would refer to the Penal Code and OECD Guidelines for Multinational Enterprises to assess the adequacy of the system. No mention was made of Annex II of the Anti-Bribery Recommendation.

338. Finally, policies regarding agents' commissions have also changed. Where a transaction involves a commercial commission, applicants are required to complete a specific questionnaire on the commission, including information on the identity of the agent and the purpose of the commission.

#### *ii. Detection and reporting*

339. CESCE is not a public body and its officials are not considered public officials. Therefore, they are not subject to the sanctions that apply to public officials who failed to perform their reporting obligations, as per article 262 CPC. Where evidence of bribery is uncovered during an enhanced due diligence, the matter is brought to the attention of the CESCE Board of Directors. In case of "credible evidence of bribery"

the Board will refer the matter to the ACPO, judicial police, and the Secretary of State for Commerce. Similarly, whistleblowers' reports would be forwarded to the ACPO.

340. At the time of Phase 3, the Working Group issued recommendation 15.a) due to concerns over two instances of suspicions of foreign bribery detected by CESCE that were not reported to the ACPO. The first arose from the CESCE's media monitoring, and the second was brought to its attention by a report from an exporter. According to CESCE, these suspicions were not reported because no credible evidence had been uncovered following an evaluation of the two cases.<sup>100</sup>

341. In its Phase 3 Written Follow-up Report, Spain reported that CESCE had reviewed and clarified its criteria for reporting, in line with recommendation 15.a). Detection measures had reportedly been improved, including consultation of international financial institutions debarment lists. With regards to the criteria for reporting, Spain explained that CESCE had adopted a clear definition of what amounts to a suspicion of bribery (however, details of this definition were not provided). Further, a reporting channel had been established for use when enhanced due diligence or further analysis is deemed to be needed. Recommendation 15.a) was deemed fully implemented.

342. Since Phase 3, no foreign bribery cases have been detected and reported by CESCE. CESCE conducts media monitoring and weekly reviews of the publicly available debarment lists of international financial institutions of both applicants and persons who have already received credits. CESCE does not conduct random inspections. During the on-site visit, CESCE explained that it would be challenging for their staff to detect a foreign bribery case. It acknowledged that another exporter can report foreign bribery practices via its whistleblowers channel, but this has not happened since Phase 3. Furthermore, since Phase 3, its media monitoring has not detected any case that was not already under investigation by the ACPO. CESCE stated that if a suspicion of bribery is found through the media, CESCE generally does not refer the information to the ACPO, as it is assumed that the ACPO is already informed. It also explained that it does not have more sources to detect foreign bribery than open source searches or whistleblowers' reports.

*iii. Incentivising internal controls, ethics and compliance programmes for the purpose of preventing and detecting foreign bribery in attributing export credits*

343. The Anti-Bribery Recommendation recommends that Parties incentivise their government agencies to consider internal controls, ethics and compliance programmes for the purpose of preventing and detecting foreign bribery in their decisions to grant public advantages, such as officially supported export credits.<sup>101</sup> Appropriate training and publicly available guidelines should be provided to government agencies on how these elements are taken into consideration in the decision making process.<sup>102</sup> As mentioned above, CESCE includes the assessment of compliance programmes during its enhanced due diligence. However, it does not consider internal controls, ethics and compliance programmes in the context of attributing export credits unless enhanced due diligence has been triggered.

### **Commentary**

***The lead examiners welcome the fact that CESCE has strengthened its internal mechanisms for examining export credit applications. However, no foreign bribery cases have been detected and reported by CESCE to date. By CESCE's own admission, the institution has limited capacity to detect foreign bribery in supported projects, noting in particular that the research they conduct is limited to open sources and they do not conduct inspections to detect foreign bribery red flags after support has been granted.***

<sup>100</sup> Spain [Phase 3 Report](#), para. 174.

<sup>101</sup> Anti-Bribery Recommendation XXIII.D.i.

<sup>102</sup> Anti-Bribery Recommendation XXIII.D.ii.

***The lead examiners therefore recommend that Spain (i) undertake a review of CESCE's policies to identify how they could be better applied in practice to enable detection of foreign bribery in supported projects; (ii) provide CESCE staff with training and awareness-raising activities to help them identify and address instances of potential bribery of foreign public officials in supported projects; and (iii) enhance CESCE's reporting mechanisms in order to ensure that allegations of foreign bribery are transmitted to the ACPO.***

***Furthermore, the lead examiners recommend that Spain encourage CESCE to consider internal controls, ethics and compliance programmes for the purpose of preventing and detecting foreign bribery in its decisions to grant export credits in all instances, rather than merely in cases where enhanced due diligence is triggered. In this perspective, they also recommend the development of guidance and training for CESCE staff to adequately assess such controls, ethics and compliance programmes, including through reference to Annex II of the Anti-Bribery Recommendation.***



## E. Conclusions: Positive achievements and issues for follow up

344. The Working Group considers that enforcement of the foreign bribery offence in Spain remains a serious cause for concern, especially in view of the size of the Spanish economy, and the geographical and industrial sectors in which Spanish companies operate, which represent high corruption risks. It is particularly concerning that to date, not one company was sanctioned for foreign bribery. Spain should therefore promptly take necessary steps to more proactively detect and enforce its anti-bribery legislation. Furthermore, Spain must extend the statute of limitations applicable to legal persons and, with due respect to judicial independence, ensure that application of its foreign bribery laws is not in practice subject to a restrictive interpretation by its law enforcement and judiciary.

345. Of the Phase 3 recommendations that were outstanding after the 2015 Written Follow-up Report, Spain has fully implemented recommendations 2.a) – d) (foreign bribery offence), 4.a) and b) (sanctions), 5.d) (investigation and prosecution of foreign bribery cases), 6 (MLA), 7 (extradition), 8.d) (tax) and 12 (anti-money laundering). It has partially implemented recommendations 1 (enforcement), 3.a) and b) (responsibility of legal persons), 5. a), b), c), f) and g) (investigation and prosecution of foreign bribery cases) 4.e) (confiscation), 8.a) (tax), 9 (awareness-raising), 13.b) (accounting and auditing), and 14 (company internal controls, ethics and compliance programmes or measures). Spain has not implemented recommendations 3.c) (responsibility of legal persons), 4.c) and d) (sanctions), 8.c) (tax), 5.e) (investigation and prosecution of foreign bribery cases), 11 (whistleblower protection), and 13.a) (accounting offences).

346. In conclusion, based on the findings in this report, the Working Group acknowledges the good practices and positive achievements set out in Part 1 below and makes the recommendations set out in Part 2. The Working Group will also follow up the issues identified in Part 3. The Working Group invites Spain to submit an oral report in one year (i.e. in December 2023) on the status of the bill to protect whistleblowers and progress on enforcement of foreign bribery and a written report on the implementation of all Phase 4 recommendations and issues for follow up in two years (i.e. in December 2024), including detailed information on its foreign-bribery enforcement actions.

### 1. Good practices and positive achievements

347. This report has identified several areas of progress related to Spain's implementation of the Convention and related instruments. Given Spain's limited foreign bribery enforcement, it is not possible to ascertain whether these actually represent good practices and positive achievements that have proved effective in combating foreign bribery.<sup>103</sup> Nevertheless, the Working Group considers that some areas developed by Spain could constitute good practices or positive achievements.

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<sup>103</sup> See [Phase 4 Monitoring Guide](#), which states that Phase 4 evaluations should also reflect good practices and positive achievements which have proved effective in combating foreign bribery and enhancing enforcement.

348. As regards good practices, Spanish authorities are very active and resourceful when it comes to requesting MLA, laying the ground through informal contacts, following-up regularly after sending the request, and, in some instances, traveling to the country where assistance was requested. SEPBLAC's feedback to reporting entities through individual meetings, periodic meetings with professional associations and yearly feedback on the quality and quantity of STRs is commendable. As regards the criminal liability of legal persons, it is positive that Circular 1/2016 on the regime for legal persons' liability clearly establishes that a certification of an organisational and management model does not exempt a legal person from liability.

349. As regards positive achievements, the substantive 2015 reform of the Penal Code further aligned relevant provisions on the foreign bribery offence and legal persons' liability with the Anti-Bribery Convention and the Anti-Bribery Recommendation. The Spanish authorities in charge of receiving MLA requests refer to the ACPO those involving foreign bribery matters over which Spain could be competent, which has led to the opening of several cases since Phase 3. Detection through the anti-money laundering system has also increased. Spain raised sanctions against natural persons through the introduction of a new calculation method based on the benefit obtained from the bribe, as well as the enactment of an aggravated foreign bribery offence that increases the maximum of a prison sentence to 9 years. Additionally, the prohibition to deduct bribes and sanctions was clarified across all Spanish tax systems.

## 2. Recommendations of the Working Group on Bribery

### *Recommendations regarding detection of foreign bribery*

1. Regarding **detection of foreign bribery**, the Working Group recommends that Spain:
  - a. take steps to ensure that law enforcement authorities increase their efforts and capacity to detect foreign bribery by proactively gathering information from diverse sources of foreign bribery allegations [2021 Anti-Bribery Recommendation VIII; Phase 3 recommendation 5(e)];
  - b. enhance the ACPO's capacity to detect foreign bribery cases by deploying additional means for monitoring Spanish and international media for foreign bribery allegations involving Spanish companies or individuals, including appropriate human resources, expertise, foreign-language skills, training and potentially software [2021 Anti-Bribery Recommendation VIII];
  - c. (i) urgently adopt its draft law on whistleblower protection, and (ii) once the law is enacted; raise public awareness of the framework for whistleblower protection, in particular on the existing reporting channels, the protections afforded to whistleblowers, and the usefulness of whistleblower reports [2021 Anti-Bribery Recommendation XXII(xii)];
  - d. provide training to its tax officials on the detection of foreign bribery and on the applicable requirement for reporting suspected offences to law enforcement officials [2021 Anti-Bribery Recommendation IV(i) and XXI(iii); 2009 Recommendation on Tax Measures II; Phase 3 recommendation 8(a)];
  - e. take steps to increase its public officials' reporting of foreign bribery by: (i) issuing guidelines on the procedure for reporting knowledge or a suspicion of a foreign bribery offence for staff in the public administration and posted abroad; (ii) clarifying the appropriate reporting channels to communicate knowledge or a suspicion of foreign bribery offence; (iii) raising awareness and providing regular training about the reporting obligation, the guidelines and the reporting channels, and (iv) updating the applicable fines under article 259 CPC [2021 Anti-Bribery Recommendation XXI(i) – (iv)]; and

- f. take measures to enhance detection by the accounting and auditing profession by (i) developing awareness-raising activities and training on the foreign bribery offence in the accounting and auditing profession to ensure auditors are in a capacity to detect foreign bribery red flags; and (ii) encouraging external auditors to take greater account of the risks of foreign bribery in the companies that they audit [Convention Article 8; 2021 Anti-Bribery Recommendation X.B; Phase 3 recommendation 13(b)].
2. Regarding **anti-money laundering** (AML) measures to enhance detection of foreign bribery, the Working Group recommends that Spain ensure that SEPBLAC continues its efforts to reach out to reporting entities and increase the quality of STRs, while putting an emphasis on non-financial obliged entities, such as those in the real-estate and gambling sectors, tax advisors, and legal professionals [Convention Article 7; 2021 Anti-Bribery Recommendation XXI(iii)].

### *Recommendations regarding enforcement of the foreign bribery offence*

3. Regarding **co-operation, resources, and specialisation in foreign bribery cases**, the Working Group recommends that Spain:
  - a. establish a national database for all ongoing cases with a view to ensuring co-ordination of foreign bribery investigations nationally and maintain statistical data on cases involving foreign bribery that may be carried out by law enforcement authorities other than the ACPO's central office, including delegate prosecutors in the ACPO local offices, other units of the SPS, and police units [Convention Article 5; Phase 3 recommendation 5(e)(iii)];
  - b. ensure that the ACPO staff and resources dedicated to foreign bribery are sufficient to seriously investigate all foreign bribery allegations [Convention Article 5; Commentary 27; 2021 Anti-Bribery Recommendation VI(ii) and VII];
  - c. with a view to proactively pursuing foreign bribery cases against natural and legal persons, ensure that both ACPO prosecutors and non-ACPO prosecutors : (i) receive regular training on the foreign bribery offence and legal persons' liability for foreign bribery, as well the investigative techniques adapted to this offence; and (ii) receive guidance and training to build the expertise necessary to assess the efficiency of an "organisational and management model" to prevent and detect foreign bribery [Convention Articles 2 and 5; 2021 Anti-Bribery Recommendation VI(iii) and Annex I.B; Phase 3 recommendation 5.a(ii)];
  - d. ensure that police forces and investigating magistrates and judges, both from the *Audiencia Nacional* and regional courts, receive adequate training on the specific elements of the foreign bribery offences and on the investigative techniques adapted to this offence with a view to pro-actively detecting, investigating and prosecuting the offence of bribery of foreign public officials by both individuals and companies [Convention Articles 2 and 5; 2021 Anti-Bribery Recommendation VI(iii) and Annex I.B; Phase 3 recommendation 5.a(i)]; and
  - e. ensure that non-ACPO and local ACPO prosecutors, when they are competent to examine foreign bribery matters, benefit from the support and expertise of the central ACPO unit.
4. Regarding the **evidentiary threshold for the foreign bribery offence**, the Working Group recommends that Spain clarify by any appropriate means that its foreign bribery offence should be interpreted consistently with Article 1 of the Convention, including by providing training and disseminating written information to investigators, prosecutors, and judges on the requirements of the foreign bribery offence under the Convention. This information should, at a minimum, ensure that (i) the foreign bribery offence encompasses acts that fall under the discretion of foreign public officials; (ii) the foreign bribery offence is in all cases autonomous; and (iii) "obtaining or retaining business" is interpreted in a broad manner to encompass more than contracts [Convention Article 1 and Commentaries 3, 4, and 7; Phase 3 follow-up issue 16(a)].

5. Regarding **investigation and prosecution of foreign bribery**, the Working Group recommends that Spain:
  - a. take all necessary measures to increase enforcement against both natural and legal persons and, in particular, to effectively enforce its corporate liability regime [Convention Articles 1, 2 and 5; 2021 Anti-Bribery Recommendation IV(iii) and VI; Phase 3 recommendation 3(c)];
  - b. create a database to maintain statistics, including on investigation, prosecution and termination of cases involving the foreign bribery offence and related offences of money laundering and false accounting [Convention Articles 1, 5, 7 and 8; 2021 Anti-Bribery Recommendation IV(iii), VI and XV(iii)];
  - c. urgently take necessary steps to ensure that ACPO prosecutors have sufficient time to effectively conduct prosecutorial investigations [Convention Article 6];
  - d. ensure that the limitation period for judicial investigations is sufficient for proper investigation and prosecution of foreign bribery;
  - e. in order to ensure that foreign bribery allegations are seriously investigated and allegations are not prematurely closed, ensure that ACPO prosecutors: (i) make extensive use of all investigative means at their disposal to gather sufficient evidence from the early stages of a foreign bribery investigation, in particular by taking investigative steps as they await MLA from foreign counterparts; (ii) have access to special investigative means, including search and seizures and wiretapping, from the early stage of foreign bribery investigations, including, if necessary, by adjusting the requirements to obtain judicial authorisation to use such means; and (iii) use information technology and conduct forensic audits when relevant [Convention Article 5; 2021 Anti-Bribery Recommendation VI(ii), X (i)-(ii); Phase 3 recommendation 5(c)];
  - f. takes steps to ensure that the threshold to open a judicial investigation into foreign bribery allows for the effective investigation and prosecution of foreign bribery allegations [2021 Anti-Bribery Recommendation VI(ii) and Annex I D(ii)];
  - g. (i) ensure that the statute of limitations to pursue a foreign bribery case against a legal person is adequate; and (ii) review the possibilities for suspension or interruption of the limitation period, in particular when awaiting MLA in the context of prosecutorial investigations [Convention Article 6; 2021 Anti-Bribery Recommendation IX]; and
  - h. as part of its efforts to increase enforcement of the foreign bribery offence, consider introducing a system of non-trial resolutions for foreign bribery cases that follows the principles of due process, transparency and accountability [2021 Anti-Bribery Recommendation XVII and XVIII].
6. Regarding the **false accounting offence**, the Working Group recommends that Spain (i) vigorously investigate and prosecute false accounting offences where appropriate, and, to this end, raise awareness and provide training to law enforcement authorities, and (ii) ensure that the criminal and administrative penalties against natural and legal persons for false accounting are effective, proportionate and dissuasive in practice [Convention Article 8].
7. Regarding **sanctions and confiscation**, the Working Group recommends that Spain:
  - a. in regard to resolutions through a *conformidad*, ensure that: (i) all the elements related to the acceptance of the facts and the penalties in the accusation are published, and (ii) the conclusion of the case in regards to individuals and legal persons who did not enter into the *conformidad* is sufficiently transparent [2021 Anti-Bribery Recommendation XV(iii); Phase 3 recommendation 5(f)];

- b. take necessary measures to ensure that: (i) suspension or conversion of sentences; and (ii) mitigating factors do not prevent the imposition of effective, proportional and dissuasive sanctions against natural and legal persons in foreign bribery cases [Convention Article 3];
  - c. ensure that sanctions against natural persons in practice, in particular those imposed following a judgement through *conformidad*, are effective, proportional and dissuasive [Convention Article 3];
  - d. issue guidelines to help investigators and prosecutors calculate the benefit from corrupt transactions to ensure consistency in the calculation of fines to be imposed under article 286ter PC [Convention Article 3; 2021 Anti-Bribery Recommendation XV(i); Phase 3 recommendation 4(c)];
  - e. compile statistics on the criminal, civil and administrative sanctions imposed for domestic and foreign bribery in order to assess whether they are effective, proportionate and dissuasive [Convention Article 3; 2021 Anti-Bribery Recommendation XV; Phase 3 recommendation 4(d)]; and
  - f. take steps to ensure that law enforcement authorities actively seek confiscation in corruption cases, whenever appropriate [Convention Article 3; 2021 Anti-Bribery Recommendation XVI; Phase 3 recommendation 4(e)(iii) and (iv)].
8. Regarding **international co-operation**, the Working Group recommends that Spain:
- a. continue to be proactive when following up outstanding requests [[Convention Article 9(3); 2021 Anti-Bribery Recommendation XIX.A(x)];
  - b. make full use of the new electronic transmission system to ensure the prompt and effective provision of MLA requests related to foreign bribery cases to foreign counterparts [Convention Article 9(1); 2021 Anti-Bribery Recommendation XIX.A(vi) and (ix)]; and
  - c. (i) where appropriate, ensure that joint investigative teams with WGB member countries can be effectively and efficiently established for the purpose of investigating foreign bribery; and (ii) take the necessary measures to strengthen its direct co-ordination in concurrent or parallel investigations and prosecutions in foreign bribery [Convention Article 5; 2021 Anti-Bribery Recommendation XIX.C(i) and (v)].

### *Recommendations regarding the liability of, and engagement with, legal persons*

9. Regarding **corporate liability**, the Working Group recommends that Spain:
- a. (i) clarify in the law the extent to which self-reporting and co-operation with law enforcement authorities affect a legal person's liability; (ii) train prosecutors on these rules; and (iii) adopt and publicise guidelines for companies on how to self-report and cooperate with authorities [Convention Article 2 and 2021 Anti-Bribery Recommendation IV(i)-(ii)];
  - b. take immediate steps to ensure by any appropriate means that the standard and level of proof to trigger the liability of the legal person for foreign bribery covers the full range of situations required in Annex I.B.3 to the Anti-Bribery Recommendation, in particular when the offence results from a failure to prevent the offence by a person with the highest level managerial authority [Convention Article 2, 2021 Anti-Bribery Recommendation Annex I.B.3 and Phase 3 recommendation 3(b)];
  - c. take immediate measures to ensure that all state-owned enterprises can be held liable for foreign bribery under the Penal Code [2021 Anti-Bribery Recommendation Annex I.B.1.]; and

- d. (i) adopt guidance on the “organisational and management model” for preventing foreign bribery, including by referring to Annex II of the Anti-Bribery Recommendation; (ii) publish and make accessible the guidance to companies of all sizes (especially SMEs) and in all sectors; (iii) disseminate the guidance to investigators, prosecutors, and the judiciary; and (iv) encourage Spanish companies, in particular SMEs, to adopt models that conform to the guidance [Convention Article 2 and 2021 Anti-Bribery Recommendation Annexes I.B and II].
10. Regarding **sanctions applicable to legal persons**, the Working Group recommends that Spain take steps to clarify whether aggravated penalties are available for legal persons when the facts of a case constitute the offence established in article 286quater PC, as is the case for natural persons [Convention Article 3].
11. Regarding **engagement with legal persons**, the Working Group recommends that Spain:
- a. (i) raise awareness among companies of all sizes of the foreign bribery offence; and (ii) actively promote anti-corruption compliance, in particular SMEs [2021 Anti-Bribery Recommendation IV(ii), XXIII.C(i) and Annex II.A.];
  - b. take measures to raise awareness on the corporate liability framework among business organisations and professional associations, and further engage with them for the purpose of raising awareness of and disseminating the organisational and management model among the private sector [2021 Anti-Bribery Recommendation IV(ii), XXIII.C(ii), and Annex II.B.]; and
  - c. (i) raise awareness of bribe solicitation risks among Spanish officials posted abroad, with particular attention to high-risk geographical and industrial sectors of operation; and (ii) train these officials to provide support to companies in need of guidance when facing solicitation [2021 Anti-Bribery Recommendation XII(i) and XII(ii)].

### *Recommendations regarding other measures affecting implementation of the Convention*

12. Regarding **tax measures to combat foreign bribery**, the Working Group recommends that Spain:
- a. raise awareness of tax officials and taxpayers on the prohibition to deduct both bribes and penalties, along with the types of expenses that are deemed to constitute bribes, including gifts and entertainment expenses [2021 Anti-Bribery Recommendation XX; 2009 Recommendation on Tax Measures I.(ii); Phase 3 recommendation 8(c)]; and
  - b. implement a mechanism for courts to systematically inform the tax authorities when natural and/or legal persons are convicted of foreign bribery to facilitate the re-examination of tax returns and determine whether bribes have been claimed as tax deductions [2009 Recommendation on Tax Measures I].
13. Regarding **public advantages**, the Working Group recommends that Spain:
- a. with respect to **public procurement**: (i) develop mechanisms to ensure that the judicial authority systematically transfer judgements prohibiting to enter into public contracts to the State Public Procurement Advisory Board, as currently required by the Law on Public Sector Contracts ; (ii) ensure that procuring entities routinely check the debarment lists of the EU and multilateral financial institutions in the context of public procurement contracting; (iii) ensure that procuring entities consider, as appropriate, the existence of anti-corruption internal controls, ethics and compliance programmes of companies seeking procurement contracts; and, for that purpose; and (iv) provide training and guidance for public procurement staff to

adequately assess such controls, ethics and compliance programmes, including through reference to the Annex II of the 2021 Anti-Bribery Recommendation [2021 Anti-Bribery Recommendation XXIV(ii); XXIII D(i)-(ii)];

- b. with respect to **official development assistance (ODA)**: (i) verify the accuracy of the information provided by applicants by consulting the debarment lists of international financial institutions; (ii) analyse and consider the risk of corruption in an ODA recipient country before awarding ODA contracts; (iii) undertake appropriate due diligence on the applicants' corruption risk management systems, prior to the granting of ODA ; (iv) take measures to provide clear instructions or guidelines on how to detect foreign bribery in ODA projects and on the concrete steps to be taken if suspicions of corruption should arise, including reporting the matter to law enforcement authorities; and (v) ensure that ODA staff as well as contractors in high risk areas are regularly trained on the risks of foreign bribery [2021 Anti-Bribery Recommendation XXI(vi); 2016 Recommendation for Development Co-operation Actors on Managing the Risk of Corruption 3(ii) and (iii), 6(iii) and (iv), 7(iii)]; and
- c. with respect to **export credits**: (i) undertake a review of CESCE's policies to identify how they could be better applied in practice to enable detection of foreign bribery in supported projects; (ii) provide CESCE staff with training and awareness-raising activities to help them identify and address instances of potential bribery of foreign public officials in supported projects; (iii) enhance the reporting mechanisms in order to ensure that allegations of foreign bribery are transmitted by CESCE to the ACPO; (iv) encourage CESCE to consider internal controls, ethics and compliance programmes for the purpose of preventing and detecting foreign bribery in its decisions to grant export credits in all instances, rather than merely when enhanced due diligence has been triggered; and (v) provide training and guidance for CESCE staff to adequately assess such controls, ethics and compliance programmes, including through reference to the Annex II of the 2021 Anti-Bribery Recommendation [2021 Anti-Bribery Recommendation XXI(vi), XXIII.D(i) and (ii), XXIV(i), 2019 Recommendation on bribery and officially-supported export credits, V].

### 3. Follow up by the Working Group on Bribery

14. The Working Group will follow up on the issues below as case law, practice and legislation develops:
  - a. The capacity of tax authorities, both the AEAT and the autonomous authorities of the Basque Country and Navarra, to detect foreign bribery;
  - b. The cooperation between the ACPO and SEPBLAC, to ensure that the ACPO systematically provides feedback to SEPBLAC about the outcome of specific cases generated or enriched by information transmitted by the FIU;
  - c. Whether SEPBLAC has sufficient human and financial resources to adequately perform its functions;
  - d. Whether authorities receiving MLA requests continue to systematically forward suspicions of foreign bribery to the ACPO, as well as related offences and other corporate crimes that might indicate a foreign bribery pattern involving Spanish companies or individuals;
  - e. The interpretation and application of the foreign bribery offence in practice, to ensure that article 286ter PC applies to all foreign bribery cases, including those where the alleged bribe receiver is an official from an EU institution or country;
  - f. The Spanish courts' interpretation of the elements of the foreign bribery offence;

- g. The enforcement of the money laundering offence in foreign bribery cases and the sanctions applied to these cases;
- h. The co-ordination and communication between the ACPO's central office and delegate prosecutors in the ACPO local offices, as well as between the ACPO and other units of the SPS, in relation to foreign bribery allegations, investigations and prosecutions;
- i. Spain's efforts to raise awareness at the national level about the need to prioritise the investigation of foreign bribery offences;
- j. The legislative process for the adoption of the draft law to reform the Code of Criminal Procedure;
- k. The statute of limitations of the foreign bribery offence, in order to ascertain whether it has been extended from 10 to 15 years, and to ensure that it allows for an adequate period of time for the investigation and prosecution of the foreign bribery offence;
- l. Spain's efforts to consult member countries in case of competing jurisdictions in foreign bribery cases;
- m. Foreign bribery prosecutions, to ensure that they are not subject to undue interference, as prohibited by Article 5;
- n. The guarantees of independence of the FGE and indirectly those of the ACPO, as well as those of the investigating magistrates;
- o. The flow of information to the authorities responsible for the administrative sanctions systems, in particular from the judicial authorities;
- p. The method used by prosecutors and courts to calculate the proceeds of foreign bribery;
- q. The use of supplementary sanctions against legal persons under the conditions set out in article 66bis PC;
- r. Practice regarding extradition in foreign bribery cases, to ensure that Spain continues to either extradite or prosecute its nationals for this offence;
- s. The courts' interpretation of an "indirect benefit";
- t. The application of rules regarding successor liability; and
- u. The exemption for legal person's liability to ensure that the mere existence of an OMM does not preclude a company from liability.



## Annex A - Spain's Foreign Bribery Enforcement Actions since Phase 3

*Note* : In this table, “LP” refers to “legal persons”, while “NP” refers to “natural persons”; in the “Date” column, “F” refers to the date of the facts and “D” refers to the date of the decision

### Foreign bribery prosecutions resulting in sanctions

Case	Date	Detection	Parties	Facts	Sanctions
<b>Publishing Companies</b>	F: 2006 – 2013 D: 23 February 2017	SEPBLAC	3 NP + 1 LP  (1 NP and 1 LP acquitted)	<p>The LP made a transfer amounting to 70,000 € in favour of a Guinean high-ranking public official who served as Deputy Minister of Education, Science and Sports in Equatorial Guinea. A second transfer was made in favour of the Ministry of Education, Science and Sports of that country amounting to 200,000 €.</p> <p>After making the transfers, the company substantially increased its economic and commercial relations with the Republic of Equatorial Guinea and entered into 4 new contracts.</p>	<p>NP 1 and 2:</p> <ul style="list-style-type: none"> <li>• 1 year prison</li> <li>• 6-month fine with a daily fee of 6 euros, with a vicarious personal liability in the event of default of three months of deprivation of liberty</li> <li>• special disqualification from the right to stand as candidates for any election during the time of the sentence</li> <li>• prohibition of entering public-sector contracts</li> <li>• loss of the possibility of receiving subsidies and the right to enjoy tax and Social</li> </ul>

Security benefits  
or incentives

- prohibition of  
partaking in  
business  
transactions of  
public significance  
for a period of  
three years and  
six months
-

### Ongoing foreign bribery proceedings

Case	Date	Detection	Parties	Facts
<b>Hybrid Power Plant case</b>	between 2006 and 2017	MLA request received from a WGB country	8 NP + 1 LP	<p>The company allegedly paid bribes to secure a contract for the construction of a hybrid solar-gas power plant worth EUR 350 million. The bribe payments were allegedly made to the wife of the president of a public Algerian company.</p> <p>Proceedings are at the pre-trial stage in the <i>Audiencia Nacional</i>.</p>
<b>Angola Police case</b>	between 2004 and 2014	MLA request received from a WGB country	25 NPs + 3 LPs	<p>A Spanish company signed a contract to sell equipment worth \$50m to the Angolan Police for \$ 153 million. The surcharged \$100m were shared out between Angolan officials and Spanish individuals involved in the scheme.</p> <p>Proceedings were sent to the <i>Audiencia Nacional</i> for prosecution and are currently pending trial.</p> <p>2 NP appealed the indictment. The Court accepted their arguments (judicial resolution dated 25.03.2019) and granted a Provisional Dismissal for these two individuals (pending final decision at trial).</p>
<b>Congo Cements case</b>	Unknown	Complaint lodged by an individual	Unknown	<p>A Spanish company allegedly paid commissions to assist it in entering Congo's cements market.</p> <p>Investigation is ongoing and currently pending the execution of an MLA request and the analysis of documentation sent by Algeria.</p>
<b>Cameroon Military Equipment case</b>	2005 – 2013	Information obtained from other criminal proceedings	3 NP + 3 LP	<p>The allegations involve 5 contracts for the supply of military equipment to Cameroon.</p> <p>At present, the proceedings have been sent to the <i>Audiencia Nacional</i>, which will set a date for holding the trial.</p>
<b>Saudi Arabia Military Equipment case</b>	2005 – 2014	Information obtained from other criminal proceedings	8 NP + 4 LP	<p>The allegations involve 11 contracts for the supply of military equipment to Saudi Arabia.</p>

				At present, the proceedings have been sent to the <i>Audiencia Nacional</i> , which will set a date for holding the trial.
<b>Brazil Military Equipment case</b>	2010 – 2012	SEPBLAC	13NP + 4LP	Alleged foreign bribery committed by the managers of a Spanish SOE related with 2 contracts in Brazil.  Investigation ongoing.
<b>Egypt Military Equipment case</b>	2010 – 2012	Complaint lodged by an individual	5NP + 2 LP	The allegations involve a supply contract signed with the Egyptian government in the amount of EUR 30.000.000. A Spanish SOE used an Irish shell company to transfer EUR 1.300.000 in bribes.  Investigation ongoing.
<b>Venezuela Thermolectric power plant</b>	2008 – 2011	SEPBLAC	16NP + 1 LP	A Spanish company allegedly paid commissions to Venezuelan officials of an approximate amount of USD 105 million to be awarded the construction of a thermolectric power plant in Caracas.  Investigation ongoing.
<b>Ammonia factories case</b>	between 2003 and 2016	Complaint lodged by an individual	10 NP + 4 LP	A Spanish company allegedly paid around USD 1.9 million to a middleman who allegedly transferred USD 1.6 million to an Algerian army General to obtain permission to build ammonia factories in Algeria. The bribes were funnelled through a UK-based company.  Investigation ongoing.
<b>Rio Turbio case</b>	2005 – 2015	WGB	9NP + 1 LP	A Spanish company allegedly paid commissions to Argentinian officials between 2005 and 2015 to obtain the concession for the construction of a thermolectric power plant in Rio Turbio.  Investigation ongoing.
<b>Angola wholesale market case</b>	between 2002 and 2017	Media	17 NPs + 4 LPs	A consortium formed with a Spanish company won a contract in 2006 to build a wholesale market and the associated infrastructure in Angola. The contract was extended and several additional contracts were signed in the following years. The overall project value was USD 533 million, of which it is alleged that at least USD 20.1

				<p>million was used to pay bribes to high ranking Angolan government officials.</p> <p>In June 2021, the ACPO lodged an indictment against 17 natural persons and 4 companies for several crimes of corruption of foreign public officials in international business transactions, the crime of the misappropriation of public funds, the crime of money laundering, the crime of forgery documents and the crime of criminal organization..</p> <p>At present, the proceedings have been sent to the <i>Audiencia Nacional</i> for prosecution, which will set the date for holding the trial.</p>
<b>Panamanian tenders case</b>	2010 – 2014	WGB complaint lodged by a business partner	18NP + 3 LP	<p>A Spanish company allegedly paid commissions in the amount of \$82 million to Panamanian authorities to obtain different public invitations to tender in that country.</p> <p>Investigation ongoing.</p>
<b>Guatemala Port case</b>	2012-2015	Media	9NP + 1 LP	<p>A Spanish company allegedly paid at least USD 30 million in bribes to Guatemala's former president and vice-president, through its subsidiary company in Guatemala to secure a USD 225 million project over 25 years to operate a new container terminal on Guatemala's Pacific coast.</p> <p>Investigation ongoing.</p>
<b>Ventilators Case</b>	2020	Customs and Excise Department of the Spanish Tax Agency	2NP + 1 LP	<p>A Spanish company exported 170 ventilators to the Bolivian Health Infrastructure Agency for an amount of EUR 4,392,748 (EUR 25,839 per unit). These ventilators had been purchased on the same day for EUR 1,122,000 (EUR 6,600 per unit). There are suspicions that the exporting company could have been set up for the purpose of generating an undue overcharge, part of which could have been used to pay bribes to public officials in Bolivia.</p> <p>Investigation ongoing.</p>

<b>Ayacucho Road Case</b>	2012 – 2013	MLA request received from a WGB country	1 LP	<p>A Spanish company allegedly paid bribes to officials of the Ministry of Transport and Communications of Peru through the issuance of invoices for fictitious services in exchange for the award of a tender for an amount of 414,707,786 soles.</p> <p>Investigation ongoing</p>
<b>Riyadh Metro Lines case</b>	between 2012 and 2018	WGB	3LP	<p>Companies of different nationalities, including Spanish, which were part of a consortium allegedly paid bribes to Saudi officials to secure the award of a USD 7.8 billion contract for the construction of three metro lines in Riyadh (Saudi Arabia).</p> <p>Investigation ongoing</p>
<b>Colombian ethanol plant case</b>	between 2011 and 2019	WGB	1LP	<p>A Spanish company allegedly paid bribes to obtain the award of a USD 138 million contract with a Colombian SOE, for the construction of an ethanol plant in the city of Puerto López.</p> <p>Investigation ongoing</p>
<b>Buenos Aires Railroads case</b>	2020	WGB	2NP + 2LP	<p>Members of a consortium, which included a Spanish companies, allegedly paid approximately USD 4.5 million to Argentine officials to win a tender for the construction of one of the main railway lines in Buenos Aires. After the award of the contract, the consortium members channelled further payments by signing two fictitious consultancy contracts with a Spanish company</p> <p>Investigation ongoing.</p>
<b>Damietta Gas Plant case</b>	not determined, but before 2012	WGB	1LP	<p>A Spanish company allegedly paid bribes to the Egyptian authorities to secure contracts related to a natural gas liquefaction plant located in north-eastern Egypt. The Spanish company hired two intermediaries so that the then Minister of Petroleum would illicitly award them the contract. Egypt unilaterally closed the plant in 2011 following an economic crisis and riots. In 2014 Spain filed a claim with the ICSID (International Centre for Settlement of Investment Disputes) to initiate arbitration proceedings over the</p>

				<p>plant's closure. Egypt brought allegations of corruption before that arbitration tribunal.</p> <p>Investigation ongoing.</p>
<b>South African locomotives case</b>	2013-2015	WGB	1LP	<p>A German company allegedly paid South African officials approximately USD 500,000 through its Spanish subsidiary to secure an agreement to supply 70 locomotives to the South African railway agency Prasa for USD 247 million.</p> <p>Investigation ongoing</p>
<b>University of Santiago case</b>	2014	WGB	2NP + 1LP	<p>A Chilean subsidiary of a Spanish company allegedly paid bribes to the former Director of Administration and Finance of the University of Santiago to obtain contracts with the University of Santiago de Chile.</p> <p>Investigation ongoing</p>
<b>Angola hydroelectric plant case</b>	2016 – 2018	SEPBLAC	5NP + 1LP	<p>An Angolan company received transfers in its accounts in Spain totalling EUR 4.8 million from a Spanish company. At the same time as these transfers were initiated, this Spanish company was awarded a project to rehabilitate the Matala hydroelectric plant in Angola. The main partner of the Angolan company benefiting from the transfers is linked to the former Angolan Head of State.</p> <p>Investigation ongoing.</p>
<b>Equatorial Guinea infrastructure case</b>	2017 – 2020	SEPBLAC	2NP + 1 LP	<p>A Spanish company carried out infrastructure works in Equatorial Guinea through its Guinean subsidiary. In May 2016, the Spanish company signed a consultancy contract with the former Director General of Post and Telecommunications of Equatorial Guinea and current Director General of that country's state-owned Telecommunications company in the amount of EUR 91,467. According to the financial intelligence report, this contract could have provided cover for the payment of illicit commissions.</p> <p>Investigation ongoing.</p>

<b>Quito subway case</b>	Between 2013 and 2017	Complaint lodged by an individual	9NP	<p>Possible bribes to Ecuadorian public officials by the heads of three Spanish companies for the award in June 2013 of contracts related to the construction of the subway network in Quito (Ecuador) for USD 15,356,104.40. These contracts were awarded to an Ecuadorian company, incorporated in July 2013, in which the three Spanish companies participated.</p> <p>The alleged bribes were paid through a services and consultancy contract by which they paid a total of USD 1,200,000.</p> <p>Investigation ongoing.</p>
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<b>EU Software Case</b>	2012-2018	SEPBLAC	9NP + 4LP	<p>A foreign company entered into a joint venture with a Spanish company in 2012 to submit a bid in a call for tenders for software development contract issued by an EU institution located in Spain worth EUR 135 million. Two individuals, a Spanish citizen and a foreign citizen resident in Spain, were involved in several attempts to open bank accounts in Spain to receive payments from the foreign company, allegedly in the context of a consultancy agreement. Authorities were able to ascertain that the foreign company, as well as a third company, had transferred funds to officials of the EU institution who had issued the bid.</p> <p>The proceedings were pursued under the offence corruption of officials of an EU body but were terminated on the ground that the persons under investigation have international immunity. The ACPO's appeal of this decision to continue this investigation for foreign bribery and money laundering is currently pending.</p>
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### Closed foreign bribery investigations

Case	Date	Detection	Parties	Facts and grounds for termination
<b>São Paulo Subway case</b>	F: 1995-2003 D: unknown	WGB	unknown	An investigation could not be initiated in Spain as the statute of limitation had expired
<b>Aviation case I</b>	F: 2003 – 2016	WGB	unknown	Following the settlement agreement signed by Airbus with France, the UK and the US, French prosecutors informed that the evidence provided by Airbus in the investigation could not be used to prosecute the legal entity again in another jurisdiction.
<b>Aviation case II</b>	F: 2003 – 2016	WGB	unknown	Following the settlement agreement signed by Airbus with France, the UK and the US, French prosecutors informed that the evidence provided by Airbus in the investigation could not be used to prosecute the legal entity again in another jurisdiction.
<b>Aviation case III</b>	F: 2003 – 2016	WGB	unknown	Following the settlement agreement signed by Airbus with France, the UK and the US, French prosecutors informed that the evidence provided by Airbus in the investigation could not be used to prosecute the legal entity again in another jurisdiction.
<b>Water company case</b>	F: Between 2012 and 2014 D: November 2020 and April 2021	Information from other criminal proceedings	7 NP and 4 LP	<p>The facts involved allegations of bribery in several jurisdictions (Colombia, Brazil, Panama and Haiti).</p> <p>Investigation into the acquisition of a Colombian company and a Brazilian company: the investigation was concluded and did not reveal the existence of any conduct constituting foreign bribery. In 2019 prosecutors brought charges of embezzlement and domestic corruption and the proceedings are currently pending trial.</p> <p>Panama: The investigation did not reveal any evidence of payments to public officials in Panama. A Panamanian judge's decision from 11</p>

July 2018 dismissed the investigation into these facts. Proceedings were reopened in Spain following information received from Panama, and once again closed since not all the information requested was received. On December 9, 2021, the Spanish judicial authority issued a new resolution agreeing to the provisional dismissal of this case until a reply is received from the Panamanian authorities to the new request for assistance

Haiti: The investigation into the payments made to the father of the former Haitian ambassador did not reveal any indication that these payments were intended to facilitate public procurement to Spanish companies in Haiti through the intermediary of the said ambassador.

<b>Cuzco gas field case</b>	F: 2004 D: 23 September 2019	WGB	1LP	<p>A Spanish company allegedly made payments to obtain the concession for the exploitation of a gas field in Cuzco (Peru), which was awarded in August 2004.</p> <p>Peruvian authorities responded to the MLA request stating that there were no investigations being carried out in the country involving Spanish companies or citizens, or actions carried out in Spain.</p>
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<b>Neltume power plant case</b>	F: 2013 D: 23 November 2016	WGB	There were no proceedings formally opened against any NP or LP	<p>Officials from a Spanish company made contributions totalling 509,750,000 pesos to political campaigns for the 2013 presidential and parliamentary elections in Chile, allegedly in order to obtain certain permits for the implementation of a hydroelectric power plant in Neltume (Chile)</p> <p>Chilean authorities considered that the company's contributions were made through the Electoral Service and in accordance with electoral legislation and the investigation was pursuing the commission of alleged tax offences.</p> <p>The ACPO closed its investigation and sent a new letter to Chile for the authorities in charge of the previous</p>
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investigation to report in the future any new facts that might come to light in the course of their investigations that might constitute foreign bribery.

<b>Railway equipment case</b>	F: July 2004 – March 2012 D: May 2018	WGB	1 LP	<p>A Spanish company allegedly bribed the Secretary of Transport in the context of a number of agreements for the acquisition by Argentina of used railway equipment.</p> <p>The Examining Magistrate in Argentina issued an indictment on 21 April 2016, including an alleged foreign bribery offence, but the Criminal Court, in a decision of 23 June 2016, revoked the indictment for this offence due to a lack of evidence and absolute lack of clarity of the facts and lack of identification of the persons allegedly responsible. In the resolutions issued by the Argentinean judicial authorities, there is no evidence that the Spanish state-owned company concerted with any local official to defraud the Argentinean public treasury.</p>
<b>Algeria highway case</b>	F: unknown D: 9 September 2019	WGB	1 LP	<p>Allegations of corruption to secure a USD 6.2 billion contract for the construction of the western and central sections of an east west highway in Algeria.</p> <p>The investigation closed for lack of evidence that any Spain nationals committed a foreign bribery offence.</p>
<b>Sales contracts case I</b>	F: 2009 – unknown D: 2017	WGB	Unknown	<p>Alleged misconduct by a company acquired by a Spanish LP.</p> <p>The US' reply to the MLA request sent by Spain revealed that no criminal proceedings had been opened and they were not aware of the involvement of any Spanish nationals.</p>
<b>Sales contracts case II</b>	F: unknown D: 2016	WGB	Unknown	<p>In June 2014 a Spanish company disclosed an ongoing DOJ corruption investigation across Europe and in South America and Asia.</p> <p>The US' reply to the MLA request revealed that no criminal proceedings</p>

had been opened and they were not aware of the involvement of any Spanish nationals.

<b>Peru construction case</b>	F: between 2012 and 2014 D: September 2019	WGB	1 LP	<p>The Spanish construction company allegedly paid commission to public officials in Peru between 2012 and 2014 in order to obtain public contracts in Peru.</p> <p>The MLA response from Peruvian authorities revealed there were no criminal investigations in the country related to the Spanish construction company.</p>
<b>Bolivia construction works case</b>	F: 2017 D: February 2020	WGB	1 LP	<p>A Spanish company, together with its Argentinian subsidiary, allegedly paid illicit commissions in 2017 to obtain the concession of two contracts for the construction of public works in Bolivia.</p> <p>The investigation was closed following information from the Argentinian authorities stating that they had not formalised an investigation since the judicial cooperation requested from Bolivia had not yielded positive results.</p>
<b>Mexico viaduct case</b>	F: 2014 D: April 2016	WGB	1 LP	<p>An executive of a company majorly owned by a Spanish company offered to pay for a holiday to a senior official of the State of Mexico in order to secure the award of a contract for the construction of a viaduct.</p> <p>The Mexican Attorney General's Office informed Spanish authorities that it had not filed any complaint against the company, nor in its investigation had it identified any Spanish nationals or detected any possible acts of corruption carried out in Spanish territory.</p> <p>Spanish authorities informed the Legal Attaché's Office in Spain of the Attorney General's Office of the Republic of Mexico that the investigation in Spain was being closed. It was requested that Mexican authorities inform its Spanish counterparts in case any new facts came to light.</p>

<b>India mining contract case</b>	F: 2010 D: April 2018	WGB	1LP	<p>Alleged payments by a subsidiary of a Spanish company to obtain the award of a mining contract in India in 2010.</p> <p>No response to the MLA request was ever received from the Indian authorities. The investigation was provisionally closed due to lack of evidence permitting it to continue.</p>
<b>Russian commissions case</b>	F: between 2012 and 2014 D: the investigation is still ongoing regarding other offences	Complaint lodged by an individual	30NP and 4LP	<p>Alleged payments in 2012-2013 to the son of a former Russian interior minister.</p> <p>The investigation carried out to date does not reveal facts that prove the commission of foreign bribery by Spanish persons or entities. According to Spanish authorities, there is no evidence that the payments were aimed at obtaining business but were rather coercive payments. According to information provided by Spanish authorities, these payments do not constitute foreign bribery because they are blackmail payments to ensure the security of business in Russia, not for a specific contract.</p>
<b>Mexico energy contracts case</b>	F: 2013 D: December 18 2015	Complaint lodged by an individual and WGB	1NP and 1 LP	<p>A Spanish company allegedly secured contracts in Mexico by bribing public officials. A Mexican national held, at the same time, the post of adviser to the Presidency of the Republic of Mexico and that of member of the Board of Directors of the company in Mexico.</p> <p>The investigation concluded that there is no evidence that the award of contracts to the Mexican company had any direct or indirect relation with the presence of the Mexican national in the company's management body.</p>
<b>Los Córdobres Hydroelectric Power Plant</b>	F: 2013 D: February 2022	WGB	1LP	<p>A subsidiary of a Spanish company allegedly agreed to pay 2,618 million pesos to finance municipal social projects in exchange for a commitment by the authorities of the municipality of San Clemente not to block the</p>

company's construction of a Hydroelectric Power Plant.

The Spanish authorities closed the investigation because Chilean authorities have not provided any further information or documents relating to the facts under investigation, nor have they provided any information on the reasons for the closure of the investigation in Chile.

<b>Saudi Arabia high-speed railway line case</b>	F: around 2011 D: May 2022	Information obtained from another criminal proceeding	2NP	<p>The alleged payment of a commission of EUR 80 million by Spanish companies to be awarded the construction of a high-speed railway line between the cities of Medina and Mecca in Saudi Arabia. This construction was awarded in October 2011 to a business consortium made up of 12 Spanish companies and 2 Saudi companies.</p> <p>Proceedings were closed in May 2022 because it could not be proved that the payment of the consultancy services by the Spanish companies concealed the payment of illegal commissions to Saudi Arabian officials or authorities to obtain the award of the contract.</p>
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<b>Unaoil case</b>	F: unknown D: 30 April 2018	WGB	No NP or LP were ever under investigation	<p>A Spanish company allegedly secured contracts after bribes were paid by Unaoil to senior officials from Libya</p> <p>The investigation was closed due to a lack of any <i>prima facie</i> evidence of a crime.</p>
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## Annex B - Phase 3 recommendations and assessment of implementation by the Working Group in 2015

Phase 3 Recommendations - 2012 <sup>104</sup>		Written Follow Up - 2015 <sup>105</sup>
<b><i>Recommendations for ensuring effective investigation, prosecution and sanctioning of foreign bribery</i></b>		
1	Review its overall approach to enforcement in order to effectively combat international bribery of foreign public officials. [Convention, Article 1, 2009 Recommendation, V.]	Not implemented
2	Regarding the foreign bribery offence, the Working Group recommends that Spain proceed, as a matter of priority with the legislative changes announced on 4 December 2012 and, in particular, amend the current statutory framework to consolidate or harmonise the offence under art. 427 PC with the one under art. 445 PC, to remove inconsistencies between the two offences which could provide obstacles to the effective implementation of the Convention, including:	
	a) by clarifying that the definition of a foreign public official encompasses “officers of the European Union or civil servants who are nationals of another Member State of the Union”, that this definition is in all cases autonomous; and that characterisation of the expected acts of foreign officials does not require recourse to foreign law in order to establish the offence;	Not implemented
	b) by clarifying that all bribes to a foreign public official to affect the official’s exercise of discretion, including where the act induced by the bribe is in accordance with the official’s duties would constitute the basis for a foreign bribery offence, regardless of whether the Company could properly have been awarded the business and whether the benefit obtained is “irregular”;	Not implemented
	c) by ensuring that the promise of a bribe; the use of intermediaries and bribes paid to a third party are covered in all cases of bribery of a foreign public official; and	Not implemented
	d) by clarifying that the defence under art. 426 PC in cases of corruption offences reported to law enforcement authorities (tantamount to “effective regret”) does not apply to the foreign bribery	Not implemented

<sup>104</sup> This column sets out the recommendations of the Working Group on Bribery to Spain in its [Phase 3 Report](#), as adopted in December 2012.

<sup>105</sup> This column sets out the findings of the Working Group on Bribery on Spain’s [Phase 3 Written Follow-Up Report](#), as adopted by the Working Group in March 2015.

	offences, including the offence under art. 427 PC. [Convention, Article 1, 2009 Recommendation, III ii) and V, Phase 2 recommendations 4a. and 4b.]	
3	Regarding the responsibility of legal persons, the Working Group recommends that, as part of the legislative reform announced by Spain in its letter to the Group dated 4 December 2012, Spain:	
	a) Amend the Penal Code to ensure that State-owned and State-controlled enterprises can also be held liable for bribery of foreign public officials under art 31bis PC; [Convention, Article 2, Article 5 and 2009 Recommendation III ii), V, Annex I(D), and Phase 2 recommendation 5a.]	Not implemented
	b) Ensure by any appropriate means that the criteria of “due control” as well as the onus and level of proof of this standard of liability be specified with a view to ensure coverage of the full range of situations required in Annex I to the 2009 Recommendation, in particular under its subsection B) b) and that the implementation of compliance programs and internal controls by a legal person cannot be used as a defence to avoid liability; [Convention, Article 2, 2009 Recommendation V, III ii), Annex I(B) and Phase 2 recommendation 5a.]	Not implemented
	c) Take steps to increase the effectiveness of the liability of legal persons in foreign bribery cases, including through raising awareness among prosecuting authorities throughout the country to ensure that the new range of possibilities available under the law for holding legal persons liable for foreign bribery is understood and applied consistently and diligently, with a view to more effectively enforcing the new corporate liability regime. [Convention, Article 2, 2009 Recommendation V, III ii), Annex I(B) and Phase 2 recommendation 5a.]	Not implemented
4	Regarding <u>sanctions</u> , the Working Group recommends that Spain:	
	a) Harmonise the regime of sanctions (both criminal and administrative) for bribery of European officials with the one available for bribery of other foreign public officials (under art. 445 PC) for both natural and legal persons to ensure effective, proportionate and dissuasive sanctions in all cases, including for bribery to obtain a favourable exercise of discretion; [Convention, Article 3; 2009 Recommendation V and Phase 2 recommendation 6a.i)]	Not implemented
	b) Increase available sanctions for natural persons in foreign bribery cases involving significant amounts of money in order to achieve sanctions proportionate to those available for similar economic crimes; [Convention, Article 3; 2009 Recommendation V and Phase 2 recommendation 6b.);	Not implemented
	c) Develop guidelines on how to calculate the proceeds of bribery to individuals and/or companies who have benefited from corrupt transactions to ensure effectiveness and consistency in the calculation of the fine available under art. 445 PC, which level depends on the size of the profit; [Convention, Article 3; 2009 Recommendation V]	Not implemented
	d) Compile statistics on the criminal, civil and administrative sanctions imposed for domestic and foreign bribery in order to assess whether they are effective, proportionate and dissuasive; [Convention, Article 3; 2009 Recommendation V]	Not implemented
	e) With regard to confiscation, (i) clarify, by any appropriate means, that confiscation in all foreign bribery cases is governed by art. 127 PC and that the limitations under art. 431 PC do not apply; (ii) also clarify that legal persons can be subject to confiscation measures on the same basis as natural persons; (iii) take steps to ensure that law enforcement authorities and prosecutors seek confiscation in corruption cases, whenever appropriate; (iv) provide training and guidance on the practical	Not implemented



	aspects of the confiscation of the proceeds of bribes and their quantification; and (v) make the Asset Recovery Office operational as a matter of priority. [Convention, Article 3.3].	
5	Regarding the <u>investigation and prosecution of foreign bribery cases</u> , the Working Group recommends that Spain take the necessary steps to:	
	a) Ensure (i) that the police forces and magistrates, in particular in the Central Investigating Magistrate Court, receive adequate training on the specific elements of the foreign bribery offences; on the investigative techniques adapted to this offence; and more generally, about the need to more actively and pro-actively detect, investigate and prosecute the offence of bribery of foreign public officials by both individuals and companies; and (ii) that the ACPO, including the specialised agents attached to it, receive specific training to update their knowledge on the above mentioned topics, in particular with regard to the revised foreign bribery offences in the Penal Code; [Convention, Article 5 and 2009 Recommendation III i), Annex I(D)]	Partially implemented
	b) (i) Clarify by any appropriate means that the foreign bribery offence under the jurisdiction of the ACPO includes the offences of bribery of an EU official under art. 427 PC; (ii) reinforce the coordination between the SPS and the ACPO and more generally between the relevant authorities in relation to foreign bribery allegations, investigations, prosecutions and international cooperation and (iii) ensure that the courts and other law enforcement authorities systematically and urgently inform the ACPO of any foreign bribery allegation which comes to their knowledge; [Convention, Article 5 and 4 and 2009 Recommendation, Annex I(D)]	Partially implemented
	c) Ensure that foreign bribery allegations are not prematurely closed; [Convention, Article 5 and 2009 Recommendation, Annex I(D)]	Partially implemented
	d) Clarify by any appropriate means that foreign bribery cases involving an EU official, as provided under art. 427 and 422 PC, are not subject to the Law on Jury Trials (art. 24(1)); [Convention, Article 5, 2009 Recommendation, Annex I(D)] and Phase 2 recommendation 3d.]	Not implemented
	e) (i) Use proactive steps to gather information from diverse sources of allegations and enhance investigations (ii) raise awareness at the national level about the need to prioritise the investigation of foreign bribery offences; and (iii) consider the establishment of a national database for all ongoing cases with a view to ensure coordination of foreign bribery investigations, including the offences of bribery of EU officials, nationally and to avoid intelligence gaps; [Convention, Article 5, 2009 Recommendation, Annex I(D) and Phase 2 recommendation 3e.]	Not implemented
	f) As necessary and in compliance with the relevant rules and procedures, and respecting the fundamental rights of the Defendant, ensure that the decisions published include elements of the arrangements reached through conformidad, when appropriate, such as the terms of the arrangement (in particular, the amount agreed to be paid); [Convention, Article 3 and 2009 Recommendation, Annex I(D)]	Not implemented
	g) Concerning the statute of limitations, as part of its announced reform of the Penal Code (i) extend the statute of limitations applicable to the offences under art. 420 PC and align it with the period (10 years) for the offences under arts. 419 and 445 PC; (ii) review the possibilities for suspension and interruption of the limitation period with a view to cover, in particular, situations where the accused is out of the country or in hiding; and (iii) clarify the rules governing the statute of limitations applicable to legal persons. [Convention, Article 6]	Not implemented

6	Regarding <u>mutual legal assistance</u> , the Working Group recommends that Spain take steps to ensure that its authorities are more proactive in seeking MLA or other forms of international cooperation in possible foreign bribery cases. [Convention Article 9; 2009 Recommendation XIII(i) and (iii)]	Partially implemented
7	Regarding <u>extradition</u> , the Working Group recommends that Spain (i) take measures to assure either that it can either extradite or prosecute its nationals for the offence of bribery of foreign public officials; and (ii) raise awareness among its judges, prosecutors and Central Authority of the obligations contained in Article 10 of the Convention and of the legal principle of <i>aut dedere aut judicare</i> . [Convention, Articles 6 and 10(3)]	Not implemented
<b>Recommendations for ensuring effective prevention and detection of foreign bribery</b>		
8	Regarding <u>tax measures</u> to combat bribery of foreign public officials, the Working Group recommends that Spain ensure	
	(a) that tax officials are trained on the applicable requirement for reporting suspected offences to law enforcement authorities;	Partially implemented
	(b) that the Basque and Navarra tax authorities take appropriate measures to make explicit the prohibition of the deduction for tax purposes of bribes paid to foreign public officials;	Fully implemented
	(c) that central and regional tax authorities inform both tax officials and tax payers of this prohibition, along with the type of expenses that are deemed to constitute bribes, including gifts and entertainment expenses; and	Not implemented
	(d) that suspicious expenses, irrespective of their size, are routinely analysed by Spanish tax officials; [2009 Tax Recommendation, I; Phase 2 recommendation 7]	Partially implemented
9	Regarding raising awareness of the foreign bribery offence, the Working Group recommends that Spain raise awareness among companies of all sizes and sectors of the implications of art. 31bis PC and of the risk of corporate liability for bribery of foreign public officials, along with the corresponding need to put in place an effective anti-bribery compliance programme; [2009 Recommendation, Annex II]	Partially implemented
10	Regarding reporting suspicions of foreign bribery, the Working Group recommends that Spain (i) create and publicise a clear means by which reports of suspected instances of foreign bribery can be made by both the private sector and general public to law enforcement authorities; (ii) establish an internal reporting procedure within the Ministry of Foreign Affairs and inform officials at Spanish overseas embassies of the obligation to report suspected instances of bribery to Spanish law enforcement authorities; and (iii) consider whether to extend public sector reporting obligations to officials of Spanish agencies that are not currently covered by these obligations. [2009 Recommendation IX ii); Phase 2 recommendation 2a.]	Fully implemented
11	Regarding <u>whistleblower protection</u> , the Working Group recommends that Spain promptly adopt an appropriate regulatory framework to protect public and private sector employees from any discriminatory or disciplinary action when they report suspicions of bribery of foreign public officials in good faith and on reasonable grounds; [2009 Recommendation IX iii)]	Not implemented
12	Regarding <u>money laundering</u> , the Working Group recommends that Spain (i) ensure that SEPBLAC, reach out to reporting entities subject to AML obligations in a more proactive way, including on their duty to detect possible instances of foreign bribery; (ii) continue its efforts to detect money laundering	Partially implemented

	linked to foreign bribery and, (iii) ensure that the ACPO provide feedback to SEPBLAC about the outcome of specific cases generated or enriched by information transmitted by the FIU. [Convention, Article 7 and 2009 Recommendation, III i)]	
13	Regarding <u>accounting rules and external audit</u> , the Working Group recommends that Spain:	
	a) Ensure that accounting offences are effectively investigated and prosecuted, particularly in connection with bribery cases; [Convention, Article 8]	Not implemented
	b) In order to ensure adequate implementation of auditors' obligations to report suspicions of foreign bribery: (i) further publicise this requirement and provide training on the circumstances under which such reporting is required; (ii) pursue the reform of its Technical Standards in order to clarify the requirement to report to management that applies to auditors, and (iii) raise awareness so that auditors know that they should identify, detect and report foreign bribery. [2009 Recommendation X B. iii)]	Partially implemented
14	Regarding <u>company internal controls, ethics and compliance programmes or measures</u> , the Working Group recommends that Spain promote, jointly with the relevant professional associations, internal controls, ethics and compliance programmes or measures in businesses involved in commercial transactions abroad, including SMEs, with reference to inter alia Annex 2 of the 2009 Recommendation, Good practice guidance on internal controls, ethics, and compliance. [2009 Recommendation, X. C. i); Annex II]	Partially implemented
15	Regarding <u>public advantages and export credit</u> , the Working Group recommends that Spain:	
	a) Reinforce the reporting framework in place in CESCE and COFIDES, for example by clarifying the criteria for reporting instances of suspected foreign bribery and training staff accordingly; [2009 Recommendation IX]	Fully implemented
	b) Pursue its proposal to modify Royal Decree 2061 in order to ensure that, when authorising exporters of military equipment and dual-use goods, JIMDDU (i) requires an anti-bribery declaration on the part of applicants and considers whether they are the subject of bribery prosecutions or convictions; and (ii) considers the temporary or permanent disqualification of enterprises convicted of bribing foreign public officials from applying for export authorisation. [2009 Recommendation XI i)]	Fully implemented

### Follow up by the Working Group

16	The Working Group will follow up on the issues below as case law and practice develop:	
	a) The impact on the scope and effective enforcement of the offence of the use of the term “contract”, instead of “business”, in Spain’s official translation of the Convention and in the foreign bribery offence under art. 445 PC; [Convention, Article 1, 2009 Recommendation, III ii) and V]	
	b) The coverage of non-pecuniary benefits under the new legislation; [Convention, Article 1, 2009 Recommendation, III. ii) and V. and Phase 2 recommendation 4.c.]	
	c) Whether art. 31bis PC imposes liability on a legal person when a principal offender bribes to the advantage of a subsidiary (or vice versa) or when an indirect advantage, such as an improved competitive situation, results from bribery	

(given the requirement under art. 31bis PC. that the offence be committed “for the account” and “to the benefit” of the legal person); [Convention, Article 2, 2009 Recommendation V, III ii), Annex I(B), (C) and Phase 2 recommendation 5a.]

d) The level of sanctions imposed against natural and legal persons, including through conformidad; are effective, proportionate and dissuasive: in the light of (i) Spain’s system of suspending and converting sentences of imprisonment; and (ii) the application of mitigating circumstances, especially in cases of solicitation of bribes by foreign public officials; [Convention, Article 3; 2009 Recommendation V]

e) The use made of administrative sanctions under the conditions set out in art. 66 bis PC; [Convention, Article 3; 2009 Recommendation V]

f) The use made of criminal and administrative penalties for false accounting against natural and legal persons; [Convention, Article 8; 2009 Recommendation X A iii)]

g) The implementation by the auditing and accounting professions of their obligation to develop specific training on foreign bribery and adopt “red flag indicators” to help detecting foreign bribery in companies’ accounts; [Convention Article 8; 2009 Recommendation III i)]

h) The guarantees of independence from the other powers of (i) of the State Prosecutor General (FGE) and indirectly those of the ACPO, as well as those (ii) of the investigating magistrates, with a view to ensure that a potential lack of independence of the prosecution combined with its increasingly prominent role does not lead to the consideration of factors prohibited under Article 5 of the Convention; [Convention, Article 5 and 2009 Recommendation, Annex I(D)]

i) The investigative powers available to the ACPO prosecutors and that the investigation tools available to them in the prosecutorial investigation phase are sufficient and in particular include the possibility to conduct searches and wiretapping (within the limits of its data protection rules and the provisions of its Constitution); [Convention, Article 5 and 2009 Recommendation, Annex I(D)]

j) Whether the system of risk-based tax audits is adequate in terms of the risks taken into account, including the risk of foreign bribery, when deciding which companies to audit, and how often; [2009 Tax Recommendation, I. ii)]

k) The impact of the Tax Amnesty Law on the effective prevention, detection and punishment of possible foreign bribery by tax officials; [2009 Recommendation III (iii); 2009 Tax Recommendation II]

l) The flow of information to the authorities responsible for the administrative sanctions systems, in particular from the judicial authorities. [2009 Recommendation XI i); Phase 2 recommendation 6e]

## Annex C - List of participants to the on-site visit

### Public sector

#### *Government ministries and agencies*

- Independent Office for Regulating and Monitoring Procurement (OIReScon)
- Ministry of Economic Affairs and Digital Transformation
- Ministry of Finance - State Public Procurement Advisory Board
- Ministry of Foreign Affairs, European Union and Cooperation
- Ministry of Industry, Trade and Tourism
- Ministry of Interior
- Ministry of Justice
- Presidency of the Government
- Spanish Agency of International Cooperation for Development (AECID)
- Spanish Export Credit Agency (CESCE)
- Spanish Tax Agency

#### *Law enforcement*

- Civil Guard
- Executive Service of the Commission for the Prevention of Money Laundering and Monetary Offenses (SEBLAC – Spanish FIU)
- Judicial Police
- National Police
- Special Public Prosecutor's Office against Corruption and Organised Crime (ACPO)

#### *Judiciary*

- Magistrate of the Central Court of Investigation n.6 of the National High Court (*Audiencia Nacional*)
- Magistrate of the Court of First Instance n.2 of Alcobendas

### Private sector

#### *Companies*

- ADIF
- BBVA

- FERROVIAL
- MAPFRE
- REPSOL
- Santander Bank
- Spanish Bank Association (AEB)

#### *Business organisations*

- Chambers of Commerce of Spain
- Spanish Confederation of Business Organisations (CEOE)
- Spanish Confederation of SMEs (CEPYME)

#### *Accounting and auditing profession*

- Association for Accounting and Business Administration
- Ernst & Young
- General Council of Economists of Spain-Registry of Economists Auditors
- Accounting and Auditing Institute (ICAC)
- *Instituto de Censores Jurados de Cuentas de España*
- KPMG
- PwC

#### *Civil society and media*

- Access Info
- Cadena SER
- El País
- Hay Derecho Foundation
- Transparency International Spain

#### *Legal profession and academics*

- CMS Albiñana y Suárez de Lezo
- Cuatrecasas
- Estudio Jurídico Rodríguez Mourullo
- Garrigues
- Pérez-Llorca
- Ramón y Cajal Abogados
- University Complutense of Madrid (UCM)
- University Rey Juan Carlos (URJC)

## Annex D - List of abbreviations and acronyms

<b>ACPO</b>	Special Public Prosecutor's Office against Corruption and Organised Crime
<b>AEAT</b>	State Tax Agency
<b>AECID</b>	Spanish Agency for Development Co-operation
<b>AML</b>	Anti-money laundering
<b>BDTR</b>	Beneficial Ownership Database
<b>CDB</b>	State Tax Agency's Consolidated Database
<b>CESCE</b>	<i>Compañía Española de Seguros de Crédito a la Exportación</i>
<b>COFIDES</b>	<i>Compañía Española de Financiación del Desarrollo</i>
<b>CPC</b>	Criminal Procedure Code
<b>ECG</b>	Export Credits and Credit Guarantees
<b>EHP</b>	School of Public Finance
<b>EIO</b>	European Investigation Order
<b>EOMF</b>	Organic Statute of the State Prosecution Service
<b>EU</b>	European Union
<b>EUR</b>	Euro
<b>FCAS</b>	Co-operation Fund for Water and Sanitation
<b>FDI</b>	Foreign direct investment
<b>FGE</b>	State General Prosecutor
<b>FIU</b>	Financial Intelligence Unit
<b>FONPRODE</b>	Development Promotion Fund
<b>FTF</b>	Central Banks Accounts Registry
<b>GAAP</b>	Spanish Generally Accepted Accounting Principles

<b>GDP</b>	Gross Domestic Product
<b>GNI</b>	Gross National Income
<b>GRECO</b>	Group of States against Corruption
<b>ICAC</b>	Institute of Accounting and Auditing
<b>ICO</b>	<i>Instituto de Crédito Oficial</i>
<b>IFRS</b>	International Financial Reporting Standards
<b>IGAE</b>	General Intervention of the State Administration
<b>ISA</b>	International Standards on Auditing
<b>JIT</b>	Joint Investigative Team
<b>LOPJ</b>	Organic Act of the Judicial Power
<b>MLA</b>	Mutual Legal Assistance
<b>MOFA</b>	Ministry of Foreign Affairs, European Union and Co-operation
<b>MOJ</b>	Ministry of Justice
<b>NGO</b>	Non-Governmental Organisation
<b>ODA</b>	Official Development Assistance
<b>OMM</b>	Organisational and Management Model
<b>ORGA</b>	Asset Recovery and Management Office
<b>PC</b>	Penal Code
<b>PEP</b>	Politically Exposed Person
<b>SEPBLAC</b>	Spain's Financial Intelligence Unit
<b>SIRAJ</b>	Administrative Registry system to support the Administration of Justice
<b>SME</b>	Small and medium enterprise
<b>SOE</b>	State-owned or state-controlled enterprise
<b>SPS</b>	State Prosecution Service
<b>STR</b>	Suspicious Transaction Report
<b>UCO</b>	Central Operating Unit of the National Guard
<b>UDEF</b>	Economic and Fiscal Crime Unit of the National Police
<b>UNCAC</b>	United Nations Convention against Corruption

<b>US</b>	United States
<b>USD</b>	US Dollars
<b>WGB</b>	OECD Working Group on Bribery in International Business Transactions



## Annex E - Excerpts of relevant legislation

### The foreign bribery offence and sanctions

#### Article 24, Penal Code

1. For criminal purposes, status of authority shall be deemed to be held by persons who, alone, or as a member of any corporation, board or collegiate body, have a commanding post or exercise jurisdiction pertaining thereto. In all cases, members of the Congress of Deputies, of the Senate, of the Legislative Assemblies of the Autonomous Communities and the European Parliament shall be deemed authorities. The officers of the Public Prosecutor's Office and the Public Prosecutors of the European Public Prosecutor's Office shall also be deemed authorities.

2. Civil servant status shall also be deemed to be held by all those who, by immediate provision of the Law, or by election or appointment by an authority with relevant powers, participate in the exercise of public duties.

#### Article 70, Penal Code

1. The higher and lower degree of punishment to that foreseen by Law for any criminal offence shall have the extent resulting from application of the following rules:

1. The higher degree of punishment shall be formed based on the maximum figure set by the Law for the criminal offence concerned and increasing that by half its amount, the resulting sum being its maximum limit. The minimum limit to the upper degree of punishment shall be the maximum punishment set by Law for the criminal offence concerned, increased by one day, or by a day-fine, in view of the nature of the punishment to be imposed.
2. The lower degree of punishment shall be formed on the basis of the minimum figure set for the criminal offence concerned and deducting that half from its amount, the result of that deduction being its minimum limit. The maximum limit of the lower degree of punishment shall be the minimum of the punishment set by Law for the criminal offence concerned, reduced by a day, or by a day-fine, in view of the nature of the punishment to be imposed.

2. For the purposes of determining the upper or lower half of the punishment or of specifying the upper or lower degree of punishment, the day or day-fine are deemed indivisible and shall act as upward or downward units of penalisation, according to the cases concerned.

3. When, in application of rule 1 of Section 1 of this Article, the higher degree punishment exceeds the maximum limits set for each punishment in this Code, they shall be deemed those immediately above, to wit:

1. If the punishment determined is that of imprisonment, the same punishment, with the condition that its maximum term shall be thirty years.
2. If absolute or special barring, the same punishment, with the condition that its maximum duration shall be thirty years.
3. If suspension from public employment and office, the same punishment, with the condition that its maximum duration shall be eight years.

4. If deprivation of the right to drive motor vehicles and mopeds, the same punishment, with the condition that its maximum duration shall be fifteen years.
5. If deprivation of the right to own and carry weapons, the same punishment, with the condition that its maximum duration shall be twenty years.
6. If deprivation of the right to reside in specific places or to visit them, the same punishment, with the condition that its maximum duration shall be twenty years.

#### **Article 286ter, Penal Code**

1. Those who, by offering, promising or granting any undue pecuniary or other kind of benefit or advantage, corrupt or attempt to corrupt, personally or through an intermediary, an authority or civil servant, for their own benefit or that of a third party, or who attend to requests in that regard, in order for them to act or abstain from acting in relation to the exercising of public functions to obtain or conserve a contract, business or another competitive advantage in the course of international economic activities, shall be punished with a prison sentence of three to six years and a fine of twelve to twenty-four months, unless the profit obtained exceeds the resulting sum, in which case the fine shall be up to three times the amount of such profit, unless otherwise punished with a more severe penalty in another provision of this Code.

In addition to the outlined penalties, the offender shall also be punished with a ban from being hired in the public sector, the loss of the possibility of obtaining public subsidies or aid, the forfeit of the right to tax or Social Security benefits and incentives and a ban on participating in commercial transactions of public significance for a period of seven to twelve years.

2. For the purposes of this Article, civil servant refers to the individuals outlined in Articles 24 and 427.

#### **Article 286quater, Penal Code**

If the deeds outlined in the Articles of this Section were of particular gravity, the penalty shall be imposed in its upper half and up to the highest degree.

In any event, the deeds shall be considered of particular gravity if:

- a) The benefit or advantage has a particularly high value;
- b) The action of the perpetrator is not merely occasional;
- c) The deeds are committed within a criminal organisation or group, or;
- d) The business in question involves humanitarian goods or services or those pertaining to primary necessity.

In the case of Section 4 of Article 286 bis, the deeds shall also be considered of particular gravity if:

- a) They aim to influence games of gambling or betting;
- b) They are committed during an official sports competition at a State level which is qualified as professional or during an international sports competition.

#### **Article 427, Penal Code**

The provisions of the preceding articles shall also be applicable when the conduct described is carried out by or affects:

- a) Any person holding, either by appointment or by election, a legislative, administrative or judicial job or position in a country of the European Union or any other foreign country.
- b) Any person exercising a public function for a country of the European Union or for any other foreign country, including a public organisation or public company, for the European Union or for any another international public organisation.
- c) Any official or agent of the European Union or of an international public organisation.
- d) Any person who has been assigned and is exercising a public service function consisting of managing, in the Member States or in third countries, the financial interests of the European Union or taking decisions relating to those interests.

### **Liability of legal persons and sanctions**

#### **Article 31bis, Penal Code**

1. In the cases foreseen in this Code, legal persons shall be held criminally liable for:

a) The criminal offences committed in their name or on their behalf, and to their direct or indirect benefit, by its legal representatives or those that acting either individually or as members of a body of the legal person authorised to take decisions in the name of the legal person or that possess organisation and control powers over such legal person.

b) Legal persons shall be criminally liable for the criminal offences committed when carrying out their corporate activities and on their account and to their direct or indirect benefit, by those who, being subject to the authority of the natural persons mentioned in the preceding Paragraph, were able to perpetrate the deeds because the duties of supervision, surveillance and control of their activities were gravely breached by the natural persons mentioned in the preceding Paragraph, in view of the specific circumstances of the case.

2. If the criminal offence were perpetrated by the persons indicated in Paragraph a) of the previous Section, the legal person shall be exempt from liability if the following conditions are fulfilled:

1. The management body has adopted and effectively implemented, before the perpetration of the criminal offence, organisational and management models that include measures of surveillance and control appropriate to prevent criminal offences of that same nature or to significantly reduce the risk of perpetration thereof.
2. The supervision of the functioning of and of compliance with the prevention model implemented has been entrusted to a body of the legal person with self-governing powers of initiative and control or has been entrusted legally with the function of supervising the effectiveness of the legal person's internal controls.
3. The individual offenders have perpetrated the criminal offence fraudulently eluding the organisational and prevention models; and
4. An omission or insufficient exercise of the function of supervision, surveillance and control on the part of the body to which the second condition refers has not occurred.

In those cases, in which only partial evidence of compliance with the preceding circumstances is available, this shall be considered to reduce the penalty.

3. In the case of a legal person of small size, the functions of supervision to which the second condition of Section 2 refers may be taken on directly by the management body. For these purposes, legal persons of small size shall be deemed those that, pursuant to the applicable legislation, are authorised to submit an abbreviated profit and loss statement.

4. If the criminal offence were perpetrated by the persons indicated in SubParagraph b) of Section 1, the legal person shall be exempt from liability if, before the perpetration of the criminal offence, it has adopted and effectively implemented an organisational and management model adequate to prevent criminal offences of the nature of the one perpetrated or to reduce in a significant way the risk of the perpetration thereof.

In these cases, the attenuation foreseen in the second Paragraph of Section of this Article shall also be applicable.

5. The organisational and management model to which the First condition of Section 2 and the previous Section refer shall comply with the following requirements:

1. Identifying the spheres of activities where the criminal offences to be prevented may be perpetrated;
2. Establishing the protocols or procedures detailing the procedure for determining the will of the legal person, the adoption of decisions and the implementation thereof in relation to such protocols or procedures;
3. Possessing management models for financial assets adequate to prevent the perpetration of the criminal offences that are to be prevented;
4. Imposing the obligation of notifying of possible risks and cases of noncompliance to the body entrusted with the surveillance of the functioning of and compliance with the prevention model;

5. Establishing a disciplinary regime to adequately punish not complying with the measures established in the model;
6. Carrying out a periodic audits of the model and, eventually, the amendment thereof whenever material violations of its provisions occur or when changes in the organisation, control structure or the activity carried occur making this necessary.

#### **Article 31 quarter, Penal Code**

Circumstances that mitigate criminal liability of a legal person may only be deemed to concur when, after the criminal offence is perpetrated, the legal persons carries out the following activities through its legal representatives:

- a) Having proceeded, prior to having knowledge of judicial proceedings being brought against it, to confess the criminal offences to the authorities;
- b) Having collaborated in the investigation of the deeds, providing evidence, at any moment of the proceedings, that is new and decisive to clarify the criminal liabilities arising from the deeds;
- c) Having proceeded at any time during the proceedings, and prior to the trial itself, to repair or decrease the damage caused by the criminal offence;
- d) Having established, prior to the trial itself, measures that are effective to prevent and discover criminal offences that might be committed in the future using the means or under the coverage of the legal person.

#### **Article 130 para. 2, Penal Code**

Transformation, merger, absorption or split of a legal person does not extinguish its criminal accountability, which shall be transferred to the firm or firms into which it is transformed, is merged or absorbed, and it shall extend to the firm or firms arising from the split. [..]

Criminal accountability is not extinguished by concealed or merely apparent dissolution of the legal person. It shall be deemed, in all cases, that there is concealed or merely apparent dissolution of the legal person when its economic activity continues and it maintains a substantial identity of clients, providers and employees, or the most important part thereof.

#### **Article 50(4), Penal Code**

In cases in which this Code foresees punishment by fine for legal persons in proportion to the profit obtained or facilitated, to the damage caused, to the value of the object, or to the sum obtained unduly or by fraud, if it is not possible to calculate such on the basis of those items, the Judge or Court of Law shall justify the impossibility to proceed to that calculation and the fines foreseen shall be replaced by the following ones:

- a) Fine of two to five years, if the criminal offence committed by a natural person has a prison sentence established in more than five years;
- b) Fine of one to three years, if the criminal offence committed by a natural person has a prison sentence established in more than two years, not included in the preceding Section;
- c) Fine of six months to two years, in the rest of cases.

#### **Article 288, Penal Code**

In the cases foreseen in the preceding Articles, publication of the judgment in the official journals shall be provided and, if requested by the offended, the Judge or Court of Law may order full or partial reproduction thereof in any other informative medium, at the expense of the convict.

If, pursuant to the terms established in Article 31 bis, a legal person is responsible for the criminal offences defined in this Chapter, it shall have the following penalties imposed thereon:

1. In the case of the criminal offences foreseen in Articles 270, 271, 273, 274, 275, 276, 283, 285 and 286:

- a) Fine of two to four times the profit obtained, or that could have been obtained, if the punishment foreseen for the criminal offence committed by a natural person is a prison sentence exceeding two years;
- b) Fine of two to three times the profit obtained or favoured, or that could have been obtained, in the

rest of the cases.

In the case of the criminal offences foreseen in Articles 277, 278, 279, 280, 281, 282, 282 bis, 284 and 286 bis to 286 quinquies:

a) Fine of two to five years, or three to five times the profit obtained, or that could have been obtained if this amount is higher, if the punishment foreseen for the criminal offence committed by a natural person is a prison sentence exceeding two years;

b) Fine of six months to two years, or one to two times the profit obtained, or that could have been obtained if this amount is higher, in the rest of the cases.

2. Pursuant to the rules established in Article 66 bis, the Judges and Courts of Law may also impose the penalties established in Sub-Paragraphs b) to g) of Section 7 of Article 33.

## Confiscation

### Article 127bis(1)(g), Penal Code

The Judge or Court of Law shall also order the confiscation of the goods, assets and gains pertaining to a person convicted of any of the following criminal offences when it is determined, based on well-founded objective evidence, that the goods or assets were obtained from a criminal activity, and their legal origin cannot be accredited: [...]

g) Criminal offences of corruption in business; [...].

## Conformidad

### Article 787, Criminal Procedure Code

1. Prior to commencing the taking of evidence, the defence, with the conformity of the accused present, may request the Judge or Tribunal to pass sentence in accordance with the statement of case containing the most serious punishment, or with that submitted in the proceedings, which may not refer to a different offence, or contain a more serious classification than that of the previous statement of case. If the punishment does not exceed six years in prison, the Judge or Court will pass sentence in accordance with the statements of the defence, if the requirements provided for in the following paragraphs are met.

2. If, from the description of the facts accepted by all the parties, the Judge or Court understands that the classification accepted is correct and the punishment is appropriate according to that classification, it will pass sentence accordingly. The Judge or Court will, in any case, have heard the accused with regard to whether their conformity was freely given and with knowledge of the consequences.

3. In the case that the Judge or Court considers the classification made to be incorrect, or deems that the punishment requested is not legally appropriate, it will summon the party which submitted the most serious statement of case to declare whether or not they ratify it. The Judge or Court may only pass sentence in conformity where the party summoned amends their statement of case in such terms so that the classification is correct and the punishment requested is appropriate and the accused, once again, is in conformity. Otherwise, the trial will be ordered to continue.

4. Once the defence declares its conformity, the Judge or President of the Court will inform the accused of its consequences and afterwards will request that they declare for the purpose of giving their conformity. Where the Judge or Court harbour doubts about if the accused has given their conformity freely, the trial will be ordered to continue.

The trial may also be ordered to continue where, notwithstanding the conformity of the accused, their defence considers it necessary and the Judge or Court deems that their request is grounded.

5. Conformities on the adoption of protection measures in cases of limitation of criminal liability are not binding on the Judge or Court.

6. The sentence in conformity will be passed verbally and will be documented in accordance with the provisions of paragraph 2 of article 789, without prejudice to its later drafting. If the prosecutor and the parties, when the ruling is made known, express their decision not to appeal, the judge will

verbally declare the sentence to be final straightaway, and, having heard the parties, will pronounce on the suspension or substitution of the punishment imposed.

7. Judgments in conformity will only be appealable when they have not respected the requirements or terms of the conformity, and the accused may not contest their freely given conformity on substantive grounds.

8. Where the accused is an incorporated entity, conformity must be given by their particularly appointed representative, as long as they have a special power of attorney. Such conformity, which will be subject to the requirements detailed in the previous paragraphs, may be given regardless of the position taken by the other accused, and its content will not be binding in the trial held in relation to the latter.

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