



# Implementing the OECD Anti-Bribery Convention



## Phase 2 Report: Peru



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# Executive summary

The Phase 2 Report on Peru by the OECD Working Group on Bribery evaluates and makes recommendations to Peru on its implementation of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and related instruments. Peru has taken some steps to improve the enforcement of corruption cases and to strengthen integrity in the judiciary and prosecutor's office. However, awareness of the foreign bribery offence and the Convention is low. The legislative framework for fighting foreign bribery contains many deficiencies. Peru has also not implemented the Working Group's Phase 1 recommendations.

Virtually all Peruvian stakeholders have poor awareness of the foreign bribery offence and the Convention. The Working Group appreciates the importance that Peru places on fighting domestic corruption. Nevertheless, many Peruvian companies are internationally active and at risk of bribing foreign officials. The Working Group therefore recommends that Peru urgently raise awareness, including among the judiciary, law enforcement, and relevant government authorities. Anti-corruption corporate compliance should be further promoted. Officials in overseas missions and commercial offices should be trained to help Peruvian companies in foreign countries that are confronted with bribe solicitations, and to report allegations of Peruvian companies bribing foreign officials. Judges and law enforcement would benefit from more training and resources for tackling corporate crime.

Peru also needs to address many legislative deficiencies in its framework for fighting foreign bribery. It should urgently enact a definition of a foreign public official that is in line with the Convention. Corporate liability for bribery committed by using an intermediary should be strengthened. A corporate compliance defence for foreign bribery committed, authorised or directed by a senior corporate officer should be eliminated. Peru should make clear its jurisdictional rules for prosecuting Peruvian nationals who commit foreign bribery overseas. It should clarify the preconditions for extraditing its nationals, and for prosecuting the laundering in Peru of the proceeds foreign bribery that had been committed abroad. Whistleblower measures should be adopted in the private sector and strengthened in the public sector. Awareness-raising is also needed to address an apparent unwillingness to blow the whistle.

The report also notes positive aspects in Peru's efforts to fight foreign bribery. The Lava Jato Special Team has begun prosecuting many Peruvian politicians and officials at the highest levels. Successful conclusion of these cases will require Peru to maintain its resources and support to the Special Team. Stronger enforcement efforts from prosecutors outside the Special Team would be beneficial, as would greater guidance and transparency on the use of non-trial resolutions. Also encouraging are recent reforms of the system for the appointment, discipline and dismissal of judges and prosecutors, though their impact on the integrity of the judiciary and prosecutor's office will be felt only in years to come. These efforts could also be undermined by the Attorney General's power to remove and transfer prosecutors, and the widespread use of provisional and supernumerary judges and prosecutors. Peru has committed to improving its statistical collection in mutual legal assistance and money laundering enforcement. Its lawmakers also expressed their commitment to advance reforms that would address the Working Group's concerns.

The report and its recommendations reflect findings of experts from Brazil and Israel. The report is based on legislation and other materials provided by Peru, and on information from a ten-day virtual visit on 11-26 January 2021 during which the evaluation team met representatives of Peru's public administration, law enforcement, parliamentarians, private sector, and civil society. Peru will provide an oral report by June 2022 on its implementation of certain recommendations, and a written report by June 2023 on its implementation of all recommendations.

# A. Introduction

1. This document reports on the Phase 2 evaluation of Peru conducted by the OECD Working Group on Bribery in International Business Transactions (Working Group). The purpose of the evaluation is to study the structures in Peru to enforce and to apply the laws and policies implementing the OECD anti-bribery instruments, namely the [Convention on Combating Bribery of Foreign Public Officials in International Business Transactions](#) (Convention); 2009 [Recommendation for Further Combating the Bribery of Foreign Public Officials in International Business Transactions](#) (2009 Recommendation); 2009 [Recommendation of the Council on Tax Measures for Further Combating the Bribery of Foreign Public Officials in International Business Transactions](#); 2016 [Recommendation of the Council for Development Co-operation Actors on Managing the Risk of Corruption](#); and 2019 [Recommendation of the Council on Bribery and Officially Supported Export Credits](#).

## 1. The virtual visit

2. An evaluation team composed of lead examiners from Brazil and Israel, and the OECD Secretariat,<sup>1</sup> conducted a virtual visit of Peru on 11-26 January 2021. Because of the COVID-19 crisis, the evaluation team was unable to conduct an on-site visit required under the [procedure](#) for Phase 2 evaluations. Under these special circumstances, Peru and the Working Group exceptionally agreed that the on-site visit would be conducted virtually. As with a physical on-site visit, the evaluation team met representatives of the Peruvian public and private sectors, judiciary, parliamentarians, civil society, and media. (See Annex 1 for a list of participants.) Prior to the visit, Peruvian authorities provided written responses to the Working Group's standard and supplementary Phase 2 questionnaires. Peruvian authorities provided parts of their questionnaire responses to some non-governmental participants before the virtual visit. Preferably, the questionnaire responses should have been circulated to non-governmental participants only after the virtual visit, so as to ensure the objectivity of these participants during the visit. Peruvian authorities provided further information to the evaluation team before and after the virtual visit. The evaluation team also conducted independent research to gather additional information.

3. The evaluation team appreciates the co-operation of Peruvian authorities during this evaluation. It is also grateful to all virtual visit participants for their co-operation and openness during the discussions.

## 2. General observations

### (a) Political and legal system

4. Pursuant to Art. 43 of its [Constitution](#), Peru is a democratic republic with a unitary, representative and decentralised form of government based on the separation of powers. The President heads the

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<sup>1</sup> [Brazil](#) was represented by Elizabeth Cristina Marques Cosmo, Office of the Comptroller General; Marcelo Ribeiro de Oliveira, Federal Prosecution Service; Davi Bressler, Attorney General's Office. [Israel](#) was represented by Tamar Rosman, Office of the Deputy Attorney General; and Yael Bitton, Office of the State Attorney. The [OECD Secretariat](#) was represented by William Loo, Alice Berggrun and Vitor Geromel, Anti-Corruption Division.

executive branch and is elected by direct popular vote to a five-year non-renewable term. The legislature is a unicameral Congress with 130 members elected to five-year terms. Legislation passed by Congress is sent to the President for approval and subsequently to the official journal for publication. This report was adopted after the last Presidential and Congressional elections in April 2021 but before the change in government expected in July 2021.

5. Peru's [judiciary](#) consists of five levels: Supreme Court; Superior Courts in each Judicial District; Specialised and Mixed Courts in each Province; Law Courts of the Peace in cities and towns; and Courts of Peace (Supreme Decree 017-93-JUS, Annex (Judiciary Law) Art. 26). The President of the Supreme Court heads the judiciary. A separate Constitutional Court hears constitutional matters as the sole and last instance, depending on the class and type of constitutional process (Constitution Arts. 200-205).

6. The doctrine of precedents applies to an extent. Jurisprudential principles published by the Supreme Court in the official gazette are binding on all judges (Judiciary Law Art. 22). Decisions of the Constitutional Court may have the same effect (Law 28 237 Art. VII). Treaties in force in Peru are part of national law (Constitution Art. 55). Human rights treaties have constitutional rank while other treaties have the same force as statutes, according to Peruvian authorities.

### **(b) Economic background**

7. Peru has a population of 31 million and the 31<sup>st</sup> largest economy among the 44 Parties to the Convention. It has an upper-middle income economy after annual economic growth averaging around 5% in the past two decades, one of the highest in the Latin America and Caribbean region. The result is a more dynamic economy and better living conditions. But the economy remains poorly diversified and concentrated on natural resources. The informal economy accounted for 72% of employment in 2016.<sup>2</sup>

8. On trade, Peru ranks 33<sup>rd</sup> and 42<sup>nd</sup> among the 44 Working Group members in exports of goods and services. In 2019, mining products accounted for 58% of exports of traditional and non-traditional goods, followed by products in agribusiness (15%), fishing (8%) and hydrocarbons (7%). China was by far the biggest export destination (29.3%), followed by the EU (13.3%), US (12.7%), Korea (4.9%) and Switzerland (4.9%). China was also the biggest import source (22.1%), trailed by the US (17.9%), EU (9.8%), Brazil (4.9%) and Mexico (3.9%). Fuel was the largest import, ahead of automobiles, mobile phones and goods-carrying vehicles. Imports and exports in services were only 16% and 27% of those for goods, and consist mainly of tourism and transport.<sup>3</sup>

9. In terms of investment, Peru ranks 38<sup>th</sup> out of 44 Working Group countries in terms of outward foreign direct investment (FDI) stocks. Data on sectors and destinations are not available. The largest inward FDI stocks are from Spain (18%), UK (17%), Chile (15%), US (10%) and Netherlands (6%). The sectors with the most inward investment are mining (23%), communications (20%), finance (18%), energy (13%) and industry (12%).<sup>4</sup>

10. Peru's state-owned enterprise (SOE) sector underwent extensive privatisation in the 1990s. The sector is consequently smaller than most other large Latin American countries in terms of the number of enterprises, contribution to GDP, employment and investment. These SOEs are mainly in the electricity, infrastructure, and financial sectors.<sup>5</sup>

<sup>2</sup> [Instituto Nacional de Estadística y Informática](#); OECD (2019), [Multi-dimensional Review of Peru](#), vol. 3, pp. 13-15; World Bank (28 May 2020), [World Development Indicators](#). 2018 GDP data at constant USD.

<sup>3</sup> SUNAT; World Trade Organisation [International Trade Statistics](#) and [Trade Profiles 2019](#).

<sup>4</sup> Proinversión; [UNCTADStat](#).

<sup>5</sup> Interamerican Development Bank (2018), "[State-Owned Enterprises and Fiscal Risks](#)", Section 3.1.



11. Micro, small- and medium-sized enterprises (SMEs) are active internationally. Exports by Peruvian SMEs grew 122% in the 15 years to 2019. In 2017, 70.5% of exporting companies were SMEs, with 4 895 enterprises generating USD 2.3 billion in exports. The main exports were mining and agricultural products (39.2% and 28.3% respectively). Some 43.8% of SME exports went to Asia, mainly India and UAE. In the same year, 23 083 SMEs representing 84.9% of importing companies imported USD 3.7 billion of goods and services, mostly from China (45.2%) and the US (10.2%).<sup>6</sup>

12. Domestic corruption is perceived to be widespread at all levels of government. Five of the last seven ex-presidents since the 1990s were implicated in corruption scandals. A sixth championed anti-corruption reforms, until he too resigned in November 2020 amidst a corruption scandal. (The seventh took over in a caretaker role until elections in April 2021.) Of the 130 Congress members before the 2021 elections, 68 faced some form of criminal charges. Unsurprisingly, trust in government and institutions is low. The country underperforms on most indicators of public opinion on institutions and governance, but has seen an uptick after widespread protests in 2019 that led to several judicial reforms.<sup>7</sup>

### (c) *Implementation of the Convention and recent legislative developments*

13. Peru enacted its foreign bribery offence in Criminal Code (CC) Art. 397-A in January 2009 and amended it in October 2016 to implement the Convention. The Corporate Liability Law 30 424 was enacted in March 2016 and amended in 2017 and 2018. Congressional approval of the Convention and its ratification by the Government took place in May 2018. Peru deposited its Instrument of Accession to the Convention with the OECD on 28 May 2018 and became a Party to the Convention on 27 July 2018. Peru completed its [Phase 1 evaluation](#) in March 2019.

### (d) *Cases involving the bribery of foreign public officials and related offences*

14. There are three known allegations of Peruvian individuals or companies bribing non-Peruvian officials (i.e. *active* foreign bribery). All three allegations concern Oil Group X which supplies, stores, distributes and trades oil products internationally. The Group comprises companies incorporated in multiple jurisdictions, including Peru. The Group was founded by an individual A, a Chilean citizen who may also have Peruvian nationality and family residing in Peru. According to media reports, Oil Group X allegedly bribed foreign officials in three countries:

- (a) The Group allegedly engaged in bribery and illegal financing of the 2011 presidential campaign in Guatemala. Payments totalled GTQ 887 000 (USD 114 000). One Group X officer and several Guatemalan public officials were arrested and charged in 2016. The case was at trial in Guatemala as of February 2020.<sup>8</sup>
- (b) An executive of Oil Group X was married to an officer of Company Y, a subsidiary of Mexico's state-owned oil company. The couple allegedly authorised several sales of oil products between the companies in 2008 that financially benefited Group X at Company

<sup>6</sup> PromPerú (19 November 2019), "[Exports by Peruvian SMEs have grown by 122 % in the last 15 years](#)"; Ministerio de la Producción (2017), [Las MIPYME en Cifras 2017](#), Chapter 8.

<sup>7</sup> OECD (2019), [Multi-dimensional Review of Peru](#), vol. 3, pp. 18 and 29; Elfoco (20 November 2020), "[La lista de los congresistas con expedientes en el Ministerio Público](#)"; The Economist (19 November 2020), "[Peru's politics of destruction, and creation](#)"; Americas Society and Council of the Americas, [Capacity to Combat Corruption Index 2020](#), pp. 14-15; Miller and Chevalier, [Latin America Corruption Survey 2020](#), pp. 6 and 18.

<sup>8</sup> [Convoca \(9 February 2015\)](#); [Centro de Medios Independientes \(2 June 2016\)](#); [CICIG \(2 June 2016\)](#); [Soy502 \(4 June 2016\)](#); [Nomada \(16 June 2016\)](#); [La Hora \(27 July 2016\)](#); [Prensa Libre \(7 August 2019\)](#); [Prensa Libre \(17 February 2020\)](#); [La Hora \(17 February 2020\)](#).

Y's expense. The wife also failed to declare a large amount of funds in multiple bank accounts. Mexican authorities filed two criminal complaints and two administrative proceedings against her in 2010. Administrative sanctions resulted in 2010 and 2013.<sup>9</sup>

- (c) In 2011, Oil Group X signed an agreement to sell oil products to Company Z, Paraguay's state-owned oil company. Individual A personally negotiated the sale on behalf of Oil Group X with senior officers of Company Z. The agreement was later found to contain an unduly elevated price favouring Group X. In 2013, Group X signed a conciliatory agreement with Paraguay's Economic Crimes Prosecutor and paid USD 835 000 as compensation. However, no individual was held liable.<sup>10</sup>

15. As explained at paras. 34-35, Peruvian law enforcement authorities were not made aware of and hence have not investigated these allegations.

16. Given the limited number of active foreign bribery allegations, this report also considers where appropriate domestic bribery cases of non-Peruvian individuals or companies bribing Peruvian public officials. Since 2016, Peruvian authorities have been actively investigating at least 28 passive foreign bribery cases. Most of these cases directly implicate Construtora Norberto Odebrecht (Odebrecht), a Brazilian construction company. Others derive from an Odebrecht case, e.g. based on the evidence of a collaborating offender. Two additional cases are also considered:

- (a) In the Printing Company Case, the Peruvian subsidiary of a US company bribed Peruvian officials in 2011-2016 to avoid late-delivery penalties. It also bribed Peruvian judges in 2011-2013 to influence judicial proceedings. In 2019, the company settled proceedings with US authorities and paid approximately USD 10 million in penalties, disgorgement and interest.<sup>11</sup> Peru's competition authority launched administrative proceedings for collusion. Criminal action for foreign bribery was not taken until October 2020, after this Phase 2 evaluation had begun.
- (b) In the Aircraft Services Case, a US company admitted in 2014 to having bribed senior officials in the Peruvian government and air force in 2010-2011 to win contracts. The company paid a USD 14 million penalty to US authorities.<sup>12</sup> In 2014, Peru opened an investigation into ten individuals.<sup>13</sup> None of them were senior government or air force officials, according to Peruvian authorities. Charges were later dropped against all but one low-level official who was convicted in 2019. He was guilty of a minor crime of trafficking in influence and fined a mere USD 3 200.

## Commentary

***The lead examiners commend Peru for the ongoing domestic foreign bribery investigations related to the construction company Odebrecht. However, they are concerned that other foreign bribery cases have not been or are not being diligently prosecuted. As explained in this report, controversy***

<sup>9</sup> [Expansion \(25 May 2010\)](#); [Convoca \(9 February 2015\)](#); [Latin American Herald Tribune \(date unknown\)](#); [Reuters \(23 May 2010\)](#); [Petróleos Mexicanos, 2014 Annual Report Pursuant to Section 13 or 15\(d\) of the Securities Exchange Act of 1934](#), p. 193.

<sup>10</sup> [ABC Color \(6 September 2013\)](#); [Convoca \(9 February 2015\)](#); [ABC Color \(11 August 2012\)](#); [D10 \(29 June 2013\)](#); [IDL Reporteros \(8 February 2015\)](#); [Diario Uno \(11 February 2015\)](#); [La Nación \(21 June 2017\)](#).

<sup>11</sup> Securities and Exchange Commission Order (26 September 2019), File No. 3-19531, [Release No. 87128](#); [Reuters \(26 September 2019\)](#).

<sup>12</sup> [Information](#), US District Court (N. Dist. of Texas), 3-14CR-483-D (10 December 2014).

<sup>13</sup> [El Comercio \(15 December 2014\)](#); [Diario Correo \(17 December 2014\)](#); [Perú21 \(3 January 2015\)](#).

*arising from the Odebrecht scandal has also spurred several institutional reforms, but it is too early to assess the success of these efforts.*

# B. Prevention, detection and awareness of foreign bribery

## 1. General efforts to raise awareness of foreign bribery

17. Peru has adopted a strategy to fight domestic corruption but not foreign bribery. The [“National Policy for Integrity and the Fight against Corruption”](#) (Supreme Decree 092-2017-PCM) sets out 13 policy objectives for fighting corruption. The [“National Plan for Integrity and Fight against Corruption 2018-2021”](#) (Supreme Decree 044-2018-PCM) then defines actions for attaining the policy objectives. Many of the policy objectives and actions are relevant to fighting not only domestic corruption but also foreign bribery, e.g. strengthening the criminal justice system, promoting compliance programmes, and enforcing the Corporate Liability Law 30 424. But the policies and actions do not explicitly mention foreign bribery. They refer to the OECD instruments on public sector integrity but not the Convention. An initiative assesses corruption risks in the Peruvian public administration but not foreign bribery. Peru argues that the Policy and Plan touch upon issues such as Peruvian officials receiving bribes from abroad, or “fighting corruption at the level of international relations”. But these topics are not the focus of the Convention.

18. Given the absence of foreign bribery from the national strategy, Peru has made very limited efforts to raise awareness of this crime. It refers to a May 2016 [workshop](#) on corporate liability for transnational corruption. The website of the Superintendence of the Securities Market (*Superintendencia del Mercado de Valores*, SMV) refers to the Convention, [other anti-corruption treaties](#), and [foreign bribery guidance issued by authorities in other countries](#) such as the US and UK. The Ministry of Justice and Human Rights held [seminars](#) for the judiciary in September 2016 that covered corporate liability for foreign bribery. Additional awareness-raising efforts focused on compliance programmes and not foreign bribery *per se* (see Section B.8(c) at p. 24). Likewise, Peru refers to two additional events that targeted transnational organised crime.

19. Missing from these activities are several government bodies that engage the private sector. These include the [Ministry of Foreign Trade and Tourism \(Ministerio de Comercio Exterior y Turismo, MINCETUR\)](#), despite its responsibility for foreign trade policy; the [Commission for the Promotion of Peru for Exportation and Tourism \(Comisión de Promoción del Perú para la Exportación y el Turismo, PROMPERÚ\)](#) which is responsible for trade promotion; and the [Ministry of Economy and Finance \(Ministerio de Economía y Finanzas, MEF\)](#) which promotes the national economy and regulates the private sector. Also inactive are two government bodies that work with SMEs: the [Internationalisation Support Programme \(Programa de Apoyo a la Internacionalización, PAI\)](#), and the Ministry of Labour and Employment. Business association and chambers have also not raised awareness of foreign bribery but only general ethical issues and corporate compliance.

20. Given the dearth of efforts, the actual awareness of foreign bribery and the Convention is very low. As described later in this report, knowledge of these subjects is almost non-existent across virtually all relevant public sector stakeholders including officials in export credits, development co-operation, diplomatic services, tax authorities, and bodies that engage the private sector. Of particular concern is law enforcement and the judiciary, including officials directly responsible for enforcing corruption offences (see para. 129). The lack of awareness is also largely true of the corporate sector. At the virtual visit,

representatives of companies, business associations and the legal profession stated that Peruvian companies are generally not at risk of committing foreign bribery because they are not internationally active. Economic data on Peru's trade and investment paint a more nuanced picture, however (see Section A.2(b) at p. 7). Civil society representatives agree that foreign bribery risks do exist but that companies are "in denial". The anti-corruption compliance programmes of Peruvian companies are further discussed in Section B.8(c) at p. 29.

### **Commentary**

***The lead examiners appreciate the importance that Peruvian authorities place on fighting domestic corruption. Nevertheless, a substantial number of Peruvian companies including SMEs are internationally active. It is therefore necessary to also address foreign bribery and the implementation of the Convention. The lack of awareness of the Convention and the foreign bribery offence among all Peruvian stakeholders, including law enforcement officials, is therefore especially concerning. Raising awareness of issues such as corporate compliance and organised crime is useful but not a substitute for addressing foreign bribery specifically.***

***The lead examiners therefore recommend that Peru assess its foreign bribery risks and its approach to enforcement, and include policies and actions in its national anti-corruption strategy that are commensurate with this risk. Peru should also take urgent steps to raise awareness of its foreign bribery law and the Convention among all relevant public and private sector stakeholders. Additional recommendations on raising awareness among specific bodies and sectors, including among law enforcement and the judiciary, are described later in this report.***

## **2. Reporting and whistleblowing**

21. This section deals with the reporting of foreign bribery by Peruvian officials and private individuals generally. Later sections deal with reporting more specifically by export credit agencies (Section B.4 at p. 15), aid agencies (B.5 at p. 16), diplomatic missions (B.6 at p. 17), tax officials (B.7(c) at p. 20), and accountants and auditors (B.8(b)(iv) at p. 23). This section also addresses anonymous reports and whistleblowing.

### **(a) Reporting by public officials**

22. The 2009 Recommendation IX.ii asks Member countries to ensure that "appropriate measures are in place to facilitate reporting by public officials, in particular those posted abroad, directly or indirectly through an internal mechanism, to law enforcement authorities of suspected acts of bribery of foreign public officials in international business transactions detected in the course of their work, in accordance with their legal principles".

23. Peruvian public officials who fail to report a crime commit a criminal offence. Under CPC Art. 326(b), public officials must report a punishable act of which they become aware in the exercise of their powers, or due to their position as public officials. Failure to report foreign bribery is punishable by up to two to four years' imprisonment (CC Art. 407). A conviction requires proof that an official breached a duty to report despite having the capacity to do so, and that the official had "certain and concrete knowledge of the commission of a punishable act."<sup>14</sup> Virtual visit participants were unable to clarify whether this or another threshold of knowledge triggers the duty to report. From 2015 to August 2020, there have not been convictions of public officials under CC Art. 407 but four proceedings are ongoing, according to Peru.

<sup>14</sup> [Supreme Court \(24 April 2018\), 153-2017-Piura](#); [Supreme Court \(5 October 2016\), 581-2015-Piura](#).

24. The reporting channel may not be entirely clear. CPC Art. 326(b) states that a public official must report a crime to the “respective authority”. Peruvian authorities refer to CPC Art. 68(1) which provides that reports of crime may be made to the National Police. They also refer to reporting channels for domestic corruption, such as those managed by the Comptroller General (CGR). A few virtual visit participants mentioned the PPO as the recipient of these reports. After reviewing a draft of this report, Peruvian authorities refer to CPC Arts. 330-331. But these provisions concern the police informing the PPO and *vice versa* of complaints. They do not concern reporting by public officials. Peru later adds that “the competent authority by definition is the PPO”. But this is not reflected in the legislative provisions.

25. Actual awareness of this duty to report may not be adequate. At the on-site visit, the reporting obligation in CPC Art 326(b) was not mentioned by public officials in export credits (see para. 38), development co-operation (para. 42), diplomatic missions (para. 46) and tax authorities (para. 53). Peruvian authorities did not describe any efforts to raise the general awareness of foreign bribery reporting among its officials.

### **Commentary**

***The lead examiners recommend that Peru raise awareness of the duty of public officials to report foreign bribery under CPC Art. 326(b), and clarify the channels for making such reports.***

#### **(b) Reporting by private individuals**

26. Individuals are not obliged to report crimes (CPC Art. 326(1)). Those who choose to report can contact the PPO including the anti-corruption prosecutor (*Fiscalías Especializadas en Delitos de Corrupción de Funcionarios*, FECOF); National Police (*Polícia Nacional*); and *Procuraduría Especializada en Delitos de Corrupción de Funcionarios*. FECOF has publicised contact information for their offices on social media. The actual reporting rate is high. From 2015-2019, FECOF received an average of 1 720 complaints of bribery annually. Individuals may also report to the Public Prosecutor’s Office in person or via an [online reporting portal](#), adds Peru. In addition, a “[Single Digital Platform for Complaints](#)” about “alleged acts of corruption in the public administration” was created recently (Supreme Decree 002-2020-JUS Art. 13). Peruvian authorities at the virtual visit state that the Platform accepts both domestic and foreign bribery complaints. But the webpage requires the user to choose from a list of public entities to which the complaint relates; non-Peruvian entities are not among the options. Additional reporting channels managed by the CGR likely only apply to domestic corruption cases, given the body’s mandate as the public sector auditor.

#### **(c) Anonymous complaints**

27. Peruvian authorities and other virtual visit participants all agreed that that an anonymous complaint can be the basis of a foreign bribery investigation. This is despite language in Art. 328 of the Criminal Procedure Code, which provides that “Every complaint must contain the identity of the complainant. [...] If [the complaint] is written, then the complainant will sign and place his/her fingerprint. If it is verbal, the respective minutes will be signed.” If the complainant cannot sign, then he/she must record the reason and leave a fingerprint.

#### **(d) Whistleblowing and whistleblower protection**

28. The 2009 Recommendation IX.iii asks countries to ensure that “appropriate measures are in place to protect from discriminatory or disciplinary action public and private sector employees who report in good faith and on reasonable grounds to the competent authorities suspected acts of [foreign bribery]”.

29. Two Peruvian laws deal with whistleblower protection. The 2017 Legislative Decree 1 327 protects natural and legal persons who report “acts of corruption” in the public administration (Arts. 1 and 4.1).

Protection includes non-disclosure of identity; “labour protection measures”; and measures for bidders of public procurement contracts (Arts. 4.6 and 9). Law 29 542 of 2010 protects individuals who report “arbitrary or illegal acts”. In addition to protection of the whistleblower’s identity, the Law prohibits dismissal or removal from office, as well as other retaliation amounting to harassment (Art. 8).

30. The scope of these laws is too narrow. The legislation focuses on the reporting of domestic corruption, not foreign bribery. Legislative Decree 1 327 thus applies to the reporting of “an act of corruption in the Public Administration” (Arts. 2 and 4.1). Law 29 542 applies to arbitrary or illegal acts “in any public entity” understood as those “indicated in the [...] Law of General Administrative Procedure” (Arts. 2-3). Furthermore, Legislative Decree 1 327 contemplates “labour protection measures” as determined by the “competent administrative authority” and executed by “the Office of Human Resources” (Arts. 4.6, 9.2 and 11.1). Protection is therefore against retaliation by Peruvian public officials, not a private sector employer. Law 29 542 also only protects individuals who report wrongdoing “in a substantiated manner” (Art. 1). This means the report must be “truthful”, according to Peruvian officials. This is an unduly high standard, as reporting in good faith may therefore not be sufficient to attract protection. Peru also refers to a Technical Opinion<sup>15</sup> which states that only a “superficial verification” of a complaint is conducted. But this Opinion applies to complaints under Legislative Decree 1 327, not Law 29 542. It also applies to an “initial verification of formal requirements” and not the final assessment of the complaint.

31. The overall regime is also duplicative and fragmented. Much of Legislative Decree 1 327 and Law 29 542 overlap. But there are also significant differences, such as the Comptroller General’s central role in receiving and evaluating complaints under Law 29 542 (Art. 4) but not the Decree. Additional piecemeal rules apply to the reporting of wrongdoing in at least two specific bodies, namely the public prosecutors’ office and official aid agency.<sup>16</sup> Whistleblowing systems in private sector companies are voluntary. One virtual visit participant referred to a survey of 250 companies that have an ISO 37 001 anti-corruption management system. Only 60% of respondents have a whistleblowing programme. The Working Group has noted in other evaluations that it is difficult for the public to understand and benefit from a fragmented whistleblowing framework.<sup>17</sup>

32. Legislation aside, an even greater challenge is an existing cultural mistrust of whistleblowing. Numerous participants representing companies, business associations, and civil society at the virtual visit described Peruvians’ strong reluctance to report wrongdoing. Even for the companies at the virtual visit that have a whistleblowing system, actual reporting rates are very low. These comments, however, contrast with the apparently high numbers of corruption reports made by the public to Peruvian authorities (see para. 26).

### Commentary

***The lead examiners are concerned about the lack of legislation to protect whistleblowers who report foreign bribery, and the apparent unwillingness to report in Peru referred to by virtual visit participants. They therefore recommend that Peru, as a matter of priority, (a) take appropriate measures to protect from discriminatory or disciplinary action public and private sector employees who report to the competent authorities suspected acts of foreign bribery, and (b) raise awareness in the public and private sectors of the importance of whistleblowing and the protection available to whistleblowers.***

<sup>15</sup> Technical Opinion 001-2021-PCM / SIP of the Secretariat of Public Integrity.

<sup>16</sup> Legislative Decree 52 Art. 51-G and Resolution 167-2019-APCI Section 6.4.

<sup>17</sup> [Finland Phase 4, para. 23.](#)

### 3. Detection through media reports

33. Multiple bodies in Peru monitor the media for reports of corruption. Three of these units are in the Public Prosecutor's Office: the National Chief Prosecutor's office, Lava Jato Special Team, and Special Prosecutors for Corruption of Public Officials (*Fiscalías Especializadas en Delitos de Corrupción de Funcionarios*, FECOF). The Ministry of Foreign Affairs also monitors the media (see para. 45). Peruvian authorities state that a media article can be the basis for starting an investigation.

34. Unfortunately, these units have only had limited success in finding media reports that lead to actual investigations. The Lava Jato Special Team has opened at least one passive bribery investigation based on media reports in Brazil. The investigation in the Aircraft Services passive foreign bribery case also began after Peruvian media reports. But the Peruvian authorities were not aware of reports in the international press on the Printing Company passive foreign bribery case. Media monitoring also appears to be targeted at cases of bribery of Peruvian and not foreign officials. Reports of the Oil Group X active foreign bribery cases therefore went unnoticed. FECOF states that information provided by the Ministry of Foreign Affairs is "not common [but] exceptional".

35. Peru has also not made use of media reports of foreign bribery allegations provided by the Working Group to its members. Neither FECOF nor the Lava Jato Special Team appears familiar with the Working Group's monitoring and circulation of media information. The Secretariat of Public Integrity, which is not a law enforcement body, represents Peru in the Working Group. The Secretariat states that it asks FECOF for updates on foreign bribery cases monitored by the Working Group. But at the virtual visit, FECOF appeared unfamiliar with the media reports on the Oil Group X Cases that had been circulated by the Working Group. The Lava Jato Special Team also does not indicate that it relies on the media information provided by the Working Group. After reviewing a draft of this report, Peru states that the "Special Team is not familiar with the monitoring and circulation of media information by the Working Group", while FECOF's "familiarisation [with these Working Group activities] is partial".

#### Commentary

***The lead examiners recommend that Peru take steps to ensure that its law enforcement authorities are aware of media reports of foreign bribery allegations implicating Peruvian individuals, companies and officials. This should include media reports circulated by the Working Group to its members.***

### 4. Officially supported export credits

36. Officially supported export credits are government financial support (e.g. direct credits to foreign buyers or refinancing) or "pure cover supports" (e.g. export credit insurance or guarantee cover for credits). Governments provide officially supported export credits through export credit agencies (ECAs) that can be government institutions or private companies operating on behalf of governments. Given their contact with internationally active companies, ECAs can potentially raise awareness of, prevent, report and impose sanctions for foreign bribery. Measures for doing so are set out in the OECD [2019 Recommendation of the Council on Bribery and Officially Supported Export Credits](#). Peru adhered to the Recommendation on [13 March 2019](#) but has not taken part in the activities of the OECD Working Party on Export Credits and Credit Guarantees.

37. Peru's [Development Finance Corporation](#) (*Corporación Financiera de Desarrollo*, COFIDE) provides officially supported export credits. COFIDE is a development bank that is 99.2%-owned by the Peruvian state. Its main mission is to support Peru's development. To this end, it has a wide range of programmes addressing issues such as SME finance, financial inclusion, and COVID-19 economic recovery. One particular programme, the CRECER Fund (*Fondo CRECER*), provides loans and



guarantees to Peruvian exporters. As of end-2019, PEN 46.8 million and PEN 2.7 million (USD 12.8 million and USD 741 00) in guarantees and loans had been provided to 1 834 SMEs and exporting companies.<sup>18</sup> COFIDE adds that it grants short-term credits to financial institutions which in turn extend credit to their exporting clients.

38. COFIDE has some anti-corruption measures that apply to its export credit guarantee activities. As with other financial institutions, COFIDE has implemented an anti-money laundering compliance programme (see Section B.9(b) at p. 26). It has a policy of not carrying out operations with a client that has “a consensual and enforceable sentence for corruption, money laundering or terrorism financing”. The same applies to clients who do not declare the origin of their resources or their economic activity.<sup>19</sup> COFIDE states that it reviews internal lists of entities associated with money laundering and the debarment lists of multilateral development banks. Suspicious money laundering transactions must be reported to the UIF, Peru’s financial intelligence unit (see Section B.9(c) at p. 27). COFIDE states that its contracts contain a clause providing for annulment if a client engages in bribery. It has not provided a copy of the standard contract, however. There is no information on whether COFIDE examines fees or commissions paid by clients to agents. In 2018, it adopted an offence prevention model under the Corporate Liability Law (see Sections C.3(c)-(d) at p. 58). But the model addresses offences committed by COFIDE employees and not its clients or exporters. No steps have been taken to raise awareness of the Convention or foreign bribery among COFIDE staff in light of Peru’s limited export credits programme.

### Commentary

***Peru currently provides very limited officially-supported export credits. The Working Group should follow up whether Peru implements the [2019 Recommendation of the Council on Bribery and Officially Supported Export Credits](#) to a degree that is commensurate to its export credits programme.***

## 5. Development co-operation

39. Government agencies responsible for development co-operation have a role in fighting foreign bribery. They are “the first line of defence in preventing corruption and managing corruption risks” in order to obtain effective use of aid resources, notes the OECD 2016 [Recommendation of the Council for Development Co-operation Actors on Managing the Risk of Corruption](#) (2016 Recommendation). These agencies’ contact with development partners allows them to raise awareness of, prevent, detect, report and impose sanctions for foreign bribery and other incidents of corruption. The 2016 Recommendation describes measures that can support these goals.

40. Peru receives and provides development co-operation. The [Peruvian Agency for International Co-operation](#) (*Agencia Peruana de Cooperación Internacional*, APCI) attached to the Ministry of Foreign Affairs was created by Law 27 692. APCI engages in “South-South and triangular co-operation” comprising mainly technical co-operation with other developing countries. In 2019, this programme consisted of PEN 597 793 (USD 164 000) on travel expenses to and from Peru for technical assistance, internships, and training. Government officials also spent time on Peru’s co-operation activities. Beneficiary countries included Paraguay, the Dominican Republic, Colombia, Saint Lucia and Uruguay. APCI did not engage

<sup>18</sup> [COFIDE Annual Report 2019](#), pp. 14 and 27-28. *Fondo CRECER* consolidated several trusts including the Export Insurance for SMEs (SEPYMEX) ([Legislative Decree 1 399](#)).

<sup>19</sup> COFIDE (January 2021), *Money Laundering and Terrorism Financing Prevention and Risk Management Manual*, p. 12.

contractors or private companies in these activities. Peru adhered to the 2016 Recommendation on [20 December 2016](#).

41. Given this limited programme, APCI has accordingly engaged in few activities related to foreign bribery. It has not raised awareness of the Convention, foreign bribery or the 2016 Recommendation among its officials or recipients of assistance funds, in light of its limited development programme. It states that measures are in place to ensure the accountability of per diem paid to those who participate in technical assistance, internships, and training.<sup>20</sup> It has some powers to audit development co-operation partners. There is no information on the use of audits to enhance corruption risk management, or other efforts to follow up audit findings. But APCI states that it has accountability and transparency mechanisms in place. APCI's Personnel Unit (UP) provides "support in the identification and management of corruption risks".<sup>21</sup> But its risk assessments focus on corruption committed by officials of APCI, not foreign countries or implementing partners. APCI has not conducted foreign bribery-related training or risk assessments at the programme and/or strategy level. It believes that no country is free of this risk and will therefore continue to strengthen its monitoring mechanisms. It also states that its supervision is focused on not one but all actors to strengthen the effectiveness of co-operation.

42. A recent APCI directive on handling corruption complaints similarly focuses on domestic corruption and not foreign bribery.<sup>22</sup> The directive covers the reporting of "acts of corruption" but defines a "denounced" individual as a "functionary or civil servant of APCI" (Section 4.1). APCI officials must report acts of corruption "within the entity" to the UP Head (Section 5.3). Anonymous complaints are permissible (Section 6.2). Protection for whistleblowers include withholding of identity and some "labour protection measures" (Section 6.4). The UP must send a copy of the complaint to APCI's Institutional Control Office and the *Procuraduría Pública* of the Ministry of Foreign Affairs (Section 6.5.12). The *Procuraduría* then decides whether to report the matter to law enforcement, according to APCI. Information on the number and outcomes of complaints received is unavailable.

### Commentary

***The lead examiners acknowledge that APCI has only a few anti-corruption measures at its disposal. They recommend that the Working Group follow up whether APCI implements anti-foreign bribery measures to a degree that is commensurate with Peru's development co-operation programme.***

## 6. Foreign diplomatic representations

43. Diplomatic and commercial missions abroad play an important role in fighting foreign bribery. They can raise awareness of foreign bribery among companies that operate overseas, and provide advice and assistance on dealing with bribe solicitations. They can also monitor the local media for foreign bribery allegations and report them to law enforcement authorities in the home country. The Ministry of Foreign Affairs (*Ministerio de Relaciones Exteriores*, MRE) is responsible for Peru's overseas embassies and consulates, while PROMPERÚ oversees Peru's commercial offices abroad. No information has been provided on PROMPERÚ's efforts to implement the Convention in these commercial offices.

<sup>20</sup> [Resolution 080-2019/APCI-DE](#).

<sup>21</sup> [Resolution 042-2020/APCI-DE](#) Art. 1(b).

<sup>22</sup> [Resolution 167-2019, Directive for the attention of complaints for alleged acts of corruption in the Peruvian Agency for International Cooperation – APCI](#).

**(a) Awareness-raising efforts**

44. The MRE has not made sufficient efforts to raise awareness of the Convention. During this evaluation, the MRE refers extensively to measures to fight corruption committed by its officials. It refers to an Institutional Integrity Task Force that focuses on institutional integrity. It describes at length its procedure for handling reports of such wrongdoing, and refers to an example of one MRE official suspected of taking bribes from human traffickers in exchange for visas. Before being posted abroad, diplomats receive training on the trafficking of humans and cultural property, but not on foreign bribery. The MRE states that it organised activities and promoted international meetings with companies on anti-corruption in 2018. But there is no guidance or training on information related to foreign bribery that can be provided to Peruvian companies in foreign countries. Nor are overseas missions instructed on the assistance to be provided when such companies are confronted with bribe solicitations, contrary to the 2009 Recommendation Annex I.A. The MRE states that it now plans future training and awareness-raising on the Convention and corporate responsibility for its staff before foreign postings.

**(b) Detection and reporting of foreign bribery**

45. The MRE was not aware of and hence did not forward to the Public Prosecutor's Office (PPO) media reports of Peru's three known active foreign bribery allegations (see para. 15). As mentioned at para. 34, FECOF prosecutors state that receiving media information from the MRE is "not common [but] exceptional".

46. In terms of reporting, if an official in a foreign mission learns of a foreign bribery offence, then he/she would inform the ambassador who would then report the matter to MRE headquarters in Lima. The official may also contact the Chief of Diplomatic Service (Deputy Minister).<sup>23</sup> The MRE does not refer to reporting to the PPO or the obligation on public officials to report crimes under Criminal Procedure Code Art. 326(b) (see Section B.2(a) at p. 12).

**Commentary**

***The lead examiners are seriously concerned that the MRE and PROMPERÚ are not sufficiently aware of the Convention and its implementation in Peruvian legislation, and therefore have not taken sufficient steps towards its implementation. They therefore recommend that the MRE and PROMPERÚ urgently (a) provide information and training as appropriate to its officials posted abroad on Peru's laws implementing the Convention, so that such personnel can provide basic information to Peruvian companies in foreign countries and appropriate assistance when such companies are confronted with bribe solicitations; and (b) clarify and provide training on the procedure for MRE and PROMPERÚ officials to report foreign bribery allegations to Peruvian law enforcement authorities.***

**7. Tax authorities**

47. This section examines Peru's treatment of the tax deductibility of bribes; the prevention, detection and reporting of foreign bribery by tax authorities; and the sharing of tax information for use in foreign bribery investigations. Peru's tax authority is the National Superintendency of Customs and Tax Administration (*Superintendencia Nacional de Aduanas y de Administración Tributaria*, SUNAT). The Ministry of Economy and Finance (MEF) sets tax policy.

<sup>23</sup> Regulations of the Law of the Diplomatic Service of the Republic, Supreme Decree 130-2003-RE, Art. 152.

### (a) *Non-tax deductibility of bribes and financial penalties*

48. The 2009 Recommendation VIII urges member countries to fully and promptly implement the 2009 [Recommendation of the Council on Tax Measures for Further Combating the Bribery of Foreign Public Officials in International Business Transactions](#). This includes explicitly disallowing the tax deductibility of bribes to foreign public officials for all tax purposes in an effective manner.

49. Peru states that it prohibits the tax deduction of bribes but not through an explicit legislative provision. The Phase 1 Report (paras. 176 and 207) noted the lack of such a provision. A SUNAT report<sup>24</sup> on the deduction of unlawful expenses is not binding. The Phase 1 Report recommended that Peru enact an explicit prohibition on deductions.<sup>25</sup> In Phase 2, Peru presented a bill that modifies the Income Tax Law (Supreme Decree 179-2004-EF, ITL) to expressly deny the deduction of “expenses related to conduct classified as crimes and those that are part of a criminal offence”.

50. Peru states that fines and confiscated property are not tax deductible. ITL Art. 44(c) forbids the deduction of “fines, surcharges, default interest provided for in the Tax Code and, in general, sanctions applied by the National Public Sector”. Peru states that this covers fines and confiscation imposed as sanctions for foreign bribery.<sup>26</sup> The provision only prohibits deductions from “the third category of income”, i.e. from business activities by natural or legal persons. For natural persons, only 20% of all expenses can be deducted from their first, second and fourth income categories, in some cases up to a maximum cap.

#### *Commentary*

***The lead examiners are encouraged that Peru has drafted an amendment to the ITL to expressly deny the tax deduction of crime-related payments, including bribes to foreign public officials. They therefore reiterate the Phase 1 Report and recommend that Peru enact the amendment as soon as possible.***

### (b) *Post-conviction enforcement of non-deductibility of bribes*

51. Peru does not re-examine the tax return of a taxpayer who has been convicted of bribery to determine whether the bribes have been deducted. SUNAT can re-examine and audit tax returns within the statute of limitations (Supreme Decree 133-2013-EF (Tax Code) Arts. 59-62A, 108(2) and 127). A re-examination or audit must be commenced within four years after a return is filed (Art. 43). A limitation period of 10 years applies only to taxes withheld from non-resident taxpayers, and hence would not arise in some foreign bribery cases. Peru states that this limitation period can be suspended during a judicial procedure in relation to a taxpayer’s tax obligations (Art. 46(1)(b)). These suspensions usually arise during tax litigation. But even if the provision also applies to criminal proceedings against a taxpayer for foreign bribery, the suspension only begins when charges are filed, not when an investigation begins. Many of these cases will take longer than four years to reach the judicial stage, let alone a conviction (see Section C.1(e)(iii) at p. 36). SUNAT adds that once an audit has been completed, it cannot be reopened unless certain limited exceptions apply.

52. After reviewing a draft of this report, SUNAT states that the statute of limitations for audits should not be extended to facilitate the detection of bribe deductions. It believes that the statute of limitations “provides certainty that [SUNAT’s] power of determination [...] are not prolonged indefinitely”. Extending the

<sup>24</sup> SUNAT Report [026-2014-SUNAT/5D0000](#).

<sup>25</sup> A recent report also recommended that Peru enact an express prohibition on the tax deduction of bribes. It further noted an absence of a regulation that expressly allows the revocation of an ineligible deduction (MESICIC (2021), [6th Round Evaluation Report](#), paras. 48-49 and 52, and Recommendations 1.4.9 and 1.4.12).

<sup>26</sup> See also SUNAT Reports [058-2006-SUNAT/2B0000](#) para. 4 and [026-2007-SUNAT/2B0000](#) para. 2.

limitation period would infringe a taxpayer's right to a ruling within a reasonable time. Additionally, SUNAT believes that it has audit tools and specialised areas targeting taxpayers with higher risks of tax non-compliance. SUNAT can also audit SMEs for refunds of the General Sales Tax. Peru also refers to legislation in Congress concerning the CGR and SBS. As stated in para. 182, the Working Group considers only enacted legislation when assessing a country's implementation of the Convention.

### Commentary

***The crime of foreign bribery is often discovered years after the fact. Peru's bribery investigations can also be protracted. The relatively short limitation period for tax audits may therefore preclude SUNAT from auditing a taxpayer after its bribery conviction. The lead examiners therefore recommend that Peru (a) develop a procedure for routinely re-examining the tax returns of individuals and companies convicted of foreign bribery to verify whether bribes have been deducted, and (b) increase the limitation period for such re-examinations.***

### (c) Detecting and reporting foreign bribery

53. Efforts to detect bribes during tax audits need to be strengthened despite SUNAT's co-operation with law enforcement authorities in criminal cases. Peruvian tax authorities have translated and disseminated the [OECD Bribery and Corruption Awareness Handbook for Tax Examiners and Tax Auditors](#). In 2019-2020, 486 officials attended a course on the General Audit Manual organised by the Institute of Customs and Tax Administration. Peru states that the course covered the OECD Handbook. But officials at the virtual visit cannot confirm that tax examiners routinely look for deducted bribe payments. They are also unable to identify red flag indicators of bribes.<sup>27</sup> SUNAT adds that the objective of a tax examination is to determine a taxpayer's tax obligations. Expanding the focus to detecting bribery would change SUNAT's strategy for audits, prolong examinations, and require additional resources.

54. In addition to awareness-raising and training on detection, the reporting of foreign bribery should also be improved. Tax Code Art. 193 requires officials to report "reasonable indications of the commission of crimes". Peru states that a tax official would make such reports to a superior. A SUNAT official adds that tax crimes are reported to an internal legal advisor. No reference was made to reporting to law enforcement, as required by 2009 Recommendation VIII.i. Nor was the reporting obligation on all public officials in Criminal Procedure Code (CPC) Art. 326(b) mentioned (see Section B.2(a) at p. 12). A 2017 report indicates that, in cases of non-tax crimes, SUNAT would only provide information not protected by tax secrecy to the prosecutor; other information is only available upon request and with a court order.<sup>28</sup> Statistics on actual detection and reporting of bribe payments are not available.

### Commentary

***The lead examiners note SUNAT's position that the purpose of tax examinations is to determine a taxpayer's obligations. But bribe detection is relevant to this purpose: taxpayers who commit bribery often do not correctly declare their tax liability because of their illegal activities. Tax examinations therefore play an important role in detecting this crime. For this reason, the Working Group has consistently recommended that countries actively train and raise the awareness of tax authorities in detecting and reporting foreign bribery. The lead examiners therefore recommend that Peru (a) further train tax auditors on the detection of foreign bribery, (b) set out the procedure***

<sup>27</sup> A recent report observes a lack of training on bribe detection (MESICIC (2021), [6th Round Evaluation Report](#), paras. 23-26 and Recommendation 1.4.5).

<sup>28</sup> OECD (2017), [Effective Inter-Agency Co-Operation in Fighting Tax Crimes and Other Financial Crimes](#), 3<sup>rd</sup>. ed., para. 135. A recent report also notes the lack of a clear reporting procedure (MESICIC (2021), [6th Round Evaluation Report](#), para. 50 and Recommendation 1.4.10).

**for reporting suspicions of foreign bribery to law enforcement, and provide guidance to tax examiners on this matter, and (c) maintain statistics on the detection and reporting of foreign bribery with a view to assessing the effectiveness of SUNAT's anti-foreign bribery measures.**

#### **(d) Providing tax and beneficial ownership information to law enforcement**

55. Peruvian law enforcement may obtain tax information if there is judicial authorisation. Tax secrecy applies to information such as tax returns (Constitution Art. 2(5) and Tax Code Art. 85). A prosecutor can seek a court order to lift tax secrecy and require SUNAT to provide “information, documents and declarations of a tax nature that it has in its possession (CPC Art. 236; Tax Code Art. 85(a)). Prosecutors describe SUNAT as “proactive and efficient”.

56. Peru can share tax information with foreign authorities for use in criminal foreign bribery investigations but has not done so in practice. Tax Code Art. 85(h) states that “information subject to tax secrecy may be exchanged with the tax administrations of other countries in compliance with what is agreed in international conventions”. Peru has been party to the [Convention on Mutual Administrative Assistance in Tax Matters](#) since 2018. The Convention allows parties to exchange tax information for tax purposes. Under Art. 22(4), however, tax information provided by Peru to another party may be used for a non-tax purpose (e.g. a criminal foreign bribery investigation). Such use is allowed when authorised under the laws of Peru and the Peruvian competent authority grants its permission. Four bilateral treaties to which Peru is party contain similar language.<sup>29</sup> However, Peru has not invoked these provisions to permit non-tax use of such information in the past. Nor has it indicated a policy of willingness to do so in the future. Peru adds that tax information can also be provided pursuant to reciprocity under the CPC, or under an applicable treaty on mutual legal assistance in criminal matters (see Section C.1(i)(i) at p. 44).

57. SUNAT also possesses corporate beneficial ownership information. Legislative Decree 1 372 requires legal persons and legal entities to report the identity of their beneficial owners to SUNAT (Arts. 3(b)-(c)). They must also maintain up-to-date information about their beneficial owners and implement mechanisms for their identification (Art. 6).<sup>30</sup>

## **8. Accounting and auditing, and corporate compliance, internal controls and ethics programmes**

### **(a) Accounting standards**

58. Art. 8(1) of the Convention requires that each Party, within the framework of its laws and regulations regarding the maintenance of books and records, financial statement disclosures and accounting and auditing standards, to prohibit the establishment of off-the-books accounts; making of off-the-books or inadequately identified transactions; recording of non-existent expenditures; entry of liabilities with incorrect identification of their object; and the use of false documents, for the purpose of committing or hiding foreign bribery.

59. Peru's accounting requirements have not changed since Phase 1 (para. 142). Accounting and auditing standards are set by the Accounting Standards Council (*Consejo Normativo de Contabilidad*, CNC) within the General Directorate of Public Accounting (*Dirección General de Contabilidad Pública*) of the Ministry of Economy and Finance. The Commercial Code 1 902 Arts. 34-49 specify the books and records that merchants are required to accurately maintain. These documents must be kept during the

<sup>29</sup> Double taxation agreements with Mexico (Protocol para. 8), Switzerland (Art. 25(2)), Japan (Art. 26) and Portugal (Protocol para. 10).

<sup>30</sup> GAFILAT (2020), [First Enhanced Follow-up Report and Technical Compliance Re-Rating](#), paras. 8-19 and 34-38.

operation of a merchant and its successor plus five years thereafter. The General Company Law 26 887 (GCL) Arts. 221-223 require companies to prepare annual financial statements and other documents that accurately state their financial and economic situation, the state of its business, and its results. The CNC has adopted the International Financial Reporting Standards (IFRS) and IFRS for Small- and Medium-sized Enterprises.<sup>31</sup> Non-listed, listed and financial companies are required to use these standards to prepare their financial statements.<sup>32</sup> Tax legislation imposes further requirements for tax purposes, such as required books, supporting documentation, and the “legalisation” of documents by notaries or judges.<sup>33</sup> Accounting offences are explained in Section 0 at p. 64.

## **(b) External auditing**

### **(i) Entities subject to external audit**

60. The 2009 Recommendation X asks countries to take the steps necessary, taking into account where appropriate the individual circumstances of a company, including its size, type, legal structure and geographical and industrial sector of operation, so that laws, rules or practices with respect to external audits are fully used to prevent and detect foreign bribery, according to their jurisdictional and other basic legal principles.

61. As in Phase 1 (para. 147), the following entities in Peru are subject to annual external audits (SBS Resolution 17 026-2010):

- (a) Listed companies (CONASEV Resolution 0103-1999-EF/94.01);
- (b) Stock companies (*sociedad anónima*) when requested by 10% or more of its shareholders (GCL Arts. 226-227);
- (c) Closed companies (*sociedad anónima cerrada*) and open companies (*sociedad anónima abierta*) under certain circumstances (GCL Arts. 242 and 260); and
- (d) Financial and insurance companies as required by the Superintendence of Banking, Insurance, and Pensions (Law 26 702, Art. 180).

### **(ii) External auditing standards and detection of foreign bribery**

62. The [International Standards on Auditing \(ISAs\)](#) have applied in Peru since 2006. Law 28 951 gives the 24 Departmental Associations of Public Accountants the power to set auditing standards. In practice, the Associations adopt auditing standards issued by their umbrella organisation, the *Junta de Decanos de Colegios de Contadores Públicos de Perú* (JDCCPP; Law 25 892). The JDCCPP has adopted the ISAs (Phase 1 Report para. 146).

63. Peruvian auditors at major firms may be more aware of the role of external auditing in detecting foreign bribery than their colleagues in smaller firms or government regulators. Auditors at the virtual visit state that ISAs 240 and 250 require them to detect fraud and non-compliance with laws that lead to material misstatements in a company’s financial statements. Such misstatements could stem from bribery and other illegal payments. One auditor received training from his international firm on foreign bribery legislation in foreign jurisdictions such as the US and UK. However, virtual visit participants believe that smaller Peruvian

<sup>31</sup> CNC Resolutions [013-98-EF/93.01](#), [013-98-EF/93.10](#), [059-2015-EF/30](#), [03-2019-EF/30](#), and [045-2010-EF/94](#).

<sup>32</sup> Legislative Decree 1 438 Art. 6; SMV [Resolution 11/2012](#); SBS [Resolution 7036-2012](#).

<sup>33</sup> Tax Code, [Supreme Decree 133-2013-EF](#); SUNAT Resolutions [234-2006](#) and [286-2009](#).

audit firms are less likely to be attuned to bribery-related issues. Government officials at the virtual visit cannot describe the link between external audit and foreign bribery detection.<sup>34</sup>

### *Commentary*

***The lead examiners recommend that Peru raise awareness among Peruvian external auditors and regulators of the role that external audits can play in foreign bribery detection.***

#### ***(iii) Audit quality and auditor independence***

64. The 2009 Recommendation X.B.ii states that member countries and professional associations should maintain adequate standards to ensure the independence of external auditors which permits them to provide an objective assessment of company accounts, financial statements and internal controls.

65. GCL Art. 114(4) stipulates that the general meeting of shareholders appoints the external auditor for private companies. Additional provisions address the independence of external auditors, such as on the rendering of non-audit services; conflicts of interest with the audited company; ownership in the audited company; and good character of the auditor.<sup>35</sup>

66. The JDCCPP sets ethical standards that are adopted by all departmental associations. It has adopted the 2014 International Ethics Standards Board for Accountants Code of Ethics.<sup>36</sup> It had planned to adopt the [2018 International Code of Ethics](#) by the end of 2020 and the non-compliance with laws and regulations (NOCLAR) standard in 2021.

67. As for audit quality control, the JDCCPP has adopted ISA 220 and International Standard on Quality Control 1 (ISQC1). But the JDCCPP and departmental associations have not adopted specific rules on a quality assurance review system. A quality assurance programme is expected to be voluntary in 2022 and mandatory by 2023.<sup>37</sup> Auditors providing services to companies regulated by the SMV and SBS must register with these authorities and subject themselves to audit quality assurance requirements.

#### ***(iv) Reporting foreign bribery and sharing information by external auditors***

##### **(1) Reporting foreign bribery to company management**

68. The 2009 Recommendation X.B.iii urges countries to require an external auditor who discovers indications of a suspected act of foreign bribery to report this discovery to management and, as appropriate, to corporate monitoring bodies.

69. As in Phase 1 (para. 150), Peruvian auditors must report material misstatements due to fraud or non-compliance with laws to the audited company's management (ISA 240(40) and (43); ISA 250(19) and (28)). Auditors at the virtual visit state that such material misstatements may result from foreign bribery. ISA 260 also deals with "communication with those charged with governance" of the company.

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<sup>34</sup> A recent report recommends training and raising awareness of anti-corruption matters among accountants, auditors and regulators (MESICIC (2021), [6th Round Evaluation Report](#), paras. 89-90 and Recommendation 2.3.5).

<sup>35</sup> Regulation of External Audit, [SBS Resolution 17026-2010](#), Art. 3.

<sup>36</sup> JDCPCP [Resolution 009-2015](#).

<sup>37</sup> IFAC (October 2020), [Peru](#).



**(2) Encouraging companies to respond to an auditor's report**

70. Peruvian authorities have not encouraged companies that receive reports of suspected acts of foreign bribery from an external auditor to actively and effectively respond to such reports, as required by 2009 Recommendation X.B.iv. Auditors at the virtual visit state that it is for the management of the audited company to decide whether and how to respond. Peru also refers to a regulation requiring companies to have internal systems to report wrongdoing to internal auditors.<sup>38</sup> The regulation is irrelevant to reporting by *external* auditors.

71. Peruvian authorities refer to measures that are not sufficient to implement this Recommendation. For example, there is no guidance in the area of corporate governance or the duties of company directors on responding to auditor reports of bribery. Peru states that prevention models under the Corporate Liability Law 30 424 encourage the reporting of bribery to the company's compliance officer and senior management. But this does not require management to respond to the report. CC Art. 407 makes it a crime for someone who fails to report a crime as required by his/her profession or employment. Similarly, CPC Art. 326 requires "those obliged to do so by express mandate of the Law" to report crimes. However, Peru has not identified any legal obligation on company management to report crimes to authorities.

**Commentary**

***The lead examiners recommend that Peru encourage companies that receive reports of suspected acts of foreign bribery from an external auditor to actively and effectively respond to such reports.***

**(3) Reporting foreign bribery and providing information to competent authorities**

72. Peru has not implemented a recommendation to consider requiring an external auditor to report suspected acts of foreign bribery to competent authorities independent of the company (Phase 1 Report para. 205). Peruvian auditors must report suspected money laundering to competent authorities (Legislative Decree 1 249; Phase 1 Report para. 151). Auditors at the virtual visit add that they must also report certain matters to the SBS (the financial sector regulator) if the audited company is a financial or insurance company. But there is no obligation to report bribery. The only exception is where the audited company is a state-owned enterprise, in which case offences must be reported to the Comptroller General. Peru was requested but cannot provide data on domestic or foreign bribery investigations initiated by an auditor's report. It adds that a proposed amendment to Law 28 951 would require accountants and auditors to report "operations incompatible with the purposes of the public sector entity or the objects of the private company". Such reports would be made to "administrative and jurisdictional authorities", among others.

**Commentary**

***The lead examiners reiterate the Phase 1 Report and recommend that Peru consider requiring external auditors to report suspected foreign bribery to competent authorities independent of the company, such as law enforcement or regulatory authorities, and ensure that auditors making such reports reasonably and in good faith are protected from legal action.***

**(c) Corporate compliance, internal controls and ethics programmes**

73. The 2009 Anti-Bribery Recommendation X.C.i asks countries to encourage companies to develop and adopt adequate internal controls, ethics and compliance programmes or measures for the purpose of preventing and detecting foreign bribery. Recommendation X.C.ii adds that Parties should encourage business organisations and professional associations to promote these measures.

<sup>38</sup> Corporate Governance and Comprehensive Risk Management Regulations, SBS Resolution 272-2017, Art. 19.

74. Peru has made some efforts to promote compliance programmes. The enactment of the Corporate Liability Law 30 424 in 2016 introduced the concept of offence prevention models (see Sections C.3(c)-(d) at p. 58). Promoting prevention models is one of the actions for implementing the current national anti-corruption strategy (see para. 17). Actual activities include a 2016 “[master class](#)”, a 2019 “[discussion board](#)”, and events on 6 April 2016 and [4-5 December 2019](#). The SMV published in 2021 [Guidelines for the Implementation and Operation of Prevention Models](#) (see Section. C.3(c) at p. 58). It states that it has created a web portal referring to the CLL and prevention models. The Supervisory Organ for State Contracts has encouraged procuring authorities to consider whether a company has a prevention model when awarding contracts. Two business associations have codes of ethics that ask their members not to engage in corruption. A third has an anti-corruption policy that refers to the Peruvian Criminal Code’s definition of a “public official” but does not explicitly mention foreign bribery. Virtual visit participants were keenly aware of the Corporate Liability Law.

75. In practice, the degree to which Peruvian companies have anti-foreign bribery compliance programmes varies. As mentioned at para. 20, the Peruvian private sector largely does not perceive itself to be at risk of committing foreign bribery. Awareness of the foreign bribery offence is also uneven. But at the virtual visit, Peruvian subsidiaries of foreign multinationals described elaborate compliance programmes that specifically addressed this crime. Most of these subsidiaries believe that they are not exposed to foreign bribery risks because they operate only in Peru. Several large Peruvian companies also have similarly sophisticated compliance programmes because of listings on overseas stock exchanges that expose them to foreign bribery legislation in other jurisdictions. The remaining companies are internationally active but have more rudimentary compliance programmes that do not refer to foreign bribery. Virtual visit participants agree that SMEs do not have adequate anti-corruption measures.<sup>39</sup>

### **Commentary**

***The lead examiners recommend that Peru take steps to encourage Peruvian companies that trade or invest overseas to develop and adopt adequate internal controls, ethics and compliance programmes or measures for the purpose of preventing and detecting foreign bribery.***

## **9. Prevention and detection through anti-money laundering measures**

76. This section concerns the prevention and detection of foreign bribery through anti-money laundering (AML) measures. The money laundering offence is addressed in Section C.3(g) at p. 61.

### **(a) Peru’s exposure to corruption-related money laundering**

77. Peru’s money laundering risk assessments do not explicitly address foreign bribery. A 2016 [national assessment](#) (p. 10) identifies an “increase in recent years of public corruption activities in Peru”, including bribes to public officials, as a money laundering threat. In 2015, suspected money laundering transactions linked to domestic corruption accounted for the highest economic value, surpassing even drug trafficking. Additional [risk assessments](#) in the fishing, timber and mining sector also touch upon domestic corruption. The [2018-2021 National Plan against Money Laundering and Terrorism Financing](#) prescribes specific actions over the four-year period. None of these documents mention foreign bribery. Peruvian authorities undertake to change this in future risk assessments.

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<sup>39</sup> A recent report recommends further awareness-raising and promotion campaigns across the private sector (MESICIC (2021), [6th Round Evaluation Report](#), para. 83, and Recommendations 2.3.6).

### Commentary

**The lead examiners recommend that Peru systematically take foreign bribery into account when conducting money laundering risk assessments in the future.**

#### (b) Customer due diligence and politically exposed persons (PEPs)

78. Several bodies are responsible for overseeing the AML system. Peru's financial intelligence unit, the *Unidad de Inteligencia Financiera del Perú* (UIF), was created by Law 27 693 (UIF Law). The UIF is a special unit within the financial sector regulator, the Superintendence of Banking, Insurance and Pension Funds Administration (*Superintendencia de Banca, Seguros y Administradoras Privadas de Fondos de Pensiones*, SBS). The UIF, in co-ordination with "supervisory bodies", issues regulations on the obligations, requirements, and sanctions that apply to regulated entities. Each supervisory body then enforces the regulation in its sector.<sup>40</sup> For financial institutions, the SBS is the responsible supervisory body (UIF Law Arts. 9.A.2 and 9.A.10). The [SBS AML Resolution 2 660-2015](#) sets out more detailed requirements for AML systems in SBS-regulated entities.

79. Regulated entities are required to perform customer due diligence. Entities must take reasonable measures to identify their customers and final beneficiaries (SBS AML Resolution Art. 28; UIF Regulation Arts. 19-21). For financial institutions, SBS AML Resolution Arts. 30.1-2 specify the minimum customer information required. Reporting entities must manage the customer's risk profile, depending on which general, simplified or enhanced<sup>41</sup> due diligence must be applied (Arts. 4 and 30-32; Phase 1 Report para. 140).

80. Special rules apply to politically exposed persons (PEPs), though the definition of this term should be broader. PEPs are defined as "natural persons, national or foreign, who fulfil or in the last five years have fulfilled prominent public functions or functions in an international organisation, whether in Peru or abroad, and whose financial circumstances may be the subject of public interest". A direct collaborator of the highest authority of an institution is also considered a PEP (Art. 2(l)).<sup>42</sup> Financial institutions must conduct enhanced due diligence on PEPs and their spouse or partner, close relatives, and legal entities in which they own 25% or more (SBS AML Resolution Art. 32(e)-(h)). The last requirement results in enhanced due diligence for some associates of PEPs. Contrary to international standards, however, enhanced due diligence is not required for other close associates of PEPs, such as prominent members of the same political party, and business partners or associates.<sup>43</sup> In other evaluations, the Working Group has recommended that countries extend their definition of PEPs to meet these international standards.<sup>44</sup>

### Commentary

**The lead examiners recommend that Peru strengthen its capacity to detect foreign bribery by extending the requirement to conduct enhanced due diligence to additional close associates of PEPs, such as prominent members of the same political party, and business partners or associates.**

<sup>40</sup> UIF Law Arts. 3(9), 9-A and 10.1; [Supreme Decree 20-2017-JUS](#) (UIF Regulation) Art. 32.

<sup>41</sup> Peru states that enhanced due diligence is known as "reinforced due diligence" in the country.

<sup>42</sup> Non-exhaustive lists of PEPs are in [SBS Resolution 4 349-2016](#) and [SMV Resolution 073-2018-SMV-02](#).

<sup>43</sup> Financial Action Task Force (FATF) (2013), [FATF Guidance: Politically Exposed Persons \(Recommendations 12 and 22\)](#), paras. 46-49.

<sup>44</sup> See [Spain Phase 2](#), paras. 49 and 177(d); [Latvia Phase 2](#), para. 96 and Recommendation 8(a).

### (c) *Suspicious transaction reporting*

81. Regulated entities must report suspected money laundering transactions to the UIF (UIF Law Art. 8 and Law 29 038 Art. 3.1). These include banks; insurance and other entities in the financial system; lawyers; accountants and accounting firms that represent clients in real estate transactions; asset management; incorporation and management of legal entities etc. (Phase 1 Report para. 136).

82. Obligations differ for three types of transactions (Phase 1 Report para. 137). First, regulated entities must identify and maintain records of unusual transactions. These are operations “whose amount, characteristics and frequency are not related to the economic activity of the client, go beyond the parameters of normality in force in the market or do not have an obvious legal basis” (UIF Law Art. 11.3(b); SBS AML Resolution Arts. 2(j) and 11(i)). Second, regulated entities must file suspicious transaction reports (STRs) to the UIF if an unusual transaction is considered suspicious. Suspicious transactions are those “that have an unusual magnitude or rotating speed, or unusual or unjustified complexity, that are presumed to proceed from some illegal activity, or that, for any reason, do not have an economic or apparent legal basis” (UIF Law Art. 11.3(a)). Finally, entities must keep a Record of Operations for transactions whose amount exceed a threshold set by the UIF (UIF Law Art. 9; UIF Regulation Art. 24; SBS AML Resolution Art. 49).

83. Guidance and typologies for identifying suspicious transactions do not specifically address foreign bribery. Peru states that this is because it has not had foreign bribery cases. SBS AML Resolution Art. 57 and Annex 5 set out 132 red flag indicators of suspicion. The indicators are fairly general and includes factors such as a client who refuses to provide requested information; frequent use of intermediaries; and media reports that a client is under investigation. The indicators are not specific to any crime type, including foreign bribery. Money laundering [typologies](#) prepared by the UIF also do not refer to foreign bribery. Some of the typologies deal with domestic corruption, both nationally and in sectors such as public procurement and natural resources. Financial institutions at the virtual visit state that they apply guidance and indicators from foreign parent companies which do address foreign bribery. This is likely not the case for domestically-owned financial institutions. The financial institutions add that Peruvian authorities have not provided foreign bribery-related awareness-raising or training.

84. The UIF provides feedback on STRs to reporting entities. The financial institutions at the virtual visit are satisfied with the feedback that they receive.<sup>45</sup>

85. The UIF has not received a foreign bribery-related STR. According to its [website](#), from 2015 to July 2020, the UIF received almost 11 500 STRs. During that period, financial institutions have filed 2 994 STRs where the predicate offence is a crime against the public administration, i.e. an average of 536 STRs annually. A total of 202 of these reports had “persons reported with foreign nationality”. This does not necessarily mean that foreign bribery is the predicate offence in these cases. Instead, the reports could refer to foreign entities laundering the proceeds of the corruption committed by Peruvian officials.

86. Legislative Decree 1 106 Art. 5 sets out the sanctions for non-reporting. Failure to report a detected suspicious transaction in breach of one’s function or professional obligations is punishable by 4-8 years’ imprisonment, 120-250 fine-days and 4-6 years’ disqualification from certain activities or positions. Other omissions to report suspicious transactions are punishable by a fine of 80-150 fine-days and 1-3 years’ disqualification. Legal persons supervised by the SBS may be fined or suspended for failure to report ([SBS Resolution 2 755-2018](#) Art. 19(2) and Annex 1).

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<sup>45</sup> A 2019 report notes that UIF and SBS had provided feedback through training, newsletters and meetings on issues such as the detection of suspicious transactions and on typologies. However, it should be noted that the feedback did not result in STRs of higher quality that led to the detection of actual cases of money laundering (GAFILAT (2019), [Mutual Evaluation Report of the Republic of Peru](#), pp. 9, 14, 74 and 84; paras. 22, 92-93, 250 and 314; Annex paras. CT349-352).

### Commentary

**The lead examiners recommend that Peru (a) raise awareness of foreign bribery among reporting entities, and (b) develop guidance and typologies on suspicious money laundering transactions that specifically address money laundering predicated on foreign bribery.**

#### (d) Processing of suspicious transaction reports, resources, and training

87. The UIF receives and analyses STRs (UIF Law Art. 3(3)). To fulfil this role, the UIF may require government bodies to provide information (UIF Law Art. 8.3 and Law 29 038 Art. 3.4). At the UIF's request, a criminal judge may lift banking or tax secrecy "whenever it is necessary and pertinent" (UIF Law Art. 3-A; UIF Regulation Art. 7).

88. After analysing an STR and concluding that a transaction may be linked to money laundering, the UIF may provide information on the transaction to the Public Prosecutor's Office (PPO) and other competent authorities such as the CGR and SUNAT. The UIF may spontaneously provide a Financial Intelligence "Informe" (*Informe de Inteligencia Financiera*, IIF) on operations that are "presumed to be linked to money laundering activities". An IIF "has no probative value and cannot be used as an indication or evidence in any investigation or judicial, administrative and / or disciplinary process" (UIF Regulation Art. 5.2.1(a)). Prosecutors may also ask the UIF for a UIF Report (*Reporte UIF*, R-UIF) which does have "probative validity" (UIF Regulation Art. 5.2.1(c)).

89. The UIF sends a moderate number of IIFs to law enforcement. In 2015-2019, the UIF sent an average of 66.6 IIFs annually, 52.6 of which went to the PPO. From 2015 to July 2020, 62 IIFs resulted in the PPO opening a case and 52 were used in already-opened cases. This translates to 11.1 and 9.3 IIFs annually. Of all the IIFs generated, corruption was the most common predicate offence, accounting for one-third of the total. The Lava Jato Special Team has 4 cases that were initiated based on information from the UIF.

90. The UIF has sufficient resources but could benefit from more foreign bribery-related training. In 2020, it had 87 officials and a budget of over PEN 23 million (USD 6.3 million). This includes 28 staff in the Operational Analysis Department. The UIF states that its resources are adequate. But as with all stakeholders in Peru, it would be beneficial to raise awareness among UIF officials of the Convention and foreign bribery.

### Commentary

**The lead examiners recommend that Peru raise awareness of the Convention and Peru's foreign bribery laws among UIF officials.**

# C. Investigation, prosecution and sanctioning of foreign bribery and related offences

## 1. Investigation and prosecution of foreign bribery

### (a) Relevant law enforcement authorities

91. The Public Prosecutor's Office (*Ministerio Público*, PPO) is responsible for conducting criminal investigations.<sup>46</sup> The Attorney General (*Fiscal de la Nación*, AG) heads the PPO and is responsible for its organisation. The AG has created a body for corruption offences, the Special Prosecutors for Corruption of Public Officials (*Fiscalías Especializadas en Delitos de Corrupción de Funcionarios*, FECOF). An additional Lava Jato Special Team created in December 2016 prosecutes cases related to the Brazilian construction company Odebrecht.<sup>47</sup> The National Police supports investigations through specialised directorates in corruption (*Dirección Contra la Corrupción*), money laundering, criminal intelligence, and complex investigations.<sup>48</sup>

92. FECOF has the authority to investigate foreign bribery cases, though responsibility for doing so has not been designated to a specific unit within this body. FECOF has jurisdiction over crimes against the public administration that are “serious, complex and have national repercussions, or whose effects exceed the scope of a Judicial District or are committed by criminal organisations”.<sup>49</sup> A serious crime is one punishable by at least five years’ imprisonment, which includes foreign bribery. However, FECOF is a nationwide body with over 550 staff in offices in each of the 34 prosecutor districts across the country. Most of these offices are understandably focused on domestic corruption. No unit has specific responsibility for foreign bribery. After seeing a draft of this report, Peru states that foreign bribery cases would be assigned to the Corporate Supraprovincial Prosecutor within FECOF. This unit is generally responsible for cases of serious and complex criminality with national and international repercussions. But the regulation creating this unit does not specifically refer to jurisdiction over foreign bribery cases. It also refers to several international treaties but not the OECD Anti-Bribery Convention.<sup>50</sup> Furthermore, the Corporate Supraprovincial Prosecutor is sub-divided into six offices. An express designation of

<sup>46</sup> [Political Constitution of Peru](#) Art. 159; Criminal Procedure Code, Preliminary Title, Art. IV; Legislative Decree 52-1981 (PPO Law) Art. 1.

<sup>47</sup> PPO Law Art. 80-A; [PPO Resolution 5050-2016-MP-FN](#).

<sup>48</sup> [Supreme Decree 026-2017-IN](#) Art. 100.

<sup>49</sup> [PPO Resolution 1833-2012-MP-FN](#).

<sup>50</sup> Regulation of FECOF, FELAPD, and Special Prosecutor for Organised Crime ([PPO Resolution 1423-2015-MP-FN](#)) Arts. 3 and 19.

responsibility for foreign bribery to one or more of these sub-offices would increase awareness of foreign bribery and accountability for such cases.

93. There are also no clear rules on which authority investigates a case that involves both bribery and related offences. Divergent views were articulated at the virtual visit. A PPO unit specialises in money laundering cases, the Special Prosecutors for Money Laundering and Confiscation (*Fiscalías Especializadas en Delitos de Lavado de Activos y Pérdida de Dominio*, FELAPD). FELAPD states that the assignment of a case involving both foreign bribery and money laundering depends on which crime is more “dominant”. But FECOF states that some cases have been split, with FECOF prosecuting the bribery charge and FELAPD money laundering. In other cases, FECOF would have exclusive responsibility for investigating both charges if the money laundering was “not complex”. One judge also cites complexity as the test. A second judge refers to rules that apply to cases involving corruption and organised crime in Law 30 077. But similar rules do not exist for bribery and money laundering. Unclear division of competence appears to have also contributed to poor co-ordination of outgoing MLA requests (see para. 169).

### Commentary

***The lead examiners recommend that Peru assign primary responsibility for foreign bribery cases to a specific prosecutorial unit. Such an approach would help ensure that sufficient priority is given to the enforcement of this crime. It would improve expertise and co-ordination, and reduce the likelihood of cases falling between the cracks. A dedicated unit would also build expertise in such cases. The unit should also be expressly given jurisdiction over related offences (e.g. money laundering and false accounting) in the same case.***

### (b) Steps of an investigation

94. The Criminal Procedure Code (CPC) sets out the rules for investigating and prosecuting foreign bribery against natural and legal persons. The main stages of a foreign bribery case are the preliminary proceedings, preparatory investigation, and trial.

95. The Public Prosecutor initiates preliminary proceedings (*diligencias preliminares*) when he/she learns of a suspicion that a crime has been committed (Phase 1 Report para. 110). The prosecutor may make this decision *ex officio* or upon receiving a complaint (CPC Art. 329). Prosecutorial discretion to decline to investigate (opportunity principle) is not available because foreign bribery is punishable by more than four years’ imprisonment (CPC Art. 2(1)). During the preliminary proceedings, the prosecutor may conduct an investigation personally or enlist the support of the National Police. The purpose of the investigation is to determine whether a crime has taken place, the material elements of the crime, and the persons involved (CPC Art. 330). Peruvian authorities add that mutual legal assistance (MLA) and investigative measures that require judicial authorisation are available at this stage.

96. At the end of the preliminary proceedings, the prosecutor will formalise the case as a preparatory investigation (*investigación preparatoria*) if the act under investigation constitutes an offence, is criminally punishable, and is not time-barred. The prosecutor files a document with a Preparatory Investigation Judge that sets out the name of the accused, the facts of the case, and the steps that must be taken immediately. The accused is formally informed of the charges. CPC Arts. 334 and 336 state that investigative steps that have been taken in the preliminary proceedings cannot be repeated in a preparatory investigation. Peruvian authorities explain that this restricts but does not exclude the same investigative measure. For example, if MLA is requested during preliminary proceedings, it can be sought again during a preparatory investigation if it is “relevant and useful”. This could nevertheless be problematic, considering that MLA is often crucial at the stage of a preparatory investigation.

97. Upon the conclusion of the preparatory proceedings, the prosecutor applies to the Preparatory Investigation Judge for an order of dismissal if there are insufficient grounds to proceed, e.g. inadequate evidence, existence of a defence, or the criminal action has been extinguished. Otherwise, the prosecutor files an accusation (CPC Arts. 344-349). Upon the issuance of the accusation, the case proceeds to the “intermediate stage”. A Preparatory Investigation Judge holds a preliminary hearing to determine certain pre-trial issues and motions. Once these issues are resolved, the Preparatory Investigation Judge issues an indictment and orders an oral trial (CPC Arts. 350-354).

### (c) *Non-trial resolutions*

#### (i) *Types of non-trial resolutions*

98. Criminal proceedings may also be concluded without trial via non-trial resolutions. Three types of resolutions are available.

99. An early termination of proceedings (*terminación anticipada*)<sup>51</sup> is akin to a plea agreement in other jurisdictions. During a preparatory investigation, the Preparatory Investigation Judge may hold a private hearing at the request of the accused or the prosecutor. The Judge urges the parties to agree on the facts of the case and sentence to be imposed. The Judge examines whether the agreed facts are sufficient to support a conviction and the penalty is within the statutory range. The accused is entitled to a sentence reduction of one-sixth unless the case involves a criminal organisation (CPC Arts. 468-471). The reduction is in addition to any for a voluntary confession unless the accused is a recidivist or habitual offender. The Judge enters a conviction unless the agreed sentence is “manifestly disproportionate”.

100. An early conclusion to a trial (*conclusión anticipada del juicio*, CPC Art. 372) is similar to an early termination but occurs at the beginning of a trial. Before entering a plea, the accused may request a private meeting with the prosecutor to seek an agreement on the penalty. If the accused admits responsibility, then the judge imposes sentence. The sentence follows an agreement, if any, between the accused and the prosecutor unless the judge decides that the facts of the case do not constitute an offence, or manifestly exempt or mitigate liability. Peruvian authorities stated in Phase 1 (para. 116) that in practice the judge verifies that the offender freely consents to the agreement, knows the nature of the accusation, and understands the consequences of the agreement.

101. Effective collaboration (*colaboración eficaz*, CPC Art. 472) is an arrangement in which the offender co-operates with the authorities in return for a more lenient sentence. A natural or legal person and a prosecutor may enter into an agreement before or during criminal proceedings. The individual or legal person must admit to and cease participation in criminal activities. They must also provide “effective” information that prevents or ends a crime or reduces its impact; identifies the circumstances of a crime and its perpetrators; or leads to the recovery of crime-related assets (CPC Arts. 474 and 475(1)). The information provided by the collaborator must be corroborated.<sup>52</sup>

102. If these conditions are met, then the individual may receive an exemption from liability or a sentence remission if his/her co-operation prevents a serious crime, identifies the leaders of a criminal organisation, or uncovers a criminal organisation’s financing or assets. Otherwise, the individual may only receive a sentence reduction or suspension. For legal persons, effective collaboration may lead to an exemption of liability, reduction of sentence below the statutory minimum, or remission of the sentence. The collaborator and the prosecutor sign a collaboration agreement and submit it for judicial approval (CPC Arts. 475(2)-(7)).

<sup>51</sup> CPC Art. 468 and [Supreme Court Plenary Agreement \(13 November 2009\), 05-2009/CJ-116](#).

<sup>52</sup> [Supreme Court \(11 December 2017\), 852-2016-Puno](#).



**(ii) Application of non-trial resolutions and sufficiency of sanctions**

103. Peru has limited data on the use of non-trial resolutions. Data on effective collaboration agreements are available only for cases conducted by the Lava Jato Special Team. Agreements were signed with Odebrecht and four of its former Brazilian executives covering four cases. Additional agreements were also signed with one Peruvian national and one foreign national. An effective collaborator was the most common source of detection of the Special Team's cases, accounting for 5 out of 19 cases for which information was available. Peruvian authorities cannot provide data on early terminations of proceedings or early conclusions to a trial. One representative of the legal profession states that these two types of resolutions are more commonly used for less complex property crimes, not corruption cases.

104. It is too early to assess the impact of effective collaboration agreements. Evidence provided by effective collaborators to the Lava Jato Special Team has yet to be tested in court. Sanctions have also been imposed pursuant to only one agreement. According to Peruvian authorities, Odebrecht will pay PEN 610 million (USD 167.3 million) over 15 years as civil compensation in four cases under Law 30 737, in addition to PEN 175 million (USD 48 million) already paid. The payments will be funded by a percentage of Peruvian government contracts won by Odebrecht, with any shortfalls covered by the parent company in Brazil. Peruvian authorities add that the four ex-Odebrecht executives who signed effective collaboration agreements were "exempted from penalty". There is no information on the other two individuals.

**(iii) Guidance on and transparency of non-trial resolutions**

105. Peru has issued guidance on whether prosecutors should enter in effective collaboration agreements and on the degree of sentence reduction in return for collaboration.<sup>53</sup> Prosecutors should enter into such agreements only if the collaborator provides information that is useful to an investigation. The benefits offered by the prosecutor to the collaborator must be proportional to collaboration, having regard to the statutory criteria of effective collaboration agreements in CPC Art. 475; the importance of the information provided; the provision of evidence to prove the crime; the risk or danger to the collaborator; and other grounds that would justify the benefits.

106. While the guidance on effective collaboration is positive, there is no similar guidance for early terminations of proceedings and early conclusions to a trial. Peru refers to guidance of the Supreme Court to judges on whether a judge can hear evidence before approving an early conclusion to a trial; or the issues a judge should consider when approving an early termination of proceedings.<sup>54</sup> In 2015, the Ministry of Justice and Human Rights published a [Practical Guide on the Use of Alternative Exits and Simplification Mechanisms for Criminal Procedure under the New Criminal Procedure Code](#). This booklet uses simple language and illustrations to explain non-trial resolutions; it is intended for lay-persons such as defendants without legal counsel, not prosecutors. A 2018 [Protocol of Interagency Action for Implementation of Early Termination of Proceedings](#) explains the roles of the defendant, judge and the prosecutor. None of these materials addresses the factors that a prosecutor should consider before exercising his/her discretion to enter into a resolution or to agree to a particular level of sentence reduction, e.g. the type and seriousness of the offence, circumstances of the offender. The CPC specifies a reduction of one-sixth for an early termination of proceedings. There are no similar provisions for the early conclusion to a trial.

107. Transparency of concluded non-trial resolutions is also inadequate. Peruvian authorities state that "early terminations and early conclusions of relevant cases are published on the website of the Judiciary".<sup>55</sup> But these websites contain only selected cases with jurisprudential value. Peru also states that effective

<sup>53</sup> PPO General Instruction 1-2017-MP-FN, sections 7.1.1, 8.1.2, 8.1.6.

<sup>54</sup> Supreme Court Plenary Agreements ([1 July 2008](#)), [05-2008/CJ-116](#); and ([13 November 2009](#)), [05-2009/CJ-116](#).

<sup>55</sup> Websites of the [judiciary](#), [National Systematised Jurisprudence](#), and [Superior Court of Justice Specialised in Organised Crime and Corruption](#).

collaboration agreements “are reserved and their official publication is subject to what the court provides.” For the agreements concluded by the Lava Jato Special Team, the [published material](#) includes only the terms of the court order. In sum, the key information such as the underlying facts or the reasons for entering into a non-trial resolution is not published. An assessment of the appropriateness of the resolution and the adequacy of the sanctions is therefore not possible. Peru also refers to rules of the Constitutional Court and the National Transparency Authority for requesting court information. But the public should be actively informed of non-trial resolutions of foreign bribery cases, and not be required to seek such information through freedom of information procedures. Representatives of the legal profession and civil society at the virtual visit consider that effective collaboration agreements are not sufficiently transparent.

### Commentary

***The Working Group has repeatedly stated that non-trial resolutions should be sufficiently transparent and accessible by the public.<sup>56</sup> At present, Peru does not publish sufficient information for this purpose. Requiring the public to submit requests through freedom of information channels is not a suitable replacement for active and routine publication of relevant information. The lead examiners therefore recommend that Peru make public, as necessary and in compliance with the relevant rules, the essential elements of non-trial resolutions, in particular the reasons for using a resolution, the main facts of the case, the party(s) to the agreement, and the sanctions.***

***The Working Group has also noted that clear and written guidance to prosecutors is necessary to ensure accountability and consistent application of non-trial resolutions.<sup>57</sup> Existing guidance in Peru on effective collaboration agreements addresses important issues such as the factors that prosecutors should consider when deciding whether to enter into an agreement and the degree of sentence discount to which they should agree. The lead examiners therefore recommend that Peru publish similar guidance that applies to early terminations of proceedings and early conclusions to a trial.***

### (d) Actual enforcement of corruption cases

108. Peru’s enforcement of corruption cases, including active and passive foreign bribery, was less than adequate until at least 2017. One report noted that in 2013-2016 fewer than one in ten corruption cases investigated by the PPO resulted in a sentence.<sup>58</sup> The foreign bribery cases described at paras. 14-16 were not adequately investigated. As previously mentioned, Peruvian authorities were not aware of and hence did not investigate the Oil Group X active foreign bribery case. In the Printing Company passive foreign bribery case, the US authorities sanctioned the company in question in 2019. But Peruvian authorities only opened an investigation in October 2020, after this Phase 2 evaluation had begun. In the Aircraft Services Case, a company admitted to US authorities in 2014 that it had bribed senior officials in the Peruvian government and Air Force in 2010-2011 to win contracts. However, Peru’s investigation only resulted in the conviction of a low-level official for a minor trafficking in influence offence.

109. Matters improved somewhat with the creation of the Lava Jato Special Team to investigate cases related to the Brazilian construction company Odebrecht. Many of these cases involve passive foreign bribery. Since 2017, the Special Team has investigated and charged several senior public officials for corruption, including five former presidents and the daughter of a sixth former president who is a highly

<sup>56</sup> See for example [Belgium Phase 3](#) (paras. 85-90); [Chile Phase 4](#) (paras. 122-134); [Denmark Phase 3](#) (paras. 77-81); [UK Phase 3](#) (paras. 64-73); [US Phase 3](#) (paras. 108-117 and Commentary after para. 128).

<sup>57</sup> See for example Chile Phase 4, paras. 122-134 and Recommendation

<sup>58</sup> Interamerican Development Bank (2016), [National Assessment of Money Laundering and Terrorism Financing Risks of Peru](#), pp. 11-12.

influential politician. Information on well over 20 cases that was provided during this evaluation show that the Special Team is proactively investigating. But virtually all of these cases are still ongoing.

110. Two other events may have spurred greater enforcement. In July and August 2018, the Peruvian press published a series of recordings that alleged widespread corruption in the judiciary. This was followed a few months later by the Attorney General's attempt to interfere with the Odebrecht investigation. (More details about these two events are described at paras. 131 and 152.) The incidents resulted in mass public protests that put significant pressure on law enforcement to act on corruption cases, according to civil society representatives at the virtual visit. Based on data provided by Peru, the annual number of cases taken to trial by FECOF increased by 71% in 2018-2019 compared to the three previous years. Convictions rose by 42%.

111. Despite these developments, there is still room for improvement, notably in enforcing the active bribery offence. During this evaluation, Peru described 28 cases, most of which are ongoing and conducted by the Lava Jato Special Team. Many of the cases allege facts that suggest possible bribery. Yet bribery is identified as an offence under investigation in only 6 cases. Almost all of the cases refer instead to crimes such as collusion. Some bribers may have entered into effective collaboration agreements, but this would not account for the absence of all bribery charges. Peruvian authorities explain that collusion carries a higher maximum sentence than bribery. However, this is true only where the collusion is aggravated. More importantly, only a Peruvian public official can commit the crime of collusion. The offence would not be available against a Peruvian individual or company that bribes a foreign public official. Even in cases where the corrupt official is Peruvian, the collusion offence is not a completely satisfactory substitute since it would not cover all acts of bribery.

112. A similar pattern exists for corporate enforcement. The Corporate Liability Law 30 424 (CLL) had not yet been enacted at the time of the offences in the 28 cases described by Peruvian authorities. However, criminal proceedings against legal persons could have been brought under Criminal Code (CC) Arts. 104 to 105-A. Instead, Peruvian authorities sought civil compensation under Law 30 737 for damage to the Peruvian state caused by corruption. This measure, however, would not be available in a foreign bribery case since it would be a foreign state, not Peru, that suffers any damage. Private sector lawyers at the virtual visit state that the authorities lack expertise in corporate prosecutions and focus more on natural rather than legal persons. That said, virtual visit participants were largely aware the CLL and its application to corruption cases.

### **Commentary**

***The lead examiners are encouraged by recent improvements in Peru's enforcement of corruption cases. The progress is especially visible in cases conducted by the Lava Jato Special Team which has resulted in the investigation and prosecution of many Peruvian politicians and officials at the highest levels. That said, these improvements are recent, and almost all of the Special Team's cases have yet to be completed.***

***The lead examiners therefore encourage Peru to take steps to sustain its recent enforcement record in domestic corruption cases. In particular, Peru should maintain the resources and support necessary for the Lava Jato Special Team to continue its investigations and prosecutions. It should also raise awareness among prosecutors of the importance of proceeding against individuals and legal persons for active foreign bribery under the CLL or CC, whenever appropriate. As further explained at para. 129, Peru should also raise awareness among law enforcement of the foreign bribery offence and corporate liability for this crime.***

## (e) *Statute of limitations and delay*

### (i) *Limitation period for foreign bribery offence*

113. The Phase 1 Report (paras. 128) found that Peru's statute of limitations for foreign bribery was adequate on its face. The same limitation periods apply to natural and legal persons (CLL Art. 4). An offence's limitation period is equal to its maximum sentence (CC Art. 80). Art 41 of the Constitution then doubles the period for "offences committed against the Public Administration". The period is thus 16 years for foreign bribery, according to Peru. The Constitution also lifts the limitation period entirely for the "most serious cases [of corruption]", but Peru states that this provision could apply to the foreign bribery offence only if the Criminal Code is amended. The limitation period begins to run when a bribe is offered, promised or given (CC Art. 82). When a series of bribe payments are made, time begins to run when the last payment is made. It also begins to run when a bribe is authorised.

114. The limitation period for foreign bribery can be extended by up to one-half (i.e. to 24 years) through suspensions and interruptions (CC Art. 83). The period is suspended when preliminary proceedings are formalised and become a preparatory investigation (CPC Art. 339(1)), or the outcome of related judicial proceedings are pending (CC Art. 84). The limitation period is interrupted (i.e. reset) if the offender commits another crime or by "the actions of the Prosecutor's Office or the judicial authorities" (CC Art. 83). Peru states that such actions are wide-ranging, e.g. the taking investigative measures by a prosecutor, formalisation of the preparatory investigation, issuance of a judicial arrest warrant, etc. However, an outstanding MLA request to a foreign country does not interrupt or suspend the statute of limitations.

115. There is insufficient data to conclude whether these limitation periods are sufficient in practice. Peru states that statistics are not available. None of the 28 cases conducted by the Lava Jato Special Team has been time-barred. That said, only one of the cases have been concluded, and almost all of the remaining are in relatively early stages. Some have limitation periods that expire as far as 2047.

### (ii) *Limitation period for preliminary proceedings and preparatory investigations*

116. In Phase 1 (paras. 114 and 201), the Working Group recommended that Peru lengthen deadlines that apply to foreign bribery investigations:

- The preliminary proceedings must be concluded within 60 days, unless a person has been detained. However, a prosecutor may set a different period "depending on the characteristics, complexity and circumstances" of the case. An individual who considers him/herself affected by an excessively long preliminary proceeding can complain to the prosecutor and the Preparatory Investigation Judge (CPC Art. 334(2)).
- The preparatory investigation must generally be concluded within 120 days (CPC Art. 342(1)). However, the prosecutor may extend this period by 60 days "for justified reasons" (CPC Art. 342(1)). If the prosecutor considers the case to be complex (based on listed factors such as multiple offences or a need for MLA), then the deadline is 8 months (CPC Art. 342(2)-(3)). In cases involving organised crime, a Preparatory Investigative Judge may extend the deadline to 36 months (CPC Art. 342(2)).

117. Peru has not implemented the Working Group's recommendation but provides information in Phase 2 that lessens concerns. Data on the Lava Jato Special Team cases show that investigative limitation periods are routinely extended in practice. Of the 21 cases for which information is available, the limitation period for preliminary proceedings was 8 months or more in 17 cases. The period was 53 months in one case, 40 months in two, and 36 in two others. For preparatory investigations, information was available for 21 (different) cases, of which 9 had limitation periods of more than 36 months. Only one case was time-barred: after a 4.5-year preparatory investigation, a judge denied the prosecutor's request for a second extension of 18 months. One caveat is that these observations are based on Special Team cases

that are high-profile and complex. Extensions may be less likely in ordinary, average cases. Data on such cases are not available.

118. In any event, Peru has prepared a draft amendment of CPC Art. 342 to address the Working Group's concerns. If enacted, a judge may extend the deadline for completing a preparatory investigation to 36 months in cases that require "international judicial co-operation assistance for dealing with crimes of a transnational character".

### *Commentary*

***The lead examiners reiterate the Working Group's recommendation in Phase 1, and recommend that Peru enact the draft amendment of CPC Art. 342 and extend the limitation periods for investigations that require MLA. The Working Group should follow up the application of limitation periods for preliminary proceedings and preparatory investigations in foreign bribery cases.***

#### ***(iii) Delay in proceedings***

119. Progress in criminal proceedings in Peru appear to be fairly slow, even if they have not (yet) run afoul of the statute of limitations. Of the 28 cases described by Peru during this evaluation, only 2 have been concluded, 1 is at trial, and 2 are in the "intermediate stage", i.e. the hearing of pre-trial motions. In at least 3 of the ongoing cases, the preliminary proceedings commenced in 2015, i.e. some 6 years ago. FECOF and the Lava Jato Special Team blame high caseloads and a heavy "procedural burden" caused the rules of criminal procedure. Several representatives of the legal profession and civil society also mention a lack of enforcement resources and expertise, as further discussed in Section C.1(g) at p. 37.

#### ***(f) Investigative tools and techniques***

120. This section deals with general and special investigative techniques in foreign bribery cases, including lifting bank secrecy and freezing assets. Obtaining tax and beneficial ownership information is covered in Section B.7(d) at p. 21. Mutual legal assistance is in Section C.1(i) at p. 44.

#### ***(i) General and special investigative techniques***

121. The Criminal Procedure Code (CPC) provides investigative tools (Phase 1 Report para. 113). Measures that impinge on an individual's rights must be proportional, necessary and supported by "sufficient elements of conviction" (Arts. 253(2) and 334-338). A full range of techniques is available, including surveillance (Art. 207), search and seizure (Art. 214), production orders (Art. 218), seizure of documents (Arts. 224 and 232-234), interception of written and telephone communications (Arts. 226 and 230), controlled deliveries (Art. 340), and undercover and covert operations (Art. 341 and 341-A). The same measures are available for investigating natural and legal persons (CLC Final Supplementary Provision, Third Section).

#### ***(ii) Bank secrecy***

122. CPC Art. 235 and Art. 2(5) of the Constitution govern the lifting of bank secrecy. A prosecutor must seek an order from a Preparatory Investigation Judge. Secrecy is lifted if the request is "necessary and pertinent" to the investigation. The judge may also order freezing or seizure of documents or funds, including against a third party who is not under investigation. The prosecutor may ask the judge to dispense with the notification of the bank account owner under CPC Art. 204.

123. Two issues of practice remain. First, each bank provides information in a different format. The use of a standard template could make the provision and analysis of information more efficient. Second, CPC Art. 235 states that a financial institution must provide the requested information within 30 business days.

FECOF and the Lava Jato Special Team prosecutors state that the deadline is usually met apart from exceptional cases, such when very old information is sought. But the Special Prosecutors for Money Laundering and Confiscation (FELAPD) report difficulties. Specific obstacles include non-compliance with the deadline for delivering the information and receipt of only part of the requested information. Data on the delay in seeking and executing lifting orders were not provided.

### *Commentary*

***The lead examiners recommend that Peru develop standard templates for banks to provide information to law enforcement. The lead examiners also recommend that the Working Group follow up whether the execution of orders to produce bank information in foreign bribery cases is unduly delayed.***

#### ***(iii) Freezing and seizing assets***

124. Prosecutors can freeze bank accounts and other assets through two means. First, CPC Art. 235 allows the freezing (known as “blocking” under Peruvian law) of bank accounts if there is a well-founded reason that the assets are related to the facts under investigation, and if the request is “necessary and pertinent” to the case. The provision specifically allows for the freezing of accounts that are not in an accused’s name.

125. Second, the UIF (the financial intelligence unit) may freeze funds or other assets administratively on its own volition or at the request of a prosecutor. Freezing is permissible if there is urgency or danger in delay, and if it is necessary due to the size and nature of the investigation. A judge must confirm (or revoke) the freezing within 24 hours. If confirmed, the prosecutor must then seek a second order under the CPC for the funds (Law 27 693 Art. 3(11) and UIF Regulation Arts. 8-10).

126. Data on freezing in practice paint a mixed picture. From 2015 to July 2020, the UIF froze funds on 63 occasions, 26 of which were in corruption cases. But of the 28 passive foreign bribery cases on which Peru provides information, asset freezing is mentioned in only 2 cases. The Lava Jato Special Team adds that it has frozen (i.e. “blocked”) or seized assets in Peru in only 7 cases. The Special Team explains that the wrongdoing in many of their cases is dated, and hence the ill-gotten assets are no longer in Peru.

### *Commentary*

***The lead examiners recommend that Peru take steps to ensure that the freezing and seizing of assets as an investigative measure is used in foreign bribery cases whenever appropriate.***

#### ***(g) Resources, specialised expertise, awareness and training***

127. Recent public pressure to fight corruption may have led to an increase of law enforcement resources for this purpose. FECOF received a one-shot increase in resources of PEN 10.1 million (USD 2.8 million) in 2017, resulting in 144 new staff. The total number of FECOF staff has increased by 40% since 2015. In 2018-2020, however, no budget was allocated for new hires. Peru was requested but did not provide FECOF’s financial budgets. DCC police personnel has also increased by 25% since 2017. Its financial budget was stable from 2017 to 2019 before falling by 19% in 2020. As mentioned at para. 119, the lack of resources is cited as one reason for delays in corruption cases by prosecutors, civil society and private sector lawyers.

128. Experts in forensic accounting and information technology (IT) are available in corruption investigations. FECOF stated that it has access to experts in the Experts Office attached to the General Management of the PPO. The Lava Jato Special Team has its own experts but has had to turn to the PPO central unit for support. Forensic accounting and financial experts have been used in only 4 of its cases,

and are requested but pending in a further 18 cases. This backlog suggests a lack of resources. Forensic IT experts were also used in 3 cases.

129. Training needs to be strengthened, especially on foreign bribery. Law enforcement officials responsible for enforcing corruption offences are unfamiliar with the Convention and Peru's foreign bribery offence. As mentioned at para. 35, they did not appear familiar with the Working Group's activities, including the media reports of foreign bribery allegations that are circulated by the Group. This hinders their ability to detect and investigate foreign bribery cases. The Ministry of Justice and Human Rights held [seminars](#) for the judiciary in September 2016 that covered corporate liability for foreign bribery. Other training events for the judiciary and FECOF since 2015 focused on issues of organised crime and corruption in general, not the bribery of foreign public officials. There was no awareness-raising of the Convention, including Art. 5 which forbids the consideration of certain factors in foreign bribery investigations and prosecutions. Peruvian judges and law enforcement have insufficient expertise in corporate and white-collar crime investigations, according to the legal profession and civil society at the virtual visit.

### **Commentary**

***The lead examiners are seriously concerned about the lack of awareness of foreign bribery and the Convention among Peruvian judges and law enforcement officials. Training in Peru has understandably focused on domestic corruption but foreign bribery should not be completely ignored. They therefore recommend that Peru take urgent steps to address this matter. This should in particular include raising awareness of Art. 5 of the Convention, which prohibits judges and prosecutors in foreign bribery cases from considering the national economic interest, potential effect upon relations with another State, or identity of the natural or legal persons involved. In addition, Peru should further train judges and law enforcement on corporate and white-collar crime investigations. It should also ensure that there are sufficient resources and specialised expertise – especially forensic financial and accounting experts – for investigating and prosecuting foreign bribery cases.***

### **(h) Independence and integrity of the judiciary and public prosecutor's office**

130. In Phase 1 (para. 202), the Working Group decided to follow up reforms of the judiciary and Public Prosecutor's Office (PPO). The issues stem from concerns about these institutions' integrity and independence, and are related to the appointment, discipline and dismissal of judges and prosecutors. This section also covers provisional and supernumerary prosecutors and judges, as well as interference with independence.

### **(i) Appointment, discipline and dismissal of judges and prosecutors**

131. The regime for appointing, disciplining and removing judges and prosecutors was substantially altered recently. Prior to 2018, the National Council of Magistrates (*Consejo Nacional de la Magistratura*, CNM) held these responsibilities. In July and August 2018, the Peruvian press published a series of recordings of alleged bribery of officials in the CNM, judiciary and PPO. The public's long-held views about widespread systemic corruption in these institutions boiled over into countrywide protests. Resignations and suspensions of several officials failed to restore calm. In response, Congress removed all seven CNM members from office on 20 July 2018.<sup>59</sup> Four days later, Congress declared an emergency and suspended the CNM's operation (Law 30 833). A Constitutional amendment was approved by referendum in

<sup>59</sup> Reuters (19 July 2018), "[Head of Peru's judiciary resigns as crisis grips justice system](#)"; France 24 (20 July 2018), "[Head of Peru's Judiciary Resigns as Thousands Protest Corruption Scandal](#)"; Insight Crime (9 August 2018), "[Peru's Judicial Corruption Scandal, Explained](#)".

December 2018 and entered into force on 10 January 2019 (Law 30 904). One key reform was the replacement of the CNM with a National Board of Justice (*Junta Nacional de Justicia*, JNJ).

132. The main improvement of the JNJ over its predecessor is measures to enhance the body's accountability and integrity. Under [Law 30 916](#) (JNJ Law), the Board's seven members are chosen through a public merit-based competition (JNJ Law Art. 5 and Constitution Art. 155). The process is conducted by a Special Commission comprising seven officials from the judiciary, PPO and academia.<sup>60</sup> Citizens are entitled to object to the appointment of specific JNJ members (Arts. 51-57). Criteria on matters such as qualifications and conflict of interest are set out in the JNJ Law Arts. 10-11 and the Constitution Art. 156. Chosen JNJ members hold five-year non-renewable terms in full-time positions (except for part-time university teaching) (JNJ Law Art. 12 and Constitution Art. 155). The JNJ became operational after its first members took office on 6 January 2020. It has an annual budget of PEN 28 million (USD 7.7 million) and 140 staff, according to Peru.

133. The JNJ plays a central role in appointing prosecutors and judges. The selection process is similar to that for JNJ members described above. Vacancies are published and filled after a public merit-based competition. A two-thirds majority of JNJ members approves each appointment. Citizens are entitled to object to specific candidates. The results of the competition, each JNJ member's vote and the vote's underlying reasons are published (JNJ Law Arts. 28-34 and 51(b); Constitution Art. 154(2)). Once appointed, judges and prosecutors are evaluated by the JNJ and the Academy of the Magistracy every 3½ years (JNJ Law Arts. 35-37). Their appointment must also be "ratified" (i.e. re-evaluated) by the JNJ every 7 years (JNJ Law Arts. 38-40 and Constitution Art. 154(2)).

134. The JNJ appoints prosecutors and judges but is not directly involved in the appointment of the Attorney General (AG) or chief judges. The Board of Supreme Prosecutors comprises the Titular Supreme Prosecutors for criminal, military criminal, civil, and administrative law. The Board elects one of its members as the AG to a three-year term renewable twice (Legislative Decree 52-1981 (PPO Law) Art. 37). The president of each court is chosen by the judges of that court, not the JNJ. Hence, the President of the Supreme Court is elected by a majority of the other Supreme Court Judges to a non-renewable two-year term (Judiciary Law Art. 74). The same applies to the Superior Courts (Judiciary Law Art. 88).

135. The JNJ is responsible for dismissing prosecutors and judges (JNJ Law Art. 2(f); Constitution Art. 154(3)). Grounds for dismissal include, among others, the commission of offences, ethical misconduct that compromise the exercise of functions, and unlawful intervention in processes or actions (JNJ Law Art. 41). The JNJ may conduct investigations for the purposes of dismissal proceedings *ex officio* or at the request of other bodies such as the Supreme Court or Board of Supreme Prosecutors (JNJ Law Arts. 43-45; PPO Law Art. 62). In lieu of dismissal, the JNJ may also reprimand or suspend Supreme Court judges and Supreme Prosecutors for up to 120 days (JNJ Law Arts. 2(g) and 42).

136. Disciplinary cases that do not call for dismissal, or do not involve Supreme Court judges or Supreme Prosecutors, are supposed to be handled by the National Control Authorities of the PPO and the Judiciary (*Autoridad Nacional de Control del Ministerio Público*, ANCMP; and *Autoridad Nacional de Control del Poder Judicial*, ANCPJ). The JNJ appoints the Heads of the ANCMP and ANCPJ, again after a public merit-based competition.<sup>61</sup> It can remove them for "very serious misconduct". The Heads hire

<sup>60</sup> The seven members of the Special Commission are the Ombudsman (*Defensor del Pueblo*); President of the Judicial Power (*Presidente del Poder Judicial*); Attorney General (*Fiscal de la Nación*); President of the Constitutional Court; Comptroller General of the Republic; a rector elected by the rectors of licensed public universities with more than fifty years of seniority; and a rector elected by the rectors of licensed private universities with more than fifty years of seniority (JNJ Law Art. 5 and Constitution Art. 155).

<sup>61</sup> Peru states that the CGR provided technical assistance to the JNJ's public competitions for the Heads of the ANCMP and ANCPJ pursuant to Inter-Institutional Co-operation Agreements.



“control” prosecutors and judges, again through public merit-based competitions, to staff the ANCMP and ANCPJ. The two bodies are responsible for investigating misconduct upon receiving a complaint or on its own motion (PPO Law Arts. 51 to 51-J). Sanctions include reprimands, fines and suspensions (PPO Career Law Arts. 50-55; Judicial Career Law 29 277 Arts. 49-55).

137. Unfortunately, the ANCMP and ANCPJ are not yet operational. Peru explains that public contests were held but none of the candidates received the JNJ’s approval or meet the votes requirement. The media reported recently of further delays; the Heads were expected to be appointed only on 15 February 2021.<sup>62</sup> Thereafter, other staff including control prosecutors and judges must still be hired. In the meantime, the predecessors of the ANCMP and ANCPJ continue to operate. Their main difference with the new institutions is that the selection process introduced by the 2019 reforms does not apply to officials of the incumbent bodies.

138. The number of disciplinary actions against judges and prosecutors was substantial even before the recent reforms. From 2015 to 2020 Q3, there were 165 disciplinary proceedings against prosecutors, including 9 against Supreme Prosecutors. Peru added that one FECOF prosecutor was dismissed and a second received “lesser punishment” in 2017. Proceedings against judges were even more frequent over the same period, totalling 311 including 10 against Supreme Court Judges. Peru states that approximately 20 judges were dismissed in 2016-2018. Since becoming operational in January 2020, the JNJ has opened approximately a dozen investigations, including against five Supreme Court Judges and two Supreme Prosecutors. By February 2021, it had dismissed two former AGs, a judge and a prosecutor.<sup>63</sup> By June 2021, one Supreme Court judge had been dismissed while decisions on others were pending appeal.

139. A recent example of alleged misconduct concerned the Lava Jato Special Team. In late 2019, the media reported that a former senior government official who was under investigation sought the assistance of two prosecutors to infiltrate the Special Team. The official was then detained pending trial but was released into house arrest in April 2020 because of his health and the COVID-19 pandemic.<sup>64</sup> The two prosecutors have been suspended. FECOF and the Special Team state that existing measures such as an ethical code and training would prevent such incidents from recurring. The Academy of the Magistracy provided 14 courses on ethics to prosecutors and judges in 2020 and planned 12 more in 2021.

140. Civil society and the legal profession at the virtual visit are yet to be convinced that the recent reforms would restore integrity in the judiciary and PPO. Several state that these reforms are still recent and would take much longer to have an effect. One participant states that the new rules need to be enforced and monitored. Until then, “advances on paper have not yet been translated to advances in reality”. One participant is more pessimistic, doubting that the reforms would address the underlying structural causes since “the same people are still in the judiciary”. Another implies the same point, emphasising new generations of judges with stronger ethics are necessary for enduring change.

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<sup>62</sup> Gestión (26 October 2020), “[JNJ publicó nuevo cronograma para elección de autoridades de control de la Fiscalía y PJ](#)”.

<sup>63</sup> El Comercio (9 December 2020), “[Pedro Chávay y Tomás Gálvez: ¿Cuál es la situación de los casos en la JNJ?](#)”; La República (13 February 2020), “[JNJ destituyó a exfiscal Carlos Ramos Heredia](#)”; El Comercio (2 February 2021), “[Pedro Chávay es destituido del Ministerio Público por la JNJ](#)”.

<sup>64</sup> El Comercio (9 July 2019), “[Fiscalía investiga obra de Odebrecht en San Martín](#)”; El Peruano (28 August 2019), “[Seis casos de Odebrecht pasan a equipo Lava Jato](#)”; Gestión (27 November 2019), “[Villanueva estará detenido siete días por investigación por tráfico de influencias](#)”; Perú21 (27 December 2019), “[César Villanueva: Sala de Apelaciones confirma prisión preventiva contra el ex primer ministro](#)”; RPP Noticias (1 April 2020), “[César Villanueva saldrá de prisión: jueces cambian su prisión preventiva por arresto domiciliario](#)”.

### Commentary

**The lead examiners are encouraged that Peru substantially reformed the system for the appointment, discipline and dismissal of judges and prosecutors in 2019. These efforts have created the JNJ which has greater transparency and accountability than its predecessor, the CNM. However, the JNJ began functioning only in January 2020. Other bodies such as the ANCMP and ANCPJ are not yet operational. Furthermore, the reforms' impact on the integrity of the judiciary and PPO, if any, will be felt only in years to come.**

**The lead examiners therefore recommend that Peru take steps to ensure that the ANCMP and ANCPJ are operational as soon as possible. They also reiterate the Phase 1 Report and recommend that the Working Group continue to follow up (a) Peru's system for appointing, disciplining and dismissing judges and prosecutors, and (b) training on ethics provided to Peruvian prosecutors and judges.**

#### **(ii) Provisional and supernumerary judges and prosecutors**

141. Peru has a system of provisional prosecutors that is meant to temporarily fill vacancies. When a prosecutor position is vacated or created, it may be filled by another prosecutor of immediately lower rank. The process starts a chain reaction, since the position vacated by the provisional prosecutor must in turn be filled. The original open position can also be filled by a lawyer outside the PPO who meets the official criteria for being a prosecutor (PPO Career Law Arts. 64-65; PPO Law Art. 29).

142. A similar system exists for filling vacant judicial positions with provisional or supernumerary judges. Provisional judges are regular judges who occupy a position at the immediately higher level that has become open due to a vacancy, dismissal or impediment. Supernumerary judges are unsuccessful candidates for a regular judge position who accepts to be on a register of judges at the same level of court (Judicial Career Law Arts. 65.2 and 65.3).

143. The rules for provisional and supernumerary appointments in the judiciary and PPO have been detrimental to the integrity of these institutions. Provisional appointments are made by the Attorney General and by the Executive Council of the Judiciary headed by the Chief Justice. The chief judges of superior courts appoint supernumerary judges.<sup>65</sup> These appointments bypass the JNJ and its safeguards for accountability, transparency and merit-based competition (see paras. 132-133). Since 2019, entry on the supernumerary register requires a “public contest of merits”, but the contest is administered by the judiciary, not the JNJ (Administrative Resolution 353-2019-CE-PJ). According to representatives of civil society and the legal profession at the virtual visit, this system hands the power of recruitment to an existing judiciary and PPO that already have a dubious reputation for integrity. The end result has been the appointment of some additional judges and prosecutors with questionable moral and ethical character. Peruvian authorities state that most provisional and supernumerary judges and prosecutors “comply and [...] fulfil their duties fully”. But they admit that “the alleged irregularities of a few prosecutors and judges affect the overall reputations of the institutions.”

144. Of equally great concern is a lack of security of tenure and its impact on independence. Unlike with regular judges, the creation of provisional and supernumerary positions is discretionary. The termination of an appointment does not require just cause. This insecurity of tenure impinges on the independence of provisional and supernumerary judges and prosecutors, according to virtual visit

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<sup>65</sup> Judicial Career Law Arts. 65.3 and 239. The COVID-19 crisis postponed the entry into force of Art. 239. Under this provision, the Executive Council of the Judiciary would appoint Superior and Specialised supernumerary judges ([Administrative Resolution 399-2020-CE-PJ](#)). The JNJ would still not be directly involved, as is the case at present.

participants, the Head of the JNJ and a Peruvian commentator.<sup>66</sup> The Working Group has reached the same conclusion on temporary judges in another country.<sup>67</sup>

145. The widespread use of provisional and supernumerary appointments aggravates these concerns. They numbered 1 558 (i.e. 47%) of the judiciary in December 2019, while 3 529 prosecutors (46%) were provisional as of June 2020. Peruvian authorities state that recruitment was halted in 2019 while the CNM was suspended. But the problem predates this event. Even in August 2017, some 25% of prosecutors totalling 2 148 were provisional. Virtual visit participants agree that the problem is longstanding. Many believe that the problem stems from deep-rooted causes such as onerous criminal procedural rules that may have led to excessive workloads. To handle the backlog, new positions are created and filled by provisional and supernumerary prosecutors and judges. However, most of these positions are at the upper levels of the judiciary, and do not completely resolve the backlogs which are concentrated at the lower courts. Some virtual visit participants also attribute the pervasive use of provisional appointments to difficulties in recruitment. The judiciary is perceived by many as an unattractive career.

### Commentary

***The lead examiners are seriously concerned about the high number provisional or supernumerary judges and prosecutors, and its impact on judicial integrity and independence. They acknowledge Peruvian authorities' assertion that only a minority of these judges and prosecutors have been found to have engaged in misconduct. But the fact remains that nearly half of the judges and prosecutors have been appointed without the regular safeguards of merit-based selection and independence. This severely undermines public confidence in these institutions.***

***The lead examiners therefore recommend that Peru take urgent measures to reduce the number of provisional and supernumerary judges and prosecutors. In particular, Peru should review the rules for judicial and prosecutorial appointments with a view to eliminating the use of provisional and supernumerary judges and prosecutors. Peru should also consider whether to increase judicial and prosecutorial appointments in the lower levels of courts.***

### (iii) Interference with independence

146. Several legislative provisions address judicial independence. The Constitution and statutes stipulate that the judiciary is independent in the exercise of its jurisdictional function. No authority shall remove cases pending before a court or interfere in the exercise of its functions. The State guarantees judges' independence, as well as their "irremovability" and continuance in office. No authority, including more senior judges, can interfere in a judge's performance.<sup>68</sup>

147. Similar provisions address prosecutorial independence. The Constitution Art. 158 states that the AG's Office is autonomous. PPO Law Art. 5 states that "Prosecutors act independently in the exercise of their attributions, which they will perform according to their own criteria and in the way they deem best suited for the purposes of their institution". However, prosecutors "must abide by the instructions that their superiors may give them".

<sup>66</sup> Ledesma, M. (11 December 2015), "[Jueces provisionales, ¿imparcialidad en riesgo?](#)"; Andina (28 September 2020), "[JNJ: objetivo es que el 100% de jueces y fiscales sean titulares](#)".

<sup>67</sup> See [Argentina Phase 3](#) paras. 104-110 and [Phase 3bis](#) paras. 120-127.

<sup>68</sup> Constitutional Arts. 139(2) and 146; Judiciary Law Arts. 2 and 16; Judicial Career Law 29 277 Arts. 34 and 35(1).

148. Of note, the executive branch of government has a statutory channel to “exhort” individual prosecutors under PPO Law Art. 7:

The Executive Power, through the Minister of Justice, may make exhortations to the members of the PPO, in relation to the exercise of their powers.

If they do not consider them appropriate, they will raise them in consultation with the Attorney General, who will immediately acquit or submit it to the decision of the Board of Supreme Prosecutors, depending on the nature of the matter consulted.

149. That exhortations may be made to specific members of the PPO arguably suggests that the provision can be invoked *viz.* specific investigations and prosecutions. Peruvian authorities state that exhortations are only of an administrative nature but do not cite jurisprudence supporting this interpretation. There is no such limitation on the face of the provision. Prosecutors were asked but cannot explain the application of this provision. Peruvian authorities add that the provision was enacted in 1981 before the 1993 Constitutional reforms that separated the PPO from the judiciary, and that the executive has not used it to interfere with prosecutors. A new PPO Law is currently being drafted.

150. Known instances of executive interference have been limited. In 2020, prosecutors investigated a contract awarded by the government to a singer to give pro-government motivational talks. The then-President stated that he “did not necessarily” share the decisions that were made. He also publicly disagreed with the “proportionality” of the arrests of certain individuals. But he added that he respected the independence of powers and “the decisions that are made”. He later reportedly asked that the investigation proceed immediately.<sup>69</sup> Separately, there have not been reports of executive interference in the prosecutions of several ex-Presidents and influential politicians conducted by the Lava Jato Special Team. Prosecutors, the legal profession and civil society at the virtual visit consider that executive interference is not the principal problem in the Peruvian justice system.

151. A bigger concern may be interference from within the PPO through the transfer and removal of prosecutors from specific posts or cases. The PPO is a hierarchical organisation, and hence prosecutors are subject to the instructions of their superiors (PPO Law Art. 5). As the head of the PPO, the AG creates specialised units such as FECOF and appoints its head with the approval of the Board of Supreme Prosecutors. Peru describes the appointments as “temporary”. The same applies to special prosecutor units such as the Lava Jato Special Team.<sup>70</sup> The AG also has discretion to terminate these appointments and return prosecutors to their prior posts. Just cause is not required.

152. There is a history of AGs inappropriately removing prosecutors from controversial cases. One AG was dismissed in 2015 because of, among other things, his decision to remove two prosecutors who were investigating a powerful family for money laundering.<sup>71</sup> More recently, the Lava Jato Special Team reached a plea agreement with Odebrecht in early December 2018. But on 31 December 2018, the then-AG attempted to jeopardise the case by removing the two prosecutors who led the investigation. In response, the President threatened to declare an emergency in the PPO and to revamp the institution. After large-scale public protests, the AG reversed his decision and resigned shortly afterwards. His successor and

<sup>69</sup> BBC News (12 September 2020), [“Peru Congress opens way for impeachment of president”](#); CNN (6 October 2020), [“Fiscalía de Perú detiene a 10 personas, incluidos 3 excolaboradores de Vizcarra, en una investigación por presunta corrupción”](#); RTL (11 October 2020), [“Peru president to face corruption probe when term ends”](#).

<sup>70</sup> PPO Law Art. 80-A.

<sup>71</sup> Diario Correo (12 November 2014), [“Decisión fiscal favorece a los Sánchez Paredes”](#); El Comercio (12 November 2014), [“Ramos Heredia también removió a fiscal de caso Sánchez Paredes”](#); Gestión (13 February 2020), [“JNJ aprueba destituir a Carlos Ramos Heredia y jueza Haydee Vergara”](#).

current AG have pledged to reform the PPO.<sup>72</sup> A civil society representative at the virtual visit agrees that the PPO lacks institutional safeguards because prosecutors are subordinated to the AG.

### *Commentary*

***The lead examiners are seriously concerned that Peru has a history of AGs removing or transferring prosecutors from sensitive cases. They recommend that Peru take steps to ensure that prosecutors are protected from unjustified removals from cases.***

#### *(i) Mutual legal assistance*

153. Peru's obligations concerning mutual legal assistance (MLA) under the Convention are twofold. First, Art. 9 requires Peru to co-operate with other Parties to the fullest extent possible in providing "prompt and effective" MLA in investigations and proceedings concerning offences within the Convention. Second, pursuant to Art. 5, Peruvian authorities must investigate and prosecute foreign bribery cases effectively, including by seeking MLA and other means of international co-operation. This section covers MLA except the sharing of tax information, which is in Section B.7(d) at p. 21.

#### *(i) Legal framework for mutual legal assistance*

154. Peru's legal framework for MLA has not changed since Phase 1 (paras. 154-155). Peru has concluded bilateral MLA treaties with 20 countries including 10 Parties to the Convention.<sup>73</sup> Multilateral treaties under which MLA can be requested in a foreign bribery case include the OECD Anti-Bribery Convention, United Nations Convention against Corruption (UNCAC), Inter-American Convention against Corruption (IACAC), and Inter-American Convention on Mutual Assistance in Criminal Matters. For treaty-based requests, the rules specified in the treaty applies. Nevertheless, Peruvian law including the CPC can be used to interpret the treaty. The CPC also applies to matters not specifically provided for in the treaty (CPC Art. 508(2)). In the absence of a treaty, CPC Arts. 508-512 and 528-537 apply. Co-operation is based on "the principle of reciprocity within a framework of respect for human rights" (Art. 508). Peru also signed a memorandum of understanding with Colombia in 2017 to exchange information in corporate foreign bribery investigations.

#### *(ii) Central authority*

155. The PPO's Legal Co-operation and Extraditions Unit (*Unidad de Cooperación Judicial Internacional y Extradiciones*, UCJIE) is Peru's central authority for international co-operation.<sup>74</sup> The UCJIE communicates directly with foreign central authorities when permitted by treaty. The Legal Co-operation Office of the Ministry of Foreign Affairs (*Ministerio de Relaciones Exteriores*, MRE) supports the UCJIE by managing and monitoring requests, safeguarding deadlines and responding to queries when appropriate.<sup>75</sup>

156. Upon the receipt of an incoming request, the UCJIE must forward the request to a Preparatory Investigation Judge for execution. The Judge must decide on the "admissibility" of the request within two days. Peruvian authorities state that the prosecutor and legal offices to which MLA requests are sent decide whether to grant or reject a request. The UCJIE and Legal Co-operation Office do not make these

<sup>72</sup> Reuters (2 January 2019), "[Peru attorney general reverses decision on graft probe](#)"; Bloomberg (8 January 2019), "[Outcry over Peru's vast graft probe prompts top lawyer to quit](#)"; Reuters (8 January 2019), "[Peru's new top prosecutor criticizes president's bill after taking office](#)".

<sup>73</sup> Argentina, Brazil, Canada, Colombia, France, Italy, Korea, Mexico, Spain and Switzerland.

<sup>74</sup> CPC Art. 512(1); [PPO Resolution 124-2006](#).

<sup>75</sup> CPC Art. 512(2); [Supreme Decree 135-2010-RE](#).

decisions. After the request is executed, the Judge submits the evidence to the UCJIE for transmission to the requesting state (CPC Art. 532; Phase 1 Report para. 156).

157. Judges and prosecutors are responsible for outgoing MLA requests in investigations and prosecutions in Peru. Requests must be processed through the UCJIE (CPC Art. 536; Phase 1 Report para. 156).

158. The UCJIE's resources appear adequate but its functioning can be improved. As of January 2021, its 27 staff members (including 7 prosecutors) each had an average of 11.6 active cases. But as further explained below in Section C.1(i)(vi) at p. 46, the UCJIE does not maintain sufficient statistics on incoming and outgoing MLA and extradition requests. There is also room for improving the co-ordination of outgoing requests.

### **(iii) Types of assistance available**

159. An applicable treaty sets out the types of MLA available. For non-treaty requests via reciprocity, CPC Art. 511 specifies the types of available assistance. These include taking statements; transfer of judicial documents; submissions of documents and reports; conducting of enquiries or inspections; examination of objects and places; search and seizure; asset tracing; freezing of assets; and communications control. Joint investigative teams have been used in organised crime and migrant smuggling cases pursuant to Law 30 077 Art. 28(3) and the Inter-American MLA Convention.

### **(iv) Grounds for denying MLA, including dual criminality**

160. Treaties specify the grounds for denying MLA requests that are made under the treaty. For non-treaty requests based on reciprocity, the offence underlying the request must be punishable by at least one year's imprisonment in the requesting state, and not be subject exclusively to military legislation. Dual criminality is required for more invasive investigative measures such as asset tracing; freezing and seizure of bank accounts and criminal assets; search and seizure; interception of communications; and other measures that "limit [individual] rights". Additional discretionary grounds for denying MLA include *non bis in idem*; persecution based on sex, race, religion, nationality, ideology or social condition; requests by temporary tribunals; and fiscal offences (CPC Arts. 511(1)(h) and 528-529; Phase 1 Report paras. 155 and 159). Peru states that if a defendant enters into an effective collaboration agreement with Peruvian authorities, it would not prevent Peru from later providing MLA to a foreign country in the same case.

161. One ground of denial raises questions concerning Art. 5 of the Convention. MLA may be denied if a request affects "public order, sovereignty, security or fundamental interests" (CPC Art. 529(1)(d)). (Extradition is similarly prohibited if "national sovereignty, security or public order or other essential interests of Peru, which make the acceptance of the request inconvenient" (CPC Art. 517(3)(b)).<sup>76</sup> The Working Group has questioned in other evaluations whether such a provision could allow consideration of factors prohibited under Convention Art. 5, namely national economic interest, potential relations with another State, and the identity of persons involved in a case.<sup>77</sup> Peru states that there is no guidance on the interpretation of these provisions.

162. In Phase 1 (paras. 162 and 206(b)), the Working Group decided to follow up MLA requests for bank information. CPC Art. 235 addresses lifting bank secrecy in domestic criminal investigations. Lifting in other contexts is governed by Art. 143(1) of the Law 26 702 (General Law on the Financial System,

<sup>76</sup> A recent report finds this ground of denial "loosely defined" and thus a potential obstacle to MLA (MESICIC (2021), [6th Round Evaluation Report](#), paras. 273-274 and Recommendation 1.4.7).

<sup>77</sup> For example, see [Belgium Phase 3](#), paras. 130 and 134 and Follow-up Issue 14(e); [France Phase 3](#) para. 160 and Recommendation 6; [Phase 3 Estonia](#) para. 110 and Recommendation 4.

GLFS). The GLFS is more limiting than the CPC, since it only allows the lifting of secrecy “against a person who is party to court proceedings.”<sup>78</sup> In Phase 2, Peruvian authorities state that the CPC, not the GLFS, applies to the lifting of bank secrecy in the context of MLA.

### Commentary

***The lead examiners recommend that the Working Group follow up on the denial of extradition or MLA where a request concerns public order, sovereignty, security or fundamental or essential interests.***

#### (v) *Mutual legal assistance in non-criminal matters*

163. Art. 9(1) of the Convention requires Parties to provide MLA to another Party for use in non-criminal proceedings against a legal person within the scope of the Convention. This is because several Parties, including Peru, impose non-criminal liability against legal persons for foreign bribery.

164. MLA in non-criminal corporate foreign bribery proceedings raises two issues for Peru. First, the legal basis for MLA is unclear. Peru is party to treaties that provide mutual legal assistance in *criminal* matters. The CPC, which governs MLA in the absence of a treaty, also only applies to criminal cases. These instruments therefore may be unavailable in *administrative* corporate proceedings. Second, Peru’s treaties and the CPC allow MLA of a coercive nature only if there is dual criminality (see para. 160). By definition, this requirement could be challenging for corporate proceedings of a non-criminal nature.

165. Peru provided explanations to these issues in Phase 1 (para. 160). For a request from other Parties, the Convention Art. 9(1) would form the legal basis for the request. Dual criminality is satisfied by reason of Art. 9(2), which provides that “dual criminality shall be deemed to exist if the offence for which the assistance is sought is within the scope of this Convention”. For a request from a non-Party, the criminal conduct of the natural person who commits the crime would be a sufficient basis for relying on the CPC and criminal MLA treaties. It would also allow the dual criminality requirement to be met. The Working Group decided to follow up the issue (Phase 1 Report para. 206(a)).

166. Peru provides very different responses to these issues in Phase 2. Peru does not refer to the Convention Art. 9 or distinguish between requests from Parties and non-Parties. Instead, it states that Peru’s criminal law enforcement authorities investigate legal persons through the criminal process. Dual criminality, however, is “strictly necessary” for coercive investigative measures such as seizures and lifting bank secrecy. It adds that Peru has received and has not rejected MLA requests in corporate proceedings, but details of the cases have not been provided.

### Commentary

***The lead examiners recommend that the Working Group continue to follow up whether Peru can seek and provide MLA in non-criminal corporate foreign bribery proceedings.***

#### (vi) *Mutual legal assistance in practice*

167. Peru has only aggregated and not detailed statistics on incoming or outgoing MLA requests. From 2015-2019, it sent an average of 1 657 MLA requests and received 246 requests annually. Peru sent 166 and received 20 MLA requests for bank information in 2017-2020. There is otherwise no data on the offences underlying the request, the type of assistance sought, or the time required for execution. Prior to the virtual visit, Peruvian authorities estimated that incoming requests are executed “according to urgency,

<sup>78</sup> A recent report notes that the GLFS allows the lifting of bank secrecy in cases of money laundering, drug trafficking and terrorism but not corruption (MESICIC (2021), [6th Round Evaluation Report](#), para. 265 and Recommendation 1.4.1).

sometimes in less than a month.” Requests for bank, tax and stock market information “may take from four to six months or so because the judge has to gather information from different entities.” But during the virtual visit, Peru stated that cases can take up to eight months. For outgoing requests, some urgent cases “have been addressed by foreign authorities in approximately two months.” But “there are also cases that may take six months or more to be addressed”. However, more detailed data provided by Peru in an evaluation conducted by another organisation has led to a different conclusion.<sup>79</sup>

168. After reviewing a draft of this report, the UCJIE states that improvements are being made to its systems to record additional information such as the underlying offence and the foreign state concerned in a request. However, it remains to be seen whether comprehensive statistics (including data on response times) that are sufficient for assessing Peru’s MLA framework will be available on a sustained basis going forward.

169. Co-ordination of outgoing requests needs improvement. On more than one recent occasion, Peru has sent multiple MLA requests to the same foreign country seeking similar or even identical information. At best, this may cause foreign authorities to seek clarification and thus delay the execution of some requests. At worst, some requests may be considered duplicative and hence refused or ignored. The UCJIE explains that the requests originated from different prosecutors handling related prosecutions. Some of the requests differed slightly, e.g. the testimony of the individual as a witness rather than a suspect. The UCJIE tried – not always successfully – to convince some prosecutors to withdraw the request because the information had already been sought. It states that in the future it will endeavour to seek the requested state’s permission to re-use evidence already received in subsequent cases, rather than submitting another request for the same evidence.

### Commentary

**Detailed statistics on incoming and outgoing MLA requests are vital for Peru – and the Working Group – to assess Peru’s performance in international co-operation.<sup>80</sup> The UCJIE recognises this concern and has begun compiling some data. But it is vital that it maintains more comprehensive information, especially request execution times, legal basis for requests, type of assistance sought and reasons for refusal. The statistics must also be maintained on a sustained basis so as to allow a proper assessment of Peru’s MLA framework.**

**The lead examiners therefore strongly urge Peru to maintain detailed statistics on incoming and outgoing MLA requests in foreign bribery cases, including the requesting/requested state, offences underlying the request, type of assistance sought, and the time required for execution or reasons for refusal. The lead examiners also recommend that Peruvian authorities take steps to improve the co-ordination of outgoing MLA requests and to eliminate duplicate requests. This should include stronger efforts by the UCJIE to track requests. Co-ordination and oversight of prosecutors who seek MLA in related cases should also be improved. Furthermore, the Working Group should follow up the time Peru requires to execute incoming MLA requests, especially those that require the lifting of bank secrecy.**

<sup>79</sup> A 2019 report finds that Peru was considered to have “a generally collaborative approach to incoming requests”. However, response times were “variable. [...] In some cases, MLA provided by Peru is timely and provided under acceptable terms, while in other cases, there were certain delays due to the complexity and type of request made” (GAFILAT (2019), [Mutual Evaluation Report of the Republic of Peru](#), paras. 340-342 and 352).

<sup>80</sup> A recent report also criticises Peru’s lack of detailed statistics (MESICIC (2021), [6th Round Evaluation Report](#), paras. 116-117 and Recommendation 3.3.3).



## **(j) Extradition**

170. Art. 10(1) of the Convention obliges Parties to include bribery of a foreign public official as an extraditable offence under their laws and the treaties between them. Art. 10(2) states that where a Party that cannot extradite without an extradition treaty receives a request for extradition from a Party with which it has no such treaty, it may consider the Convention to be the legal basis for extradition in respect of the offence of foreign bribery.

### **(i) Legal framework for extradition**

171. Peru's legal framework for extradition has not changed since Phase 1. It has bilateral extradition treaties in force with 26 countries including 14 Parties to the Convention.<sup>81</sup> Peru is party to multilateral treaties that could provide extradition in foreign bribery cases, including the OECD Anti-Bribery Convention, UNCAC, IACAC, UNTOC, Treaty on International Criminal Law 1889, and Agreement on Extradition 1915. In the absence of a treaty, extradition is available based on reciprocity (CPC Art. 513). Peru stated in Phase 1 (para. 165) that in these cases the Convention would be "an element to be taken into account".

172. After receiving an extradition request from a foreign state, the UCJIE seeks an order from a Preparatory Investigation Judge to arrest the person sought. Upon arrest, the Judge holds a hearing to consider preventive detention. The UCJIE then sends the extradition request to the Judge for "qualification". If the request meets applicable requirements, then the Judge sends the file accompanied by an "illustrative report" to the Criminal Chamber of the Supreme Court within 24 hours. The Supreme Court must then conduct an extradition hearing within 15 days. An opinion by the Supreme Court against extradition is binding. If the Court favours extradition, then the matter is transferred to the Ministry of Justice and Human Rights within five days. The Council of Ministers makes the final decision of whether to surrender the person sought. One virtual visit participant cites the need to seek the approval of multiple Ministers as a cause of delays. Peruvian authorities disagree with this view, stating that Ministers are not consulted individually. In any event, whether this is a systemic problem is unclear, given the absence of detailed statistics (see para. 180). This entire process can be avoided if the person sought consents to extradition (CPC Arts. 514-524; Constitution Art. 37).

173. For outgoing extradition requests, the prosecutor or victim may ask the judge in charge of the criminal process to seek extradition. If the request is approved, the judge sends the matter to the Supreme Court for further approval. The Council of Ministers makes the final decision of whether to send the request to the foreign state (CPC Arts. 525-527).

### **(ii) Grounds for denying extradition**

174. Grounds for denying extradition are in applicable treaties and, for extradition based on reciprocity, the CPC. Extradition is available if the conduct underlying the request is punishable by at least two years' imprisonment in Peru and the foreign state (CPC Art. 517(1)). The requesting state must present sufficient evidence of the commission of the criminal act and the participation of the person sought (CPC Art. 518). The CPC lists additional mandatory grounds for denial, including the absence of "correct administration of justice" in the foreign state; *non bis in idem*; expiry of the statute of limitations in Peru or the foreign state; requests by temporary tribunals; political or fiscal offences; persecution based on race, religion, nationality or political opinions; and absence of assurances that the death penalty would not be applied (CPC Arts. 516-517 and Constitution Art. 37).

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<sup>81</sup> Argentina, Belgium, Brazil, Chile, Colombia, Costa Rica, France, Italy, Korea, Mexico, Netherlands, Spain, UK and US.

175. Extradition is also denied where “there are special reasons of national sovereignty, security or public order or other essential interests of Peru, which make the acceptance of the request inconvenient” (CPC Art. 517(3)(b)). As mentioned in para. 161, this provision raises questions under Art. 5 of the Convention.

### (iii) *Extradition of nationals*

176. The Convention Art. 10(3) requires each Party to take any measures necessary to ensure that it either extradites its nationals or prosecutes them for the offence of foreign bribery. A Party that declines a request to extradite a person for foreign bribery solely on the ground that the person is its national shall submit the case to its competent authorities for the purpose of prosecution (*aut dedere aut judicare*).

177. In Phase 1 (paras. 168-169 and 206(c)), Peru stated that it denies extradition not on the basis of nationality *per se* but on territoriality. In a 2012 case involving a request to extradite a Peruvian national, the Supreme Court held that offences “can and should be judged where they are committed, especially where those responsible and victims are national and reside in the territory”.<sup>82</sup> Peruvian authorities added that “if the act of bribery directly or indirectly affects the interests of the Peruvian State, the principle of territoriality must prevail and, therefore, the application of Peruvian criminal law. However, if the bribery only transgresses the operation of the foreign public administration, it would be possible to accept a possible request for extradition, regardless of the nationality of the extraditable person.” The Working Group decided to follow up this issue in Phase 2.

178. In Phase 2, Peru takes multiple positions that differ from Phase 1. Peru’s questionnaire responses initially stated that the test for refusing extradition is based not on territoriality *per se* but on Peru’s jurisdiction. A request would therefore be refused if Peru has either territorial or extraterritorial jurisdiction over the offence underlying the request (CC Arts. 2-5; see Section C.2(c) p. 55). But the questionnaire responses later put forth a third position: that Peru would grant extradition whenever the requesting state has jurisdiction over the case. New criteria then emerged at the virtual visit. Peruvian authorities stated that Peru may deny (or grant) extradition having regard to the strength of the requesting state’s case, the interest of the requesting state in the case, and the seriousness of the crime in each country. If extradition is denied, Peru would prosecute the case itself. There was no mention of the three earlier positions taken by Peru or the 2012 Supreme Court case.

179. After reviewing a draft of this report, Peru states that extradition was denied in the 2012 Supreme Court case because of a lack of dual criminality, not nationality. The Supreme Court also considered an issue of prescription. But even accepting this explanation, Peru still has not provided a clear and consistent statement on the rules that apply to the extradition of its nationals.

### *Commentary*

***The lead examiners are concerned that Peru has articulated several different grounds for denying the extradition of nationals over the course of Phases 1 and 2. None of these grounds is stipulated in the CPC or Peru’s extradition treaties. The lead examiners therefore recommend that the Peru take steps to clarify through legally-binding means the rules on the extradition of Peruvian nationals in foreign bribery cases.***

### (iv) *Extradition in practice*

180. As with MLA, Peru lacks detailed statistics on extradition. From 2015-2019, Peru sent an average of 238 and received 66 requests annually. Data on execution times are not available. Peruvian authorities

<sup>82</sup> Supreme Court (15 March 2012), Extradición 23-2012-Lima.

estimate that it takes “about nine months” to execute an extradition request in Peru, and “about six months” for a simplified (i.e. consent) extradition. A figure of eight months was given at the virtual visit.<sup>83</sup> Peru, however, provided more detailed in an evaluation by another organisation.<sup>84</sup> As mentioned in para. 168, the UCJIE states that improvements are being made to its systems to record additional information.

### Commentary

***As with MLA, detailed statistics on incoming and outgoing extradition requests are vital for assessing Peru’s performance in this area. The UCJIE has begun to compile some additional statistics. Nevertheless, the lead examiners recommend that Peru maintain detailed statistics on incoming and outgoing extradition requests in foreign bribery cases, including the requesting/requested state, offences underlying the request, and time required for execution or reasons for refusal.***

## 2. Offence of foreign bribery

181. Peru has not amended its foreign bribery offence in CC Art. 397-A since Phase 1:

Art. 397-A: Anyone who, under any form, offers, grants or promises directly or indirectly to an official or public servant of another State or official of an international public organisation, donation, promise, advantage or undue advantage that may be in his own interest or in that of another person, so that said server or public official performs or omits acts specific to his position or employment, in violation of his obligations or without breaching his obligation to obtain or retain a business or other undue advantage in the performance of international economic or commercial activities, shall be punished with deprivation of liberty not less than five years nor more than eight years; disqualification, as applicable, in accordance with paragraphs 1, 2 and 8 of Art. 36; and, with 365 to 730 fine-days.

182. Peru has largely not implemented the Working Group’s Phase 1 recommendations concerning the foreign bribery offence (or corporate liability, as discussed in Section C.3). Peru’s High-Level Anti-Corruption Commission has prepared a draft law. If enacted in its current form, the draft law would not fully address the Working Group’s concerns, as explained below. Moreover, the draft law has yet to be submitted to Congress. Peruvian parliamentarians at the virtual visit committed to implementing the Working Group’s recommendations. But that was prior to the general elections in April 2021. Following Working Group practice,<sup>85</sup> this Phase 2 evaluation refers to some aspects of the draft amendments but does not scrutinise them to the same level as the present law. In assessing Peru’s implementation of the Convention, the Working Group will also only take into account legislation that is in force. Any relevant new legislation will be assessed only if and when it is enacted.

<sup>83</sup> A recent report recommends that Peru maintain more detailed statistics (MESICIC (2021), [6th Round Evaluation Report](#), para. 192 and Recommendation 6.3.3).

<sup>84</sup> A 2019 report found that “in some cases Peru granted the extradition in less than 1 year.” In 2014-2018, Peru received 110 extradition requests of which 15 were denied, including 7 requests due to prescription. The remaining denials were on grounds of dual criminality, “affectation” of due process, *non bis in idem*, and lack of full identification of the extraditable and formal requirements (GAFILAT (2019), [Mutual Evaluation Report of the Republic of Peru](#), paras. 347-349).

<sup>85</sup> For example, see [Chile Phase 3](#) at para. 29.

### Commentary

**The lead examiners are very concerned that Peru has implemented virtually none of the Working Group's Phase 1 recommendations on the foreign bribery offence and corporate liability. They therefore recommend that Peru take urgent steps to amend its legislation to address the Working Group's recommendations below.**

#### (a) Elements of the foreign bribery offence

##### (i) Intentionally

183. In Peru, the crime of foreign bribery requires “wilful intent”. CC Art. 397-A does not explicitly describe the *mens rea* element of the offence. CC Art. 12 merely states that offences must be committed intentionally. In Phase 1 (paras. 5 and 178), Peru explained that this requires an act to be committed consciously and voluntarily. The offence also covers acting while being aware of the result of one’s actions. This awareness of the result can be direct, eventual, or of necessary consequence.<sup>86</sup> One case dealing with the reception of stolen goods held that “deliberate ignorance” and “blindness to the facts” lead to culpability.<sup>87</sup> The Working Group decided to follow up this issue.

184. Peru clarifies that the *mens rea* element of the foreign bribery offence is sufficiently broad to implement the Convention. The Supreme Court has held (in a case not involving bribery) that “eventual intent” is sufficient to found liability. This occurs when an individual “knows that the risk of his/her behaviour is high, but accepts the probable realisation of the result.”<sup>88</sup> The Court has also held that intent may be inferred from circumstantial evidence, including when “the circumstances in which the author acted allowed him to understand the illicit nature of his conduct”.<sup>89</sup> Virtual visit participants were asked to consider a hypothetical situation where an individual pays a consultant a large sum of money to win a contract in a country with rampant corruption. The individual does not receive any tangible work product in return or questions how the money is spent. Judges and legal professionals state that the requisite intent for bribery could be inferred in such a case.

##### (ii) Awareness of the bribe by the foreign public official

185. In Phase 1 (paras. 6-7 and 179), Peru initially stated that the bribery offence is complete once the offer or promise is made, but later added that the foreign public official must be aware of the bribe offer or promise. A requirement of awareness is not consistent with the Convention Art. 1, which states that the offence is complete upon the offer, promise or giving of the bribe. The Working Group recommended that Peru “take steps to rectify this concern”.

186. Peru has not implemented the Working Group’s recommendation. The draft bill does not address this issue. Peruvian authorities explain that bribery offences aim to protect Peru’s governance and the integrity of its public administration. These interests are not harmed if the public official is not aware of the bribe.<sup>90</sup> But this reasoning applies to domestic and not foreign bribery. The latter crime rarely injures the governance or integrity of the public administration in the briber’s country. Furthermore, requiring proof of awareness will often be difficult in practice. The prosecutor in a foreign bribery case may not have access

<sup>86</sup> Supreme Court (26 March 1998), 455-1997-Callao; Supreme Court (3 June 2004), 517-2004-Arequipa; Supreme Court (3 June 1998), 6293-1997-Ancash.

<sup>87</sup> Superior Court, 00115-2012-Lima.

<sup>88</sup> [Supreme Court \(2 January 2010\), 5083-2008-Cusco.](#)

<sup>89</sup> [Supreme Court \(5 February 2015\), 266-2014-Piura.](#)

<sup>90</sup> [Supreme Court \(7 March 2008\), 1406-2007-Callao.](#)

to the bribed official or other evidence in the foreign jurisdiction that may be needed to prove awareness. After reviewing a draft of this report, Peru reiterates its statement in Phase 1 that the offence is complete when a bribe is offered or promised.

### *Commentary*

***The lead examiners reiterate the Phase 1 Report and recommend that Peru take steps to clarify that the awareness of the bribe by the foreign public official is not an element of the foreign bribery offence.***

#### ***(iii) An impossible or unachievable advantage***

187. Peru has clarified that its foreign bribery offence covers bribe offers or promises that, unbeknownst to the foreign public official, are impossible or unachievable. In Phase 1 (paras. 7 and 180), Peru stated that “it is an offence only if the undue advantage offered or promised to the foreign official is achievable or possible.” The Working Group decided to follow up this issue. In Phase 2, Peru indicates that the offence is complete if the undue advantage is sufficiently compelling to motivate the foreign public official to act.<sup>91</sup> The official does not have to know that the advantage is in fact possible or achievable.

#### ***(iv) Undue pecuniary or other advantage***

188. In Phase 1 (paras. 9 and 181), the Working Group decided to follow up whether Peru’s foreign bribery offence prohibits legitimate payments seeking proper official action. The offence covers a “donation, promise, advantage or undue benefit” (*donativo, promesa, ventaja o beneficio indebido*). The word “undue” (*indebido*) appears to modify “benefit” but not “donation”, “promise” or “advantage”, partly because it is in the singular form. In Phase 2, Peru states that the offence only covers illegal payments and that the use of the singular form is a legislative drafting technique. Supporting case law was not provided.

### *Commentary*

***The lead examiners reiterate the Phase 1 Report and recommend that the Working Group continue to follow up whether CC Art. 397-A prohibits proper or due advantages to foreign public officials.***

#### ***(v) Definition of a foreign public official***

189. Peru’s CC does not define a foreign public official, as the Working Group noted in Phase 1 (paras. 11-16 and 185). CC Art. 397-A covers the bribery of “an official or public servant of another State or official of an international public organisation”. An “official or public servant” is defined in CC Art. 425 and refers to Peruvian public officials. This raised concerns that the offence does not cover many categories of foreign public officials, such as officials holding legislative or judicial office; police officers; and persons exercising a public function. It was also not clear that the term “another State” covers all levels and subdivisions of government, as well as any organised foreign area or entity, autonomous territory or a separate customs territory. Peru was therefore recommended to “urgently enact legislation defining a foreign public official in line with the Convention”.<sup>92</sup>

190. Peru has not implemented the Working Group’s recommendation but reiterates its argument in Phase 1. It states that treaties that are in force form part of Peru’s national law. The Convention’s definitions

<sup>91</sup> [Supreme Court \(24 October 2018\), 02-2018-1-Lima.](#)

<sup>92</sup> A recent report also recommends that Peru clarify the concept of a foreign public official (MESICIC (2021), [6th Round Evaluation Report](#), paras. 106-111 and Recommendation 3.3.1).

of “foreign public official” and “foreign country” therefore apply directly; domestic legislation is not needed. Peru provides one case in which a court referred to the Inter-American Convention against Corruption (IACAC) to qualify a voluntary firefighter as a public official.<sup>93</sup> Two other cases cited by Peru merely used treaties as interpretative aids. One used the UN Convention against Corruption (UNCAC) to interpret Peru’s unfair collusion offence.<sup>94</sup> The second stated that a model law adopted by an international organisation was “a guiding norm that regulates and guides” the development of Peruvian legislation.<sup>95</sup> Peruvian prosecutors also recently applied the definitions in the OECD Convention when responding to an MLA request in a foreign bribery case from another Party. But this is not jurisprudence. Nor is it surprising, since Peru considers the Convention as a treaty basis for MLA (see para. 154).

191. The Working Group has already rejected Peru’s argument of direct application of the Convention in Phase 1.<sup>96</sup> Peru is party to three treaties (OECD Convention, UNCAC and IACAC) that have different definitions of a “foreign public official”. Peruvian authorities state that the OECD Convention would take precedence in foreign bribery cases but did not provide supporting case law. Furthermore, Peru states that treaties “have the rank of law”; they are not superior to domestic law, as only human rights treaties have “constitutional rank”. It is therefore unclear what would happen when the Convention conflicts with Peruvian legislation.

### *Commentary*

***The lead examiners reiterate the Phase 1 Report and recommend that Peru urgently enact legislation defining a foreign public official in line with the Convention.***

#### ***(vi) Bribery to act outside official competence***

192. The Convention Art. 1(1) covers bribery “in order that the official act or refrain from acting in relation to the performance of official duties”. This phrase includes “any use of the public official’s position, whether or not within the official’s authorised competence” (Art. 1(4)(c) and Commentary 19). In Phase 1 (paras. 18-19 and 183), Peru stated that its foreign bribery offence does not cover this situation. Such conduct is covered by the “incompatible negotiation or illegal sponsorship” offence which applies only to Peruvian public officials. The Working Group recommended that Peru amend its legislation.

193. Peru has not implemented the Working Group’s recommendation but provides a new explanation. It states that a bribe to a public official to act outside his/her competence is covered by the influence peddling offence (CC Art. 400). The draft bill would also add “foreign public official or servant” to the offence. However, influence peddling carries shorter minimum and maximum sentences than foreign bribery for prison (4-6 vs. 5-8 years). Fines are also halved. But the Convention does not consider bribery to act outside competence to be less serious than other forms of foreign bribery. If the draft bill is enacted, then it must also be considered whether the influence peddling offence would necessarily cover all cases of bribery to act outside the official’s competence.

### *Commentary*

***The lead examiners reiterate the Phase 1 Report and recommend that Peru amend its legislation to ensure that bribery in order that a foreign public official uses his/her position outside his/her***

<sup>93</sup> [Superior Court of Justice, Third Special Criminal Chamber of Lima \(7 January 2010\), 032-2006.](#)

<sup>94</sup> [Constitutional Court \(3 May 2010\), 00017-2011-PI/TC.](#)

<sup>95</sup> [Supreme Court \(11 October 2017\), 1-2017/CIJ-433.](#)

<sup>96</sup> Phase 1 Report, para. 15. See also [Spain Phase 2](#), para. 113.

***authorised competence is prohibited and subject to the same sanctions as other forms of foreign bribery.***

***(vii) Authorisation and attempt***

194. Peru clarifies that the CC prohibits authorising but not attempting foreign bribery, two follow-up issues from Phase 1 (paras. 21-25 and 184). CC Arts. 23-25 mentions several types of complicity but not authorising a crime. Participants in the Phase 2 virtual visit explain that a person who authorises foreign bribery is nevertheless liable under CC Art. 23 as an author of the offence or for committing the crime through another person. Peruvian authorities also provide jurisprudence in which the Supreme Court has held that “the attempt is not allowed in the crimes of mere activity, such as the crime of bribery in general, whether active or passive, as no result is required.”<sup>97</sup> An attempt is hence not a crime for domestic or foreign bribery, which complies with Art. 1(2) of the Convention.

***(b) Defences to foreign bribery***

***(i) Defence of “culturally conditioned understanding error”***

195. In Phase 1 (paras. 29 and 185), the Working Group decided to follow up the defence of “culturally conditioned understanding error”. CC Art. 15 provides sentence mitigation or a full defence to “anyone who, due to his/her culture or customs, commits a punishable act without being able to understand the criminal nature of the act or being determined in accordance with that understanding”. A person in a country with widespread bribery could conceivably claim to believe that such corrupt practices are legal because of his/her culture and custom. This would contravene Commentary 7 of the Convention, which states that foreign bribery is an offence irrespective of the perceptions of local custom.

196. Peru clarifies that the defence is unlikely to apply to foreign bribery. The provision aims to mitigate social conflicts in an ethnically plural country like Peru.<sup>98</sup> It requires a “socio-cultural environment that has not internalised the prohibition rule which penalises [the impugned] conduct”.<sup>99</sup> The defence has largely arisen in cases of child sexual abuse in indigenous communities. Supreme Court guidance<sup>100</sup> on such cases requires a “delicate and scrupulous application” of the defence. The alleged culture or custom must be proven by anthropological evidence and corroborated via additional sources. Peruvian authorities state that the defence would apply in a foreign bribery context only if an indigenous community has an ancestral custom of bribing foreign officials. This would be unlikely.

***(ii) Defence of acting “by order of a competent authority issued in the exercise of his/her functions”***

197. Peru clarifies that the defence of acting under a “compulsory order of a competent authority issued in the exercise of his/her functions” would not apply to foreign bribery. The Phase 1 Report (paras. 30 and 185) queried whether this defence in CC Art. 20(9) would apply if an official in a state-owned enterprise orders an employee to commit foreign bribery. However, the Supreme Court has held that the defence would fail if the order of the competent authority is “manifestly illegal or that the subordinate knows of its illegality”. In such cases, “the duty to obey the order disappears and executing it carries criminal liability”.<sup>101</sup>

<sup>97</sup> [Supreme Court \(7 March 2018\), 1406-2007-Callao](#). See also [Supreme Court \(29 January 2010\), 4130-2008-Santa](#).

<sup>98</sup> Gaceta Jurídica (2004), Código Penal Comentado, Tomo I, p. 497.

<sup>99</sup> [Supreme Court \(16 July 2015\), 1289-2014-Apurimac](#).

<sup>100</sup> [Supreme Court \(2 October 2015\), Plenary Agreement 1-2015/CIJ-116](#).

<sup>101</sup> [Supreme Court \(5 December 2019\), 1131-2018-Puno](#).

This would encompass a superior's order to an employee to bribe a foreign public official, according to Peruvian authorities.

### (iii) *Defence of concusión and bribe solicitations*

198. Peruvian authorities state that *concusión* is an available defence to foreign bribery. In a domestic context, a Peruvian public official who abuses his/her position and “obliges or induces” an individual to give or promise something of value is guilty of *concusión* under CC Art. 382. The individual is considered a victim and not to have committed bribery. In a foreign context, a non-Peruvian public official who “obliges or induces” someone to give a benefit is not liable under Peruvian law because CC Art. 382 applies only to Peruvian officials. Nevertheless, the individual who provides the benefit would not be guilty of foreign bribery, according to Peruvian authorities.

199. Compared to other jurisdictions,<sup>102</sup> however, the threshold of conduct amounting to *concusión* appears much higher in Peru. The Supreme Court has stated that the official's behaviour must “affect the will of the subject, vitiating it, becoming a constraint or an inducement, that is, it involves the use of violence, which is exercised on the victim to bend his/her will, in such a way that it accedes to its illegitimate claims.”<sup>103</sup> Commentators state that “to oblige” is to issue a “threat of suffering some damage derived from the Public Administration”, while to “induce” is to “incline [an individual's] will. [...] This act ranges from persuasion to suggestion, deception and fraud on the part of the public servant.”<sup>104</sup> Judges, lawyers and officials at the virtual visit variously associated *concusión* with “threats”, “coercion” and “harm to physical integrity”. Many stated that the mere solicitation of a bribe to renew a business licence, for example, constitutes bribery and not *concusión*. That said, some virtual visit participants had difficulty articulating the threshold for *concusión*, or whether a mere solicitation is sufficient for the defence to succeed.

#### *Commentary*

***The lead examiners recommend that the Working Group follow up the application of concusión under CC Art. 382.***

### (c) *Jurisdiction over natural persons*

200. The Convention Art. 4(1) requires each Party to “take such measures as may be necessary to establish its jurisdiction over the bribery of a foreign public official when the offence is committed in whole or in part in its territory.” Art. 4(2) requires each Party which has jurisdiction to prosecute its nationals for offences committed abroad to take such measures as may be necessary to establish its jurisdiction to do so in respect of foreign bribery, according to the same principles.

201. Peru clarifies two follow-up issues from Phase 1 (paras. 98 and 199) concerning jurisdiction over offences that occur partly in Peru. First, it is not an offence when a briber contacts a foreign official while in Peru to arrange a subsequent meeting abroad where the bribe is offered. Nor is it a crime if the briber withdraws the bribe money from a bank account in Peru. The reason is not jurisdictional, however, but

<sup>102</sup> For example, see [Costa Rica Phase 2](#), paras. 208-215.

<sup>103</sup> [Supreme Court \(28 January 2009\), 1601-2006-Huaura](#).

<sup>104</sup> Instituto de Democracia y Derechos Humanos (2019), “[El Equipo Anticorrupción del IDEHPUCP presenta diez claves para reconocer el delito de concusión](#)”; Gozales Cieza, M.M. and Torres Pachas, D.R. (2019), “[Reflexión y análisis del delito de concusión en el código penal peruano](#)”, *Revista de Derecho YACHAQ*, No. 10-2019, pp. 141-152.



because the foreign bribery offence does not cover preparatory acts.<sup>105</sup> Second, Peru has jurisdiction when the benefits from foreign bribery flow to a Peruvian company. CC Art. 1 states that Peruvian criminal law applies to a punishable act committed in Peru. CC Art. 5 then provides that the place where an offence is committed includes not only where the perpetrator acted or omitted to act, but also where the effects of the offence take place.

202. Jurisdiction over Peruvian nationals for foreign bribery committed abroad remains problematic. CC Art. 2(4) provides jurisdiction over extraterritorial offences. Peru has not implemented the recommendation in Phase 1 (paras. 100 and 198) to eliminate the dual criminality requirement under this provision. Also unimplemented is a recommendation to clarify a second condition that the offender “enter in any way into [Peruvian] territory”. Phase 2 virtual visit participants have widely divergent interpretations of this latter requirement. One says that only non-Peruvian nationals who commit a crime against Peru are required to enter Peru. Another asserts that the requirement does not apply to transnational offences like foreign bribery. Neither of these positions is reflected in the statute, however. A third participant says the provision is not problematic because Peru may seek the offender’s extradition.

203. Peru does clarify one aspect of extraterritorial jurisdiction. CC Art. 2(4) provides jurisdiction over extraterritorial offences only if, among other things, the case does not involve “political crimes or related facts” (Phase 1 Report paras. 100(c) and 199). The Constitutional Court has held that “political crimes are those that threaten the stability and normal functioning of public powers. [...] These do not arise for any kind of personal reasonableness or profit motive.”<sup>106</sup> Peruvian authorities add that political crimes are those against the constitutional order, and not a “standard” crime such as foreign bribery.

### Commentary

***The lead examiners reiterate the Phase 1 Report and recommend that Peru amend its legislation to extend its foreign bribery offence to cover preparatory acts and to eliminate the following preconditions for exercising jurisdiction over Peruvian nationals who commit foreign bribery extraterritorially: (a) dual criminality, and (b) the individual enters in any way into Peruvian territory.***

## 3. Liability of legal persons

204. Art. 2 of the Convention requires each Party to “take such measures as may be necessary [...] to establish liability of legal persons for the bribery of a foreign public official”. Annex I of the 2009 Recommendation provides further guidance on how to implement Art. 2 of the Convention.

205. Peru has not amended its corporate liability regime or implemented any Working Group recommendations since Phase 1, though some additional guidance has been issued. Peru enacted CC Arts. 104 to 105-A in 1991 to sanction legal persons for criminal offences. In March 2016, Peru added administrative liability of legal persons for foreign bribery and other crimes (Law 30 424 Corporate Liability Law, CLL). This legislation was subsequently amended by Legislative Decree 1 352 and Law 30 835. Supreme Decree 002-2019-JUS (CLL Regulation) provides additional guidance. Since Phase 1, the Superintendence of the Securities Market (*Superintendencia del Mercado de Valores*) issued in March 2021 [Guidelines for the Implementation and Operation of Prevention Models](#) (2021 SMV Guidelines).<sup>107</sup> Peru states that there has not been any practice under these provisions. The bill drafted by the High-Level Anti-Corruption Commission mentioned at para. 182 proposes some amendments to the CLL. In assessing

<sup>105</sup> [Supreme Court \(7 March 2018\), 1406-2007-Callao](#). See also Section C.2(a)(vii) at p. 50 on attempted foreign bribery.

<sup>106</sup> [Constitutional Court \(3 March 2005\), 3966-2004-HC/TC](#).

<sup>107</sup> Resolution 006-2021-SMV/01.

Peru's implementation of the Convention, the Working Group takes into account only legislation that is in force. The lack of corporate enforcement in practice is addressed at para. 112.

### (a) *Legal entities subject to liability*

206. The CLL applies to legal entities which are defined as “private law entities, as well as associations, foundations, non-governmental organisations and non-registered committees, irregular companies, entities that administer an autonomous patrimony and companies of the Peruvian State or companies of mixed economy” (CLL Art. 2).

207. Follow-up issues from Phase 1 (paras. 34-35 and 186) concerning successor liability are unresolved given the lack of practice. Corporate liability follows a legal person despite any “change of name, denomination or corporate name, corporate re-organisation, transformation, split (spin-off), merger, dissolution, liquidation or any act that may affect the legal entity” (CLL Art. 2). Peru clarifies that liability applies to all successor companies in a spin-off despite the provision's reference to an “absorbing legal person”. However, there is no support for this position in the provision or jurisprudence. Furthermore, a merged or spun-off entity escapes liability if adequate due diligence had been conducted before the corporate re-organisation. On its face, the defence applies even if the due diligence uncovers foreign bribery, or if a company knows it has committed foreign bribery and reveals the crime during the due diligence process. Peru states that the bill that it has drafted addresses these issues.

### *Commentary*

***The lead examiners note that the draft bill prepared by Peru intends to clarify the entities to which successor liability applies after a corporate spin-off. They therefore recommend that Peru enact legislation to remedy this issue. They also reiterate the Phase 1 Report and recommend that the Working Group continue to follow up whether a company that uncovers foreign bribery during the due diligence process prior to a corporate merger or spin-off could escape liability for acts committed by the predecessor company.***

### (b) *Standard of liability*

208. CLL Art. 3 states that a legal person is liable when a partner, director, *de facto* or legal administrator, legal representative or representative of the legal person, or its affiliate or subsidiary:

- (a) Commits an offence;
- (b) Orders or authorises another person under his/her authority and control to commit an offence; or
- (c) Does not fulfil his/her duties of supervision, surveillance or control which results in another person under his/her authority and control committing an offence.

209. There has not been practice or legislative amendments to clarify liability for offences committed by low-level employees (Phase 1 Report para. 38). CLL Art. 3 imposes liability for foreign bribery committed by a person “under the authority and control” of a senior corporate officer. The 2009 Recommendation, however, requires liability for foreign bribery committed by any “lower-level person” due to the failure of the company's highest level managerial authority to supervise the person or to implement adequate internal controls, ethics and compliance programmes or measures. This raises the question of whether the CLL would impose liability when a lower-level person who commits foreign bribery is not directly supervised by senior officers. Peru states that the CLL does not require such direct subordination. There is no practice or jurisprudence to support this interpretation, however. Peru states that its draft bill will address this issue.

210. Peru has not amended the CLL to address issues concerning the notion of “benefit” (Phase 1 Report paras. 40-43 and 187). The first paragraph of CLL Art. 3 states that legal persons are liable only if

foreign bribery is committed “in their name or on their behalf and for their benefit, directly or indirectly”. The last paragraph of the same provision adds that companies are not liable when natural persons commit foreign bribery “exclusively for their own benefit or in favour of a third party other than the legal entity”. Peru has not amended the CLL to impose corporate liability if foreign bribery benefits *both* the natural and legal persons, or if an expected benefit does not materialise. A proposal in the draft bill to repeal the last paragraph of Art. 3 would not completely resolve these issues.

211. Peru has also not implemented a recommendation concerning bribery through intermediaries (Phase 1 Report paras. 45-46 and 187). The 2009 Recommendation Annex I.C states that a legal person cannot avoid responsibility by using intermediaries, including related legal persons, to commit foreign bribery. CLL Art. 3 does not refer to intermediaries but only to “subsidiaries” and “affiliates”. Liability also only arises for offences committed “in the name or on behalf” of the legal person. A legal entity might thus avoid liability by “turning a blind eye” to bribery committed by an intermediary, even if it benefits from the crime. The draft bill will also address this issue, says Peru.

### Commentary

***The lead examiners are encouraged that the draft bill prepared by Peru seeks to resolve issues concerning the standard of liability in the CLL. Nevertheless, they reiterate the Phase 1 Report and recommend that Peru amend the CLL to (a) ensure that a legal person is liable for foreign bribery that benefits both the natural person who perpetrated the crime and the legal person; (b) ensure that a legal person is liable for foreign bribery that is intended to benefit it, even if the benefit later does not materialise; and (c) ensure that legal persons cannot avoid liability for foreign bribery by using an intermediary to make bribe payments. The Working Group should continue to follow up whether the CLL would impose liability when a lower-level person who is not directly supervised by senior corporate officers commits foreign bribery due to the failure of the company’s highest level managerial authority to supervise the person or to implement adequate internal controls, ethics and compliance programmes or measures.***

### (c) Scope and elements of the prevention model defence

212. CLL Art. 17 provides a prevention model defence. A prevention model is essentially a corporate compliance programme. A legal person is not liable if, before the crime is committed, it adopted and implemented a model that is “appropriate to its nature, risks, needs and characteristics, consisting of adequate surveillance and control measures” to prevent or significantly reduce the risk of the offence. CLL Art. 3(c) provides a similar defence. A legal person is exempt from liability if company management had fulfilled its “duties of supervision, surveillance and control over the activity entrusted, in response to the specific situation of the case.”

213. Peru has not addressed the Working Group’s concerns that these provisions are overbroad (Phase 1 Report paras. 48-49 and 188-189). The defence in CLL Art. 17 is available even when foreign bribery is committed, authorised or directed by senior corporate officers, contrary to the 2009 Recommendation Annex I.<sup>108</sup> Furthermore, a legal person is entitled to define the duties of supervision, surveillance and control that are required under CLL Art. 3(c), according to Peru. This would give the company significant ability to determine when the prevention model defence would succeed. The bill drafted by Peru would convert the prevention model in CLL Art. 17 from a defence to a sentence mitigation factor. But CLL Art. 3(c) would remain.

214. Also unimplemented are recommendations on the elements of a prevention model (Phase 1 Report paras. 50-54 and 190). CLL Art. 17(2) sets out the minimum elements that a prevention model must

<sup>108</sup> [Chile Phase 4](#), paras. 154-156.

have for the defence to succeed. The CLL Regulation provides further non-binding guidance on the appropriate elements.<sup>109</sup> The Working Group found that the list of minimum elements in CLL Art. 17(2) includes the identification, evaluation and mitigation of risks. But if residual risks remain, then policies for addressing them should not be merely optional. The CLL Regulation suggests that some important elements are optional regardless of a company's features and risk profiles. Some elements are also omitted or do not go far enough. The bill drafted by Peru would state that a prevention model must be based on a legal person's risk profile which must be reviewed annually. The model must also be "implemented considering" certain enumerated elements, including several that are not currently in the CLL or CLL Regulation. Peru adds that, if the draft bill is enacted, then consequential amendments would also be made to the Regulation.

215. Peru has also not implemented a final recommendation on prevention models for micro, small and medium-sized enterprises (SMEs) (Phase 1 Report paras. 55-56 and 191). SMEs include a company with gross annual revenues of up to UIT 2 300 (PEN 10.1 million or USD 2.8 million).<sup>110</sup> Unlike in larger companies, an SME's board member can serve as the company's "prevention" (i.e. compliance) officer, which significantly diminishes the independence of the position. Furthermore, the prevention models in SMEs are allowed to have fewer elements. Peru's draft bill states that a prevention model should be based on a company's risk profile taking into account its size, nature, characteristics and operational complexity. A board member could continue to serve as a prevention officer in an SME, however.

216. The 2021 SMV Guidelines also do not implement these Working Group recommendations. The Guidelines (Sections 5.2 and VI) reiterate the reduced model requirements for SMEs. Peru states that the Guidelines (Section VI) suggest that legal persons, including SMEs, may implement prevention models with more than the minimum elements in CLL Art. 17(2). But this is hardly surprising, since these elements are by definition "minimum". More importantly, the Guidelines are not legally binding. An SMV resolution also cannot override the CLL, which is an act of Congress. The Guidelines (Section I) therefore acknowledge that they "do not establish the methodology, criteria, requirements, standards or content" of assessments conducted by the SMV for determining a prevention model's adequacy (see para. 218).

### Commentary

***The lead examiners reiterate the Phase 1 Report and recommend that Peru (a) urgently amend the CLL to eliminate the prevention model defence when a senior corporate officer commits, authorises or directs a crime of foreign bribery; and (b) amend CLL Art. 3(c) to ensure that the parameters of the prevention model defence are not regulated by companies' management itself.***

***Regarding the elements of prevention models, the lead examiners recognise that the SMV Guidelines published after Phase 1 are a step forward. But the Guidelines are not legally binding and raise some of the same concerns as the CLL. As mentioned in Phase 1, Peru should therefore amend CLL Art. 17(2) and Art. 33 of the CLL Regulation to align more closely with the Working Group's Good Practice Guidance on Internal Controls, Ethics and Compliance, including by (a) expanding the lists of mandatory and optional elements for a prevention model; (b) elaborating on certain existing elements, and (c) clarifying that some of the elements listed in Art. 33 are mandatory for certain companies.***

***Regarding SMEs, the lead examiners reiterate the Phase 1 Report and recommend that Peru ensure that (a) the legally binding requirements for SMEs under the CLL take into account the companies' risk profile and (b) clarify which of the minimum prevention model elements in CLL Art. 17(2) are required for SMEs.***

<sup>109</sup> [Supreme Decree 002-2019-JUS](#).

<sup>110</sup> [Supreme Decree 013-2013-PRODUCE](#) Art. 5.

**(d) Proof of the prevention model defence**

217. The onus of proving the prevention model defence remains an outstanding follow-up issue from Phase 1 (paras. 57 and 192). Peru states that the legal person has the onus of proving that its prevention model had the requisite elements and was effectively implemented. It cites a money laundering case that does not squarely address the issue.<sup>111</sup>

218. Notwithstanding the onus of proof, the CLL gives responsibility for assessing a prevention model to the Superintendence of the Securities Market (*Superintendencia del Mercado de Valores*, SMV). During an investigation, CLL Art. 18 requires a prosecutor to obtain a technical report from the SMV on the implementation and operation of a legal person's prevention model. The provision explicitly states that a report which finds the model adequate and implemented is binding on the prosecutor who must then terminate the case. Peruvian authorities state that this provision is unconstitutional because it encroaches on a prosecutor's exclusive power to terminate a prosecution. The draft bill prepared by Peru would eliminate the binding nature of the SMV report.<sup>112</sup>

219. The Working Group also recommended that Peru ensure that the SMV has sufficient powers to assess prevention models, particularly when gathering evidence from third parties outside the prosecuted legal person (Phase 1 Report paras. 59-60 and 192). The SMV can demand information and documentation from the prosecuted legal person and its business partners. It can take witness statements and make "unannounced" inspections.<sup>113</sup> However, it does not have the same powers as a prosecutor, such as to conduct search and seizure. Peruvian authorities state that this is not necessary because it is in the company's interest to co-operate and provide information. But this would not be the case for third parties outside the company. Peru adds that the draft bill will remedy this concern. For its part, the SMV would like the CLL to state more clearly its available powers, including for obtaining information from third parties. It would also like to extend the deadline for completing assessments from 30 to 90 days (depending on the complexity, size and location of the legal entity concerned).

220. A related issue is the SMV's resources and expertise. The SMV has yet to be called upon to assess a prevention model. Nevertheless, 23 staff members are available for this task, including three lawyers, four accountants and one economists. None has experience in corporate anti-corruption compliance. The SMV adds that their staff have received training on prevention models from January 2018 to August 2020. It developed an internal guide for staff to assess models. But many virtual visit participants from the private sector, legal profession and civil society continue to doubt whether the SMV has sufficient expertise.<sup>114</sup> The SMV disagrees with this assessment.

221. A final concern is independence and confidentiality. The SMV is attached to the Ministry of Economy and Finance in the executive branch of government. Its involvement in a criminal investigation raises questions about executive interference and investigative secrecy. The SMV dismisses this concern, arguing that it has "functional, administrative, economic, technical and budgetary autonomy" under Law 26 126. It also claims that it is subject to CPC Art. 324 on investigative secrecy. The draft bill prepared by Peru would make the information obtained by SMV confidential and inaccessible by the public.

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<sup>111</sup> [Supreme Court \(21 May 2018\), 864-2017/NACIONAL](#).

<sup>112</sup> A recent report recommends repealing this provision (MESICIC (2021), [6th Round Evaluation Report](#), paras. 133-134 and Recommendation 3.3.5).

<sup>113</sup> [Supreme Decree 002-2019-JUS](#), Art. 47.

<sup>114</sup> A recent report also recommends "a systematic and continuous training programme for the personnel of SMV" (MESICIC (2021), [6th Round Evaluation Report](#), paras. 135-137 and Recommendation 3.3.6).

### Commentary

**The lead examiners recommend that Peru repeal the unconstitutional provision in CLL Art. 18 which binds the prosecutor to the SMV's assessment of prevention models. They also recommend that the Working Group follow up (a) the burden of proof for the prevention model defence; (b) whether the SMV has sufficient independence, expertise and powers to assess prevention models, particularly to gather evidence from third parties outside the prosecuted legal person; (c) the SMV's interpretation of the requirements of a prevention model; and (d) whether the SMV applies the requirements consistently.**

#### (e) Defence of “fraudulently eluding”

222. Peru has not implemented the recommendation on the defence of “fraudulently eluding” (Phase 1 Report paras. 61 and 193). Under CLL Art. 17(4), a legal person “also” escapes liability when a natural person commits foreign bribery by fraudulently eluding a duly implemented prevention model. Peru explained that this provision is an example of when the prevention model defence in Art. 17(1) CLL succeeds and not a separate defence. However, this explanation is not consistent with the language in the statute. Peru also stated that the prevention model could be “circumvented through the identification of a control vacuum” in a new part of the “company that has not yet been included in the prevention model”. But a new part of a company should not be exempted from the compliance programme. The bill drafted by Peru would repeal this provision.

### Commentary

**The lead examiners reiterate the Phase 1 Report and recommend that Peru amend the CLL to clarify the meaning of Art. 17(4).**

#### (f) Proceedings against the legal person and the natural person

223. Parties to the Convention must ensure that the conviction or prosecution of a natural person is not a precondition to the liability of a legal person for foreign bribery (2009 Recommendation Annex I.B).

224. The Phase 1 Report (paras. 64-66 and 194) identified this issue for follow-up. CLL Art. 4 states that the liability of a legal person is “autonomous of the criminal responsibility of the natural person and the causes for extinguishing of criminal action against a natural person do not affect the administrative responsibility of the legal person”. Grounds for extinction include death, amnesty, pardon, res judicata, and statute of limitations, among other things (CC Arts. 78 and 85). But natural person proceedings can be halted for other reasons, e.g. the individual has absconded. In these cases, Peru stated initially in Phase 1 that the natural person must nevertheless be prosecuted and sentenced. It later stated that this position was mistaken, and that a conviction of the individual is not required. There is no practice or jurisprudence to support this position.

### Commentary

**The lead examiners reiterate the Phase 1 Report and recommend that the Working Group continue to follow up whether the prosecution of a legal person requires in practice that a natural person be prosecuted, convicted and/or sentenced.**

#### (g) Jurisdiction over legal persons

225. Peru has not implemented a recommendation to clarify territorial and nationality jurisdiction over legal persons for foreign bribery (Phase 1 Report paras. 101-102 and 200). In Phase 1, Peru took inconsistent positions. It first stated that the CPC applies, even though there are no jurisdictional rules in

the CPC. It then stated that the CC applies, but this is not supported by the CLL. The CC jurisdictional provisions are also designed for natural persons and are not necessarily applicable to legal persons. Finally, Peru states that the test for jurisdiction is whether the company is registered in the country. This too was not supported by a clear statutory provision. In Phase 2, Peru again refers to the CC, stating that foreign bribery committed abroad by a non-Peruvian employee would have effects in Peru. The offence would therefore be subject Peruvian jurisdiction under CC Art. 2. Peru added that it would consider enacting legislation clarifying the jurisdictional rules under the CLL.

### *Commentary*

***The lead examiners reiterate the Phase 1 Report and recommend that Peru enact legislation to clarify its territorial and nationality jurisdiction over legal persons for foreign bribery.***

## 4. Offence of money laundering

226. Under Art. 7 of the Convention, if a Party has made bribery of its own public officials a predicate offence for its money laundering legislation, then it must do so on the same terms for foreign bribery, regardless of where the bribery occurred.

### *(a) Elements of the money laundering offence*

227. Peru's money laundering offence is in Legislative Decree 1106 (AML Law). Arts. 1-3 provide three modalities of money laundering: conversion and transfer; concealment and possession; and transport, transfer, and import/export. Art. 10 specifies that eligible predicate offences include "crimes against public administration", which includes domestic and foreign bribery. Predicate offences also include any crime that has a capacity to generate illegal profits. The money laundering offence is "autonomous", i.e. an investigation or conviction for the predicate offence is not required. The individual must "know or must have presumed" the "illicit origin of the goods", though knowledge of the precise details of the predicate offence is not needed (Phase 1 Report para. 133).

228. The Phase 1 Report (paras. 132 and 203) identified one issue for follow-up: the coverage of foreign predicate offences, i.e. the laundering in Peru of the proceeds of foreign bribery committed outside the country. Peru took two different positions in Phase 1. It explained initially that its money laundering offence did not cover this situation. Later it stated that it is an offence if the act generating the laundered proceeds is a crime at the place where the act occurred. Such a requirement of dual criminality would be contrary to Working Group standards, however.<sup>115</sup>

229. Discussions in Phase 2 suggest that Peruvian authorities do not appreciate the issue. The UIF, the financial intelligence unit, refers to CC Art. 2, which deals with Peru's jurisdiction over extraterritorial crimes. The Special Attorney for Money Laundering and Asset Recovery (*Procuraduría de Lavado de Activos*) states that Peruvian law can be applied to crimes committed abroad which produce an effect in Peru. This likely refers to CC Art. 2(2), which deals specifically with money laundering committed extraterritorially. FELAPD states that Peru has universal jurisdiction over certain crimes; this statement thus again concerns extraterritorial offences. None of the authorities appears to recognise that the issue is liability for an act of money laundering in Peruvian territory, even if the predicate offence takes place earlier elsewhere.

230. After the virtual visit, Peruvian authorities provide yet another position that demonstrates continuing miscomprehension of the issue. They state that the "principle of territoriality" is applied where

<sup>115</sup> [Ireland Phase 3](#), paras. 99-102 and Recommendation 6(a); [New Zealand Phase 3](#), paras. 74-77 and Recommendation 24(a).

the proceeds of foreign bribery committed outside of Peru is laundered in the country. Dual criminality is not required. In support of this position, Peruvian authorities then cite an ongoing investigation of officials of a bank in Andorra. The official allegedly opened and managed accounts of Andorran banks that had been used by Peruvian officials to launder the proceeds of corruption. But the case is an example of an act of laundering in Andorra – not Peru – of the proceeds of corruption committed in Peru – not abroad. In any event, an ongoing investigation does not have jurisprudential value.

231. Peruvian authorities refer to two additional cases. They state that the first case involves the laundering in Peru of the proceeds of “corruption in the government of Venezuela”.<sup>116</sup> However, the decision is of a preparatory investigative judge approving an effective collaboration agreement. It is not a court judgment after a trial in which the issue of foreign predicate offences was litigated. Effective collaboration agreements are certainly an important enforcement tool. However, the judicial decisions confirming these agreements have limited value in establishing a precedent. There is also no explanation of the reasoning applied by the preparatory investigative judge on the coverage of money laundering with a foreign predicate offence. For example, it is unclear whether dual criminality is required (as Peru stated in Phase 1) or whether the “principle of territoriality” applies (as stated in Phase 2).

232. The second case to which the Peruvian authorities refer does not deal with foreign predicates.<sup>117</sup> In describing the case, Peruvian authorities confirm “the predicate offence was the illicit enrichment [...], a criminal act that occurred in Peru.” The court convicted the accused of money laundering because she knew that the funds in question were proceeds of crime.

### Commentary

***The lead examiners are concerned that Peruvian authorities do not appreciate the requirement under Art. 7 of the Convention that Peru must criminalise the laundering in Peru of the proceeds of foreign bribery committed abroad. Without a clearer understanding of this issue, Peruvian authorities are unlikely to enforce the law when this conduct occurs. Case law provided by Peru does not provide a clear statement of the law on this issue.***

***The lead examiners therefore recommend that Peru take steps to clarify whether and how its money laundering offence covers the laundering in Peru of the proceeds of foreign bribery committed abroad. This should include clarifying the applicable jurisdictional rules, and ensuring that dual criminality is not a prerequisite for conviction. After this matter is clarified, Peru should raise awareness of this issue among prosecutors, UIF and other relevant authorities.***

### (b) Enforcement of the money laundering offence

233. The enforcement of the money laundering offence is inadequate, according to data provided by Peru.<sup>118</sup> In 2012-2018, 152 individuals and 4 legal persons were convicted of money laundering. Only seven of the sentences were for money laundering predicated on crimes against the public administration, even though FECOF had 1 012 corruption convictions in 2018 alone.<sup>119</sup> Peruvian authorities cite several

<sup>116</sup> File 249-2015-51. Peruvian authorities did not provide the preparatory investigative judge’s written reasons for the decision in this case because the effective collaboration agreement to which the decision relates is in effect. They indicated instead that the facts of the case are available in a related matter (Supreme Court (11 September 2019), 144-2019-Lima).

<sup>117</sup> Superior Court (18 November 2019), 28464-2010-Lima.

<sup>118</sup> SBS (2020), [I Informe de Sentencias de Lavado de Activos en el Perú](#).

<sup>119</sup> A 2019 report also found a low level of effectiveness in investigating and prosecuting money laundering. Enforcement levels were also disproportionate to the risk level facing Peru and the number of convictions for predicate



reasons for inadequate enforcement. A judge states that the main difficulty is determining the criminal origin of assets. Lifting bank secrecy is challenging, though anti-corruption prosecutors did not share this view (see para. 123). The UIF notes a lack of resources and expertise.<sup>120</sup> However, some officials believe that the number of convictions has increased recently.

### Commentary

**The lead examiners recommend that Peru take steps to increase awareness and enforcement of the money laundering offence, including by training law enforcement authorities on issues that constitute obstacles to the enforcement of the offence.**

### (c) Sanctions for money laundering

234. Under AML Law Arts. 1-4, natural persons are punishable for money laundering by 8-15 years' imprisonment; a fine of 120-350 fine-days; and deprivation of functional or political rights. For aggravated offences, the penalties rise to 10-20 years' imprisonment and 365-730 fine-days. Sanctions are reduced to 4-6 years' imprisonment and 80-110 fine-days for those who launder less than UIT 5 (PEN 22 000 or USD 6 034)<sup>121</sup> or who co-operate with the authorities. Art. 9 allows for seizure and confiscation in accordance with CC Art. 102.

235. Legal persons are administratively liable for money laundering (CLL Art. 1). The penalties available are identical to those for foreign bribery, i.e. a fine of two to six times the benefit. Additional available sanctions include dissolution, prohibition on certain business activities, debarment from public contracting, enforced closure of business premises, and deprivation of rights. Issues concerning these sanctions, such as the calculation of fines where the benefit is unquantifiable, are discussed in Section C.6(b) at p. 67.

236. After the virtual visit, Peru provided a study with data on sanctions imposed for money laundering. In 2012-2018, 127 out of 152 convicted natural persons received jail sentences. All but three of the sentences were for four years or more. The remaining 25 individuals received suspended sentences. Four legal persons were also dissolved.<sup>122</sup> Data on the number of investigations and prosecutions were not available. Peru states that the data in the study will be updated annually in the future.

### Commentary

**The lead examiners note that Peru only provided statistics on sanctions for money laundering after the virtual visit. They therefore recommend that Peru maintain, on a regular basis, statistics on the number of foreign bribery-related money laundering cases.**

## 5. Offence of false accounting

237. As mentioned at para. 58, Art. 8(1) of the Convention requires Parties to prohibit the establishment of off-the-books accounts; making of off-the-books or inadequately identified transactions; recording of non-existent expenditures; entry of liabilities with incorrect identification of their object; and use of false

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offences (GAFILAT (2019), [Mutual Evaluation Report of the Republic of Peru](#), paras. 10, 122-125, 135). See also *Instituto Democracia y Derechos Humanos* of the PUCP University (2018), [Reporte sobre Corrupción y Lavado de Activos](#).

<sup>120</sup> The above-mentioned 2019 report reaches a similar conclusion (GAFILAT (2019), [Mutual Evaluation Report of the Republic of Peru](#), para. 115).

<sup>121</sup> In 2021, one UIT (*Unidad Impositiva Tributaria*) equals PEN 4 400 (approx. USD 1 207).

<sup>122</sup> SBS (2020), [I Informe de Sentencias de Lavado de Activos en el Perú](#).

documents. Under Art. 8(2), Parties must provide effective, proportionate and dissuasive civil, administrative or criminal penalties for such misconduct.

238. Peru's false accounting offences are unchanged from Phase 1 (para. 143). It refers to a range of provisions, each of which falls short of Art. 8 of the Convention:

- CC Art. 198(1) prohibits hiding the true situation of a legal entity, falsifying balance sheets, reflecting or omitting profits or losses therein, or using any artifice that involves an increase or decrease in accounting items. The provision is more restrictive than Convention Art. 8 because (a) it only applies to "a person exercising administrative functions or representation of a legal entity"; (b) there must be proof that the true information is hidden from "shareholders, partners, associates, internal auditor, external auditor, [...] or interested third parties"; and (c) there must be proof of damage to the company or third parties.
- CC Art. 198-A applies to external or internal auditors who fail to disclose significant distortions or misrepresentations in the financial accounting information of a legal entity. The offence does not apply to those who commit false accounting, but only to auditors who fail to report it.
- CC Art. 199 prohibits the maintaining of parallel accounts, but only to obtain an undue advantage. It is not clear to whom the advantage must accrue. The offence is punishable by imprisonment of up to one year and 60-90 fine-days, which is low. Other types of misconduct described in Convention Art. 8 are not covered.
- General Company Law (GCL) Arts. 177, 181 and 191 impose civil liability but only on a company's managers, directors, shareholders, creditors, and third parties.
- Criminal Tax Law (Legislative Decree 813) Art. 5 and Tax Code Art. 16: Breaches of books and accounting requirements under tax laws are punishable by imprisonment of two to five years and 180-365 fine-days. These provisions are more limiting than the Convention because they only cover false accounting with tax consequences.

239. Peru has drafted a bill that would increase the punishment for some of these offences but would not rectify the deficiencies identified above. If the bill is enacted, sanctions for CC Arts. 198 and 199 would be increased to one to five years' imprisonment and 180-365 fine days. A further amendment would allow the Association of Public Accountants to sanction public accountants.

240. Peru has not implemented the Working Group's recommendation to increase sanctions against legal persons for false accounting (Phase 1 Report paras. 144 and 204). Unlike for foreign bribery and money laundering, corporate liability for false accounting is under CC Arts. 105 and 105-A, not the Corporate Liability Law 30 424. False accounting committed in the exercise of a legal person's activity or used to assist or conceal a crime is punishable by a fine of only 5-500 UITs (PEN 22 000-2.2 million or USD 6 034-603 438). Additional sanctions include suspension of the legal person from operation for up to two years; prohibition from engaging in the activities that resulted in the crime permanently or up to five years; closing of the legal person's premises; and dissolution of the legal person.

241. Actual enforcement of corruption-related false accounting is inadequate. Peru does not have detailed statistics on the enforcement of this offence. However, false accounting charges have not been laid against any natural or legal persons in any of the 28 passive foreign bribery cases described by Peru during this evaluation.

### **Commentary**

***The lead examiners recommend that Peru (a) enact a false accounting offence that covers the full range of misconduct described in Convention Art. 8(1), (b) include foreign bribery-related false accounting as a punishable offence under the Corporate Liability Law 30 424, (c) ensure that sanctions against natural and legal persons for false accounting are effective, proportionate and***

***dissuasive, and (d) take steps to increase the actual enforcement of foreign bribery-related false accounting.***

## 6. Sanctions for foreign bribery

242. Art. 3(1) of the Convention requires foreign bribery to be punishable by “effective, proportionate and dissuasive criminal penalties”. If legal persons are not subject to criminal responsibility, then they must be subject to “effective, proportionate and dissuasive non-criminal sanctions, including monetary sanctions”.

### (a) Sanctions against natural persons for foreign bribery

243. As in Phase 1, active (and passive) foreign bribery is punishable by 5-8 years’ imprisonment and 365-730 fine-days (CC Art. 397-A). Administrative sanctions are also available (see Section C.6(d) at p. 68). CC Arts. 45-46 list the aggravating and mitigating sentencing factors.

244. A sentence may go beyond the statutory range in certain circumstances. If an offender voluntarily confesses to the crime, then the penalty imposed may be reduced by up to one-third below the minimum (CPC Art. 161). An “effective collaboration” (CPC Art. 475(2)-(7)) can also reduce the sentence below the statutory minimum, according to Peru. An early termination of the proceedings reduces a sentence by an additional one-sixth (except for recidivists or habitual offenders) (CPC Art. 471). (See Section C.1(c) at p. 31 for details about these non-trial resolutions.) Partially meeting a ground for exemption from liability (e.g. self-defence) also reduces a sentence to below the minimum (CC Arts. 21-22). Conversely, a sentence may exceed the maximum in some cases, e.g. for recidivists, habitual offenders, and public officials (CC Arts. 46-A to D).

245. These sentence reductions could result in non-custodial sentences for foreign bribery. CC Arts. 57-61 permit sentences of one to three years to be suspended with conditions. The Supreme Court has further mandated suspensions of all sentences of four years or less if the offender is not a recidivist or habitual offender, and is unlikely to re-offend.<sup>123</sup> Alternatively, custodial sentences can be substituted with community service or “limitation of free days” (i.e. participation in educational, psychological, occupational or cultural programmes during weekends and holidays).<sup>124</sup> These non-custodial sanctions would be available to a sentence for foreign bribery that has been reduced to under four years due to, for instance, a voluntary confession or effective collaboration.

246. Peru provides an example of non-custodial sentences in a domestic corruption case. In the only concluded case conducted by the Lava Jato Special Team, seven individuals were convicted of collusion. Only one individual was handed a prison sentence (for 99 months) while four others received 48-month sentences that were suspended. (Two were convicted in absentia.) Detailed statistics on sentence suspensions are not available.

247. The absence of statistics also prevents an assessment of the adequacy of fines. As mentioned above, active foreign bribery is also punishable by a fine of 365-730 fine-days. A fine-day is equal to the offender’s average daily income and is determined based on his/her assets, income, remuneration, expenses and other indicators of wealth (CC Art. 41). In Phase 1 (paras. 76 and 195), the Working Group decided to follow up: (a) whether fines imposed in practice are adequate; (b) how fines compare to the value of the bribe and benefit, and (c) whether fines can be imposed against an offender who does not have any income. Fines were not imposed in the single concluded domestic corruption case conducted by

<sup>123</sup> [Supreme Court \(5 April 2016\), 3037-2015-Lima.](#)

<sup>124</sup> CC Arts. 32-35; [Supreme Court \(7 July 2016\), 1100-2015-Cusco.](#)

the Lava Jato Special Team. The seven convicted individuals were found jointly liable for PEN 27 110 922 (USD 7.4 million) in damages, however. Statistics on sanctions in domestic corruption and economic crime cases are not available.

### Commentary

**The lead examiners recommend that Peru maintain detailed statistics on the sanctions imposed in foreign bribery cases, and ensure that sanctions in practice – particularly in light of sentence suspensions – are effective, proportionate and dissuasive. They also recommend that the Working Group follow up (a) whether fines imposed in practice are adequate; (b) whether fines can be imposed against an offender who does not have any income, and (c) the use of non-custodial sentences in corruption cases.**

#### (b) Sanctions against legal persons for foreign bribery

248. This section focuses on fines against legal persons for foreign bribery. Additional administrative sanctions are discussed in Section C.6(d) at p. 68.

249. The fines available against legal persons for foreign bribery are unchanged since Phase 1 (paras. 77-84). Where the value of the benefit obtained or expected to be obtained from the offence can be determined, then the fine against a legal person must be between two to six times the benefit (CLL Art. 5(a)). If the company obtains a benefit whose value cannot be determined, then CLL Art. 7 sets out three ranges of fines based on the company's annual revenues at time of the offence.

250. Peru has not implemented a recommendation to increase the fines for foreign bribery that yields a benefit of undetermined value. The Phase 1 Report (paras. 80-81 and 196) noted that the minimum fines in these cases are too small relative to the legal person's annual revenues. A draft bill would change the fine to 6-14% of the company's gross annual income. This would still be low, even if the minimum fine is higher than at present. The fine would also be based on the company's gross annual income in the five years before and two years after the offence. The fine may therefore be too small if the company's income has grown since the offence, as the Working Group noted in Phase 1. A company with little or no income would also have a perverse incentive to bribe, knowing that a potential fine would be small.

251. A database of corporate convictions is also unimplemented (Phase 1 Report paras. 84 and 197). The CLL's 5th Supplementary Provision contemplates a public registry that would record convictions for five years after the sanction is executed (e.g. a fine is paid) unless the sanction is permanent. Peru stated that a separate database would maintain a permanent record of corporate convictions. Subsidiary legislation was adopted on 15 January 2020 to create a Registry of Sanctioned Legal Entities.<sup>125</sup> Actual implementation has been delayed because of the COVID-19 crisis.<sup>126</sup>

252. Peru provides only one example of a legal person sanctioned for corruption. In October 2020, Peru announced that Odebrecht had agreed to pay PEN 610 million (USD 167 million) over 15 years in civil compensation pursuant to an effective collaboration agreement. The company had already paid PEN 175 million (USD 49 million).<sup>127</sup> As mentioned at para. 104, the payment was under Law 30 737 for damages to the Peruvian state. A similar sanction would not be available in foreign bribery cases. Peru

<sup>125</sup> [Administrative Resolution 016-2020-CE-PJ](#), approving Directive 002-2020-CE-PJ "Norms that Regulate the Registry of Sanctioned Legal Entities".

<sup>126</sup> A recent report recommends that Peru publicise the database broadly once it has been implemented (MESICIC (2021), [6th Round Evaluation Report](#), para. 139 and Recommendation 3.3.8).

<sup>127</sup> La República (7 October 2020), "[Odebrecht pagará histórica suma de S/ 650 millones de reparación](#)".

has not yet brought proceedings under the CLL, or under CC Arts. 104 to 105-A for corruption offences predating the CLL.

253. Given the lack of practice, follow-up issues from Phase 1 (paras. 79-83 and 197) remain unresolved. These include whether the term “benefit” equates to the revenue or profits from a contract, or merely the value of the bribe. The above-mentioned draft bill would replace the notion of “benefit” with “the gross income [...] obtained or will obtain as the result or product of the offence”. Other outstanding follow-up issues include whether sanctions are effective, proportionate and dissuasive in practice, especially after the application of mitigating factors in CLL Arts. 12-15; the suspension and eventual annulment of sanctions if a legal person pays total compensation and implements a prevention model (CLL Art. 16); and sentence mitigation when a legal person implements a partial prevention model or a model after the offence (CLL Arts. 12(d) and (e)).

### **Commentary**

***The lead examiners reiterate the Phase 1 Report and recommend that Peru (a) amend its legislation to increase sanctions for foreign bribery that generates a benefit whose value cannot be determined, and (b) establish a database of foreign bribery convictions of legal persons.***

***The lead examiners also recommend that the Working Group continue to follow up (a) the interpretation of “benefit” in CLL Art. 5(a), (b) the use of suspended penalties in practice, (c) whether sanctions are effective, proportionate and dissuasive in practice, especially after the application of mitigating factors, and (d) sentence mitigation when a legal person implements a partial prevention model at the time of the offence, or a prevention model after the offence.***

### **(c) Confiscation**

254. The legislative framework for criminal confiscation does not raise any particular issues. CC Art. 102 provides for confiscation against natural persons upon conviction. Property subject to confiscation includes the instruments, effects or gains of a crime, and property that is “intrinsically criminal”. Value confiscation is available. CLL Art. 11 applies these provisions to legal persons. Peru stated in Phase 1 (paras. 89-90) that confiscation is mandatory against natural persons but discretionary against legal persons. Legislative Decree 1 373 additionally provides for non-conviction-based confiscation.

255. There are serious concerns that confiscation is underused in Peru, despite it being a vital measure for fighting corruption and other economic crimes. Peru does not provide relevant statistics. In the Lava Jato Special Team case where seven individuals were convicted of collusion, illicit payments had been made to public officials, according to Peru. Nonetheless, confiscation was not imposed. The same is true of a second case in which a municipal official was convicted of incompatible negotiation.<sup>128</sup>

### **Commentary**

***The lead examiners recommend that Peru (a) take steps to ensure that confiscation is routinely applied in foreign bribery cases, and (b) maintain statistics on confiscation in corruption cases.***

### **(d) Administrative sanctions, including debarment from public procurement**

256. Convention Art. 3(4) requires each Party to consider the imposition of additional civil or administrative sanctions upon a person subject to sanctions for foreign bribery. 2009

<sup>128</sup> A 2019 report notes that confiscation is imposed mainly in cases of drug trafficking, not corruption. It concludes that Peru has “an adequate legal framework for the confiscation of assets [...]; however, confiscation of assets and instrumentalities of crime in terms of results is modest” (GAFILAT (2019), [Mutual Evaluation Report of the Republic of Peru](#), paras. 11, 140-141 and 144-146).

Recommendation XI(i) asks countries to permit authorities “to suspend, to an appropriate degree, from competition for public contracts or other public advantages, including public procurement contracts, [...] enterprises determined to have bribed foreign public officials”.

257. Both natural and legal persons may be subject to administrative sanctions for foreign bribery in Peru. Natural persons may be disqualified from holding certain positions and public office; and deprived of degrees or titles associated with a position, profession or office used to commit the offence (CC Arts. 36 and 397-A). Legal persons may be suspended; prohibited from activities that led to the crime; denied licences, concessions or other rights; forced to close premises; or dissolved (CLL Art. 5). CLL Arts. 14-15 set out the factors for deciding whether to impose such sanctions and their duration.

258. The Public Procurement Law 30 225 (PPL) further debarb natural and legal persons from seeking public procurement contracts. Individuals convicted of corruption in Peru or abroad by means of a consensual or enforceable judgment are permanently debarred, whether as bidders, contractors or sub-contractors. The same applies if the individual admits to having engaged in corruption to authorities in Peru or abroad (PPL Art. 11.1(m)). The prohibition also applies to legal persons whose legal representatives or related persons have been convicted of or admits to corruption (Art. 11.1(n)). Natural and legal persons that have been blacklisted by multilateral organisations are also debarred (Art.11 (t)). Peruvian authorities confirm that all of these provisions apply to foreign bribery.

259. The CLL also provides for debarment against legal persons and hence overlaps with the PPL. Art. 5(b)(3) states that the judge, at the prosecutor’s request, may order “inability ... to contract with the State of a definitive nature.” Art. 8 adds that if the bribery was committed in a public procurement context, then debarment is compulsory.

260. These provisions need better enforcement. Peru states that the contracting authority is required to verify the accuracy of the information associated with a bid.<sup>129</sup> Peruvian authorities at the virtual visit explain that, to implement this provision, a bidder must file an affidavit attesting that it is not impeded from participating in the procurement process. But procuring authorities do not go behind the affidavit and verify its veracity. They also do not check the debarment lists of multilateral development banks. To date, only 42 entities have ever been added to a list of ineligible entities, including 20 currently on the list. The reasons for ineligibility are not available.

### **Commentary**

***The lead examiners recommend that Peru (a) take steps to ensure that its procuring authorities verify whether an individual or entity seeking a public procurement contract has been convicted of foreign bribery, including by checking the debarments lists of multilateral development banks, and (b) train procuring authorities to ensure that debarments may be imposed in practice whenever appropriate.***

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<sup>129</sup> [Regulation of PPL Law, Supreme Decree 344-2018-EF](#) Art. 64.6.

# D. Recommendations and issues for follow-up

261. Based on its findings regarding Peru's implementation of the Convention and the 2009 Recommendation, the Working Group (1) makes the following recommendations to Peru under Part 1 below; and (2) will follow up the issues in Part 2 when there is sufficient practice. Peru will report to the Working Group orally within one year, i.e. by June 2022, on the steps taken to implement recommendations 1(b), 9(a), 9(b), 10(a), 10(b) and 15(b). Peru will further report in writing within two years, i.e. by June 2023, on its implementation of all of the recommendations; its foreign bribery enforcement actions; and developments concerning the follow-up issues.

## 1. Recommendations

### *Recommendations for ensuring effective prevention and detection of foreign bribery*

1. With respect to prevention and awareness-raising, the Working Group recommends that Peru:
  - (a) assess its foreign bribery risk and its approach to enforcement, and include policies and actions in its national anti-corruption strategy that are commensurate with this risk. (2009 Recommendations II and III(i)); and
  - (b) take urgent steps to raise awareness of foreign bribery and the Convention among all relevant public and private sector stakeholders (2009 Recommendations II and III(i)).
2. Regarding the reporting of foreign bribery, the Working Group recommends that Peru raise awareness of the duty of public officials to report foreign bribery under CPC Art. 326(b), and clarify the channels for making such reports (2009 Recommendations III (iv), IX(ii) and Annex I.A).
3. Regarding whistleblowing, the Working Group recommends that Peru, as a matter of priority:
  - (a) take appropriate measures to protect from discriminatory or disciplinary action public and private sector employees who report to the competent authorities suspected acts of foreign bribery (2009 Recommendations III(iv), IX(i) and (iii)); and
  - (b) raise awareness in the public and private sectors of the importance of whistleblowing and the protection available to whistleblowers (2009 Recommendations III(iv), IX(i) and (iii)).
4. Regarding detection through media reports, the Working Group recommends that Peru take steps to ensure that its law enforcement authorities are aware of media reports of foreign bribery allegations implicating Peruvian individuals, companies and officials, including media reports circulated by the Working Group to its members (2009 Recommendation III (i) and Annex I.A).

5. Regarding the detection by foreign diplomatic representations, the Working Group recommends that the MRE and PROMPERÚ urgently:
  - (a) provide information and training as appropriate to its officials posted abroad on Peru's laws implementing the Convention, so that such personnel can provide basic information to Peruvian companies in foreign countries and appropriate assistance when such companies are confronted with bribe solicitations (2009 Recommendation III (i)(iv) and Annex I.A); and
  - (b) clarify and provide training on the procedure for MRE and PROMPERÚ officials to report foreign bribery allegations to Peruvian law enforcement authorities (2009 Recommendation III (i)(iv) and Annex I.A).
  
6. Regarding taxation, the Working Group recommends that Peru:
  - (a) enact, as soon as possible, the amendment to the ITL to expressly deny the tax deduction of crime related payments, including bribes to foreign public officials (2009 Recommendation VIII(i); 2009 Tax Recommendation I(i));
  - (b) develop a procedure for routinely re-examining the tax returns of individuals and companies convicted of foreign bribery to verify whether bribes have been deducted; and increase the limitation period for such re-examinations;
  - (c) further train tax auditors on the detection of foreign bribery (2009 Recommendations III(iii) and VIII(i));
  - (d) set out the procedure for reporting suspicions of foreign bribery to law enforcement, and provide guidance to tax examiners on this matter (2009 Recommendations III(iii) and VIII(i)); and
  - (e) maintain statistics on the detection and reporting of foreign bribery with a view to assessing the effectiveness of SUNAT's anti-foreign bribery measures (2009 Recommendations I and III(iv)).
  
7. With respect to accounting requirements, external audit and internal company controls, the Working Group recommends that Peru:
  - (a) raise awareness among Peruvian external auditors and regulators of the role that external audits can play in foreign bribery detection (Convention Art. 8; 2009 Recommendations X.B(i) and (v));
  - (b) encourage companies that receive reports of suspected acts of foreign bribery from an external auditor to actively and effectively respond to such reports (Convention Art. 8; 2009 Recommendation X.B(iv));
  - (c) consider requiring external auditors to report suspected foreign bribery to competent authorities independent of the company, such as law enforcement or regulatory authorities, and ensure that auditors making such reports reasonably and in good faith are protected from legal action. (Convention Art. 8; 2009 Recommendations III(iv), IX(iii) and X.B(v)); and
  - (d) take steps to encourage Peruvian companies that trade or invest overseas to develop and adopt adequate internal controls, ethics and compliance programmes or measures for the purpose of preventing and detecting foreign bribery. (2009 Recommendations III(i) and (v), X.C(i)).
  
8. Regarding money laundering, the Working Group recommends that Peru:
  - (a) systematically take foreign bribery into account when conducting money laundering risk assessments in the future (Convention Art. 7; 2009 Recommendation II);
  - (b) extend the requirement to conduct enhanced due diligence to additional close associates of PEPs, such as prominent members of the same political party, and business partners or associates (Convention Art. 7; 2009 Recommendation II);



- (c) raise awareness of foreign bribery among reporting entities (Convention Art. 7; 2009 Recommendation II);
- (d) develop guidance and typologies on suspicious money laundering transactions that specifically address money laundering predicated on foreign bribery (Convention Art. 7; 2009 Recommendation II); and
- (e) raise awareness of the Convention and Peru's foreign bribery laws among UIF officials (Convention Art. 7; 2009 Recommendations II and III(i)).

***Recommendations for ensuring effective investigation, prosecution and sanctioning of foreign bribery and related offences***

9. With respect to investigation and prosecution of foreign bribery and related offences, the Working Group recommends that Peru:
  - (a) take urgent steps to raise awareness among prosecutors, judges and law enforcement officials of (i) the Convention, particularly Art. 5, (ii) the foreign bribery offence, and corporate liability for this crime, and (iii) the importance of proceeding against individuals and legal persons for active bribery under the CLL or CC, whenever appropriate (Convention Art. 5 and Commentary 27; 2009 Recommendations III, V and Annex I.D);
  - (b) assign primary responsibility for foreign bribery cases (including related offences) to a specific prosecutorial unit (Convention Art. 5 and Commentary 27; 2009 Recommendations III, V and Annex I.D);
  - (c) maintain the resources and support necessary for the Lava Jato Special Team to continue its investigations and prosecutions;
  - (d) ensure sufficient resources and specialised expertise – especially forensic financial and accounting experts – for investigating and prosecuting foreign bribery cases (Convention Art. 5 and Commentary 27; 2009 Recommendation V and Annex I.D); and
  - (e) further train judges and law enforcement on corporate and white-collar crime investigations (Convention Art. 5 and Commentary 27; 2009 Recommendation V and Annex I.D).
10. Regarding non-trial resolutions, the Working Group recommends that Peru:
  - (a) make public, as necessary and in compliance with the relevant rules, the essential elements of non-trial resolutions, in particular the reasons for using a resolution, the main facts of the case, the party(s) to the agreement, and the sanctions (Convention Art. 5 and Commentary 27; 2009 Recommendation V and Annex I.D);
  - (b) publish guidance that applies to early terminations of proceedings and early conclusions to a trial (Convention Art. 5 and Commentary 27; 2009 Recommendation V and Annex I.D).
11. Regarding statute of limitations, the Working Group recommends that Peru enact the draft amendment of CPC Art. 342 and extend the limitation period for investigations that require MLA (Convention Arts. 5, 6 and 9 and Commentary 27; 2009 Recommendation V and Annex I.D)
12. Regarding investigative tools, the Working Group recommends that Peru:
  - (a) develop standard templates for banks to provide information to law enforcement (Convention Art. 5 and Commentary 27; 2009 Recommendation V and Annex I.D);
  - (b) take steps to ensure that the freezing and seizing of assets is used in foreign bribery cases whenever appropriate (Convention Art. 5 and Commentary 27; 2009 Recommendation V and Annex I.D).

13. Regarding judicial and prosecutorial independence and integrity, the Working Group recommends that Peru:

- (a) take steps to ensure that the ANCMP and ANCPJ are operational as soon as possible (Convention Art. 5 and Commentary 27; 2009 Recommendation V and Annex I.D);
- (b) take urgent measures to reduce the number of provisional and supernumerary judges and prosecutors, including by reviewing the rules for judicial and prosecutorial appointments with a view to eliminating the use of provisional and supernumerary judges and prosecutors (Convention Art. 5 and Commentary 27; 2009 Recommendation V and Annex I.D);
- (c) consider increasing judicial and prosecutorial appointments in the lower levels of courts (Convention Art. 5 and Commentary 27; 2009 Recommendation V and Annex I.D); and
- (d) take steps to ensure that prosecutors are protected from unjustified removals from cases (Convention Art. 5 and Commentary 27; 2009 Recommendation V and Annex I.D).

14. Regarding MLA and extradition, the Working Group recommends that Peru:

- (a) maintain detailed statistics on incoming and outgoing MLA requests in foreign bribery cases, including the requesting/requested state, offences underlying the request, type of assistance sought, and the time required for execution or reasons for refusal (Convention Art. 9; 2009 Recommendations III(ix) and XIII);
- (b) take steps to improve the co-ordination of outgoing MLA requests and to eliminate duplicate requests (Convention Art. 9; 2009 Recommendations III(ix) and XIII);
- (c) take steps to clarify through legally-binding means the rules on the extradition of Peruvian nationals in foreign bribery cases (Convention Art. 10; 2009 Recommendations III(ix) and XIII); and
- (d) maintain detailed statistics on incoming and outgoing extradition requests, including the requesting/requested state, offences underlying the request, and time required for execution or reasons for refusal (Convention Art. 10; 2009 Recommendations III(ix) and XIII).

15. With respect to the foreign bribery offence, the Working Group recommends that Peru:

- (a) take steps to clarify that the awareness of the bribe by the foreign public official is not an element of the foreign bribery offence (Convention Art. 1; 2009 Recommendations III(ii) IV, V, and Annex I.A);
- (b) urgently enact legislation defining a foreign public official in line with the Convention (Convention Art. 1 and Commentaries 12 to 18; 2009 Recommendations III(ii) IV, V, and Annex I.A);
- (c) amend its legislation to ensure that bribery in order that a foreign public official uses his/her position outside his/her authorised competence is prohibited and subject to the same sanctions as other forms of foreign bribery (Convention Art. 1 and Commentary 19; 2009 Recommendations III(ii) IV, V, and Annex I.A); and
- (d) amend its legislation to extend its foreign bribery offence to cover preparatory acts and to eliminate the following preconditions for exercising jurisdiction over Peruvian nationals who commit foreign bribery extraterritorially: (i) dual criminality, and (ii) the individual enters in any way into Peruvian territory (Convention Art. 4(1) and (4) and Commentary 26; 2009 Recommendation III(ii)).

16. With respect to liability of legal persons, the Working Group recommends that Peru:

- (a) enact legislation to clarify to which entities successor liability applies after a corporate spin-off (Convention Art. 2; 2009 Recommendation III(ii) and Annex I.B);

- (b) amend the CLL to (i) ensure that a legal person is liable for foreign bribery that benefits both the natural person who perpetrated the crime and the legal person; (ii) ensure that a legal person is liable for foreign bribery that is intended to benefit it, even if the benefit later does not materialise; and (iii) ensure that legal persons cannot avoid liability for foreign bribery by using an intermediary to make bribe payments (Convention Art. 2; 2009 Recommendation III(ii) and Annexes I.B and II);
  - (c) urgently amend the CLL to eliminate the prevention model defence when a senior corporate officer commits, authorises or directs a crime of foreign bribery (Convention Art. 2; 2009 Recommendation III(ii) and Annexes I.B and II);
  - (d) amend CLL Art. 3(c) to ensure that company management's duties of supervision, surveillance and control are not set by the company itself (Convention Art. 2; 2009 Recommendation III(ii) and Annexes I.B and II);
  - (e) amend CLL Art. 17(2) and Art. 33 of the CLL Regulation to align more closely with the Working Group's Good Practice Guidance on Internal Controls, Ethics and Compliance, including by (i) expanding the lists of mandatory and optional elements for a prevention model; (ii) elaborating on certain existing elements, and (iii) clarifying that some of the elements listed in Art. 33 are mandatory for certain companies (Convention Art. 2; 2009 Recommendation III(ii) and Annexes I.B and II);
  - (f) ensure that (i) the legally binding requirements for SMEs under the CLL take into account the companies' risk profile and (ii) clarify which of the minimum prevention model elements in CLL Art. 17(2) are required for SMEs (Convention Art. 2; 2009 Recommendation III(ii) and Annexes I.B and II);
  - (g) repeal the unconstitutional provision in CLL Art. 18 which binds the prosecutor to the SMV's assessment of prevention models (Convention Art. 2; 2009 Recommendation III(ii) and Annex I.B);
  - (h) amend the CLL to clarify the meaning of Art. 17(4) (Convention Art. 2; 2009 Recommendation III(ii) and Annex I.B); and
  - (i) enact legislation to clarify its territorial and nationality jurisdiction over legal persons for foreign bribery (Convention Arts. 2 and 4; 2009 Recommendation III(ii) and Annex I.B).
17. Regarding the money laundering offence, the Working Group recommends that Peru:
- (a) take steps to (i) clarify whether and how its money laundering offence covers the laundering in Peru of the proceeds of foreign bribery committed abroad, including applicable jurisdictional rules and ensuring that dual criminality is not a prerequisite for conviction, and (ii) raise awareness among prosecutors, UIF and other relevant authorities of these matters (Convention Art. 7; 2009 Recommendations II and V);
  - (b) take steps to increase awareness and enforcement of the money laundering offence, including by training law enforcement authorities on issues that constitute obstacles to the enforcement of the offence (Convention Art. 7; 2009 Recommendations II and V); and
  - (c) maintain, on a regular basis, statistics on the number of foreign bribery-related money laundering cases (Convention Art. 7; 2009 Recommendations II and V).
18. Regarding the false accounting offence, the Working Group recommends that Peru:
- (a) enact a false accounting offence that covers the full range of misconduct described in Convention Art. 8(1) (Convention Art. 8; 2009 Recommendations III(ii), X.A(i) and Annex I.B);
  - (b) include foreign bribery-related false accounting as a punishable offence under the Corporate Liability Law 30 424 (Convention Art. 8; 2009 Recommendations III(ii), X.A(i) and Annex I.B);

- (c) ensure that sanctions against natural and legal persons for false accounting are effective, proportionate and dissuasive (Convention Art. 8; 2009 Recommendations III(ii), X.A(iii) and Annex I.B); and
  - (d) take steps to increase the actual enforcement of foreign bribery-related false accounting (Convention Art. 8; 2009 Recommendations III(ii), X.A(i) and Annex I.B).
19. Regarding sanctions and confiscation, the Working Group recommends that Peru:
- (a) amend its legislation to increase sanctions for foreign bribery that generates a benefit whose value cannot be determined (Convention Arts. 2 and 3);
  - (b) establish a database of foreign bribery convictions of legal persons (Convention Art. 3; 2009 Recommendation III(ii));
  - (c) ensure that sanctions in practice – particularly in light of sentence suspensions – are effective, proportionate and dissuasive (Convention Art. 3);
  - (d) take steps to ensure that confiscation is routinely applied in foreign bribery cases (Convention Art. 3);
  - (e) maintain detailed statistics on the sanctions and confiscation imposed in foreign bribery cases (Convention Art. 3; 2009 Recommendation III(ii));
  - (f) take steps to ensure that its procuring authorities verify whether an individual or entity seeking a public procurement contract has been convicted of foreign bribery, including by checking the debarments lists of multilateral development banks (Convention Art. 3; 2009 Recommendations II, III(ii) and XI(i)); and
  - (g) train procuring authorities to ensure that debarments may be imposed in practice whenever appropriate (Convention Art. 3; 2009 Recommendations II, III(ii), and XI(i)).

## 2. Follow-up by the Working Group

20. The Working Group will follow up the issues below as case law, practice and legislation develops:
- (a) issues related to public advantages, namely (i) whether Peru implements the [2019 Recommendation of the Council on Bribery and Officially Supported Export Credits](#) to a degree that is commensurate to its export credits programme; and (ii) whether APCI implements anti-foreign bribery measures to a degree that is commensurate with Peru's development co-operation programme (2009 Recommendations XI(ii), XII, 2016 ODA Recommendation and 2019 Export Credit Recommendation);
  - (b) limitation periods for preliminary proceedings and preparatory investigations in foreign bribery cases (Convention Arts. 5 and 6 and Commentary 27; 2009 Recommendation V and Annex I.D);
  - (c) delay in the execution of orders to produce bank information in foreign bribery cases (Convention Art. 5 and Commentary 27; 2009 Recommendation V and Annex I.D);
  - (d) appointment, discipline and dismissal and ethical training of judges and prosecutors (Convention Art. 5 and Commentary 27; 2009 Recommendation V and Annex I.D);
  - (e) international co-operation, particularly: (i) the denial of a request due to public order, sovereignty, security or fundamental or essential interests; ii) MLA in non-criminal corporate foreign bribery proceedings; iii) delay in executing incoming MLA requests especially those that require the lifting of bank secrecy. (Convention Arts. 9 and 10; 2009 Recommendations III(ix) and XIII);

- (f) the foreign bribery offence, particularly: (i) whether CC Art. 397-A prohibits proper or due advantages to foreign public officials; and ii) the application of *concusión* under CC Art. 382 (Convention Art. 1; 2009 Recommendation IV and Annex I.A);
- (g) the CLL, particularly: (i) successor liability for foreign bribery discovered during the due diligence; ii) liability when a lower-level person who is not directly supervised by senior corporate officers commits foreign bribery due to the company's highest level managerial authority's failure to supervise the person or to implement adequate internal controls, ethics and compliance programmes or measures; iii) whether the prosecution of a legal person requires in practice that a natural person be prosecuted, convicted and/or sentenced (Convention Art. 2; 2009 Recommendation III(ii) and Annex I.B);
- (h) prevention models, particularly: (i) the burden of proof for the prevention model defence; ii) SMV's independence, expertise and powers; and iii) the SMV's interpretation and application of the requirements of a prevention model (Convention Art. 2; 2009 Recommendation III(ii) and Annex I.B);
- (i) sanctions against natural persons, particularly: (i) whether fines imposed in practice are adequate, including against an offender with no income; iv) the use of non-custodial sentences in corruption cases (Convention Art. 3; 2009 Recommendation III(ii)); and
- (j) sanctions against legal persons, particularly (i) the interpretation of "benefit" in CLL Art. 5(a); (ii) the use of suspended penalties in practice; (iii) adequacy of sanctions, including when a legal person implements a partial prevention model at the time of the offence, or a prevention model after the offence (Convention Art. 3; 2009 Recommendation III(ii)).

# Annex 1 Virtual visit participants

## Public sector

- Presidency of the Council of Ministers (*Presidencia del Consejo de Ministros*)
  - Secretariat of Public Integrity (*Secretaría de Integridad Pública*)
  - High-Level Anticorruption Commission (*Comisión de Alto Nivel Anticorrupción*)
- Peru Multisectoral Commission – OECD
- Ministry of Justice and Human Rights (*Ministerio de Justicia y Derechos Humanos*)
  - International Judicial Co-operation Department (*Dirección de Cooperación Jurídica Internacional*)
- Ministry of Foreign Affairs (*Ministerio de Relaciones Exteriores*)
- Ministry of Economy and Finance (*Ministerio de Economía y Finanzas*)
  - Superintendence of the Securities Market (*Superintendencia del Mercado de Valores, SMV*)
  - *Dirección General de Contabilidad Pública (DGCP)*
  - Accounting Standards Council (*Consejo Normativo de Contabilidad, CNC*)
  - General Directorate of Public Revenue Policy (*Dirección General de Política de Ingresos Públicos*)
- Ministry of Foreign Trade and Tourism (*Ministerio de Comercio Exterior y Turismo*)
- Ministry of Production (*Ministerio de la Producción*)
- Ministry of Labour and Employment (*Ministerio de Trabajo y Promoción del Empleo*)
- Commission for the Promotion of Peru for Exportation and Tourism (*Comisión de Promoción del Perú para la Exportación y el Turismo, PROMPERÚ*)
- Supervisory Organ for State Contracts, Ministry of Economy and Finance (*Organismo Supervisor de las Contrataciones del Estado (OSCE), Ministerio de Economía y Finanzas*)
- Development Finance Corporation (*Corporación Financiera de Desarrollo S.A., COFIDE*)
- *Superintendencia Nacional de Aduanas y de Administración Tributaria (SUNAT)*
- Superintendence of Banking, Insurance and Private Pension Fund Administrators (*Superintendencia de Banca, Seguros y AFP, SBS*)
  - Financial Intelligence Unit (*Unidad de Inteligencia Financiera, UIF*)
- Special Attorney for Money Laundering and Asset Recovery (*Procuraduría Lavado De Activo*)
- Comptroller General (*Contraloría General de la República, CGR*)
- *Fondo de Financiamiento de la Actividad Empresarial del Estado (FONAFE)*

## Judiciary and law enforcement

- Supreme Court
- Superior Court of Justice
- Preparatory Investigation Judge
- National Board of Justice (*Junta Nacional de Justicia, JNJ*)
- Academy of the Magistracy
- National Police (*Policía Nacional del Perú*)
  - Anti-Corruption Directorate (*Dirección Contra la Corrupción*)
- Public Prosecutor's Office (*Ministerio Público*)
  - Special Prosecutors for Corruption of Public Officials (*Fiscalías Especializadas en Delitos de Corrupción de Funcionarios*)
  - Special Prosecutors for Money Laundering and Confiscation (*Fiscalías Especializadas en Delitos de Lavado de Activos y Pérdida de Dominio*)
  - Lava Jato Special Prosecutor Team (*Coordinación Equipo Especial Lava Jato*)
  - Legal Co-operation and Extraditions Unit (*Unidad de Cooperación Judicial Internacional y Extradiciones, UCJIE*)
  - Supreme Internal Control Prosecutors (*Fiscalía Suprema de Control Interno*)

## Private sector

### Companies, including state-owned or state-controlled enterprises

- Alicorp
- Antamina
- Backus
- Compañía de Minas Buenaventura
- Credicorp
- Falabella Peru
- Gloria S.A.
- Minera Cerro Verde
- Petróleos del Perú S.A. (Petroperú)
- Southern Peru Copper Corp.
- Telefónica del Peru
- Volcán
- Asociación de Bancos del Perú (ASBANC)
- Banco de Credito del Peru (BCP)
- Banco de la Nación
- Banco Interamericano de Finanzas SA
- Banco Internacional del Peru (Interbank)
- Banco GNB Perú
- Banco Pichincha
- BBVA Continental
- Scotiabank Peru S.A.A.

### Business associations

- Businessmen for Integrity (*Empresarios por la Integridad*)
- *Confederación Nacional de Instituciones Empresariales Privadas* (CONFIEP)
- Lima Chamber of Commerce (*Cámara de Comercio de Lima*, CCL)
- *Sociedad Nacional de Industrias* (SNI)
- World Compliance Association, Peruvian Chapter

### Legal profession and academics

- Lima Bar Association (*Colegio de Abogados de Lima*)
- [Carlos Caro Coria Abogados](#)
- [DLA Piper](#)
- [Estudio Ore Guardia](#)
- [Hernández & Cia](#)
- Orihuela Abogados
- Philippi, Prietocarrizosa Ferrero Du & Uria
- [Rebaza, Alcázar & De Las Casas](#)
- Santiváñez Antúnez Abogados

### Accounting and auditing profession

- BDO
- EY
- Grant Thonton
- Grupo Latinger
- KPMG
- PWC

### **Civil society and media**

- Asociación Civil Transparencia
- Asociación Civil JAPIQAY, Memoria y Ciudadanía
- El Peruano
- Gestión
- Peruvian Institute of Economy (*Instituto Peruano de Economía*, IPE)
- Proética (Transparency International Peru)

### **Parliamentarians**

- Special Commission for Monitoring Peru's Accession to the OECD (*Comisión Especial de Seguimiento de la Incorporación del Perú a la Organización para la Cooperación y el Desarrollo Económico* (OCDE))
- Commission of Justice and Human Rights (*Comisión de Justicia y Derechos Humanos*)

# Annex 2 List of abbreviations and acronyms

AG	Attorney General ( <i>Fiscal de la Nación</i> )	JDCCPP	<i>Junta de Decanos de Colegios de Contadores Públicos de Perú</i>
AML	anti-money laundering	JNJ	National Board of Justice ( <i>Junta Nacional de Justicia</i> )
ANCMF	National Control Authority of the PPO ( <i>Autoridad Nacional de Control del Ministerio Público</i> )	MEF	Ministry of Economy and Finance ( <i>Ministerio de Economía y Finanzas</i> )
ANCPJ	National Control Authority of the Judiciary ( <i>Autoridad Nacional de Control del Poder Judicial</i> )	MESICIC	Follow-Up Mechanism for the Implementation of the Inter-American Convention against Corruption
APCI	Peruvian Agency for International Co-operation ( <i>Agencia Peruana de Cooperación Internacional</i> )	MFTT	Ministry of Foreign Trade and Tourism ( <i>Ministerio de Comercio Exterior y Turismo</i> )
Art.	article	MLA	mutual legal assistance
CAN	High-Level Anti-Corruption Commission (Comisión de Alto Nivel Anticorrupción)	MRE	Ministry of Foreign Affairs ( <i>Ministerio de Relaciones Exteriores, MRE</i> )
CC	Criminal Code	PAI	Internationalisation Support Program, Ministry of Foreign Trade and Tourism (Programa de Apoyo a la Internacionalización, PAI)
CGR	<i>Contraloría General de la República</i>	PEN	Peruvian <i>sol</i>
CLL	Corporate Liability Law 30 424	PPL	Public Procurement Law 30 225
CNC	Accounting Standards Council ( <i>Consejo Normativo de Contabilidad</i> )	PPO	Public Prosecutor's Office ( <i>Ministerio Público</i> )
CNM	National Council of Magistrates ( <i>Consejo Nacional de la Magistratura</i> )	PROMPERÚ	Commission for the Promotion of Peru for Exportation and Tourism in MFTT
CPC	Criminal Procedure Code	SBS	Superintendence of Banking, Insurance, and Pensions ( <i>Superintendencia de Banca, Seguros y AFP</i> )
DCC	National Police Anti-Corruption Unit ( <i>Dirección Contra la Corrupción</i> )	SME	micro, small or medium-sized enterprise
DGCP	General Directorate of Public Accounting ( <i>Dirección General de Contabilidad Pública</i> )	SMV	Superintendence of the Securities Market ( <i>Superintendencia del Mercado de Valores</i> )
FECOF	Special Prosecutors for Corruption of Public Officials ( <i>Fiscalías Especializadas en Delitos de Corrupción de Funcionarios</i> )	SOE	state-owned or controlled enterprise
FELAPD	Special Prosecutors for Money Laundering and Confiscation ( <i>Fiscalías Especializadas en Delitos de Lavado de Activos y Pérdida de Dominio</i> )	SUNAT	Superintendency of Tax Administration ( <i>Superintendencia Nacional de Aduanas y de Administración Tributaria</i> )
FONAFE	<i>Fondo Nacional de Financiamiento de la Actividad Empresarial del Estado</i> (SOE regulator)	UAP	Personnel Administration Unit ( <i>Unidad de Administración de Personal</i> ) of APCI
GCL	General Company Law 26 887 ( <i>Ley General de Sociedades</i> )	UCJIE	Legal Co-operation and Extraditions Unit of the PPO ( <i>Unidad de Cooperación Judicial Internacional y Extradiciones</i> )
IACAC	Inter-American Convention against Corruption	UIF	Financial Intelligence Unit ( <i>Unidad de Inteligencia Financiera del Perú</i> )
IFRS	International Financial Reporting Standards	UIT	tax unit ( <a href="#">Unidad Impositiva Tributaria</a> )
ISA	International Standards on Auditing	UNCAC	United Nations Convention against Corruption
ITL	Income Tax Law (Supreme Decree 179-2004-EF)	USD	United States dollar



# Annex 3 Excerpts of relevant legislation

## Foreign bribery offence

### **Criminal Code Article 397-A. Transnational Active Bribery**

Anyone who, under any form, offers, grants or promises directly or indirectly to an official or public servant of another State or official of an international public organization, a donation, promise, advantage or undue benefit that may be in his own interest or in that of another person, so that said server or public official performs or omits acts specific to his position or employment, in violation of his obligations or without breaching his obligation to obtain or retain a business or other undue advantage in the performance of international economic or commercial activities, shall be punished with deprivation of liberty not less than five years nor more than eight years; Disqualification, as applicable, in accordance with paragraphs 1, 2 and 8 of Article 36; and, with three hundred sixty-five to seven hundred thirty fine-days.

## Liability of legal persons

### **CLL Article 2. Subjective Scope of Application**

For the purposes of this Law, legal persons are private law entities, as well as associations, foundations, non-governmental organizations and non-registered committees, irregular companies, entities that administer an autonomous patrimony and companies of the Peruvian State or companies of mixed economy.

The change of name, denomination or corporate name, corporate reorganization, transformation, split, merger, dissolution, liquidation or any act that may affect the legal status person of the person does not prevent the attribution of responsibility to it.

In the case of a merger or spin-off, the absorbing legal person: (i) can only be sanctioned with the payment of a fine, which is calculated taking into account the rules established in articles 5 or 7, as appropriate, and based on the assets transferred, provided that the offense was committed before the merger or split, unless the legal entities involved have used these forms of corporate reorganization for the purpose of avoiding any administrative liability of the merged or divided corporate person, in which case this assumption does not operate; and, (ii) it does not incur in administrative liability when it has performed an adequate due diligence process, prior to the merger or spin-off process. It is understood that due diligence is fulfilled when verifying the adoption of reasonable actions aimed at verifying that the merged or split corporate person has not incurred in the commission of any of the offenses set forth in article 1.

### **CLL Article 3. Administrative liability of legal persons**

Legal persons are administratively liable for the crimes indicated in article 1, when these have been committed in their name or on their behalf and for their benefit, directly or indirectly, by:

- a. Its partners, directors, de facto or legal administrators, legal representatives or representatives of the legal person, or its affiliates or subsidiaries.
- b. The natural person who, being subject to the authority and control of the persons mentioned in the preceding paragraph, committed the offense under their orders or authorization.
- c. The natural person indicated in the preceding paragraph, when the commission of the crime was possible because the persons mentioned in literal a. have not fulfilled their duties of supervision, surveillance and control over the entrusted activity, in relation to the specific situation of the case.

Legal entities that have the status of parent companies will be liable and sanctioned whenever the natural persons of their affiliates or subsidiaries, who commit any of the conducts indicated in the first paragraph, have acted under their orders, authorization or with their consent.

Legal persons are not liable in cases in which the natural persons indicated in the first paragraph, had committed the offenses set forth in article 1, exclusively for their own benefit or in favour of a third party other than the legal person.

#### **CLL Article 4. Autonomy of the administrative liability of the legal person and termination of the action against the legal person**

The administrative liability of the legal person is autonomous of the criminal liability of the natural person. The causes that extinguish the criminal action against the natural person do not enervate the administrative responsibility of the legal entities.

The action against the legal person is extinguished by prescription or *res judicata*.

The action against the legal person prescribes in the same time as that provided for the natural person, in accordance with the first paragraph of article 80 of the Criminal Code, being applicable also, as appropriate, articles 82, 83 and 84 of the Penal Code.

#### **CLL Article 17. Exempt for implementation of prevention model**

17.1. The legal person is exempt from liability for the commission of the crimes included in article 1, if it adopts and implements in its organization, prior to the commission of the crime, a prevention model appropriate to its nature, risks, needs and characteristics, consisting of adequate surveillance and control measures to prevent the aforementioned crimes or to significantly reduce the risk of their commission.

17.2. The prevention model must have the following minimum elements:

- 17.2.1. A person in charge of prevention, appointed by the highest administrative body of the legal person or who acts as such, who must exercise his function autonomously. In the case of micro, small and medium enterprises, the role of the prevention manager can be assumed directly by the administrative body.
- 17.2.2. Identification, evaluation and mitigation of risks to prevent the commission of the crimes foreseen in article 1 through the legal person.
- 17.2.3. Implementation of complaint procedures.
- 17.2.4. Dissemination and periodic training of the prevention model.
- 17.2.5. Evaluation and continuous monitoring of the prevention model.

The content of the prevention model, taking into account the characteristics of the legal person, is developed in the Regulation of this Law. In the case of micro, small and medium enterprises, the prevention model will be limited to its nature and characteristics and it should only have one of the minimum elements mentioned above.

17.3. In the case of state companies or mixed economy companies, the prevention model is exercised without prejudice to the powers and powers that correspond to the institutional control bodies and all the bodies that make up the National Control System.

17.4. It also excludes the liability of the legal person, when any of the natural persons indicated in article 3 commits the offense fraudulently eluding the prevention model duly implemented.

## **Sanctions**

#### **CLL Article 5. Applicable administrative measures**

The judge, at the request of the Public Prosecutor's Office, may order, as appropriate, the following administrative measures against legal entities that are responsible for the commission of the offenses set forth in Article 1:

- a. Fine not less than double nor more than six times the benefit obtained or expected to be obtained with the commission of the offense, without prejudice to the provisions of article 7.
- b. Debarment, in any of the following modalities:

1. Suspension of their social activities for a period of not less than six months nor more than two years.
2. Prohibition of carrying out future activities of the same kind or nature as those in which the crime was committed, favoured or concealed. The prohibition may be temporary or definitive. The temporary prohibition shall not be less than one year nor more than five years.
3. To contract with the State in a definitive way.
- c. Cancellation of licenses, concessions, rights and other administrative or municipal authorizations.
- d. Closing of their premises or establishments, temporarily or permanently. The temporary closure is not less than one year nor more than five years.
- e. Dissolution.

#### **CLL Article 7. Fine**

When it is not possible to determine the amount of the benefit obtained or expected to be obtained with the commission of the offenses set forth in article 1, the value of the fine is established according to the following criteria:

- a) When the annual income of the legal person at the time of commission of the crime amounts to one hundred and fifty (150) tax units, the fine is not less than ten (10) nor more than fifty (50) tax units.
- b) When the annual income of the legal person at the time of commission of the crime is greater than one hundred fifty (150) tax units and less than one thousand seven hundred (1700) tax units, the fine is not less than fifty (50) nor more than five hundred (500) tax units (UIT).
- c) When the annual income of the legal person at the time of commission of the crime is greater than one thousand seven hundred (1700) tax units, the fine is not less than five hundred (500) nor more than ten thousand (10000) tax units (ITU).

The fine must be paid within ten business days of the judgment that has the quality of consented or enforceable. At the request of the legal person and when the payment of the amount of the fine could jeopardize its continuity or the maintenance of the jobs or when it is advisable for the general interest, the judge authorizes the payment to be made in monthly instalments, within a limit not exceeding thirty-six months.

In case the legal person does not comply with the payment of the fine imposed, it can be executed on its assets or converted, following a judicial request, to the extent of definitively prohibiting activities, foreseen in numeral 2 of section b ) of article 5.

#### **CC Article 102. Seizure of property from crime**

The judge, whenever the autonomous process of extinction of ownership does not proceed, resolves the seizure of the instruments with which the crime was executed, even when they belong to third parties, except when they have not given their consent for its use. The objects of the crime are confiscated when, according to their nature, their delivery or return does not correspond. Likewise, it provides for the seizure of the effects or gains of the crime, whatever the transformations they may have experienced. The confiscation determines the transfer of said assets to the sphere of ownership of the State.

The judge also provides for the seizure of intrinsically criminal assets, which will be destroyed.

When the effects or gains of the crime have been mixed with goods of lawful origin, confiscation proceeds to the estimated value of the illicit mixed goods, unless the former had been used as means or instruments to hide or convert the goods of illicit origin, in which case the confiscation of both types of goods will proceed.

If forfeiture of the effects or gains of the offense is not possible because they have been concealed, destroyed, consumed, transferred to a third party in good faith and for consideration or for any other analogous reason, the judge orders the confiscation of the assets or assets of ownership. of the responsible or eventual third party for an amount equivalent to the value of said effects and profits.

**CC Article 104. Deprivation of benefits obtained for criminal offenses against legal entities**

The judge will also decree the deprivation of the benefits obtained by legal entities as a consequence of the criminal offense committed in the exercise of their activity by their officers or dependents, as necessary to cover pecuniary responsibility of a nature civil of those, if their assets were insufficient.

**CC Article 105. Measures applicable to Legal Entities**

If the punishable act was committed in the exercise of the activity of any legal entity or using your organization to favour or conceal it, the Judge must apply all or some of the following measures:

1. Closing of your premises or establishments, temporarily or permanently. The temporary closure shall not exceed five years.
2. Dissolution and liquidation of the company, association, foundation, cooperative or committee.
3. Suspension of the activities of the company, association, foundation, cooperative or committee for a period not exceeding two years.
4. Prohibition to the society, foundation, association, cooperative or committee to carry out in the future activities, of the kind of those in whose exercise the crime has been committed, favoured or covered up. The prohibition may be temporary or definitive. The temporary prohibition will not be greater than five years.
5. Fine not less than five nor more than five hundred tax units.

When any of these measures is applied, the Judge will order the competent authority to order the intervention of the legal entity to safeguard the rights of the workers and the creditors of the legal entity for a period of two years.

The change of the corporate name, legal status or corporate reorganization, will not prevent the application of these measures.

**Jurisdiction****CC Article 1. Principle of Territoriality**

The Peruvian Criminal Law applies to anyone who commits a punishable act in the territory of the Republic, except for the exceptions contained in International Law.

It also applies to punishable acts committed in:

1. Public national aircraft or aircraft, where they are located; and,
2. Private national aircraft or ships, which are on the high seas or in airspace where no State exercises sovereignty.

**CC Article 2. Principle of Extraterritoriality, Real or Defence Principle and Active and Passive Personality Principle**

The Peruvian Criminal Law applies to all crimes committed abroad, when:

[...]

4. It is perpetrated against a Peruvian or by a Peruvian and the crime is foreseen as susceptible to extradition according to Peruvian Law, provided that it is also punishable in the State in which it was committed and the agent enters in any way into the territory of the Republic;

**CC Article 4. Exceptions to the Principle of Extraterritoriality**

The provisions contained in Article 2, paragraphs 2, 3, 4 and 5, do not apply:

1. When the criminal action has been extinguished according to one or another legislation;
2. When it comes to political crimes or related facts with them; and,
3. When the defendant has been acquitted abroad or the convicted person has served the sentence or it is prescribed or remitted.

If the agent has not fully complied with the sentence imposed, the process may be renewed before the courts of the Republic, but the part of the penalty served will be computed.

## Time limits for investigation and prosecution

### CPC Article 334 (2). Qualification

2. The term of the preliminary proceedings, according to article 3, is sixty days, unless a person is detained. However, the public prosecutor may set a different period depending on the characteristics, complexity and circumstances of the events under investigation. Anyone who considers himself affected by an excessive duration of the preliminary proceedings, will request the prosecutor to give him a term and dictate the corresponding disposition. If the prosecutor does not accept the request of the affected party or sets an unreasonable term, the latter may go to the judge of the preparatory investigation within five days urging his pronouncement. The judge will decide after a hearing, with the participation of the prosecutor and the applicant.

### CPC Article 342. Term

1. The term of the Preparatory Investigation is one hundred and twenty calendar days. Only for justified reasons, by issuing the corresponding Provision, the Prosecutor may extend it for a single time up to a maximum of sixty calendar days.

2. In the case of complex investigations, the term of the Preparatory Investigation is eight months. In the case of investigation of crimes perpetrated by imputed members of criminal organizations, persons linked to it or acting on behalf of it, the term of the preparatory investigation is thirty-six months. The extension for the same term must be granted by the Judge of the Preparatory Investigation.

3. The Prosecutor is responsible for issuing the provision that declares the process complex when: a) it requires the performance of a significant number of investigative acts; b) understand the investigation of numerous crimes; c) involves a significant number of accused or aggrieved; d) demand the realization of skills that involve the revision of a large documentation or complicated technical analysis; e) it needs to carry out procedures of a procedural nature outside the country; f) involves carrying out proceedings in several judicial districts; g) reviews the management of legal entities or entities of the State; or h) include the investigation of crimes perpetrated by members of a criminal organization, persons linked to it or acting on behalf of it.

### CPC Article 344. Decision of the Public Ministry

1. Having prepared the conclusion of the Preparatory Investigation, in accordance with numeral 1) of article 343, the Prosecutor shall decide within fifteen days whether to make an accusation, provided that there is sufficient basis for this, or if it requires the dismissal of the case. In complex cases and organized crime, the Prosecutor decides within thirty days, under responsibility.

## Money laundering

### Legislative Decree 1 106 – Articles 1-3

#### **Article 1.- Acts of conversion and transfer**

Whoever converts or transfers money, goods, effects or profits whose illicit origin he knows or must have presumed, in order to avoid the identification of his origin, his seizure or forfeiture, will be repressed with deprivation of liberty of not less than eight nor greater of fifteen years and with one hundred twenty to three hundred fifty days fine and disqualification in accordance with subparagraphs 1), 2) and 8) of article 36 of the Criminal Code.

#### **Article 2.- Acts of concealment and possession**

Whoever acquires, uses, possesses, keeps, administers, receives, receives, conceals or keeps in his possession money, property, effects or profits, whose illicit origin he knows or must have presumed, shall be punished by deprivation of liberty of not less than eight nor more than fifteen years and with one hundred and twenty three hundred and fifty days fine and disqualification in accordance with subparagraphs 1), 2) and 8) of article 36 of the Criminal Code.

**Article 3.- Transportation, transfer, entry or exit through national territory of money or securities of illicit origin**

Whoever transports or transports with him or by any means within the national territory money in cash or negotiable financial instruments issued "to the bearer" whose illicit origin he knows or must presume, with the purpose of avoiding the identification of his origin, his seizure or confiscation; or enter or leave the country with or by any means such property, whose illicit origin is known or presumed, with the same purpose, shall be punished with imprisonment of not less than eight nor more than fifteen years and one hundred twenty to three hundred fifty days fine and disqualification in accordance with subparagraphs 1), 2) and 8) of article 36 of the Criminal Code.

**Article 4.- Aggravating and mitigating circumstances**

The penalty shall be deprivation of liberty not less than ten nor more than twenty years and three hundred sixty-five to seven hundred thirty days fine, when:

1. The agent uses or makes use of his status as a public official or agent of the real estate, financial, banking or stock exchange sector.
2. The agent commits the crime as a member of a criminal organization.
3. The value of the money, goods, effects or profits involved is greater than the equivalent of five hundred (500) Tax Units.

The penalty shall be deprivation of liberty not less than twenty-five years when the money, goods, effects or profits come from illegal mining, illicit drug trafficking, terrorism, kidnapping, extortion or trafficking in persons.

The penalty shall be deprivation of freedom not less than four nor more than six years and eighty to one hundred ten days fine, when the value of money, goods, effects or profits involved is not greater than the equivalent of five (5) Tax Units. The same penalty shall apply to anyone who provides the authorities with effective information to prevent the consummation of the crime, identify and capture the perpetrators or participants, as well as detect or seize the assets subject to the acts described in articles 1, 2 and 3 of the present Legislative Decree.

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