
**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS**

# SPAIN: PHASE 2

# REPORT ON THE APPLICATION OF THE CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS AND THE 1997 RECOMMENDATION ON COMBATING BRIBERY IN INTERNATIONAL BUSINESS TRANSACTIONS

*This report was approved and adopted by the Working Group on Bribery in International Business Transactions on 24 March 2006.*

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## EXECUTIVE SUMMARY

The Phase 2 Report on Spain by the Working Group on Bribery evaluates Spain's implementation of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. Overall, the Working Group finds that Spain has engaged in significant efforts to implement the Convention, including the maintenance of a specialized and experienced anti-corruption prosecution agency, but that stronger efforts are necessary in several key areas. Spain has still not adopted liability and sanctions that meet the requirements of the Convention with regard to legal persons (companies) that engage in foreign bribery. Remedial measures are also necessary to address the lack of awareness of the Convention and the foreign bribery offence both in the public and the private sectors. Spain does not yet have a conviction for foreign bribery, but it has an investigation underway.

The Report finds that, despite certain improvements in 2003, Spain's law with regard to liability and sanctions for legal persons for foreign bribery is inconsistent with Articles 2 and 3 of the Convention because of the absence of direct liability of legal persons for foreign bribery and any monetary sanctions against legal persons for foreign bribery. The Report notes that Spain has commenced drafting a law regarding legal persons and urges it to proceed as quickly as possible in this regard. The Working Group will evaluate the regime of liability and sanctions for legal persons for foreign bribery once it is adopted and once there has been sufficient practice.

The Report also recommends that additional issues be addressed including ensuring that the foreign bribery offences in Spain do not require recourse to foreign law for their application and that they sanction appropriately bribes to obtain a favourable exercise of discretion by a foreign public official, such as the attribution of a contract. The Working Group also recommends that sanctions be increased as necessary in order to ensure that effective mutual legal assistance and extradition are potentially available in all foreign bribery cases. The Report also finds that Spain should take measures to make explicit the prohibition concerning the tax deductibility of foreign bribes in order to improve the awareness of tax inspectors and companies about the offence and its tax treatment.

The Report also highlights a number of positive aspects in Spain's fight against foreign bribery. The Report welcomes the Spanish authorities' decision that the Anti-Corruption Prosecution Office (ACPO), which the Report describes as a high-profile and specialized anti-corruption prosecution agency with dedicated support units to assist in investigations, will be given the power to investigate foreign bribery cases without the need for a case-specific decision from the Attorney-General. The Report also notes Spain's adoption of improved legislation regarding confiscation and Spain's positive practice with regard to the recent changes in the OECD Model Tax Convention potentially allowing the use of tax information received pursuant to tax conventions for corruption-related investigations.

The Report, which reflects findings of experts from Chile and Mexico, was adopted by the OECD Working Group along with recommendations. In addition to the expected additional review of corporate liability referred to above, regular Phase 2 follow up procedures will occur: within one year of the Working Group's approval of the Phase 2 Report, Spain will report to the Working Group on the steps that it will have taken or plans to take to implement the Working Group's recommendations, with a further report in writing within two years. The Report is based on the laws, regulations and other materials supplied by Spain, and information obtained by the evaluation team during its on-site visit to Madrid. During the five-day on-site visit in October 2005, the evaluation team met with representatives of Spanish government agencies, the private sector, civil society and the media. A list of these bodies is set out in an annex to the Report.

# A. INTRODUCTION

1. This report evaluates Spain's enforcement of its legislation implementing the OECD Convention, assesses its application in the field and monitors Spain's compliance with the 1997 Revised Recommendation. It reflects the Spanish authorities' written responses to the general and supplementary Phase 2 questionnaires (hereinafter, the "Responses and the "Supp. Responses"), interviews with government experts, representatives of the business community, lawyers, accounting professionals, financial intermediaries and representatives of civil society encountered during the on-site visit from 3-7 October 2005 (see attached list of institutions encountered in Annex 1), and review of relevant legislation and independent analyses conducted by the Lead Examiners and the Secretariat. The evaluating team is described in Annex 2.

2. The report is structured as follows. The Introduction in Part A reviews Spain's role in the international economy and provides an overview of corruption trends. Part B focuses on the prevention and detection of foreign bribery and discusses ways to enhance their effectiveness. Part C deals with the investigation and prosecution of foreign bribery and related offences. Part D examines the foreign bribery offence, including the liability of legal persons, as well as related offences and sanctions. Part E sets forth the recommendations of the Working Group and the issues that it has identified for follow-up. A list of the principal acronyms and abbreviations used in the report is included in Annex 3. Translations of the principal legislative and other legal provisions are reproduced in Annex 4.

## 1. Economic background and international economic relations[1]

3. Spain's international economic profile has grown appreciably in recent years. Its economy is the fifth largest in the EU and the eighth largest in the OECD. It is the world's 16th largest exporting country. Spanish companies and banks have invested around EUR 100 billion in Latin America over the last eight years, more than any other country except for the United States. In the last two years, Mexico, Chile and Brazil all figured among the top ten destinations for Spanish outward direct investment. A significant number of Spanish companies and banks have become major multinational corporations, largely as a result of their investments in Latin America. Although Latin America has been the destination of most Spanish direct investment abroad, there have also been major investments in other countries, including other EU countries and the United States.

4. In 2003 Spain's official development aid (ODA) was 0.23% of gross national income (GNI) (15$^{th}$ amongst 22 OECD Countries). Over 40% of Spain's gross bilateral aid in 1996-2000 went to Latin America. Africa was the second highest destination, fluctuating between 26%-37% of bilateral ODA. In September 2005, the government announced a major increase (37%) in its budget for development assistance.

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[1] Statistics have been taken from: OECD (2005), Economic Survey: Spain; OECD (2005), Development Co-operation Report 2004; OECD (2004), DAC Peer Review: Spain; OECD (2005), International Investment perspectives, Trends and recent developments in foreign direct investment; Spain, Dirección General de Comercio e Inversiones (2005), Spanish foreign direct investment inflows and outflows 2004; The Elcano Royal Institute, Inside Spain N°4, William Chislett; Spain: Going Places, William Chislett; International Development Economics Associates, Banking FDI in Latin America: An Economic Coup, Sukanya Bose.

## 2. Overview of corruption trends

5. As a number of on-site participants noted, Spain suffered from a number of serious corruption scandals in the 1980s and early 1990s. The scandals involved a number of high-ranking state officials and political figures and were regularly reported on in the press over an extended period. Corruption-related scandals led to the creation of a special anti-corruption prosecution service in 1995, which is discussed further below. It is widely considered that domestic corruption has been significantly reduced in Spain in recent years.

6. Spain ranked 23rd out of 159 countries in Transparency International's Corruption Perception Index in 2005.[2] Spain's CPI ranking has substantially improved in recent years. In 1995, at the height of a series of corruption scandals in Spain, Spain scored a 4.35 out of 10; in 2005 it received a 7.0 score. Out of the countries surveyed in the study, Spain is the one which has most improved its position during the last few years. Spain ranked 11th out of 21 countries in the 2002 TI Bribe Payers Index.[3]

7. The Spanish government has recently taken a number of important measures in the fight against corruption, including the signature in 2005 of the United Nations Convention Against Corruption and of the Council of Europe Civil and Criminal Law Conventions on Corruption.[4] The parliamentary process necessary for the ratification of these conventions is underway. In addition, the government has taken important measures in line with the OECD Guidelines for Managing Conflicts of Interest in the Public Sector, such as adoption of a Code of Good Conduct for members of the government and senior public officials and preparation of legislation on conflicts of interest.

## 3. Preparation of the on-site visit

8. The lead examiners appreciate the cooperation and efforts of the Spanish authorities in regard to the Phase 2 process. However, the examiners note that they experienced certain difficulties in preparing for the on-site visit as a result of lengthy delays in the receipt of a significant number of responses to the supplementary questionnaire and weaknesses in the preparation of an integrated set of responses by Spain. In addition, there were some delays in the preparation of the agenda for the on-site visit, which in some cases may have affected the availability of certain panellists and limited discussion between the examiners and Spanish authorities. Nonetheless, the examiners acknowledge and appreciate the particular efforts of the Spanish authorities in the period immediately prior to and during the on-site visit to ensure the presence of key individuals and the examiners are satisfied that overall they were able to meet with a representative cross-section of individuals and institutions.

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2 The Corruption Perception Index (CPI) provides data on perception of the "extent of corruption" within countries. It focuses on domestic corruption and is in fact a "poll of polls"; a composite index aggregating the results of carefully selected international surveys and experts scorecards from different institutions. The source data used to create the composite index reflect the perceptions of non-resident experts, non-resident business leaders from developing countries and resident business leaders evaluating their own country. The questions used by the sources relate the "extent of corruption" to the frequency of bribe payments and/or overall size of bribes in the public and political sectors; and provide a ranking of countries.

3 The Transparency International Bribe Payers Index (BPI) ranks leading exporting countries in terms of the degree to which international companies with their headquarters in those countries are perceived to be likely to pay bribes to senior public officials in key emerging market economies. The BPI 2002 was conducted by Gallup International Association in 15 emerging market economies, via a total of 835 interviews.

4 Although Spain has not yet ratified the Council of Europe Conventions, it has participated actively in the GRECO monitoring process.

## B. PREVENTION AND DETECTION

### 1. Prevention of foreign bribery and related offences

9. Lack of public awareness about the prohibition of foreign bribery can be one of the greatest impediments to the fight against foreign bribery and to effective prosecution of the offence. This section evaluates efforts by Spain to prevent foreign bribery including by raising awareness about its status as a criminal offence and about how to combat it. Spain is a decentralised state consisting of a central government and autonomous communities with their own defined competencies, governments, parliaments and administrations. While the primary focus of evaluation concerned efforts by the central government, efforts by the regions are also evaluated where appropriate.

#### *a) Government and public agencies in general*

10. The lead examiners consider that the prominence and reputation of the Special Attorney General's Office for the Repression of Economic Offences related with Corruption ("ACPO") – both inside government and in the wider society – significantly raises the profile of the fight against corruption generally in Spain. The ACPO's short name in Spanish -- the Fiscalía Anticorrupción or even Anticorrupción -- is frequently referred to in the media. It was widely recognized during the on-site visit as a central agency to which significant corruption allegations should be reported. However, while the very existence of the ACPO is significant for awareness about the fight against corruption generally, insufficient efforts have been made with regard to raising awareness about the Convention within the public administration. The ACPO engages in training programs for other law enforcement agencies, but it has not addressed foreign bribery in that context. As discussed further below, foreign bribery cases have not been identified as cases of special significance for the ACPO.

11. The examining team also found limited evidence of efforts so far to publicize or explain the foreign bribery offence within the government. The Ministry of Foreign Affairs (MFA) does not have any specific training related to foreign bribery for its agents; its principal focus in the area in corruption has been with regard to efforts to prevent the corruption of Spanish officials by improving awareness of the potential liability of public officials under passive bribery offences and other laws. Tax inspectors do not receive extensive training on bribery; officials indicated that inspectors receive a few hours of training regarding corruption at the outset of their career, but there is no continuing education. In response to concerns about awareness of foreign bribery as a crime among tax inspectors, particularly in light of the absence of an express prohibition on deductibility of foreign bribes, a tax official indicated that the tax inspection regulations are currently being revised and a proposal exists to draft an article to add additional detail about the need to report suspicions of crimes in three areas: fraud with regard to public subsidies, money laundering and corruption.

12. The Ministry of Industry, Tourism and Commerce (MITC) is the ministry responsible for ICEX (Instituto Español de Comercio Exterior), Spain's principal trade promotion agency. Officers of Spanish commercial offices abroad (frequently located in embassies) also generally represent ICEX. According to MITC representatives at the on-site visit, foreign bribery issues are addressed in the context of general training programs for such officers. MITC has printed the Convention and it is distributed during the courses; the Convention has also been sent to all Spanish commercial offices abroad. However, other than the Convention itself, there has been no written documentation prepared in this context.

13. With regard to the law enforcement agencies, a Ministry of Justice (MOJ) representative indicated that judges and prosecutors are expected to know the law. The Ministry of Justice included references to changes to the art. 445 PC foreign bribery provision in a general continuing education course

for prosecutors on changes in the Penal Code (PC) adopted in 2003. Courses for new prosecutors focus on public ethics, but do not appear to address foreign bribery. Courses for judges have not focused to date on foreign bribery and a senior judge suggested that the General Council of the Judiciary (*Consejo General del Poder Judicial*, CGPJ) could include training with regard to foreign bribery in its training program for judges. A local court judge, for example, appeared to be unaware of the existence of nationality jurisdiction in foreign bribery cases.[5]

14. Police training for senior staff includes initial and continuing training with regard to the principal economic crime offences but it is unclear how much attention is paid to foreign bribery in this context. The existence and nature of foreign bribery as a distinct offence did not always appear to be well understood by police representatives, including from the ACPO, and regional police at times seemed unclear about their role with regard to foreign bribery. Police representatives recognized that more efforts could be made to improve awareness of the foreign bribery offence.

***Commentary:***

***The lead examiners recommend that efforts be undertaken by the Spanish authorities to raise the awareness about foreign bribery among officials in public agencies. In addition, the lead examiners recommend that training specifically targeting the foreign bribery offence be provided to judges, prosecutors and police in the context of overall anti-corruption and economic crime training. The lead examiners encourage the Spanish authorities to use the high profile and success of the ACPO in the fight against domestic corruption to strengthen the fight against foreign bribery in Spain as well.***

***b) Government efforts to improve private sector awareness and prevention***

*i) Export credit and trade promotion agencies*

15. Public agencies that promote or support foreign trade and investment are well situated to advise companies about the law on foreign bribery and how to address bribery risks. Spain's export credit agency, CESCE, is a member of the OECD Working Party on Export Credits and Credit Guarantees (ECG). CESCE is implementing the "Action Statement on Bribery and Officially Supported Export Credits" and, pursuant to a Ministerial order from February 2003, has taken actions to fight bribery centred on two fronts: publicizing the Convention and modifying contracts and legal norms. Publicity efforts have included internal courses for employees and efforts to inform business, including a letter and a web page. General articles about the Convention and ECG discussions have also been published in CESCE's magazine.

16. Requests for support from the CESCE must include a declaration of awareness about the Convention and an undertaking not to bribe. Contracts for support also include anti-corruption clauses. However, the Action Statement (§ 4) provides that "the applicant and/or the exporter, in accordance with the practice followed in each ECG Member's export credit system, shall be invited to provide an undertaking/declaration that neither they, nor anyone acting on their behalf, have been engaged or will engage in bribery in the transaction". It thus expressly contemplates extension of the declaration to include agents working on behalf of the applicant. The sample declaration supplied to the evaluating team,

[5] This perception may be linked to the pre-eminent role of the National Court with regard to cases based on nationality jurisdiction, as discussed below. However, the lead examiners note that ACPO prosecutors indicated that the National Court would not normally have jurisdiction and that foreign bribery cases would normally be resolved by the local courts. There may be some risk that the different courts each consider that it is a matter for the other.

however, refers only to the entity seeking the support and makes no mention of agents, subcontractors or others.[6] CESCE representatives indicated that they restrict coverage to cases where agents' commissions do not exceed 5%.

17. Representatives of the MITC indicated that ICEX is available to advise companies confronted with foreign bribery situations. However, neither the MITC nor ICEX has prepared any guidelines, documents or brochures for companies, and MITC representatives indicated that ICEX has not received any actual requests for assistance from companies. An MITC representative indicated that they include references to the part of the OECD Guidelines for Multinational Enterprises that refer to the OECD Convention where appropriate. Experience with trade promotion agencies at the regional level was variable; some regional agencies have instituted anti-corruption clauses whereas others have not undertaken any specific anti-corruption measures.

18. MITC also has an oversight role with regard to the 38 foreign Chambers of Commerce. In August 2005, MITC sent brief letters to the Superior Council of Chambers of Commerce and to the largest employers' federation, Confederación española de organizaciones empresariales (CEOE), encouraging them to make their members aware of the Convention. However, the letter does not describe the law and offers only to provide additional copies of the Convention. The lead examiners were unable to determine whether any action has been taken by CEOE. At the on-site visit, the representatives of the Superior Council did not refer to the letter or to distribution of the Convention although they noted that they have worked on more general issues relating to codes of conduct.

19. The lead examiners consider that government efforts to improve private sector awareness and prevention would benefit from stronger cooperation between Ministries and agencies, and in particular between those charged with legal and economic affairs. Improved coordination between such Ministries with regard to foreign bribery issues would help to infuse the dialogue with business with better practical explanations of the application of legal rules in concrete business situations.

*ii) Development agencies*

20. The Fund for Aid for Development (Fondo de Ayuda al Desarrollo, FAD) principally provides development aid tied to Spanish exports. According to its representative, the FAD has introduced anti-corruption clauses in its contracts and strengthened its questionnaire to applicants, pursuant to a law adopted in 2003. It also issued a voluntary code of good practice in February 2005. COFIDES (Compañía Española de Financiación del Desarrollo) is a company with both public and private shareholders that engages in development finance on a for-profit basis. It issued a code of ethics in September 2005 and expected to amend its contracts to contain a specific reference to the Convention, a recognition by co-contractants that a copy has been received, and a commitment not to engage in bribery as defined in the Convention. The AECI (Agencia Española para la Cooperación Internacional), which receives its funding from the MFA, deals primarily with non-profit NGOs and foreign governments to which it provides grants. It does not have any specific rules to combat corruption, but Spain has indicated that AECI will adopt an anti-corruption policy in the context of more general legal reforms in 2007. It has adopted more specific rules with regard to the selection of its NGO partners. The examiners did not have an opportunity to review the policies of development agencies in the regions, but Spain has clarified that all development agencies are subject to the same four-year policy plan, currently in force for 2004-2008. Decentralized cooperation through autonomous regions and local authorities is a notable feature of Spanish development cooperation and accounted for 25% of bilateral ODA in 2000.

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6 The CESCE web page in English (but not the page in Spanish) refers to an undertaking applicable to the applicant "or anyone acting on its behalf", in accordance with the Action Statement.

### *c) The private sector and civil society*

*i) Companies, business organisations and the professions*

21. For most of the largest Spanish companies, a number of which are listed on foreign stock exchanges, their policies to fight bribery respond principally to obligations imposed in other countries, the risk that the firm or its executive bodies will incur criminal or civil liability in those countries, the potential impact of bribery on the firm's reputation, and pressure from major investors. In implementing prevention policies, such firms generally adopt uniform, group-wide standards rather than ones tailored to each country's legislation. Certain large companies indicated that they had foregone activity in certain countries because of perceived risks associated with bribery.

22. Large companies have also adopted internal controls. Listed companies are required to have audit committees pursuant to a 2003 law although a report in 2004 indicated that 12% of such companies still had not created them.[7] Some companies have instituted internal hotlines to facilitate reporting of improper behaviour by employees. However, while large companies had elaborate audit systems generally culminating in reports to an audit committee, those systems did not appear to be producing many actual cases. For example, one very large company with thousands of employees, many of whom are active in markets with a high risk of corruption, had not had any recent cases of bribery reported through its internal systems. Its representative noted that it only tracks actual cases of bribery, and not events such as solicitations that are refused.

23. The lead examiners had less opportunity to evaluate the situation with regard to medium sized companies. Representatives of small companies active in sensitive markets indicated that they are regularly confronted by solicitation for bribes, including requests to take on family members as employees. Such companies generally do not have formal codes of ethics in light of their small number of employees.

24. Business organisations have played a very limited role with regard to preventing foreign bribery. No information has been provided about any activities by CEOE, the largest business confederation. The ICC has translated its publication on foreign bribery into Spanish. However, its representative noted that the national chapter does not have regular contact with businesses (except for certain specific subjects other than bribery). Generally, the awareness of business organisations about foreign bribery appeared to be weak. Other than the ICC, none of the organisations encountered at the on-site visit had made efforts to raise awareness or provided any assistance to businesses confronted with foreign bribery risks. None had any experience of companies coming to them with questions.

25. There is a lively debate and considerable activity in Spain regarding corporate social responsibility (CSR), although it seems to focus principally on risks other than bribery, such as environmental questions. Listed companies are required to have ethical codes and the practice has spread beyond such companies. A business organisation representative, however, indicated that provisions for enforcement of such codes are often left somewhat vague. A 2005 study by a major audit firm indicated that the number of Spanish companies that produce public CSR reports has substantially increased since 2002; of the top 100 companies in Spain, 11% produced CSR reports in 2002 whereas 25% did so in 2005, one of the largest increases among countries surveyed.[8] A Member of Parliament informed the examiners that the government is reviewing possible action, including legislation, with regard to CSR. There is also significant academic interest in CSR in Spain.

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7 See "El 12% de las sociedades cotizadas no tiene aún comité de auditoría", Europa Press (15 November 2004) (referring to study by large audit firm) (available at http://labolsa.com/canales/1018/).

8 See KPMG International Survey of Corporate Responsibility Reporting 2005 (June 2005), available at http://www.kpmg.com/Rut2000_prod/Documents/9/Survey2005.pdf.

26. The recent introduction of a limited and narrow form of criminal liability for legal persons does not appear to have been widely commented upon among the business sector. As discussed further below, the lead examiners consider that the law in the area of legal person liability should be strengthened and in this connection they invite the Spanish authorities to engage in awareness raising about corporate liability associated with foreign bribery.

27. Lawyers and accountants/auditors can also be key players in prevention and raising awareness about the foreign bribery offence and the non tax deductibility of bribe payments. Lawyers are not currently required to pass examinations to join the bar so that many practicing lawyers have only university training; a bar association representative recognized that there is no specific attention to foreign bribery, although it might be dealt with in general courses on criminal law. Lawyers indicated that interest in the issue of legal advice about foreign bribery risks is weak amongst their clients. One noted that there is an increasing general awareness that bribery is not tolerated, but that it frequently involves a cost-benefit analysis by companies. Lawyers perceive that the costs have gone up to some degree; in addition, whereas foreign bribery was previously openly engaged in, people who still engage in bribery now seek to conceal it. The professional organisations of the accounting and auditing professions have not conducted any specific training in relation with the detection of foreign bribery.

*ii) NGOs and the press*

28. Spain has an active NGO sector including a significant number of NGOs interested in development-related issues, but relatively few appear to have focused on foreign bribery. After a period of inactivity, the Spanish chapter of Transparency International has recently been reorganised under the aegis of the Fundación Ortega y Gasset and has recently commented on international corruption issues in the press. Spanish academics have begun to focus on international corruption issues. The examiners were pleased to note publication of a book which focuses in detail on the OECD Convention, the Spanish law implementing the Convention from 2000, and, importantly, the Phase 1 review.[9]

29. Newspapers in Spain report and editorialise aggressively on issues of alleged domestic corruption and engage in investigative and often combative journalism, especially in cases involving political ramifications; they also frequently vigorously seek out and debate allegations of political interference in the judicial system. The lead examiners questioned representatives from leading general daily and business newspapers during the on-site visit about the relatively low number of press reports of allegations of foreign bribery by Spanish companies, noting that those companies operate in many foreign markets. Press representatives indicated that, as a general matter, reporting from foreign countries is expensive. They noted that the press actively reported about allegations of bribery by Spanish companies where such allegations surfaced in the past, such as 10-12 years ago. However, they noted that press applies a high standard to the verification of allegations, in part out of concern about potential liability. One senior journalist estimated that "less than half" of the allegations the press hears about are published.

***Commentary:***

***The lead examiners note the recent initiatives by the Spanish authorities to improve awareness of the Convention and Spanish law on foreign bribery, but they consider that Spain should do more in this regard. They recommend that Spain take measures targeted at the business sector to improve awareness about foreign bribery and that it continue to seek to involve business organisations in these efforts. The lead examiners consider that these efforts would benefit from***

[9] Eduardo A. Fabián Caparrós, La Corrupción de Agente Público Extranjero e Internacional (Tirant lo branch 2003). The book was completed prior to the 2003 amendments to article 445.

***increased cooperation between government ministries and agencies responsible for legal and economic affairs.***

***The lead examiners recommend in particular that Spain should consider producing a brochure or other guide to explain the foreign bribery and related offences, using a series of concrete examples to explain their operation, to relevant persons and entities, including business. The lead examiners welcome the significant efforts to improve corporate social responsibility in Spain and encourage the Spanish authorities to include foreign bribery in the context of policies promoting CSR, including CSR reporting by companies in annual reports.***

***The lead examiners note the CESCE's efforts to train its staff and inform businesses about the risks of corruption, as well as its adoption of a limit of 5% for agent commissions. They recommend that the Spanish authorities ensure that declarations required from applicants for public support, and in particular those used by CESCE, provide for an undertaking that applies to bribery by persons acting on behalf of the applicant and/or exporter. The examiners also note the anti-corruption measures recently adopted by certain development agencies in Spain and the expected introduction of an anti-corruption policy by the AECI. They invite the Spanish authorities to ensure the effective implementation of these measures. The examiners recommend that the Working Group follow up with regard to anti-corruption measures by development agencies, including agencies in the regions.***

## 2. Detection and reporting of foreign bribery and related offences

### *a) Detection and reporting by private individuals and companies, including whistleblowing protections*

30. Employees of companies and other individuals can be important sources of information about acts of bribery. Article 262 of the Criminal Procedure Law (*Ley de Enjuiciamiento Criminal*, LECrim) provides that those persons who because of their positions, professions or affectation learn of a public crime, must report it immediately to the relevant judicial or enforcement authorities. Art. 262 LECrim thus only applies to persons in certain professional-type positions.[10] The text of art. 262 does not clarify whether it requires reporting of reasonable suspicions of bribery or whether it applies only when the individual has firm evidence of a crime. The Spanish authorities have indicated that it applies to reasonable suspicions; it does not require firm proof, but not cover mere unfounded conjecture. They have also indicated that persons who report are protected provided they are acting in good faith, but no examples of such protection have been supplied. The Criminal Procedure Law provides no meaningful sanction for violation of art. 262 (fines of less than EUR 2). The lead examiners are concerned with the limited effectiveness of this law with regard to individuals and employees of private companies.

31. The examiners further understand that there are no specific safeguards to protect whistle-blowers in the phase prior to and subsequent to prosecution of a case. NGO representatives underlined that there is a very limited culture of whistleblowing. Union representatives recognised a need to improve protection of whistleblowers.

[10] A second provision, art. 259 LECrim, appears to apply only when a person witnesses the commission of an offence and appears to be of limited relevance for foreign bribery cases.

***Commentary:***

***The lead examiners encourage the Spanish authorities to consider measures to facilitate the reporting of suspicions of foreign bribery by individuals, including improved enforcement of the obligations in art. 262 LECrim. The lead examiners also recommend that Spain examine whether existing labour law and other provisions sufficiently protect people in the private sector who report foreign bribery cases from retaliatory action and consider establishing whistleblower protections for employees who report suspicions of foreign bribery in good faith.***

### *b) Detection and reporting by government and public agencies in general*

32. In the absence of any provision specifically applying to public officials on this subject, the same general provision as for private individuals above seems to apply, i.e., art. 262 LECrim. In addition to providing for a very small fine as discussed above, art. 262 also provides that non-reporting by a public official should be reported to the official's superior so that administrative measures may be taken. Non-compliance with the reporting obligation is subject to the sanctions foreseen in Art. 14 of the Regulation on the Disciplinary Regime for Public Officials in the State Administration, which includes sanctions up to dismissal; public officials who work for the regions are also subject to disciplinary sanctions for violations of art. 262 LECrim. The Spanish authorities have indicated that until now, they have no knowledge of cases of this kind being registered, because such information is confidential and not made public by the judiciary. While the examiners recognize the importance of the confidentiality of personal data, they consider that aggregate statistics could likely be maintained while preserving such confidentiality. CESCE representatives indicated that they are subject to an obligation to report suspicions, but no reports have been made to date.

33. The Spanish authorities indicate that they cannot provide the examiners with data on disciplinary sanctions and that they do not foresee to keep data on the subject. The absence of clear sanctions or any examples of reporting leads the examiners to express concerns about the level of enforcement of the obligation to report. With regard to whistleblowing safeguards for public officials, the Spanish authorities explained that the public officials are protected by the fact that they cannot be arbitrarily sanctioned or removed except for the specific reasons laid down in the law. However, there are no specific whistleblowing protections.

***Commentary:***

***The lead examiners invite the Spanish authorities to consider measures to improve detection and reporting of allegations of foreign bribery by public officials or authorities, including improved publicity and enforcement of the obligation in art. 262 LECrim and the collection of relevant statistics. The lead examiners also recommend that the Spanish authorities take appropriate measures to ensure effective detection and reporting of suspicions of foreign bribery by employees of important agencies and entities in the fight against bribery, including export credit, trade promotion and development aid organisations. They also encourage the Spanish authorities to make a brochure describing the foreign bribery offence, as referred to above, available to such employees.*** [11]

### *c) Detection and reporting by tax inspectors*

34. The tax authorities can be an important source of information about foreign bribery. In particular, an obligation or a power of tax officials to report suspicions spontaneously to the law enforcement bodies

[11] See also below the section on the treatment of allegations in the public domain.

can be an important source of information leading to the opening of investigations. With regard to the obligation to report suspicions of foreign bribery, article 95(3) of Law 58/2003 appears to give tax inspectors an unclear option: they are required either to report suspicions to the competent authorities or to "determine the degree of guilt".[12] Tax inspectors indicated that the concept of "*deducir el tanto de culpa*" is difficult to translate and that in effect tax inspectors must report suspicions that they discover in the course of their work. However, the lead examiners consider this obligation could be clarified.

35. Article 7.4 of the Tax Inspectors Regulation approved by Royal Decree 939/1986 of 25 April (*Reglamento General de la Inspección de los Tributos*) obligates tax officials to inform the criminal law enforcement authorities about suspicious criminal transactions. In contrast to the 2003 law, the obligation to report is clearly expressed. When questioned about the relationship between the 2003 law and the regulation, tax officials explained that the regulation was adopted pursuant to an earlier tax law dating from the 1960s, which has been replaced by the 2003 law. However, not all of the implementing regulations are in place under the new law. Spain has indicated that they will be adopted soon and will require tax officials to reports suspicions of foreign bribery and similar crimes.

36. Tax officials indicated that tax inspectors regularly report suspicions of non-tax offences to prosecutors and other panellists indicated that tax information is well organised and frequently used in criminal cases. The tax authorities have detected a few potential cases of domestic corruption and transmitted the suspicions to prosecutors, but have not yet had similar experience with foreign bribery. No statistics are available about reporting.

37. Spain's practice with regard to the recent changes in the OECD Model Tax Convention and Commentary is impressive. The tax authorities informed the examiners that they have decided systematically to include the proposed additional wording suggested in the Commentary to art. 26 of the Model Convention to allow the use of information received by a Contracting State for non-tax purposes including in particular corruption-related investigations.[13] The new version has been used in tax treaty negotiations over the past two years and is included in recent treaties, such as one with Colombia. Indeed, Spain has proposed eliminating the requirement of a specific authorization by the supplying State for use of the information in non-tax purposes, and noted that its recent treaty with Nigeria includes this modified version of art. 26(2). In addition, Spain's policy is to require exchange of information provisions in all its tax treaties and to exclude use of bank secrecy as a bar to the provision of tax information. Spain also has agreements providing for the automatic exchange of tax information with a number of countries, including Argentina, Belgium, Chile, France, the Netherlands and Sweden.

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12 See art. 95(3) (when it might be considered that a crime has been committed, the tax administration is required to "*deducir[] el tanto de culpa o remitir[] al Ministerio Fiscal relación circonstanciada de los hechos que se estimen constitutivos de delito").*

13 Paragraph 12.3 of the Commentary to art. 26 of the OECD Model Tax Convention states that "Contracting States may wish to allow the sharing of tax information by tax authorities with other law enforcement agencies and judicial authorities on certain high priority matters (e.g., to combat money laundering, corruption, terrorism financing). Contracting States wishing to broaden the purposes for which they may use information exchanged under this Article may do so by adding the following text to the end of paragraph 2: 'Notwithstanding the foregoing, information received by a Contracting State may be used for other purposes when such information may be used for such other purposes under the laws of both States and the competent authority of the supplying State authorises such use.'"

***Commentary:***

***The lead examiners recommend that the Spanish authorities continue to ensure that applicable regulations provide clear rules with regard to the reporting of suspicions of foreign bribery by tax inspectors.***

***The lead examiners commend Spain's practice with regard to the recent changes to the OECD Model Tax Convention and in particular its extension of the information exchange provisions to permit the use of exchanged information in corruption-related proceedings. They recommend that this possibility be publicized in appropriate ways, such as in training materials for ACPO prosecutors and others involved in investigating prosecution cases.***

### *d) Detection and reporting by accountants and auditors*

38. Accountants and auditors can play a vital role in detecting and reporting suspect payments in a company's records and accounts, and alerting management, corporate monitoring bodies and/or outside authorities so that appropriate preventive or punitive action can be taken. International Standards of Auditing (ISAs) developed by the auditing profession, and especially ISA 240, are of particular significance with regard to the detection of bribery. As revised in 2004, ISA 240 requires the auditor to direct more focused efforts on areas where there is a risk of material misstatement of financial statements due to fraud, including management fraud. Auditors are required to design and perform audit procedures responsive to the identified risks of material misstatement due to fraud, including procedures to address the risk of management override of controls. The Auditing and Accounting Institute (*Instituto de Contabilidad y Auditoria de Cuentas*, ICAC) adopted ISA 240 in Technical Standards adopted in 2000 and 2001.[14] The Spanish authorities have indicated that the 2004 amendments to ISA 240 will be adopted in the context of changes pursuant to EU provisions regarding auditing.

39. With regard to the obligations of auditors to report suspicions to management and corporate monitoring bodies within the company, the relevant Technical Standard provides that auditors must report to the board, senior management or, if available, an audit committee with regard to actual violations (*incumplimientos*) of applicable rules by the company, which includes bribery.[15] However, there is generally no obligation to report if "the violations are insignificant and do not affect the auditor's views about the financial statements".[16] An exception to the exception provides that irregularities, which are essentially defined as intentional manipulations that have an effect on the financial statements, must be reported. In all cases, however, an effect on the financial statements appears to be required. Similarly, in the section requiring reporting of suspicions (*eventuales incumplimientos*) to management, only suspicions that could give rise to a significant effect on the annual financial statements must be reported. (See Technical Standard § 26.) The laws that the Technical Standard implements contain similar requirements

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14 ICAC is an autonomous body of the State Administration assigned to the Ministry of Economy and Finance. The Technical Standards are prepared by the corporations that represent auditors and are then officially approved and published by ICAC.

15 See ICAC Technical Standard on compliance with legal rules applicable to the audited entity (*Norma Técnica de Auditoría sobre cumplimiento de la normativa aplicable a la entidad auditada*, adopted by resolution of ICAC, 26 July 2001 (the "Technical Standard"). The Technical Standard was adopted pursuant to regulations (Royal Decree 1636/1990) implementing the Law on Auditing (Act 19/1988 of 12 July 1988), and pursuant to art. 209.1 of the Law on Companies (*Ley de Sociedades Anónimas*, approved by Royal Decree 1564/1989 of 22 December 1989).

16 See Technical Standard, § 32.

of an effect on the financial statements.[17] The examiners are concerned that these requirements could be interpreted to limit the reporting of all suspicions of foreign bribery to management and corporate monitoring bodies.

40. The situation in Spain with regard to the obligations of auditors to report suspicions to authorities outside the company and in particular law enforcement authorities is unclear. Article 13 of the Act on Auditing provides that auditors are generally required to maintain the secrecy of matters learned in the course of their audit. Violation of the art. 13 auditor secrecy obligation is a "very severe" offence sanctioned by very substantial fines or removal of an auditor, an audit firm or both from the registry of auditors. In contrast, other than for reports to supervisory authorities regarding certain regulated entities (such as reports to the Bank of Spain regarding financial institutions), a failure to report suspicions is not specifically considered as an offence. The Spanish authorities have explained that they consider that a failure to report could be indirectly considered to be an offence when it involves lack of compliance with the Technical Standard. Art. 16(3)(2) of the Law on Auditing provides that violation of auditing norms that could have a significant effect on the results of the auditor's work and report is a severe offence; art. 16(4)(a) provides that other violations of auditing rules constitutes a minor offence.

41. The Technical Standard specifically refers to the general art. 13 obligation of secrecy, but does not refer to any exception to the secrecy obligation applicable to reporting by auditors of ordinary companies or to any possibility of auditors reporting to prosecutors or law enforcement authorities. The Technical Standard largely implements ISA 240 which does not itself require any reporting by auditors to regulatory and enforcement authorities unless national law so provides.[18]

42. While the reader of the Technical Standard would conclude that outside reporting is not permissible except in the limited case of reporting to supervisory authorities in the case of regulated entities, the Spanish authorities have indicated that they consider that art. 262 LECrim (discussed above in the section on detection and reporting by private individuals and companies) broadly requires auditors to report suspicions to prosecutors with regard to all companies. There appeared to be little evidence, however, that this obligation is widely understood in this fashion by auditors. The Technical Standard does not refer to art. 262 or to reporting to prosecutors in its lengthy description of reporting requirements. Nor do any of the other specific rules governing auditors. The representative of a large audit firm at the on-site visit stated that external auditors have no obligation to inform the authorities, and especially not in cases of mere suspicion of a crime, and stressed that it is rare for an auditor to have more than suspicions and to be faced with uncontested evidence. He considered an audit firm that took the initiative to report suspicions outside the company would be engaging in a very high risk activity. The Spanish authorities have indicated since the on-site visit that they consider that reporting of suspicions by auditors would be exempt from the art. 13 secrecy requirement pursuant to the obligation in art. 262 LECrim and an exemption in art. 14 of the Law on Auditing for disclosures required by law. However, art. 14 of the Law on Auditing establishes certain exemptions from secrecy for access to auditor information by certain third parties such as ICAC and persons designated by judicial order; it does not appear to contemplate spontaneous disclosure of suspicions by auditors. Panellists indicated that there are no statistics with regard to the use of art. 262 LECrim by auditors and they had no knowledge of any case of bribery being reported to prosecutors by auditors.

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17 See, e.g., Royal Decree 1636/1990, art. 5(e) (providing that an auditor must state his opinion in the report on the possible breaches of the legal or statutory regulations "that may have a relevant effect on the true image" of the annual accounts).

18 See ISA 240 – The Auditor's Responsibility to Consider Fraud and Error in an Audit of Financial Statements ¶ 68 (stating that an auditor's professional duty of confidentiality "ordinarily precludes reporting fraud and error to a party outside the client entity", but that the duty may be overridden by national law).

43. While art. 262 LECrim appears to be of little practical impact at present in this context, the examiners note that as in other countries, auditors have recently been made subject to obligations with regard to the prevention of money laundering. (See below next section) Since the foreign bribery offences are or shortly will be predicate offences for this purpose in Spain, this development offers an important opportunity to expand the role of auditors in reporting suspicions of foreign bribery to competent outside authorities.

44. The representative of a large audit firm also indicated that the selection process implemented by large audit firms helps to reduce fraud. When reviewing their portfolio of clients on an annual basis, they reject companies perceived to represent too great a risk for the audit firm. He also indicated that in some cases audit firms can terminate an ongoing audit contract, in which case ICAC must be immediately informed. The Spanish authorities have indicated that in such cases ICAC analyzes the causes of the contract termination to determine if an offence is involved.

***Commentary:***

***The examiners recommend that the Spanish authorities take steps to improve the detection of foreign bribery by accountants and auditors, including taking measures to increase awareness of those professions about the status of foreign bribery as a predicate offence for money laundering and about their role in the fight against bribery.***

***The examiners also recommend that Spain continue to improve the applicable measures to ensure that auditors are required to report all suspicions of foreign bribery to management and, as appropriate, to corporate monitoring bodies, without requiring any degree of expected impact on the financial statements as a condition to the reporting obligation.***

***The lead examiners consider that the application to auditors of article 262 LECrim is not well understood by relevant actors. They invite the Spanish authorities to clarify and publicize auditors' reporting obligations to competent authorities with regard to suspicions of foreign bribery.***

### *e) Detection and reporting in the context of the money laundering reporting system*

45. Spain has established a financial intelligence unit (SEPBLAC) that receives suspicious transaction reports (STRs) from – mainly financial – businesses, government and foreign authorities. The law and regulations on the prevention of money laundering, notably Law 19/1993 and Regulation 925/1995, have been recently amended in light of European and international developments, and the number of persons and entities required to file STRs has been significantly expanded to include, among others, lawyers and auditors. Sanctions for failure to report money laundering are generally severe.

46. There is a discrepancy between the definitions of money laundering as an offence in the Penal Code and for purposes of the preventive system in Law 19/1993. In the Penal Code, all crimes are predicate offences for money laundering, whereas in Law 19/1993 only crimes punishable with more than three years imprisonment are predicate offences. The current law on prevention thus does not cover several of the possible foreign bribery offences such as those involving the sanctions under arts. 421 or 425-26 PC, or those under art. 420 PC where the public official does not carry out the unjust act.[19] It would also appear not to apply to any cases involving solicitation by the public official because of the lower penalties applicable in that case under art. 423(2). However, Law 19/1993 will be amended shortly in order to

[19] See below the sections on the foreign bribery offence and sanctions. As discussed below, it is unclear whether the foreign bribery offence applies to arts. 425-26 PC; those articles are referred to here in order to ensure completeness.

implement the Third EC Anti-money laundering and terrorist financing directive (Directive 2005/60/EC). Pursuant to articles 1 and 3 of the directive, which must be implemented by EU member states by 15 December 2007, all corruption offences must constitute predicate offences.

47. SEPBLAC's 2004 annual report indicates that from 2001-2004, the number of STRs has increased from 1 064 to 2 414, an increase of 127%. The number of entities subject to reporting obligation has risen from 5 075 to 8 519. In addition, SEPBLAC receives systematic monthly reports (115 630 in 2001, 334 452 in 2004). The annual report states that in 2004 the number of SEPBLAC money laundering investigations begun grew by 46.14%, the fastest rate of growth in the last few years (2 228 in 2003 and 3 256 in 2004). The number of cases completed rose by 36.37% (2 106 in 2003 and 2 872 in 2004) and cases in progress by 36.36% (1 056 in 2003 and 1 440 in 2004). The number of investigations was larger than the number of STRs which may be as a result of investigations started on the basis of systematic monthly reports.

48. The rapid expansion of reporting obligations is raising issues about resources in the money laundering agencies. As of year-end 2005, SEPBLAC had 81 employees including police officers and officials from the Bank of Spain and tax administration. In addition to resources to deal with STRs, there is a strong demand for guidance about how to deal with the new reporting rules. SEPBLAC has indicated that it makes guidance available through various mechanisms, including feedback about the quality of reports to reporting entities, responses to individual requests for advice, sectoral meetings and information on its website. SEPBLAC carried out 148 inspections of groups of reporting entities between 2001 and 2005. The inspected groups account for approximately 70% of the total transactions carried out by all reporting entities.

49. In September 2005, the Ministry of Economy and Finance issued Guidelines with regard to money laundering for credit institutions, which refer specifically to payments to politically exposed persons (PEPs) and their close family members.[20] The examiners welcome the attention to the issue of PEPs. However, they note that the discussion of PEPs in the Guidelines (§ 7) is limited to a single paragraph and a relatively narrow set of possible transactions rather than focusing on requiring systems to identify PEPs and generally heightened scrutiny of transactions by PEPs, including reasonable inquiries into the origin of funds. In addition, the Guidelines focus on PEPs from non-democratic countries, referring – under a heading entitled "Political Personnel from Risky Regions" -- to "persons who occupy pre-eminent political posts, high public offices or similar positions ... generally in non-democratic countries ..." The examiners recognize that such countries may lack certain safeguards that exist in democratic countries, but they consider that the recent past makes clear that the bribery of foreign public officials and PEPs is not limited to officials of such countries. Representatives of major banks and credit unions indicated during the on-site visit that they have systems in place to seek to identify payments that involve PEPs, but the examiners consider that guidelines on PEPs are likely of most importance for smaller credit institutions and non-financial entities.

***Commentary:***

***The lead examiners welcome the recent introduction of expanded money laundering reporting requirements and recommend that Spain ensure that the money laundering authorities have adequate resources to carry out their expanded duties effectively. They encourage the Spanish authorities to implement promptly the planned amendments to provide that all foreign bribery offences constitute predicate offences for purposes of money laundering prevention. The lead examiners note that the existence of money laundering guidelines should assist in effective***

[20] See *Catálogo Ejemplitivo de Operaciones de Riesgo para Entidades de Crédito*. Additional guidelines exist for other regulated sectors.

***prevention, but recommend that the authorities modify and expand the treatment of PEPs in the current guidelines for credit institutions and other relevant guidelines.***

## C. INVESTIGATION AND PROSECUTION

### 1. Prosecutorial and investigative bodies

#### *a) The State Prosecution Service, the ACPO and the police*

50. The State Prosecution Service (*Fiscalía General del Estado*, SPS) is organised under Law 50/1981 of 30 December 1981. It is comprised of prosecution services attached to various courts, as well as certain special prosecution services and general offices. The head of the SPS is the State Attorney General (*Fiscal General del Estado,* FGE) who is nominated by the Government. The offices of public prosecution are structured hierarchically and are bound to instructions.

51. The ACPO is a special prosecution service for economic crime and corruption cases. Although it forms part of the SPS, the ACPO differs from other public prosecution offices because it has support units permanently assigned to it. The ACPO has nine prosecutors (each with more than 10 years experience) and an Assistant Chief Prosecutor under the direction of a Chief Prosecutor. Special units are assigned to the ACPO from the Tax Department (nine inspectors and deputy inspectors); from the Support Unit of the General Administrative Inspectorate of the Civil Service (two inspectors and three administrators); and from the two principal law enforcement agencies, the Civil Guard and the National Police (21 officers).[21] The Chief Prosecutor of the ACPO is selected by the Government on a proposal submitted by the FGE, after having consulted the Attorney General Council (*Consejo Fiscal*).

52. In addition to the Civil Guard and the National Police, some regions, like Catalonia and the Basque Country, have set up their own police forces. Both the Civil Guard and the National Police have units specifically assigned to the ACPO that specialize in the fight against corruption.

#### *b) Investigative powers of the prosecution and police, including with regard to bank and tax information*

53. The SPS has significant powers of investigation, which include the power to compel the attendance of the suspect, including through detention, or of witnesses to answer questions, and instructing the police or public authorities to provide reports.[22] Prosecutors cannot interfere with fundamental rights or order provisional measures (except for detention) without a judicial order. While as noted the ACPO has special support units, it does not have any additional legal powers beyond those available to regular prosecutors.

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21 An ACPO representative indicated that recently additional prosecutors have been nominated as ACPO "delegates" in regular SPS offices in a number of regions and cities, including Baleares, Alicante and Málaga.

22 See Vicente Gimeno Sendra, Derecho Procesal Penal (Colex 2004) at 286.

54. The examiners have noted that on paper, the ACPO has fewer powers to investigate the economic situation of a suspect, including relevant bank information, than does a separate special prosecution service dedicated to the fight against drugs, the Special Attorney General's Office for the Prevention and Repression of Illicit Traffic in Narcotic Drugs (ADPO). Art. 18bis of the Law 50/1981, of 30 December 1981, adopting the Organic Statute of the State Prosecution Service (*Estatuto Orgánico del Ministerio Fiscal*, EOMF) expressly gives the ADPO the power to investigate the economic situation of the suspect by compelling the production of information from public and private organisations and companies, whereas art. 18ter EOMF, which applies to the ACPO, contains no similar provision. A GRECO report raised this issue and recommended that the ACPO should be given powers similar to those of the ADPO; a subsequent GRECO compliance report found that the recommendation had been addressed by Spain because the ACPO has been effectively able to exercise such powers due to its multi-agency composition even though they have not been formally conferred upon it.[23] In addition, judges can obtain information from financial institutions.

55. Representatives of banks and police representatives indicated that in practice, banks most often refer to constitutional provisions when they object to the provision of bank information to prosecutors. Banks frequently rely on Article 18 of the Constitution, which establishes the right to privacy. However, this right to privacy is not an absolute right, as the Constitution permits the making of laws that interfere to some degree with the right to privacy where it is in the public interest. The examiners also note that new legal provisions continue to be adopted in the area of bank secrecy, with possibly uncertain effects. For example, the Responses (§ 17) indicate that bank secrecy was "introduced in Spain by the law of 22 November 2002 on Measures to reform the Financial System (*Ley 44/2002, de Medidas de Reforma del Sistema Financiero*)". This law added a provision to the Law on Discipline and Intervention of Credit Institutions (*Ley 26/1988 de Disciplina e Intervención de las Entidades de Crédito*) requiring credit institutions to keep client information confidential.[24] Other than client consent, the only express exception is where disclosure is required by law; there is no specific reference to the SPS or ACPO.

56. It thus appears that a number of provisions of uncertain scope can thus be invoked by banks to object to the provision of information. The Responses (§ 7.2) refer generally to difficulties due to the time it takes to obtain information from banks. Questioned about actual practice in the context of these various rules, a senior SPS representative noted at the on-site visit that the law does not distinguish between the ACPO and regular prosecutors with regard to bank secrecy, but in practice a bank is more likely to cooperate with the ACPO whereas it will require a judicial order from a regular prosecutor. Police and regular prosecutors confirmed this description. Generally, police representatives indicated that where there is active follow-up to obtain the information from a bank, it takes three weeks to a month to obtain information. The uncertain nature of the applicable texts also generates negotiations about the scope of the information to be made available. The lead examiners noted that ACPO prosecutors at the on-site visit generally expressed satisfaction with the scope of their investigative powers including with regard to bank information.

57. With regard to tax information, Article 95 of Law 58/2003 establishes a basic principle that tax information is confidential and may only be used for tax purposes. Exceptions exist for cooperation with judges or the SPS (once a judicial investigation is open), cooperation with other tax authorities and with the financial intelligence unit (SEPBLAC). Generally, however, only tax officials can access tax

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23 See GRECO, First Evaluation Round, Evaluation Report on Spain, adopted by GRECO 11-15 June 2001, GRECO Eval I Rep (2001) 1E (Final) § 91-91, 140(x); GRECO, First Evaluation Round, Compliance Report on Spain, adopted by GRECO 13-17 October 2003, GRECO RC-I (2003) 7E, § 46-49.

24 See Law 26/1988, First Additional Provision, as introduced by Law 44/2002. In addition, Organic Law 15/99 of 13 December 1999 concerning the protection of personal data is relevant, although it has an express exemption for, *inter alia*, the SPS and judges.

information in the absence of an existing judicial investigation. The ACPO, however, has a direct link - via the tax inspection unit assigned to it - with the Tax Inspectorate's national database containing details of the tax returns of all individuals and legal entities in Spain over the last six years. Prosecutors noted that almost all ACPO cases require access to tax information as part of the investigation; in the pre-judicial investigation phase of an ACPO case, the tax officials at the ACPO can obtain the necessary information. In contrast, access to tax information for other prosecutors requires the existence of an open judicial case. The SPS is currently studying the possibility of making tax information available to certain other prosecutorial units in addition to the ACPO.

58. The Spanish law enforcement authorities appear to make very limited use of witness protection in corruption cases. Some progress appears to have been made in this area, i.e. witnesses can anonymously testify in court in some circumstances and the court-rooms have been arranged for this purpose. However, an ONG representative indicated that although a new law has been adopted in this area, its use has been effectively limited to terrorism and drugs cases. Police representatives recognized that they make limited use of informants in part because they tend to want to remain anonymous. The GRECO I report, which dates from 2000, similarly noted that the ACPO had never used witness protection mechanisms.

***Commentary:***

***The examiners consider that a focused approach to the fight against corruption and economic crime with a specialized prosecution service and support units provides substantial benefits in the fight against corruption. The lead examiners note that in practice the ACPO has a number of very substantial advantages over regular prosecutors with regard to resources and investigative powers of particular relevance to foreign bribery cases.***

***The lead examiners consider that access to financial information is of paramount importance for the effective investigation of foreign bribery offences. The examiners note that in addition to the difference between arts. 18bis and 18ter EOMF, new legal provisions continue to be adopted in the area of bank secrecy. They take note that the ACPO generally appears to be satisfied with its access to bank and economic information about suspects despite the lack of express authorization in the law and that judges can require the production of financial information.***

***The examiners recommend that Spain explore the use of witness protection programs in the context of foreign bribery cases.***

### *c) Attribution of foreign bribery cases to prosecutors: the "special significance" criterion for ACPO jurisdiction*

59. As discussed above, the lead examiners consider that the ACPO has substantial advantages over regular prosecutors for the prosecution of foreign bribery offences. At the same time, they note that most domestic corruption cases are investigated by regular prosecutors, not the ACPO, because the ACPO generally deals only with the most important cases. For example, in 2003 the ACPO investigated five domestic bribery cases while regular prosecutors dealt with 80 such cases.[25] The examiners accordingly examined the criteria for attribution of foreign bribery cases to prosecutors and in particular to the ACPO.

60. Article 18ter EOMF defines a list of offences over which the ACPO potentially has jurisdiction to investigate and prosecute. This list includes both economic crime and bribery offences: bribery (*cohecho*) and exercise of undue influence, as well as fraud and extortion. ACPO prosecutors confirmed

[25] See GRECO, Second Evaluation Round, Evaluation Report on Spain, adopted by GRECO 17-20 May 2005 (GRECO EVAL II Rep (2004) 7E) § 21.

that the reference to bribery includes foreign bribery. However, art. 18ter EOMF also provides that, in addition to falling within the Article 18ter list, the offences concerned must be of "special significance" as defined by the FGE.

61. The FGE issued an instruction in 1996 concerning the special significance criterion and the application of art. 18ter.[26] The Instruction (para. III.a) defines certain types of cases as constituting prima facie cases of special significance, which can be opened by the ACPO without the need for special approval by the FGE. For other cases falling within the list in art. 18ter EOMF, the FGE must decide on the special significance of the individual case before the ACPO can initiate an investigation. The criteria in the Instruction are only indicative and the FGE has discretion to find that a particular case should (or should not) be investigated and prosecuted by the ACPO. The ACPO and the FGE also apply an informal value threshold of approximately EUR 600 000 in evaluating whether a case is of special significance. However, prosecutors emphasized that this is only a rough guideline and that cases below the threshold can be considered.

62. It appears that for most foreign bribery cases an individual decision of the FGE concerning special significance would currently be required for ACPO jurisdiction. With the exception of a reference to fraud against EU financial interests, none of the defined categories in the Instruction would appear necessarily to apply to a foreign bribery case and no instruction has been issued with reference to foreign bribery since the adoption of the foreign bribery law in 2000.[27]

63. The lead examiners note that the broad reference to bribery in art. 18ter EOMF would allow the FGE to identify in an instruction foreign bribery cases (other than minor cases) as cases of special significance, which would signify the need for priority treatment and improve awareness about the foreign bribery offence. It would also allow the ACPO to open the case without an individual decision by the FGE, thereby limiting the potential for consideration of factors prohibited under article 5 of the Convention. The lead examiners believe that the high profile and prestige of the ACPO helps ensure that law enforcement personnel are aware that it should be alerted about significant domestic corruption-related matters. They consider that a clearer indication in an appropriate instruction about the special significance of foreign bribery cases could also further ensure that all significant foreign bribery allegations are also transmitted to the ACPO for review.

64. The examiners note that there have been a number of proposals to expand the ACPO's jurisdiction in various ways since 1996. For example, in 2003, the government proposed a controversial extension of the ACPO's jurisdiction to a wide variety of organised crime, but the proposal was not adopted and the list of matters in art. 18ter remained unchanged. An ACPO prosecutor indicated that the ACPO's jurisdiction had recently been expanded to include money laundering cases. To date, this has been done by a decision of the FGE that is not yet reflected in an instruction.

65. Subsequent to the on-site visit, Spain indicated that the FGE will issue in the very near future a new instruction to replace the 1996 instruction, which will provide that the ACPO has the power to investigate foreign bribery cases without the need for a case-specific decision from the FGE. The

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26 See FGE Instruction No. 1/1996 of 15 January 1996.

27 There is no reference in the Instruction to cases involving foreign public officials. It provides that a case involving alleged crimes committed by a high level Spanish official ("*alto cargo*", as defined in a separate 1995 law), would constitute prima facie a case of special significance. However, the Instruction is limited to infractions committed by such officials and active bribery with regard to such officials is not mentioned. Certain fraud offences are included, but there is no specific reference to bribery. Active bribery of EU officials is arguably included in the Instruction's inclusion of fraud against the economic interests of the European Union (except for small cases) as a category of cases of special significance.

examiners welcome this important change which should help to ensure that foreign bribery cases are effectively investigated and prosecuted. The examiners also encourage the government to use it as an opportunity to publicize the foreign bribery offence as an offence of special significance and its intention to enforce the law.

66. The ACPO can take over or cease acting in a case at any time. Thus, for example, during the on-site visit, the Chief Prosecutor of the ACPO ordered that all reports about certain allegations of domestic corruption be transmitted to the ACPO so that it could determine if it should open an investigation. Where the ACPO does not have or does not exercise jurisdiction, it is attributed to the territorially competent prosecutor.

***Commentary:***

***The lead examiners welcome the decision of the Spanish authorities to establish that the ACPO will have the power to investigate all foreign bribery cases other than minor cases without an individual determination of special significance by the FGE. The lead examiners urge the government to ensure that adequate additional resources are provided to the ACPO in connection with its increased responsibilities. In addition, while they recognize the need for flexibility in attributing jurisdiction to prosecutorial authorities, they strongly encourage the government to ensure that the focus of the ACPO on corruption is not lost. The examiners recommend that the Working Group follow up with regard to jurisdiction over foreign bribery investigations and prosecutions.***

## 2. Initiation and conduct of cases

### *a) Uncertainty regarding applicable procedures for foreign bribery cases*

67. Spain introduced jury trials for specified offences in 1995; according to some commentators, cases involving jury trials are subject to many procedures different from those in other cases, and may suffer from serious delays.[28] In response to questions at the on-site visit, a number of panellists, including a senior judge, recognized that it is unclear whether foreign bribery cases under art. 445 PC would be subject to a jury trial under the Organic Law on Jury Trials; the issue does not appear to have been addressed by academic commentators.

68. The list of offences subject to jury trial in art. 1.2 of the Organic Law on Jury Trials was the object of considerable debate prior to adoption of the law in 1995; art. 1.2 specifically refers to cases "of bribery (arts. 419-426 [PC])", i.e. active and passive domestic corruption, but does not include economic crimes such as fraud or embezzlement. The list of offences subject to jury trial was not modified in connection with the introduction of the foreign bribery offence (art. 445 PC) in 2000 and, as some panellists noted, such cases would thus appear to not be subject to jury trial. However, art. 445 PC provides that foreign bribery is punished with the sanctions provided for in art. 423 PC (the domestic active bribery offence), which is included in the list in the Organic Law on Jury Trials. As some panellists noted, it is unclear whether the incorporation of art. 423 into art. 445 could have the effect of providing for a jury trial in a foreign bribery case despite the absence of any specific reference to art. 445. After the on-site visit, the Spanish authorities contended that foreign bribery cases are not subject to jury trials because art. 1.2 of the law does not expressly refer to art. 445; while this is certainly a reasonable interpretation, other interpretations, as recognized by various panellists, also appear to be reasonable.

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28 See Sendra at 798-99.

69. Some panellists indicated that an initial judicial error with regard to whether a case is a jury trial case would not necessarily be unduly serious because after the appeal the case could be transformed into a jury or non-jury case as required without undue difficulty. However, the uncertainty about the applicable procedures creates an additional burden for prosecutors. In order to avoid undue complexity, the discussion below generally describes the non-jury trial process, but the lead examiners express no opinion about whether foreign bribery cases should be resolved by a jury trial.

***Commentary:***

***The lead examiners recommend that Spain clarify the law in order to remove uncertainty about whether foreign bribery cases are subject to trial by jury.***

### *b) The initiation of cases*

70. Spanish law provides for a broad panoply of methods for the commencement of criminal proceedings. A case usually begins with a simple report (*denuncia*) or a criminal complaint under which the complainant becomes an accusing party (*querella*). Reports can be filed with the police, a prosecutor or a judge. Prosecutors can also commence cases on their own initiative and important cases have begun as a result of the SPS or ACPO reacting to press reports. Offences involving corruption do not require a private complainant (with the possible exception of jury trial cases, see below).

71. Spain follows the rule of mandatory prosecution in accordance with the EOMF and arts. 100 and 105 of the LECrim. Intentional failures to prosecute can be sanctioned under art. 408 PC with removal from public office for 6-24 months. Spanish law also allows victims, including foreign citizens and companies, to bring private prosecutions.

72. A number of panellists underlined that the FGE exercises a considerable degree of hierarchical control over the prosecution service and in particular the ACPO. In some cases, the ACPO has reportedly had difficulties in commencing a case where the FGE did not agree with the ACPO's view that prosecution was required. In this regard, it is important to note that the Spanish Constitution gives a broad right to private citizens to bring criminal actions in a process known as the *acción popular*. For the *acción popular*, a private prosecutor does not have to be a victim of the alleged crime; the only requirements are that the person be a Spanish citizen (other than a judge) with legal capacity and that he/she not have been convicted twice for malicious prosecution. Traditionally the right to bring an *acción popular* did not extend to legal persons, but recent case law has extended it to such persons.[29] In a number of high profile cases, individuals or associations, such as associations of consumers, have exercised the right of private prosecution, including in a case where, according to the Chief Prosecutor of the ACPO at the time, the FGE refused, based on a FGE determination that no crime was disclosed by the facts, an ACPO request to file a case with a judge after a significant prosecutorial investigation.[30] As a panellist noted at the on-site visit, a significant number of corruption cases in Spain have been commenced by private action. It appears that the ACPO has been permitted to join private actions subsequently even where its initiation of the case may have been the subject of dispute. The right to bring an *acción popular* does not extend to foreign citizens or, presumably, to foreign companies. However, given the breadth of the *acción popular*, it could be possibly overcome by Spanish associations or NGOs interested in the issue of foreign bribery.

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[29] See Sendra at 156, 256.

[30] See Carlos Jiménez Villarejo, El Mundo (5 July 2004), p. 22. The case did not involve allegations of corruption.

73. In addition, a commentator has noted that art. 24(1) of the Law on Jury Trials may require that jury trial cases be commenced by a "party".[31] This could apparently exclude the possibility of prosecutors and judges commencing the case ex oficio if it were determined that foreign bribery cases are subject to jury trial, and reinforces the need to clarify the inapplicability of the jury trial law to foreign bribery.

***Commentary:***

***The lead examiners note that the FGE has a considerable degree of hierarchical control over the ACPO and prosecutors in general. The lead examiners consider that the broad availability of private prosecution can be an important safeguard in this respect. They recommend that the Working Group follow up with regard to the prosecution of foreign bribery cases and the role of the FGE.***

### *c) The initial prosecutorial investigation*

74. Prior to the opening of the judicial procedure, the SPS can investigate cases in a phase known as the prosecutorial investigation (*diligencias informativas*). In 2003, art. 5 EOMF was amended to place two significant limits on this process for all prosecutions including those by the ACPO. First, its duration was limited to six months from the date of receipt of the complaint, unless extended by a decree and opinion from the FGE. This change was controversial and was criticized by some as an attempt to limit the power of the ACPO.[32] At the on-site visit, an ACPO prosecutor indicated that while six months may be appropriate and helpful as a general rule, it is generally too short for many ACPO cases, which are complex and frequently involve international aspects; nonetheless, he noted that this change has not caused serious problems to date because repeated extensions are available and all requests to the FGE for extensions have been granted.

75. ACPO prosecutors at the on-site visit expressed much greater concern about the current impact of the second change to prosecutorial investigation. Article 5 EOMF was also amended to introduce a requirement that during the initial investigation, the prosecutor must take a declaration from the suspect, who must be represented by legal counsel and who may review the dossier of the proceedings. Under the new rules, it is thus not possible for the prosecutor to maintain the secrecy of the initial investigation. ACPO prosecutors recognized that these rules could be reasonable for other types of cases, but underlined that a requirement that the suspect be informed in effect during the initial investigation of an economic crime or corruption investigation and have access to the complete dossier sharply undercuts the effectiveness of the investigation.[33] Some police representatives noted that police investigations are not subject to article 5 and are occasionally very lengthy, particularly in corruption cases; this could raise a concern that police might refrain from informing prosecutors about certain investigations.

76. Following a prosecutorial investigation, the prosecutor can request the relevant examining magistrate to carry out a judicial investigation, provide him/her with the evidence obtained up to that point, and make the arrested person and the effects of the crime, if any, available to him/her. Once a judicial proceeding has commenced (whether at the request of the prosecution, a private party or otherwise), the prosecutor must terminate the prosecutorial investigation. Alternatively, if at the conclusion of a

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31 See Sendra at 799 (noting that the wording of art. 24.1 of the Law on Jury Trials apparently requires initiation of the case by a party and excludes commencement of the case ex oficio).

32 See, e.g., Cortes Generales, session no. 96, 28 April 2003, p. 23871.

33 Victims and complainants do not appear to benefit from any right of access to the case file during this phase, although, as noted, if the prosecutor decides not to file the case with a judge, the prosecutor must inform them of their right to file a complaint directly with an investigating magistrate. (See Sendra at 285.)

prosecutorial investigation the prosecutor considers that there is insufficient evidence of a criminal offence, the prosecutor can file or close the proceedings. In this case, the prosecutor must notify the person(s) who claimed to have been injured by the offence of that decision in order that he/she may have the opportunity to repeat his/her accusation before the examining magistrate. [See Article 773(2) LECrim]. In the absence of any complainant or identified victim, there may be no one who can be informed about the possibility that the case has been closed. The Spanish authorities point out that such cases are generally rare, but they may exist in foreign bribery cases commenced on the basis of news reports.

77. Prosecutors, including the ACPO, are required to inform the FGE about significant cases and the FGE can give instructions in individual cases. The FGE has appeared before the Justice and Interior Committee of the Parliament to explain actions in high profile cases and his interaction with the ACPO; these appearances frequently attract significant media attention.

***Commentary:***

***The lead examiners recommend that Spain reconsider the rule requiring that the suspect be informed during the initial investigation of foreign bribery allegations in light of its likely interference with the effectiveness of the investigation, in particular by the ACPO. The lead examiners also recommend follow up with regard to the rule generally limiting prosecutorial investigations to six months in order to ensure that it does unduly limit prosecutorial investigations in foreign bribery cases and that it does not prevent prosecutors from learning about police investigations in such cases.***

### *d) The judicial phase*

78. Spain's administration of justice is rendered through the Judicial Power, formed by courts (*Juzgados*), consisting of a single individual, and tribunals (*Tribunales*), composed of three or more magistrates. The administration of justice is governed by the Constitution (Articles 117-127) and by the Organic Act of the Judicial Power (*Ley Orgánica del Poder Judicial*, LOPJ).[34] The Provincial Courts (*Audiencias Provinciales*) are collegiate organs located in provincial capitals that hear cases (other than those attributed to the central courts) where the sentence could exceed 5 years imprisonment. These courts also hear appeals against sentences and decisions determined by lower courts. The local Criminal Courts are single judge courts which hear cases where the punishment is imprisonment of five years or less. The National Court (*Audiencia Nacional*), situated in Madrid, has competence over a series of high profile offences as well as serious offences committed outside Spain (see below).[35]

79. Once a judge becomes involved, the criminal process in Spain generally has three stages: judicial investigation (*diligencias previas*); preparing the oral trial; and the oral trial. The first stage is supervised by an investigating magistrate who is in charge of investigating the crime, its circumstances, perpetrators and any other matters relating to the offence. The second stage can be supervised by the same magistrate or by a three-judge Provincial Court. For foreign bribery cases, the nature of the investigating magistrate can be of particular importance and the lead examiners accordingly reviewed the rules governing the

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[34] The Judiciary is governed by the Spanish General Council of the Judiciary (*Consejo General del Poder Judicial,* CGPJ) which is an independent organ responsible for recruiting and appointing judges, training, career and disciplinary decisions over the whole of the Spanish territory. The CGPJ does not exercise any judicial function. It is chaired by the President of the Supreme Court, and composed of twenty Members, appointed by the Lower and Upper Houses of Parliament.

[35] A second court with national jurisdiction, the Central Criminal Court, has jurisdiction over the same types of cases as the National Court whenever the offence has less than a five year maximum sentence. For convenience, the text refers only to the National Court.

attribution of foreign bribery cases to such magistrates. Cases in both Provincial Courts and local Criminal Courts are prepared by a local investigating magistrate (*Juzgado de instrucción*). Cases in the National Court are investigated by a central investigating magistrate (*Juzgado central de instrucción*) who has jurisdiction to act throughout Spain.[36]

80. There are two principal bases for potential National Court jurisdiction rationae materiae over foreign bribery cases. First, while the National Court's jurisdiction does not specifically extend to corruption, it has the power to deal with certain serious economic offences in the private sector as well as matters related thereto. An ACPO prosecutor suggested that he expected that National Court jurisdiction over a foreign bribery allegation would require that it be connected with other offences over which the National Court has jurisdiction; cases involving only foreign bribery would be heard by a local Criminal Court or a Provincial Court and the judicial investigation would be conducted by a local investigating magistrate. Second, the National Court also has jurisdiction over "offences committed outside of the national territory of Spain, when according to statutory provisions or international treaties they are to be heard at the Spanish courts". [See art. 65(1)(e) LOPJ]. Nationality jurisdiction is established by art. 23.2 LOPJ. (See below the section on jurisdiction)

81. ACPO prosecutors noted at the on-site visit that due to the nature of their cases, they most frequently file them with a central investigating magistrate who can prepare the case for National Court. However, they did not express a strong preference for the National Court as opposed to local courts. When questioned about the potential impact of the jurisdiction of local magistrates and courts over foreign bribery cases, ACPO prosecutors noted that while central investigating magistrates have a high profile and extensive powers, there are only six such magistrates and each has a heavy case load of terrorism and drug trafficking cases. ACPO prosecutors indicated that it some cases it could be easier to prosecute a case in a local court where the case may attract more judicial attention than in the National Court. It is unclear, however, whether a case handled by local prosecutor and local judge would be hampered by the limited scope of action of these actors. In addition, it is unclear if the local courts would have relevant expertise and resources to deal with a complex case; a local investigative magistrate from Madrid indicated that each judge in that jurisdiction deals with approximately 7 000 cases a year; in his case, only one involved corruption. Where the ACPO is the prosecutor in a local court, its extensive powers and expertise could help overcome any such limits.

82. In practice, prosecutors and judges indicated that prosecutors frequently continue to play a central role in the investigation during the judicial phase in part because of limited judicial resources. Certain commentators, including a magistrate subsequently appointed to the Supreme Court, have noted that the decline in the role of the investigating magistrate and the corresponding increased reliance on prosecutors raises general concerns about the prosecution of politically sensitive cases because of the degree to which the SPS and ACPO are subject to the FGE.[37]

83. Once the judge has completed his/her preliminary investigation (*diligencias previas*), he/she can decide, inter alia, (1) to file the case (*sobreseimiento*) if there is insufficient evidence or the facts do not reveal commission of a crime; (2) issue a formal decision which opens the intermediate phase of proceedings (preparation of the oral phase). The intermediate phase similarly can end either with a transfer

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36 See Sendra at 122.

37 See Perfecto Andrés Ibañez, "L'Espagne: Les organes centralisés de poursuite pénale. Analyse d'un problème", available at http://www.cidadevirtual.pt/asjp/medel/perfecto.html#. The author notes that the general trend toward a lesser role for investigating magistrates as opposed to prosecutors has been masked by the role of the six central investigating magistrates in the National Court, who have responsibility for a large number of high profile cases both nationally and internationally.

of the case to the relevant court for the oral phase, or with a filing of the case by the judge. (Procedures may differ for jury trials.)

84. Spanish criminal procedure provides for a form of settlement known as *conformidad*. It generally operates when the accused and the defence attorney agree to the highest sanction sought by the prosecutors (which can include both the SPS/ACPO and private prosecutors). Settlement is sometimes characterized as a unilateral act by the defence, but various provisions provide some scope for negotiations about the maximum requested sanction which the defence then accepts. (See Sendra at 620-21.) The judge generally has the power to reject the settlement and order the continuation of the case.

***Commentary:***

***The lead examiners recommend that Spain continue its efforts to ensure adequate resources for effective investigation and adjudication of foreign bribery cases in the relevant courts.***

## 3. Mutual legal assistance (MLA) and extradition

### *a) Mutual legal assistance*

85. Mutual legal assistance ("MLA") in Spain is principally governed by treaties and by general provisions in arts. 276-78 of the LOPJ and in the LECrim. Spain is a party to a number of multilateral MLA conventions, including the 1959 European Convention and its Additional 1978 Protocol[38]; and the Convention of 19 June 1990 implementing the Schengen Agreement of 14 June 1985. Spain has also concluded bilateral treaties with a number of countries. MLA treaties in force in Spain are applied directly and do not require implementing legislation or other measures. A number of framework decisions by the Council of the European Union are also of great importance for MLA in Spain, as for other EU countries, particularly in the field of seizure and confiscation. In the absence of a treaty, MLA is subject to a condition of reciprocity evaluated by the Ministry of Justice pursuant to article 278 LOPJ.

86. The main institutions involved in MLA include the Ministry of Justice, the SPS (including the ACPO), the courts and the police. The Ministry of Justice, CGPJ and the SPS recently produced a 100-page guide (*Prontuario)* to MLA. It describes the operation of the system and the application in this area of numerous relevant treaties. Both treaties specific to MLA and other treaties with MLA provisions, such as the UN Convention against Transnational Organised Crime, are described. However, as of the onsite visit, the OECD Convention was not mentioned. Since the on-site visit, the Prontuario has been updated to include references to the OECD Convention.

87. Prosecutors, and in particular the ACPO, can both send and execute many MLA requests. Prosecutors can provide MLA within the same bounds of Spanish law as apply with regard to prosecutorial investigations, i.e., with regard to matters not involving interference with fundamental rights. For matters involving such interference, the intervention of an investigating magistrate is necessary. A recent instruction has clarified that prosecutorial activity with regard to passive MLA is not subject to the six-month time limit on prosecutorial investigations. (See Instruction 2/2003 of the FGE.)

88. Although many MLA requests are now received directly by prosecutors or courts, the Ministry of Justice continues to receive a significant number of requests where direct requests are not possible. The Ministry of Justice reviews such requests for formal defects and sends it through a registry to one of the 17 Regional High Courts, which then transmits the request to the relevant judicial body. The completed MLA

[38] European Convention of 20 April 1959 on Mutual Assistance in Criminal Matters and its Additional Protocol of 17 March 1978.

request must again be transmitted to the Ministry of Justice through the regional court before being transmitted to the requesting country. Ministry of Justice personnel noted that this system, which is designed to give the regional courts a supervisory role, can lead to delays. Currently, no statistics are kept regarding the time taken to fulfil MLA requests, but Ministry of Justice representatives indicated that computer systems are being updated and improved statistics will soon be available.

89. The ACPO can provide MLA in many corruption cases and has jurisdiction to act throughout Spain. Bank and financial information is available on the same basis as for domestic investigations and raises the same concerns with regard to the powers of the ACPO as outlined above in the section on investigative powers. ACPO prosecutors indicated that they recently supplied bank information in response to an MLA request from a Working Group member relating to allegations of (domestic) corruption and money laundering. The request was sent to the ACPO by the foreign embassy and despite the absence of an MLA treaty, the ACPO provided information on the basis of reciprocity and an agreement between the SGS and the foreign prosecution service. The ACPO also regularly seeks MLA abroad. In one case involving allegations of large payments to a Latin American politician by a Spanish bank (predating the introduction of art. 445 PC), the ACPO was able to trace payments through various jurisdictions to accounts in an overseas territory of a Working Group member, but ACPO prosecutors indicated that they then were confronted with the "insuperable barrier of a tax haven" and have been unable to obtain necessary information from that jurisdiction.

90. As noted in the Phase 1 report, MLA is generally not conditioned on double criminality. However, under the 1959 Convention, Spain made a reservation requiring that, where seizure or confiscation is sought, the offence must be an extraditable offence in both jurisdictions. The bribery offences under arts. 421 and 425-26 provide only for fines so that seizure and confiscation is not available for MLA requests under that Convention. Spain has indicated that its likely implementation in 2006 of a European Union framework decision on seizure should help rectify this problem with regard to other EU members. (See also the discussion and commentary below with regard to extradition.)

91. In addition, dual criminality is generally required for coercive measures under applicable treaties. [See Responses § 13.1(d)] As discussed below, Spain has not fully introduced criminal liability for legal persons. Accordingly, where double criminality is required, it is unclear whether complete MLA could be granted for criminal proceedings against legal persons for foreign bribery. In Phase 1, Spain indicated that it can provide MLA in relation to non-criminal proceedings against a legal person, but has not provided further information or examples in this area.

***Commentary:***

***The lead examiners recommend that the Spanish authorities take all necessary measures to ensure that the full range of MLA, including seizure and confiscation, can be provided in all criminal cases for foreign bribery against legal and physical persons.***

***The lead examiners' concerns about access to bank information (set forth above in the section on investigative powers) also extend to the field of MLA. The examiners note the ACPO's recent provision of a wide range of bank information in response to a MLA request relating to corruption. While the system appears to be functioning well in this regard, they recommend that the Working Group follow up with regard to the issue of the availability of bank information in the context of MLA.***

***The lead examiners welcome the efforts to expand the Prontuario to address the OECD Convention and foreign bribery. The lead examiners also welcome the current efforts to improve***

***the collection of statistics with regard to MLA and urge the authorities to ensure that statistics relating to foreign bribery are collected.***

### *b) Extradition*

92. Extradition can be provided pursuant to Spain's multilateral and bilateral extradition agreements, or, in the absence of such an agreement, based on reciprocity. Under most multilateral and bilateral extradition treaties to which Spain is a party, the offence in question must be punishable under the laws of both the requesting Party and the requested Party by a deprivation of liberty for a maximum period of at least one year. The one-year threshold would not be met in relation to every type of foreign bribery covered by the Convention and in particular under arts. 421 and 425-26, which provide only for fines. For European Union countries, the EU arrest warrant has largely replaced extradition and is available for all foreign bribery offences. However it does not apply to non-EU countries.

93. Spanish law allows the denial of extradition in some cases based on "any other reason in Spain's essential interests" and the government's decision in this regard cannot be appealed. The Spanish authorities have indicated that the notion of essential interest has not been applied in the last 20 years. The National Court has jurisdiction to decide all cases of passive extradition (requests to Spain from foreign countries) as well as with regard to the EU arrest warrant.

***Commentary:***

***The lead examiners recommend that Spain take appropriate action to ensure that effective mutual legal assistance and extradition are not excluded by the level of applicable sanctions in any foreign bribery case.***

## 4. Treatment of allegations in the public domain

94. ACPO prosecutors indicated that the ACPO opened a foreign bribery investigation in 2004 with regard to allegations of bribery of a high-ranking foreign public official by executives of an affiliate of a Spanish company in a country in the Americas. The investigation has not been presented to a judge and remains under prosecutorial investigation in the ACPO. The period for prosecutorial investigation has been extended twice by the FGE, most recently in October 2005. Prosecutors noted that jurisdiction could be based on acts in Spain, or on acts in the foreign country by a Spanish citizen under art. 23(2) of the LOPJ. Prosecutors described in general terms the investigative activity in the case and the Spanish authorities have indicated that, as of February 2006, the ACPO was continuing its factual investigation.

95. ACPO and other prosecutors and police representatives at the on-site indicated that they were unaware of allegations of bribery by a Spanish company of high-level officials in an African country in the context of a major public procurement contract. The Responses also did not provide any information about these allegations or about any investigative activity in Spain. The allegations were made by a senior diplomatic official of another OECD country. Prosecutors and police indicated that they do not review the foreign press for allegations and rely on allegations involving Spanish companies being reported in Spain. An MFA official indicated that in theory personnel in Spanish Embassies should report allegations to a central service for forwarding to the MFA legal department and then to the ACPO. However, he recognized that this system had not functioned with regard to the case arising in the Americas, perhaps because the case was widely reported in the press. The system also does not appear to have functioned with regard to the allegations in the African country.

***Commentary:***

***The lead examiners note the active attention of the ACPO to the investigation of certain allegations, but are concerned that other significant allegations have not been transmitted to or addressed by prosecutors to date. They recommend that the Spanish authorities issue regular guidance to staff in embassies and commercial offices abroad about the duty to report allegations of foreign bribery involving Spanish companies, and that they ensure the effective functioning of the reporting system. They also recommend that the Spanish authorities take additional measures to ensure that all significant foreign bribery allegations are investigated.***

## 5. Jurisdiction

### *a) Territorial jurisdiction*

96. Article 23.1 LOPJ addresses territorial jurisdiction, but it does not expressly refer to offences committed in part in Spanish territory. Nor do arts. 14-18 LOPJ, which provide rules for the internal competence of Spanish courts. In Phase 1 and in the Responses, however, the Spanish authorities have indicated that the rules for territorial jurisdiction are broadly interpreted so that jurisdiction is established over offences that are committed wholly or partially in Spanish territory, and that a telephone fax or email emanating from Spain can be sufficient to establish jurisdiction. Spain has provided a case in which territorial jurisdiction was based on the effects in Spain of an offence committed abroad.

***Commentary:***

***The lead examiners recommend that the Working Group follow up with regard to territorial jurisdiction over foreign bribery cases committed partially in Spanish territory.***

### *b) Nationality jurisdiction*

97. The LOPJ provides for nationality jurisdiction in article 23.2. Nationality jurisdiction requires dual criminality, but it is broadly defined to require only that "the act is punishable in the place where it was carried out". The law also requires that either the aggrieved party or the public prosecutor makes a complaint before the Spanish courts. It is unclear who could be considered as an aggrieved party and in particular whether a company that lost a tender would fit with the definition of an aggrieved party.[39]

### *c) Legal persons and jurisdiction*

98. As discussed below in this report, Spain has not fully adopted criminal liability for legal persons. Since the on-site visit, the Spanish authorities have indicated that the current jurisdictional provisions (arts. 23.1 and 23.2 LOPJ) will be amended in conjunction with the adoption of substantive criminal liability of legal persons in accordance with the requirements of the Convention.

***Commentary:***

***The lead examiners are concerned about the law regarding jurisdiction of the Spanish courts over legal persons that commit bribery. They recommend that Spain take all necessary measures to provide for clear territorial jurisdiction and nationality jurisdiction over legal persons in cases of foreign bribery in accordance with the provisions of the Convention.***

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[39] Under art. 23.4 LOPJ, Spain has established a relatively broad basis for universal jurisdiction, but it does not apply to foreign bribery.

***The lead examiners also recommend that the Working Group follow up with regard to the notion of the aggrieved party in nationality jurisdiction cases.***

## 6. Statute of limitations

99. Limitations periods are fixed by article 131 PC and are based on the sanctions for the offence. Where the foreign bribery offence is subject to a six year prison sentence as under article 419 PC, the limitations period is 10 years. Where the penalty is one to four years of prison as under the first part of article 420 PC, the limitations period is 5 years. However, the limitations period is only 3 years for cases involving the second part of art. 420 PC as well as articles 421, 425 and 426 PC. (See below the sections on the offence of foreign bribery and sanctions) The statute of limitation starts running from the day the offence was committed.

100. The Spanish authorities indicated in the Responses (§ 9.2) that the limitations periods can cause difficulties in investigating and prosecuting cases. Although there are no statistics for the number of prosecutions for corruption which have not been investigated or have had to be abandoned because of a time bar, most of the Spanish respondents interviewed by the examining team stated that the statute of limitation on criminal proceedings for the offence of corruption is too short. A lawyer also raised the practical issue that at the beginning of proceedings it is not always possible to know which bribery provision is at issue especially if reference to foreign law is necessary.

101. Pursuant to article 132(2) PC, the limitations period is initially interrupted when judicial criminal proceedings are initiated against the suspect. It begins to run again (from zero) once the proceedings are "paralyzed" or when they conclude without a conviction. As a result, the limitations period can also expire during the investigation and prosecution of a case by a judge. The nature of acts that can interrupt paralysis (and thus restart the period) is not entirely clear. It appears that substantial judicial acts leading to trial such as acts carried out for processing the case generally suffice. However, some case law has apparently held that non-substantive judicial acts or substantive acts not directed against the accused do not interrupt paralysis. The limitations period can also run during periods during which the accused is out of the country or in hiding.

102. The lead examiners are concerned that a three years limitation period may constitute a serious obstacle to prosecutions in Spain. The use of false invoices, multiple intermediaries and other devices makes it very difficult initially to unmask this type of crime. Moreover, such practices often come to light only when investigations are conducted in respect of other offences or when cooperating witnesses emerge. In addition, the three year period could present difficulties for the conduct of complex international investigations. The lead examiners note that the limitations period would increase for the offences currently subject to a three-year limitation period if the sanctions for those offences were increased.

***Commentary:***

***The examiners are of the opinion that a three year limitation period, as exists at present for certain foreign bribery offences, does not allow a reasonable period of time for discovery and investigation of those offences. This may prejudice the effective implementation of the law. For this reason, the lead examiners recommend that appropriate measures be taken, such as increasing the applicable sanctions, to ensure that the statute of limitations applicable to such offences extends for an appropriate period.***

## 7. Statistics

103. As noted at various points in this report, the lead examiners frequently found that the limited availability of relevant statistics hindered their ability to evaluate the fight against corruption and foreign

bribery in Spain. Basic statistics about criminal law enforcement and the criminal justice system were often unavailable, making it difficult to evaluate the effectiveness of the fight against foreign bribery in many areas or to compare it with other offences. In some cases, the lack of statistics has been explained due to the need to protect the confidentiality of personal data. The examiners recognize the importance of protecting personal data, but encourage Spain to generate improved statistics using techniques that allow the protection of such data.

***Commentary:***

***The lead examiners recommend that Spain take appropriate measures to improve the collection and dissemination of statistical information relevant to evaluating the fight against foreign bribery.***

## D. THE FOREIGN BRIBERY OFFENCE, RELATED OFFENCES AND SANCTIONS

### 1. The foreign bribery offence

104. The provisions on foreign bribery applicable to physical persons were adopted in 2000. Two changes were introduced in 2004: (1) the foreign bribery offence was renumbered from article 445bis PC to article 445 PC; and (2) Title XIXbis, a specific title for the foreign bribery offence, was eliminated, and art. 445 PC was incorporated into Title XIX which contains, among other things, all of the domestic bribery provisions. The Spanish authorities have indicated that no judicial interpretations exist yet with regard to the application of the foreign bribery offence.

105. Since the on-site visit, the Spanish authorities have indicated that they have taken an initiative so that the current legislature can undertake a substantial reform of the current Penal Code in order to adapt it with regard to the definition of foreign public official, applicable sanctions and regulation of liabilities of legal persons, among other matters. The Ministry of Justice has established a group of experts to undertake this study. The lead examiners welcome this initiative.

#### *a) Overview of relevant provisions and uncertainty regarding applicable provisions*

106. Article 445 PC establishes the offence of bribing a foreign public official. Although art. 445 appears to contain a full definition of the offence, it provides that sanctions are to be applied by reference to the sanctions provided for under article 423 PC, which applies to the active bribery of a domestic public officials. Article 423 in turn states that active bribers shall be sanctioned in the same manner as domestic officials are sanctioned for passive bribery. It is thus necessary to refer first to art. 423 and then to the provisions for the passive bribery of domestic public officials in order to apply art. 445.

107. The domestic passive bribery offences are set forth in arts. 419-421 PC and 425-26 PC. They differ principally in the nature of the act or omission by the public official. They thus sanction bribery in markedly different ways depending on whether the official carries out an act or omission "constituting a crime" (article 419), carries out an unjust act that does not constitute a crime (art. 420), refrains from carrying out an act he/she should have carried out (art. 421), carries out a "characteristic action" of an

official's "duty" (article 425), or receives a payment in consideration of his/her function or for the accomplishment of an act that is not legally prohibited (art. 426).

108. The uncertainty about applicable provisions in foreign bribery cases arises out of art. 423 PC. Although art. 423 refers generally to punishment of active bribers in accordance with the punishment of officials guilty of passive bribery, it does not refer to specific articles amongst the various passive bribery offences in arts. 419-421 and 425-26. There is a debate in Spain about the passive bribery offences to which article 423 refers, and in particular about whether it refers to arts. 425-26. The resolution of this issue directly affects the application of the foreign bribery offence in art. 445 because it explicitly refers to art. 423.

109. Until recently, the Spanish authorities took the position in the Working Group that art. 445 (and thus art. 423) refers only to the offences in articles 419-21.[40] Accordingly, it did not apply to the offences in art. 425-26. However, case law, while not abundant, has consistently held that art. 423 applies to arts. 425-26 as well as to art. 419-421. For example, a Supreme Court case in 1999 explicitly found that art. 423 applied to art. 426, citing a series of earlier cases.[41] A recent academic analysis of the problem reached the same conclusion, although it recognized that prior commentators (but not case law) tended to support the inapplicability of art. 423 to arts. 425-426.[42] Since the on-site visit, the Spanish authorities have indicated that they consider that art. 423 (and thus art. 445) apply to art. 425-426.

110. The lead examiners recognize that the Convention does not require any specific number of offences, but rather that the entire Article 1 offence be included in national law. However, the continuing debate about art. 423 raises important issues about arts. 425-26. In particular, as discussed further below, it is important to determine (1) whether the broad scope of the Art. 1 definition of the offence in the Convention is fully addressed by arts. 419-421; and (2) whether, if parts of the Art. 1 offence are covered only by arts. 425-426, it is sufficiently clear that art. 445 applies to arts. 425-426. (Additional issues relating to the sanctions applicable under, *inter alia*, arts. 425-426 are addressed below in the section on sanctions.)

### *b) Elements of the offence*

#### *i) Definition of foreign public official*

111. Article 445 PC applies to bribes given, etc. to "authorities or public officials whether foreign or from international organisations". However, a definition of foreign public official has not been included in the Penal Code. Article 24 PC contains a definition of national public officials applicable to the offence of bribing a domestic official under article 423. It has been broadly interpreted by the courts in domestic cases – including in an important recent Supreme Court decision drafted by a judge who is now the FGE[43] -- but it is generally recognized that it does not apply as such to foreign public officials.[44] The Spanish authorities have indicated that the definition of public official in art. 24(2) of the PC can be extrapolated and applied directly to foreign officials. (See Supp. Responses § 5)

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40 See, e.g., Phase 1 Report at p. 2 footnote 2 and p. 5-6; Supp. Responses § 8.

41 See STS 2171/97 of 13 January 1999.

42 See Caparrós at p. 107-112.

43 Supreme Tribunal, Criminal Chamber, Case n° 2074/2001 of 22 April 2004.

44 See, e.g., Caparrós at p. 99 (except for specific reference to certain European officials, art. 24 applies only to domestic officials).

112. In the Responses and in Phase 1, the Spanish authorities indicated that they would expect that the courts would apply the definition in the Convention. The Spanish authorities consider that this definition is a self-executing provision of the Convention and note that under article 96.1 of the Spanish Constitution, "validly made international treaties, when officially published in Spain, will form part of the internal legal system". However, numerous panellists at the on-site visit either rejected or expressed doubts about the direct effect of the Convention, especially in any case where it would operate to the detriment of the accused or where, as in the case of the Convention, the Spanish Parliament has adopted an implementing law. One panellist indicated that where there is an implementing law, he would not generally look to a treaty; others expressed concerns about the rights of the accused to know the law.

113. The Spanish authorities have not supplied any cases in which a treaty provision has been directly applied to the detriment of the accused. It is also difficult to see how businesspeople, for example, would know that some parts of Art. 1 of the Convention, but apparently not others, are of direct effect in Spain and are to be found in the Convention itself. In addition, the examiners note that a direct application theory may raise additional problems in the context of Spain's intention to ratify additional international conventions relating to corruption. A legal expert from the Ministry of Justice noted that in Spain the issue of the absence of a statutory definition of foreign public officials has been repeatedly raised and that the issue is currently under consideration in the Ministry of Justice.

***Commentary:***

***The examiners welcome the on-going efforts of the Spanish authorities to review the question of the applicable definition of a foreign public official for purposes of the foreign bribery provisions and recommend that Spain clarify that definition.***

*ii) The expected acts or omissions by foreign public officials and the autonomy of the offence*

114. The lead examiners have four concerns about the requirements of the foreign bribery laws with regard to the expected acts or omissions of foreign officials: (1) the lack of autonomy of the offence from foreign law; (2) language in art. 445 that appears to impose a requirement beyond those established by the Convention; (3) coverage of bribes to foreign public officials in order to affect their exercise of discretion; and (4) coverage of bribes to foreign public officials for acts or omissions in accordance with their duties other than small facilitation payments. These issues are addressed in turn.

115. The Commentary to the Convention underlines that Art. 1 of the Convention requires the establishment of an autonomous offence. In other words, the foreign bribery offence must not require proof of the law of a particular foreign official's country. This is an important requirement of the Convention in part because of the practical difficulties of proving foreign law. Because of the effective subdivision of Spanish bribery law into five different provisions based on different types of expected actions of the public official, the issue of the autonomy of the offence is particularly important. Many panellists at the on-site visit recognized that the complicated system of offences in arts. 419-426 PC requires refined characterizations of the expected acts of foreign officials in order to determine the applicable sanction. As noted above, sanctions differ markedly depending on whether, *inter alia*, the expected act or omission is a crime, an unjust act, the refraining from carrying out an act he/she should have carried out, a characteristic action of his/her duty or an act that is not legally prohibited.

116. At the on-site visit, most panellists considered that the offences in art. 419-421 and 425-26, which are incorporated into art. 445, are not autonomous. For example, a legal expert from the Ministry of Justice recognized that it is necessary to determine how the act is considered in the official's country in order to determine the applicable category under arts. 419-426. Similarly, a senior SPS representative and an academic commentator considered that reference to foreign law to qualify the offence cannot be

avoided. The Supp. Responses (§ 7) state that "[s]hould the act not be considered a crime under the law of the foreign public official's country, it cannot be prosecuted [unless it is established by treaty as a universal jurisdiction offence]". However, while a majority of panellists considered that the offence is not autonomous, ACPO prosecutors considered that Spanish law would apply to the characterization of the foreign official's expected acts regardless of the characterization of the act under foreign law.[45] Since the on-site visit, the Spanish authorities have recognized that in foreign bribery cases it is necessary to apply foreign law to characterize the infractions under arts. 419-421 and 425-426.

117. With regard to the second concern, Article 1 of the Convention requires only that the bribe be offered to the official for an act "in relation to the performance of official duties". While art. 445 contains this language, it also contains an additional requirement that the bribe must be offered to the official "in the exercise of his/her post" ("*en el ejercicio de su cargo*"). As noted by a Spanish commentator, this additional language appears to add a more restrictive requirement.[46] The government has contended that the additional clause is mere surplus language, but panellists at the on-site recognized that under general principles of statutory interpretation the courts seek to give meaning to each part of the language of the law.[47]

118. Third, the provisions in arts. 419-421 do not clearly apply to all undue payments intended to affect acts of discretion. A favourable act of discretion could rather be considered to be a "characteristic action" of the official's duty (article 425). Such bribery could also arguably be considered a payment made to public official in consideration of his/her function or for the accomplishment of an act that is not legally prohibited (art. 426). These articles would appear to be even more likely to apply in cases where the briber was the best-qualified bidder.[48] At the on-site visit, a senior SPS official indicated that the prevailing trend of case law would apply art. 426 to bribes to obtain the exercise of discretion with regard to a public procurement contract. Similarly, a Ministry of Justice legal expert indicated that he thought that arts. 419-421 would not apply to cases involving discretion. While the Spanish authorities have recently indicated that they consider that art. 445 applies to arts. 425-426, some uncertainty continues to exist in this regard. In addition, as discussed further below in the section on sanctions, arts. 425-426 provide only for relatively small fines. Since the onsite visit, the Spanish authorities have provided a case applying art. 420 to a discretionary act and have indicated that bribes to obtain discretionary acts can fall under arts. 419-420 when the official action also constitutes a crime or unjust act. However, it is unclear whether all bribes to affect the exercise of discretion would involve official action constituting a crime or unjust act.

119. Fourth, it also appears that arts. 419-21 do not necessarily apply to all cases of bribes to foreign public officials for acts or omissions in accordance with their duties other than small facilitation payments. Like payments for exercises of discretion, such bribes could also be considered payments to obtain a characteristic action of the official's duty (article 425), or payments made to public official in consideration of his/her function or for the accomplishment of an act that is not legally prohibited (art. 426). No case law has been supplied in this regard and panellists were uncertain about coverage of these cases under arts. 419-421.

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45 Other panellists considered that the necessity to refer to foreign law would depend which of the offences was at issue, whereas a lawyer familiar with corruption issues indicated that he was unsure of whether foreign law would be required or how it would be proved in practice.

46 See Caparrós at p. 103-104.

47 The examiners also note that in addition to the additional language in art. 445 itself, arts. 119 and 120 have similar additional requirements.

48 Under the Convention, foreign bribery remains an offence regardless of whether the company concerned was the best qualified. See Commentary § 4.

***Commentary:***

***The lead examiners consider that Spanish law does not provide for autonomy of the foreign bribery offences from the need for recourse to foreign law. They consider that this issue is particularly serious in light of the need to make fine distinctions about the nature of the expected act of the foreign official in order to determine the applicable provision and sanction. They recommend that the Spanish authorities take all necessary measures to ensure that the foreign bribery offences do not require recourse to foreign law for their application.***

***The lead examiners also recommend that Spain take appropriate action to ensure that the law applies to all bribes offered, promised or given to a foreign public official "in order that the official acts or refrains from acting in relation to the performance of official duties", as required by the Convention. They recommend in particular that the Spanish authorities ensure that the foreign bribery offence can apply to (a) all bribes to foreign public officials in order to affect their exercise of discretion; and (b) all bribes to foreign public officials for acts or omissions in accordance with their duties other than small facilitation payments.***

*iii) Nature of undue benefit provided to the public official*

120. Article 1 of the Convention requires that the offence apply to bribes composed of either pecuniary or non-pecuniary benefits. The Spanish authorities have indicated that they consider that section 445 would apply to bribes composed of non-pecuniary benefits such as sexual favours. However, it appears that a majority of Spanish legal commentators considers that the language used in the bribery law applies only to bribes composed of pecuniary benefits. It therefore excludes non-pecuniary benefits such as sexual favours. Practically all panellists questioned at the on-site visit expressed agreement with this majority view of legal doctrine. For example, a Ministry of Justice legal expert noted that there was no case law, but considered that non-pecuniary bribes would not be included because the relevant Spanish terms appear to require that a bribe be quantifiable. Since the on-site visit, Spain has indicated that it considers that this issue could be resolved through case law interpretation.

121. More generally, the lead examiners noted that several panellists spontaneously described the terminology in the bribery provisions as "archaic" and inappropriate to describe the reality of the economic crimes addressed by the Convention. For example, the word "dádiva", which has been translated in English by the word "gift", is not in common usage in contemporary Spanish and certain panellists noted that it conjures up an image of gifts of a limited value. The examiners note that the same language is used to apply to domestic bribery as well, but they invite the authorities to consider whether the language reflects the current economic reality of corruption.

122. The examiners note that art. 425 explicitly applies, inter alia, to benefits provided to the public official as a reward for an action already carried out. This provision, if it applies to foreign bribery, could thus simplify proof in cases where the order of events may be unclear.

***Commentary:***

***The lead examiners recommend that Spanish authorities ensure that the law can apply to bribes to foreign public officials composed of non-pecuniary benefits.***

*iv) Defences*

123. Article 427 exempts from punishment an individual who consents to solicitation for a bribe by a public official but reports it, within 10 days, to the relevant authorities. The law does not make clear whether this art. 427 defence applies to art. 445. The legislative history appears to support the non-

application of art. 427 to foreign bribery cases because a bill explicitly providing for its application was amended.[49] However, the Responses note that such history is not formally considered to be a source of law. In Phase 1, the Spanish authorities indicated that art. 427 would not apply to art. 445 because art. 445 (then numbered art. 445bis) was in a different title from art. 427; the 2003 amendments to the foreign bribery provision, however, eliminated the separate title for the foreign bribery offence. This argument for non-application is thus no longer available.

124. While the law is unclear about the application of art. 427 defence, key actors in the fight against bribery hold strong views about its application. During the on-site visit, an ACPO representative underlined that he considers that article 427 PC undoubtedly applies to foreign bribery. Although he recognized that there is no case law on the issue, he stressed that a law should normally be interpreted pursuant to the literal terms of the text and that recourse to parliamentary debate should only be used in cases of doubt, which in his view does not exist in this case. In contrast, as a professor has noted, art. 427 seeks to elicit the cooperation of active bribers in order to further the effective prosecution of the passive offence.[50] Given the absence of the corresponding passive offence applicable to foreign officials, there is no basis for its application in cases involving bribery of foreign officials.

125. Since the on-site visit, the Spanish authorities have indicated that they consider that art. 427 can apply in foreign bribery cases and that its application should help to further the purposes of art. 445 by facilitating investigations. The lead examiners recognize the importance of cooperating witnesses in the effective prosecution of foreign bribery cases. Cooperation, however, is not a defence under the Convention; while cooperation can be considered with regards to sanctions (providing the sanctions remain proportional, effective and dissuasive), it cannot constitute a complete defence to liability. The examiners note that even in the absence of art. 427 cooperation can apparently be an attenuating factor for purposes of sanctions under art. 21(4) PC. They encourage the Spanish authorities to consider other means of facilitating cooperation, such as improving witness protection.

***Commentary:***

***In light of the uncertainty about the possible application of the defence in art. 427 to liability under art. 445, the lead examiners recommend that the Spanish authorities explicitly clarify that art. 427 does not apply to the foreign bribery offences.***

## 2. Liability of legal persons

126. In Phase 1, the Working Group found that Spain did not meet the standards of the Convention with regard to liability and sanctions on legal persons for foreign bribery. In 2003, two new provisions were added to the Penal Code to introduce a form of criminal liability for legal persons. Article 445(2) PC is a new paragraph, and it permits application to legal persons in foreign bribery cases of the sanctions defined in article 129 PC (i.e., the winding up or dissolution of the legal person, or prohibitions on activities). Article 31 PC has also been modified to add a new paragraph (2), which provides for fines on legal persons under some circumstances. Neither art. 445(2) nor art. 31(2) has been applied to date. This section examines the conditions for liability of legal persons; the applicable sanctions on legal persons are reviewed below in the section on sanctions. As noted above, since the on-site visit Spain has indicated that a working group is preparing a reform of the law in order to conform to the standards of the Convention with regard to the liability of legal persons.

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49 See Caparrós at 122.

50 Id.

### *a) Conditions for liability of legal persons under article 445(2) PC*

127. Article 445(2) PC provides that where an individual guilty of foreign bribery belongs to a company, organisation or association, a judge can impose on the entity the sanctions provided for in art. 129 PC. The need for a "guilty person" ("*culpable*") unambiguously means that conviction of an individual is required for liability of the legal person, as was confirmed by participants at the on-site visit and by the Supp. Responses. Questioned about this derivative nature of liability under art. 445(2) PC, an Ministry of Justice legislative drafting specialist (as well as other panellists) recognized that Spain has not yet fully adopted the principle of criminal liability of legal persons and that the focus remained on the physical persons involved.

128. Article 445(2) also requires that the culprit "belong" ("*perteneciere*") to the legal person in order for the legal person to be liable. This language could suggest that the law is limited to acts by organs, executives and employees, and that it may not apply to bribes by agents or temporary employees. A Ministry of Justice representative at the on-site indicated that he expected that the law would be interpreted to apply broadly to persons who act for the benefit of the legal person. However, there is no case law in this area.

129. Liability of legal persons under art. 445(2) could also arguably appear to require that the entity have as its object the carrying out of bribes ("*se dedicare a la realización de estas actividades*"), i.e., that it must be in effect a criminal enterprise. The Supp. Responses affirm that art. 445 (2) is applicable to companies that bribe occasionally but whose objects are legitimate.

### *b) Conditions for liability of legal persons under article 31 PC*

130. As introduced in 2003, article 31(2) provides for joint and several liability of legal persons with regard to fines imposed on managers who are convicted under art. 31(1). Thus, in order for a legal person to be liable under art. 31(2), a manager must be convicted and sentenced under art. 31(1). The liability of the legal person appears to be automatic if the manager is convicted and sentenced to a fine.

131. High-level courts and prosecutorial authorities have repeatedly stated that art. 31 PC applies only to certain offences known as special personal offences ("*delitos especiales propios*" or "*delitos especiales*"). These are crimes that can be committed only by persons that meet defined characteristics.[51] The Constitutional Court has stated in this respect that "what is pursued is to obviate the impunity into which criminal acts perpetrated under the shroud of a legal person by members of that same legal person who are perfectly individualised would fall, when, because this is a special personal offence, namely, an offence whose responsibility necessarily demands the presence of certain characteristics, these would only concur in the legal person and not in the individual members that form that legal person."[52] Article 445 is not a special personal crime and thus art. 31 is not applicable to cases of foreign bribery.

132. ACPO prosecutors noted that in some recent cases some lower courts have applied art. 31 more broadly to crimes other than special personal offences. However, no such cases have been supplied to the evaluating team. Moreover, as a defence lawyer noted, a 2004 Circular from the FGE regarding the 2003

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51 See, e.g., Juan Manuel Fernández Martínez, ed., Diccionario jurídico (3d ed. 2004) at 268 (defining "*delito especial*" in part as "those criminal offences that cannot be committed by any person, but rather only by those, indicated in the legal definition of the offence, that are potentially in a position to harm the legal interest protected by the offence ...") (translation by the Secretariat)

52 See Constitutional Court, STC 253/1993 of 20 July 1993 (quoted in Responses § 5.2).

amendments to the PC repeatedly affirms that art. 31 "only applies in relation to special personal crimes".[53] According to panellists at the on-site visit, the majority of commentators also continue to consider that art. 31 applies only to special personal crimes.

133. The conditions for managerial liability under art. 31(1) -- and thus for the derivative liability of legal persons under art. 31(2) -- are complex, but in light of its scope of application they need not be reviewed in detail here. It is noteworthy, however, that although the text of art. 31(1) does not refer to any requirement of managerial action for managerial liability, the courts have found that the provision does not create automatic or objective liability for managers of companies that commit crimes. The degree of managerial misconduct necessary to generate managerial liability, however, is unclear; a number of courts have found that the manager must have had a "real participation in the events at issue as well as guilt with regard to the same" or that the manager must have "carried out the crime".

***Commentary:***

***The lead examiners welcome Spain's initiation of a process of amendment of its law on the liability of legal persons, but they are very concerned about continuing non-compliance with Article 2 of the Convention. They recommend that, with regard to cases of foreign bribery, Spain ensure that all legal persons can be directly liable for the offence, including by eliminating requirements of individual or managerial liability as a prerequisite for the liability of the legal person; and clarify the standard with regard to the necessary relation of the individuals involved in the crime and the legal person in order to take due account of the frequent use in foreign bribery cases of agents and others who act under the direction of the legal person.***

## 3. Sanctions for foreign bribery

### *a) Criminal sanctions*

134. The Convention requires Parties to institute "effective, proportionate and dissuasive criminal penalties" comparable to those applicable to bribery of the Party's own domestic officials. The Convention also mandates that for a natural person, criminal penalties include the "deprivation of liberty" sufficient to enable MLA and extradition. In Phase 1, the Working Group noted that the sanctions for certain foreign bribery offences in Spain were insufficient to allow extradition and certain MLA and recommended that Spain "reconsider the levels of penalties where imprisonment is not provided and mutual legal assistance and extradition would not be available". (See Phase 1 Report at 25)

135. As noted above, there is uncertainty about the provisions applicable to foreign bribery and in particular about whether the offences in arts. 425-26 PC apply in foreign bribery cases. Those sanctions under those offences are included in the analysis here for completeness.

#### *i) Natural persons*

Applicable sanctions and sentencing

136. As discussed above, Article 445 PC incorporates by reference the penalties under article 423 PC. Pursuant to article 423(1) PC, a person who bribes or attempts to bribe a public official "will be punished with the same penalties of imprisonment and fine as the authorities or public officials in question". The

[53] See Fiscal General del Estado, Circular 2/2004 Sobre Aplicación de la Reforma del Código Penal Operada por Ley Orgánica 15/2003, de 25 de noviembre (Primera Parte), (22 December 2004) at p. 6-7.

penalties applicable to public officials are in turn defined in arts. 419-421 PC and 425-426 PC. The result is the following five types of sanctions:

> 1. Imprisonment for 2-6 years and a fine of 1-3 times the value of the bribe, where the bribe is offered, etc. in order for the public official to carry out in the exercise of his/her duty an action or omission constituting a crime. (article 419)
>
> 2. Imprisonment for 1-4 years and a fine of 1-3 times the value of the bribe where the bribe is offered, etc. in order for the public official to execute an unjust act not constituting a crime, related to the exercise of his/her duty, and he/she executes it. Where the public official does not execute the act, the term of imprisonment is 1-2 years and the fine is the same. (article 420)
>
> 3. A fine between 1-3 times the value of the bribe where the bribe is offered, etc. in order to prevent the public official from carrying out an act that he/she is required to carry out in the exercise of his/her post. (article 421)
>
> 4. A fine between 1-3 times the value of the bribe where the bribe is offered, etc. in order for the public official to carry out a characteristic action of his/her duty or as a reward for an action already carried out. (article 425)
>
> 5. A fine of 90-180 daily rates[54] where the bribe is offered to the public official in consideration of his/her position, or is offered to him in order that he/she fulfils an act not forbidden by law. (article 426)

137. As a general matter, the lead examiners note that the nature of the expected official action is very broadly defined in the Convention – it is only required to be "in relation to the performance of official duties"-- and is not referred to as a relevant factor with regard to sanctions. In this context, they are concerned about a system that applies very different sanctions for foreign bribery based on the precise legal nature of the expected action of the foreign official, particularly where, as here, the characterization of the acts requires analysis of foreign law. The exact nature of the expected official action may also be difficult to prove in foreign bribery cases because of frequent unavailability of the foreign official. In addition, a strong focus on the precise legal nature of the expected official acts may produce somewhat unpredictable sanctions.

138. Articles 421 and 425-26 (as applied to active bribers) provide only for fines. Other than for art. 426, maximum fines are linked to size of the bribe and are limited to at most three times its value. This raises a number of concerns. First, as noted above, the absence of sanctions of imprisonment limits MLA and extradition. Second, a fine linked to the value of the bribe is not easily applicable to non-pecuniary bribes. Third, the size of a bribe to a foreign public official may be relatively small in some cases in comparison to the size of the advantage sought to be obtained. A sanction restricted to a fine limited to a small multiple of the bribe appears unlikely to be dissuasive, especially given the difficulty of discovering and prosecuting foreign bribery. These concerns are heightened because important Convention cases, such as bribes to influence the exercise of discretion, are only subject to the fines in arts. 425-426. (See above the section on the offence of foreign bribery)

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[54] Daily rates range between two and 400 euros. See art. 50(4) PC.

139. Analysis of the proportionality of sanctions is also important. While sanctions for foreign bribery are proportional to those for domestic bribery, they do not appear to be proportional to those for serious economic crime cases. Fraud (*estafa*) of special gravity is punished by one to six years of imprisonment and fines of 180 to 360 daily rates, and in certain aggravated cases, with sanctions of up to eight years. (See arts. 248-250 PC.) Case law has apparently determined that cases of fraud in excess of EUR 36 060 (six million pesetas) will generally be of special gravity.[55] Similar sanctions apply to embezzlement (*apropiación indebida*) under art. 252 PC. These sanctions thus appear to be considerably higher than for foreign bribery cases other than under art. 419, i.e. not involving illegal actions by the foreign public official. In particular, whereas the sanction for economic crime rises rapidly once relatively modest amounts are at stake, the amount at stake has no impact on the maximum prison sentence and limited impact on the maximum fine for foreign bribery.

140. Mitigating and aggravating factors are identified in articles 21-22 PC and are applied to the offence pursuant to rules set out in art. 66 PC. Under art. 21, a confession prior to discovery of the offence is an attenuating factor, as is partial or complete elimination of the effects of the crime. Under art. 66, where there is one attenuating factor, sentences are in the lower half of the range for the offences; for example, for art. 420, this would apparently mean a sentence of between one year and two and a half years. Where there are two mitigating factors, a "penalty inferior in one to two degrees" to the one in the basic offence shall be applied; as discussed below, this very substantially lowers the applicable penalties. It thus appears that in cases involving a confession at the outset of the case and attempts to remedy the effects of the bribery, very substantially reduced penalties would apply.

141. Judges at the on-site visit pointed out that for sentences of less than two years, they can issue suspended sentences under arts. 80-81 PC. In addition, judges can impose substitute sentences of fines or community work (with the consent of the convicted party) in cases involving prison sentences of less than two years under arts. 88 and 49. There are no available statistics with regard to sentences actually imposed in bribery cases.

Mandatory reduced sanctions in cases of solicitation

142. Pursuant to article 423(2) PC, the penalties for active foreign bribery are reduced in cases of solicitation by the public official. A "penalty inferior in degree to the one" in the basic offence is applied. In such cases, Article 70.1 PC indicates that the maximum is the previous minimum penalty less a day; the minimum penalty is one half of the previous minimum. Accordingly, for art. 419 cases involving solicitation, the maximum would be three years less a day, and the minimum would be one year. For article 420, the maximum would be one year less a day – thus raising issues about the availability of extradition -- and the minimum would be six months. Fines under arts. 421 and 425-26 would also be reduced in cases of solicitation.

143. Commentators in Spain have apparently generally recognized that this reduction of sanction is not based on lesser guilt of the active briber in cases of solicitation, but on policy considerations and in particular the desire to elicit cooperation by the active briber with the investigation.[56] However, as one commentator has noted, a rule that apparently seeks to facilitate cooperation with regard to discovery and prosecution of the passive offence makes little sense when as, in the case of foreign bribery, the passive offence (by the foreign public official) is not sanctioned under Spanish law. The rule also raises evidentiary concerns because, unlike in the domestic sphere, the public official will rarely be available to refute claims of solicitation. While the lead examiners consider that the existence of aggressive solicitation could in

[55] See Código penal (Colex 9th ed. 2004), notes under art. 250 (referring to STS 238/2003 of 2 February 2003 and STS 17/2004 of 16 January 2004).

[56] See Caparrós at 120.

some cases be relevant to sentencing for the foreign bribery offence (although not for liability), they consider that a rigid rule requiring substantially lesser penalties in every case of solicitation, no matter how casual, should be seriously reconsidered. In addition, because of the low sanctions that apply to many of the basic foreign bribery offences, the provision further reduces the overall sufficiency of applicable sanctions.

***Commentary:***

***The lead examiners recognise that Spain has sought to achieve proportional sanctions for foreign bribery by aligning them with the sanctions for domestic bribery as required by the Convention. However, they consider that applicable sanctions for foreign bribery do not in all cases meet the standards of the Convention. The lead examiners recommend that sanctions be increased as necessary to ensure that extradition and mutual legal assistance (including seizure and confiscation) are not hampered by the level of applicable sanctions in any foreign bribery case. Sanctions applicable to bribery to obtain a favourable exercise of discretion, such as the attribution of a contract, should also be significantly increased. In addition, the examiners consider that Spain should consider whether to increase available sanctions for serious foreign bribery cases in order to achieve sanctions proportional to those for serious economic crime cases.***

***The lead examiners also recommend that the Spanish authorities eliminate mandatory reductions of sanctions for foreign bribery (1) in cases of solicitation; and (2) in cases where the foreign public official does not carry out the unjust act. They should ensure that the applicable sanctions in all such cases are effective, proportionate and dissuasive, and should take appropriate steps to improve the collection of statistics in this area.***

***The lead examiners also recommend that in conjunction with the recommended amendment of the law to ensure its application to bribes composed of non-pecuniary advantages, the Spanish authorities modify the method of fixing pecuniary sanctions for foreign bribery.***

*ii) Legal persons*

144. The Convention requires "effective, proportionate and dissuasive" sanctions on legal persons for foreign bribery, including monetary sanctions. As noted above, since the Phase 1 report Spain has introduced a form of criminal liability of legal persons in articles 445 and 31 PC. As noted above, since the on-site visit Spain has indicated that it has initiated a process of substantial reform of the Penal Code provisions relating to sanctions on legal persons.

Sanctions under articles 445 and 129 PC

145. As noted above, article 445(2) PC is a new provision from 2003 that provides that where the physical person guilty of foreign bribery belongs to a legal person, the legal person can be subject to the sanctions in article 129 PC. These sanctions are defined as accessory sanctions and include closure or dissolution of the company or suspension of its activities; and permanent or temporary prohibitions for up to five years on activities similar to those that gave rise to the conviction. The lead examiners have a number of concerns about arts. 445(2) and 129 PC.

146. First, article 129 PC does not provide for any fines or monetary sanctions against legal persons. Second, sanctions under arts. 445 and 129 are discretionary. Both art. 129 and art. 445 indicate that the court "can impose" one or more sanctions under art. 129, but do not require the imposition of sanctions. The criteria for the decision in this regard are not specified. Third, the purpose of the sanctions in art. 129 is expressly stated as "the prevention of the continuation of the activity and the effects of the same"; there is no reference to deterrence. [See art. 129(3) PC.] The Supp. Responses state that a preventive purpose is

also dissuasive. However, panellists agreed that where there is no reason to suspect the individual company will continue violating the law, it would appear that no penalty would be appropriate under art. 129. Fourth, sanctions such as closing down the company or appointing an administrator may not be realistic sanctions in most foreign bribery cases; the only other option is a prohibition on activities. A judge noted that art. 129 can serve a useful purpose as a sanction in some cases, but considered that judges need additional options in terms of sanctions.

Sanctions under art. 31 PC

147. As noted above, art. 31(2) PC is a new article that provides for joint and several liability of legal persons with regard to fines imposed on managers who are convicted under art. 31(1) PC. As discussed above in the section on the liability of legal persons, it appears that art. 31 applies only to special personal offences and thus not to the foreign bribery offence in art. 445. Even if art. 31 were found to apply to foreign bribery, it provides for relatively weak sanctions on legal persons. The liability of the legal person is limited to joint and several liability for a fine imposed on a physical person. For a large company, a fine determined with regard to an individual is unlikely to be effective or dissuasive. Moreover, as noted above, fines for individuals are limited to a maximum of three times the bribe, which may be far less that the expected profit of the company.

***Commentary:***

***The lead examiners welcome Spain's initiation of a process of amendment of its law on the sanctions for legal persons, but they are very concerned about continuing non-compliance with Article 3 of the Convention. The examiners consider that Spain does not apply effective, proportionate and dissuasive sanctions on legal persons for foreign bribery as required by the Convention. In addition to the considerations above relating to the regime for the liability of legal persons, the examiners recommend that in cases of foreign bribery, Spain provide for fines or monetary sanctions applicable directly to the legal person that are sufficient to be dissuasive in light of the circumstances, including the size of the legal person and the nature of the advantage sought to be obtained through the bribe; eliminate the discretionary nature of the imposition of sanctions on legal persons; and ensure that sanctions are dissuasive as well as preventive and effective in nature.***

***b) Non-criminal sanctions***

148. Pursuant to article 20(a) of the Law on Contracts with the Public Administration (*Ley de Contratos de las Administraciones Públicas*), a natural or legal person is subject to a prohibition to contract with the Spanish public authorities[57] where specified criminal offences, including bribery, are committed by its administrator(s) or representative(s) on its behalf. Persons can be prohibited from contracting for up to eight years. Art. 21(4) of the law provides that relevant authorities must inform the Consultative Committee for Public Contracts and relevant authorities in the regions about decisions so that the Committee can deliberate with regard to the relevant sanction under the Law on Contracts. In cases under art. 20(a), the administrative sanction is in theory "automatic", but it is in practice decided upon by the Ministry of Economy and Finance upon advice received from the Committee. The sanction as declared by the Ministry applies to the entire public administration. Individuals and companies under prohibition are identified on the Ministry website; approximately 20 were on the list at the time of the on-site visit (for all reasons).

[57] This is understood to mean the Central Government, the Governments of the Autonomous Communities and the local government bodies.

149. Representatives of the Consultative Committee indicated that while information necessary for the prohibition system generally circulates well within the administration, they do not receive necessary information from the judicial authorities. They also recognized that there is no functioning mechanism for the Committee to learn about foreign bribery convictions other than the possibility of spontaneous reports from the Spanish administration. There are no statistics about use of the prohibition by judges.

150. Although the Law on Contracts with the Public Administration appears to apply broadly to all administrations, other bodies have specific administrative sanctions applicable in the case of bribery convictions. A 2003 law relating to the FAD provides that the government can rescind FAD credits and support where a conviction occurs under art. 445. It provides that the Spanish company "responsible for the infraction" can be excluded from FAD contracts for up to five years pursuant to a procedure in the MITC.[58] Given the reported difficulties with regard to the flow of information, the lead examiners note that a single centralized system may be more effective.

151. In accordance with the OECD Action Statement, CESCE's contracts contain provisions stating that contracts affected by the existence of bribery under art. 445 (as recognized by the insured or in a final judgment) are not covered by the relevant support. They also provide that CESCE has the right to suspend payment pending resolution of a legal proceeding relating to bribery. CESCE has no practical experience with denying cover based on a bribery conviction.

***Commentary:***

***The lead examiners consider that the Law on Contracts with the Public Administration generally appears to provide a solid basis for broad administrative sanctions in the area of public procurement for natural and legal persons that engage in foreign bribery, although it is difficult to judge in the absence of relevant statistics. However, the limitation of the law to cases of bribery committed by an administrator or representative of a company limits its effectiveness as a sanction against legal persons for foreign bribery. The examiners encourage the Spanish authorities to take practical measures to improve the flow of information to the authorities responsible for the administrative sanctions systems, in particular from the judicial authorities.***

### *c) Confiscation and pre-trial seizure*

152. Article 127 PC contains general principles concerning the confiscation of illegal gains. In Phase 1, the Working Group expressed concern about the unavailability of confiscation when the assets were no longer available. Article 127 has been amended in this regard and Art. 127(2) now permits the confiscation of property the value of which corresponds to that of the bribe and proceeds where they are no longer available because, for instance, they are in the possession of a bona fide third party. As amended in 2003, art. 127(3) now provides that the court also may order confiscation in cases where there is no criminal liability.

153. Statistics on seizure and confiscation in relation to economic crime offences have not been supplied. The Responses § 7.3(b) state that confiscation under art. 127 PC applies to legal persons in the same manner as to natural persons, but no cases have been supplied.

154. In addition to the general provision in art. 127, the PC also contains a specific provision in art. 431 with regard to confiscation in bribery cases. It is much narrower than art. 127 and refers only to confiscation of the actual gift or bribe. It is unclear whether art. 431 would apply to art. 445 since it applies only to cases in chapters V and VI of Title XIX. (Art. 445 is in Chapter X, but incorporates art. 423, which

[58] See Law 62/2003 of 30 December 2003, Second Additional Provision, ninth paragraph.

is in chapter V.) While it appears to be clear that art. 431 does not interfere with the application of art. 127, the current purpose of art. 431 appears unclear.

155. Articles 589 to 614 LECrim (together with art. 127 PC) apply to pre-trial seizure. The use of provisional measures (including the seizure of proceeds) can be ordered (1) to prevent the supposed offender from altering his financial position or credit, resulting in the loss of components of possession connected to or obtained from the corruption offence under investigation; or (2) when there are reasons to presume that an object can serve as evidence. The Responses indicate that in cases of drug related offences, seizure can be ordered on a third ground: to secure the payment of a confiscation order. This power is apparently unavailable in bribery cases. [See Responses § 7.3(a)]

156. ACPO's support units are very useful in investigations aimed at identifying and tracing proceeds of economic crime, including corruption. In particular, the Support Units of the Tax Inspectorate and the General State Financial Controller's Office assist the ACPO in relation to movements of funds, fiscal and taxation examination and financial operations, and provide direct access to the Tax Inspectorate's Consolidated Data Base. In appropriate cases, the ACPO can seek assistance from other Tax Inspectorate bodies. The police support units also assist the ACPO in tracing and recovering illegally gained property, funds and capital.

***Commentary:***

***The lead examiners welcome the expanded scope of art. 127 PC and in particular its application to the confiscation of substitute property. They consider that the ACPO is well-equipped to effectively carry out seizure and confiscation in major cases. The examiners consider that the Working Group should follow up to ensure that confiscation in foreign bribery cases is governed by art. 127 PC and that art. 431 PC does not limit confiscation in such cases.***

## 4. Related offences and obligations

### *a) Denial of tax deductibility of foreign bribes and enforcement*

157. The Companies Tax Law and the Personal Income Tax Law do not expressly deny the tax deductibility of bribes paid to foreign public officials.[59] As in Phase 1, Spain relies on a Supreme Court decision finding that expressly prohibited behaviour cannot give rise to a deduction.[60] The expenses in that case related to costs incurred by a company in advertising and promoting gaming activities which were prohibited and characterized as "serious misconduct" under gaming regulations. The Supreme Court overturned the decision of the lower court, which had found the expense deductible. The Court reinstated the decision of the tax authorities that to acknowledge the expenses as tax deductible "would be tantamount to accepting as legal, in the domain of taxation, behaviour expressly prohibited" by law.

158. Reliance on such a broad principle raises the issue of awareness of the foreign bribery offence by tax inspectors. During the on-site visit, tax officials contended that it would be "obvious" or that it would be a matter of "common sense" to a tax inspector that a foreign bribe is a crime and therefore could not be deducted. The lead examiners are sceptical about general awareness that foreign bribery is a crime as a basis for the effective enforcement of the prohibition. There have not been any directives or guidelines issued to Spanish tax authorities to make them aware that foreign bribe payments are not deductible or to explain the relevant Penal Code provisions. (See Supp. Responses § 33). Law professors, media

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59 Pursuant to article 26 of the Personal Income Tax Law, the provisions under the Companies Tax Law also apply to natural persons in determining their income from economic activities.

60 Decision of the Supreme Court (Third Chamber) of 4 July 1998, Appeal no. 3065/1992.

representatives and others made clear that general awareness of foreign bribery as an offence in Spain is weak; for example, professors noted that law students in criminal law courses are almost invariably surprised to learn that foreign bribery is a crime. The examiners consider that there is little basis for confidence about knowledge that foreign bribery is illegal, particularly in circumstances where it is widespread, carried out in response to perceived bribery by others or solicitations by public officials. Even assuming that the bar on deductions of expenses related to illegal activities is widely understood, it is unclear that tax officials are aware that foreign bribery now constitutes an offence.

159. Certain tax officials contended that an express prohibition would cause difficulties because it would require inspectors to characterize an infraction in legal terms and because it would create interpretive difficulties. The Supreme Court case cited by the Spanish authorities, however, apparently relied on the fact that the activity was "expressly prohibited" by law, and denial of deductions based on their constituting a criminal offence would presumably require a similar express basis. In practice, tax officials are likely to react to things that look like they could constitute a bribe without engaging in doctrinal analysis, but the examiners consider that the likelihood of such a reaction with regard to foreign bribery would be significantly greater in the presence of an express prohibition in the tax law. Moreover, an express prohibition is also an important signal to auditors, financial officers in companies and other who frequently have limited familiarity with criminal law or the Convention. The lead examiners also note that under general principles of the Spanish legal system, judges, prosecutors and tax inspectors are presumed to know the law.

160. In addition, it appears that the tax code contains broad provisions that could be used to attempt to deduct bribes. For example, article 14 of the Companies Tax Law prohibits the deduction of “gifts and generosity”, but there are significant exceptions, including “expenses derived from public relations with clients or suppliers” and "expenses correlated with earnings". Bribes used for the purpose of obtaining contracts are frequently used to generate earnings. Tax officials made clear that illicit payments as such could not be deducted under art. 14, but recognized that it is broadly worded. They explained that it was amended to expand deductions that had previously been limited them to expenses necessary for the activity of the company. While this allows flexibility for the deduction of expenses such as restaurant expenses and holiday parties, and has reduced the amount of litigation about what is deductible, it may also facilitate efforts to deduct bribes under different guises. Tax officials also indicate that deductions must be sufficiently documented and that the lack of sufficient documentation frequently constitutes the main argument to reject the deductibility of this kind of payments.

161. Tax officials indicated that audits of large and very large companies are carried out by special units. They noted that the goal is to audit every large and very large company every four years so that the statute of limitations does not expire between audits. While this goal is achieved with regard to very large companies, it is not achieved with regard to large companies. For smaller companies, audits are conducted among companies selected based on software that analyses relevant risks. The tax authorities did not appear to be aware of the OECD Bribery Awareness Handbook for Tax Examiners, although questions did not address this issue in detail. Article 93 of the General Tax Law expressly establishes that bank secrecy is not an obstacle for tax investigations.

162. An NGO representative and law professor has contended in the press that foreign bribes remain widely deductible in Spain in particular under the rubric of general expenses.[61] At the on-site visit, he explained that the problem does not involve a rule allowing the deductibility of bribes, but arises out of

[61] The article (El Pais, 21 October 2004) quoted Jesus Sanchez Lambas, secretario general de la Fundación Ortega y Gasset, as stating that despite the OECD Convention, national legislation in some countries allows deduction of foreign bribes under certain euphemisms such as general expenses or expenses without support, and in the case of Spain they can be deducted up to 5%.

several factors relating to the application of the tax laws, including an increased acceptance of deductions generally, the absence of a catalogue of acceptable and unacceptable deductions in the tax law, and the difficulty of determining whether illicit activity is involved with regard to specific expenses. He noted the importance of the regulations that still need to be adopted with regard to the new 2003 tax law. Spain considers that the problem is limited to a provision applicable to individuals with income from economic activities of less than EUR 600 000 who can deduct 5% of net income as permitted provision and general expenses.

163. The tax administration recently launched a major campaign to fight tax fraud (*Plan de prevención del fraude fiscal*) which includes a lengthy study and over 300 remedial measures.[62] The plan calls (§ 2.5) for reinforced relations between the tax authorities and the ACPO. Although the Plan addresses tax fraud in foreign commerce and money laundering specifically, it does not address tax fraud linked to foreign bribery. Tax officials explained this absence of focus on the basis that there is essentially no problem because no one would attempt to deduct a foreign bribe. While the examiners recognize that there may have been improvements in this regard, they believe this view is unduly optimistic and they note that tax officials have played a role in discovering domestic bribery in some cases.

164. The Basque region has long had a significant degree of autonomy regarding its own tax administration which is recognized in the Organic Law 3/1979, and more recently in Law 12/2002. Navarra also has significant autonomy in this area. Basque tax officials indicated that they have a provision similar to art. 14 and that they consider that the Supreme Court decision with regard to non-deductibility of illicit expenses applies to the Basque region. They indicated they do not have special audit units due to the size of the region; they deal with approximately 8 000 company tax returns each year. They described their information exchange with local judicial authorities as fluid.

***Commentary:***

***The lead examiners consider that Spain should take appropriate measures to make explicit the prohibition concerning the deductibility of foreign bribes in order to improve the awareness of tax inspectors and companies about the offence and its tax treatment. The training plan for tax inspectors should incorporate training with regard to foreign bribery and the recent anti-tax fraud plan should be expanded to include measures targeted at tax fraud related to foreign bribery. The lead examiners urge the Spanish authorities to adapt existing Spanish translations of the OECD Handbook for Tax Examiners for use to Spain and to distribute it to tax officials as appropriate.***

### *b) Accounting and auditing*

#### *i) Accounting and auditing requirements*

165. The Commercial Code (CC) establishes that all "entrepreneurs" must keep accounting books and records and provide financial statements following a certain number of requirements. The General Chart of Accounts implements the accounting aspects of the corporate law and applies to all enterprises regardless of their legal form. Mercantile companies are required to deposit their financial statements and related documents, including auditor's reports, in the Mercantile Registry Office where they are made publicly available; violations are sanctioned by ICAC and the courts. The prohibition of off-the-books accounts by Spanish law was unanimously confirmed during the visit. In addition, the disclosure of material contingent liabilities appears to be required in both article 200 of the Law on Companies and in the General Chart of Accounts.

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62 See http://www.aeat.es/campanyas/fraude/ppff.pdf

166. In accordance with an EU regulation, Spanish companies listed on a regulated European securities market must prepare their consolidated financial statements in accordance with International Financial Reporting Standards (IFRS) starting in 2005.[63] Spain has not opted to require other companies to use IFRS. It does permit the use of IFRS for unlisted companies that are required to produce consolidated accounts, at the option of the company required to produce the consolidated accounts under applicable rules in art. 42 CC.

167. Under art. 42 CC, the parent or dominant company in a group of companies is required to produce consolidated reports for the group, including direct and indirectly controlled subsidiaries. The notion of a group appears to be defined in relatively narrow terms. However, Spain has indicated that consolidation requirements are applied broadly and that companies with minority shareholder interests in subsidiaries are required to consolidate the subsidiaries' accounts where they have control.

168. Article 203 of the Law on Companies and Additional Provision One of the Law on Auditing establish auditing requirements. Only companies below certain importance thresholds are exempt, i.e. those which meet two out of the three conditions in article 181 of the Law on Companies: total assets that do not exceed EUR 2 373 998; annual sales that do not exceed EUR 4 747 996; and an average number of employees that does not exceed fifty. A 2002 law requires listed companies to have audit committees starting in 2002. The CNMV is responsible for oversight on this issue. Internal audit services have also been established by 93% of listed companies.

169. Only a person with the legal status of an auditor can perform an audit and ICAC maintains the Registry of Auditors (ROAC). ICAC has instituted quality control reviews for auditors. Article 8 of the Law on Auditing states the requirements for auditor independence, including incompatibilities and rotation requirements. Pursuant to article 8(4), auditors are appointed initially for a period of between three and nine years. After the initial period, annual renewals are possible. Some representatives of the profession met at the on-site visit suggested that nine years is an absolute maximum, but the Spanish authorities have indicated that they disagree with this interpretation and that there is no maximum. Rotation requirements are applicable to audit partners and staff. Rotation is required after seven years for certain types of companies such as regulated entities, listed companies and those with over EUR 30 000 000 in annual net turnover.

***Commentary:***

***The lead examiners welcome the quality control reviews and attention to audit quality by ICAC.***

*ii) Sanctions and enforcement*

170. Pursuant to article 290 PC, it is an offence for a director ("*administrador*") of a company that has been incorporated or is being formed to falsify annual accounts or other documents that must reflect the financial situation of an entity, in order to cause financial harm to the entity, partners or a third party. The penalty is three years of imprisonment and a fine. Prosecutors interviewed explained that this article has been interpreted broadly as to apply not only to the director of a company but also to all its managers. Auditors can also be held liable if they are "necessary cooperators" with management. ACPO prosecutors indicated that article 290 PC is frequently applied, but no statistics are available.

171. Pursuant to older provisions in article 395 PC, it is also an offence to falsify a "mercantile document". The penalties for such falsifications range from 6 months to 2 years of imprisonment. Article 310 PC punishes more generally individuals that being obliged to keep accounting books and records

63 Regulation 1606/2002(EC) of 19 July 2002, art. 4.

according to tax law, perform certain activities such as double accounting, recording non-existing operations, or non-recording existing operations etc. The penalty is 5 to 7 months of imprisonment.

### *c) Money laundering*

172. Article 301 PC, as amended in 2003, adopts an "all crimes" approach to defining predicate offences. A previous reference to serious crimes was deleted. All of the foreign bribery offences are now accordingly predicate offences under art. 301. Penalties for money laundering include prison terms of six months to six years, fines of up to three times the value of the laundered assets, as well as exclusions from public office or from certain activities. Money laundering in Spain applies both to intentional acts and to gross negligence (art. 301(3) PC). The issue of coverage of self-laundering (i.e. laundering by the same person who committed the predicate offence) appears to have been addressed in a few cases, but not clearly resolved. The money laundering offence expressly applies to predicate offences committed wholly or partly abroad.

173. SEPBLAC representatives indicated that it has received STRs where present or former foreign public officials or their family members were identified although STRs generally do not identify a predicate offence. From 2002 to September 2005, SEPBLAC had received 17 STRs involving such foreign public officials or related persons. Four were transmitted to the ACPO, one to a central investigating magistrate, one to the national police, eight were closed due to lack of evidence of suspicions and three remain under investigation.[64] The Spanish authorities have not supplied information about the status of these cases. Statistics regarding money laundering prosecutions and convictions do not appear in the SEPBLAC annual report. SEPBLAC indicated that it does not receive feedback about the outcome with regard to STRs it transmits.

## E. RECOMMENDATIONS

174. The Working Group notes Spain's recent efforts to prepare legislation with regard to the criminal liability of legal persons and appropriate sanctions, and encourages Spain to proceed as promptly as possible to prepare and adopt legislation in this regard. The Working Group also recognises the introduction in 2003 of certain possible accessory sanctions for legal persons. The Working Group notes, however, with significant concern, that as of the time of the on-site visit and as of the date of this report, Spain had not yet established full criminal or administrative liability of legal persons for the bribery of foreign public officials. The Working Group will evaluate the regime of liability and sanctions for legal persons for foreign bribery once it is adopted and once there has been sufficient practice.

175. Based on its findings regarding Spain's implementation of the Convention and the Revised Recommendation, the Working Group also (i) makes the following recommendations to Spain under part I; and (ii) will follow up the issues in part II when there is sufficient relevant practice.

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64 Overall the 2004 report notes that 204 cases were transferred to the ACPO and over 1 000 to the police (National Police and Civil Guard).

## Part I. Recommendations

***Recommendations for ensuring effective prevention and detection of the bribery of foreign public officials***

176. With respect to awareness raising and prevention-related activities to promote the implementation of the Convention and the Revised Recommendation, the Working Group recommends that Spain:

a) take additional measures, including further training, to raise the level of awareness of the foreign bribery offence within the public administration and among those agencies that interact with Spanish companies active in foreign markets, including trade promotion, export credit and development aid agencies and ensure that declarations required from applicants for support from CESCE provide for an undertaking that applies to bribery by persons acting on behalf of the applicant and/or exporter (Revised Recommendation, Paragraph I);

b) take action to improve awareness among business organisations and companies of the legislation regarding foreign bribery and of the intention to enforce it, including promoting better coordination between Ministries and agencies responsible for legal and economic affairs for purposes of producing explanatory materials relating to foreign bribery (Revised Recommendation, Paragraph I);

c) work with the accounting, auditing and legal professions to raise awareness of the foreign bribery offence and its status as a predicate offence for money laundering, and encourage those professions to develop specific training on foreign bribery in the framework of their professional education and training systems (Revised Recommendation, Paragraph I).

177. With respect to the detection and reporting of the offence of bribing a foreign public official and related offences to the competent authorities, the Working Group recommends that Spain:

a) issue regular guidance to staff in Spanish embassies and commercial offices concerning the steps that should be taken where credible allegations arise, in the foreign press or elsewhere, that a Spanish company or individual has engaged in foreign bribery, and take measures to ensure the effective transmission of suspicions to prosecutors in Spain (Revised Recommendation, Paragraph I);

b) facilitate the reporting of suspicions of foreign bribery to prosecutors, including by clarifying and publicizing the effect of art. 262 LECrim and considering steps to better protect from retaliatory action employees who make reports in good faith (Revised Recommendation, Paragraph I);

c) continue to improve the applicable measures to require auditors to report all suspicions of bribery by any employee or agent of the company to management and, as appropriate, to corporate monitoring bodies, and consider more effective measures than art. 262 LECrim to require auditors, in the face of inaction after appropriate disclosure within the company, to report all such suspicions to the competent law enforcement authorities (Revised Recommendation, Paragraph V.B);

d) modify and expand the treatment of politically exposed persons (PEPs) in the current money laundering prevention guidelines for credit institutions and in other relevant guidelines as appropriate, and ensure that the money laundering authorities have adequate resources to carry out their expanded duties effectively (Revised Recommendation, Paragraph I).

***Recommendations for ensuring effective investigation and prosecution of offences of bribery of foreign public officials and related offences***

178. With respect to the investigation and prosecution of foreign bribery and related offences, the Working Group recommends that Spain:

a) implement the decision of the Spanish authorities to attribute to the Anti-Corruption Prosecution Office (ACPO) the power to investigate and prosecute all foreign bribery cases other than minor cases without the need for a case-specific determination of special significance by the Attorney General of Spain (FGE), take additional measures to ensure that all significant foreign bribery allegations are investigated and continue to provide the necessary resources to investigators and prosecutors (Convention, Article 5; Revised Recommendation, Paragraph 1);

b) reconsider the rule requiring that the suspect be informed during the initial investigation of foreign bribery allegations in light of its likely interference with the effectiveness of the investigation (Convention, Article 5; Revised Recommendation, Paragraph 1);

c) take appropriate measures, such as increasing the applicable sanctions, to ensure that the statute of limitations applicable to all foreign bribery offences extends for an adequate period of time for the investigation and prosecution of the offence (Convention, Art. 6);

d) clarify the law in order to remove uncertainty about whether foreign bribery cases are subject to trial by jury (Convention, Articles 5, 6; Revised Recommendation, Paragraph 1);

e) take appropriate measures to improve the collection and dissemination of statistical information relevant to evaluating the fight against foreign bribery (Revised Recommendation, Paragraph I)

179. With respect to the offence of foreign bribery, the Working Group recommends that Spain:

a) amend the law to ensure that the foreign bribery offences do not require recourse to foreign law for their application (Convention, Art. 1);

b) take all necessary action to ensure that the following would constitute the basis for a foreign bribery offence: (i) all bribes to a foreign public official to affect the official's exercise of discretion; (ii) all bribes for an act or omission in relation to performance of official duties, regardless of whether it is offered to the official "in the exercise of his/her post"; and (iii) all bribes for acts or omissions in accordance with the official's duties other than small facilitation payments (Convention, Art. 1);

c) clarify the definition of foreign public official and that art. 427 PC does not apply to the foreign bribery offences, and ensure that the law applies to bribes to foreign public officials composed of non-pecuniary benefits (Convention, Art. 1).

180. With respect to the liability of legal persons for foreign bribery, the Working Group recommends that Spain:

a) amend the law to ensure that all legal persons can be held directly liable for bribery of foreign public officials (Convention Art. 2);

b) exclude requirements of individual liability as a prerequisite for the liability of the legal person (Convention Art. 2).

181. With respect to sanctions for foreign bribery, the Working Group recommends that Spain:

a) increase the criminal sanctions applicable to foreign bribery in order (i) to provide for effective, proportional and dissuasive sanctions in all cases, including in particular for bribery to obtain a favourable exercise of discretion; and (ii) to ensure that effective mutual legal assistance and extradition are not excluded by the level of applicable sanctions in any foreign bribery case (Convention, Art. 3(1));

b) consider whether to increase available sanctions for foreign bribery cases involving significant amounts of money in order to achieve sanctions proportional to those for similar economic crime cases (Convention, Art. 3);

c) eliminate mandatory reductions of sanctions for foreign bribery (i) in cases of solicitation; and (ii) in cases where the foreign public official does not carry out the unjust act (Convention, Art. 3(1));

d) amend the law to provide that legal persons shall be subject to effective, proportional and dissuasive sanctions for foreign bribery, including fines or monetary sanctions (Convention Art. 2, 3);

e) take practical measures to improve the flow of information to the authorities responsible for the administrative sanctions systems, in particular from the judicial authorities (Convention, Art. 3).

182. With respect to related accounting/auditing, money laundering and tax offences and obligations, the Working Group recommends that Spain take appropriate measures to make explicit the prohibition of the deduction for tax purposes of bribes paid to foreign public officials, incorporate training with regard to foreign bribery and its tax treatment into the training plan for tax inspectors, and consider adapting existing Spanish translations of the OECD Handbook for Tax Examiners for use in Spain (Revised Recommendation, Paragraphs I, IV);

**Part II. Follow-up by the Working Group**

183. The Working Group will follow up on the issues below, as practice develops, in order to assess:

a) the existence of territorial jurisdiction over foreign bribery cases committed partially in Spanish territory, and the interpretation of the notion of the "aggrieved party" in nationality jurisdiction cases (Convention, Art. 4);

b) the role of the FGE with regard to the prosecution of foreign bribery cases, including the impact of the rule requiring that the FGE grant extensions for prosecutorial investigations that last more than six months (Convention, Art. 5; Revised Recommendation, Paragraph I);

c) seizure and confiscation in foreign bribery cases, including any possible limiting effect of art. 431 PC (Convention, Art. 3).

## ANNEX 1 – LIST OF PARTICIPANTS IN THE ON-SITE VISIT

### MINISTRIES AND STATE ORGANS

Ministry of Economy and Finance – Tax Department
Ministry of Economy and Finance – General Directorate for the Treasury and Financial Policy
Ministry of Economy and Finance - General Directorate for State Assets, Secretariat of the Consultative Board for Administrative Contracts
Ministry of Foreign Affairs and Cooperation
Ministry of Industry, Tourism and Commerce – General Secretariat for International Trade
Ministry of Industry, Tourism and Commerce – General Directorate for Trade and Investment
Ministry of Industry, Tourism and Commerce – National Contact Point (OECD Guidelines for Multinational Enterprises)
Ministry of the Interior
Ministry of Justice – Technical General Secretariat
Ministry of Justice – Deputy Direction General of International Judicial Cooperation
Ministry of Justice – Deputy Direction General for Justice Matters Before the EU and International Organisations
Ministry of Public Administration
Members of Parliament
Ombudsman

Bank of Spain
National Tax Agency (AEAT)
Basque region tax administration
National Stockmarket Commission (CNMV)
Spanish export credit agency (CESCE)
Spanish Company for Development Finance (COFIDES)
Spanish Institute for Foreign Commerce (ICEX)
Court of Audit
Accounting and Auditing Institute (ICAC)
Andalucía region, Administrative Contracts Service
Spanish Agency for International Cooperation (AECI)
Official Credit Institute (ICO)
Galicia export and investment promotion agency (IGAPE)
Madrid region Investment Promotion Office (PromoMadrid)

### LAW ENFORCEMENT AND JUDICIAL AUTHORITIES

State Prosecution Service
Special Attorney General's Office for the Repression of Economic Offences Related with Corruption
Prosecutors
Public Defender

Spanish General Council of the Judiciary (CGPJ)
Investigative judge, Madrid Local Court
Judges from Supreme Court, Madrid Provincial Court and Madrid Local Court

Financial Intelligence Unit (SEPBLAC)
Civil Guard
National police
Regional police (Catalonia, Basque region)

**ACCOUNTING AND AUDITING BODIES**

Senior Council of the Official College of the Mercantile Professions (Consejo Superior de Colegios Oficiales de Titulados Mercantiles)
Spanish Association for Accounting and Business Administration (AECA)
Large audit firms

**PRIVATE SECTOR AND CIVIL SOCIETY**

Major corporations (telecommunications, utilities, energy, construction)
Small companies (energy, export contract consulting and intermediation)
Superior Council of Chambers of Commerce
Federation of Spanish Chambers of Commerce in Latin America (FECECA)
International Chamber of Commerce
Exporters and Investors Club
Spanish Association of Publishers Guilds
Trade unions

Major banks
Spanish Bankers' Association
Spanish Confederation of Credit Unions

Transparency International Spain
José Ortega y Gasset Foundation
Intermon Oxfam
Corporate Social Responsibility Observatory
Law professors
Law firms
Spanish Bar Association
Press (national daily newspapers and national business daily newspaper)

## ANNEX 2 – EVALUATORS FOR SPAIN PHASE 2 REVIEW

| LEAD EXAMINERS | |
|---|---|
| **CHILE -- Lead Examiners** | **MEXICO -- Lead Examiners** |
| **Mr. Manuel BRITO**<br>Legal Adviser<br>Ministry of Finance<br><br>**Mr. Hernán FERNÁNDEZ**<br>Under Director of the Specialized Unit of Civil Servants Crimes and Public Probity of the Public Prosecutor of the Public Ministry<br><br>**Ms. Mirna OLMOS**<br>Legal Adviser,<br>Ministry of Justice<br><br>**Mrs. Alejandra QUEZADA**<br>Public international law specialist,<br>Legal Division,<br>Ministry of Foreign Affairs | **Ms. Laura Edith GARCÍA ALCALDE**<br>Agent for the Federal Prosecution Service<br>General Office for Extradition and Judicial Assistance<br>General Prosecutors Office<br><br>**C.P. Marco GONZÁLEZ TEJEDA**<br>[Titular] of the Unit for Government Audit,<br>Public Service Secretariat<br><br>**C.P. José Alberto ORTÚZAR CÁRCOVA**<br>Administrator of International Tax Audits,<br>Tax Administration Service,<br>Secretariat for the Economy and Public Finance |

| OECD SECRETARIAT | |
|---|---|
| **Mr. Patrick MOULETTE**<br>Head of the Anti-Corruption Division<br>Directorate for Financial and Enterprise Affairs<br><br>**Ms. Sandrine HANNEDOUCHE-LERIC**<br>Administrator – Legal Expert<br>Anti-Corruption Division<br>Directorate for Financial and Enterprise Affairs | **Mr. David GAUKRODGER**<br>Coordinator of the Spain Phase 2 Examination<br>Principal Administrator – Senior Legal Expert<br>Anti-Corruption Division<br>Directorate for Financial and Enterprise Affairs |

## ANNEX 3 – PRINCIPAL ABBREVIATIONS

| Abbreviation | Spanish | English |
|---|---|---|
| ACPO | | Special Attorney General's Office for the Repression of Economic Offences Related with Corruption |
| AECI | Agencia Española para la Cooperación Internacional | Spanish Agency for International Cooperation |
| CC | | Commercial Code |
| CESCE | Compañía Española de Seguros de Crédito a la Exportación, S.A. | Spanish export credit agency |
| CGPJ | Consejo General del Poder Judicial | Spanish General Council of the Judiciary |
| CNMV | Comisión Nacional del Mercado de Valores | National Stockmarket Commission |
| COFIDES | | Spanish Company for Development Finance |
| CSR | | Corporate social responsibility |
| ECG | | OECD Export Credit Group |
| EOMF | Estatuto Orgánico del Ministerio Fiscal | Law 50/1981, of 30 December 1981, adopting the Organic Statute of the State Prosecution Service |
| FGE | Fiscal General del Estado | State Attorney General |
| GRECO | | Group of States Against Corruption, Council of Europe |
| ICAC | Instituto de Contabilidad y de Auditoría de Cuentas | Accounting and Auditing Institute |
| ICEX | Instituto Español de Comercio Exterior | Spanish Institute for Foreign Commerce |
| LECrim | Ley de Enjuiciamiento Criminal | Criminal Procedure Law |
| LOPJ | Ley Orgánica del Poder Judicial | Organic Act of the Judicial Power |
| MITC | | Ministry of Industry, Tourism and Commerce |
| MLA | | Mutual legal assistance |

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| PC | Código penal | Penal Code |
| SEPBLAC | | Executive Service of the Commission for the Prevention of Money Laundering and Financial Offences (Financial Intelligence Unit) |
| SPS | Ministerio fiscal | State Prosecution Service |
| STC | Sentencia del Tribunal Constitucional | Sentence of the Constitutional Court |
| STS | Sentencia del Tribunal Supremo | Sentence of the Supreme Court |
| STR | | Suspicious transaction report |

## ANNEX 4 – EXCERPTS FROM RELEVANT LEGISLATION

### *1. Penal Code [Código penal (PC)]*

**Article 31**

1. Whoever acts as a "de facto" or "de jure" manager of a legal person, or who acts on behalf of or as a legal or voluntary representative of another, will have to answer personally, even though he may not have the conditions, qualities or relations that the corresponding crime or misdemeanour requires to be the active subject of same, if these circumstances exist in the entity or person on whose behalf or under whose representation he acts.

2. In these cases, should the crime perpetrator be given a fine by sentence, the legal person in whose name or on whose behalf he or she acted will be responsible for the payment of the same in a joint and several manner.

**Article 127**

1. Penalties imposed for a culpable crime or misdemeanour will bring with them the loss of the effects coming from it and the instruments used to commit it, as well as the profits coming from the crime whatever the transformations they may have suffered. These effects, instruments and profits will be seized, except when they belong to a bona fide third party, who is not responsible for the crime, and who has legally acquired them.

2. If for some reason it is not possible to seize the assets referred to in the preceding paragraph, seizure of assets of equivalent value belonging to those criminally responsible for the offence shall be ordered.

3. The judge or tribunal can order the seizure provided for in the preceding paragraphs of this article even where no sanction is imposed on a person because he/she is exempt from criminal liability or because such liability has lapsed, in this latter case, provided that the illicit nature of the assets is proven.

4. Effects and instruments seized will be sold if their trade is legal, and their product will be used to cover the civil responsibilities of the sentenced person. If their trade is illegal, they will be dealt with according to regulations and if no regulations apply, they will be destroyed.

**Article 129**

1. Without prejudice to article 31, in the cases envisaged in this Code, after a hearing with the public prosecutor, the owners of the undertaking or their legal representatives, the Judge or Court may, in a reasoned decision, order the following consequences:

    a) Temporary or permanent shutdown of the undertaking, its premises or establishments. Temporary shutdowns may last no more than five years.

    b) Dissolution of the company, association or foundation.

    c) Suspension of the business of the company, undertaking, foundation or association for a term of no more than five years.

    d) Prohibition against conducting future business, commercial operations or dealings of the sort in whose exercise the offence was committed, aided or concealed. This prohibition may be temporary or permanent. If it is temporary, the term of prohibition may last no more than five years.

e) Placement of the undertaking in receivership in order to safeguard the rights of employees or creditors for the necessary time, not to exceed a maximum of five years.

2. The temporary shutdown in 1.a) and the suspension indicated in 1.c) above may also be ordered by the Investigating Judge during processing of the charges.

3. The accessory consequences called for in this article are oriented towards the prevention of the continuation of the criminal activity and the effects thereof.

**Article 131**

1. Crimes reach their limitation period:

After twenty years when the maximum penalty provided for the crime is imprisonment of fifteen or more years.

After fifteen years, when the maximum penalty provided by law is disqualification for more than ten years, or imprisonment for more than ten and less than fifteen years.

After ten years, when the maximum penalty provided by law is imprisonment or disqualification for more than five years and less than ten years.

After five years, when the maximum penalty provided by law is imprisonment or disqualification for more than three years and not more than five years.

After three years, for the remaining less serious crimes. […]

**Article 132**

3. The limitations period is interrupted, and the time passed shall be without effect, when the proceedings are directed against the guilty party [*culpable*], and the limitations period shall begin to run again once the proceedings are paralyzed or when they terminate without a conviction.

**Article 419**

The authority or public official who for his own benefit or that of a third party, requests or receives, by himself or through an intermediary, a gift or present or accepts an offer or promise for him/her to carry out in the exercise of his/her duty an action or omission constituting a crime, will be punished with imprisonment for a period of between two and six years, a fine ranging from the value to triple the value of the gift and specific disqualification from any public employment or post for a period of between seven and twelve years, without prejudice to the penalty corresponding to the crime perpetrated due to the gift or promise.

**Article 420**

The authority or public official who for his/her own benefit or that of a third party, requests or receives, by himself or through an intermediary, a gift or present for him to execute an unjust act not constituting a crime, related with the exercise of his/her duty, and does execute it, will be punished with imprisonment for an amount of time ranging from one to four years and specific disqualification from any public employment or post for a period of six to nine years. If he/she does not execute the act, the penalty will be imprisonment for a period of between one and two years and specific disqualification from any public employment or post for a period of three to six years. In both cases, a fine will also be imposed, ranging from the value to triple the value of the gift.

**Article 421**

When the gift requested, received or promised is aimed at preventing an authority or public official from fulfilling an action which he/she has to carry out in the exercise of his duty, the penalties will be a fine from the value to double the value of the gift and specific disqualification from any public employment or post for a period of between one and three years.

**Article 423**

1. Any person who corrupts or endeavours to corrupt, authorities or public officials with gifts, presents, offers or promises, will be punished with the same penalties of imprisonment and fine as the authorities or public officials in question.

2. Those who accept the requests of authorities or public officials will be punished with the penalty inferior in degree to the one established in the precedent paragraph.

**Article 425**

1. The authority or public official who requests a gift or present or accepts an offer or a promise to carry out a characteristic action of his duty or as a reward for an action already carried out, will be punished with a fine ranging from the value to triple the value of the gift and suspension from his/her public employment or post for a period from six months to three years.

2. In the case of reward for an action already carried out, if this action constitutes a crime there will also be imposed the penalty of imprisonment from one to three years, a fine of six to ten months and specific disqualification from any public employment or post for a period from ten to fifteen years.

**Article 426**

The authority or public official who receives a gift or present that is offered to him in consideration of his position, or is offered to him/her in order that he fulfils an act not forbidden by law, will be punished with a fine from three to six months.

**Article 427**

The individual who consents occasionally to the request of a gift or present made by an authority or public official, and who reports this fact to that authority which has the duty to make enquiries, before the commencement of any corresponding procedure, will be exempt from punishment, provided that no more than ten days have passed since the date of the facts.

**Article 445**

1. Whoever that, through presents, gifts, offers or promises, bribes or tries to bribe, whether directly or through intermediaries, authorities or public officials whether foreign or from international organizations in the exercise of their post to the advantage of them or of a third party, or complies with their demands in respect to this, in order that they act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business, will be punished with the penalties set forth in Article 423 in each respective case.

2. Should the guilty person belong to a corporation, organisation or association, including those of a provisional nature, dedicated to carry out these activities, the judge or court shall be able to impose some of the consequences set forth in Article 129 of this Code.

*2. Criminal Procedure Law [Ley de Enjuiciamiento Criminal (LECrim)]*

**Article 262**

Those who by reason of their charge, office or profession receive notice of a public crime shall be obliged to immediately report it to the public prosecutor, the competent tribunal, the investigating magistrate and, in their absence, to the municipal employee or police officer closest to the site, in the case of a [flagrant crime].

Those who do not fulfil this obligation will incur the fine set forth in article 259 [25 to 250 pesetas], which shall be imposed in disciplinary proceedings. [...] If the person who omitted to report is a public official, the matter shall be reported to his/her immediate superior for imposition of the appropriate administrative measures. [...]

*3. Organic Statute of the Public Prosecution Service [Estatuto Orgánico del Ministerio Fiscal (EOMF)]*

**Article 5**

The public prosecutor may receive complaints, forwarding them to the judicial authority or decreeing the case closed when the public prosecutor finds no grounds for taking any action whatsoever, in which latter case the public prosecutor shall notify the complainant of this decision.

Likewise, in order to shed light upon the facts appearing in the submitted complaint or testimony, the public prosecutor may carry out or order any proceedings the public prosecutor is empowered to order under the Criminal Procedure Law, which proceedings cannot entail precautionary measures or measures restricting rights. Nevertheless, the public prosecutor may order preventive detention.

All proceedings performed by the Public Prosecution Service or carried out under its management shall be presumed to be vested with authenticity.

The principles of contradiction, proportionality and defence shall inspire the conduct of such proceedings.

To that end, the public prosecutor shall take a statement from the suspect, who must be attended by counsel and may peruse the contents of the proceedings thus far. The length of proceedings must be proportionate to the nature of the event under investigation and may be no longer than six months, save when extended under a Decree with reasons from the Attorney General of Spain. After the proper time, should the investigation reveal evidence of facts of criminal significance, then, regardless of the status of the proceedings, the public prosecutor shall proceed to bring the affair to court by formulating for that purpose the proper complaint or charge, save should it prove to be in order to close the affair.

The public prosecutor may also lodge pre-procedural proceedings aimed at facilitating the exercise of the other functions attributed by law to the public prosecutor.

**Article 18 bis**

1. The Special Public Prosecution Office for the Prevention and Eradication of Illegal Drug Trafficking shall exercise the following functions: […]

    d) To investigate the economic and asset situation, as well as the financial and commercial operations of all manner of persons who exhibit signs of performing or participating in acts of illegal drug trafficking or belonging to or aiding organisations trafficking in illegal drugs. It may demand such information as it deems necessary from Public Administrations, other entities, corporations and private persons. […]

**Article 18 ter**

The Special Public Prosecution Office for the Repression of Economic Crimes Related with Corruption shall carry out the proceedings referred to in article 5 hereof and shall participate directly in criminal proceedings judged by the Attorney General of Spain to have special significance in relationship with: […]

b) Crimes of breach of trust. […]

e) Fraud and extortion.

f) Crimes of political favour-peddling.

g) Crimes of bribery. […]

j) Crimes connected with the above crimes.

For smooth operation, it shall be assigned a Special Unit of Judicial Police and as many professionals and experts as necessary to aid it on a permanent or temporary basis. […]

### *4. Organic Act of the Judicial Power [Ley Orgánica del Poder Judicial (LOPJ)]*

**Article 23**

1. In the penal area, the Spanish jurisdiction shall hear cases for crimes and misdemeanours committed in Spanish territory or committed aboard Spanish airlines or ships, without prejudice to the provisions contained in international treaties to which Spain is party.

2. Likewise, Spanish jurisdiction will take cognizance of the acts defined in the Spanish penal laws as crimes, although they may have been committed outside the Spanish territory, provided that the people criminally liable are Spanish or foreigners who have acquired Spanish nationality after the perpetration of the act and provided the following requirements are fulfilled:

   a) that the act is punishable in the place where it is carried out, except when by virtue of an international Treaty or a rule of an international organization to which Spain is a Party this requirement is not necessary;

   b) that either the aggrieved party or the Public Prosecutor makes a complaint before the Spanish Courts; […]

**Article 65**

The Criminal Division of the Audiencia Nacional (National Court) will hear:

1. Legal proceedings conducted for any of the following offences unless they are to be heard in first instance at the Central Criminal Courts: […]

   e) Offences perpetrated outside the national territory of Spain when according to statutory provisions or international treaties, they are to be heard at the Spanish courts.

In any event, the Criminal Division of the National Court will extend the scope of its jurisdiction to all related offences arising from the perpetration of any of the aforementioned criminal acts.

*5. Tax provisions*

**Tax Inspectors Regulation (*Reglamento General de Inspección de los Tributos*)**

**Article 7.4**

2. The Tax Audit Office shall report to the judicial authorities, the public prosecutor or the pertinent competent authority, any facts of which it becomes aware during the performance of its proceedings and which may constitute a crime, offence or administrative infringement directly or indirectly damaging public finances. As well, the Tax Audit Office will provide the competent judicial authority with any requested data during the prosecution of such crimes, offences or administrative infringements.

*6. Law on Contracts with the Public Administrations (Ley de Contratos de las Administraciones Públicas)*

**Article 20 - Prohibitions to enter into contracts**

Under no event, the persons who are under the following circumstances may enter into contracts with Public Administrations:

If they have been convicted by final sentence for any of the following offences, forgery, embezzlement, counterfeiting, bribing public officers, misappropriation of public funds, insider trading, disclosure of official secrets, use of privileged information, offences against the Public Revenue and the Social Security, offences against the rights of workers or the market or the consumers. The prohibition to enter into contracts applies also to legal persons in the event that their current administrators or directors holding such office are in under any of the aforementioned situations for actions perpetrated in the name of or on behalf of said legal persons or when the conditions, qualifications or relations concur in connection with the nature of the offence to consider that they are the material authors of such offence.