



PHASE 2 REPORT ON IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION IN COLOMBIA

October 2015

This Phase 2 Report on Colombia by the OECD Working Group on Bribery evaluates and makes recommendations on Colombia's implementation of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 2009 Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions. It was adopted by the Working Group on 16 October 2015.

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EXECUTIVE SUMMARY

The Phase 2 Report on Colombia by the OECD Working Group on Bribery evaluates and makes recommendations on Colombia's implementation of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and related instruments. While Colombia has made sincere efforts to implement the Convention, including through recent legislative amendments, the Working Group is concerned that Colombia has yet to satisfactorily address several key Phase 1 recommendations relating to Colombia's foreign bribery offence, liability of legal persons, and sanctions against legal persons.

The Working Group is particularly concerned about persisting shortcomings in Colombia's corporate liability regime, particularly concerning the lack of liability of publicly-traded companies, financial institutions, and non-profit entities, and the necessity of establishing the responsibility of a natural person, in practice, to effectively enforce the foreign bribery offence against a legal person. Sanctions against legal persons are also – at their current level –insufficiently effective, proportionate and dissuasive. The Working Group welcomes the draft legislation Colombia currently has before Parliament that would potentially address many of these deficiencies (as well as other Phase 1 issues, such as those relating to Colombia's foreign bribery offence). However, at the time of this Phase 2 Report, the Bill under consideration was not yet adopted.

In addition to the issues noted above, the Working Group also has doubts relating to the investigation and adjudication of foreign bribery cases. The Working Group is concerned about the large number of agencies with potential competence for foreign bribery investigations, which may result in confusion or fragmentation of enforcement efforts, as well as the lack of specialised expertise among judges, investigators and prosecutors. Colombia's enforcement capabilities with respect to legal persons also raise concerns as the Superintendency of Corporations may not have at its disposal all the investigative powers necessary to autonomously conduct investigations into foreign bribery. The Phase 2 Report also recommends that Colombia enhance its ability to detect foreign bribery by including the notion of politically exposed persons in its anti-money laundering framework and providing adequate protection to both public and private sector whistleblowers.

The Report also highlights a number of positive aspects in Colombia's fight against foreign bribery. With respect to tax-related matters, Colombia has been active in raising awareness among businesses and providing training to tax examiners and auditors on the detection of foreign bribery. Furthermore, recent amendments to the Tax Statute explicitly prohibit the tax-deductibility of bribes and allow for the sharing of tax information with law enforcement authorities both domestically and abroad. The Working Group welcomes Colombia's intention to establish similar mechanisms to facilitate the sharing of information between the tax authorities and the Superintendency of Corporations. The Working Group also commends Colombia for the high priority given to responding to requests for mutual legal assistance (MLA) by other countries and the quality of its MLA system.

The Report, which reflects findings of experts from Luxembourg and Mexico, was adopted by the Working Group along with recommendations. The Report is based on the laws, regulations and other materials supplied by Colombia, and information obtained by the evaluation team during its on-site visit to Bogotá. During the five-day on-site visit in January 2015, the evaluation team met with representatives of Colombian government agencies, the private sector, civil society and the media. Colombia will report to the Working Group within one year on the status of Bill 159 of 2013, as well as steps taken to implement key recommendations. Pursuant to regular Phase 2 procedures, Colombia will provide a further report on all recommendations in writing within two years, which will be made publicly available.

A. INTRODUCTION

1. This Phase 2 report is conducted by the OECD Working Group on Bribery in International Business Transactions (the Working Group). It evaluates Colombia's enforcement of its legislation implementing the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the Convention) and compliance with the 2009 Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions (the 2009 Recommendation). It reflects Colombia's written responses to the general and supplementary Phase 2 questionnaires, interviews with experts during the on-site visit in Colombia in January 2015, and a review of relevant legislation and independent analyses conducted by the lead examiners and the Secretariat.

1. On-site visit

2. The Phase 2 on-site visit to Colombia was undertaken by a team from the Working Group from 19–23 January 2015 in Bogotá. The purpose of the on-site visit, which was conducted pursuant to the procedure for the Phase 2 self- and mutual evaluation of the implementation of the Convention and the 2009 Recommendation, was to study the structures in place in Colombia to enforce the laws and regulations implementing the Convention and to assess their application in practice.¹

3. The evaluation team was composed of lead examiners from Luxembourg and Mexico and representatives of the OECD Secretariat.² During the on-site visit, meetings were held with officials from the Colombian government (and related bodies) and representatives from civil society, business associations, companies, the legal profession, the judiciary, and Parliament.³ The evaluation team appreciated the high level of co-operation received from the Colombian authorities at all stages of the Phase 2 process, including the detailed responses to the written questionnaires, the provision of translated legislation and other pertinent documentation (both prior to and after the on-site visit), and the organisation and coordination of the on-site visit, which ran very smoothly. The examination team is additionally grateful to all participants met during the on-site visit for their co-operation and openness during the course of discussions.

2. General observations

a. Political and legal framework

4. The Republic of Colombia is a unitary republic comprised of 32 departments and one capital district. The 32 departments are further broken down into municipalities, districts and provinces.

¹ The [Phase 1 Report on Colombia](#) was adopted by the Working Group on Bribery on 14 December 2012. The purpose of the Phase 1 examination was to assess whether Colombia's laws complied with the legal standards set by the Convention. The issues raised by the Working Group in Phase 1 are followed up in the context of the Phase 2 examination.

² Luxembourg was represented by: Mr. Laurent Thyges, Government Attaché, Ministry of Justice; Ms. Sophie Hoffmann, Commissaire Principal, Judicial Police. Mexico was represented by: Ms. María Fernanda Cánovas, Director for Anticorruption and Transparency, Attorney General's Office; Ms. Azyadeh Bravo, Deputy Administrator for International Relations and Cooperation, Tax Administration Service. The OECD Secretariat was represented by: Ms. France Chain, Co-ordinator of the Phase 2 Examination of Colombia, Senior Legal Analyst, Anti-Corruption Division; Ms. Catherine Marty, Policy Analyst, Anti-Corruption Division; Ms. Kathleen Kao, Policy Analyst, Anti-Corruption Division.

³ See [Annex 1](#) for a full list of participants.

Colombia's system of governance remains highly decentralised – fiscally, administratively and politically – a strategy that was initially conceived to improve access to social services, more fairly allocate public goods, and increase political accountability. Colombia's Constitution and the electoral process confer substantial political legitimacy on the various departments and subdivisions. Some literature suggests that Colombia's regionalism may pose some impediments to the replication and implementation of national policies on a local level.⁴

5. The Government of Colombia is separated into the executive, legislative and judicial branches. Representatives of the people are elected through direct vote. The Colombian legal system is based on civil law tradition, influenced by the Spanish and French civil codes. The Constitution is the source and origin of all Colombian laws and overrides them all. Since its independence from Spain in 1810, Colombia has had a number of constitutions. The Constitution of 1886 established the present-day unitary republic. The 1991 Constitution is the latest in a long series of constitutional reforms. Also known as “the Constitution of Rights”, the 1991 Constitution modernised and democratised the old electoral system (including through the decentralisation of the political process), as well as recognised certain liberties and rights, such as freedom of religion and freedom of expression. The 1991 Constitution also recognises the pre-eminence of human rights, the division of powers and the representative system.

6. The Head of State is the President, elected through a popular vote every four years. As Chief of State, the President oversees the executive branch of government and is responsible for establishing national macroeconomic policies and signing treaties. In addition to administrative powers, the chief executive also possesses considerable legislative authority. The President may, pursuant to certain specific legal requirements, promulgate decrees with the force of law (called “decree-laws”, or *decreto-leyes*).

7. Legislative authority is also vested in a bicameral Congress, consisting of the Senate (*Senado*), with 102 members, and the House of Representatives (*Cámara de Representantes*), with 166 members. Both houses of Congress have joint responsibility for initiating, amending, interpreting, and repealing legislation. Members of Congress are elected from the territorial departments and national territories on a proportional basis. Congress has the ability to block proposals introduced by the executive. When this occurs, the policy issue may sometimes be resolved by a summit-style meeting among government officials, the President and leaders of key political or congressional factions or interest groups opposing the legislation. According to Colombia, this process occurs informally, but has no legal basis in the law.

8. The Judiciary consists of a Constitutional Court, the Supreme Court, the Council of State, the Superior Council of the Judicature⁵ and district, superior, circuit, municipal, and lower courts. The Supreme Court is organised into three chambers: civil, criminal and labour. Constitutional issues are within the purview of the Constitutional Court. The Supreme Court's constitutional mandate grants it the authority

⁴ See Ramirez, Juan, “Decentralization in Colombia: Searching for Social Equity in a Bumpy Economic Geography”, Fedesarrollo, Working Paper No.62 (2014); see also Escobar-Lemmon, Maria, “Does Decentralization Improve Perceptions of Accountability? Attitudinal Evidence from Colombia”, American Journal of Political Science, Vol.58, Issue 1 (July 2013).

⁵ According to the authorities, a constitutional reform was passed in June 2015 that replaces the Superior Council of the Judicature with the following organs: (1) the Administrative Chamber is replaced by a Judicial Government Council, formed by the presidents of the Constitutional Court, Supreme Court of Justice, and State Council, one representative of magistrates and judges, one representative of judicial employees, three experts and the Manager of the Judicial Branch; (2) the Disciplinary Chamber is replaced by a National Commission of Judicial Discipline, which is composed by the same number of magistrates, but four of them will be chosen from within the judicial branch rather than lists from the President with implications for the Higher Judiciary Council (see article 178-A of the Constitution).

to try public officials for misconduct or violation of the laws and to deal with legal matters concerning foreign governments.

b. Economic background

9. Colombia is Latin America's third largest economy, recently surpassing Argentina and trailing Brazil and Mexico. Once labelled a "nearly failed state", Colombia is now hailed as Latin America's rising star, boasting one of the most stable growing markets in the region.⁶ With a drastically improved security situation and significant economic reforms, Colombia has also overtaken Peru to become the region's fastest growing economy.⁷ Colombia's human development indicator places it in the "high human development" category⁸, while it ranks as an upper middle income economy based on gross national income.⁹ Real growth rates in GDP over the five year period ending in 2013 averaged a vigorous 4.2% per year. This strong performance stems in part from an increasingly solid monetary, fiscal and financial framework, as well as from increased political stability. Bilateral free trade agreements and unilateral measures have continued to reduce barriers to trade and investment. Strong growth also has been driven by an oil and mining boom, by foreign direct investment (FDI) in the commodity sector and by broad-based investment.¹⁰

10. Colombia's economy has close trade and investment ties with the global economy. Trade averaged 36.2% of GDP over the period of 2011–2013. In 2013, the top five destinations for Colombia's exports were (in descending order): the United States, the EU, China, Panama and India. Colombia's main exports included petroleum (with crude petroleum accounting for 42% of exports and refined petroleum for 7.3%), coal, emeralds, coffee, nickel, flowers and textiles. Travel and transportation were the important sectors for services exports.¹¹ Colombia depends heavily on energy and mining exports (oil exports alone accounting for approximately 40% of export revenue).¹² Colombia is the world's fourth largest coal exporter and Latin America's fourth largest oil producer.¹³

11. The rapid growth of Colombia's outward FDI in recent years is in line with a more general trend in Latin American and Caribbean countries.¹⁴ Colombia's outward FDI has established it as an important source of investment flows in Central and South America. In 2013, the main recipients of Colombia's

⁶ See "Colombia: a rediscovered country", Financial Times (June 2013); see also "Latin America's Surprise Economic Star", The Financialist (March 2014); see also "Colombia: Latin America's rising star", World Finance (July 2013).

⁷ "Latin American economies: Passing the baton", The Economist (August 2014).

⁸ See the UN Development Programme's table on the [Human Development Index](#) (HDI), where Colombia ranks 98th out of 187 economies in 2013. The HDI is an index of average achievement three areas: 1) longevity and health; 2) access to education; and 3) standard of living.

⁹ See <http://data.worldbank.org/country/colombia>.

¹⁰ Real growth rates and associated analysis are taken from the [OECD Economic Survey of Colombia](#), January 2015.

¹¹ WTO [Trade Profiles – WTO Statistics Database. Colombia](#) (September 2014).

¹² Oil sector is Colombia's biggest economic concern -finance minister, Reuters (June 2014).

¹³ CIA World Factbook: Colombia.

¹⁴ [OECD Investment Policy Reviews: Colombia 2012](#).

outbound FDI were: Panama, USD 3.201 billion (41.8%), Bermuda, USD 769 million (10.1%), Spain, USD 718 million (9.4%), Chile, USD 680 million (8.9%), and Peru, USD 634 million (8.3%).¹⁵

12. In 2013, the principal sectors of Colombian outbound FDI were: financial and business services (48.5%), extractives (oil, mining and quarrying) (19.5%), manufacturing (19%), and electricity, gas and water (8.3%).¹⁶ Growth in outward FDI has been robust: Colombia's outward FDI stocks rose by a cumulative 65% over the 2010 to 2013 period.¹⁷ In mergers and acquisitions, key sectors for outward investment were banking, oil and gas, and food industries.¹⁸ In the petroleum sector, a central government-owned state-owned enterprise (SOE) – the largest firm in Colombia – has made major foreign investments. Colombian financial institutions have also expanded rapidly abroad. Colombian banking groups now account for over half of banking system assets in El Salvador and over 20 per cent in Panama, Nicaragua and Honduras.¹⁹

13. Most Colombian multinational enterprises are *translatinas* (Latin American multinational enterprises that are spearheading economic integration in the region).²⁰ SOEs play an important role in the Colombian economy. The number of Colombian central government-owned SOEs totals about 70 wholly and partly state-owned companies, organised mostly as either statutory corporations or stock companies. Colombia also has numerous SOEs at the regional and municipal levels with variable governance and managerial capacities. Only three SOEs, one in petroleum and two in electrical power, are listed on the Colombian stock exchange, but represent an important percentage of total market share. The Colombian government has an average 80% stake in each of these three SOEs.²¹

3. Overview of corruption trends and recent measures

a. Corruption overview

14. Historically, Colombia has witnessed pervasive corruption, in state institutions, through the influence of the drug trade and due to internal conflict.²² Local government, in particular, has been one of the “lesser-known victims” of Colombia's decades old conflict.²³ Decentralisation had unintended consequences, including making local governments more attractive economic targets for illegal actors, strengthening political ties between politicians and paramilitary organisations, and increasing corruption in

¹⁵ Information provided by Colombia.

¹⁶ Information provided by Colombia.

¹⁷ World Investment Report 2014 [Country Fact Sheet: Colombia](#). Colombia's outward FDI stocks in millions of US dollars were: 23, 653 (2010), 31, 957 (2011), 31,351 (2012) and 39,003 (2013).

¹⁸ [UNCTAD World Investment Report 2014](#).

¹⁹ Analysis presented in the IMF Article 4 Consultation: Staff Report for Colombia (May 2014).

²⁰ [OECD Investment Policy Reviews: Colombia 2012](#).

²¹ Lehuedé, H. (2013), “Colombian SOEs: A Review Against the OECD Guidelines on Corporate Governance of State-owned Enterprises”, OECD Corporate Governance Working Papers, No. 12, OECD Publishing (at <http://dx.doi.org/10.1787/5k3v1ts5s4f6-en>).

²² Understanding the causes of Colombia's conflict: Weak, corrupt state institutions, The Open University UK: Colombia Reports (2015). See also Colombia: Overview of corruption and anti-corruption, U4 Expert Answer (2013) and Garay-Salamanca, Luis, [Drug Trafficking, Corruption and States: How Illicit Networks Shaped Institutions in Guatemala, Colombia and Mexico](#) (2015).

²³ “Cutting the links between crime and local politics” (2011), International Crisis Group.

municipalities.²⁴ Colombia's experience with bribery has been chiefly domestic: largely in the context of corruption among high-level public officials in central and regional administrations.²⁵ The issue of corruption has recently come to the forefront of Colombia's political agenda. The Santos administration, elected in 2010, brought a new focus to the fight against corruption, including the enactment of the Anti-Corruption Statute in 2011 (Law 1474 of 2011) reforming the Penal Code (PC) and the Criminal Procedure Code (CPC) in a number of areas. The 2011 Anti-Corruption Statute also introduced liability of legal persons for foreign bribery and created several new bodies to improve the fight against corruption.

15. Despite these improvements, however, Colombia is still perceived as facing significant corruption problems. Colombia's ranking in Transparency International's Corruption Perception Index (CPI)²⁶ has consistently worsened in the last decade. From 2002 to 2011 (after which the CPI's methodology was changed), the country went from a ranking of 57th to 80th. The 2014 Corruption Perception Index places Colombia in 94th position, with a score of 37 (up one point since 2012 and 2013). According to Transparency International, Colombia still faces "structural corruption challenges", including "the collusion of the public and private sectors, clientelism and policy capture by organized crime, lack of state control and weak service delivery in remote areas of the country, and the inefficiency of the criminal justice system".²⁷ According to the "Americas Barometer 2013" published by the Latin American Public Opinion Project, the perception of corruption in Colombia reached 81.7%, its highest level since the study was first carried out in 2004. The World Bank Global Competitiveness Report for 2013-14 lists corruption as the most problematic factor for doing business in Colombia.²⁸ Similarly, the 2014 Survey of Colombian Companies' Anti-Bribery Practices found that 91% of businesspeople believed their peers offered bribes and that 58% of companies lacked mechanisms for reporting cases of bribery.

16. Further, Transparency International has noted that although the swift development of extractives industries in the country has boosted the economy, "the lack of adequate regulation and accountability mechanisms is a cause for concern".²⁹ The ten principal companies in Colombia accounting for approximately 80% of total market capitalisation at the Colombian Stock Exchange are concentrated in the oil and gas industry and the financial sector.³⁰ Fuel and mining products accounted for 67.9% of Colombia's exports in 2013.³¹ The extractives sector – a labour-intensive industry, involving high-value commodities – has long been viewed as being particularly vulnerable to corruption at all stages of the value chain, especially with respect to facilitation payments, the difficulty of performing due diligence on local contractors, and the business climate in resource-dependent countries where the industry typically flourishes. The OECD Foreign Bribery Report analysing data generated from all completed enforcement actions since the entry into force of the Convention estimates that 19% of foreign bribery cases concluded

²⁴ See *supra* note 22.

²⁵ See e.g., Grand Corruption in Colombia's 'Parapolitics', Tufts University New Routes Journal, No. 3 (2009) (available at: <http://fletcher.tufts.edu/News-and-Media/2009/09/16/Grand-Corruption-in-Colombias-Parapolitics>), noting that bribery and corruption in Colombia often also involves narcotics traffickers, guerrillas and paramilitaries.

²⁶ The Transparency International Corruption Perception Index ranks countries according to their perceived level of corruption in the public sector. For more information: www.transparency.org/research/cpi.

²⁷ Transparency International, Colombia: Overview of Corruption and Anti-Corruption, U4 Expert Answer (March 2013).

²⁸ World Bank Competitiveness Report 2013-14, p.158.

²⁹ Transparency International, Colombia: Overview of Corruption and Anti-Corruption, U4 Expert Answer (March 2013).

³⁰ *Supra*, note 26.

³¹ WTO [Trade Profiles – WTO Statistics Database. Colombia](#) (September 2014).

to date occur in the extractives industry. Colombian companies, increasingly active in the non-renewable sector abroad, are also increasingly exposed to risks of foreign bribery and corruption. Recognising this increased risk factor, Colombia is taking part in the Extractive Industries Transparency Initiative.³²

b. Implementation of the Convention and legislative developments

17. In the Colombian legal tradition, treaties must be approved by Congress by way of legislation. Once adopted, such legislation may then be signed by the President of the Republic, who then submits it to the Constitutional Court for judicial review. Colombia's implementing legislation ratifying the Convention was adopted by Congress on 19 June 2012, signed by the President and published in the Official Gazette on 2 August 2012, and upheld by the Constitutional Court on 14 November 2012.

18. Since the Phase 1 review in 2012, legislative developments have taken place that may potentially impact Colombia's implementation of the Convention. On 31 October 2014, Bill 159 of 2014 was introduced before Congress by the Ministry of Justice. Bill 159 proposes a number of legislative amendments, including changes to, *inter alia*, the foreign bribery offence, the rules on the liability of legal persons, sanctions, and investigative procedure. At the time of the on-site visit, Bill 159, including the additional changes, was anticipated to be adopted by June 2015. The individual provisions of Bill 159 are discussed in more detail in the relevant sections below. Due to delays, however, the Colombian authorities indicated that the Bill would not be adopted before the end of 2015.

c. Cases involving the bribery of foreign public officials

19. To date, no allegations have surfaced concerning bribery by Colombian nationals of foreign public officials. Hence, no investigations have been initiated in Colombia into offences falling directly under the Convention.

20. However, four allegations of foreign bribery involving the bribery of Colombian officials by companies or nationals of other Parties to the Convention are currently under investigation either in Colombia, for domestic bribery or related offences, and/or in the foreign jurisdictions.³³ These cases are not described in detail as they do not involve active bribery by Colombian companies, but may be referred to in the body of the report where relevant to the topic (for instance, in the section C.1.g on mutual legal

³² The Extractive Industries Transparency Initiative (EITI) is a global Standard to promote open and accountable management of natural resources. It seeks to strengthen government and company systems, inform public debate, and enhance trust. In each implementing country it is supported by a coalition of governments, companies and civil society. See www.eiti.org/eiti.

³³ These cases concern:

- (1) Allegations of bribery involving six current and former officials of Colombia's state-owned oil company by a company registered in a country not Party to the Convention with offices in a State Party in exchange for an award of multiple contracts. Co-operation through MLA with the other State Party is ongoing, and charges have been laid in Colombia.
- (2) Allegations of bribe payments to regional Colombian officials to exercise their discretion in granting permits and in awarding a lucrative mining contract. The company (from another State Party) has been charged with breach of contract. A number of investigative steps (including providing information to the other State Party) have been taken by Colombian authorities.
- (3) Alleged bribery of an official or officials in the Colombian navy by a company from another State Party for the sale of equipment. Colombia opened an investigation into this allegation, but subsequently closed it due to lack of evidence. Investigative steps included seeking MLA from the other State Party involved.
- (4) Allegations of bribery of an indigenous community by a mining company from another State Party. A formal investigation by the Constitutional Court is ongoing, but no charges have been laid. Under Colombian law, the individual involved would not be considered a public official, but this determination has not yet been made by the other State Party.

assistance). Out of these four allegations, one is the subject of an ongoing investigation, in the course of which mutual legal assistance (MLA) has been provided to the other State Party involved, and public officials as well as former employees of the Colombian company have been charged in Colombia (*Case #1 – Oil company case*); one is under investigation, with sanctions already imposed at the disciplinary level on Colombian public officials (*Case #2 – Coal mining company case*); one has been the subject of an outbound MLA request but does not appear to have resulted in further investigative steps (*Case #3 – Engineering company case*); and one has resulted in no procedural steps to date (*Case #4 – Exploration company case*)

Commentary

The lead examiners appreciate that Colombia has taken steps to investigate the passive bribery of its officials and has shown a good level of cooperation with other State Parties. Lead examiners encourage Colombia to also take steps to proactively detect instances of foreign bribery involving Colombian companies. As discussed in greater detail later in this Report, the lead examiners suggest that further efforts could be made to enhance detection of cases falling under the Convention – for instance by protecting private and public sector whistleblowers, and improving detection through Colombia’s anti-money laundering regime – and to increase training of relevant stakeholders.

B. AWARENESS, PREVENTION AND DETECTION OF FOREIGN BRIBERY

1. General efforts to raise awareness

21. Section III of the 2009 Recommendation lists the development of awareness-raising initiatives in the public and private sector for the purpose of detecting foreign bribery as one area that each Member country should “take concrete and meaningful steps in conformity with its jurisdictional and other basic legal principles to examine”.

a. Government initiatives

22. The Government of Colombia has adopted a whole of government approach to anti-corruption, one of the priority areas identified by President Santos’ administration. On 12 July 2011, Colombia enacted the Anti-Corruption Statute (Law 1474 of 2011) establishing new rules on a broad spectrum of issues, including, transnational bribery, liability of legal persons, whistleblowing duties of auditors, new investigative techniques to fight transnational crimes, and sanctions related to public contracting. The Anti-Corruption Statute also originally laid out the Presidential Program (later modified by subsequent Decrees) for Modernization, Efficiency, Transparency and the Fight against Corruption,³⁴ which includes, *inter alia*:

- The implementation of the Government Policy in the fight against corruption, based on the Constitution and the National Development Plan (see below);

³⁴ This programme was replaced by the Secretariat for Transparency established by way of Decree 4637 of 2011, amended by Decree 1649 of 2014.

- The implementation of preventive guidelines, mechanisms and tools for institutional strengthening, citizen participation, social control, accountability, access to information, and the culture of integrity and transparency;
- The implementation of the commitments made by Colombia in the international instruments to fight corruption;
- Inter-agency coordination of the different branches of power and controlling bodies on the national and local level;
- Strategic actions between the public and the private sector in the fight against corruption; and,
- The direct reversal of any administrative act for the award of a government contract where there are serious grounds to infer that, during the pre-contractual procedure serious crime or disciplinary offense may have taken place.

23. The Colombian comprehensive anti-corruption framework is complemented by the National Strategy for the Integral Public Anti-Corruption Policy (CONPES 167 of 2013). The central objective of CONPES 167 of 2013 is to strengthen the tools and mechanisms for prevention, investigation and sanctioning in the fight against corruption in both public and private sectors. The instrument contains an Action Plan consisting of 110 actions to be carried out and five core strategies: (i) improving the access and quality of public information to prevent corruption; (ii) improving public management tools to prevent corruption; (iii) increasing the incidence of social control in the fight against corruption; (iv) promoting integrity and a culture of legality in the State and society; and, (v) reducing impunity for acts of corruption. None of the Action Plan's 110 actions appear to be specific to foreign bribery, although one mentions the Convention and asks for the modification of Colombia's corporate liability regime following OECD standards.

24. The National Development Plan (NDP) presents the plan for growth and improvement in the country. The NDP for 2014-18, entitled "All for a New Country" (*Todos por un Nuevo País*), contains a testament of "unwavering solidarity" with the private sector to "fight public and private corruption in its various forms". The latest NDP addresses the subject of "transnational corruption" in the chapters on good governance, which also cover issues such as accountability and transparency. Overall, the emphasis appears to be largely on domestic corruption and not foreign bribery, which is largely understandable in light of the current domestic corruption focus in Colombia. The only mention of foreign bribery in the 2014-18 NDP is a statement that Colombia shall cooperate with the Working Group by providing "permanent, comprehensive assistance to monitor corruption cases with a high national or regional impact".

25. A number of bodies are involved in the fight against corruption in Colombia. The Secretariat of Transparency is perhaps the most important agency in the government's efforts in raising awareness and providing training on foreign bribery. The Secretariat of Transparency has been the primary institution responsible for designing, coordinating and implementing policies related to transparency and anti-corruption, and has drafted, for instance, the current Bill 159 before Congress. The 2011 Anti-Corruption Statute also created several other bodies dedicated to anti-corruption. The National and Regional Moralisation Commissions are responsible for the co-ordination of government-wide anti-corruption policies. The Regional Commissions are particularly important for articulating national anti-corruption policies on a departmental level in each of the local authorities. The Commissions ensure compliance with the Anti-Corruption Statute, coordinate and implement joint actions to fight corruption at national and sub-national levels, and engage with public and private entities for the exchange of good practices. On 20 January 2015, the National Moralisation Commission introduced an Action Plan for the next few years covering all of Colombia's international commitments, including under the Convention. This Action Plan applies to all state entities. The Anti-Corruption Statute also established the National Citizens Commission

for the Fight against Corruption (NCCFC), comprised of representatives of business associations, NGOs, academia, and media, for the purpose of monitoring government policies, programs and actions aimed at the prevention, control and punishment of corruption. The NCCFC evaluates government policies and provides recommendations in annually prepared reports.

(i) *Within the government and public agencies*

26. Despite its holistic approach to foreign bribery, Colombia's efforts to raise the awareness of its public officials (particularly those dealing with Colombian enterprises operating abroad) on the issue of foreign bribery and its detection have been limited. The Secretariat of Transparency presented information on two trainings – one in March 2013 more broadly on corruption with a session on foreign bribery and another in December 2014 specifically on foreign bribery – to public and private sector representatives, as well as a training in June 2014 targeting Colombian tax officials.³⁵ Public officials were represented from the Attorney General's Office, tax and customs officials, representatives from the Superintendency of Corporations and Superintendency of Finance and investigators and prosecutors. Representatives from the Prosecutor General's Office (*Fiscalía General de la Nación*, or PGO) at the on-site visit described only a general training conducted by experts from other countries in the region and the United States on investigative techniques not specific to foreign bribery. Following the on-site visit, Colombia provided information on two additional awareness-raising events on 13 and 18 August 2015, one focusing specifically on foreign bribery and liability of legal persons, and the other on corruption investigations more generally with speakers from the World Bank and other Latin American countries. Investigators, prosecutors, and officials from the Superintendencies, among others, were in attendance at the latter; the list of participants in the former was not communicated. The Secretariat of Transparency admitted that Colombia does not have the resources to train all public prosecutors on the subject. Judges noted that they had received no training on foreign bribery. The Economic and Financial Police, the *Policía Económico Financiera* (PEF), had, however, received training on foreign bribery. No other awareness-raising or training activities specific to foreign bribery have taken place, although the Ministry of Foreign Affairs disseminated a circular on the Convention among its officials on 24 September 2015.

27. After the on-site visit, Colombian authorities informed the evaluation team that Colombia had secured support from the UK Prosperity Fund to send in the fall of 2015 a delegation of high-ranking Colombian officials to the UK for a one-week training on foreign bribery. In November 2015, officials from the Superintendencies are also expected to receive training through this project.

Foreign diplomatic missions

28. Foreign diplomatic missions are able to play a critical role in raising awareness of foreign bribery as they are uniquely situated to provide support to companies facing bribe solicitations, or other forms of corruption, while operating abroad. To date, Colombia has not conducted any training or awareness-raising of Colombian diplomatic staff, either at home or overseas, although the Ministry of Foreign Affairs indicated at the on-site visit it intends to conduct such activities in the future. The Colombian National Contact Point (NCP) reported having held events with Ministry of Foreign Affairs to promote the OECD Guidelines for Multinational Enterprises (MNE Guidelines) to Colombian Embassies, but it is not clear whether foreign bribery was specifically addressed (see below for a detailed discussion on the MNE Guidelines and the NCP). After the on-site visit, Colombian authorities indicated that the Ministry of Foreign Affairs had formally requested that mention of the Convention be included in the manual training officials who will serve in the Colombian diplomatic missions and consular offices abroad. A Circular was,

³⁵ Following the on-site visit, the Secretariat created a new link on its website providing information on the training of companies, investigators, prosecutors and other public sector officials on foreign bribery: <http://www.secretariatransparencia.gov.co/estrategias/Paginas/socializacion-y-entrenamiento-ocde.aspx>.

however, circulated to Ministry of Foreign Affairs officials in all embassies on 24 September 2015 highlighting key features of the Convention's implementation in Colombian law, and recalling reporting obligations and channels for embassy officials where they suspect an incidence of foreign bribery.

(ii) *Within the private sector*

29. The majority of Colombia's foreign bribery awareness-raising efforts have been focused on the Colombian private sector. In March 2012, Colombia conducted a "Latin-American seminar against transnational corruption" at which the Anti-Corruption Division of the OECD was invited to speak on the Convention. This seminar also covered topics such as liability of legal persons and asset recovery. Similarly, in July 2012, Colombia co-organised with the National Business Association of Colombia (ANDI) another technical seminar on the Convention and changes in domestic legislation for Colombian businesses, at which the OECD also spoke. In February 2013, Colombia held a regional event, jointly organised with OAS and the OECD, for fighting corruption in the private sector. Again, in September 2014, Colombia organised several seminars with ANDI and OAS to promote awareness of the Convention. Colombia has also developed a project to encourage good practices in compliance and anti-corruption within the private sector. After the on-site visit, Colombia reported that in February 2015, Colombia launched a "Pro Ethics Records" project for Colombian companies. The launch included a special session on the Convention and foreign bribery. Colombia additionally reported that in June 2015, Colombia conducted an awareness-raising campaign in different regions of Colombia to companies, including SMEs.

30. Colombia adhered to the OECD Declaration on International Investment and Multinational Enterprises in December 2011, and created a NCP for the MNE Guidelines in June 2012. The Colombian NCP is located in the Ministry of Trade, Industry and Tourism under direct supervision of the Vice-Minister of Trade and the Director of Foreign Investment and Services. The NCP's responsibilities include promoting the MNE Guidelines among all stakeholders, including government agencies, private companies, NGOs, trade unions and academia. Since June 2012, the Colombia NCP has participated in 52 events organised by an external stakeholder and 36 events organised by either the NCP itself or another government agency. With the help of ANDI, the NCP has presented the MNE Guidelines before more than 300 representatives of companies from a number of sectors, including non-renewables. The NCP does not have its own webpage, but is featured on the Ministry of Trade's website, which has posted the MNE Guidelines in English and Spanish. Additionally, the NCP printed the Guidelines in Spanish, an information booklet on the Guidelines, and two brochures – one for the private sector and one for labour unions and civil society organisations – summarising the MNE Guidelines and explaining how to file a specific instance before the NCP. During the on-site visit, the NCP admitted that it does not specifically promote awareness of foreign bribery, which is addressed only in the context of the MNE Guidelines Chapter VII on Combating Bribery, Bribe Solicitation and Extortion. The NCP essentially addresses the issue of bribery with respect to the importance of conducting due diligence to identify and mitigate the risk of bribery along various points in the value chain.

31. An additional private sector initiative for the prevention of bribery and corruption includes the project by the Secretariat of Transparency to develop a Register of Enterprises Active in Compliance and Anti-Corruption. The register of enterprises would include "a set of international ethical standards, transparency in the private sector, training of employees, collective action and measures to regulate the relationship between the private sector and the State". The register aims to promote good corporate practices in compliance and corruption prevention and generate a set of standards that can be aligned with the mitigating factors listed in Bill 159 on the responsibility of legal persons. During the on-site, Colombian authorities confirmed that the register will address foreign bribery specifically, but was still in the development phase at the time of the on-site visit. After the on-site visit, Colombia informed the evaluation team that the register had begun to be implemented, following a launch in February 2015. At the

time of the drafting of the report, nine companies had registered and were in the process of formally accepting the terms of the Register.

32. Colombia also maintains permanent contact with several organisations of the civil society. Article 66 of the Anticorruption Statute established the National Citizens Committee for the Fight against Corruption (NCCFC), now one of the key civil society committees aimed at preventing corruption and fostering transparency. The NCCFC is comprised of a wide representation of private sector actors, including business associations, NGOs, universities, media, the National Planning Council and trade unions. The NCCFC is the body that represents Colombian citizens in the improvement of policies aimed at promoting ethical conduct and curbing corruption in both the public and private sectors. Colombia explained that the Secretariat of Transparency carries out a set of activities related to anticorruption policy formulation and implementation and awareness-raising in conjunction with the NCCFC. Among the issues that the NCCFC is intended to address is the OECD Convention against foreign bribery. During the on-site visit, the Chair of the NCCFC stated that to date, the Government of Colombia has carried out only a few activities on this subject with the NCCFC and that there is little public awareness on the issue. However, Colombia points out that all of the specific reports prepared by the NCCFC mention the issue of foreign bribery.

b. Private sector initiatives

(i) Business organisations

33. The three business organisations present at the on-site panel agreed that corruption is one of the primary areas of concern facing Colombian businesses operating abroad, particularly taking into consideration the nature of business conducted by many of these companies. For instance, one association stated frankly that corruption is certain to occur in oil and gas companies. Associations also observed that although large multinationals likely have adequate compliance programmes, they still suffer from a lack of transparency. Accordingly, Colombian business associations have been working to improve overall integrity and transparency in the operations of Colombian businesses.

34. ANDI reported that, along with the Secretariat for Transparency, starting in 2011, it has conducted several events to promote the awareness of the Convention among its members. ANDI also reported that in 2011, it generated a set of principles with the Convention as a starting point. However, it is not clear what these principles (intended to eventually form the basis of a pact to be signed by Colombian companies) entail and whether they have been widely distributed. ANDI also requires its members to adhere to a code of ethics. Although business associations appeared in agreement that Colombian companies are facing corrupt situations abroad, ANDI indicated that it had not received any such reports through its members.

35. The National Chamber of Services Companies (CAMPETROL), on the other hand, reported that – through an initiative carried out with Colombia’s state-owned oil company – it maintains a reporting channel for Colombian businesses, although to date no reports have been received. This initiative further included an anti-corruption and anti-bribery pact. CAMPETROL also described an event conducted jointly with the Secretariat de Transparency on the importance of ethics and compliance programmes.

36. Business organisations concurred that awareness of corruption risks and legal implications under Colombian law may be low among small- and medium-sized enterprises (SMEs). The membership base of both ANDI and CAMPETROL are primarily large multinationals, which have instituted strong internal controls to comply notably with the FCPA and UK Bribery Act. They conceded that Colombian SMEs probably do not generally have ethics and compliance programs in place to prevent and detect corruption and bribery. On-site panellists also widely acknowledged that the awareness of SMEs of anti-bribery laws

(both Colombian and international) is fairly low. However, none of the associations present at the on-site have targeted SMEs in their awareness-raising campaigns.

(ii) *Colombian companies*

37. Nine large Colombian companies, including six SOEs, with operations and exposure abroad attended the on-site visit. No SMEs were in attendance. As is generally the case with large multinationals, Colombian companies present at the on-site visit were aware of the foreign bribery offence under Colombian law, as well as their obligations and liability under foreign legislation such as the FCPA and the UK Bribery Act. However, they acknowledged that their level of awareness may not be reflective of the wider situation in Colombia (particularly with respect to SMEs). Transparency International pointed to the 2013 Survey of Colombian Companies' Anti-Bribery Practices that indicated that 79% of entrepreneurs were not aware of the Anti-Corruption Statute. Companies present on-site also showed good awareness of the corruption and bribery risks present in foreign operations, particularly with respect to certain high-risk sectors, such as the extractives industry. They generally appeared to have adequate corporate compliance programs and anti-corruption policies in place, although such programs appear to be due, in large part, to exposure to liability under the FCPA. Several companies also indicated that they require suppliers and contractors to sign anti-corruption clauses pledging to comply with ethical practices, including reporting instances of bribery or fraud. The companies also broadly agreed that the pacts and collective actions initiated by Colombian private sector and business associations have been beneficial, especially in educating smaller companies and improving the reputation of the oil and gas sector.

38. Several of the companies also indicated that they had carried out training and awareness-raising programs for their employees. Colombia's state-owned oil company reported that it had trained over 5,000 employees over the last five years. It further maps compliance risks by continuously monitoring its risk management and compliance programs. Several of the companies also indicated that they had hotlines in place for employees to report instances of corruption or wrongdoing. One of the companies indicated that it had received reports through the hotline, but not of bribe solicitation. Civil society panellists also appeared optimistic about the improvement in compliance culture among Colombian companies. Transparency International noted, for instance, that Colombian companies have begun to shift their compliance programs down their value chains to local suppliers and contractors. However, panellists equally noted that although progress is being made, much work remains to be done.

Commentary

While the lead examiners welcome recent anti-corruption initiatives undertaken by the Colombian government, they remain concerned about the insufficient number of initiatives specifically focusing on the foreign bribery offence. Lead examiners recommend Colombia to develop and implement more targeted training and awareness-raising for both the public and private sectors.

With respect to prevention and detection in the public sector, the lead examiners recommend that Colombia pursue more rigorous efforts to train relevant public sector officials, in particular those involved with Colombia companies operating abroad, such as, but not limited to, foreign diplomatic missions, on foreign bribery and how to detect it.

With respect to private sector initiatives, the lead examiners welcome recent efforts by the Secretariat of Transparency to raise awareness among Colombian companies and encourage the continuation of such activities. The lead examiners believe that further efforts are needed and recommend that Colombia develop awareness-raising and training targeting SMEs and companies operating in high-risk geographic regions and sensitive sectors.

2. Reporting foreign bribery and whistleblower protection

39. Section IX of the 2009 Recommendation asks Parties to have appropriate measures in place to facilitate reporting by public officials to law enforcement authorities of suspected acts of foreign bribery detected in the course of their work. It also recommends that Parties have in place appropriate measures to protect both private and public sector whistleblowers from discrimination or retaliation.

a. Duty to report crimes

40. In Colombia, public officials have a duty to report criminal acts. Under article 417 PC, a public servant who has “knowledge of the consummation of a criminal offence whose investigation must be taken forward ex officio, [and] does not report it to authority, liable [*sic*] shall incur a fine and loss of employment or public office”. Colombian law also contains a number of disciplinary sanctions for failure to report. Article 48 of the Single Disciplinary Code (Law 734 of 2002) for civil servants considers an omission, delay or obstruction of a report of wrongdoing grounds for removal from office and/or debarment from the exercise of public functions. Colombian public officials present on-site exhibited a high level of awareness of both their duty to report and potential penalties for failure to report. Discussions also confirmed that reports may be (and are) made both to law enforcement directly or initially to supervisors. The Inspector General of Colombia (*Procuraduría General de la Nación*) has received a large number of such reports from public officials (totalling 16,557, of which none have related to foreign bribery).

41. Colombian authorities explain that an anonymous tip may trigger criminal proceedings if it is accompanied by verifiable information. Under article 69 CPC, a report may be made verbally or in writing, but must contain a detailed account of the facts known to the reporter. Anonymous tips that do not provide concrete evidence or data to enable “research” will be precluded by the prosecutor. Colombian law does not provide for any formal channels through which foreign bribery, among other crimes, can be reported to the PGO or to the judicial police. However, during the on-site visit, Colombian public officials affirmed that any natural or legal person affected by the commission of a crime may present a formal complaint and that highly accessible reporting channel exists for complaints. Article 66 CPC requires the PGO to commence criminal proceedings ex officio, or when suspected offences are brought to its attention through reports (*denuncia*), special requests (*petición especial*), complaints (*querrela*) or any other means. Article 74 of the CPC defines the offences requiring a complaint (*querrela*), amongst which transnational bribery is not included.

42. Colombia reports that the general duty to report crimes originates with the Colombian Constitution (article 95, section 7). Article 67 of the CPC also places a general duty to report criminal activity on all people. The public may report crimes to the PGO through an online channel. To date, a total of 12,374 complaints about “wrongdoing” have been received through this channel. Complaints received online are not formally considered as complaints, but are still sent to a prosecutor who must then decide whether to open an investigation. Discussions with civil society panellists suggest, however, that in general, Colombian citizens may be reluctant to report corruption. Panellists stated that reporting is made difficult, for instance, in small municipalities where local politicians may be the ones involved in corrupt behaviour. Further, observations by panellists indicate that Colombia’s decentralisation is a significant factor in the low awareness of the general public of issues related to bribery and corruption. Panellists commented for instance, that in the territories, where internet access can be quite limited, people are likely to be unaware of even domestic anti-corruption initiatives undertaken by the Colombian government.

43. Although the situation has somewhat improved in recent years, reporting culture in Colombia is reportedly further impeded by the heightened security situation that has been a prominent feature of Colombian socio-political dynamics up until the very recent past. Civil society panellists explained that

whereas in some countries reporting may cost a whistleblower his job, in Colombia, it could cost him his life.³⁶ Civil society representatives noted that journalists have been targeted due to attempts to report official misconduct, human rights violations, organised crime and corruption and have been the subject of kidnapping, intimidation, investigations and coercive measures. Reporters without Borders and Freedom House have decried various attacks on journalists in recent years although in 2014, Freedom House deemed Colombia to be partly free, seeing improvement from 2013 to 2014 due to an ongoing peace process with one of Colombia's main rebel factions.³⁷

b. Whistleblower protection

44. Colombian law does not presently contain any specific whistleblower protection although the new Anti-Corruption statute now imposes whistleblowing obligations on public officials. Instead, Colombia relies essentially on its labour law which provides protection against retaliatory acts or unjust dismissal. In particular, the Work Harassment Law (Law 1010 of 2006), article 2, contains provisions prohibiting workplace harassment, described as “any conduct that is persistent and verifiable, exercised on an employee or worker on the part of the employer, manager or immediate superior in the company hierarchy, or a work companion or subordinate with the purpose of instilling fear, intimidation, terror and anguish, occupational detriment, generate discouragement at work or provoke the resignation of said worker”. It further goes on to categorise various types of harassment, such as abuse, persecution, labour obstruction and labour inequity. However, the history of Law 1010 reveals that it was adopted primarily to regulate the relationship between employers and employees in a wide context (such as creating a work environment free of discrimination and sexual harassment). Law 1010 does not establish criminal liability for harassment, but does envisage, *inter alia*, disciplinary sanctions up to dismissal if the perpetrator is a public official, fines, and reimbursement of any medical treatment. Further, Law 1010 specifically addresses retaliatory action only in the context of labour actions initiated due to workplace harassment; these guarantees are not applicable to terminations authorised by the Ministry of Labour or disciplinary sanctions by the Public Ministry or the Disciplinary Chambers of the Judiciary. In the public sector, the Single Disciplinary Code article 35 creates an additional, but vague, duty to “offer guarantees” to public officials who report or denounce anti-juridical acts or omissions of superiors or individuals who administer public funds or hold public office. The Disciplinary Code does not further elaborate what kinds of guarantees must be made, although public officials who fail to make such guarantees are subject to disciplinary action.

45. Civil society panellists agreed that the current legal framework does not provide adequate protection to whistleblowers. The overall view was that employers can retaliate against whistleblowers with impunity. The NCCFC expressed a similar view. It stated that, in general, employees will not blow the whistle due to a high perception of impunity and the lack of protection under Colombian law.

46. The concept of whistleblowing is still relatively new in Colombia. Participants at the on-site visit frequently confused whistleblower protection with witness protection provisions and requirements. However, Colombia appears to be considering the issue more seriously over recent years. Colombia reports that – in cooperation of the European Union – it is working on a comparative study of legislative

³⁶ See also e.g., “Drummond coal spill whistleblower receives death threats”, Colombia Reports (6 March 2013) (available at: <http://colombiareports.co/drummond-coal-spill-whistleblower-receives-death-threats/>).

³⁷ See Freedom House survey on Freedom of the Press: Colombia (2013) and “We will not be silenced”, a series of interviews by Reporters without Borders with Colombian journalists (at <http://en.rsf.org/colombia-we-are-not-going-to-be-silenced-09-02-2015.47566.html>) stating, “Reporting is a risky occupation in Colombia, especially for those covering corruption, organised crime or human rights violations. Colombia is the second deadliest country for journalists in the Americas: 56 were killed from January, 2000 to September, 2014”.

frameworks and experiences in whistleblower protection in similar legal contexts. This document is intended to advise Colombia in creating its own legal framework implementing whistleblower protections. At the time of drafting the report, work on the draft law was still in progress.

Commentary

Given the circumstances faced by whistleblowers and journalists reporting corruption, Colombia needs to develop protection for whistleblowers as a matter of urgency. The lead examiners welcome the first steps taken by Colombia to initiate legislative reform in this area, and encourage Colombia to adopt, as a matter of priority, measures to protect from retaliatory or disciplinary action private and public sector employees who report in good faith and on reasonable grounds suspected acts of foreign bribery.

3. Officially Supported Export Credits

47. Export credit agencies provide export financing in the form of credits (financial support) or credit insurance and guarantees to exporters, which – by the very nature of their business – operate abroad. Export credit agencies acting on behalf of a government can thus play a vital role in raising awareness of the Convention and detecting bribery of foreign public officials in international business transactions. The institution primarily responsible for providing officially supported export credits in Colombia is the Banco de Comercio Exterior de Colombia (Bancóldex), Colombia’s state-owned development bank. Bancóldex is an entrepreneurial development and import/export bank providing short, medium, and long-term financing and specialised financial products to support Colombian exports and other foreign trade-related activities. Incorporated as a mixed-capital corporation, Bancóldex operates under the same legal regime as private sector financial institutions. It plays a central economic policy role in promoting and supporting the activities of the country’s SMEs. Bancóldex is among the largest financial institutions in Colombia based on asset size and equity. In 2012, the top three sectors of Bancóldex’s loan portfolio were services (34%), financial services (20%), and oil, chemical and plastic (15%).³⁸ The bank is 99.7% owned by the Colombian government, with the remaining portion owned by the private sector.

48. Bancóldex is an invitee to the OECD Working Party on Export Credits and Credit Guarantees (ECG), which regularly surveys how adhering countries implement the 2006 Recommendation of the Council on Bribery and Officially Supported Export Credits (the 2006 Recommendation). Bancóldex’s responses to the ECG’s survey³⁹ on measures taken to combat bribery in officially supported export credits were most recently submitted in June 2014.

a. Detection of foreign bribery

49. Bancóldex has not taken any measures to deter bribery in international business transactions, as required by the 2006 Recommendation. As a second-tier bank, Bancóldex does not currently provide officially supported export credits by directly financing or disbursing credit to Colombian companies or entrepreneurs seeking export support. Rather, Bancóldex refinances loans for private financial institutions that have entered into loan or credit agreements with companies or entrepreneurs for overseas investment. The private financial institution thus operates as an intermediary between Bancóldex and the borrower. As Bancóldex has no direct involvement with the borrower, it “delegates” the responsibility of assessing the credit risk of a particular transaction to the financial institution. Accordingly, Bancóldex does not seek to verify that applicants or anyone acting on their behalf have not engaged, and will not engage, in foreign bribery. Nor does Bancóldex seek to acquire any background information on the applicant. Bancóldex

³⁸ http://www.bancoldex.com/portal_ingles/annual-report/Our_Bank_2012.aspx.

³⁹ See <http://www.oecd.org/tad/xcred/anti-bribery-survey.htm>.

indicated during on-site discussions that they assume this task will be undertaken by the financial intermediary, although Bancóldex does not require it expressly to carry out these tasks. Neither does Bancóldex raise the awareness of applicants of the foreign bribery offence or its legal consequences under Colombian law. It also did not appear from the on-site discussions that Bancóldex staff have received any training on detecting instances of foreign bribery committed by applicants. In its responses to the ECG survey, Bancóldex admitted that none of its internal policies or regulations mentions foreign bribery.

50. Bancóldex has in place two operational risk management schemes, which include risk assessments and “know your customer rules” under Bancóldex’s anti-money laundering (AML) obligations. Although one of the risk management schemes incorporates elements of the Anti-Corruption Statute (Law 1474) and anti-fraud regulations, neither addresses foreign bribery. Consequently, Bancóldex will conduct a risk assessment of the country of destination and perform due diligence on the financial intermediary, but does not perform much, if any, due diligence on the borrower in the context of export credit support. During the on-site visit, Bancóldex admitted that its due diligence is generally limited to checking the public registration list of companies ineligible for public contracting. Further due diligence, such as checking the debarment lists of International Financial Institutions or verifying the existence of appropriate compliance mechanisms or control systems to deter bribery is expected to be undertaken by the financial institution as the direct lender, although Bancóldex does not expressly require, nor routinely check, that such due diligence is performed. Bancóldex maintains that it has no legal grounds to “penetrate” the financial intermediary to access the relevant information of the borrower to conduct such due diligence itself. After the on-site Bancóldex clarified that it applies a general “know your customer” procedure (in the form of a check-list) to the beneficiaries of disbursements, but with the presumption that the financial institution is responsible for having “the full knowledge” of the beneficiary. However, Bancóldex representatives explained at the on-site visit that enhanced due diligence can take place at any stage in the loan transaction, including after credit has been extended, if suspicions of criminal activity arise. In instances where Bancóldex learns of a company’s criminal behaviour, it can either suspend disbursement of funds or request the return of funds from the financial broker. This has happened in the past although not with respect to foreign bribery.

51. Although Bancóldex does not currently have in place any policies or procedures related to detecting or deterring foreign bribery, it has indicated, both during the on-site discussions and in its answers to the ECG survey, that some measures, such as checking international debarment lists, which although not presently done, may be possible, particularly given its existing AML framework. Bancóldex further notes that it will consider the need to revise its policies on the subject.

52. Colombia maintains that Bancóldex’s risk management schemes are sufficient and constitute an important base to enable Bancóldex to identify specific international bribery risks. This assertion reveals a common misconception that foreign bribery risks are identical to fraud risks and that fraud prevention mechanisms can be successfully applied to foreign bribery.

b. Duty to report

53. As public officials, Bancóldex staff are subject to the reporting obligations articulated under article 417 PC. During the on-site visit, Bancóldex representatives confirmed that credible evidence of foreign bribery would be reported to investigative authorities, although no instances of foreign bribery have yet been detected by Bancóldex staff. None of Bancóldex’s internal procedures address the reporting of foreign bribery specifically, although Colombia admitted after the on-site that, in fact, no guidelines on the reporting of any crime exist. However, Bancóldex refers to its obligation to report criminal activity as stipulated in the Organic Statute of the Financial System, Decree-Law 663 of 1993 (*Estatuto Orgánico del Sistema Financiero*) sections 102-104. Pursuant to its AML requirements, Bancóldex has notified the appropriate law enforcement authorities and interrupted loan disbursement due to the discovery of criminal

activity, albeit thus far not any incidences of foreign bribery. Bancóldex also has in place an anonymous online reporting channel through which any staff or external stakeholder may report suspicions of irregular activity or misconduct. No information was received on the number of reports that have been received to date through this channel.

Commentary

With respect to export credits, the lead examiners acknowledge Bancóldex's willingness to adapt its internal policies to the 2006 Export Credit Recommendation. However, they are concerned about the absence of any mention of foreign bribery in Bancóldex's current regulations. Further, while they acknowledge that Bancóldex is a second tier bank, which does not directly engage with the exporter or applicant seeking export support, the lead examiners are not convinced that Bancóldex's present controls adequately safeguard against the risk of foreign bribery. The lead examiners therefore recommend that, to the extent that Bancóldex provides officially supported export credit, Colombia:

- (i) Require that Bancóldex institute appropriate measures (such as by adapting its internal policies and procedures) and adopt mechanisms to facilitate the detection of foreign bribery;*
- (ii) Insert express references to the foreign bribery offence and its legal consequences under Colombian law in Bancóldex's contracts and encourage exporters and/or applicants to develop, apply and document appropriate management control systems that combat bribery;*
- (iii) Raise awareness of the foreign bribery offence among Bancóldex staff as well as among applicants (i.e., the financial intermediary) requesting export credit support;*
- (iv) Train Bancóldex staff on (i) due diligence procedures to detect foreign bribery, and (ii) their obligation to report foreign bribery instances they may come across in the course of their work;*
- (v) Implement fully the provisions contained in the 2006 OECD Council Recommendation on Bribery and Officially Supported Export Credits, including by, for example: (i) requiring exporters and/or applicants to provide a declaration that they have not engaged in bribery in the transaction and to disclose whether they have been convicted of bribery in the preceding five years; (ii) checking whether exporters and/or applicants have are listed on International Financial Institutions' debarment lists; (iii) requiring exporters and/or applicants to disclose the identity of persons acting on their behalf in connection with the transaction and the amount and purpose of commissions and fees paid, or agreed to be paid; and (iv) undertaking due diligence if Bancóldex has reason to believe that bribery may be involved in a transaction.*

4. Official Development Assistance

54. Articles X and XI of the 2009 Recommendation provide that Parties should have appropriate anti-corruption provisions in aid-funded procurement and should consider internal controls, ethics, and compliance programmes or measures in their decisions to grant public advantages, including public subsidies, licences, public procurement contracts, contracts funded by official development assistance, and officially supported export credits.

55. Colombia⁴⁰ does not dispense international official development assistance (ODA), as defined⁴¹ by the OECD Development Assistance Committee. Since the 1970s, Colombia has participated in South-

⁴⁰ Colombia is in fact an ODA recipient. According to OECD statistics, Colombia received a total of USD 772 million in 2013.

South Cooperation (SSC) in Latin American and the Caribbean. SSC refers to the sharing of knowledge, skills and expertise between middle-income and developing countries with the aim of building capacity and advancing development. Colombia's aid consists entirely of technical cooperation (such as through knowledge-sharing or logistical assistance) and not funds. Under SSC, Colombia does not carry out projects in foreign countries although the Agencia de Cooperación Internacional de Colombia may at times contract with local service providers.

5. Tax authorities

56. Colombia's tax legislation appears to broadly conform with the requirements under the 2009 Anti-Bribery Recommendation and the 2009 Recommendation on Tax Measures for Further Combating Bribery of Foreign Public Officials in International Business Transactions (2009 Tax Recommendation). It effectively and explicitly disallows the tax-deductibility of bribes, and allows for domestic and international sharing of tax information with law enforcement authorities. In addition, Colombia has taken steps to raise awareness and provide training on the detection of foreign bribery by tax examiners and auditors.

a. Non-deductibility of bribes

57. Section VIII of the 2009 Anti-Bribery Recommendation urges the full and prompt implementation by Member countries of the 2009 Tax Recommendation, which recommends in particular "that Member countries and other Parties to the OECD Anti-Bribery Convention explicitly disallow the tax deductibility of bribes to foreign public officials, for all tax purposes in an effective manner."

58. At the time of the Phase 1 evaluation, Colombia's legislation did not explicitly disallow the deduction of bribe payments to foreign public officials. The Working Group therefore recommended that Colombia explicitly disallow, by law or any other binding means, the tax deductibility of bribes to foreign public officials, for all tax purposes. In 2012, Colombia amended article 107 of its Tax Statute (TS) to prohibit the tax deductibility of expenses from any criminal conduct (i.e. including bribery of foreign public officials). The new provision reads: "*In no event shall expenses from criminal conduct enshrined in the law as punishable offenses with intent be deductible. The tax administration may, notwithstanding any applicable sanctions, disregard any deduction that fails to comply with this prohibition.*"⁴²

59. Colombia explains that article 107 has been framed so as to allow the tax administration to independently assess whether an expense is related to the commission of a criminal offense for tax purposes, and consequently autonomously disregard the deduction. If the tax administration, following its independent assessment, has disregarded the deduction, it "shall send copies of the decision to disallow such a deduction to the authorities responsible for taking action in relation to the commission of criminal conduct", as provided in article 107. The tax administration's independent assessment may be subject to reversal by a court decision or as a result of the opening of proceedings, but only after it is determined "that the conduct that led the tax administration to disregard the deduction is not punishable". This presupposes an *a priori* and independent assessment by the tax administration that is not contingent on the opening of an investigation or of court proceedings.

⁴¹ The OECD Development Assistance Committee defines ODA as "flows to countries and territories on the DAC List of ODA Recipients and to multilateral institutions which are provided by official agencies [...] and each transaction of which is administered with the promotion of the economic development and welfare of developing countries as its main objective, and is concessional in character and conveys a grant element of at least 25 per cent (calculated at a rate of discount of 10%)."

⁴² Article 107 subsection, as added by article 158 of Law 1607 of 2012. See [Annex 3](#) for legislative excerpts.

60. In terms of reopening tax returns, Colombia explains that the tax administration may examine tax returns up to two years after the deadline for filing has expired. The statute of limitations is five years starting from the filing due date whenever, in the tax return, tax losses are declared or compensated. In the case of tax returns which have not been filed, or are deemed to not have been filed, the statute of limitations is extended to five years after the deadline for filing. Representatives of DIAN explained at the on-site visit that the opening of a criminal investigation, for instance for an alleged foreign bribery offence, would not justify reopening a tax return beyond the two or five year period.

Commentary

The lead examiners welcome the amendments made by Colombia to its Tax Statute to explicitly disallow the tax deductibility of expenses from any criminal conduct, including foreign bribery, thus bringing Colombia in compliance with requirements under the 2009 Tax Recommendation. They are nevertheless concerned that the two (or even five) year limitation period to reopen tax returns may be insufficient to allow tax authorities to effectively make a readjustment of taxes when criminal proceedings reveal a foreign bribery offence has occurred in a previously filed tax claim. They therefore recommend that Colombia extend the statutory time during which a tax return may be re-examined to determine whether bribes have been deducted.

b. Awareness, training and detection

61. Recommendation I(ii) of the 2009 Tax Recommendation asks member countries to assess whether adequate guidance is provided to taxpayers and tax authorities on the identification and detection of expenses that could be deemed to constitute bribes to foreign public officials.

62. Efforts to raise awareness on the non-tax deductibility of bribes have mostly targeted DIAN officials. In this respect, Colombian responses to the Phase 2 questionnaire as well as discussion on-site demonstrate that DIAN has turned its attention to the issue of prevention, as well as detection through the identification of possible red flags. In particular, DIAN officials from the Offices of Internal Control and of the Director-General training, as well as from the areas of auditing, internal organization, and disciplinary action, received training in July and December 2014 on the Convention and the 2009 Tax Recommendation. Such training brought together DIAN and other Colombian officials, and included a specific item on the non-tax deductibility of foreign bribe payments.

63. To enhance potential detection of bribery by DIAN auditors, the OECD Bribery and Corruption Awareness Handbook for Tax Examiners and Tax Auditors has been circulated within DIAN. In terms of identifying red flags for the detection of possible bribe payments, Colombian responses to the Phase 2 questionnaire, as well as discussions during the on-site with DIAN officials, demonstrated a good level of reflection on the issue. For instance, a number of categories of expenses are the subject of closer scrutiny as they would be relevant for purposes of identifying suspicious payments that could constitute bribe payments to a foreign public official, generally referred to as “foreign payments”. One of these categories contains the reported information which would correspond to deductible expenses for a taxpayer on the basis of payments made to persons outside of Colombia, and is filed monthly with DIAN. Colombia explains that payments made to foreign persons would usually be reported as deductible expenses in the income tax returns of taxpayers, and would therefore be traceable by tax authorities when comparing the information *vis a vis* tax withholding returns. In addition, certain large tax payers are required to file and identify certain categories of expenses and deductions that are being claimed, such as foreign production or operating costs, administrative operating expenses, sales operating expenses, etc. DIAN indicates that these categories may be examined to identify suspicious payments that could constitute bribe payments to a foreign public official.

Commentary

The lead examiners welcome the efforts undertaken by Colombia to raise awareness and provide training on the detection of foreign bribery to tax auditors. They encourage Colombia to seize future opportunities to raise awareness of the private sector on the non-tax deductibility of bribe payments as a consequence of the criminalisation of foreign bribery under Colombian law.

c. Sharing of information and duty to report foreign bribery

64. Recommendations I(iii) and II of the 2009 Tax Recommendation also asks member countries aim to facilitate detection and investigation of foreign bribery by asking countries to allow sharing of tax information with law enforcement authorities, both domestically and internationally.

(i) Sharing of tax information with domestic law enforcement authorities

65. Tax information is generally subject to confidentiality rules in Colombia, arising from the principle of personal intimacy enshrined in Article 15 of the Constitution. Regarding the confidentiality of tax information more specifically, article 583 of the Tax Code provides for a general rule of confidentiality: *“tax information regarding taxable bases and the self-assessment of taxes contained in tax returns shall be maintained as confidential information.”*

66. Nevertheless, tax confidentiality may be waived in the terms and circumstances prescribed by law. Article 10 of Law 1581 on the protection of personal data provides a general framework: *“Holder authorization will not be necessary when dealing with: a) Information required by a public or administrative entity within the exercise of its legal functions or by a judicial order.”*⁴³ This general waiver has been incorporated into specific legislation applicable to tax information held by DIAN, which defines the entities that have been legally conferred the right to request the disclosure of confidential tax information. These entities include the Prosecutor General’s Office (PGO), Colombia’s Financial Intelligence Unit (the UIAF), as well as a number of other local authorities (municipalities, social insurance and pension authorities, etc.). However, legislation does not allow for transmission of tax information to the Superintendency of Corporations (which is in charge of proceedings against legal persons for foreign bribery offences – see section C.3. below). DIAN officials at the on-site also could not cite to any such exception and stated that, in their view, confidential tax information could not be transmitted to the Superintendencies. Following the on-site visit, Colombia introduced an amendment to Bill 159 on 14 October 2015 which, if passed, would allow for the sharing of information between the tax authorities and the Superintendency of Corporations.

67. In addition to the possibility to waive confidentiality upon request, tax authorities are also under obligation in certain circumstances to spontaneously share tax information (including information about suspicious bribery transactions) with Colombian criminal law enforcement authorities. DIAN officials explained at the on-site visit that this reporting obligation stems firstly from the general reporting obligation incumbent on all Colombian public officials under article 417 PC (see section B.2 above). In addition, a specific obligation has been imposed on the tax administration since 2012 to automatically report to criminal law enforcement authorities any decision to disallow deduction of expenses from criminal conduct. Article 107 subsection of the TS provides that *“The tax administration shall send copies of the decision to disallow such a deduction to the authorities responsible for taking action in relation to the commission of criminal conduct.”*⁴⁴ Both of these provisions are interpreted by DIAN as an obligation

⁴³ Article of Law 1581 of 2012.

⁴⁴ Article 107 subsection, as added by article 158 of Law 1607 of 2012. See [Annex 3](#) for legislative excerpts.

to report information to criminal law enforcement authorities, and not to administrative law enforcement authorities and regulatory bodies such as the Superintendency of Corporations. DIAN officials explained on-site that, in practice, such reports would be channelled to the Legal Division of DIAN, which would verify the reports made by the officials and the evidence given. Once this has been verified, the Legal Division would forward the claim to the PGO, and file its own legal claim if tax offences were involved.

68. DIAN provided the following figures on the transmission of information from DIAN to the PGO between 1997 and 2014. None of the reports concerned suspicions of foreign bribery.

<i>Tax related crimes transmitted to PGO between 1997 and 2014</i>				<i>Other crimes transmitted to PGO between 1997 and 2014 (private and public document forgery, fraud, peculation, theft and larceny)</i>		
60 228				2 092		
Finalised Total: 43 669			Still pending	Finalised Total: 301		Still pending
4 278 criminal sanctions	30 152 payment agreements	9 239 terminated or ending in acquittal	16 659	4 criminal sanctions	297 terminated or ending in acquittal	1 791

69. With respect to domestic bribery involving DIAN officials, statistical information was also provided by the Agency of the Inspector-General of Taxation, Income and Parafiscal Contributions of Colombia (ITRC). The ITRC is an independent governmental agency responsible for conducting disciplinary investigations of corruption cases involving DIAN officials. According to the ITRC, since its creation in 2011, 1052 disciplinary cases have been opened involving DIAN officials, with 331 of these cases involving criminal conduct (59 domestic bribery related offenses). Forty of these 331 cases have already resulted in disciplinary verdicts. Within these 40 cases, disciplinary sanctions were imposed in 29 cases and 11 ended in acquittal; 2 of the 29 cases that concluded in disciplinary sanction involved the payment of bribes to domestic public servants. Information could not be made available concerning any ensuing criminal proceedings against the active bribers, as such statistics are not currently maintained by the ITRC.

(ii) *Sharing of tax information with law enforcement authorities abroad*

70. The 2009 Tax Recommendation I.(iii) asks countries to consider adding optional language in bilateral tax treaties, as referenced in in paragraph 12.3 of the former commentary to Article 26 of the OECD Model Tax Convention.) The optional language allows for 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 foreign bribery).⁴⁵

⁴⁵ In July 2012, Article 26 of the OECD Model Tax Convention was revised, with the formerly optional language now included within Article 26, paragraph 2. The revised article now expressly states that when the receiving State wishes to use the information for any non-tax purpose (such as foreign bribery investigations), it should (i) specify to the supplying State the non-tax purpose for which it wishes to use the information and (ii) confirm that the receiving State can use the information for such non-tax purpose under its own laws.

See update to Article 26 of the OECD Model Tax Convention and its Commentary at:
[http://www.oecd.org/ctp/exchangeofinformation/120718_Article%2026-ENG_no%20cover%20\(2\).pdf](http://www.oecd.org/ctp/exchangeofinformation/120718_Article%2026-ENG_no%20cover%20(2).pdf).

71. Colombian tax law allows for exchange of information with foreign authorities for tax purposes as well as for criminal proceedings, on the basis of reciprocity. Article 693-1 of the TS provides: “*Tax information may be provided by direct request of foreign governments and their agencies and based on agreements of reciprocity, in the event that it is required for fiscal control purposes or for fiscal or criminal proceedings. In such event, the requesting government or agency shall be required to commit expressly to use such information for the purposes mentioned in the request as well as ensure due protection to the confidentiality that protects the information provided.*”

72. As of the time of this review, Colombia indicates that it has exchange of information relationships with 86 jurisdictions, as a result of its ratification of the Multilateral Convention on Mutual Administrative Assistance in Tax Matters.⁴⁶ Article 22.4 of the Convention allows information received for tax purposes to be used for non-tax purposes, and therefore to be passed to law enforcement authorities to be used in criminal investigations (e.g. for foreign bribery) with the permission of the country providing the information. Colombia is also Party to ten Double Taxation Conventions (DTCs), (the Tax Convention of the Andean Community of Nations, and nine other DTCs), with others under “active negotiation”. Colombia indicates that all DTCs except one contain the language in paragraph 2 of Article 26 of the OECD Model Tax Convention, and that two DTCs specifically include language allowing for the sharing of tax information for other purposes, including criminal law enforcement. Colombia also has a Tax Information Exchange Agreement (TIEA) with one country, and is in the process of concluding TIEA negotiations with four jurisdictions.

Commentary

The lead examiners congratulate Colombia on the measures in place to allow for the sharing of information between Colombian tax authorities and criminal law enforcement authorities in Colombia and abroad. They recommend that Colombia allow for similar sharing of information, both spontaneously and on request, between the tax authorities and the Superintendencies for the purpose of proceedings against legal persons for foreign bribery offences.

6. Detection through accounting and auditing

a. Awareness-raising efforts

73. In light of the roles that internal and external auditors play in detection, the 2009 Recommendation asks countries to raise awareness on the foreign bribery offence among the accounting and auditing professions, as well as encourage them to develop specific training programmes on foreign bribery in the framework of their professional education and training systems.

74. At the time of the on-site visit, neither the Technical Council for Public Accounting (CTCP)⁴⁷ (that regulates the accounting and auditing professions) nor the Superintendency of Corporations (which is mandated to supervise the financial statements of companies that fall within its portfolio) had produced training materials, newsletters or other documents that specifically address foreign bribery.

⁴⁶ For the status of signatures and ratifications of the Convention, see www.oecd.org/ctp/exchange-of-tax-information/Status_of_convention.pdf.

⁴⁷ Law 43 of 1990 created the Technical Council for Public Accounting under the Central Board of Accountancy (Junta Central de Contadores) to issue technical guidance on accounting standards. The CTCP that operates under the Ministry of Commerce, Industry and Tourism prepares drafts of standards related to international accounting and auditing to be considered and then issued by the Ministry of Finance and the Ministry of Commerce, Industry and Tourism.

75. Discussions at the on-site visit revealed that only the largest audit firms appear to provide training to their staff on fraud detection and bribery. On-site visit participants stated that the large international accounting firms in Colombia, as well as the professional body that represents the audit profession (the National Institute of Public Accountants or INCP), do provide in-house training on the FCPA of their own initiative. However, panellists could not describe any such training provided to the smaller Colombian accounting and auditing firms. Moreover, no specific awareness-raising activities on the role of accountants and auditors in detecting foreign bribery had taken place. Following the on-site visit, a seminar organised by the Superintendency of Corporations took place on 17 and 18 September 2015 where, according to Colombian authorities, the OECD Convention as well as Bill 159 were discussed with more than 5.000 certified public accounts and statutory auditors. Representatives of the accounting and auditing profession met on-site highlighted the need to work more closely with the authorities on these issues. This issue should be followed up.

b. Internal controls, supervisory boards and audit committees

76. The 2009 Recommendation Section X asks Working Group Members to encourage the development and adoption of adequate internal company controls and standards of conduct in companies (notably through the implementation of its Annex II “Good practice guidance on internal controls, ethics and compliance”). An effective internal controls system can enhance the quality of financial reporting and assist to minimise financial, operational and compliance risks. As such, they have a potential for enhancing firms’ capacity to internally detect and prevent fraud that can be related to foreign bribery. The 2009 Recommendation also asks Working Group Members to encourage companies to create monitoring bodies independent of management, such as audit committees of boards of directors or of supervisory boards. In this regard, a firm’s bribery prevention strategy could benefit from the presence of a focused and capable corporate monitoring body.

(i) Internal controls

77. Although Colombia has an extensive legal and regulatory framework for corporate governance (established through a wide range of laws, decrees, etc. and a voluntary corporate governance code), none of these instruments specifically address foreign bribery (in particular, Law 43 of 1990 stipulates rules for the statutory auditor known as the *revisor fiscal*, which with some exceptions, has a function similar to an external auditor).⁴⁸ Discussions held on-site indicate, however, that the current knowledge and interest in corporate governance is expanding in Colombia. The publication in 2007 by the Superintendency of Finance of a corporate governance code, known as *Código País*, seems to have been a significant incentive. The code comprises best practices drawn up by issuers in the non-financial and financial sectors and aims at standardising the corporate governance practices that companies had developed independently through their own internal codes. Adoption of the code is voluntary and based on the principle of self-regulation, but the Superintendency of Finance requires that all issuers submit an annual report on their implementation of the measures it recommends.⁴⁹ Although the code was updated in September 2014 to

⁴⁸ Other provisions include Law 222 of 1995 contains norms in line with the OECD Principles on Corporate Governance, particularly as regards shareholders’ rights, disclosure and creditors’ rights as well as the operation of a company’s board and the responsibilities of its management. Law 964 of 2005 inspired by the Sarbanes-Oxley Act sets out rules on independent directors, audit committees and systems of information and financial control.

⁴⁹ The Superintendency reviews compliance with the 41 measures recommended by the code (based on responses provided by companies). The last figures published by the Superintendence show that the number of measures that companies fully comply with has been gradually rising every year, from 47.7% in 2007 to 63.0% in 2013.

include new provisions concerning internal controls, it still does not specifically deal with bribery or corruption.

78. Many large Colombian companies appear to have developed some form of corporate compliance, internal controls and ethics programmes that are relevant to detecting and preventing foreign bribery. According to the 2014 Survey of Colombian Companies' Anti-Bribery Practices, currently, 27% of surveyed businesspeople reported having in place a policy prohibiting the offering or receipt of bribes (a notable increase from 0% in 2008, 2010 and 2012). However, 91% reported that these policies do not identify the processes that are the most vulnerable to bribes or facilitation payments. Several major, internationally active Colombian corporations attended the on-site visit, including ones in high risk sectors. Most of these companies indicated that their compliance programmes deal specifically with foreign bribery, largely because of the FCPA. The companies in question are subject not only to Colombian laws but also to FCPA jurisdiction, and their compliance programmes refer specifically to the FCPA. Only one participant clearly indicated that the compliance programmes in place refer to Colombia's own foreign bribery laws. The panellists also indicated that the awareness efforts undertaken by these large companies are not reflective of the wider situation in Colombia, in particular among SMEs.

(ii) *Supervisory boards and audit committees*

79. For issuers of publicly traded securities, article 45 of Law 964 of 2005 establishes the obligation to have an audit committee formed by at least three directors and including all the independent directors. The Audit Committee is tasked with supervising compliance with the internal audit programme, which must account for business risks and the preparation, presentation and disclosure of financial information. It may also contract independent specialists as it considers appropriate. The *Código País* further recommends specific Audit Committee functions to include (i) issuing written reports on possible related party transactions, including whether or not they are made on market terms and do not violate equal treatment of shareholders; (ii) establishing policies, criteria and practices used in the production and dissemination of financial information; and (iii) defining mechanisms to consolidate the information for the reporting to the Board. External Circular 38 of 2009 from the Superintendency of Finance requires all companies under its supervision to establish an audit Committee. Other rules from the Superintendency of Finance also require the creation of risk committees. The *Código País* further recommends companies to voluntarily set up, in addition to an audit committee, at least two other committees: an Appointments and Remunerations Committee and a Corporate Governance Committee. According to the Superintendency of Finance, while overall compliance rates with the *Código País* continue to improve, compliance in 2012 remained low for some measures. In particular, recommendations on the functions of a nomination and remuneration committee (25%), corporate governance committee (18%) and audit committee (36%) had particularly low compliance rates. In addition, it appears that SOEs are not, in general, consistent in their practice of setting up committees. Some unlisted SOEs report that they do not have any committees, not even an audit committee, while others have a long list of five or more committees.⁵⁰

c. *External audit*

80. Under Section X.B of the 2009 Recommendation, Parties are requested to maintain adequate standards to ensure the independence of external auditors and to require reporting of suspected acts of bribery discovered in the course of an external audit. In Phase 1, the Working Group agreed to monitor the issues relating to auditing of companies.⁵¹ The auditing principles applicable in Colombia are defined by Law 43 of 1990, which regulates auditors' conduct, and by Decree 2 469 of 1993, which establishes the

⁵⁰ See *supra* note 20.

⁵¹ See [Colombia Phase 1 Report](#), §109.

applicable standards.⁵² At the time of the on-site visit, Colombia was planning to issue regulations for adoption of IAS. Following the on-site visit, Colombia indicated that Decree 302 of 20 February 2015 establishes the implementation of IAS in Colombia from 1 January 2016.

81. Under article 203 CoC, a *revisor fiscal* must be employed by all stock companies, branches of overseas companies and “companies in which, by law or under their statutes, their administration does not correspond to all the partners, when so determined by partners excluded from the administration who represent no less than 20% of the capital”.⁵³ The shareholders’ meeting appoints the *revisor fiscal* and its duties include: (i) certification of the quality of internal controls defined broadly (including processes and operations); (ii) certification that the firm complies with laws and bylaws; (iii) signing of financial statements together with the legal representative. Article 215 adds that the *revisor fiscal* must be a public accountant and may not serve as the auditor of more than five stock companies at any given time.

82. The World Bank raised some concerns in its 2003 corporate governance review of Colombia that the *revisor fiscal* has functions that “are not compatible with the functions of an independent auditor of financial statements”.⁵⁴ OECD committees in recent reviews have agreed with this assessment. The *revisor fiscal* is required, for instance, not only to certify the effectiveness of the company’s internal control statements and ensure its assets, but also to ensure that the enterprise’s obligations to various government agencies including tax administration have been met in a timely manner. These additional duties led the World Bank to conclude that their legal responsibilities “may impede an external auditor’s independence as outlined in the auditor independence rules promulgated by the International Federation of Accountants”.

83. Although there has been no recent change in the law on this matter, the Superintendency has issued regulations (such as Circular 54 of 2008 and Circular 38 of 2009) aiming to better define the scope of the external audit and internal control functions assigned to the *revisor fiscal*. The issue of independence has also been addressed through regulations requiring the rotation of firms or partners, and preventing the simultaneous rendering of additional services, including via sister companies. Other pending concerns are the competence and professional standards of *revisores fiscales* in general, as the law contains no additional requirements for the external auditor than those applicable to any public accountant. Likewise, there is no self-regulatory organisation for auditors (there is only one for accountants) that could impose higher standards or continuous education requirements. The Central Board of Accountants (that is responsible for the registration and control of public accounting in Colombia) and the Superintendency of Companies also acknowledge an interest to strengthen training and continuing education for statutory auditors.

84. Auditors in Colombia are subject to administrative sanctions for failure to comply with accounting and auditing regulations. The Superintendency and the PGO can sanction the auditors who violate accounting and financial rules. The Central Board of Accountants has also a central role to play. Traditionally, the Central Board’s main activity has been to review complaints and to sanction those

⁵² Article 7 of Law 43 of 1990 establishes the generally accepted accounting norms which include evaluation of the internal control system, the obligation to provide a professional opinion on the reasonableness of the information contained in financial statements including whether they are in accordance with generally accepted accounting principles, and the requirement to indicate reservations about the report in a clear and unequivocal manner. A code of ethics for auditors is contained in articles 35 to 38.

⁵³ Article 13 of Law 43 of 1990 also establishes that all commercial companies, regardless of their nature, must employ an external auditor when their gross assets as of 31 December of the previous year were equivalent to or more than five thousand times the minimum monthly wage) or their gross revenues in that period were equivalent to or more than three thousand times the minimum monthly wage.

⁵⁴ World Bank (2003), Report on the Observance of Standards and Codes (ROSC) Corporate Governance Country Assessment, Colombia.

accountants and firms that do not comply with the law or its code of ethics. Between 2010 and 2013, the Central Board handled an average of 1,200 processes and issued 283 sanctions, which most frequently involved suspension of the accountant's certification for one year, and in rare cases, cancellation or removal from the profession. The Central Board also has begun to increase surveillance and inspection activity, citing a need to support implementation of IFRS.⁵⁵

d. Duty to report foreign bribery

85. Under Colombian legislation, there is no specific legal obligation for statutory auditors to report a suspected act of bribery of a foreign public official to management or corporate monitoring bodies. However, article 208 CoC requires an internal auditor's report on the financial statements of a company to include whether the accounts are maintained in accordance with legal regulations and reservations or exceptions about the faithfulness of the financial statements. Additionally, Article 7 of Law 1474 of 2011 (dealing with statutory auditors' obligations to report to law enforcement authorities outside the company) amended article 26 of Law 43 of 1990 to include failure to inform relevant authorities of alleged acts of corruption ("*corrupción*") within 6 months as a ground for cancellation of an auditor's registration. The Working Group discussed in the Phase 1 report whether bribery of foreign public officials was included in the definition of "corruption" for the purposes of this article and concluded that reporting requirements for auditors for acts of foreign bribery should be followed up in Phase 2. The authorities stated after the on-site visit that Article 7 of Law 1474 of 2011 does not cover foreign bribery and confirmed that no legislative change aiming at clarifying the reporting requirements applicable to auditors has occurred since Phase 1. The lead examiners welcome Bill 159 that proposes to complete article 26 of Law 43 of 1990 and to introduce a clear reporting obligation that would apply to auditors.

Commentary

The lead examiners recommend that Colombia:

- (i) in consultation with relevant professional associations, take steps to encourage the detection and reporting of suspected bribery of foreign public officials by accountants and internal and external auditors, in particular through guidelines and training for these professionals and through raising the awareness of the management and supervisory boards of the companies about these issues;***
- (ii) take measures to encourage Colombian companies, including SOEs, to: (i) continue to develop and adopt adequate internal company controls and standards of conduct with a particular focus on compliance with the law criminalising foreign bribery; and (ii) adopt and develop efficient internal audit procedures, including through corporate monitoring bodies, such as audit committees;***
- (iii) develop and implement more stringent auditing requirements consistent with international standards in order to effectively ensure the independence of external auditors and provide adequate education and training of revisores fiscales; and,***
- (iv) consider introducing a clear duty for auditors to report suspicions of foreign bribery, such as the one envisaged under Bill 159; and, if such a reporting obligation is put in place, ensure that auditors making such reports reasonably and in good faith are protected from legal action.***

7. Detection through anti-money laundering systems

86. An effective system designed to detect and deter money laundering may uncover underlying predicate offences like foreign bribery. In Colombia, money laundering is criminalised pursuant to article

⁵⁵ See *supra* note 20.

323 PC and foreign bribery (see section C.4 below on the money laundering offence). Colombia is a member of the Financial Action Task Force of South America (GAFISUD)⁵⁶. Colombia underwent a mutual evaluation of its implementation of anti-money laundering and counter-terrorist financing (AML/CFT) measures in December 2008.⁵⁷ Its most recent follow-up took place in 2009.⁵⁸

87. Colombia's financial intelligence unit is the *Unidad de Información y Análisis Financiero* (UIAF), established by Law 526 of 1999 as a special administrative unit within the Ministry of Finance and Public Credit. As Colombia's central authority for unusual financial operations reporting, the UIAF is responsible for collecting, centralising and analysing all the relevant information received from financial institutions, companies and individuals. The UIAF reports specific cases to the PGO. The UIAF is also tasked with carrying out specific studies related to AML measures, provide best practice guidelines for sectors and economic operations at risk for money laundering, propose new AML control mechanisms and amend existing ones.

a. Suspicious transaction reporting

88. The duty to report suspicious transactions is codified in Decree 663 of 1993, the Organic Statute of the Financial System, most recently complemented by the Basic Legal Circular 29 of 2014. Article 102(1) of Decree 663 obliges entities subject to the control and surveillance of the Superintendency of Finance to adopt appropriate and sufficient control measures to detect and prevent money laundering. Obligated entities are required to report "immediately and sufficiently" to the UIAF any information on the amount or nature of transactions that give rise to a suspicion that entities involved are being used to "transfer, manage, use or invest money or resources from criminal activities". In its 2009 follow-up report, GAFISUD surmised that the UIAF may also impose reporting obligations on entities not subject to the supervision of the Superintendency of Finance. Article 2 of Decree 1497 of 2012 provides that "without prejudice to the obligations of institutions that advance financial, insurer or stock market activities, public and private entities from different sectors" shall report to the UIAF the information described in the Organic Statute of the Financial System in the manner and timing requested by the UIAF.

89. Entities obliged to report suspicious transactions include all entities in the financial sector (*i.e.* brokerage firms, trust companies, pension funds, insurance companies, credit institutions, etc.). In Colombia, Designated Non-Financial Businesses and Professions (DNFBPs), among which are casinos traders in precious metals, and notary publics, are also required to report. DIAN (the National Bureau of Taxes and Customs) oversees entities buying and selling currency. The 2008 mutual evaluation by GAFISUD expressed scepticism as to the effectiveness of the reporting system as it relates to currency exchange houses. For instance, the report noted that the directive establishing DIAN's supervisory authority (External Circular No. 170 of 2002) does not impose an obligation to take into account complex or unusually large transactions, or transactions demonstrating unusual behaviour. GAFISUD recommended that Colombia issue specific regulations on this point. Further, entities supervised by DIAN are not required to maintain the results of their STRs for a minimum period of five years. Under article 105 of Decree 663 of 1993 (or Organic Statute of the Financial System), financial institutions present at the on-

⁵⁶ In July 2014, members of GAFISUD agreed to change the name to Financial Action Task Force of Latin America (GAFILAT) to reflect the expansion of its membership to include all Latin American countries.

⁵⁷ 2008 GAFISUD Mutual Evaluation of Colombia (available in Spanish only at: http://www.gafisud.info/pdf/InformedeEvaluacinMutuaRepblicadeColombia_1.pdf).

⁵⁸ 2009 GAFISUD Follow-Up Report on Colombia (available in Spanish only at: http://GAFISUD.org.iplan-unix-03.toservers.com/UserFiles/Biblioteca/Evaluaciones/Avances/1er_Informe_Avance_Colmbia_2009.pdf)

site confirmed that all entities making STRs are protected by the law from legal action and are prohibited from notifying their clients.⁵⁹

90. Currently, Colombian law contains no reporting requirements for lawyers or accountants, although Article 27 of Law 1762 of 2015 (the Anti-Smuggling Law), establishes reporting obligations for internal auditors. Law 1762 imposes on auditors the same duty imposed on financial institutions and other designated entities to report to the UIAF the information on suspicious transactions. No similar legislative changes relating to lawyers are currently in the pipeline; however, the UIAF acknowledges that this is an area of weakness in Colombia's AML framework and calls it a "pending task" for the country. Colombian lawyers, on the other hand, do not appear to support the introduction of such a reporting obligation. Lawyers present at the on-site expressed extreme reluctance to be subject to the obligation to report suspicious transactions, which they viewed as an infringement on attorney-client privilege. Such an objection indicates that lawyers present at the on-site did not fully understand that such requirements would be applicable only in the context of certain types of transactions, such as the sale and purchase of real estate or a business, managing financial assets, or managing or incorporating a company.

91. Colombia's AML regime currently has no legal definition or list of politically exposed persons (PEPs). Neither does it contain any provisions requiring enhanced due diligence for PEPs. In its most recent GAFISUD evaluation, Colombia was recommended to codify all issues pertaining to PEPs in one legal provision. Although no legislative changes have taken place since Colombia's last GAFISUD follow-up, at the on-site visit, multiple panellists informed the evaluation team that the President was preparing a decree that would define PEPs. The draft Decree was provided shortly following the on-site visit. This draft provides a list of civil servants to be considered as PEPs. This list includes, *inter alia*, the President, Directors, Managers and Presidents of public entities, Generals, Senators and Judges. The draft also notes GAFISUD recommendation 12 relating to enhanced due diligence measures pertaining to PEPs. However, it is unclear whether this draft decree – in its acknowledgement of recommendation 12 – would entail any actual legal obligation on entities to undertake such measures. Further, it does not appear to address all categories of PEPs described by the FATF (which defines PEPs as an individual who is or has been entrusted with a prominent public function). For one, the list of PEPs defined in the draft decree appears to apply only to domestic and not foreign PEPs (for example, the President of the Republic clearly refers to the President of Colombia). Moreover, the list does not mention persons exercising a prominent public function for an international organisation or family members or close associates of PEPs. Colombia notes that as the Decree is still a draft and has not yet been signed, it is not valid and has no legal effect. Colombia further cautions that, given its preliminary stage, the draft may change substantially in different versions.

(i) *Sanctions for failure to report*

92. Pursuant to article 325 of the Penal Code (entitled "Omission of reports on cash transactions, movement or storage of cash"), subjects under control of the UIAF "who wilfully omit to comply with reports to this entity on cash transactions or on movement or storage of cash, shall incur" a possible prison term of 38-128 months and a fine of 133.33-15,000 minimum monthly wages. The Superintendency of Corporations may impose a fine of 200 minimum monthly wages, i.e. COP 128 870 000 (approximately USD 54 000⁶⁰) for failure to report by legal persons. The Superintendency of Finance reports having sanctioned 42 companies in 2010, 36 in 2011, 18 in 2012, and only 1 company each year in 2013 and 2014. The level of sanctions imposed was not provided.

⁵⁹ Under article 42 of Law 190 of 1995, suspicious transaction reporting will not result in liability to the reporting entity.

⁶⁰ As of 1 May 2015, 1 Colombian Peso (COP) = 0.000417711 USD.

(ii) *Money laundering statistics*

93. Colombia provides the following statistics on STRs received by the UIAF for the period 2012-2014: 7,080 in 2012, 7,008 in 2013 and 6,124 in 2014. Of these reports, the UIAF reports that the one in 2013 was ultimately determined to be predicated on an offence of transnational bribery (but of a Colombian official by a foreign company). Of the STRs received in the period 2012-14, the UIAF forwarded to the PGO 84 cases (stemming from 502 STRs) in 2012, 70 cases (from 204 STRs) in 2013 and 47 (from 49 STRs) in 2014.

94. The UIAF also reports that all of the 260 cases submitted to the PGO between the years 2011 and 2015 have triggered criminal investigations. Further, the amount of property identified for potential asset forfeiture is USD 3.9 million. The UIAF also imposed preventative measures on USD 2.4 million worth of property. The UIAF cannot itself determine the underlying predicate offence (see discussion below in the section on exchange of information), but it hypothesises that of these 260 cases, 51 corresponded to crimes against the public administration.

b. *Exchange of information*

95. The UIAF does not, in its analysis and assessment of STRs, make a determination as to the underlying offence. The UIAF explains in materials submitted after the on-site visit that this would “exceed[] the scope of its legal faculties”. A determination of the underlying crime can only be made by the PGO. As such, the UIAF does not maintain statistics on STRs as categorised by predicate offence. Although this issue was not raised in the most recent mutual evaluation report by GAFISUD, FATF Recommendation 29 states that “[c]ountries should establish a financial intelligence unit (FIU) that serves as a national centre for the receipt and analysis of [...] other information relevant to money laundering [and] associated predicate offences [emphasis added]”. The commentary to Recommendation 29 further clarifies that the operational analysis carried out by FIUs should allow them to “follow the trail of particular activities or transactions, and to determine links between those targets and possible proceeds of crime, money laundering, predicate offences or terrorist financing”.

96. In the additional materials submitted after the on-site visit, the UIAF also explained that since 2010, it has developed a new model of analysing and transmitting information to the competent authorities. Under this new model (known as the Systematic, Expanded and Bidirectional model (SEB)), the UIAF submits to the PGO cases, developed through its intelligence activities, containing more in-depth analysis and substance than the intelligence reports that were transmitted in the past (which contained more raw data). The SEB model also entails a new method of transferring the information. As opposed to the previous method, which consisted of submitting financial intelligence reports in writing, the FIU now delivers the information orally, in the context of a working group consisting of the PGO, PEF and UIAF analysts.

97. The UIAF is as a member of the Egmont Group. Colombia can provide MLA linked to money laundering in the context of a bilateral treaty or cooperation agreement. Colombia has entered into a number of judicial assistance agreements with other countries in Latin America as well as adhered to multiple multilateral treaties on MLA.

98. The UIAF also provides feedback to obliged entities on the quality of information contained in STRs and the outcome of such reports. The UIAF reported to GAFISUD that between 2010 and 2014, a total of 130 entities in the financial sector received feedback (representing 2% of the feedback from all entities in all sectors). Financial institutions present at the on-site discussions verified that the UIAF provides timely and detailed feedback on the reports received. The UIAF does not provide feedback on specific STRs, but rather on the strengths and weaknesses of STRs submitted to UIAF by the obligated

subject, the quality and timeliness of the reports and information about statistics about UIAF's different classification levels. Colombia also confirmed that the UIAF receives feedback from the PGO through collaborative meetings in which subjects such as statistics of the cases, sentences, precautionary measures, the criminal news and the assets identified are covered.

c. Resources, awareness and training

99. GAFISUD did not identify any issues with respect to the UIAF's level of resources in its most recent report, but discussions with representatives from the UIAF suggested a need for increased resources. In 2007, 75% of the UIAF's staff were concentrated in "mission areas" (i.e. General Direction, Deputy Direction of Analysis Operations, Deputy Direction of Strategic Analysis, and Deputy Direction of Information Technology). The UIAF had a total of 49 officials, among whom 27 were analysts on money laundering, 4 were analysts of strategic studies and 7 were personnel dedicated to the reception, centralisation and systematisation of information collected by the UIAF. Currently, the UIAF has a total of 63 officials, including 16 money laundering analysts, 14 strategic analysts, 4 legal analysts, 7 managers and 22 officials dedicated to the reception, centralisation and systematisation of information gathered by the FIU.

100. Under Law 526 of 1999, the UIAF is also vested with the authority to participate in the formulation of policies and laws related to money laundering, coordinate studies related to identifying additional sectors at risk of money laundering, and communicate to all competent authorities and obliged entities any relevant information. As such, the UIAF conducts technical assistance and training activities for government agencies, such as the Superintendencies, the PGO, DIAN, the judiciary, and police, as well as to private sector entities, such as banks and other financial institutions. In materials provided following the on-site visit, the UIAF reported that in the preceding 5 years, it has issued 69 typologies in 18 different sectors. None of the titles of the 69 typologies mentioned (domestic and foreign) bribery; the most related typology to bribery was on the use of corporate structures to conceal corruption. However, at the on-site visit, financial institutions confirmed that the UIAF prepares and provides guidelines or other informational materials relating to bribery and corruption, as well as on developments and changes to the law. Representatives of the financial sector also mentioned a compendium of typologies prepared by the UIAF, 20 of which focused on corruption, although none addressed bribery.

101. Financial sector representatives at the on-site were aware of the Convention and the money laundering risks associated with bribery and corruption. Further, they had in place mechanisms for systematically monitoring transactions to identify any atypical behaviours or transactions and procedures for customer identification, as well as "know your customer" principles under Colombian law. Despite the absence of the notion of PEPs in Colombian law, most of the financial institutions responded that they perform analysis specifically aimed at identifying PEPs and conducted enhanced due diligence when PEPs are identified.

Commentary

The lead examiners commend Colombia for its continued efforts in developing a comprehensive regime for the prevention and detection of money laundering. However, lead examiners believe that further improvements could be made in several areas, namely with respect to the UIAF's inability to identify the underlying criminal offence, the notion of PEPs, and the scope of entities obliged to report suspicious transactions to the UIAF. The lead examiners also note that although the UIAF provides a significant amount of training to regulatory bodies and reporting entities, it does not appear that any of these training activities are targeted toward foreign bribery. The lead examiners would therefore recommend that Colombia increase its capacity to detect foreign bribery through its AML regime, and in particular:

- (i) *Provide training or clarification to the UIAF with respect to the identification of the underlying predicate offence, in line with FATF recommendation 29, with a view to detecting instances of foreign bribery;*
- (ii) *Maintain statistics on predicate offences;*
- (iii) *Develop the concept of PEPs in Colombian law;*
- (iv) *Extend suspicious transaction reporting obligations to lawyers; and,*
- (v) *Issue appropriate directives and training materials (e.g. typologies) on the identification and reporting of active bribery, including on concealment of bribery and bribe proceeds.*

C. INVESTIGATION, PROSECUTION AND SANCTIONING OF FOREIGN BRIBERY AND RELATED OFFENCES

1. Investigation and prosecution of foreign bribery

102. As noted in the introduction to this report, no allegations have surfaced concerning bribery by Colombian nationals of foreign public officials since the entry into force of the Convention in Colombia in early 2013. Consequently, Colombia has not investigated or prosecuted any cases involving foreign bribery. Law enforcement agencies could enhance efforts to more proactively detect and investigate foreign bribery, especially in light of the fact that certain Colombian companies operate in what are typically high-risk sectors in high-risk markets. Training and awareness raising initiatives seem necessary for investigators, prosecutors and judges, which should be given adequate resources to fight foreign bribery. The timely conduct of investigations while preserving judicial independence in practice is also an issue for Colombia to address in the context of foreign bribery.

103. In Colombia, two types of investigations can be conducted in the context of a foreign bribery case: criminal and administrative. Criminal investigations are conducted against natural persons and administrative investigations against legal persons involved in foreign bribery. Proceedings against legal persons are detailed in a separate section of the report (see below [section C.3](#)).

104. Several law enforcement bodies and one prosecution agency can be involved in a foreign bribery case at different procedural stages (i.e.: detection, investigation, and prosecution of foreign bribery). According to article 250(8) of the Constitution, the PGO is responsible for managing and coordinating the functions of the Judicial Police (*Policía Judicial*). These functions are permanently carried out by the Colombian National Police (*Policía Nacional*) and any other organs that the law establishes. At the time of the Phase 1 evaluation, the National Police's Criminal Investigations Office (*Dirección de la Policía Judicial y Investigación* or DIJIN) within the National Police was responsible for exercising the judicial police functions in foreign bribery cases together with the Prosecutor General's Corps of Technical Investigators (*Cuerpo Técnico de Investigación* or CTI) responsible for executing the functions of the judicial police within the PGO. This institutional arrangement was modified as a result of the adoption of Decree 16 of 9 January 2014. This Decree reorganises the institutional structure and functional organisation of the PGO and attributes judicial police functions to five new specialised judicial police departments within the PGO, including PEF in charge of corruption offences (article 23). Decree 16 (article 21) maintains the judicial police functions of the CTI.

105. Instances of foreign bribery can be detected by any institution with law enforcement powers or through the receipt of information from other state institutions, citizens, and other sources. If detected, allegations of foreign bribery would be referred to a prosecutor who will choose which agency will act as judicial police.⁶¹ As a consequence, a case detected by the DIJIN or the CTI could stay, upon decision of the prosecutor, within the purview of these investigative bodies although PEF is the designated authority with expertise in financial and economic crimes, including corruption. The prosecutor could also form investigative teams using complementary expertise of the CTI, the DIJIN and the PEF.

106. The PGO serves several functions in the context of a foreign bribery case. In criminal proceedings, prosecutors are responsible for the prosecution of foreign bribery offences.⁶² They are also responsible for directing the actions and overseeing the legality of the actions taken by investigators and operative officers, ensuring that the operational and search activities are conducted in accordance with the law, and that the correct procedures are upheld, all with the main purpose of ensuring that the collected evidence is admissible in court.

107. International cooperation in the form of direct law enforcement (police-level) cooperation, including exchange of intelligence, is performed by criminal investigators; international cooperation in the form of the mutual legal assistance (MLA) is carried out via one of the Central Authorities – namely, the PGO, the Ministry of Justice and the Ministry of Foreign Affairs (see below [section C.1.h.](#)) of the report).

a. Investigative authorities

(i) Structure, awareness, training and resources

The Economic and Financial Police (PEF)

108. The PEF became operational in April 2014. The powers, organisation and legal status of the PEF are defined in Decree 16 of 9 January 2014 and Resolution 561 of 2 April 2014. The PEF falls under the supervision of the Vice-General Prosecutor and reports directly to the National Directorate of Joint Specialized Judicial Police (*Dirección Nacional de Articulación de Policías Judiciales Especializadas*) of the PGO. As a specialised judicial police unit within the PGO, the PEF is given the responsibility to execute and control the functions of judicial police in its area of competence and support the PGO in criminal investigations.⁶³ According to Resolution 561, the PEF is primarily responsible for investigating financial and economic crimes, including corruption.⁶⁴

109. The PEF has jurisdiction throughout the country. It is comprised of the main office in Bogota and two regional offices⁶⁵. The Headquarters consist of three Directorates. Foreign bribery can be investigated both centrally and in the regions, and would fall under the competence of the operational unit of the PEF. There is no specialised unit within the PEF dedicated to the investigation of foreign bribery.

110. According to the authorities, the PEF is staffed with experienced investigators and relevant multidisciplinary expertise (lawyers, accountants, etc.). As of March 2015, 60 people were employed by the PEF and 45 of them were investigators. At the on-site visit, a representative from the PEF informed the

⁶¹ Article 23(2) of Decree 16.

⁶² Article 200 of the CPC.

⁶³ Article 24 of Decree 16.

⁶⁴ Article 1, *ibid.*

⁶⁵ At the time of drafting this report, Colombia indicated that two other regional offices were about to be opened.

examination team that most PEF investigators have been transferred from the CTI. A minority of positions are new positions created to meet the PEF's needs in professional personnel. The view was expressed by several officials during the on-site visit that the resources in personnel able to carry out investigations of foreign bribery cases are generally satisfactory, but that there is a need to better prioritise high profile cases and improve the existing criminal case management within the PGO. The lack of management of cases was also highlighted by civil society. Representatives of civil society also expressed the need for better monitoring of investigations as a way to contribute to better accountability of the prosecutors. At the time of the on-site visit, only one training initiative had benefited to PEF officials in relation the foreign bribery offence and the Anti-Bribery Convention. A half-day event focusing on intelligence gathering and investigative techniques in corruption cases (not limited to foreign bribery) was organised after the on-site visit, on 18 August 2015, with participation from the World Bank and other Latin American countries. It was attended by officials from PEF, as well as other police and prosecution authorities, and the Superintendency of Corporations and Superintendency of Finance, among others.

The Corps of Technical Investigators (CTI)

111. Under article 21 of Decree 16, CTI's main responsibilities consist in advising and supporting units of the PGO in criminal investigation, forensic services and the administration of technical and legal information required for criminal investigation. It organises, directs, controls and executes the judicial police functions of the PGO. Foreign bribery can be investigated both centrally and in the regions. The CTI is divided into local departments, which are small offices in every main city and every Colombian department. According to Colombia, any CTI staff member could take up a foreign bribery investigation at any time under the supervision and direction of a prosecutor. However, this position is questionable in practice, given foreign bribery investigations generally demand a specialised skill set, and there is no specialised unit or set of investigators within the CTI dedicated to foreign bribery. In addition, at the time of the on-site visit, no training had been provided focusing on the foreign bribery offence and the specificities of related investigations. Following the on-site visit, CTI attended the 18 August 2015 event on intelligence gathering and investigative techniques in corruption cases. In terms of resources, no information was provided by Colombia on the number of CTI investigators able to carry out investigations on crimes such as foreign bribery.

The National Police's Criminal Investigations Office (DIJIN)

112. The DIJIN is organised into eight areas and several groups according to the categorisation of crimes in the Penal Code, such as narcotics, traffic and transportation of drugs, etc. A specific group within the DIJIN is responsible for investigating crimes against the public administration and internal affairs and investigations (including but not limited to foreign bribery). At the time of Phase 1, Colombia explained that foreign bribery cases would fall under the competence of this department of the DIJIN.⁶⁶ The DIJIN supports the PGO in the investigation of a criminal conduct, including by obtaining material and physical evidence, arresting suspects and seizing elements. With the establishment of the PEF, the DIJIN may play a lesser role in foreign bribery investigations.

113. Colombian authorities indicate that the DIJIN has 66 investigators. Information on funding available for investigation of foreign bribery cases has not been provided although the authorities indicated that there is no specialised expertise available within DIJIN for carrying out foreign bribery investigations. Only one training was provided in December 2014 within DIJIN focusing on the foreign bribery offence and the specificities of investigations into this type of offence. Open sources indicate that the Colombian National Police has acquired experience in intelligence gathering, search and seizure of criminal organisations and has 18 different educational facilities throughout Colombia.

⁶⁶ See [Phase 1 Report on Colombia](#), § 84.

(ii) *Capacity to investigate foreign bribery and prioritisation of law enforcement activity*

114. In the past, commentators such as the Organisation of American States (OAS) have commented on the lack of qualifications of the personnel performing judicial police functions and their ability to deal with the highly complex nature of financial investigations.⁶⁷ Other open sources have criticised the Colombian system for its inefficiency and inefficacy in investigating and prosecuting serious crimes.⁶⁸ By way of illustration, from 2005 to 2008, PGO figures indicate that the more serious crimes reach the stage of charging in only 2% of total cases, with only 1% reaching a verdict⁶⁹. Commentators (including in Colombia) generally agree that the major problem resides with the prosecutors and the investigative police. They highlight that both institutions are insufficiently staffed and that the police in particular lack adequate preparation for investigating complex crimes. In addition, although the Prosecutor's Office has its own investigative police – the CTI –, they are fewer in number and also considered to be less prepared than the investigative arms of the DIJIN. Representatives of civil society met during the on-site visit echoed these concerns and stressed the need to provide these bodies with more adequate human and technical resources.

115. During the on-site visit, the authorities stated that the reorganisation of the judicial police functions within the PGO and the setting up of the PEF result from the determination of Colombia to strengthen its capacity to fight complex crimes, which requires improving the efficiency of investigations. The PEF is intended to become a privileged stakeholder with reference to economic crimes although the CTI and the DIJIN also have jurisdiction to investigate all types of crimes including economic ones. None of these forces have units specialising in foreign bribery. Hence, each prosecutor has the possibility of assigning foreign bribery matters to any police service as he/she see fit, thus drawing on the strengths of the available law enforcement agencies. The authorities state that in practice, the prosecutor may assign any foreign bribery case to the PEF although, at the discretion of the prosecutor, other police authorities may be relied upon. This remains to be seen and will require further follow-up by the Working Group. In any case, the evaluation team believes that this absence of specialisation within the law enforcement authorities is likely to impact their capabilities to seriously and efficiently investigate foreign bribery. Although they note that the different authorities can work jointly, adding efforts and capacities in the criminal investigations that each one develops, they also believe that adequate training and specialisation ensure more effective investigation of bribery of foreign public officials.

116. Very little information has been provided by Colombia regarding the actual prioritisation of the detection and investigations of the foreign bribery offence. In its responses to the Phase 2 questionnaire, Colombia stated only that the DIJIN has come up with a strategy for detecting and investigating crimes, including bribery. However this strategy essentially consists in tackling domestic corruption, including corruption in the public administration.

(iii) *Independence and integrity of the bodies with competence to investigate foreign bribery*

117. Article 5 of the OECD Anti-Bribery Convention requires that State Parties should be vigilant in ensuring that prosecutions of the bribery of foreign public officials in international business transactions are not influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved. The Working Group places great

⁶⁷ See the OAS report of September 2013 on the implementation in Colombia of the Inter-American Convention against Corruption http://www.oas.org/juridico/PDFs/mesicic4_col_en.pdf and www.oas.org/juridico/pdfs/mesicic4_col_consejo2007.pdf

⁶⁸ See for instance the “[Assessment of USAID/Colombia's Justice Reform and Modernization Program](#)” of March 2010.

⁶⁹ *Ibid.*

value in the independence granted to investigative authorities, as an essential element in ensuring that “improper influence by concerns of a political nature” is not exercised in the context of foreign bribery enforcement.

118. In Colombia, officials are bound by a unique Disciplinary Code, which regulates the disciplinary conduct of its staff, setting the duties and obligations of those who make it up, the charges, the corresponding sanctions and the procedures for application. According to the authorities, enforcement of such code is highly promoted by the PGO. Criminal law also establish several rules that punish behaviours related to influence any criminal investigation conducted by the PGO, and more generally any attempt to interfere with public functions or activities in order to benefit from it. These rules apply without distinction to PEF, DIJIN and CTI investigators.

Independence of the PEF, DIJIN and CTI

119. The PEF is led by the Director of the Economic and Financial Police who is in charge of planning, directing, assigning and controlling the functions of judicial police and crime analysis that fall under PEF’s portfolio.⁷⁰ The Director of the PEF acts as representatives of the PGO and is answerable to the Prosecutor General who can freely appoint and dismiss him/her. Colombia indicated that potential abusive dismissals of the Director of PEF are safeguarded under the Disciplinary Code and that grounds for dismissal are those that are applicable to any public official. Officials of the PEF expressed the view that their officers work independently in accordance with laws, internal rules and regulations, without regard to any improper external influences, and that any such influence with the purpose of affecting the conduct of investigations is punishable by criminal law. According to the authorities, PEF investigators have a direct channel of communication with PEF Direction to report any improper attempt to influence any ongoing investigation by any party.

120. Rules that govern the appointment (and dismissal) of DIJIN officials as well as their reporting obligations to the National Police and the Executive were not provided to the evaluation team in time for inclusion in this Report.⁷¹ All police chiefs within the National Police, including its Director, are appointed by the President of Colombia. The National Police reports to the Ministry of Defence who reports to the President. Although there are local operational police forces, the functioning of the National Police is centralized and local police officers report to the national level. DIJIN however operates in police departments. Some commentators note that “while independent from political control, it is subordinate to the executive, which becomes particularly problematic at the local level.”⁷² DIJIN is organisationally under the National Police and reports to it while the PGO directs and coordinates the investigations of the National Police in its exercise of permanent judicial police functions⁷³.

121. The safeguards in place to protect DIJIN and CTI investigators from improper influence in their investigations are those applicable to any public servant in Colombia. Representatives of the police participating in the on-site visit stated that nothing has occurred in practice to raise concerns regarding the autonomy and independence of the law enforcement bodies that have conducted in the past a number of high profile investigations. According to the authorities, no undue interference or pressure can be exerted on criminal investigators. They note that criminal investigations are conducted pursuant to the CPC, and are overseen by the competent prosecutor. While the basic legal safeguards and the current institutional

⁷⁰ Article 3 of Resolution 561.

⁷¹ Colombia indicated that such rules existed only at the time of finalising the report. As this could not be assessed by the evaluation team, the Working Group will review this in its next evaluation of Colombia.

⁷² See Transparency International, March 2013: [Colombia: Overview of corruption and anti-corruption](#).

⁷³ Article 250 of the Constitution.

framework appear to be in accordance with Article 5 of the Convention, their application in practice has yet to be tested in the context of a foreign bribery investigation.

Integrity and corruption within the PEF, DIJIN and CTI

122. In the case of allegations of corruption involving employees of the National Police, including the DIJIN, the Inspector General of the National Police (Inspección de la Policía Nacional) is authorised to discipline the police and has offices in each department of Colombia. In 2011, it initiated 4,964 disciplinary investigations, fired 343 police agents, suspended 375 others and fined 587⁷⁴. According to the authorities, the National Directorate of Prosecutors is in charge of initiating criminal proceedings against CTI and PEF employees. Back in May 2011, the PGO highlighted the “corrupting power of criminal organisations” over certain members of the National Police as well as the CTI⁷⁵. Press articles also echo the problem of corruption in the police as well as the CTI.⁷⁶ As of the time of this review, the scale of the problem seems difficult to measure, particularly with respect to its potential impact in financial crimes’ investigations. This issue could be revisited as foreign bribery case law develops.

Commentary

The lead examiners consider that the large number of agencies with potential competence for foreign bribery investigations may result in excessive fragmentation of efforts, lack of specialised expertise, and lack of clarity both for the public and for investigative authorities, which could result in problems in achieving coherent action. The lead examiners therefore welcome the establishment of the Economic and Financial Police (PEF). This partial centralisation of responsibility in an agency with specific human and financial resources could constitute an important step forward in improving detection and enforcement of foreign bribery in Colombia.

The lead examiners are also concerned about the lack of specialised investigators and adequate training on foreign bribery. Although they acknowledge some overlap between domestic and foreign bribery investigations, they stress that foreign bribery cases are often more difficult and time-consuming, with key evidence and witnesses often located abroad, requiring different investigative techniques and methods of proof.

Finally, the lead examiners are of the view that the foreign bribery offence does not have high law enforcement priority, due to a much greater emphasis given to combating domestic corruption. The lead examiners do not in any way wish to question Colombia’s emphasis on fighting domestic corruption, a highly worthwhile goal which, in time, could have an indirect, positive influence on foreign bribery investigations and prosecutions. However, in the context of assessing Colombia’s enforcement of its foreign bribery laws and its compliance with the Convention, Colombia should place more priority on ensuring adequate resources are available for the effective detection and investigation of foreign bribery.

In light of the above, the lead examiners recommend that Colombia:

- (i) Take further steps to ensure that specialised expertise in foreign bribery investigations is available to PEF and any other relevant investigative bodies, and that sufficient and adequate human and financial resources are made available to them;*

⁷⁴ Ibid.

⁷⁵ See <http://www.refworld.org/docid/4f9e7f652.html>

⁷⁶ See for instance <http://www.insightcrime.org/news-briefs/over-200-investigations-show-reach-of-bacrim-corruption-in-colombia>

- (ii) *Provide adequate training on the foreign bribery offence and the particularities of investigations into this offence;*
- (iii) *Emphasise the importance of pursuing foreign bribery and place greater priority on the detection and investigation of foreign bribery cases.*

b. Prosecutors

(i) *Powers, tasks and structure of the Prosecutor General's Office (PGO)*

123. The PGO is responsible for coordinating the investigation of all Penal Code offences, including foreign bribery committed by natural persons⁷⁷ (foreign bribery offences committed by legal persons are investigated by the Superintendency of Corporations – see [section C.3](#) below on legal persons). A Unit specialised in crimes against corruption, including transnational bribery, has been reorganised under Decree 16 of 9 January 2014. However, generally, the prosecution and trial of an offence would take place at the place where the indictment will be made. In a foreign bribery case, the place where the offence was committed would generally determine the relevant tribunal for prosecution and trial.

124. The PGO jurisdiction covers the entire country, with regional offices in the five major Colombian cities, as well as sectional offices in each judicial district, and local prosecutorial offices, known as *Unidades de Fiscalía*. While the local prosecutors have broad discretion in directing the judicial police, ultimate supervision rests with the Chief Prosecutor who is in charge of directing and coordinating the judicial police in their various functions.

125. The PGO has a number of different sections, which are in turn composed of different units responsible for investigating criminal conduct. The Unit specialised in crimes against corruption reorganised in 2014 may exercise its competence over the whole Colombian territory for the investigation and prosecution before criminal courts. This Unit has jurisdiction only in those cases specifically assigned by the Prosecutor-General on a case-by-case basis. Several other sub-units within the various branches of the PGO may also participate in corruption cases. These groups have their own prosecutors specialised in the investigation of crimes against the public administration. The interaction between these sub-units and the Unit specialised in crimes against corruption remains unclear.

(ii) *Resources and training*

126. Colombia did not provide information on human resources (the number of prosecutors and other personnel available for investigation and prosecution of foreign bribery offences) available to the Unit specialised in crimes against corruption. Although open sources⁷⁸ seem to suggest that the Colombian government has taken recent steps to increase resources for the PGO, specialised expertise available to prosecutors involved in prosecuting corruption seems to be lacking. Experts from the OAS in a recent report (see above) noted a shortage of financial investigators and forensic accountants to assist the anti-

⁷⁷ Functions assigned to the PGO under Article 250 of the Constitution include: asking the judge responsible for overseeing warrants to take the necessary steps to ensure the appearance of the accused at criminal proceedings; safeguarding evidence; presenting lists of charges to the judge with a view to initiating an oral, public, adversarial and consolidated trial, with substantiation of evidence and all guarantees of due process; asking the judge to order a stop to investigations when by law there are no grounds for accusation; asking the judge to take the necessary judicial measures to provide assistance to victims, restore the law and make indemnify victims; supervising the protection of victims, jurors, witnesses, and other participants in criminal proceedings; and directing and coordinating the judicial police functions regularly performed by the national police and other organisations stipulated by law.

⁷⁸ See <http://www.state.gov/j/drl/rls/hrrpt/2011humanrightsreport/index.htm?dliid=186502#wrapper>

corruption area, as well as a lack of specific training of prosecutors in financial or accounting matters. The experts also noted (and this was acknowledged by the authorities) that another problem with investigating crimes against public administration has to do with the qualifications of the personnel performing judicial police functions and their ability to deal with the highly complex nature of investigations in this field. During the on-site visit, the authorities indicated that the PGO and its specialised units face a heavy workload.

127. In terms of specialisation, prosecutors are specialised according to the various types of crime, such as, for example, public corruption. However, there are currently no prosecutors within the PGO specialised in foreign bribery cases, which may be explained by the relatively recent entry into force of the foreign bribery offence in Colombia, as well as the absence of foreign bribery cases at present. With respect to training, the Criminal Investigation and Forensic Science academy has responsibility for training within the PGO. During the on-site visit, Colombia indicated that authorities have been proactive in training the officials called to enforce the foreign bribery offence, such as prosecutors and judges. A training event was held in early December 2014. This initiative seems however very isolated and more training initiatives targeted at prosecutors, specifically as concerns the foreign bribery offence and the Anti-Bribery Convention, should be undertaken.

(iii) *Independence and integrity of the PGO*

128. With respect to prosecutorial independence, procedures for appointment, promotion, demotion, and dismissal of prosecutors include some safeguards from political influence. According to article 249 PC, the PGO consists of the Prosecutor General, assistant prosecutor attorneys, and other officials determined by law. The Prosecutor General is elected for a period of four years by the Supreme Court of Justice from a list originating with the President of the Republic and is not eligible for re-election. The candidate must possess the same qualifications required for a judge of the Supreme Court of Justice. The PGO is part of the judiciary and enjoys administrative and budgetary autonomy. In disciplinary matters, the Prosecutor General is subject to the rules set forth in Article 178-A of the Constitution. According to the law, disciplinary and criminal proceedings are set in motion by an investigative commission appointed by Congress. The House of Representatives is empowered to remove the Prosecutor, and this decision may be appealed before the Senate. In criminal matters, the investigative commission may present an indictment before the Supreme Court of Justice. Law 938 of 2004 on the Organic Statute of the Officer of the General Prosecutor sets out the functions and competencies of the PGO, Deputy Prosecutor (Vicefiscal), and Assistant Prosecutors, as well as the rules on appointment and dismissal.

129. The Prosecutor General may not be removed from office unilaterally by the President or by any other authority of the Executive Branch, but instead has a fixed four-year-term and may only be removed through impeachment⁷⁹. At the time of Phase 1, the Working Group noted some criticism of the circumstances surrounding the annulment of the election of the Prosecutor-General, and decided to follow up on guarantees for the independence of this position.⁸⁰

130. A recent report from Freedom House⁸¹ states that the Prosecutor General, who is in charge of investigations of all crimes, is independent from the government, even if the President has an important influence in his nomination. The report further states that the Prosecutor General is nominated by the

⁷⁹ Article 249 of the Constitution.

⁸⁰ See in particular <http://www.bbc.co.uk/news/world-latin-america-17240645> and <http://impunitywatch.com/viviane-morales-colombias-chief-prosecutor-forced-to-resign/>

⁸¹ See in particular report from 2011 from Freedom House on Colombia: <https://freedomhouse.org/report/countries-crossroads/2011/colombia>

Supreme Court for four years from a list of three candidates provided by the president. Although the President has an important influence on the Prosecutor General's selection, once nominated, the Prosecutor General does not follow instructions from the government and cannot be removed from office by the President. The nomination of the Prosecutor General in 2009 was however very controversial and this position was left vacant for almost a year.⁸²

131. With respect to the allocation of cases among the PGO, Colombia explains that the procedure for distribution is based on a computerised system that allocates the cases to the specific units within the PGO based on the principle of speciality (e.g. a suspicion of corruption will be attributed to the Unit specialised in crimes against corruption). This system cannot be manipulated although a case can still be reassigned to a more relevant unit in the course of the investigation. The rules that govern the allocation of cases to individual prosecutors are similar: cases are generally assigned randomly through a computerized system, unless the Prosecutor considers the need to reassign them. This assignation and withdrawal is regulated internally by the PGO through Resolution 0689 of 2012.

132. At the on-site visit, representatives from the PGO underlined the high level of independence of the PGO and the absence of undue pressure on the most sensitive cases that fall under its jurisdiction. Colombian authorities explained that mechanisms are in place to protect sensitive investigations from undue influence. In particular, the most serious cases of corruption, when they occur, are due to be transferred from the regions to prosecutors and investigators in Bogota that are better trained and less vulnerable to potential pressure (economic or political) occurring at a local level. The change in assignment may be decided exceptionally when, in the place where the procedure is taking place, there are circumstances which may affect public order, impartiality or independence of administration of justice, procedural guarantees, publicity of the proceedings, security or personal integrity of intervenes, especially the victims or of public officials. The change in assignment shall be presented to the Criminal Chamber of the Supreme Court of Justice, which shall decide the request summarily. There shall be no recourse against the decision on the request for change in assignment⁸³.

133. By contrast, representatives of civil society interviewed during the on-site visit highlighted a clear risk of political interference in sensitive cases, including those where high economic interests are at stake. Although the institutional design described above implies a rather sophisticated system of checks and balances, the system remains vulnerable. In this regard, allegations of corruption involving at least two General Prosecutors have been echoed in the press over the past years⁸⁴. This could affect the legitimacy and credibility of the Colombian judicial system.

134. International observers highlight that the legal framework of independence is accompanied by the system's profound and acute shortcomings in efficiently and fairly dealing with common citizens' more routine conflicts.⁸⁵ On balance, the results of the judiciary's intervention in civil, administrative, and

⁸² The nomination of the prosecutor general was very controversial in September 2009 because the Supreme Court refused to select any of the candidates proposed by President Uribe as the Court considered them not suitable for the job. President Uribe refused to change the list, so for almost a year, it was not possible to select a new attorney general. Only in October 2010, after the new President Santos decided to change the list, did the Court select the new prosecutor general.

⁸³ Articles 46 and 47 CPC.

⁸⁴ See <http://colombiareports.co/is-colombias-justice-system-really-that-rotten-yes-it-is/> (reporting that almost all of the country's top courts, and the Prosecutor General, have been called into question about their integrity after a series of corruption allegations and apparent cases of conflict of interests).

⁸⁵ See the 2011 Freedom House Report on Colombia:
<https://freedomhouse.org/report/countries-crossroads/2011/colombia>

criminal matters remain deficient. There is however recognition that the situation is getting better in criminal matters, especially thanks to improved oversight by more independent judges of prosecutors' work. Efficiency has also increased in some respects: the average time for cases to arrive at the formal accusation stage has decreased from 29 months to 4 months.⁸⁶ Some inefficiencies persist however, and the level of impunity remains very high, even for very serious crimes.⁸⁷

(iii) *Interagency coordination*

135. Under Article 250 of the Constitution, it is the role of the PGO to “*manage and coordinate the functions of the Judicial Police that are permanently carried out by the National Police and other organs that the law establishes*”. During the on-site visit, the examination team was told that the setting up of the PEF aims to address the need for a better interagency cooperation, which has been recognised as a challenge in Colombia since the adoption of an adversarial system.

136. Coordination among the investigative bodies was raised as an area of concern by several representatives of the civil society met during the on-site visit. Open sources seem to support this analysis. They indicate that criminal investigations have suffered in the past from lack of coordination in the collection of evidence, resulting in the needless duplication of investigatory efforts.⁸⁸ All the criminal procedure reforms since 2004 have attempted to correct this problem by granting the PGO – and the PEF since April 2014 – greater responsibility for directing and coordinating the various functions of the judicial police at the national level. Further, the PGO is tasked to coordinate and control investigations, with a view to limiting the competition between the various law enforcement agencies and avoiding the duplication of efforts in criminal investigations. For instance, the CTI is mandated to work with other agencies to promote the coordination of investigations that should be undertaken jointly.

137. During the on-site visit, the lead examiners were told that informal mechanisms have been put in place to support the exchange of information among law enforcement bodies. The examiners were also told that a national system centralising all criminal notices has been put in place. This aims to ensure that investigations into the same criminal offence are not conducted in parallel by different authorities, and which should further ensure that any foreign bribery allegation is not overlooked. The effectiveness of this system in practice remains to be evaluated, in particular with regard to coordination between the PEF and other investigative authorities in foreign bribery investigations.

138. With regard to cooperation in individual cases, Colombia indicated that the law expressly allows the prosecutor to adopt a multi-disciplinary approach⁸⁹. Such multidisciplinary investigative teams (with all different expertise represented) can be formed to investigate complex cases or cases involving large volumes of work, e.g., foreign bribery cases. At the on-site visit, law enforcement officials confirmed that such teams work well in practice, and may also draw on specialised expertise from other State institutions. It remains to be seen how such cooperation will work in practice in future foreign bribery investigations.

⁸⁶ See the 2011 Freedom House Report on Colombia:
<https://freedomhouse.org/report/countries-crossroads/2011/colombia>.

⁸⁷ In 2008, for instance, there were convictions in only 2.7 percent of the homicides committed.

⁸⁸ See in particular “Wanted: Criminal Justice -Colombia’s Adoption of a Prosecutorial System of Criminal Procedure” from Michael R. Pahl. See also the “[Assessment of USAID/Colombia’s Justice Reform and Modernization Program](#)” of March 2010. The authors of the report highlight the fact that the lack of investigation and prosecution of serious crimes is more an institutional than legal issue, and should require attention to enhancing the ability of sector organisations to carry out their roles adequately.

⁸⁹ Article 211 of the CPC.

139. Another important issue is the coordination between the PGO and the Superintendency of Corporations, which has sole responsibility for imposing financial sanctions on legal persons for foreign bribery, in administrative proceedings completely separate from the criminal process involving natural persons (see section C.3. below on Liability of legal persons). While the Superintendency is required by law to share any suspicion of a criminal offence with the PGO, the PGO, on the other hand was under no obligation at the time of the on-site visit to share with the Superintendency any information it collects in the course of its own criminal proceedings, even if it appears a legal person may be involved in the alleged foreign bribery. The situation under the law was made all the more serious in light of discussions with PGO representatives during the on-site visit, which clearly showed that very little consideration is being given to the liability of legal persons in the context of criminal proceedings against individuals. Some attempts have been made in Bill 159 to rectify this and would need to be complemented by awareness-raising and training of prosecutors on the subject. After the on-site visit, Colombia reported the adoption on 9 October 2015 of an Agreement between the Superintendency of Corporations and the PGO under which the two institutions commit to exchange evidence (See also [section C.3.h.\(ii\)](#) below on coordination with the Superintendency of Corporations in the case of parallel proceedings against legal persons.)

Commentary

Any PGO office in Colombia has jurisdiction over foreign bribery cases which raises concerns about the potential dilution of expertise and resources to prosecute this offence. The lead examiners however welcome the establishment in 2014 at central level of a Unit specialised in crimes against corruption, including transnational bribery, but consider that the rules governing interaction and coordination between these Unit and other PGO offices are unclear. The lead examiners are also concerned about potential problems arising from lack of coordination among the different agencies involved in foreign bribery enforcement.

In light of the above, the lead examiners recommend that Colombia:

- (i) Clarify the rules governing the allocation of foreign bribery cases within the PGO;*
- (ii) Consider granting a greater coordinating role to the Unit specialised in crimes against corruption;*
- (iii) Ensure appropriate and specific foreign bribery training is developed for prosecutors, including on the particularities of foreign bribery investigations and prosecutions, and on the referral and coordination of cases of foreign bribery and related offences;*
- (iv) Ensure adequate human and financial resources are provided to the PGO for the effective investigation and prosecution of foreign bribery cases;*
- (v) Strengthen the current framework to promote better coordination among law enforcement authorities, including within the PGO, between the PGO and the police, and especially between the PGO and the Superintendency of Corporations; and*
- (vi) Draw the attention of the PGO to the importance of considering legal person liability in the context of foreign bribery cases, and to the need to coordinate closely in that respect with the Superintendency of Corporations.*

The lead examiners welcome the existing framework aimed at preserving the independence of law enforcement in Colombia. Nevertheless, they are concerned that individual prosecutors and investigators may be vulnerable to undue pressure in individual cases. The lead examiners therefore recommend that the Working Group follow up on the issue of independence as foreign bribery cases emerge.

c. The Judiciary

(i) Structure of Courts

140. Since Colombia is a unitary state, the judicial system (known as the Judicial Branch) is national, although for the purposes of distributing work there are administrative divisions, known as judicial districts. Despite the country's size, and the limited extent of government penetration, the justice sector entities and representatives are fairly well dispersed, and the country's number of judges, prosecutors, investigative police, and public defenders is on the high end for the region.⁹⁰ The High Courts – i.e. the higher state bodies or last instance bodies which have national jurisdiction – are: the Supreme Court of Justice, the Council of State, the Constitutional Court and the Superior Council of the Judicature. At the time of the on-site visit, the Executive was considering a constitutional reform that would aim at reorganizing the administration of the judiciary and further increasing its independence vis-à-vis the executive branch. According to the authorities, this reform was passed in June 2015.⁹¹ Considering the calendar of this evaluation, the lead examiners have however not been in the position to review it. It should form part of a subsequent evaluation.

141. As noted above, a foreign bribery criminal case, as a rule, is filed in the appropriate court with territorial jurisdiction over the case, i.e. the court of residence of the defendants. At the time of the on-site visit, Colombia indicated that consideration was being given by the Executive to creating specialised judges with competence over corruption cases, including foreign bribery. This reform aims to contribute to addressing the slowness of the regular court system when dealing with corruption cases.

142. At the time of the on-site visit, no training initiatives had been taken in relation to foreign bribery that would have targeted judges, beyond the December 2014 event (see above).

(ii) Independence and integrity of the Judiciary

143. Under the Constitution, the Judicial Branch is governed by the Superior Council of the Judicature, an independent body in charge of judicial administration and judicial elections. Decisions on appointment, removal and transfers of judges are made by this Council and not by the Executive Branch, in order to ensure that judges and tribunals have the necessary independence to carry out their functions, including in cases related to bribery of foreign public officials. The Superior Council of the Judicature body is formed by six magistrates appointed by Colombia's three high courts: the Supreme Court of Justice, the Constitutional Court and the State Council.⁹² Judges may not be removed from office except for a disciplinary breach⁹³. The authorities further state that disciplinary infractions are specified in Law 734 of 2002. Disciplinary sanctions may only be imposed by the Superior Council of the Judicature⁹⁴.

144. The issue of distribution of cases may play an important role in ensuring integrity of the adjudication process. In Colombia, the Code of Criminal Procedure establishes rules of competence

⁹⁰ See the '[Assessment of USAID/Colombia's Justice Reform and Modernization Program](#)' of March 2010.

⁹¹ According to the authorities, this reform prevents in particular the interference of the Parliament in the decisions of the High Court's judges and provides these judges with functional immunity. New election rules of judges in senior position are in place as well as new disciplinary rules over the members of the Judicial Branch.

⁹² Articles 254-256 of the Colombian Constitution.

⁹³ Article 149 of Law 270 of 1996.

⁹⁴ Article 111 of Law 270 of 1996

according to subject-matter and place⁹⁵. Furthermore, cases are assigned through a computerized system, structured on the basis of an equitable distribution of workload among judicial officials, for which the following rules are adopted: grouping of cases by class, according to their nature; random allotment for each group; with protection mechanisms to avoid manipulation and, especially, to avoid selection of the judge that shall hear the case⁹⁶.

145. Several international observers highlight the fact that Colombia has a long tradition of judicial independence, at least compared to other neighbouring countries.⁹⁷ Judicial nominations are not made by the President but coordinated by the Superior Council of the Judicature. High court jurists in Colombia – in particular, members of the Constitutional Court – are generally held in higher esteem than many regional peers. In spite of these safeguards, civil society and the general public often note that the judiciary remains vulnerable to undue influence, including risks of corruption.⁹⁸ Judges met by the evaluation team indicated that they had never faced any external pressure in their work. They further indicated that a judge could ask for a case to be transferred, but only at his request and that, to their knowledge, such a situation has never occurred in a corruption case.

146. The outright corruption, in its classic form of cash bribes accepted by judges, can be perceived as a factor contributing to undue influences in court decisions. In Colombia, several recent scandals have been reported by the press, involving judges who accepted large bribes from criminals in return for more lenient sentences. Allegations of corruption in the top of the country's justice system have also been widely reported by the press and have contributed to tarnish the credibility of the highest judicial bodies in Colombia.⁹⁹

147. Local judges are identified as being particularly exposed to corruption. As an example, in 2010 and according to the press, a significant number of Colombian judges were investigated by the DIJIN for corrupt practices.¹⁰⁰ In a report published in September 2013, the OAS compiled figures by the Superior Council of the Judicature on the number of proceedings against judicial officials for corruption between 11 January 2007 to 19 December 2011. The reports noted that of the 43 proceedings against judicial officials for corruption in the four-year period from 2007 to 2011, a high percentage (63%) of the measures taken involved archiving the investigation or refraining from a decision and from taking disciplinary action, and that, moreover, no penalties were imposed in any of the proceedings. The experts formulated a

⁹⁵ Articles 32 to 45 CPC.

⁹⁶ Accord 1589 of 2002 adopted by the Superior Council of the Judicature.

⁹⁷ See in particular report from 2011 from Freedom House on Colombia: <https://freedomhouse.org/report/countries-crossroads/2011/colombia>

⁹⁸ According to Transparency International's Global Corruption Barometer 2010-2011, the judiciary in Colombia is perceived to be quite corrupt, while almost a quarter of the surveyed households report to have paid a bribe to the judiciary during 2010. In 2013, 20% to 29% of Colombians admitted to bribing a member of a service provider, including the judiciary. See Transparency International, Global Corruption Barometer 2013, at p. 10, available at http://issuu.com/transparencyinternational/docs/2013_globalcorruptionbarometer_en.

⁹⁹ See for instance March 2015 articles: <http://colombiareports.co/biggest-corruption-crisis-in-constitutional-court-history-no-reason-for-president-to-resign/> and <http://colombiareports.co/is-colombias-justice-system-really-that-rotten-yes-it-is/>

¹⁰⁰ See <http://www.insightcrime.org/news-briefs/bogota-cartel-of-judges-highlights-judicial-corruption> and <http://colombiareports.co/ig-to-investigate-100-corrupt-judges/>. Colombia clarifies that the figure referencing 100 judges is not accurate.

recommendation to Colombia to consider analysing the reasons for this state of affairs in order to identify challenges and recommend corrective measures.¹⁰¹

148. Attempts to destabilise the independence of the judiciary via surveillance and illegal wiretapping of Supreme Court magistrates in the recent past are also recognised.¹⁰² Another challenge facing the judiciary in Colombia is the lack of security for judges, prosecutors and witnesses. According to the US Department of State,¹⁰³ the judicial branch has been hindered by intimidation and threats and in some cases even assault and murder.¹⁰⁴ This high level of threats and attacks carried out by offenders contributes to a high rate of impunity amongst judges. Judges are more susceptible to corruption when under pressure from the threats of the offenders. This is also supported by the Bertelsmann Foundation 2012, which notes that the threat posed by armed guerrilla groups and paramilitaries has impaired the impartiality of the judiciary.¹⁰⁵ According to the US Department of State, many witnesses under investigations refused to testify in courts despite the PGO providing a witness protection programme.

Commentary

The lead examiners recommend that Colombia promptly develop training for judges specifically on foreign bribery, and ensure that sufficient resources and expertise are available in the courts. In light of the low level of conviction rate which appears to plague the general criminal justice system in Colombia, the lead examiners also recommend that Colombia take appropriate steps to ensure the effective investigation, prosecution and sanctioning of foreign bribery cases. In particular, Colombia could consider whether an integrated approach, relying on specialised courts to deal with offences such as economic and financial crime, may be appropriate.

With respect to the independence of judges, the lead examiners welcome the constitutional and legal frameworks regulating the judiciary, which clearly establish that the judiciary in Colombia is independent from the executive and legislative and that judges are only bound by the Constitution and the laws. They note, however, that examples of undue influence and large-scale corruption in the judiciary have been detected and reported by the media, international observers and human right defenders. The lead examiners therefore recommend that the Working Group follow up on this issue in practice to ensure foreign bribery cases are not affected. The Working Group should also continue monitoring the efforts made by Colombia to reform the judiciary and address its independence.

¹⁰¹ This information can be consulted in Spanish in its entirety at:
www.oas.org/juridico/pdfs/mesicic4_col_consejo2007.pdf

¹⁰² See for instance <http://colombiareports.co/cops-sentenced-for-illegally-wiretapping-supreme-court-justice/> and <http://colombiareports.co/former-intelligence-chief-carlos-arzayus-sentenced-9-years-10-months/>

¹⁰³ See the 2012 Human Rights Report on Colombia here
<http://www.state.gov/documents/organisation/160452.pdf>

¹⁰⁴ See
<http://www.justiceforcolombia.org/news/article/852/anti-corruption-investigator-assassinated-in-colombia>

¹⁰⁵ See <http://www.business-anti-corruption.com/country-profiles/the-americas/colombia/corruption-levels/judicial-system.aspx> and <http://www.bti-project.org/reports/country-reports/lac/col>

d. The conduct of investigations

(i) Commencement of criminal proceedings and sources of detection

149. The CPC provides that a criminal case may be initiated on the basis of the following: report about a crime (*denuncias*)¹⁰⁶ or any other reports; giving oneself up (*confession*); information regarding a committed crime or crime in preparation received from other sources; order of the prosecutor forwarding appropriate materials to the preliminary investigation body for deciding on criminal prosecution. This rule applies to foreign bribery offences committed by individuals (natural persons). An “order of the prosecutor” covers situations where the crime is reported to the prosecutor directly, or where a crime report received by another public official is forwarded to the prosecutor. The prosecutor decides which investigator has competence over the alleged crime and forwards information received (appropriate materials) to his investigator. According to the authorities, reports from private institutions/professionals (for example, private auditors) or foreign authorities fall under any of the triggering factors described above.

150. In its responses to the Phase 2 Questionnaire, Colombia states that the PGO does not keep statistics on the sources of investigations. It is therefore difficult to assess the level of proactivity and the reporting channels which work most effectively. During the on-site visit, Colombian law enforcement authorities indicated that investigations into complex economic crimes are often triggered as a result of information obtained through law enforcement intelligence. The reports of crime made by citizens were cited as another reliable source of detection in domestic corruption cases, but may be less fruitful in the case of foreign bribery, since evidence and witnesses of foreign bribery are often located abroad, perpetrators of foreign bribery are less likely to report it to Colombian authorities, and potential victims of foreign bribery are often not aware of it. According to the authorities, an investigation could also be commenced on the basis of information appearing in the media.

(ii) Verification of the crime reports and opening of the criminal case against a natural person

151. All bribery offences are subject to investigation and prosecution *ex officio* under Colombian law. Accordingly, the investigator is obliged to open a criminal case if there is a reasonable suspicion that the offence of foreign bribery has been committed. According to article 205 CPC, when a complaint is filed that shows possible existence of a criminal offense, the investigative body that has received the complaint must immediately take every urgent step to collect evidence. The investigative officers must report to the competent prosecutor who will assume the direction, coordination and control of the investigation. According to Colombia, the investigators have no discretion with regard to the opening of criminal cases if there are reasonable grounds to believe that the crime occurred.

152. The pre-trial discovery stage is closed and conducted under the sole direction of the prosecutor, who responds to the complaint and formulates the case theory. Based on case theory, the prosecutor then creates a methodological plan for obtaining needed information, known as the body of evidence, which becomes proof during the trial stage. Under Colombia’s accusatory system, it is assumed that there is no debate in this stage that would require the participation of the involved parties. However, any person that becomes aware that there are criminal investigations against them can petition the judge to order the prosecutor to disclose to them the body of evidence that has been collected in order to prepare for the defence.

153. This preliminary investigative stage does not have a time limit set by law, and continues until the prosecutor collects enough evidence to make the accusation or dismiss the case due to lack of evidence. At

¹⁰⁶

Article 69 CPC.

the on-site visit, the PGO indicated that investigation times fluctuate very much in practice, depending on the complexity of the crime and the number of defendants.

154. International commentators highlight problems of slowness and inefficiency at this stage of the criminal proceedings. In 2012, “Lawyers without Borders” undertook a review of 1,837 proceedings arising under the Rome Statute reported by the PGO.¹⁰⁷ Criminal proceedings appeared to be overwhelmingly in the preliminary stage of the investigations, with 95% of cases not having advanced past the preliminary phase of inquiry. For the reviewers, this level of inactivity results, in part, from the overload of cases in the different offices and a consequent lack of capacity to investigate. This pressure on the prosecutors and the demands to produce measurable results in terms of indictments and convictions seems to generate a distortion in the system of administration of justice that leads to the easiest cases (generally involving an arrest *in flagrante delicto*) being the ones that prosper. Thus, the complex cases get lost in the growing volume of cases, and the likelihood increases that cases will be archived. According to the same review, the more time a case passes in a pre-investigation, the more likely it is to be closed without a final determination of responsibility. In the cases examined, the delay between the occurrence of the act and the trial appeared excessive, and the inquiry phase tended to extend without producing results. The early stagnation of the cases has very grave repercussions on the probabilities of success and reflects a potential violation of the principle of due diligence in the criminal investigation. Although more recent figures have not been made available by the authorities, this phenomenon was mentioned by representatives of the civil society interviewed during the on-site visit. They highlighted the delays in dealing with corruption cases that, to their opinion, contribute to undermine the credibility of the judiciary in Colombia, and reinforce a sense of impunity for those allegedly involved in corruption.

(iii) *Investigative techniques and bank secrecy*

155. Articles 213 to 245 CPC set out the investigative techniques that are available to law enforcement authorities, which include wire-tapping; undercover agents; controlled deliveries in cases involving arms trafficking, explosives, ammunition, counterfeit, drugs of dependency or continuing criminal activity; selective database searches; and DNA analysis. Interrogation, examination of premises, buildings and vehicles, examination of items and of documents, surveillance and identification of persons are also at the disposal of law enforcement authorities. The Colombia authorities stated that wire-tapping requires prior judicial authorisation except in case of emergency where this authorisation can be granted afterwards. Other investigative techniques that affect fundamental rights of citizens, such as search and seizure in certain circumstances, must be previously approved by the judge. All of these investigative tools and techniques are available in foreign bribery investigations involving natural persons (see [section C.3.h\(ii\) below on investigations into legal persons](#)). The representatives of the law enforcement bodies met during the on-site visit indicated that they have sufficient investigative tools at their disposal to deal with complex crimes’ investigations. Based on experience in domestic corruption cases, they indicated that the most commonly used investigative tools in practice include wiretapping, accessing bank information and search and seizure among others.

156. Prosecutors may demand documents through a judicial order by a supervisory judge. Prosecutors may seek authority to raid a company to seize documents also through a judicial order known as *Orden de Registro y Allanamiento*. Only the supervisory judges may authorise the execution of this type of judicial order. Based on article 206 CPC, prosecutors may seek a voluntary interview with any person who is a victim or a witness of a crime, but these individuals may refuse to do so. A supervisory judge may issue a judicial order commanding employees, officers, or directors to appear before the judicial police to answer

¹⁰⁷ See Lawyers Without Borders, 2012, “[Rome Statute and the Colombian Situation: A Case that Demands More than a “Positive” Approach](#)”. Following the on-site visit, Colombia explained that the problems raised were due to the complexity of the cases that related to grave human rights violations.

questions. Article 383 CPC states that every person is obligated to testify, under oath, during trial if requested.

157. Article 15 of the Constitution provides for the right to privacy (“*intimidad*”). However, this is lifted for tax purposes under Article 15 which states: “For tax and judicial purposes, and in the case of inspection, oversight and intervention of the State, the presentation of accounting records and other private documents may be required, in the terms provided by Law”. Related legal provisions include: article 105 of Law 663 of 1993 (Organic Statute of the Financial System), which provides for the lifting of bank secrecy at the request of Colombia’s Financial Intelligence Unit (UIAF) or the PGO; article 200 CPC which requires official and private organisations to cooperate with authorities exercising judicial police functions; and articles 61 and 63 CoC which establish exceptions to bank secrecy for those with the function of overseeing or auditing books and records of commercial companies, and following orders from officials from the judicial or executive branches in the context of criminal proceedings and in accordance with the CPC. Law enforcement agencies interviewed during the on-site visit reported no particular difficulties in accessing bank information.

(iv) *Indictment and criminal prosecution*

158. After the prosecutor has reasonable inference that a person is the author of a crime, the prosecutor formally informs the person that they are the subject of an official criminal investigation during a hearing known as *Audiencia de Imputación*. Throughout this pre-trial phase, the Guarantee Judge (Juez de Garantías) must ensure that the prosecutors and the judicial police respect the fundamental rights of the accused enshrined in the Constitution of Colombia, the Criminal Code, and international human rights treaties. Colombian criminal law is quite detailed about the level of evidence needed by a prosecutor to lay charges. Article 397 CPC states “*the prosecutor... will formally charge the accused only when the occurrence of an act can be demonstrated and a confession or testimony exists which shows serious and credible motive, serious evidence and is supported by documents, or other probative means which indicate the responsibility of the defendant.*”

159. Under the accusatorial criminal procedure code implemented in 2008, the prosecutor presents an accusation and evidence before an impartial judge. No juries are involved.¹⁰⁸ The first hearing of the trial phase is the indictment.¹⁰⁹ The trial stage is held publicly, with oral proceedings where the parties present their evidence and defend their respective allegations before the judge. The judge must render an impartial verdict based upon the evidence adduced at the trial. The trial is held in accordance to the principles of immediacy, contradiction, and concentration. When the judge finds a defendant guilty, it begins the process of reparation (*Incidente de Reparación*) in order to repair or compensate the damage caused to the victims of the crime.

160. Criminal procedures can be closed under any of the seven grounds listed in article 332 CPC, which are: the impossibility of initiating or continuing the prosecution; existence of a ground to exclude criminal liability under the PC; inexistence or irregularity of the act being investigated; lack of involvement of the accused; impossibility of disproving the presumption of innocence; or expiry of the statute of limitations.

Commentary

The lead examiners recommend that Colombian law enforcement authorities make full use of all available methods to proactively detect foreign bribery, including by raising awareness of

¹⁰⁸ See the 2013 Country Reports on Human Rights Practices on Colombia.

¹⁰⁹ The required form and content of the indictment is set out in articles 286 to 289 CPC.

foreign bribery and encouraging reports from relevant governmental and private sector actors, as well as using incoming MLA requests as a potential source of information for initiating foreign bribery investigations in Colombia.

The lead examiners welcome the broad range of investigative measures available for investigating foreign bribery offences. They encourage the law enforcement authorities to make full use of these techniques to proactively and effectively investigate allegations of foreign bribery.

The lead examiners further recommend that the Working Group follow up as case law and practice develop on Colombia's capacity to efficiently and successfully investigate foreign bribery, including in the preliminary stages of the investigation.

e. Principles of prosecution

(i) Mandatory prosecution versus opportunity principle

161. Under Article 250 of the Constitution, the PGO has the obligation to prosecute and investigate the facts that could be characterised as crimes brought to its attention through routine channels, formal accusations, special petitions and legal notifications, on the condition that there are sufficient reasons and factual circumstances that indicate the possible existence of the offense". Article 322 CPC sets out the legality principle, which requires the PGO to prosecute offences except when the opportunity principle applies.¹¹⁰

162. Under article 323 CPC, the principle of opportunity is defined as: "the Constitutional faculty that permits the Office of the PGO, notwithstanding the existence of a basis for proceeding with a criminal investigation, to interrupt, renounce or suspend it for reasons of criminal policies according to causes clearly defined in the Law subject to the regulations emitted by the PGO and submitted for legal control before a supervisory judge." According to the authorities, the opportunity principle is exceptional in law and practice. It has been classified by the Constitutional Court as a "regulated" power, as opposed to a discretionary power, and according to the CPC, the decision not to prosecute must be reviewed by a judge. As a consequence, prosecutors are unable to suspend, discontinue or abandon criminal proceedings except in cases falling under the opportunity principle set out in article 324 CPC.

163. Article 324 CPC sets out the circumstances under which the opportunity principle may be invoked, and provides, in paragraph 2, for its application by the PGO in relation to crimes with a maximum penalty of over 6 years' imprisonment (i.e. including the foreign bribery offence).¹¹¹ Colombia stated in Phase 1 that any such decision must be subject to judicial review, in accordance with Article 250 of the Constitution. The opportunity principle may be applied in cases where, *inter alia*, the victim has been compensated; the defendant is extradited to another country; the defendant collaborates before the judgment hearing to prevent the continuation of the crime or agrees to serve as a prosecution witness against other defendants; the defendant has suffered serious physical or moral harm; or when the criminal procedure implies risk or serious threat to the Foreign Security of the State.

164. Law 1474 of 2011 inserted in article 324(18) CPC a bribery-specific exception to the obligation to prosecute, which allows an exception to the legality principle in cases where the offender files the formal complaint initiating the investigation, actively cooperates with the PGO, and amends the harm done.¹¹² In Phase 1, Colombia pointed out that this article applies only to cases of domestic bribery

¹¹⁰ See [Annex 3](#) for legislative excerpts.

¹¹¹ *Ibid.*

¹¹² *Ibid.*

contained in Chapter III, Title XV of the Penal Code, entitled “*Cohecho*”.¹¹³ Colombia expressed the same opinion in Phase 2. However the article does not specifically refer to articles 405 to 407 on domestic bribery offences, but only refers to “bribery” (*cohecho*) in general. According to Colombia, foreign bribery is not a “*cohecho*” since it is named “*soborno*” under the Criminal Code. The Working Group expressed doubts in Phase 1 on how this provision might be used by a defendant in a foreign bribery case, in particular as it is unclear how the damage caused could be adequately quantified and remedied in satisfaction of this provision. In terms of procedure, the Working Group further considered unclear the role of the Judicial Police, the PGO and the courts in determining whether the various elements are satisfied, and in deciding whether this defence should succeed. According to Colombia, this determination is made by the prosecutor and then the judge, based on the facts of the case. Colombia also explained in Phase 1 that, even if this exception was applied in a foreign bribery case and the accused was not prosecuted for criminal policy reasons, confiscation would still be available with respect to the bribe and its proceeds under the *extinción de dominio* provisions. The Working group agreed to follow up in Phase 2 the application of this provision. In the absence of foreign bribery cases as of the time of this review, this issue should continue to be followed up to ensure it does not hinder the effective enforcement of the foreign bribery offence. During the Phase 2 on-site visit, one prosecutor stated that he would consider applying the opportunity principle to grant full immunity to a perpetrator of foreign bribery because the cooperation with the accused could assist the foreign authority. In its theoretical application to a foreign bribery case, the principle of opportunity could result in an exoneration of the accused for cooperation with law enforcement authorities. While this may have a distinct benefit in cases of domestic bribery as the bribe recipient is also within the jurisdiction of the country, it does not carry the same advantage in cases of foreign bribery. Thus, the application of this principle in foreign bribery cases could be potentially misused and lead to a loophole in the implementation of the Convention, were it to lead to complete exoneration from sanctions of the active briber in foreign bribery cases.

(ii) *Considerations such as national economic interest, the potential effect upon relations with another State or the identity of the natural or legal person involved*

165. As noted above, the PGO may only suspend, interrupt or decline to prosecute in accordance with the opportunity principle, set out in article 324 CPC, and subject to a decision by a supervisory judge. Several exceptions are listed in article 324 CPC. In particular, the Working Group asked the Phase 2 review to examine the exception in article 324(8) CPC to ensure it does not provide an opportunity for potential factors prohibited under Article 5 of the Convention.

166. Article 324(8) CPC allows the PGO to decline prosecution if it involves “serious risk or threat to the external security of the State”. The exact scope of this exception is not defined in the CPC. In Phase 1, Colombia referred to jurisprudence of the Constitutional Court citing Article 189(6) of the Constitution, which mandates the President of the Republic to exercise powers to ensure the “external security of the Republic”, to infer that this is defined as (i) the independence and honour of the nation, (ii) the inviolability of its territory, and (iii) a situation of foreign war. It was unclear for the Working Group how this interpretation might be applied to the article 324(8) CPC provision for suspending, interrupting or declining prosecutions that involve serious risk or threat to the external security of the State. In any case, Colombia stated that in cases that might involve “the external security of the State”, the Executive may suggest when such proceedings might constitute a threat but that the final decision is left to the prosecutor to decide, subject to control by the supervisory judge.

167. More information was provided by the authorities in the course of Phase 2. According to Colombia, there are several guarantees in place to ensure that article 324(8) is not relied on in

¹¹³

See [Colombia Phase 1 Report](#), §§ 91-92.

contravention of Article 5 of the Convention. In particular, all conditions for the opportunity principle set out under article 323 of the CPC must be fulfilled, thus providing several safeguards:¹¹⁴

- The principle may only be invoked “for reasons of criminal policy”, as provided under article 321 CPC. Criminal policy is defined in Colombian case law as “the set of responses that the State considers necessary to confront conducts which are considered reproachable or causing social prejudice with the aim of guaranteeing the protection of the essential interests of the State and the rights of the inhabitants of its territory.”¹¹⁵ Criminal policy includes, but is not limited to, criminal laws approved by Congress. Thus, the Anti-Bribery Convention and its implementing legislation (both Law 1474 of 2011 and the new Bill presented before the House of Representatives, if it becomes legislation), form part of the criminal policy of the State.
- More importantly, by specifying that the principle may be invoked “*for reasons of criminal policy*”, article 323 CPC excludes other reasons, such as those mentioned in Article 5 of the Convention (economic interest, relations with another State, or the identity of the natural or legal persons involved). Along the same lines, the principle may only be invoked “according to the causes established exhaustively by law”. The Constitutional Court has held that the causes for the opportunity principle are governed by the principle of strict legality, as they represent a departure from the general principle of legality.¹¹⁶
- The expression “*external security of the State*” contained in article 324(8) must therefore be interpreted restrictively. It does not, on the face of the text, include the three factors prohibited under Article 5 of the Convention.
- The application of the principle is “subject to the regulation made by the Prosecutor General”. This regulation is yet to be issued by the PGO. The requirement of a regulation is a relatively new element in the CPC,¹¹⁷ designed to allow the Prosecutor General to publicly disclose the standards by which the opportunity principle should be exercised, so that not even the Prosecutor General may exercise absolute discretion in applying the opportunity principle.
- The decision is “*subject to a review of legality before a judge of guarantees*”. This review ensures that the decision not to prosecute, or to suspend prosecution, is grounded in law and not the exercise of pure discretion by the prosecutor.¹¹⁸ According to the authorities, this provision

¹¹⁴ *Ibid.*

¹¹⁵ Constitutional Court, Decision C-646 of 2001, available in Spanish at <http://www.corteconstitucional.gov.co/relatoria/2001/c-646-01.htm>

¹¹⁶ Constitutional Court, Decision C-673 of 2005, available in Spanish at <http://www.corteconstitucional.gov.co/relatoria/2005/C-673-05.htm> (“With respect to the causes for application of the opportunity principle, the Court considers that for them to adjust to the provisions of Article 250 of the Constitution, that is, for them to effectively apply in the cases established by law, they must be defined by the legislator in a clear and precise manner, so that the discretionary power to apply does not become a possibility of arbitrary application.”)

¹¹⁷ It was added by Law 1312 of 2009.

¹¹⁸ Article 327 regulates such judicial review, stating: “... *Such review shall be automatic and obligatory and shall be made in a special hearing in which the victim and the Public Ministry may challenge the evidence tendered by the Prosecutor General’s Office to sustain the decision. ...*” In Colombia the Inspector General’s Office (Procuraduría General de la Nación), may intervene in criminal trials to protect the rights of the parties and uphold the law. The Inspector General’s Office is also referred to in the law as the Public Ministry (Ministerio Público).

entails, first, that the application of the opportunity principle must be grounded in evidence, and second, that such evidence may be challenged. In short, the decision to apply the opportunity principle is subject to judicial review both in fact and in law.

168. Colombia further explains that, in practice, the application of the opportunity principle is highly exceptional. Between April 2012 and February 2013, the PGO requested the application of the opportunity principle in 32 cases out of 76872 cases which reached a final decision that year, i.e. in approximately 0.03% of cases.¹¹⁹ Furthermore, the opportunity principle was denied by the reviewing judge in roughly two out of every three cases. Open sources point to very slight increase in recent years on the use of the principle of opportunity, with figures ranging from two to three percent of all investigations opened.¹²⁰

169. Finally, the authorities state that article 324(8) is not a standalone provision allowing officials to withhold prosecution if they think that the security of the State is threatened. The whole of Title IV of the CPC enjoins them to verify the set of conditions necessary for the application of the opportunity principle, and to prove to a judge that those conditions have been met. The risk of Article 324(8) being applied in foreign bribery cases in contravention of Article 5 of the Convention appears therefore extremely small, if not negligible.

(iii) *Plea-bargaining*

170. The Colombian legal system has adopted plea-bargaining procedures, which allow acceptance of the charges and plea bargaining from the arraignment onwards, for all offences including foreign bribery. These so-called “preliminary agreements” are regulated under articles 348-354 CPC.¹²¹ Article 350 provides in particular that “from the time of the Hearing of Formulation of Imputation up to before the Writ of Indictment is presented, the Prosecution and the Accused can reach a preliminary agreement concerning the terms of the imputation.” These plea agreements imply an admission of guilt on the part of the accused, who, in turn, may benefit from a reduction of up to one half of the sanction foreseen by the law.¹²² In addition, and where applicable, the accused must have returned any proceeds gained from the commission of the crime.¹²³ Preliminary agreements must be presented to the Presiding Judge in charge of the case, although the judge may not oppose such agreements, unless they breach “fundamental liberties”.¹²⁴ Preliminary agreements may also be reached after the indictment and up to the moment when the accused is interrogated at the beginning of the oral trial; in this case, sanctions may only be reduced by one third.¹²⁵

171. Prosecutors present at the on-site visit indicated that such plea agreements are often relied on in Colombia. Judges, on the other hand, indicated that the reduction in sanctions offered under this procedure is not sufficiently enticing for defendants. Prosecutors further explained that, like all court-sanctioned

¹¹⁹ See PGO Report 2012-2013 available in Spanish at <http://www.fiscalia.gov.co/en/wp-content/uploads/2012/01/InformedeGestion2012-2013.pdf>, p.30 (for number of applications of opportunity principle), and PGO Statistical Bulletin available in Spanish at http://www.fiscalia.gov.co/colombia/wp-content/uploads/Boletin-46-ley-906_600.pdf, p.23 (for number of cases coming out of trial during the year).

¹²⁰ See the “[Assessment of USAID/Colombia’s Justice Reform and Modernization Program](#)” of March 2010.

¹²¹ See Annex 3 for legislative excerpts.

¹²² Article 351 CPC.

¹²³ Article 349 CPC.

¹²⁴ Article 351 CPC.

¹²⁵ Article 352 CPC.

decisions, plea agreements are carried out in an oral, public hearing, which may be attended by anyone, including the media. Written transcripts of oral hearings are available, including through the internet in relevant judicial services based on the name and case file number. According to the authorities, the offences, facts, and names of the persons as well as the sanctions imposed are set out in the decision.

Commentary

The lead examiners welcome explanations provided by the Colombian government in respect of article 324(18), which provides an exception to the legality principle in bribery cases for cooperating offenders initiating the criminal investigation. Nevertheless, in the absence of case law, and given the interpretation by the PGO at the on-site visit, they are concerned about its application in foreign bribery cases. They therefore recommend that Colombia take any appropriate steps, such as providing guidance to prosecutors, to ensure that the application of article 324(18) in practice does not prevent effective enforcement of the foreign bribery offence.

The lead examiners are largely reassured by the explanations provided by Colombia as regards application of article 324(8) CPC which allows the PGO to decline prosecution if it involves “serious risk or threat to the external security of the State”. They consider that a number of safeguards are in place which should prevent this provision from being relied on in contravention of Article 5 of the Convention.

f. Statute of limitations and time limits for the criminal process

172. Article 6 of the Convention requires that any statute of limitations with respect to bribery of a foreign public official provide for ‘an adequate period of time for the investigation and prosecution’ of this offence.

173. Under Colombia’s Penal Code, the minimum statute of limitations for criminal investigations into a foreign bribery offence would run 15 years if committed in Colombia. Since the statute of limitations increases by half for offences initiated or committed abroad (without exceeding a maximum of 20 years), the statute of limitations for foreign bribery could even reach 20 years if initiated or committed abroad. As already noted in Phase 1, this statute of limitations appears sufficient to meet the requirements of the Convention.

174. In the response to the Questionnaire, the authorities provided the time limits for the stages of the criminal process as follows:¹²⁶

- From the arraignment to the indictment, there is a time limit of 90 days.
- From the indictment to the preparatory hearing, where discovery of evidence takes place, there is a time limit of 45 days.
- From the preparatory hearing to the trial hearing, there is a time limit of 45 days.
- The judge must enter a judgment of conviction or acquittal immediately after the trial hearing.
- After a conviction, the judge has 15 days to issue a sentencing judgment (Article 447).
- Appeals to the trial judgment must be lodged immediately, and must be decided by the appellate judge in 15 days (Article 179).

¹²⁶

Article 175 CPC.

175. The procedural timelines described above did not raise any concerns among the judges met by the lead examiners at the on-site visit. There has been however much criticism of the short time limits for processing a case once charges are filed. According to some observers, a tendency for prosecutors is to focus on processing simple, largely *in flagrante* cases, with a consequent inattention to more complex crimes, and it has been hypothesised that this is a rational response to the time limits.¹²⁷ There has also been considerable public debate about the time limits for taking cases forward after charging, especially after the release of alleged offenders in high profile cases in 2010.¹²⁸ However, panellists interviewed during the on-site visit dismissed the argument that the time limits were too short and argued that the prosecutors were too quick to charge in the mentioned case examples, thus not handling their cases strategically.¹²⁹ Practicalities of these time limits in foreign bribery cases should be followed up by the Working Group as case law develops.

Commentary

The lead examiners recommend that the Working Group follow up on the procedural timelines for law enforcement authorities, to ensure there is an adequate period of time for the investigation and prosecution of the foreign bribery offence.

g. Jurisdiction

176. Under Article 4 of the Convention, Parties must be able to assert jurisdiction both over bribery of foreign public officials committed by non-nationals within their territory as well as over foreign bribery committed by their nationals abroad.

(i) Territorial jurisdiction

177. Article 4.1 of the Convention requires each Party to “take such measures as may be necessary to establish its jurisdiction over the bribery of a foreign public official when the offence is committed in whole or in part in its territory”. Commentary 25 to the Convention clarifies that “an extensive physical connection to the bribery act is not required”. Article 14 PC governs the exercise of territorial jurisdiction.¹³⁰

178. In cases of transnational bribery, to establish Colombian territorial jurisdiction where the offer, promise or giving of the bribe occurred abroad, a territorial link to Colombia would need to be shown, i.e. that at least part of the action or omission occurred in Colombia, or produced its “final result” in Colombia. Colombia explains that the principle of territoriality can be applied in one of two ways: (i) “subjective territoriality” covering acts that began in Colombia, but ended in another territory, or (ii) “objective territoriality” covering acts initiated outside of Colombia, but culminating in, or having substantial and direct effect in, Colombia.

179. In the absence of case law as of the time of this review, it remains unclear how the term “final result” may be interpreted in foreign bribery cases. In Phase 1, Colombia indicated that the “final result” refers to the prejudice caused by the criminal act. According to this interpretation, if the only link to

¹²⁷ See in particular the “[Assessment of USAID/Colombia’s Justice Reform and Modernization Program](#)” of March 2010.

¹²⁸ See <http://www.justiceforcolombia.org/about-colombia/>. Following the on-site visit, Colombia specified that this situation was due to the complex nature of grave human rights violations involved.

¹²⁹ See “Crime in Colombia: More law enforcement or more justice?”, February 2014 at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2456717

¹³⁰ See [Annex 3](#) for legislative excerpts.

Colombia was the benefit gained by a Colombian company, this would not be sufficient to show that “the final result occurred” in Colombia and thus establish a territorial link. In other discussions, Colombia explained that it would be sufficient to show “any link” to Colombian territory. This issue will need to be followed up as case law develops.

(ii) *Nationality jurisdiction*

180. Article 4.2 of the Convention requires that where a Party has jurisdiction to prosecute its nationals for offences committed abroad it shall, according to the same principles, “take such measures as may be necessary to establish its jurisdiction to do so in respect of the bribery of a foreign public official”.

181. Article 16 PC clearly provides for the possibility for Colombia to exercise nationality jurisdiction over Colombian natural persons who have allegedly committed offences against the public administration (including foreign bribery).¹³¹ The Working Group in Phase 1 did not identify any problems with the exercise of extraterritorial jurisdiction with respect to natural persons, and was only concerned with the issue of nationality jurisdiction over legal persons, explored in section XX hereunder.

h. Mutual legal assistance and extradition

i. Mutual legal assistance

182. Article 9.1 of the Convention mandates that each Party co-operate with the others to the fullest extent possible in providing “prompt and effective legal assistance” with respect to criminal investigations and proceedings, and non-criminal proceedings against a legal person, that are within the scope of the Convention.”

183. Responses to the Phase 2 questionnaire, discussions at the on-site and perceptions of other Parties to the Convention appear to show that the provision of MLA by Colombia is generally efficiently carried out. The PGO explained that it has a general policy prioritising responses to all MLA requests. Colombia has put in place an efficient system to track, inter alia, the status of assistance, the requesting authority, and the nature of the request. This enables Colombian authorities to quickly and positively respond to incoming MLA requests, including in the context of Convention-related cases. Colombia indicates that no MLA requests in respect of Convention cases have ever been denied.

MLA process

184. Where an international instrument or bilateral agreement serves as the basis for MLA, the Ministry of Justice or the PGO is generally designated as the relevant central authority. For the purpose of Articles 9 and 10 of the OECD Anti-Bribery Convention, and as of the time of this review, Colombia has designated the Ministry of Foreign Affairs as its official central authority for making and receiving requests. In civil matters, the PGO and the Ministry of Foreign Affairs are the responsible authorities: the PGO, for assessing the validity of the request, and the Ministry of Foreign Affairs for executing it. In the absence of a treaty, article 484 CPC sets out the general principle that investigative and judicial authorities will provide international cooperation, through the Ministry of Foreign Affairs, in accordance with the Constitution, international instruments and laws. Colombia has also concluded a number of regional bilateral MLA treaties, as well as ones with Working Group members, such as Argentina, Brazil, France, Mexico, Spain and the United Kingdom.

¹³¹

Ibid.

185. Colombia's framework for international cooperation is set out in Book V of the CPC, which sets out the different types of assistance Colombia may provide and in which Colombia may engage in the context of transnational crime investigations.¹³² Colombia does not require dual criminality to provide MLA. The only grounds for refusing MLA are the constitutional values set out in the preamble to the Constitution (life, work, justice, equality, peace and freedom) and principles described in article 489 CPC (such as sovereignty and human dignity). Prosecutors at the on-site could not recall any instance where MLA had been refused on the basis of article 489.

186. As explained in Phase 1, bank secrecy is not a justification for refusing to respond to an MLA request.¹³³ Prosecutors at the on-site explained that information from financial institutions could be obtained very promptly, possibly within a day if the information sought was clear and would allow the police to go directly to the bank. In fact, obtaining information from financial institutions for the purpose of responding to an MLA request would often be quicker than in the context of domestic proceedings (see [section C.1.d.\(iii\) on bank secrecy](#)).

Consultation in multijurisdictional cases

187. Article 4.3 of the Convention requires that "When more than one Party has jurisdiction over an alleged offence described in this Convention, the Parties involved shall, at the request of one of them, consult with a view to determining the most appropriate jurisdiction for prosecution."

188. It does not appear that any formal process has been established to deal with potential multijurisdictional foreign bribery cases. That being said, as noted earlier, Colombia has not yet experienced a foreign bribery case.

189. As far as general rules on international cooperation in investigations go, Colombia mentions in its Phase 2 responses the possibility for the PGO, under article 487 of the CPC, to take part in international and inter institutional commissions for the investigation of transnational crimes.¹³⁴ Colombia also refers to the possibility of transferring cases, as has been recognised in several instances by the Supreme Court of Justice. In these pronouncements, the Supreme Court has established that the application of the Principle of Territoriality allows the Colombian State to investigate and sanction crimes committed in a foreign country, and also allows a foreign State to investigate and sanction crimes in Colombia when the conditions established by the principles of international extraterritoriality are met.¹³⁵

MLA in relation to legal persons

190. As concerns incoming request, although liability of legal persons is administrative in nature in Colombia's legal system, Colombia indicates that this would not prevent it from providing MLA in the context of criminal proceedings against legal persons in a foreign jurisdiction. In Phase 1, Colombia explained that this is notably because Colombia does not require dual criminality to provide MLA (even in the absence of a treaty), and because the only grounds for refusing MLA are the constitutional values and

¹³² See *ibid.*, §§ 117-119.

¹³³ See *ibid.*, §§ 122-123.

¹³⁴ Article 487 CPC provides that "*General Attorney's Office, when dealing with crimes that have an international dimension, is able to be a part of an international or inter institutional commission whose objective is to collaborate in the investigation and the gathering of evidence.*"

¹³⁵ Decisions of the Criminal Chamber of the Supreme Court of Justice Filing Nos. 20292 and 26687, mentioned in Colombia's responses to the Phase 2 Questionnaire.

principles set out in article 489 CPC. Colombia further stated as an example the assistance provided to a Party to the Convention in one of the foreign bribery cases involving Colombian officials (see below).

191. With respect to outgoing requests, the Superintendency of Corporations may not request MLA directly from criminal law enforcement authorities abroad. The two options available to the Superintendency of Corporations are either to (i) act through the PGO, assuming criminal proceedings are also engaged against a natural person; or (ii) ask the Ministry of Foreign Affairs to transmit the request to administrative authorities abroad. Colombia explains that the Superintendency of Corporations has obtained MLA from criminal law enforcement authorities, notably in the Interbolsa case, where the Superintendency of Corporations sought MLA from several countries to recover funds invested there by Interbolsa in order to repay the defrauded investors. The Interbolsa case however involved matters of insolvency and cross-border insolvency, for which the Superintendency may exercise judicial functions (the Superintendency of Corporations does not exercise judicial functions in foreign bribery matters). Colombia has attempted to address this MLA challenge by providing in Bill 159 that the Superintendencies of Corporations and Finance “may carry out the actions attributed to the Central Authority designated in the mutual legal assistance treaties subscribed by Colombia.” Bill 159 further proposes that “the Superintendencies of Corporations and Finance can send officials abroad to carry out designated proceedings with the authorisation of legitimate foreign authorities”. In the absence of concrete examples to date, the ability of the Superintendency(ies) to seek MLA in foreign bribery related cases against a legal person (in particular where no natural person is prosecuted) will need to be followed up as practice develops.

MLA in the context of foreign bribery cases

192. In terms of incoming MLA requests relating to foreign bribery cases (concerning bribe payments to Colombian public officials), Colombia reports having received (in the context of *Case #1 – Oil Company case*) one request from a Party to the Convention since the Convention’s entry into force in Colombia. Colombia responded positively to this request within four months. In addition, Colombia notes that it has responded to 60 MLA requests in relation to other crimes against the public administration between 2013 and 2014; of these 36 were provided to Parties to the Convention and 24 to non-Parties.

193. Colombia states in its Phase 2 responses that it takes an average of six months to respond to incoming MLA requests. Colombia further indicates that 44% of MLA requests receive responses within one year. By way of example, Colombia explained that out of the 407 rogatory letters (covering all offences) received in 2013-14, 179 have been answered and 228 were being processed as of the time of this evaluation.

194. As noted earlier, Colombia does not have any foreign bribery investigation or prosecution underway (i.e. concerning payment of bribes by Colombian nationals to foreign public officials), and has therefore never sent out a request for MLA in that context. Nevertheless, it may be worth noting that in relation to two allegations of bribery of Colombian officials by nationals of other Parties to the Convention (*Case #1 – Oil company case* and *Case #3 – Engineering company case*), Colombia has sent out MLA requests to two countries Party to the Convention, and received positive responses within two and ten months respectively.

ii. Extradition

Extradition process

195. Article 494 CPC allows the Colombian government to grant extradition under the conditions it deems appropriate and provided that the extradited person is not convicted for offences different to those

contained in the extradition request, or subjected to sanctions beyond those that correspond to the offence in the extradition request. Colombia will extradite its nationals for offences committed abroad if dual criminality is deemed to exist. Extradition of nationals is not available for acts committed before 17 December 1997, the date of enactment of Legislative Act 01/1997, which repealed the Constitutional prohibition on the extradition of Colombian nationals by birth.

Extradition requests in the context of foreign bribery cases

196. In respect of extradition in relation to foreign bribery, Colombia reports one extradition request by a Party to the Convention concerning alleged bribery by a Colombian citizen of a domestic public official of the Party. The Colombian Supreme Court of Justice responded positively to this request.¹³⁶

197. Apart from this instance, most extradition requests sent to Colombia do not concern foreign or domestic bribery cases. Colombia reports that incoming extradition requests receive a response within 4 to 12 months, depending on the complexity of the case.

198. In the absence of any foreign bribery investigation or prosecution, Colombia has never had to send out an extradition request for MLA in relation to this offence.

Commentary

The lead examiners commend Colombia for the quality of its MLA system and the high level of priority given to responding to MLA requests. In particular, the lead examiners welcome the data compiled and provided by Colombia on MLA and extradition through its efficient tracking system, noting that the compilation of such statistics is a horizontal issue among members of the Working Group.

In light in the absence of foreign bribery cases in Colombia to date, the lead examiners recommend that the Working Group follow-up on Colombia's ability to seek MLA in foreign bribery related cases against a legal person.

2. The offence of foreign bribery

199. Colombia's Penal Code (Law 599 of 2000) criminalises passive and active bribery of domestic and foreign public officials. The offence of foreign bribery (or "transnational bribery") is contained in Title XV, Crimes against the Public Administration, article 433 of the Penal Code (PC) and was amended by article 30 of the new Anti-Corruption Statute (Law 1474 of 2011).

200. Colombia's legal framework for foreign bribery has not changed since Phase 1, but certain legislative changes to the offence are currently pending. In Phase 1, the Working Group found Colombia's foreign bribery offence to be "generally capable of conforming to the standards of the Convention"¹³⁷, but identified several issues that would require further clarification and follow-up. The most significant of these issues relate to the definition of foreign public official (including the definition of "foreign state" and "public entity"), offer (in situations where the offer does not reach the destination) and the wording "any action related to a financial or commercial transaction". All issues are described in detail below.

201. On 31 October 2014, Bill 159 proposing amendments to, *inter alia*, provisions in article 433 PC was introduced to Congress. Bill 159 aims to bring Colombia's foreign bribery offence more in line with

¹³⁶ Since the natural person was prosecuted and sanctioned in the requesting jurisdiction, Colombia did not pursue the matter further.

¹³⁷ [Phase 1 Report on Colombia](#), §139.

the Convention and is anticipated to be adopted by June 2015 at the latest. If passed, Bill 159 will rectify most of the concerns raised by the Working Group in Phase 1; however, as the law is still in draft phase, developments in this area cannot be considered final.

a. Elements of the offence

(i) Definition of a foreign public official

202. Although Colombia's definition of foreign public official is *prima facie* very broad and covers the categories of foreign public officials described in Article 1 of the Convention, the Phase 1 report identified two potentially problematic aspects. First, article 433 PC defines a foreign public official as any person exercising a specific function for a foreign country, but the term "foreign country" is not defined under Colombian legislation. In the absence of such a definition, the Working Group expressed concern in Phase 1 that the offence may not cover public officials of organised foreign areas or entities that do not qualify as, or are not recognised as States, in accordance with the Convention.¹³⁸ Colombia maintains that any territory outside of Colombia is considered a "foreign country". Colombia admitted, however, that in the absence of case law, it cannot be determined whether the term would cover autonomous territories. If passed, Bill 159 will cure this deficiency as it defines what is covered by a "State" in line with the recommendations issued by the Working Group (although jurisprudence would still be necessary to shed light on the finer points of the law, such as on the issue of autonomous territories). However, until such time Bill 159 is passed, this issue may not be deemed rectified.

203. Second, article 433 PC defines a foreign public official as any person who "has a legislative, administrative or judicial role in a foreign country, whether appointed or elected, as well as any person exercising a public function for a foreign country, either within a public body or a public service company", including international organisations. In Phase 1, the Working Group examined a translation of article 433 PC using the wording "public entity" rather than "public body".¹³⁹ The phrase "public entity" raised questions as to whether it would cover all types of enterprises under Colombian law. In the responses to the Phase 2 questionnaire, Colombia reiterated that article 433 PC (again using the translation "public entity") covered all enterprises described in articles 70 (Public Establishments), 83 (Social State-Owned Enterprises), 84 (Official Public Utilities Enterprises) and 85 (Industrial and Commercial State-Owned Enterprises) of Law 489 of 1998.

204. However, as noted in Phase 1, the definitions contained in these provisions are limited in scope. Article 70 refers only to agencies established under public law to carry out administrative functions and provide public services. Similarly, articles 83-85 reference only SOEs in health services, official utilities or the industrial and commercial sector. Although each of the individual entities listed by Colombia fall within the definition provided by official commentary 13 (defining a public agency as "an entity constituted under public law to carry out specific tasks in the public sector"), an inventory of the types of entities covered by article 433 limits the scope of the law. Under the current interpretation, and as already noted in Phase 1, article 433 would fail to cover public establishments not providing an administrative function or public service, as well as any SOE not specifically enumerated in articles 83-85. Further, the interpretation provided in the course of the present review (employing the phrasing "public body" and "public service company"), makes it even more likely that article 433 PC fails to apply to a number of different public enterprises. Colombia maintains, however, that any entity constituted under public law is considered a state-owned enterprise. Colombia notes that "public body" (literally translated to *cuero público*) does not have an exact functional translation in Spanish. Colombia posits that the issue may be

¹³⁸ *Ibid*, §14.

¹³⁹ *Ibid*, §6.

more one of application of the law rather than of the law itself and may be put to rest by the development of case law.

205. Bill 159 proposes to revise the definition of a foreign public official to include anyone who performs a public function “within a public organ, a state-owned enterprise or an entity whose decision making power is subject to the will of the State, its political subdivisions or local authorities, or a foreign jurisdiction”. Although the new wording of Bill 159 will cure certain deficiencies (such as the association with public service), it potentially creates a new one, namely, whether the will of the State is as broad as the language used in commentary 13. Arguably, an entity could be constituted under public law to carry out specific tasks in the public sector and not be subject to “the will of the State”, creating yet another lacuna in Colombian law. It is questionable whether this new definition would not address the problems raised with Colombia’s present method of defining SOEs by sector or function. If no other types of SOEs are defined under Colombian law, the same concerns raised in Phase 1 remain.

(ii) *Intentionality*

206. The foreign bribery offence contained in article 433 PC does not refer to the requisite *mens rea*, but article 21 PC categorises intentional illegal conduct as “wilful, negligent or felony”. Article 22 PC provides that “behaviour is wilful when the agent is aware of the facts constituting the offense and wants their execution. Conduct will also be wilful when the conduct of the criminal offense has been foreseen as probable and its non-occurrence is left to chance”. During the on-site, Colombian authorities reaffirmed the position stated in Phase 1 that wilful misconduct is the relevant *mens rea* for the transnational bribery offence, as with any other offence in the PC, as the offender must “have knowledge of and must bring about a behaviour which violates the legal system”.¹⁴⁰

(iii) *To offer promise or give*

207. Article 433 PC defines the conduct of transnational bribery as “giving or offering” a bribe to a foreign public official. The language in the criminal code does not specifically include “promise”, but Colombian authorities explained that an offer would also be considered a promise. This interpretation was confirmed during the on-site visit with Colombian prosecutors and judges (who stated that the notion of “promise” was already covered by “offer”), but not supported by Colombian lawyers, who argued that in the case of solicitation by a public official, an agreement (or promise) to provide the requested bribe would not constitute an offer. If passed, Bill 159 would nullify this question as it seeks to amend article 433 PC to include promise.

208. Actual delivery or receipt of payment is not necessary for the offence to be considered complete. Given the absence of foreign bribery cases, and that the language of the foreign bribery offence mirrors the language of the domestic bribery offence (contained in article 407 PC), jurisprudence on domestic bribery provides the best source of interpretation. Colombia asserts that it is “probable that this element of the offence of bribery of foreign public officials will be interpreted in a similar way”. The Colombian Supreme Court of Justice has held in a case of domestic bribery that “giving or offering” a bribe occurs “even if the public official does not accept such bribe”.¹⁴¹

209. The Phase 1 report raised a question with respect to an offer to bribe that does not, for whatever reason, reach the intended public official. Colombian authorities in Phase 1 took the position that an offer that did not reach its destination would not be considered a completed offence. The Phase 1 report cited to

¹⁴⁰ *Ibid.*, §8.

¹⁴¹ The Supreme Court of Justice, Chamber of Cassation, Judgment of 26 November 2003, Case No. 17674, Reporting Judge Mauro Solarte Portilla.

a Supreme Court ruling that held that bribery is considered an “offence of mere behaviour and instantaneous consummation”. As such, an offer to bribe would be deemed a completed offence (regardless of whether the bribe reached the public official), but a mere *attempt* to offer a bribe would not constitute an offence in Colombia.¹⁴² Judges and policy makers at the Phase 2 on-site visit disagreed with this position and stated unequivocally that a mere offer is sufficient to constitute the full offence. Discussions with prosecutors and lawyers, however, presented a more ambiguous picture. At least one of the prosecutors present at the on-site speculated that an offer is not an offer unless it has been received; thus in the absence of receipt, no offence has been committed under Colombia’s criminal law. Several lawyers agreed with the perspective of the judges, but others (like the prosecutors) expressed doubt that an offer that failed to reach the public official would constitute a crime. One argued that from a purely semantic point of view an offer implies receipt. Another lawyer countered this position by pointing out that, in civil law, an offer may still be deemed legally binding even if it fails to reach the recipient. Although there does not appear to be any problems with Colombia’s legislation on this point, the variances in views on this issue does indicate that further clarification is needed. As with several other points of Colombian law, this issue is addressed in Bill 159 of 2014, which seeks to amend Colombia’s offence to apply “even if the offer does not reach the knowledge of the foreign public official”.

(iv) *Any undue pecuniary or other advantage*

210. Colombia’s foreign bribery offence covers both monetary and non-monetary advantages. Colombia explained that the settled view amongst scholars is that the phrase “any other good” means any material, moral, economic, or non-economic gain, such as, for example, honorific distinctions, or any other undue favour. This view is also supported by the Supreme Court of Justice, which held that a benefit can be economic, personal or of any other nature.¹⁴³ Colombian authorities present at the on-site visit also confirmed that all manner of benefits, even those that do not generate profit (such as sexual favours), are covered by the transnational bribery offence.

(v) *Whether directly or through intermediaries*

211. Article 433 PC covers the offer or gift of a bribe “directly or indirectly”. In Phase 1, Colombia clarified that it is not necessary to prove intent (or wilful misconduct) on the part of the third party or intermediary when determining the liability of the original briber. Such intent needs to be proven only if the intermediary him or herself is prosecuted.¹⁴⁴

(vi) *For a third party*

212. Article 433 PC refers explicitly to third party beneficiaries. In Phase 1, Colombia provided jurisprudence on cases of appropriation and embezzlement involving third parties, including the situation where the third party could not be identified.¹⁴⁵

¹⁴² [Phase 1 Report on Colombia](#), §9 & §26 (citing the decision of the Criminal Chamber of the Supreme Court of 26 November 2003).

¹⁴³ The Supreme Court of Justice, Chamber of Cassation, Decision of 19 August 1976, Reporting Judge Gustavo Gomez Velasquez.

¹⁴⁴ [Phase 1 Report on Colombia](#), § 12.

¹⁴⁵ *Ibid*, §17.

(vii) *In the conduct of international business*

213. Article 433 PC criminalises the payment of bribes in exchange for “any action related to a financial or commercial transaction”, a phrasing that is arguably more narrow than the wording used in Article 1 of the Convention. The Working Group was concerned that some bribes paid “in the conduct of international business” might fall outside the scope of financial or commercial transactions (for instance, bribes paid in order to reduce tax rates, to release goods from customs or to overlook safety or regulatory standards). The Phase 1 report noted this as a potential loophole, to be further monitored in Phase 2. Colombia acknowledges this possible loophole in its response to the questionnaire for the preliminary accession assessment, but reports that article 433 PC is intended to be amended by Bill 159. The wording that has been proposed by Bill 159 will replace “related to a financial or commercial transaction” with “in relation to an international business [...] transaction” to mirror the language of the Convention.

b. Defences and exemptions

214. Although there are no defences specific to bribery, the Colombian Constitution provides for the “principle of opportunity”, enshrined in articles 323 and 324 PC. The opportunity principle is discussed in detail under [section C.1.e.](#) above on principles of prosecution.

215. Additionally, Bill 159 provides for “benefits for collaboration” which may be granted to natural or legal persons under certain circumstances, and which may include total exoneration from the sanction, including in foreign bribery cases. See [section C.3.g.](#) on Defences, benefits for collaboration and mitigating circumstances below for discussion of this issue.

Commentary

The lead examiners are of the position that Colombia’s foreign bribery offence (article 433 PC) largely conforms to the requirements of Article 1, with a few outstanding issues that still need to be addressed. The lead examiners acknowledge that Bill 159 (currently before Congress) may resolve many of the issues raised in the report. However, until such time Bill 159 is passed, the lead examiners recommend that Colombia:

- (i) Amend its law to ensure that the definition of “foreign country” is not limited to States, but includes any organised foreign area or entity, such as an autonomous territory or a separate customs territory, in conformity with commentary 18 to the Convention;*
- (ii) Take steps to ensure that its foreign bribery offence is sufficiently broad to cover employees of all public enterprises as defined by commentary 14, including all types of SOEs;*
- (iii) Promptly proceed with the adoption of foreseen legislation aiming to include “promise” to the foreign bribery offence; and*
- (iv) Take steps to clarify that an offer that does not reach the intended public official constitutes an offence under Colombian law.*

The lead examiners also note that the full scope and application of article 433 PC remains to be tested in Colombian courts. Accordingly, in the absence of case law, the lead examiners recommend that the Working Group follows up on the application of article 433 PC in practice to ensure it is interpreted in conformity with the Convention. The lead examiners also recommend that the Working Group closely monitor any legislative developments following the passing of Bill 159.

3. Liability of legal persons

216. Article 2 of the Convention requires each Party to “take such measures as may be necessary [...] to establish liability of legal persons for the bribery of a foreign public official.” The 2009 Anti-Bribery Recommendation in its Annex I lays down in greater details the standards for an effective corporate liability regime. Colombia’s corporate liability regime for foreign bribery is essentially administrative in nature, and proceedings against legal persons for the imposition of fines are the sole responsibility of the Superintendency of Corporations. Consequently, this section reviews all the elements of the foreign bribery offence and the rules on investigations specifically relevant to proceedings against legal persons, which differ from those examined in sections 1 and 2 above.

a. Introduction to Colombia’s legal framework for corporate liability

217. Under Colombian law, article 34 of Law 1474 of 2011 provides for liability of legal persons for offences against the public administration or public property, which includes foreign bribery.¹⁴⁶ Article 34 is a standalone provision, which encompasses administrative liability within criminal proceedings against natural persons (paragraph 1), civil liability for damages (paragraph 2), and administrative liability in independent proceedings by the Superintendency of Corporations (paragraph 3). Procedural rules regulating the status and functioning of the Superintendency of Corporations are included in several pieces of legislation including Law 122 of 1995, Law 1437 of 2011, and Decree 1023 of 2012.

218. Suspension and cancellation of a legal person as a penalty, such as envisioned under article 34(1), has been recognised by the Working Group as being generally excessive in the context of foreign bribery. Similarly, civil damages envisaged under article 34(2) are not the type of sanctioning foreseen by the Convention. Consequently, the most relevant instrument to hold legal persons liable for acts of foreign bribery is provided for in article 34(3) under which the Superintendency of Corporations may impose administrative fines on corporations. Thus, this section of the report focuses largely on liability of legal persons under article 34(3).¹⁴⁷

219. Article 34 may soon be replaced with the provisions contained in Bill 159 on administrative liability of legal persons. Articles 1 to 28 of the Bill concern the functioning of corporate liability under Colombian law and may well address some of the Working Group’s concerns identified in Phase 1. Where relevant, amendments to Colombia’s corporate liability regime as envisaged in Bill 159 are mentioned in the corresponding sub-sections below.¹⁴⁸

220. Liability of legal persons in Colombia is either administrative or civil in nature, even though administrative sanctions may sometimes be imposed against legal persons in the context of criminal proceedings against a natural person. During discussions about some of the functional problems under the current system of administrative liability of legal persons which could affect specifically foreign bribery investigations (see [section h.](#) below), the hypothesis of introducing criminal liability for legal persons in Colombia was briefly evoked. Government representatives explained that Colombia’s Constitution does not preclude criminal liability of legal persons, and that the Constitutional Court has stated that criminal liability of companies would be possible if provided by law.¹⁴⁹ To many practitioners, the principle of

¹⁴⁶ See [Annex 3](#) for legislative excerpts.

¹⁴⁷ For further analysis of civil damages envisaged under article 43(2) see the [Phase 1 Report on Colombia](#) at §45.

¹⁴⁸ Discussions of Bill 159 in this Report are based on the version made available to the evaluation team as of the time of this review.

¹⁴⁹ See for instance Constitutional Court decisions C-674 of 1998 and C-320 of 1998.

“*societas delinquere non potest*” – i.e., a legal person cannot have a mind of its own and cannot therefore have a criminal intent – still bears great weight, and criminal liability of corporates is difficult to conceive. Nevertheless, one representative from Parliament and several private sector lawyers at the on-site expressed the view that there was no legal or constitutional obstacle to criminal liability in practice, that legal doctrine is gradually accepting the concept of criminal liability of legal persons, and that, in time, this might be a topic for consideration by Congress on the basis of international experience in this field.

Commentary

The lead examiners consider that some of the problems under the current system of administrative liability of legal persons relating to the investigative capacities of the Superintendencias could adversely impact foreign bribery investigations. In light of this, the lead examiners encourage Colombia to conduct an assessment of its current corporate liability regime to consider ways it could most efficiently resolve the current functional problems.

b. Legal entities subject to liability

221. Corporate fines for foreign bribery under article 34(3) of Law 1474 may only be imposed on a limited number of legal persons. These include corporations, including state-owned and state-controlled enterprises. The Phase 1 Report had already identified that non-profit entities could not be held liable for foreign bribery. Phase 2 discussions revealed a much greater problem: under the current law the nearly 90 companies listed on the Colombian Stock Exchange as well as financial institutions are not subject to financial sanctions for foreign bribery (although they could be dissolved under article 34(1) of Law 1474). Both of these major loopholes would be addressed if Bill 159 is passed into law.

(i) State-owned and state controlled enterprises

222. Ensuring that SOEs are covered by Colombia’s corporate liability law is particularly important in the context of the Colombian economy, where SOEs represent an important percentage of total market-share (see [section A.2.b.](#) above on Economic background). As concerns the applicability of corporate liability to SOEs, at the time of Phase 1, Colombia pointed to article 85 of Law 489 of 1998 on the Organisational Structure and Operation of State Entities, which provides that SOEs involved in industrial or commercial and economic management are governed by the rules of private law. Colombia asserts that this liability of state-owned and state-controlled enterprises has been enforced on several occasions by Colombian courts, including at the Supreme Court and Constitutional Court level, although not specifically in corruption cases.¹⁵⁰ Article 1, subsection 2 of Bill 159 further clarifies this issue by providing that “the provisions of this law shall also extend to [...] state owned industrial and commercial enterprises.” (See also [section C.2.a.\(i\)](#) which also covers Colombia’s definition of SOEs.)

(ii) Non-profit entities

223. In contrast to the first two paragraphs of article 34, which allow for the dissolution of “legal persons” in general, article 34(3) provides for fines only against a corporation. Colombia explained in Phase 1 that this is because the Superintendency of Corporations, the agency in charge of the surveillance of “corporations”, is the only one with the mandate to impose fines under article 34(3). Bribery of foreign public officials by non-profit entities would therefore not be punishable by financial sanctions, thus falling short of Convention standards on this point.

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See Supreme Court of Justice Decision of 28 February 2006, and Constitutional Court Decision T-390/12 of 28 May 2012.

224. Colombia explains that Bill 159 would alleviate this concern, since it addresses generally “legal persons”, and gives authority to the Superintendency of Corporations to proceed against all legal persons (i.e. including not-for-profit entities), except those under the authority of the Superintendency of Finance.

(iii) *Listed companies and financial institutions*

225. Discussions during the Phase 2 on-site visit revealed that financial sanctions for foreign bribery cannot currently be imposed on financial institutions or the approximately 90 publicly traded companies listed on the Colombian Stock Exchange. This is because these corporations are placed under the supervision of the Superintendency of Finance, which has no responsibility for foreign bribery enforcement under Law 1474. Thus, the foreign bribery offence is currently unenforceable against a very large number of major Colombian corporations with significant operations abroad. Article 2 of Bill 159 proposes to close this substantial loophole by providing both Superintendencies (of Corporations and of Finance) with jurisdiction over foreign bribery offences.

226. A further weakness, identified by the IMF in a 2013 report,¹⁵¹ is the Superintendency of Finance’s lack of supervisory and regulatory powers over the holding company of a financial conglomerate. The Superintendency of Finance has authority to supervise and review transactions and risks to the market with respect to the different companies within the conglomerate, but lacks this authority with respect to the holding company itself. Following the on-site visit, Colombia indicated that a legal reform was underway to close this loophole.

Commentary

The lead examiners are seriously concerned that a number of legal persons, including financial institutions, publicly traded companies and non-profit entities, are currently not liable to financial sanctions for acts of foreign bribery. They recommend that Colombia urgently proceed with the passing of legislation to close this major loophole.

c. *Link between the liability of the natural person and the legal person*

227. Annex I.B. to the 2009 Anti-Bribery Recommendation specifies that prosecution of a legal person should not depend on the prosecution or conviction of the natural person. It further details two possible approaches to an effective corporate liability regime.

228. The Colombian approach to corporate liability is akin to the second concept envisaged in the 2009 Anti-Bribery Recommendation.¹⁵² Under both articles 34(1) and (3) of Law 1474, the liability of the legal person is triggered by an act by a “legal representative” or “manager” of the legal person. The terms “legal representative” or “manager” are not defined in Law 1474 of 2011. A definition is, however, contained in article 22 of the Colombian CoC, which provides that “[a]dministrators are the legal representative, the liquidator, the factor, members of the boards of directors and whoever exercises those functions according to the by-laws.”

229. The standards of liability for legal persons differ slightly under paragraphs 1 and 3 of article 34. Under article 34(3), a corporation may receive a fine if it has participated in the commission of an offence against the public administration (i.e. including for a foreign bribery offence). Article 34(1) provides for the possibility to suspend or dissolve the legal status of a legal person which sought to benefit from the commission of an offence.

¹⁵¹ See [IMF Financial System Stability Assessment \(FSAP\) review](#) (IMF 2013), §25.

¹⁵² See section B, paragraph 2.b. of Annex I to the 2009 Anti-Bribery Recommendation.

(i). *Standard of liability for the imposition of an administrative fine under article 34(3)*

230. Under article 34(3)3, the Superintendency of Corporations may fine a corporation if it has participated in the commission of an offence against the public administration (i.e. including for a foreign bribery offence) [emphasis added].¹⁵³ According to Colombia, proceedings by the Superintendency are independent from any proceedings against natural persons, although this is not explicitly stated in the law (see also [section h.\(ii\)](#) below on Opening and conducting foreign bribery investigations into legal persons). To trigger the liability of legal persons under this provision, the offence against the public administration must have been committed by or “with the consent of his legal representative or any of their managers or with their tolerance”. Colombia explained in Phase 1 that, since this is not a criminal liability offence, the notion of consent could be inferred from the notion of “obligation” provided for in article 1502 of the Civil Code as a “voluntary agreement”, and would include negligence and wilful blindness. Colombia explained in Phase 1 that there were numerous court decisions in support of this interpretation, although not specifically in cases of transnational bribery in international business transactions. Colombia also pointed in support of its interpretation to article 23 of Law 222 of 1995, which provides, *inter alia*, that “managers must act in good faith, with loyalty and the diligence required from a good businessman” and “should [...] ensure strict compliance with legal or statutory provisions.” The Working Group agreed in Phase 1 that it was still unclear whether a legal person could be held liable for transnational bribery committed by lower level employees, and to what extent, in practice, the corrupt act of the natural person would need to be demonstrated to establish a case against a legal person.

231. This concern was reinforced by discussions during the on-site visit. For the majority of representatives from the Superintendencies, the PGO, as well as private sector lawyers interviewed during the on-site visit, it was difficult to conceptualise a foreign bribery case involving a legal person which would not also necessitate investigating and prosecuting a natural person. Investigations by the Superintendency into foreign bribery committed by corporations may in some cases rely heavily on evidence gathered by the public prosecutors in the context of criminal investigations into natural persons, notably due to the limited range of investigative powers available to the Superintendency (further discussed under [section h.\(ii\)](#) below). Several panellists expressed the view that the Superintendency of Corporations has very broad investigative powers which enable it to efficiently conduct corporate investigations. Nevertheless, representatives from the private sector expressed the view that administrative authorities must wait until a final ruling has been handed down against a natural person to be able to sanction a company by way of fines.

232. Bill 159 aims to clarify the situation and address the Working Group’s concern by proposing that legal persons be held liable for acts committed by “employees, directors or officers, whether or not they have authority to bind the legal entity”, an approach closer to the first concept envisaged under Annex I to the 2009 Anti-Bribery Recommendation. Furthermore, the Bill aims to more clearly dissociate proceedings against legal persons from those against natural persons: article 3 of the Bill states that corporate liability proceedings “shall not depend upon or be subject to the initiation of another legal process, irrespective of its nature, nor to the decision to be rendered in such process”.¹⁵⁴ However, the Bill does not remedy the functional issues inherent to the nature of the Superintendencies, which will still only have limited investigative powers in foreign bribery cases against legal persons and which are further examined below (see [section h.\(ii\)](#) below on Opening and conducting foreign bribery investigations into legal persons).

¹⁵³ The standards of liability for legal persons differ slightly under paragraph 1 and paragraph 3 of article 34. Paragraph 1 provides for the possibility to suspend or dissolve the legal status of a legal person which sought to benefit from the commission of an offence.

¹⁵⁴ See article 3, *ibid*.

(ii) *Standard of liability for cancellation or dissolution of the legal status of the legal person under article 34(1)*

233. In addition to issues raised above in relation to acts committed by legal representatives and managers, article 34(1) raises other problems. Firstly, cancellation or suspension of the legal status of the legal person may only be imposed against legal persons in the context of criminal proceedings against natural persons. Therefore, final imposition of this sanction against the legal person would require the prosecution and conviction of a natural person, contrary to the requirements under the 2009 Anti-Bribery Recommendation.¹⁵⁵

234. Secondly, for this sanction to apply, the legal person must have sought to benefit from the commission of the crime. As “benefit” is undefined, it is unclear what the prosecution will need to establish in order for these sanctions to be applied in foreign bribery cases, a situation that will only be clarified by case law. The word “sought” suggests that the benefit might not need to be realised. Nevertheless, it is unclear whether, for example, a case in which a bribe is paid to obtain a loss-making contract would satisfy this requirement (such as where the company is seeking to enter a major new market). Colombia considers that such a situation would be covered, as the bribes would have been paid with the view of obtaining a future, indirect benefit, separate from the loss-making contract itself, although no case law exists as of this time in support of this interpretation.

235. Finally, article 34(1), in conjunction with article 91 CPC, requires the legal person to “have been totally or partially used in criminal activities.” This raises a question as to whether application of this provision might be limited to cases where the legal person has been created largely or solely for the purpose of committing criminal activities – a situation which Colombia may be familiar with in its dealings with drug cartels. It remains to be seen in practice how this provision may be applied in practice in a bribery case concerning a legitimate corporation engaging in an international business transaction. In any event, as noted earlier, this section may be of limited application in practice in transnational bribery cases.

Commentary

The lead examiners are concerned that the investigation, prosecution, and possibly the conviction, of a natural person appear to be necessary in order to proceed against and establish the liability of a legal person. Consequently, they consider that corporate liability under Law 1474 of 2011 does not meet the standards set under Annex I to the 2009 Recommendation which provides that prosecution of a legal person should not depend on the prosecution or conviction of a natural person. They further consider that, in practice, the limited range of investigative powers available to the Superintendency of Corporations may, in some cases, make it difficult to effectively investigate foreign bribery committed by a legal person, without a criminal process against a natural person undertaken in parallel by the public prosecutor’s office. Consequently, they recommend that Colombia take all necessary measures to ensure that its system for liability of legal persons for foreign bribery is not

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Paragraph 1 of article 34 provides that the legal status of a legal person may be suspended or cancelled, as provided under article 91 CPC (Law 906 of 2004). This cancellation or suspension may be pronounced by the supervisory judge (*juez de control de garantías*) as a temporary measure at any moment before the indictment stage, if there are well founded motives to believe that the criteria set out in article 91 CPC are met. The sanction only becomes final once the natural person has been convicted, and it has been established beyond a reasonable doubt that (1) the legal person has been totally or partially dedicated to criminal activities; (2) that the legal person sought to benefit from the commission of a crime against the public administration; and (3) that the crime was committed directly or indirectly by its legal representatives and managers (on this last factor, see discussion above). See [Phase 1 Report on Colombia](#), § 41.

restricted to cases where the natural person who perpetrated the offence is prosecuted or convicted.

In addition, in the absence of case law confirming that a legal person may be held liable for transnational bribery committed by lower level employees, the lead examiners recommend that this issue be followed up by the Working Group.

d. Corporate liability for acts by related legal persons

236. Annex I.C. to the 2009 Anti-Bribery Recommendation requires that “a legal person cannot avoid responsibility by using intermediaries, including related legal persons, to offer, promise or give a bribe to a foreign public official on its behalf.” Article 34(1) provides for crimes against the public administration committed by the legal person’s legal representative or manager “directly or indirectly”. Colombia explains that this would include acts by related legal persons.

237. In Bill 159, article 1, paragraph 2 clearly provides “legal person shall be liable [...]when the offer is made directly, and also when it is made through intermediaries”. Article 1, paragraph 3 however seems to limit the range of related legal persons whose acts can trigger liability of the original perpetrator, by stating that “entities classified as parent companies [...] shall also be liable and shall be subject to administrative penalties in the event in which any of its subsidiaries engages in [foreign bribery]”. Since “subsidiaries” are specifically mentioned, this raises the question whether legal persons may not be held liable for bribery committed by other related legal persons, such as a holding company, or member of the same industrial group. If not addressed in future versions of the Bill, it may be necessary to wait for court decisions to provide clarity on this point.

Commentary

In the absence of explicit legal provisions and case law, the lead examiners recommend that the Working Group follow up on the application in practice of corporate liability for foreign bribery to ensure that a legal person cannot avoid responsibility by using related legal persons.

e. Statute of limitations and investigation periods applicable to legal persons

238. Under current legislation, administrative investigations of legal persons are subject to a five year statute of limitations.¹⁵⁶ The investigation period is limited to 30 labour days, which may be extended to 60 if there are more than 3 investigated persons or if evidence needs to be found abroad.¹⁵⁷ It is questionable whether this period would be sufficient in practice to investigate foreign bribery cases, which may involve analysis of complex accounting and corporate structures, as well as seeking evidence from abroad.

239. Bill 159 proposes to extend the statute of limitations to ten years. Indictment would interrupt the running of the limitation period, which would run anew after the indictment for another ten years. Bill 159 also provides for a time limitation on the preliminary investigation period (i.e., prior to the indictment), which may not last more than one year.

Commentary

The lead examiners recommend that Colombia take steps to ensure that the statute of limitations and the investigation period for foreign bribery allows adequate time for investigating and prosecuting this offence.

¹⁵⁶ Article 235 of Law 222 of 1995.

¹⁵⁷ Article 48 *ibid*.

f. Jurisdiction over legal persons

240. Colombia's current corporate liability legislation under article 34 of Law 1474 does not address territorial or nationality jurisdiction with respect to legal persons. Article 16 on nationality jurisdiction (see [section C.1.g.](#) above on jurisdiction) is part of the Penal Code, which makes it inapplicable to administrative proceedings envisaged against legal persons. Colombia asserted in its Phase 1 evaluation that provisions of Law 222 from 1995 would operate to provide nationality jurisdiction over legal entities. The Working Group, however, remained sceptical and flagged this issue for follow-up in Phase 2. In the absence of case law, it remains doubtful whether jurisdiction may be asserted over Colombian companies on the sole basis of their nationality, without also establishing a territorial link to the offence.

241. Bill 159 would clarify the situation by providing explicitly for nationality jurisdiction. Article 2, paragraph 2 of the Bill states that "the Superintendencies shall have jurisdiction over conduct committed in foreign territory, as long as the legal person or the branch of a foreign company allegedly responsible is incorporated in Colombia."

Commentary

The lead examiners are concerned that the current corporate liability legislation does not allow the Superintendency of Corporations to exercise its competence over Colombian companies engaging in foreign bribery on the basis of nationality jurisdiction. They therefore recommend that Colombia proceed with the adoption of legislation that explicitly provides for nationality jurisdiction over Colombian legal persons.

g. Defences, benefits for collaboration and mitigating circumstances for legal persons

242. There are currently no defences or mitigating circumstances explicitly stated in the law on liability of legal persons.

243. However, under article 19 of Bill 159 entitled "benefits for collaboration", the "competent authorities" would be able to totally or partially exonerate the natural or legal person from sanctions if the person self-reports or collaborates with the Superintendencies. Such exoneration may be granted even if the Superintendency is already carrying out an administrative action against the offender. The purpose of this provision and its usefulness in a domestic bribery context is clear, as it could, for instance, help identify and convict corrupt Colombian officials by offering companies clear avenues for collaborating with authorities. Greater care may need to be taken in a foreign bribery context, where a company, even after an investigation has been initiated, and even if it voluntarily engaged in the bribery scheme, could potentially be fully exonerated if it provides, for instance, information about the individual bribers, other foreign entities, or the foreign public official involved. If it were to lead to full exoneration of the legal person, there may be potential for misuse and the application of this article could lead to a loophole in the implementation of the Convention. Article 19 is not, however, of automatic application but is left to the discretion of the "competent authorities". It may therefore be useful for Colombia to consider providing a framework for the application of this provision in a foreign bribery context, to ensure that benefits for collaboration do not, in effect, undermine the effective application of the foreign bribery offence.

244. Mitigating circumstances are also envisaged under Bill 159. Article 7 provides for graduated sanctions, taking into account, for instance the economic benefit obtained, reiteration of conduct, obstruction of the investigation, the existence of effective compliance programmes, and self-reporting (see also [section i.](#) below on Promotion of anti-corruption compliance measures under Bill 159).

Commentary

The lead examiners recommend that Colombia, in proposing amendments to its foreign bribery offence and corporate liability regime through Bill 159, ensure that any provision on benefits for collaboration and mitigating circumstances for legal persons are in conformity with the Convention, for instance by providing guidance on its application.

h. Institutional and procedural framework for engaging corporate liability

245. In Phase 1, the Working Group agreed that Phase 2 should seek to clarify procedural issues related to the administrative nature of proceedings against legal persons.¹⁵⁸ Since no foreign bribery cases have been investigated to date in Colombia, this Phase 2 review considers the legal arrangements in place, and, where relevant, comparable practice in investigating other economic offences committed by legal persons. Under article 34(3) of Law 1474 of 2011, which, as of the time of this report, regulates corporate liability for foreign bribery, the Superintendency of Corporations bears responsibility for investigating foreign bribery committed by legal persons and imposing administrative fines. Once Bill 159 comes into force, such powers will be shared with the Superintendency of Finance (which has responsibility for all corporations not falling under the purview of the Superintendency of Corporations). Since, as of the time of this review, only the Superintendency of Corporations has competence for corporate foreign bribery investigations, this section of the report will focus primarily on this Superintendency.

246. Discussions during the on-site visit highlighted the professionalism and awareness of both Superintendencies on foreign bribery issues. However, discussions also revealed that the investigative powers of the Superintendencies are limited by law and may be insufficient to enable them to carry out foreign bribery investigations into legal persons autonomously. Panellists also voiced concerns about the nomination and termination process of Superintendents, which could affect their independence; however, legislative amendments addressing this issue are in the process of being drafted.

(i) Overview of the Superintendency of Corporations

247. The Superintendency of Corporations is a technical body, ascribed to the Ministry of Commerce, Industry and Tourism, with legal personality, administrative autonomy and its own assets through which the President of the Republic exercises the inspection, surveillance and control of commercial companies not surveyed by the Superintendency of Finance.¹⁵⁹ Its duties include:

- Advising the Government of Colombia and participate in the formulation of politics in all matters that have to do with the inspection, surveillance and control of companies;
- Exercise, in accordance with the law, the inspection, surveillance and control over commercial companies, branches of foreign companies and any other determined by law;
- Develop the functions of judicial police in the terms established by law and under the direction of the office of the PGO;
- Exercise the functions related to compliance of the currency exchange regime in Colombia, Colombian investment abroad by legal and natural persons;
- Take part in resolution of conflict through administrative, judicial and alternative dispute mechanisms;

¹⁵⁸ See [Phase 1 Report on Colombia](#), §49.

¹⁵⁹ See <http://www.supersociedades.gov.co/English/OurOrganization/WhoWeAre/Pages/default.aspx>

- Interrogate under oath any person whose testimony is required to examine facts related to the direction, administration or oversight of the companies over which it exercises inspection, surveillance and control;
- Impose fines, successive or not to those who fail to observe the Superintendence's orders, break the laws or their own statutes;
- Exercise the functions that in matter of coercive jurisdiction are assigned to the Superintendence by law; and,
- Provide support in matters of its competence to the business sector and State bodies.

Structure and independence

248. In addition to a General Secretariat, the Superintendency of Corporations includes four delegations, each headed by a Deputy Superintendent. The Delegation for Inspection, Surveillance and Control has responsibility for overseeing foreign bribery proceedings. Not counting its central office in Bogota, the Superintendency of Corporations has eight regional offices (Regional Intendencies of Cali, Cartagena, Cucuta, Barranquilla, Bucaramanga, Manizales and Medellin).¹⁶⁰ Representatives of the Superintendency of Corporations explained during the on-site visit that foreign bribery would be exclusively dealt with by the central office in Bogota, which could send people to investigate in regions as necessary. The regional offices of the Superintendency are therefore under obligation to immediately inform the central office if they become aware of foreign bribery allegations concerning a Colombian company.¹⁶¹

249. In terms of independence, Colombian authorities assert that the Superintendency of Corporations is an independent agency in charge of inspection, oversight and control of legal persons. Its decisions may not be reviewed by the President or his Ministers, and are instead subject to an independent judicial review. At the time of the on-site visit, concerns existed regarding the nomination and termination process for the Superintendents (of Corporations or of Finance), which could impact the independence of these bodies. Under the system in place at the time of discussions, the Superintendent was appointed and removable at will by the President of the Republic, and Deputy Superintendents were appointed and removable at will by the Superintendent. Neither position had a fixed term of office. Concern over the independence of the Superintendency of Finance has been expressed by other international bodies, such as the International Monetary Fund (IMF), which expressed the view that “there are issues with the *de jure* independence of the [Superintendency of Finance], as the President can dismiss the superintendent at any time without cause. Possible reforms to improve independence could include the requirement to appoint the superintendent for a fixed term or to require a public explanation of the reasons for dismissal.”¹⁶² During the on-site visit, representatives of the Superintendency of Corporations indicated that plans were underway to introduce legislation amending the condition for appointment, tenure and removal of the Superintendents of Corporations, Finance, and Industry and Commerce. Following the on-site visit, Administrative Decree 1817 was passed on 15 September 2015 providing notably for (i) the appointment of the Superintendents through a transparent process and based on professional criteria; (ii) a four-year tenure to coincide with the Presidential mandate, not renewable; and (iii) in case of removal prior to end of

¹⁶⁰ See the organisational structure of the Superintendency of Corporations at: <http://www.supersociedades.gov.co/English/OurOrganization/Organization/Pages/default.aspx>

¹⁶¹ Internal Resolution 100-000009 of 2013.

¹⁶² See [IMF Financial System Stability Assessment \(FSAP\) review](#) (IMF 2013), §§25, 100.

the tenure, the need for the removal decision to be “duly reasoned” (the Decree does not require the reasons for dismissal to be made public).¹⁶³

250. Another issue which could hamper the freedom of decision of the Superintendencies concerns the personal liability of staff for actions carried out in their professional capacity. This could lead to greater caution by Superintendency staff, and the IMF noted “a potential chilling effect on appropriate action”. The IMF recommended that Colombia amend its legal framework to clarify that liability for failure to perform the regulatory mandate in good faith should be defined as equivalent to acting in bad faith; and that the judicial authorities limit circumstances in which private parties can sue.¹⁶⁴ This concern over personal liability of Superintendency staff has also been raised by several OECD Committees. Colombia had indicated that the aforementioned Decree would aim to limit the personal liability of the Superintendent and his staff to gross negligence and acts of bad faith, and would provide that the Superintendency would pay the legal fees for Superintendency staff (or former staff) in any legal or judicial procedure related to their functions. However, Decree 1817 passed in September 2015 does not address these concerns. Following the on-site visit, the Superintendency clarified that the long-standing practice has been to provide insurance policies at least for the Superintendent of Companies and the four Deputy Superintendents, which are intended to cover all corresponding legal expenses and fees that may arise in connection with any judicial procedure.

Resources, awareness and training

251. The Superintendency of Corporations has a budget of COP 121 billion (USD 51 million), and a total team of 593 officers – figures which have been stable over the past few years. The Delegation for Inspection, Surveillance and Control, has a staff of 180 people, including lawyers, accountants and economists. As in Phase 1, Colombian authorities consider that the Superintendency of Corporations is adequately resourced and has access to the necessary expertise to effectively combat foreign bribery once cases arise. It is unclear whether additional resources are planned to be made available to the Superintendency of Corporations and Superintendency of Finance once Bill 159 comes into force. Indeed, since article 1, paragraph 4 of the bill proposes to grant the Superintendencies competence also over natural persons committing foreign bribery for the benefit of a legal person, this could potentially increase their caseload.

252. Representatives of the Superintendency of Corporations present at the on-site visit appeared well aware of the legal framework for combating foreign bribery. They participated in training seminars for investigators and prosecutors in December 2014, and the Superintendency of Corporations also organised a seminar for the private sector in September 2014. At the time of the on-site visit, no foreign bribery training or awareness raising on foreign bribery had yet been provided to the regional offices of the Superintendency of Corporations. Although the regional offices do not have the authority to investigate foreign bribery, they are nevertheless required to report it to the Bogota office, and thus need to be sufficiently trained and aware of what may constitute foreign bribery in order to be able to report it.

253. Following the on-site visit, Colombia reported on a number of additional steps to enhance training and further raise awareness on foreign bribery and liability of legal persons. The Superintendency of Corporations circulated an internal Directive on 6 October 2015 to all its employees on their reporting obligations and on sanctions incurred for active and passive bribery under Colombian law. Colombia plans to update this Directive to cover the new regime under Bill 159 once it becomes law. Colombia reported on two further awareness-raising events in August 2015 jointly organised by the Superintendency of Corporations and the Secretariat of Transparency: (1) one half-day forum focusing on foreign bribery and

¹⁶³ Administrative Department of the Public Function Decree Number 1817 of 2015, 15 September 2015.

¹⁶⁴ See [IMF Financial System Stability Assessment \(FSAP\) review](#) (IMF 2013), §§25, 100..

liability of legal persons, including reforms foreseen under Bill 159 (the list of participants in this event was not communicated); and (2) another half-day international summit on intelligence gathering and investigative techniques in corruption cases (not limited to foreign bribery), including in relation to legal persons, and involving officials from the World Bank and other Latin American countries, attended by staff from the Superintendency of Corporations and Superintendency, as well as other law enforcement authorities. Colombia also indicated that it was organising, in coordination with the United Kingdom, training for both Superintendencies officials. Finally, a Computer Forensic Unit – already operating successfully within the Superintendency of Industry and Commerce – is planned to be established within the Superintendency of Corporations to assist with electronic data collection and analysis.

(ii) *Opening and conducting foreign bribery investigations into legal persons*

Initiating an investigation into a legal person

254. The Superintendency of Corporations may open an investigation into a legal person on its own initiative, *ex officio*, or on the basis of a complaint. Representatives at the on-site visit explained that media articles often serve as a basis on which to initiate proceedings. Reports by foreign entities could also trigger the opening of investigations. However, the Superintendency of Corporations indicates that private party petitions are the main sources for initiating proceedings. Private party petitions may be less likely to occur in foreign bribery instances, and the Superintendency may therefore need to rely on other sources to initiate investigations into legal persons for that offence.

255. Enforcement actions by the Superintendency start with a request for information or audit. As soon as the information is received or collected by the auditing officers, a summary of findings is included in a written resolution. Such resolution is sent to the investigated parties in order for them to provide any explanations concerning each factual finding. After analysing the explanations, the Superintendency may, in a foreign bribery case, either, (i) close the investigation without imposing any penalties if it finds the explanations to be satisfactory; or (ii) fine any or all of the investigated parties if it concludes that there was a violation of the law.

Investigative powers

256. In terms of investigative powers, the Superintendency of Corporations may send information requests to any company under its jurisdiction, conduct audits either through the request of relevant documents or the deployment of officers to the company's headquarters, and question witnesses. No court order is required for such requests of information or deployment to the premises. The Superintendency of Corporations does not have police powers to apply coercive measures, such as forcing entry and search and seizure (the Superintendency can search the premises only with the consent of the occupant or proprietor). However, "reluctance to provide information"¹⁶⁵ is punishable with a fine of up to 100 minimum monthly wages (i.e. between COP 61 600 000 or approximately USD 26 000). Bill 159 aims to increase this sanction to 20 000 minimum monthly wages (i.e. USD 5.2 million). This raises concern that a company may prefer to refuse – or delay – entry, to allow for the possible destruction or disguising of evidence. The Superintendency however points out that such a refusal is unlikely as it would incur a very costly fine.

257. Investigative tools available to the Superintendency of Corporations for the conduct of administrative investigations are more limited than those of criminal law enforcement authorities and may not always allow for autonomous investigation of foreign bribery offences committed by legal persons. The Superintendency of Corporations' powers do not include investigative techniques such as wire-tapping, use of undercover agents, controlled deliveries, selective database searches, surveillance and

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As phrased under article 51 of Law 1437 of 2011.

identification of persons, or search and seizure – all available to the PGO in foreign bribery investigations into natural persons. The Superintendency of Corporations is also unable to request information from banks, other financial institutions, or the tax or anti-money laundering authorities. This could become quite problematic in practice in foreign bribery investigations, notably given that criminal law enforcement authorities indicated during the on-site visit that wiretapping, access to bank information and search and seizure are the most commonly relied upon tools in the bribery investigations they carry out against natural persons.

258. The Superintendency pointed out that it has successfully investigated and sanctioned legal persons for a number of corporate offences. However, these examples do not relate to bribery offences, and concern essentially investigations carried out in a domestic context, and/or for offences where the Superintendency exercised judicial powers (which are not available for investigations into foreign bribery). Foreign bribery investigations are likely to require the use of investigative tools not available to the Superintendency such as, for instance, accessing financial information, including transnationally. It therefore appears that the Superintendency of Corporations may often be unable in practice to effectively conduct investigations into legal persons unless criminal proceedings against a natural person are also underway and the PGO is willing to share evidence gathered in the course of the criminal proceedings. Colombia holds the view that investigative techniques such as wiretapping or surveillance, while useful for investigating natural persons, are not necessary – although desirable – when investigating legal persons. Colombia therefore considers that the Superintendencies have the full range of investigative powers necessary to complete foreign bribery investigations into legal persons. The Working Group however is concerned that the unavailability of investigative tools, such as access to bank and financial information or interception of telecommunications, may hinder the capacity of the Superintendency of Corporations (and the Superintendency of Finance once Bill 159 is passed into law) to autonomously conduct investigations into legal persons in foreign bribery cases.

259. Where international cooperation is concerned, the Superintendency of Corporations may not request MLA directly from criminal law enforcement authorities abroad, but may liaise through the PGO. Bill 159 further proposes to enhance the Superintendencies' capacity to seek international cooperation in foreign bribery cases (see [section C.1.h\(i\)](#) above on Mutual legal assistance for a more detailed discussion of this issue).

Coordination with the PGO

260. Like all public officials, staff of the Superintendency of Corporations are subject to a reporting obligation and must therefore signal to the PGO any suspected offence of which they become aware (see [section B.2.a.](#) above on the duty to report crimes for public officials). However, the PGO is under no obligation to share any information it collects in the context of its own criminal investigations with the Superintendency of Corporations, even where the Superintendency may have competence over the legal persons for the same offence.

261. Bill 159 attempts to remedy this imbalance by providing that information gathered by the PGO may be transferred to the Superintendency of Corporations or Finance, and that the Superintendencies may ask the PGO for such information. However, the PGO is under no obligation and retains the final decision on whether or not to share the information. Bill 159 also provides that the PGO and Superintendencies should formalise agreements for the sharing of information. Even though Bill 159 had yet to be passed, following the on-site visit, Colombia was already able to report on progress in this area with the conclusion, on 9 October 2015 and for a four-year period, of an Agreement between the Superintendency

of Corporations and the PGO to enhance coordination and cooperation between the two bodies.¹⁶⁶ Under this Agreement, the Superintendency of Corporations and the PGO “commit to establish a framework of cooperation within the scope of their competences” to allow, inter alia, for exchange of evidence between the two institutions, including in relation to data obtained from foreign authorities, as well as the possibility of joint actions to investigate and sanction behaviours “that affect interests of the State”.

Coordination with other agencies

262. While agencies such as the tax and anti-money laundering authorities are under obligation to report any suspected offence to the PGO, no similar obligation exists with respect to reporting suspected foreign bribery offences to the Superintendencies. Thus, the money laundering or tax authorities are not currently under any obligation to transfer information they have collected relating to potential foreign bribery committed by a legal person to the Superintendencies (see also relevant sections of this report on reporting by the UAIF and the DIAN). Similarly, the Superintendencies do not have the power to request information from the tax authorities. Colombia however indicated that, on 14 October 2015, an amendment to Bill 159 was introduced which would allow for such sharing of information.

(iii) Decision on the liability of the legal person

263. Decision-making powers are also vested in the Superintendency of Corporations. Representatives explained during the on-site visit that decisions to impose administrative fines would be made by the same unit within the Superintendency of Corporations (i.e. the Delegation for Inspection, Surveillance and Control in foreign bribery cases) but not by the same persons as those in charge of the investigations.

264. In terms of process and timeline, once the indictment has been made, the indicted has ten labour days to file its pleadings.¹⁶⁷ The final administrative decision must be issued within 30 days of the filing of the pleadings.¹⁶⁸ All decisions by the Superintendency of Corporations are made publicly available and include identification of the person, analysis of facts and evidence, infringed provisions, and the reason for the final decision.¹⁶⁹

265. Decisions by the Superintendency of Corporations can be appealed through the judicial review process. Any party (including recognised third parties) adversely affected by a decision from the Superintendency of Corporations can pursue judicial relief along two avenues. First, as a matter of administrative law, article 138 of the Administrative Procedure Code provides that a party may file a petition for a “Declaration of Nullity and Restoration of Rights” to obtain the review of a final decision. Second, as a matter of constitutional law, a party (or any other affected person) may immediately seek a judicial writ (*Acción de Tutela*, or “tutela”) against an agency act or omission that violates or threatens to violate the petitioner’s fundamental constitutional rights, if effective protection of the right would be prejudiced by awaiting resolution of the underlying case.

266. In respect of enforcement practice, the Superintendency of Corporations has never proceeded against a corporation for any offence against the public administration (including domestic or foreign bribery). Enforcement figures were provided for the period 2010-2014: 4500 sanctions in 2010; 2821 sanctions in 2011; 1608 sanctions in 2012; 2711 sanctions in 2013; and 1006 sanctions in 2014. The large

¹⁶⁶ Agreement between the Superintendency of Corporations and the Prosecutor General’s Office, 9 October 2015.

¹⁶⁷ Article 48 of Law 1437 of 2011.

¹⁶⁸ Article 49, *ibid.*

¹⁶⁹ *Ibid.*

majority of these sanctions were pronounced for non-reporting of financial statements to the Superintendency of Corporations or offences to the foreign investment and foreign indebtedness regime.

Commentary

The lead examiners welcome steps already taken by Colombia following the on-site visit to address concerns relating notably to the independence and the training of the Superintendencies. Nevertheless, they recommend that Colombia:

- (i) Further strengthen safeguards for the independence of the Superintendencies, for instance relating to personal liability of staff for actions carried out in their personal capacity, and take any other steps to ensure that the Superintendency of Corporations and Superintendency of Finance are not subject to improper influence by concerns of a political nature or factors prohibited by Article 5 of the Convention;*
- (ii) Ensure that appropriate training and awareness-raising, specifically addressing foreign bribery, is carried out among officials of the Superintendency of Corporations and of Finance, including in the regional offices;*
- (iii) Ensure that all necessary investigative means are available for carrying out investigations into foreign bribery committed by legal persons even where there are no ongoing criminal proceedings against a natural person; and*
- (iv) Establish appropriate mechanisms for cooperation and coordination between the Superintendencies, the PGO, and other relevant agencies such as the anti-money laundering and tax authorities, to ensure all suspicions of foreign bribery involving legal persons can be effectively investigated by the Superintendencies.*

i. Promotion of anti-corruption compliance measures under Bill 159

267. Article 7 of Bill 159 proposes that effective compliance measures be taken into account in graduating sanctions against legal persons. Article 22 further mandates that the Superintendency of Corporations “promote the adoption of transparency programmes and corporate ethics programmes or of internal anticorruption mechanisms by legal persons...” It is unclear whether this will simply take the form of encouragement and support of such initiatives or a more stringent requirement on companies to adopt such programmes, since the last part of article 22 states that the Superintendency of Corporations “shall determine the legal persons subject to this regime”. Following the on-site visit, Colombia explained that its intention was to target these programmes to big companies and “multilatinas”, which are more likely to be operating abroad. The application of this provision in practice should be followed up once the bill is passed into law and practice has developed.

4. The offence of money laundering

268. Article 7 of the Convention states that “each Party which has made bribery of its own public officials a predicate offence for the purpose of its money laundering legislation shall do so on the same terms for bribery of a foreign public official, without regard to the place where the bribery occurred”.

a. Scope of the money laundering offence

269. Article 323 PC establishes criminal liability for laundering the proceeds of crime. Money laundering is an intentional offence; a defendant cannot be convicted of money laundering based on negligence. The money laundering offence covers self-laundering. The Colombian Supreme Court has ruled that neither a judicial decision on the defendant’s involvement in the underlying offence nor a conviction for the underlying offence itself is required to secure a conviction for money laundering

offence.¹⁷⁰ In that ruling, the Supreme Court held that money laundering is an autonomous offence and “independent of any other punitive conduct”; it is therefore sufficient to establish the mere existence of the underlying offence. At the time of the Phase 1 review, Colombia could not point to any provisions indicating that legal persons could be held liable for money laundering. The situation has not improved in Phase 2.

270. Offences against the public administration, which include foreign bribery, are predicate offences to money laundering. Article 323(3), as amended by Law 314 of 2001, explicitly provides that money laundering is punishable in Colombia even if the predicate offence has been committed partially or wholly abroad. This was confirmed by prosecutors at the on-site visit.

b. Sanctions and enforcement of the money laundering offence

271. The money laundering offence carries a prison sentence of 10 to 30 years, and fines of 650 to 50 000 minimum monthly wages, i.e. between COP 368.355 million and COP 28.335 billion (or between approximately USD 154 500 000 and 12 million). Under article 31 PC, and as confirmed by prosecutors at the on-site visit, sanctions for the predicate offence and the money laundering can be cumulated. An additional sanction of dissolution can be imposed on legal persons that have been used as a vehicle for money laundering.

272. As discussed above, the UIAF cannot make a determination as to the predicate offence. As such, the UIAF reports that the number of STRs that include suspicion of bribery or corruption cannot be officially be determined, although they provided an unofficial estimate (see section 8.a. on Colombia’s AML framework). However, at the conclusion of an enforcement action, the UIAF should receive feedback from the competent law enforcement authority as to the underlying offence. The UIAF has not been able to provide any statistics on the number of concluded money laundering actions predicated upon corruption offences, but the UIAF was able to report that in the last five years, 7 of the 232 investigations initiated since 2011 related to crimes against the public administration, leading to 67 trials and resulting in 26 sentences. Colombia verified that the UIAF does not receive more specific feedback on the nature of the predicate offence from law enforcement. To date, Colombia has not had any money laundering cases predicated on foreign bribery. Colombia also does not report any enforcement against legal persons for the offence of money laundering.

Commentary

The lead examiners recommend that Colombia maintain detailed statistics on (i) sanctions in money laundering cases, including the size of fines and forfeited/confiscated assets, and (ii) whether foreign bribery is the predicate offence.

The lead examiners also recommend that, as practice develops, the Working Group follow up on the application of sanctions imposed on legal persons for the offence of money laundering.

5. The offence of false accounting

273. The Convention and 2009 Recommendation both emphasise the importance of systems of accounting in the fight against foreign bribery. In particular, Article 8 of the Convention requires Parties to prohibit, within the framework of their laws regarding the maintenance of books and records, financial statement disclosures and accounting and auditing standards, the making of fraudulent accounts, creating statements and records for the purpose of bribing foreign officials or of hiding such bribery.

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Supreme Court of Justice, Chamber of Criminal Appeals, Filing No. 23174. M.P. Alfredo Gómez Quintero.

a. Scope of the false accounting offence

274. Colombia has multiple legally established sources of accounting standards and rules. The legal requirements on accounting can be found in (i) the Code of Commerce, which sets forth the general accounting requirements that commercial enterprises must follow in maintaining books of account, recording transactions, and preparing financial statements; (ii) Law 43 of 1990, which provides a general legal framework authorizing the government to issue detailed Colombian accounting and auditing standards, and to regulate the practice of public accounting as a profession; (iii) Decree 2649 of 1993, which promulgates Colombian generally accepted accounting principles (Colombian GAAP); and, (iv) Law 1314 of 13 July 2009 providing for convergence of national standards with International Financial Reporting Standards (IFRSs). In addition to these sources of accounting requirements, various government agencies and regulatory bodies issue Chart of Accounts and accounting instructions. Law 222 of 1995 empowered various regulatory bodies (called *Superintendence's*) and other government entities (including DIAN) to issue accounting rules for the entities they supervise.

(i) Duty to keep books and documents

275. Colombian accounting standards, as well as the duty to keep books and records, are set out primarily in Law 43 of 1990, Presidential Decree 2649 of 1993, Law 1314 of 2009, and the Commercial Code (CoC). According to article 19(3), companies and individuals are required to keep regular accounts of their business operations. According to Colombia, article 19(3) CoC requires “any natural or legal person” to keep accounts of its business and is therefore applicable to all Colombian companies. Under article 50 CoC, accounts must be kept exclusively in Spanish according to the double-entry system in registered books, so as to provide a clear, complete and accurate account of the business affairs. Books must be kept for at least 10 years from the date of closure or last entry (article 60) and can only be examined by their owners or authorised persons (article 61) unless ordered by members of the executive or judicial branches for the purposes of, inter alia, criminal or administrative inquiries (article 63). Presidential Decree 2649 of 1993 lists, in articles 19 to 33, the basic financial statements that companies are required to maintain and disclose. These include the balance sheet, income statement and consolidated financial statements.

(ii) Accounting standards

276. Law 1314 of 2009 states the government’s intention to converge Colombian GAAP with international standards and calls for Colombia to implement IFRS and International Standards on Auditing (ISA). The transition to IFRS was under way at the time of this evaluation, while further steps will be needed to begin the transition to ISA. The issue has been under discussion for more than a decade in Colombia, with some resistance from the private sector due to concerns about the capacity of the accounting sector to handle the transition. However, according to the international audit firms present in Colombia – which are responsible for statutory auditing of most listed companies – most of Colombia’s largest companies already follow IFRS. Implementing decrees of Law 1314 were issued in 2012 and 2013 establishing three groups that will be subject to IFRS. The first group, comprised of listed and other large Colombian companies, are required to issue financial statements for the 2015 fiscal year and thereafter exclusively under IFRS rules. The second group, which includes some of the smaller financial institutions, SOEs and other mid-sized companies, will be subject to full implementation of IFRS for the beginning of 2016. The third group, involving micro-businesses, will have additional time and flexibility to implement IFRS. At the time of the on-site visit, the Ministry of Finance was also planning to issue regulations for adoption of ISA. These developments are important given that Colombia’s GAAP failed to incorporate many areas covered by the international standards. The lead examiners highly welcome this move towards integrating/adopting/meeting accounting standards widely accepted in the world. They note that it remains important for IFRS implementation to continue to proceed as planned under Law 1314.

b. Sanctions for false accounting

277. Sanctions for false accounting are contained in several laws. These are included in the Commercial Code, the Penal Code, the Tax Code and legislation regulating liability of legal persons.

278. Administrative liability for use of false documents or forgery of any kind in the financial records of a company is provided under article 43 of Law 222 of 1995, amending the Commercial Code. It fixes imprisonment sanctions of one to six years for those who knowingly (i) provide the authorities with information contrary to reality, or issue certifications or attestation of the same nature; or (ii) order, tolerate, incorporate or conceal forgeries in financial statements or notes. Sanctions for violating the article 57 CoC false accounting provision are a fine of up to COP 9 250 (USD 3.8832) to be imposed by the Chamber of Commerce or the Superintendency of Corporations. In cases where the perpetrator cannot be identified, the “owner of the books”, the accountant and auditor will be held jointly liable. This administrative liability is imposed without prejudice to criminal liability under the Penal Code. Consequently, in addition to any administrative sanction imposed under the CoC, a person may also be held criminally liable, for example under the article 289 PC, of falsifying private documents, punishable by 16 to 108 months’ imprisonment.

279. The Penal Code also foresees criminal penalties for false accounting. Article 289 provides that forgery and later use of a private document shall be considered a criminal offence punishable by one to six years’ imprisonment. Article 446 PC further provides that persons who have knowledge of the commission of the criminal offence and, without prior agreement, help evade the action of the authorities or impede the investigation, incur imprisonment for a period of one to four years. Under article 289 PC, forgery and later use of a private document is considered a criminal offence, carrying a penalty of imprisonment of one to six years.

280. Tax auditors are also subject to liability. Article 660 of the Tax Code provides that the accountant or auditor who signed a tax return, an attestation or a certificate that contained inexact information which lead to a miscalculation of the tariff will be suspended from signing tax returns or certifying financial statements or other probes relating to taxes, for up to a year upon the first instance, up to two years upon the second, and indefinitely upon the third.

281. Legal persons may be held administratively liable for false accounting offences under Law 43 of 1900. In the case of managers (managers, board members and others), the law states that: “The managers will be liable jointly and for the prejudices wilfully or not cause to the society, other partner or to third parties” according to article 200 CoC. Sanctions are imposed by the judges at the request of the affected third party or *ex officio* by control agencies such as the Superintendencies.

282. Colombia has not provided any statistics on sanctions imposed on Colombian individuals or legal persons for false accounting so an assessment as to whether sanctions for false accounting are effective, proportionate and dissuasive cannot be made at this time.

Commentary

The lead examiners welcome the efforts undertaken by Colombia to align Colombian accounting standards with existing international standards. The lead examiners recommend that Colombia proceed with legislative developments intended to incorporate the IFRS into Colombian law and maintain detailed statistics on enforcement of false accounting offences.

6. Sanctions for foreign bribery

283. Article 3 of 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. Where a Party’s domestic law does not subject legal persons to criminal responsibility, the Convention requires the Party to ensure that they are subject to “effective, proportionate and dissuasive non-criminal sanctions, including monetary sanctions”. Additionally, the Convention requires each Party to take such measures as necessary to ensure that the bribe and the proceeds of the bribery of the foreign public official are subject to seizure and confiscation, or that monetary sanctions of “comparable effect” are applicable. Finally, the Convention requires each Party to consider the imposition of additional civil or administrative sanctions.

284. The legal situation with respect to sanctions for the foreign bribery in Colombia is unchanged since Phase 1¹⁷¹, although Bill 159 envisages an increase of the ceiling of monetary sanctions for both natural and legal persons.

a. Sanctions against natural persons

285. Under the current Penal Code (PC), the sanctions for natural persons are as follows:

Offence	Imprisonment	Financial penalty	Additional sanctions
Foreign bribery offence (article 433 PC)	9 to 15 years	100 to 200 minimum legal monthly wages i.e. between COP 61 600 000 and COP 123 200 000 (appr. USD 25 866 – 51 800) ¹⁷²	None
Active domestic bribery offence (articles 405-407 PC)	4 to 9 years	66.66 to 150 minimum legal monthly wages	Deprivation of political rights and prohibition from exercising public functions for 80 to 144 months

286. As can be seen, the sanctions for foreign bribery are generally higher than the ones foreseen for active bribery of a domestic public official. Nevertheless, at the time of Phase 1, the Working Group noted that “while the available prison sentences are significant, it is questionable whether the financial sanctions are sufficiently effective, proportionate and dissuasive.” Furthermore, the additional sanction of deprivation of rights is not available for active foreign bribery, even though it is available for active domestic bribery (i.e. the bribe payer in a domestic bribery case may be prohibited from the exercise of political rights and public functions).

287. Bill 159, currently before Parliament, proposes to increase the level of financial sanctions. Article 29 of the Bill seeks to amend article 433 PC to provide for sanctions between 650 and 50 000 minimum legal monthly wages, or between COP 400.4 million and 30.8 billion (approximately between USD 167 600 and 12.9 billion). It further proposes to impose additional sanctions of deprivation of rights or prohibition from public functions for the foreign bribery offence similar to those applicable to active domestic bribery.

¹⁷¹ See *ibid*, at §§ 50-69.

¹⁷² The [2015 minimum legal monthly wage](#) (or SMMLV) is set at 644 350 Colombian pesos (COP) (USD 270 as of 1 May 2015).

288. In terms of sanctions in practice, as noted earlier, there have not been any cases of foreign bribery in Colombia as of the time of this review. Colombia, however, provided the data below on sanctions for “crimes related to bribery” (both active and passive).

	2010	2011	2012	2013	2014
<i>Number of imprisonment sanctions imposed</i>	105	81	64	64	45
<i>Average time in months</i>	80.8	74.2	97.6	146.9	57.9
<i>Maximum</i>	98.3	169.5	154.0	130.3	71.8
<i>Minimum</i>	24.0	0.2	25.0	80.0	36.0
<i>Number of financial sanctions imposed</i>	21	40	21	19	12
<i>Average fine in thousand COP</i>	28,504.6	104,395.4	54,942.8	357,943.7	55,095.6
<i>Maximum</i>	244,223.3	563,272.7	171,183.1	317,375.0	69,605.9
<i>Minimum</i>	18,540.0	17,851.5	21,534.6	19,630.4	5,544.0

Commentary

The lead examiners note that deprivation of political rights and prohibition from exercising public functions are sanctions available in Colombia for active domestic bribery committed by natural persons. They therefore recommend that Colombia adopt a similar approach for the foreign bribery offence, in line with Article 3.1 of the Convention which requires that “the range of penalties [for foreign bribery] shall be comparable to that applicable to the bribery of the Party’s own public officials...”

b. Sanctions against legal persons

289. Penalties for legal persons convicted of foreign bribery are provided for in article 34 of Law 1474 of 2011, and may be imposed cumulatively.¹⁷³ In the absence of foreign bribery cases, such sanctions have never been applied in practice, nor have they been applied for domestic bribery or other crimes against the public administration committed by legal persons. The current level of sanctions does not meet the Article 3 requirement that sanctions be effective, proportionate and dissuasive. This concern may however be addressed once Bill 159 is passed into law. (Please see also discussion on liability of legal persons under [section C.3.](#) above.)

(i) Suspension or dissolution of the legal person

290. Paragraph 1 of article 34 provides for the imposition of an administrative penalty, as referred to under article 91 CPC, in the form of suspension or dissolution of the legal person. This measure may be pronounced by a judge on petition by the prosecutor, and therefore in situations where proceedings are also taking place against a natural person.¹⁷⁴ The application in foreign bribery cases of this sanction appears improbable, or, at the very least, very limited. Indeed and as already noted in Phase 1, the dissolution of the

¹⁷³ See [Annex 3](#) for legislative excerpts.

¹⁷⁴ See *ibid.*.

company provided under article 91, might, depending on the case, be considered inappropriate and disproportionate to the act committed.¹⁷⁵

(ii) *Financial sanctions*

291. The administrative sanction under paragraph 3 of article 34 appears the most likely to be applied in the context of bribery of a foreign public official in an international business transaction. Under this provision, the Superintendence of Corporations may impose fines ranging from 500 to 2000 minimum monthly wages, i.e. between COP 308 million and COP 1 232 million (or between approximately USD 128 720 and 515 000). In Phase 1, the Working Group expressed concern that this level of sanctions was not sufficiently effective, proportionate and dissuasive for a legal person, especially where that legal person may be a large multinational corporation.¹⁷⁶ As a point of comparison, sanctions in Colombia for money laundering for natural persons may reach as high as 50 000 times the minimum monthly wage (COP 30.8 billion i.e. up to USD 12.9 million).

292. Article 4 of Bill 159 would remedy this situation in law, as it envisions increasing the ceiling of the current sanctions regime one hundred fold to 200 000 minimum monthly wages (i.e. USD 54 million). Bill 159 does not set a minimum sanction.

(iii) *Additional sanctions*

293. As of the time of this report, Colombian legislation does not provide for debarment sanctions directly against legal persons. Where individuals have been declared guilty of foreign bribery, they, and the corporations in which such persons are partners, their parent companies and subsidiaries, may be banned for 20 years from bidding in public procurement procedures and from entering into public contracts.¹⁷⁷ Article 4 of Bill 159 proposes that debarment from commercial activities and from public procurement in Colombia may be pronounced against legal persons convicted of foreign bribery for a period of up to 20 years.

Commentary

As already expressed by the Working Group in Phase 1, the lead examiners are concerned that the current level of financial sanctions applicable to legal persons in Colombia is not sufficiently effective, proportionate and dissuasive. They therefore welcome the significant increase in financial sanctions proposed in Bill 159, and recommend that Colombia promptly proceed with its adoption. The lead examiners further welcome the proposed debarment sanctions which should also be introduced through Bill 159.

c. *Confiscation*

294. As explained in Colombia's Phase 1, confiscation, as understood under the Anti-Bribery Convention, is provided for in Colombian law under a different terminology. The bribe and proceeds of bribery may be seized and confiscated under two different procedures: (1) "*comiso*" (article 82 of the CPC), and (2) *extinción de dominio* (Law 793 of 2002). *Extinción de dominio* is the procedure more likely to be relied on in foreign bribery cases.

¹⁷⁵ See [Phase 1 Report on Colombia](#), §54.

¹⁷⁶ *Ibid.*, §§ 55 and 146.

¹⁷⁷ Article 8.1(j) of Law 80 of 1993.

(i) *Comiso*

295. *Comiso*, under article 82 CPC, is based on a criminal conviction, and is therefore only applicable to natural persons, since legal persons cannot be held criminally liable.¹⁷⁸

296. Article 82 CPC allows for confiscation of both the instrument and proceeds of crime. In the context of a foreign bribery offence, article 82 would allow for confiscation of the bribe if still in the hands of the perpetrator or another participant, provided that person is convicted. Article 82 would also allow for confiscation of the proceeds resulting from the foreign bribery offence, or their financial equivalent, provided they are in the hands of the natural person convicted of foreign bribery. This may render its use of little effect in the case of bribery of a foreign public official in an international business transaction, given the proceeds may often be held by legal rather than natural persons, and the bribe itself may be beyond reach in the hands of the foreign public official.

297. Article 83 CPC allows for the possibility of pre-trial seizure of goods susceptible of criminal confiscation under article 82 “when there are well founded motives to infer that the goods and resources at issue are a direct or indirect product of a wilful offence; that their value is equivalent to that of such product; that they have been used or are destined to be used as a means or instrument of a wilful offence; or that they constitute the material object of the offence...” Again, this type of pre-trial seizure is only applicable to natural persons, as only natural persons may be held criminally liable.

(ii) *Extinción de dominio*

298. Given that *comiso* may be of limited application in the context of a foreign bribery offence, the *extinción de dominio* provisions available under Law 793 of 2002 are more directly relevant, as they could apply to bribes and the proceeds of foreign bribery in the hands of both natural and legal persons. The object of the *extinción de dominio* procedure (or extinction of the right of property) is the assets themselves, and not their owner. Article 2 of Law 793 of 2002, as modified by article 72 of Law 1453 of 2011, lays down the circumstances whereby *extinción de dominio* may occur.¹⁷⁹

299. As provided under article 7 of Law 793 of 2002, to establish that goods are proceeds of an illegal activity, the civil standard of proof on the balance of probabilities will apply (as opposed to the standard of “proof beyond reasonable doubt” applicable in criminal law). In terms of process, under article 5 of Law 793, the procedure may be initiated *ex officio* by the prosecutor when it appears likely that the grounds set forth in article 2 are met. In Phase 1, Colombia explained that this *extinción de dominio* procedure is initiated systematically when the goods or resources in question are the subject of criminal proceedings, but no final decision has been made as to their status, illicit or otherwise. Colombia indicated it was therefore likely that, where a criminal investigation into a foreign bribery offence was opened, pre-trial seizure of the bribe and its proceeds would be initiated on the basis of the *extinción de dominio* provisions, since this is an autonomous action by the public prosecution, separate from the criminal proceedings for the foreign bribery offence itself. According to the Colombian authorities themselves, the application of the *extinción de dominio* provisions therefore depends in practice on the initiation of a criminal investigation into a natural person. If proceedings are opened only by the Superintendency of Corporations – with no powers of confiscation – into foreign bribery committed by a legal person, it appears unlikely that *extinción de dominio* could occur.¹⁸⁰ Colombia points to precautionary measures envisaged by Bill 159

¹⁷⁸ See [Annex 3](#) for legislative excerpts.

¹⁷⁹ See *ibid.*

¹⁸⁰ During the finalisation of the report, Colombia informed the evaluation team of more recent legislation on *extinción de dominio*, which would allow for confiscation of proceeds from legal persons even in the

which would address this deficiency. Article 13 of the draft law provides that “the competent authority may order precautionary measures if they are necessary to protect and guarantee, provisionally, the object of the proceedings and the effectiveness of an eventual sanctioning decision.” This provision is however meant to freeze assets which may later be used to pay the fine, and not to confiscate benefits (proceeds) derived from the commission of the foreign bribery offence.

300. Regarding confiscation in practice, Colombia provided the following statistics on *extinción de dominio*:

	2010	2011	2012	2013	2014
<i>Number of procedures initiated</i>	859	563	1062	455	405
<i>Number of procedures finalised</i>	358	210	172	254	161
<i>Value of affected assets in million COP</i>	123,654	261,286	136,808	2,010,490	3,500,000

301. These figures show a steady increase in the value of assets confiscated, which reached COP 3,500,000 million in 2014 (USD 1,467,000,000). *Extinción de dominio* was largely imposed in cases of drug-trafficking and money laundering.

Commentary

The lead examiners note that the extinción de dominio process allows for effective confiscation of the bribe, the proceeds of foreign bribery, or property the value of which corresponds to that of such proceeds, in conformity with Article 3.3 of the Convention. They are however concerned that, in practice, the application of extinción de dominio in foreign bribery cases will depend on the opening of a criminal investigation by the prosecution authorities into the natural person, and may therefore not be enforced in cases where only a legal person is being proceeded against. They therefore recommend that Colombia ensure that confiscation of the proceeds of foreign bribery, or property the value of which corresponds to that of such proceeds, can be enforced in practice against legal persons, even in the absence of criminal proceedings against a natural person, or that monetary sanctions of comparable effect are applicable.

d. Other sanctions

302. Section XI of the 2009 Recommendation advises Member countries to examine their system of public subsidies, licences, public procurement contracts, contracts funded by official development assistance, officially supported export credits, and other public advantages to allow for adequate detection and sanctioning through agencies responsible for public contracting. Recommendation XI, in particular, provides that “Member countries’ laws and regulations should permit authorities to suspend, to an appropriate degree, from competition for public contracts or other public advantages, including public procurement contracts and contracts funded by official development assistance, enterprises determined to have bribed foreign public officials in contravention of that Member’s national laws”.

absence of a conviction of a natural person. Given the late submission, the evaluation team recommended that the Working Group review this in the next evaluation of Colombia.

(i) *Officially supported export credits*

303. As mentioned above, although Bancóldex procedures do not specifically address foreign bribery (see section B.4 on export credit support), control systems are in place providing for enhanced due diligence or other measures where suspicions of criminal activity arise. Where Bancóldex becomes aware of criminal activity before it has provided credit or other support, it can (i) undertake enhanced due diligence, (ii) stop the transaction and deny disbursement, or (iii) implement other monitoring or control procedures. If Bancóldex discovers criminal activity after funds have been disbursed, Bancóldex can interrupt loan disbursements and claim immediate reimbursement from the financial intermediary.

304. In practice, Bancóldex has not detected any incidents of foreign bribery through the provision of export support. However, through enhanced due diligence carried out under its anti-money laundering obligations, Bancóldex has detected incidents of other types of corruption (money laundering) after dispensing support. When this happened, Bancóldex interrupted the loan disbursements, invalidated the export cover, sought recourse for payments already made, and denied official support for a specified period of time. Bancóldex admits that its procedures are not developed to address or detect foreign bribery, but posits that its AML regime may be adapted to apply the same measures to detecting and reporting foreign bribery.

(ii) *Public procurement*

305. Under article 8(1) of Law 80 of 1993, as modified by article 1 of Law 1474 of 2011, individuals declared guilty of crimes against the public administration punishable by imprisonment (which includes foreign bribery) are ineligible to contract with the Colombian government for a term of 20 years. This prohibition is extended to corporations in which such persons are partners, their parent companies and subsidiaries, except for limited liability corporations. Convicted individuals are entered in a register of convicted persons called the Information System of Ineligibility (*Sistema de Información y Registro de Inhabilidades*, or SIRI), which may be consulted by the public procurement authorities. Private firms wishing to participate in competitions for public contracts must attach a certificate of eligibility that is issued by the SIRI. Failing to produce this certificate will result in ineligibility to participate in the tender. Under Colombian law as it currently stands, no provisions exist to exclude a legal person from public contracting if it has been determined to have engaged in foreign bribery, but no associated natural person was convicted. However, Bill 159 of 2014 (in its section on penalties) envisions debarment from contracting with the Colombian government for a term of up to 20 years for engaging in foreign bribery. This prohibition will apply equally to natural and legal persons.

Commentary

The lead examiners note that natural persons convicted of foreign bribery are banned from public procurement contracting for a period of 20 years, and that this exclusion extends to companies controlled by such persons. The lead examiners recommend that Colombia consider extending this exclusion to legal persons engaged in foreign bribery where appropriate.

With respect to export credits, lead examiners recommend that Colombia establish formal, written policies for denying export credit support to legal and natural persons convicted of foreign bribery.

D. RECOMMENDATIONS OF THE WORKING GROUP AND FOLLOW-UP

306. Based on its findings regarding Colombia's implementation of the Convention and the 2009 Anti-Bribery Recommendation, the Working Group: (1) makes the following recommendations to Colombia under Part 1; and (2) will follow up the issues in Part 2 when there is sufficient practice. Colombia will report to the Working Group within one year on the status of Bill 159 of 2013, as well as steps taken to implement key recommendations on investigation and prosecution of the foreign bribery offence (7.b, c, and d), the foreign bribery offence (recommendation 8), liability of legal persons (recommendation 9 a-d) and administrative proceedings against legal persons for foreign bribery (recommendation 10). Pursuant to regular Phase 2 procedures, Colombia will provide a further report on all recommendations in writing within two years.

1. Recommendations

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

1. With respect to prevention, awareness raising and training activities, the Working Group recommends that Colombia:
 - a. Pursue more targeted training for relevant public sector officials, in particular those involved with Colombia companies operating abroad on foreign bribery and how to detect it; and
 - b. Develop awareness-raising and training targeting companies, including SMEs, operating in high-risk geographic regions and sensitive sectors. [2009 Recommendation, Section III(i) and (iv), and IX(ii)]
2. Regarding whistleblower protection, the Working Group recommends that Colombia proceed as a matter of priority with its plan to adopt measures to protect from retaliatory or disciplinary action private and public sector employees who report in good faith and on reasonable grounds suspected acts of foreign bribery. [2009 Recommendation, Sections III(iv) and IX(iii)]
3. With respect to officially supported export credits, the Working Group recommends that Colombia implement fully the provisions contained in the 2006 OECD Council Recommendation on Bribery and Officially Supported Export Credits, and in particular that Bancóldex, its export credit agency:
 - a. Require exporters and/or applicants to provide a declaration that they have not engaged in bribery in the transaction and to disclose whether they have been convicted of bribery in the preceding five years, and encourage exporters and/or applicants to develop, apply and document appropriate management control systems that combat bribery;
 - b. Check whether exporters and/or applicants have are listed on International Financial Institutions' debarment lists;
 - c. Require exporters and/or applicants to disclose upon demand (i) the identity of persons acting on their behalf in connection with the transaction, and (ii) the amount and purpose of commissions and fees paid, or agreed to be paid, to such persons;

- d. Raise awareness of the foreign bribery offence among Bancóldex staff as well as among financial intermediaries, and institute appropriate measures (such as by adapting its internal policies and procedures) to facilitate the detection and reporting of foreign bribery;
 - e. Establish formal, written policies for denying or withdrawing export credit support to legal and natural persons convicted of foreign bribery; and
 - f. Undertake enhanced due diligence if Bancóldex has reason to believe that bribery may be involved in a transaction. [2009 Recommendation, Section XII and 2006 Export Credit Recommendation]
4. Regarding taxation, the Working Group recommends that Colombia:
- a. Extend the statutory time during which a tax return may be re-examined to determine whether bribes have been deducted; and
 - b. Allow tax authorities to share information, both spontaneously and on request, with the administrative authorities in charge of proceedings against legal persons for foreign bribery. [2009 Recommendation, Sections III(iii) and VIII, and 2009 Tax Recommendation]
5. Regarding accounting and auditing, the Working Group recommends that Colombia:
- a. Encourage the detection and reporting of suspected foreign bribery by the accounting and auditing profession, in particular through guidelines and training for these professionals, and through raising the awareness of the management and supervisory boards of companies about these issues;
 - b. Encourage Colombian companies, including SOEs, to: (i) continue to develop and adopt adequate internal controls, ethics and compliance measures for preventing and detecting foreign bribery; and (ii) adopt and develop efficient internal audit procedures, including through corporate monitoring bodies, such as audit committees;
 - c. Develop and implement more stringent auditing requirements consistent with international standards in order to effectively ensure the independence of external auditors and provide adequate education and training of *revisores fiscales*; and
 - d. Consider introducing a clear duty for auditors to report suspicions of foreign bribery, such as the one envisaged under Bill 159; and, if such a reporting obligation is put in place, ensure that auditors making such reports reasonably and in good faith are protected from legal action. [2009 Recommendation, Sections III(i), (iv) and (v), X, and Annex II]
6. With regard to money laundering and foreign bribery, the Working Group recommends that Colombia increase its capacity to detect foreign bribery through its anti-money laundering regime, and in particular:
- a. Provide training or clarification to the UIAF with respect to the identification of the underlying predicate offence, in line with FATF recommendation 29, with a view to detecting instances of foreign bribery;
 - b. Maintain statistics on predicate offences;

- c. Continue to develop the concept of PEPs in Colombian law;
- d. Extend suspicious transaction reporting obligations to lawyers; and,
- e. Issue appropriate directives and training materials (e.g. typologies) on the identification and reporting of active bribery, including on concealment of bribery and bribe proceeds. [2009 Recommendation, Sections III(i), (iv) and (vi)]

Recommendations for preventing and detecting bribery of foreign public officials

7. Regarding the investigation and prosecution of foreign bribery and related offences, the Working Group recommends that Colombia:
 - a. Emphasise the importance of pursuing foreign bribery and place greater priority on the detection and investigation of foreign bribery cases;
 - b. Take further steps to ensure that specialised expertise in foreign bribery investigations is available to PEF and any other relevant investigative bodies;
 - c. Ensure appropriate and specific foreign bribery training is developed for investigators and prosecutors, including on the particularities of foreign bribery investigations and prosecutions, and on the referral and coordination of cases of foreign bribery and related offences;
 - d. Ensure sufficient and adequate human and financial resources are provided to the PEF and the PGO for the effective investigation and prosecution of foreign bribery cases;
 - e. Clarify the rules governing the allocation of foreign bribery cases within the Prosecutor General's Office (PGO), and consider granting a greater coordinating role to the Unit specialised in crimes against corruption;
 - f. Strengthen the current framework to promote better coordination among law enforcement authorities, including within the PGO, between the PGO and the police, and especially between the PGO and the Superintendency of Corporations;
 - g. More proactively detect and investigate foreign bribery, including by encouraging law enforcement authorities to make full use of all available investigative methods, and to use incoming MLA requests as a potential source of information for initiating foreign bribery investigations in Colombia;
 - h. Take appropriate steps, such as providing guidance to prosecutors, to ensure that the application of article 324(18), which provides an exception to the legality principle in bribery cases for cooperating offenders, does not prevent in practice effective enforcement of the foreign bribery offence;
 - i. Ensure adequate and sufficient training, resources and expertise are available in the courts, and consider whether an integrated approach, for instance relying on specialised courts to deal with offences such as economic and financial crime, may be appropriate to ensure foreign bribery can be effectively sanctioned;
8. Regarding the foreign bribery offence, the Working Group recommends that Colombia:

- a. Amend its law to ensure that the definition of “foreign country” is not limited to States, but includes any organised foreign area or entity, such as an autonomous territory or a separate customs territory, in conformity with commentary 18 to the Convention;
 - b. Take steps to ensure that its foreign bribery offence is sufficiently broad to cover employees of all public enterprises as defined by commentary 14, including all types of SOEs;
 - c. Promptly proceed with the adoption of foreseen legislation aiming to include “promise” to the foreign bribery offence; and
 - d. Clarify that an offer that does not reach the intended public official constitutes an offence under Colombian law. [Convention, Article 1]
9. Regarding the legislation on liability of legal persons for foreign bribery, the Working Group recommends that Colombia:
- a. Urgently amend its legislation to ensure that all legal persons, including listed entities, financial institutions, publicly-traded companies and non-profit entities, can be held liable for foreign bribery;
 - b. Take all necessary steps to ensure that proceedings against legal persons do not, in law or in practice, depend on the initiation of proceedings against a natural person;
 - c. Ensure that the statute of limitations and the investigation period allow adequate time for proceeding against legal persons for a foreign bribery offence;
 - d. Explicitly provide in legislation for nationality jurisdiction over Colombian legal persons for the foreign bribery offence; and
 - e. Clarify the application of benefits for collaboration envisaged under draft legislation, so that they do not prevent in practice the effective enforcement of the foreign bribery offence against legal persons [Convention, Article 2; 2009 Recommendation, Sections III(viii) and Annex I.B].
10. Regarding administrative proceedings against legal persons for foreign bribery, the Working Group recommends that Colombia:
- a. Further strengthen safeguards for the independence of the Superintendency of Corporations¹⁸¹ to ensure it cannot be subject to improper influence by concerns of a political nature or factors prohibited by Article 5 of the Convention;
 - b. Provide appropriate training and awareness-raising specifically addressing foreign bribery among Superintendency officials, including in the regional offices;

¹⁸¹

The WGB recommendations address the Superintendency of Corporations as the administrative authority in charge of foreign bribery enforcement against legal persons at the time of this review. If, as foreseen under Bill 159 currently before Parliament, the Superintendency of Finance is also endowed with authority over certain legal persons for the foreign bribery offence, these recommendations will also be applicable to it.

- c. Ensure that all necessary investigative means are available to the Superintendency for effectively carrying out foreign bribery investigations into legal persons;
 - d. Ensure the PGO and the relevant Superintendencies closely coordinate in foreign bribery cases and draw the attention of prosecutors to the importance of considering legal person liability; and
 - e. Establish appropriate mechanisms for cooperation and coordination between the Superintendency and other relevant agencies such as the anti-money laundering and tax authorities, to ensure all suspicions of foreign bribery involving legal persons can be effectively investigated by the Superintendency [Convention, Article 2; 2009 Recommendation, Sections III(viii) and Annex I.B]
11. Regarding the related money laundering offence, the Working Group recommends that Colombia maintain detailed statistics on (i) sanctions in money laundering cases, including the size of fines and forfeited/confiscated assets, and (ii) whether foreign bribery is the predicate offence. [Convention, Article 7]
 12. Regarding the related false accounting offence, the Working Group recommends that Colombia
 - a. Proceed with legislative developments intended to incorporate the IFRS into Colombian law; and
 - b. Maintain detailed statistics on enforcement of false accounting offences. [Convention, Article 8; 2009 Recommendation, Section X.A]
 13. Regarding sanctions and confiscation applicable to foreign bribery, the Working Group recommends that Colombia:
 - a. Introduce the sanction of deprivation of political rights and prohibition from exercising public functions for foreign bribery committed by a natural person, in line with the sanction applicable for active domestic bribery;
 - b. Promptly proceed with the adoption of legislation to increase financial sanctions applicable to legal persons, with a view to ensuring they are effective, proportionate and dissuasive;
 - c. Ensure that confiscation of the proceeds of foreign bribery, or property the value of which corresponds to that of such proceeds, can be enforced in practice against legal persons, even in the absence of criminal proceedings against a natural person, or that monetary sanctions of comparable effect are applicable; and
 - d. Consider extending the exclusion from public contracting already applicable to natural persons convicted of foreign bribery, and to legal persons controlled by such natural persons, to legal persons engaged in foreign bribery where appropriate. [Convention, Article 3]

2. Follow-up by the Working Group

14. The Working Group will follow up on the issues below:

- a. Legislative developments concerning the passing of Bill 159 and how they may affect Colombia's implementation of the Convention;
- b. Whether foreign bribery cases are preserved from undue influence and large-scale corruption in the judiciary, as well as efforts made by Colombia to reform the judiciary and address its independence;
- c. Colombia's capacity to efficiently and successfully investigate foreign bribery, including in the preliminary stages of the investigation;
- d. The procedural timelines for law enforcement authorities, to ensure there is an adequate period of time for the investigation and prosecution of the foreign bribery offence;
- e. The application of article 433 PC on the foreign bribery offence, as case law develops, to ensure it is interpreted in conformity with the Convention;
- f. Colombia's ability to seek MLA in foreign bribery-related cases against a legal person;
- g. Whether a legal person can be held liable for transnational bribery committed by lower level employees;
- h. Whether a legal person can be held liable in practice for foreign bribery committed by related legal persons; and
- i. The application of sanctions imposed on legal persons for the offence of money laundering.

ANNEX 1 – LIST OF PARTICIPANTS

Presidential, government and public institutions

- Ministry of Justice
- Secretariat for Transparency
- Superintendence of Corporations
- Superintendence of Finances
- Ministry of Foreign Affairs
- Ministry of Finance
- Ministry of Trade, Industry and Economy (National Contact Point)
- National Citizens Committee for the Fight against Corruption (NCCFC)
- DAFP (Civil Service Administrative Department)
- Ministry of Labour
- National Planning Department (DNP)
- *Unidad de Información y Análisis Financiero* (UIAF) (Colombia's FIU)
- APC

Other public institutions or institutions with a public service mission

- *Banco de la República* (Central Bank)
- *Colombia Compra Eficiente* (Procurement agency)
- *Proexport* (Colombia's investment promotion agency)
- Members of Parliament
- Supreme Court
- Superior Council of Judicature
- Constitutional Court
- Office of the Auditor General

Law enforcement

- National Police's Criminal Investigations Office (DIJIN)
- Office of the Prosecutor General
- Office of the Prosecutor General (Anti-Money Laundering Unit)
- Regional Prosecutorial Offices
- General's Corps of Technical Investigators (CTI)
- Economic and Financial Police (PEF)
- National Tax and Customs Administration (DIAN)
- Fiscal and Customs Police (*Policia Fiscal y Aduanera* or *POLFA*)

Private Sector

Companies

- *Banco de Comercio Exterior de Colombia* (Bancóldex)
- *Bancolombia*
- *Banco de Bogota*
- *Banco Davivienda*
- *EPM Group*
- *Ecopetrol SA*
- *Grupo Argos*
- *Organisation Corona*
- *Indumil*
- *Odinsa*
- *Interconexion Electrica (ISA)*
- *Empresas Publicas de Medellín (EPM)*
- *Grupo Aval*
- *AeroAndina*
- *Avianca*
- *Grupo Nutresa*

Business associations

- National Business Association of Colombia (ANDI)
- Banking Association of Colombia
- *Confecamaras* (Colombian Federation of Chambers of Commerce)
- CAMPETROL

Legal profession and academics

Legal profession

- Rodriguez Azuero Abogados
- MNA Martinez Abogados Ltda.
- RUIZ LÓPEZ ABOGADOS & ASOCIADOS LTDA.
- Prias Cadavid Abogados
- Prietocarrizosa & Uría

Academics

- Universidad de los Andes

Accounting and auditing profession

- KPMG
- Deloitte
- PWC
- JCC
- Ernst & Young
- Accounting Oversight Body
- Companies and Intellectual Property Commission
- Independent Regulatory Board for Auditors

Civil Society

- Transparencia por Colombia
- DeJusticia
- Foro Colombia
- Ocase
- Fundacion Para la Libertad de Prensa, FLIPP
- Excelencia en la Justicia
- Somos Mas
- Association of Corporate Foundations
- ICP

Media

- El Tiempo

ANNEX 2 – LISTS OF ABBREVIATIONS, TERMS AND ACRONYMS

2006 Recommendation	2006 OECD Council Recommendation on Bribery and Officially Supported Export Credits
2009 Recommendation	2009 Recommendation for Further Combating the Bribery of Foreign Public Officials in International Business Transactions
2009 Tax Recommendation	2009 Recommendation of the Council on Tax Measures for Further Combating the Bribery of Foreign Public Officials in International Business Transactions
AML	Anti-money laundering
ANDI	National Business Association of Colombia
Bancóldex	Bank of Foreign Trade (<i>Banco de Comercio Exterior</i>)
CAMPETROL	National Chamber of Services Companies
CoC	Commercial Code
CONPES	National Strategy for the Integral Public Anti-Corruption Policy
COP	Colombian Peso
CPC	Criminal Procedure Code
CPI	Transparency International's Corruption Perception Index
CTCP	Technical Council for Public Accounting
CTI	General's Corps of Technical Investigators
DIAN	National Tax and Customs Administration
DIJIN	National Police's Criminal Investigations Office
DNFBPs	Designated Non-Financial Businesses or Professions
DTC	Double Taxation Convention
ECG	OECD Working Party on Export Credits and Credit Guarantees
FATF	Financial Action Task Force
FCPA	Foreign Corrupt Practices Act
FDI	Foreign direct investment
FIU	Financial Intelligence Unit
GAFILAT	Financial Action Task Force of Latin America (former GAFISUD)
GAAP	Generally Accepted Accounting Principles
GDP	Gross domestic product
IFRSs	International Financial Reporting Standards
IMF	International Monetary Fund
ISA	International Standards on Auditing
MLA	Mutual legal assistance
MNE Guidelines	OECD Guidelines for Multinational Enterprises
NCCFC	National Citizens Committee for the Fight against Corruption
NCP	National Contact Point
NDP	National Development Plan
NGO	Non-governmental organisation
OAS	Organisation of American States
ODA	Official development assistance
OECD	Organisation for Economic Co-operation and Development
PC	Penal Code
PEF	Economic and Financial Police
PEPs	Politically Exposed Persons
PGO	Prosecutor General's Office
SIRI	Information System of Ineligibility
SMEs	Small and medium-sized enterprises
SOE	State-owned enterprise
STR	Suspicious Transaction Report
The Convention	OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions
The Working Group	The OECD Working Group on Bribery in International Business Transactions
TIEA	Tax Information Exchange Agreement
TS	Tax Statute
UIAF	Colombia's Financial Intelligence Unit
UN	United Nations
USAID	United States Agency for International Development
WTO	World Trade Organisation

ANNEX 3 – EXCERPTS FROM RELEVANT LEGISLATION

PENAL CODE

Article 14 – Territorial Jurisdiction

Colombian criminal law shall apply to any person who infringes upon it in the national territory, except as set forth in international law. The criminal offense is deemed to have occurred:

- (1) In the place where all or part of action was carried out.
- (2) In the place where the omitted action should have been carried out.
- (3) In the place where the result was produced or should have been produced.

Article 16 para.1 – Nationality Jurisdiction

Colombian criminal law shall be applied to the person who commits a crime abroad against the existence and security of the State, against the constitutional regime, against the economic and social order other than the conduct defined in article 323 of this Code, against the public administration, or whom falsifies national currency or incurs in the crime of terrorism financing and the management of resources related to terrorist activities, even when they have been acquitted or convicted abroad with a lesser sentence than that under Colombian law. In any case, any period for which they been deprived of their liberty will be considered as a completed part of the sentence.

Article 83 – Statute of Limitations

The criminal proceedings shall have a prescription term equal to the maximum for the sentence established by law, if deprivation of liberty, but in no case shall it be less than five (5) years nor more than twenty (20), except as provided in the next section of this article. [...] The prescription term will also increase, by half, when the criminal offense has been initiated or consummated abroad.

Article 323 – Money Laundering

Whoever acquires, safeguards, invests, transports, processes, stores, keeps, has custody or administers property that originates directly or indirectly from activities of [...] crimes against the public administration, or related to the proceeds from crime under conspiracy to commit crime, or gives the assets coming from such activities the appearance of legality or legalizes, conceals or disguises the true nature, source, location, destination, movement or right over such property, or performs any other act to conceal or disguise their illicit origin, shall incur by that act alone, imprisonment of ten (10) to thirty (30) years and a fine of six hundred and fifty (650) to fifty thousand (50,000) minimum monthly wages.

Article 417 – Failure by a Public Servant to Report an Offence

The public servant that having knowledge of the consummation of a criminal offense whose investigation must be taken forward ex officio, does not report it to authority, liable shall incur a fine and loss of employment or public office. The sentence shall be thirty-two (32) to seventy-two (72) months imprisonment if the criminal offense whose reporting was omitted is of those referred to in the offense of failure to report of an individual.

Article 433 – Transnational Bribery

Whoever gives or offers a foreign public official, for his own benefit or that of a third party, directly or indirectly, any money, object of financial value or any other good in exchange for committing, omitting, or delaying any action related to a financial or commercial transaction, shall incur in imprisonment for a period of nine (9) to fifteen (15) years and a fine of one hundred (100) to two hundred (200) current minimum legal monthly wages.

PARAGRAPH: For the purposes of this article, a foreign public official is any person with a legislative, administrative or judicial position in a foreign country, whether elected or appointed, as well as anyone who exercises public functions for a foreign country, whether it be in a public entity or in a company that provides a public service. Any officer or agent of an International Public Organisation is also considered a foreign public official.

CRIMINAL PROCEDURE CODE

Article 66 - Obligation to Initiate Criminal Prosecution

The State, through the intervention of the Office of the Prosecutor General of the Nation, is under the obligation to initiate criminal prosecution and an investigation of the actions that can constitute a felony, or

to process information that is brought to its attention through a complaint, special petition, lawsuit or any other means, save the exceptions contemplated in the Political Constitution and this Code.

It is not possible, as a result, to suspend, interrupt or renounce criminal prosecution except in the cases established by law that permit the application of the principle of opportunity regulated within the framework of the criminal policy of the State, which shall, in turn, be submitted to legal control on the part of the judge in charge of control of guarantees.

Article 67 – Duty to Report

Everyone must report to the authorities the crimes that is aware of [sic] and to be investigated ex officio.

The public server that has knowledge of the commission of a crime to be investigated ex officio, must commence without delay the investigation if he is competent to do so; otherwise, shall immediately report the fact to the competent authority.

Article 82 – Confiscation (*Comiso*)

The Confiscation shall fall on the goods and resources of the person that committed the crime which proceeded directly or indirectly from the offense or on those used or that are destined to be utilized on the willful acts as a means or instrument for its culmination without jeopardizing the rights of good faith third parties. When the goods or resources that proceed directly or indirectly from the offense are mingled with goods of licit origin, the confiscation shall take place up to the estimated value of the illegal product unless, with said behavior, another offense is committed. In this case, the confiscation shall encompass all of the goods involved in the offense. Without prejudice to the rights of the victims or third parties of good faith, the confiscation shall apply to the goods of the offender up a value that corresponds, or is equivalent to the direct or indirect proceeds arising out of the offense. This shall occur if the goods cannot be found, identified or repossessed, or if the confiscation of the goods cannot be done in the terms provided above.

Once the goods have been confiscated, they shall be delivered definitively to the General Attorney's Office through the Special Fund for the Administration of Goods, unless the law orders their destruction or a different destination.

PARAGRAPH. For the effects of confiscation, it shall be understood that “goods” refers to those that have an economic value or those subject to right of property, whether they are corporal or not corporal, movable or immovable, tangible or intangible, including the documents or deeds that prove the right of property over them.

Article 91 – Suspension and cancellation of the legal status

At any moment before the Indictment, on petition of the office of the prosecutor, the judge with functions of guarantee control can order the competent authorities to proceed with the cancelation of the legal status or the temporary closure of the shops or establishments of legal or natural persons, subject to prior fulfilment of the requirements established by the law, whenever there are well founded motives to infer that they have been totally or partially used in criminal activities.

The above cited measures will be made final in the conviction sentence whenever there is proof beyond a reasonable doubt of the circumstances that created them.

Article 175, modified by Law 1453 of 2011, Article 49 - Duration of the procedures

The term available to the Prosecution for formulating an accusation or preclusion cannot exceed ninety (90) days beginning the day after the formulation of the charges, except as stipulated in Article 294 of this Code. The term shall be one hundred and twenty (120) days when the crimes are concurrent, when there are three or more indicted individuals or when they are within the jurisdiction of the Criminal Judges of the Specialized Circuits.

The Preliminary Hearing shall be performed by the Presiding Judge within the forty five (45) days following the Hearing for the Formulation of Charges.

The Hearing for the Oral Trial should begin within the forty five (45) days following the conclusion of the Preliminary Hearing.

The Prosecution shall count with a maximum period of two years from the moment of the reception of the request to formulate charges or to order the files of the investigation. This term shall not exceed three years when there are concurrent crimes or when the indicted are three or more individuals. When the investigation deals with crimes within the jurisdiction of the Criminal Judges of the Specialized Circuit, the maximum term shall be five years. (Note: Paragraph declared enforceable for the charges stipulated by the Constitutional Court in Sentence C- 893 of 2012.).

Article 200, reformed by Law 1142 of 2007, Article 49 - Organs

It is the responsibility of the Prosecutor General of the Nation to perform an inquiry and investigation of the actions that have the appearance of a crime that are brought to his attention by complaints, grievances, special petitions or any other appropriate means.

When carrying out the tasks stipulated above, the Prosecutor General of the Nation, by conduct of the prosecutor directing the investigation should direct, coordinate, provide judicial control and scientific and technical verification of the activities carried out by the Judicial Police, according to the stipulations of this Code.

By Judicial Police, it is understood that the reference is to those organisms of the State that are involved with and support criminal investigation and which, in doing so, are functionally dependent on the Prosecutor General of the Nation and his delegates.

Official and Private institutions are obligated to collaborate with the requirements of the Judicial Police in the terms established in the investigation for the elaboration of emergency acts as well as compliance with the activities stipulated in the methodological programs. Failure to do so shall be sanctioned according to law.

Article 205 - Activity of the Judicial Police in the inquiry and investigation

Public Officials who, in the exercise of the function of Judicial Police, receive complaints, grievances or reports of any kind that could indicate that a crime has been committed, shall immediately perform all the emergency actions, such as the inspection of the place of the crime, the inspection of the corpse, interviews and interrogations. They shall also identify, collect, technically package probative material elements and physical evidence as well as registration in writing or tape of the interviews and interrogations that will be submitted to custodial chains.

When a legal medical exam should be practiced on the victim, the victim should be accompanied, whenever possible to the corresponding medical center.

If a corpse is involved, it should be referred to the respective dependency of the National Institute for Forensic Medicine and Science. If this is not possible, the cadaver should be sent to an official medical center where a legal medical necropsy can be performed.

With these emergency acts and results, the Judicial Police should present, within the following thirty six (36) hours an executive report to the competent Prosecutor so that he can assume the direction, coordination and control of the investigation.

In any case, the authorities of the Judicial Police shall elaborate a report of initiation of activities so that the Office of the Prosecutor General of the Nation can immediately assume the direction, coordination and control of the investigation.

Article 207 - Methodological Program

Once the report mentioned in Article 205 has been received, the prosecutor in charge of coordinating the investigation shall ratify the results of the investigation and organize work sessions with members of the Judicial Police. If the complexity of the matter merits it, the prosecutor shall, previous consent of the head of the unit where he is ascribed, enlarge the investigative group.

During the work sessions, the prosecutor, with the support of the members of the Judicial Police will outline a methodological program of the investigation which should contain the objectives in relation to the nature of the criminal hypothesis; the criteria for evaluating the information; functional delimitation of the tasks that must be performed in order to accomplish the objectives; control procedures in the development of the tasks and the improvements for the results obtained.

In the development of the methodological program of the investigation, the prosecutor will order all activities that do not infringe upon the fundamental rights of those involved and that are conducive to shedding light on the facts, on the uncovering of probative material evidence, on the individualization of the authors and participants in the crime and on the evaluation and measurement of the damage caused as well as the assistance and protection of the victims.

Field investigation and laboratory study and analysis shall be done directly by the Judicial Police.

Article 321 - Principle of Opportunity and criminal policy

The application of the Principle of Opportunity should be done with subjection to the criminal policy of the State.

Article 322 - Legality

The Office of the Prosecutor General of the Nation is under the obligation of pursuing the authors and participants of the acts that constitute punitive conducts brought to their attention, except in the application of the Principle of Opportunity, in the terms and conditions stipulated in this Code.

Article 323, reformed by Law 1312 of 2009, Article 1 - Application of the Principle of Opportunity

The Prosecutor General's Office may, in the investigation or at trial, until before the trial hearing, suspend, interrupt or decline prosecution, in the cases established in this code for the application of the opportunity principle. The opportunity principle is the constitutional power that allows the Prosecutor General's Office, notwithstanding the existence of a basis to prosecute, suspend, interrupt or decline prosecution, for reasons of criminal policy, according to the causes established exhaustively by law, subject to the regulation made by the Prosecutor General and subject to a review of legality before a judge of guarantees.

Article 324(18) CPC – Exception to the legality principle in bribery cases

The opportunity principle is applicable in the following cases: ... When the author or participant in the cases of bribery files the formal complaint that originates the criminal investigation, accompanied with useful evidence for the trial, and serves as a witness for the Prosecution, on the condition that he or she voluntarily and integrally amends the harm done ... The effects of the opportunity principle will be revoked if the person that it benefits fails to comply with his or her obligations in the Judgment Hearing.

Article 327, reformed by Law 1312 of 2009, Article 5 - Judicial control in the application of the Principle of Opportunity

The Judge of Control of Guarantees should carry out the control of legality of the respective individual or collective requests within the five (5) days following the decision of the Prosecution to apply the Principle of Opportunity.

This control shall be automatic and obligatory and shall take place in a special Hearing in which the victim and the Public Ministry can debate the evidence presented by the Prosecutor General of the Nation. The judge shall have the final say.

The application of the Principle of Opportunity and the agreements of the possibly imputed or accused individuals with the Prosecution, cannot compromise the presumption of innocence and can only proceed if there is a minimum of proofs that permits the inference of the authorship or participation in the conduct and its profile.

Article 332 – Causes

The Prosecutor shall request the preclusion of the investigation in the following cases:

1. The impossibility of initiating or continuing the exercise of the criminal action.
2. Existence of a cause that exempts responsibility according to the Criminal Code.
3. Non-existence of the fact being investigated.
4. Impossibility of typifying the action under investigation.
5. Absence of intervention of the accused in the action under investigation.
6. Impossibility of eliminating the presumption of innocence.
7. Expiration of maximum term stipulated in subsection two of Article 294 of this Code.

During the Trial. If causes contemplated in numerals 1 and 3 are supervened, the Prosecutor, the Public Ministry or the Defense can request the Trial Judge to preclude the investigation.

Article 348 – Finalities

With the purpose of humanizing the procedural action and the punishment, obtain brief and timely justice, activate the solution of the social conflicts that are generated by the crime, promote integral reparation of the damages and participate the indicted in the definition of his case, the Prosecution and the accused can reach preliminary agreements that imply the termination of the process.

The official, when reaching preliminary agreements should follow the directions of the Office of the Prosecutor General of the Nation and the guidelines established for criminal policy with the purpose of promoting prestige to the administration of justice and avoid impertinent questioning.

Article 349 – Inadmissibility of agreements or negotiations with the accused

In those crimes in which the active subject in the punitive action has received economic gains because of the act, agreements with the Prosecution cannot be reached until the goods have been returned in at least fifty per cent of the equivalent value of the increment received and the collection of the remaining amount is assured.

Article 350 – Preliminary Agreements during the Hearing of Formulation of Imputation

From the time of the Hearing of Formulation of Imputation up to before the Writ of Indictment is presented, the Prosecution and the Accused can reach a preliminary agreement concerning the terms of the imputation. Once this preliminary agreement is reached, the Prosecutor shall present it to the Presiding Judge as a Writ of Indictment.

The Prosecutor and the Imputed through his Defense Attorney can try to reach an agreement in which the imputed shall declare himself guilty of the crime imputed or of a related one with reduced punishment in exchange for the following:

1. Elimination of some cause of aggravation from his accusation.
2. Typify his conduct in his conclusive argument in such a way that the punishment is reduced.

Article 351 – Modalities

The acceptance of the charges in the Hearing of Formulation of Imputation carries a reduction of up to one half of the punishment stipulated. This agreement should be registered in the Writ of Accusation.

The Prosecutor and the imputed can also reach a preliminary agreement concerning the imputed acts and their consequences. If the individual had a favorable modification in relation to the punishment to be imposed, this would constitute the only compensatory reduction of the agreement. For the purpose of the accusation the guidelines of the above subsection shall be applied.

In the event that the Prosecution, for lack of new elements intends to formulate charges different and more serious in the imputation, the preliminary agreements should refer to this new and possible imputation.

The preliminary agreements between the Prosecution and the accused are binding for the Presiding Judge unless they breach fundamental liberties.

Once the judge has approved the agreements, he shall proceed to convoke the Hearing for dictating the corresponding sentence.

Reparations that result from the preliminary agreements, involving the victim, that can be accepted or rejected by the Prosecution or the Accused can be accepted by the victim. In case of refusal, the victim can present them to the pertinent judicial channels.

Article 352 - Subsequent preliminary agreements to the presentation of the accusation

Once the accusation is presented and up to the moment when the accused is interrogated at the beginning of the Oral Trial concerning the acceptance of his responsibility, the Prosecutor and the accused can reach preliminary agreements in the terms stipulated in the article above.

When the preliminary agreements are reached in the procedural stage, the punishment stipulated shall be reduced by one third.

Article 353 - Total or Partial acceptance of the charges

The imputed or accused can partially accept the charges. In this case the benefits of punitive conduct shall only be extended to what is accepted.

Article 354 - Common Regulations

Agreements reached without the presence of the Defense Attorney are nonexistent. In case of discrepancies with the attorney the position of the imputed or accused shall prevail. A record will be kept of the agreements.

If the type of agreement permits the quick adoption of the sentence, a Hearing shall be programmed for its announcement in which the Prosecutor and the imputed shall briefly manifest their positions according to the regulations in this Code.

LAW 1474 OF 2011 - LIABILITY OF LEGAL PERSONS**Article 34 – Measures against legal persons**

Regardless of individual criminal liability that might arise, the measures referred to in Article 91 of Law 906 of 2004 shall apply to legal persons who have sought to benefit from the commission of crimes against public administration, or any criminal offence related with public property, made by its legal representative or managers, directly or indirectly.

In crimes against public administration or affecting public property, possibly affected State entities may require as third-party civil liable the legal persons who have participated in their commission.

In accordance with the provisions of Article 86 of Act 222 of 1995, the Superintendence of Corporations may impose fines ranging from five hundred (500) to two thousand (2000) current monthly minimum wages, when with the consent of his legal representative or any of their managers or with their tolerance,

the corporation has participated in the commission of an offence against the public administration or against public property

LAW 793 OF 2002 – EXTINCTION OF THE RIGHT OF PROPERTY (*Extinción de dominio*)

Article 2 – Causes

The right of property shall be declared extinct by court order, when any of the following cases occur:

1. When there is unjustified increase in assets at any time, without explanation of their legal origin.
2. When the good or goods in question proceed directly or indirectly from an unlawful activity.
3. When the goods in question have been used as a means or instrument to commit illegal activities or are intended to be used for such activities or correspond to the object of the crime.
4. When the assets or resources in question proceed from the sale or barter of other goods which proceed directly or indirectly from illegal activities, or which have been destined for illegal activities or are proceeds, effect, instrument or object of the offence.
5. When the goods in question have lawful origin but have been mixed, integrated or confused with resources of illicit origin, excepting Decentralized Securities Deposits, provided that the holders of such securities adequately met standards on the prevention of money laundering and terrorist financing.

[...]PARAGRAPH 2nd. The illegal activities to which this article refers are: [...] Those involving the serious deterioration of social morality. For purposes of this provision, activities that are understood to cause deterioration of social morality are those against the public health, economic and social order, natural resources and the environment, public safety, the public administration, the constitutional and legal regimes, kidnapping, kidnapping for ransom, extortion, procurement, human trafficking and migrant smuggling.

TAX STATUTE

Article 107 subsection, as added by article 158 of Law 1607 of 2012 – Non-tax deductibility of bribes

In no event shall expenses from criminal conduct enshrined in the law as punishable offenses with intent be deductible. The tax administration may, notwithstanding any applicable sanctions, disregard any deduction that fails to comply with this prohibition.

The tax administration shall send copies of the decision to disallow such a deduction to the authorities responsible for taking action in relation to the commission of criminal conduct. In the event the competent authorities determine that the conduct that led the tax administration to disregard the deduction is not punishable, the taxpayers in respect of which the deduction has been disregarded may request the corresponding refund or request compensation in accordance with the rules contained in this Statute, due regard being had to the established time limits which will begin to run from the time of legal execution of the decision or act by which it is determined that the conduct is not punishable.