



PHASE 3 REPORT ON IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION IN SPAIN

December 2012

This Phase 3 Report on Spain by the OECD Working Group on Bribery evaluates and makes recommendations on Spain's implementation and application 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 14 December 2012.

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EXECUTIVE SUMMARY

The Phase 3 report on Spain by the OECD Working Group on Bribery evaluates and makes recommendations on Spain's implementation and enforcement of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and related instruments. It focuses on horizontal issues, which concern the Working Group as a whole, particularly enforcement, and also considers country-specific (vertical) issues arising from progress made since Spain's Phase 2 evaluation in March 2006, taking into account progress observed in Spain's written follow-up report in June 2008.

The Working Group has serious concerns that, almost 13 years after the entry into force of Spain's foreign bribery offence, no individual or company has ever been prosecuted or sanctioned for this offence. At the time of this report, the Spanish foreign bribery offence has only given rise to seven [7] investigations, that had all been closed. The Working Group welcomes the entry into force, in 2010, of a new foreign bribery offence in the Spanish Penal Code, which *prima facie*, addresses most Phase 2 recommendations regarding the deficiencies identified in the former foreign bribery offence. However, the Working Group is seriously concerned that a separate offence was also introduced for the bribery of European officials, which still contains these same deficiencies, in particular with regard to the scope of the offence, the level of sanctions, and the statute of limitations. The Working Group hence recommends that Spain complete the reform of its Penal Code, to consolidate or harmonise the offence under art. 427 PC with the one under art. 445 PC, and to remove inconsistencies between the two offences which could provide obstacles to the effective implementation of the Convention. The Working Group considers that the entry into force, in 2010, of Spain's first regime of liability for legal persons, which offers a wide range of possibilities for holding companies criminally liable for offences of foreign bribery, was an important step. However, the Working Group is seriously concerned that this new regime of liability excludes from its scope State owned enterprises and recommends that the reform of the regime of criminal liability of legal persons be completed with the removal of this exception. The Working Group also recommends that Spain clarify that the criteria of "due control" cannot be used by legal persons as a defence to avoid liability. The Working Group welcomes the additional reform of the Penal Code announced in a letter to the Chair of the Working Group from Spain's Minister of Justice dated 4 December 2012.

The regime of sanctions applicable to natural and legal persons should also be harmonised to ensure that the sanctions imposed are effective, proportionate and dissuasive for bribery of all foreign public officials, including European officials. The Working Group expresses concerns about the continued lack of implementation of confiscation measures, for any offence, despite the legal framework that has been in place for almost ten years and recommends that Spain make full use of confiscation of both the bribe and the proceeds of foreign bribery and clarify that these rules also apply to legal persons. The report also notes that the Special Public Prosecutor's Office against Corruption and Organised Crime (ACPO), Spain's highly specialised prosecutor's office, should be allowed to perform effectively the central role it has been allocated in the fight against foreign bribery. The Group is concerned that the ACPO has not been informed of some clear cases of suspected foreign bribery which have come to the attention of other law enforcement authorities. To this end, Spain should reinforce the coordination between the broader State Prosecution Service (SPS) and the ACPO and ensure that the courts and other law enforcement authorities systematically and urgently inform the ACPO of any foreign bribery allegation, which comes to their knowledge. Noting that since Phase 2, a majority of foreign bribery investigations have been closed because they were time barred, the report welcomes the extension of the statute of limitations to ten years

for the offence of bribing non-EU officials. However, the Working Group recommends that Spain enact a uniform limitation period for all foreign bribery offences, including the offence of bribing EU officials and review the possibilities for suspension and interruption of the limitation period.

In relation to tax measures to combat bribery in Spain, the Working Group is concerned that the autonomous tax regions of the Basque Country and Navarra still do not have an explicit prohibition on the tax deductibility of bribes. It urges Spain to take measures to eliminate this possible loophole. The Working Group also recommends that Spain take measure to address the concerning lack of legislative protection for public and private sector whistleblowers who report suspected offences, including foreign bribery, in good faith and on reasonable grounds.

The report and its recommendations reflect the findings of experts from Brazil and Chile and were adopted by the OECD Working Group on Bribery. Spain will make an oral report on the recommendations 2(b), relating to the consolidation or harmonisation of the offences of foreign bribery (under art. 427 and 445 PC), 3(a) and 2(a) regarding the coverage of State-owned and State-controlled companies under the regime of liability of legal persons, 5(g) regarding the extension of the limitation period in certain cases within a period of one year, 8(b) regarding the explicit prohibition on the tax deductibility of bribes in the autonomous tax regions and 10 on public and private whistleblower protection and will submit a written report on all the recommendations within a period of two years. The Phase 3 report is based on the texts of laws, regulations and other documents supplied by Spain as well as on information obtained by the evaluation team during its 3-day on-site visit to Madrid on 3-5 July 2012, during which the team met representatives of the Spanish public and private sectors and of civil society.

The Working Group requests that Spain provide a written self assessment report in one year (*i.e.* in December 2013) on (1) progress in amending its Penal Code; and (2) prosecuting foreign bribery cases, including on implementation of recommendations 2(b), 3(a), 5(g), 8(b) and 10. It further invites Spain to submit a written follow-up report on all recommendations and follow-up issues within two years (*i.e.* in December 2014). The Working Group will take appropriate measures throughout this process, including the possibility of a Phase 3*bis* evaluation, should Spain have failed to take steps to address its recommendations.

A. INTRODUCTION

1. The on-site visit

1. On 3 to 5 July 2012, a team from the OECD Working Group on Bribery in International Business Transactions (the Working Group on Bribery) visited Madrid as part of the Phase 3 peer evaluation of the implementation of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the Convention), the 2009 Recommendation for Further Combating the Bribery of Foreign Public Officials in International Business Transactions (the 2009 Recommendation) and the 2009 Recommendation of the Council on Tax Measures for Further Combating the Bribery of Foreign Public Officials in International Business Transactions (the 2009 Tax Recommendation). The purpose of the visit was to evaluate the implementation and enforcement by Spain of the Convention and the 2009 Recommendations.

2. The evaluation team was composed of lead examiners from Brazil and Chile as well as members of the OECD Secretariat.¹ During the visit, the evaluation team met with representatives of the Spanish public and private sectors and civil society.² The evaluation team was grateful for the efforts made by Spain to secure the participation of a wide range of individuals from both the public and private sectors, including a number of high ranking officials from the Ministry of Justice (MOJ), the Ministry of Foreign Affairs and the Ministry of Economy and Finance and several prosecutors who had worked on key foreign bribery cases. The evaluation team is also grateful to all the participants at the on-site visit for their open and frank discussions. The evaluation team notes that the Spanish government was not present during the panel discussions with the private sector and civil society.

2. Outline of the report

3. This report is structured as follows: Part B examines Spain's efforts to implement and enforce the Convention and the 2009 Recommendations having regard to Group-wide (horizontal) issues for evaluation in Phase 3, with particular attention to enforcement efforts and results, as well as country specific (vertical) issues arising from progress made by Spain on weaknesses identified in Phase 2, or issues raised by changes in the domestic legislation or institutional framework of Spain; and Part C sets out the Working Group's recommendations and issues for follow-up.

3. Economic background

(a) General

4. In 2011, Spain had a GDP of USD 1 413 billion and was the eleventh largest economy in the Working Group. Spain's main trading partners are the 27-nation EU Member States, accounting for 66.4% of total exports and 52.8% of imports, followed by Asia and Africa (respectively accounting for 7.7% and 5.3% of total exports and for 19.8% and 9% of total imports) which have displaced Latin America (except in exports) and North America from their traditional role as Spain's main trade partners outside the EU. In terms of its international business activities, in 2010 Spain had a total of USD 632 million in outward flows of foreign direct investment (FDI), the majority of foreign investments were destined for the UK, Brazil, US, Mexico, and the Netherlands in the services and financial intermediation sectors.

5. According to statistics from the Spanish Ministry of Industry, Tourism and Commerce, in 2011 there were 3 243 185 small and medium sized enterprises (SMEs) in Spain,³ accounting for 99.88% of all

¹ Brazil was represented by: Ms Sãmia Albuquerque, Analyst, Treaties and International For a Advisory, Ministry of Justice, Ms Izabela Correa, Manager of Ethics, Transparency and Integrity, Office of the Comptroller-General and Mr. Álvaro Stipp, Public Prosecutor, Federal Public Prosecutor's Office. Chile was represented by: Mr. Carlos Ogno, Ministerial Auditor, Ministry of Finance and Ms Alejandra Quezada, Head, Public International Law Department, Ministry of Foreign Affairs. The OECD Secretariat was represented by: Ms. Sandrine Hannedouche-Leric, Co-ordinator of the Phase 3 evaluation of Spain and Senior Legal Expert in the Anti-Corruption Division, Ms. Leah Ambler, Policy Analyst in the Anti-Corruption Division and Ms. Catherine Marty, Policy Analyst in the Anti-Corruption Division.

² See Annex 4 for a list of participants.

³ Companies with between 0 and 249 employees.

Spanish companies. The main sectors for SMEs are business, services and construction.⁴ In 2009, of the 1 263 exporting companies in Spain, 840 had less than 200 employees.⁵

(b) *Situation of Spain's autonomous communities*

6. The main exporting regions of Spain are Andalusia, the Basque Country, Catalonia, the Community of Madrid and the Valencian Community, which represented 67.1% of the total volume of exports in 2011.⁶ In the same year, exports from the Basque Country, Catalonia and Valencia represented a total of EUR 96 604 536.⁷ The current organisation of the Spanish government includes, besides the central government, 17 Autonomous Communities (as the regional governments are called) and 2 Autonomous Cities at the sub-national level. Autonomous Communities do not have separate jurisdiction and their courts are courts of the State but the Basque Country, Catalonia, and Navarra have developed regional police units. The distribution of powers between the government and the Autonomous Communities is discussed in more detail regarding the police, tax and public advantages (under sections 5, 10 and 11 of the report).

4. Cases involving the bribery of foreign public officials

(a) *Spain's exposure to bribery of foreign public officials*

7. Of particular importance to Spain's implementation of the Convention is the role of State-owned or State-controlled enterprises (SOEs) in the Spanish economy, particularly in light of the exception to corporate criminal liability for State or territorial commercial public entities (see below, in relation to liability of legal persons). There are currently 151 enterprises with central government participation in Spain, these have a combined 160,000 employees and a total estimated value of USD 80.1 billion.⁸ In terms of economic weight of SOEs, this places Spain in the middle group of OECD countries. The Spanish entrepreneurial public sector was significantly reduced as a result of the privatisations carried out during the 1990s, and will be subject to further reductions as a result of a law on public sector reform adopted by the Government on 15 March 2012. Large financial institutions have benefited from recent government rescue initiatives, and have significant overseas operations. Following the on-site visit, Spain provided information from the Ministry of Finance and Public Administration counting a current total of 2,750 SOEs, which includes 246 State enterprises; 857 Regional enterprises and 1647 Local enterprises.⁹ While the majority of Spain's SOEs are regional, a number of these have an international economic reach. For example, Transports Metropolitans de Barcelona (TMB) is an important regional SOE which is

⁴ SME Statistics, Ministry of Industry, tourism and Commerce: http://www.ipyme.org/Publicaciones/ESTADISTICAS_PYME_N10_2011.pdf.

⁵ General Directorate on Industry and SMEs, Report on SMEs, 2011: <http://www.ipyme.org/Publicaciones/Informe-PYME2011.pdf>.

⁶ Spanish Exports: No Crisis, Centro de Estudios y Documentación Internacionales de Barcelona (CIDOB), citing the Secretary of State of Commerce and National Statistics Institute of Spain: http://www.cidob.org/es/publicaciones/articulos/in_focus/july_2012/spanish_exports_no_crisis.

⁷ Source: Comext data (<http://datacomex.comercio.es/index.htm>).

⁸ OECD (2011), "The size and composition of the SOE sector in OECD countries", *OECD Corporate Governance Working Papers, No.5*, www.oecd.org/daf/corporateaffairs/wp. Available at: www.oecd.org/dataoecd/55/42/48512721.pdf.

⁹ Source: Ministry of Finance and Public Administration – Inventory of State Public Sector Entities; Inventory of Entities dependent on CC.AA; General Database of Local Entities.

headquartered in Catalonia and, in 2010, had total assets of EUR 1 113 million and is involved in projects in Algeria, Colombia, France, Morocco, Panama, Peru, and Saudi Arabia.¹⁰

8. Spain is also active in the defence sector, an industry at increased risk of bribery of foreign public officials. In 2010, Spain exported EUR 2 238 million in authorised defence materiel. The first quarter of 2011 saw a 96.6% increase on the figures for the previous year, with EUR 1 099.8 million in defence exports.¹¹ The main purchasers of defence materiel from Spain were Brazil, Norway, Mexico, Australia and Venezuela. Ships and aircraft account for the majority of Spanish defence exports.¹² The foreign bribery risks specific to Spain's defence industry will be discussed below in the section on Public Advantages.

(b) Spain's approach to cases of foreign bribery

9. According to figures provided by the Special Public Prosecutor's Office against Corruption and Organised Crime (ACPO), seven investigative proceedings into possible bribery of foreign public officials have been opened since the foreign bribery offence entered into force in Spain, almost 13 years ago. The first investigation started in March 2006. All had been closed at the time of the on-site visit (the latest, a month prior to the visit). All seven investigations were conducted using art. 445 of the Penal Code (one of the foreign bribery offences under the Spanish Penal Code) and were allegedly carried out by individuals. No legal person was investigated. Out of the 7 cases, only 2 went beyond the stage of the initial prosecutorial investigation: 1 was subject to an order of a central investigating magistrate to start judicial investigation in April 2008 but was stayed 18 months later on the basis of the ACPO's request (Costa Rica case); in the other one (Angola case), the central investigating magistrate ordered the stay of proceedings in September 2011, against the ACPO's request to enter the judicial investigation phase. Hence, these investigations did not lead to the prosecution of any of the individuals investigated although 16 persons were summoned as suspected people in relation to cases 1, 2 and 5.

10. In addition to the 7 abovementioned cases which were closed during the investigation stage,¹³ the Embassy of Spain in Panama reported one foreign bribery allegation in the same period to the State Prosecution Service (SPS). The Embassy reported to the SPS media allegations of bribery of public officials in Panama in February 2010. According to the written response from the SPS to the Embassy, this report did not result in the commencement of an investigation because there were no specific individuals identified, although the press reports referred to a particular Spanish company (Panama Case). After the on-site visit, Spain informed the evaluation team that the SPS closed the case without informing the ACPO, which only heard about the case following its discussion by the Working Group. Another important foreign bribery allegation was revealed in 2005 in an extradition request from El Salvador for a Spanish national wanted for bribery of Salvadorian public officials. After the on-site visit, Spain explained that the request was processed by the High Court without the knowledge of the ACPO and that therefore ACPO did not have an opportunity to consider the facts disclosed in the request in the context of a possible foreign bribery investigation or prosecution (El Salvador Case). The failure to transmit the information to the

¹⁰ TMB Annual Report 2010: http://www.tmb.cat/ca/c/document_library/get_file?uuid=f68eac05-72d4-4111-8c00-752892a27b06&groupId=10168.

¹¹ Spanish Exports of Defence Materiel, Other Materiel and Dual-Use Products, First Semester of 2011: http://www.sipri.org/research/armaments/transfers/transparency/national_reports/spain/spa_first_half.2011.

¹² Spanish Statistics on Exports of Defence Materiel, Other Materiel and Dual-Use Products, 2010; State Secretariat for Foreign Trade: http://www.sipri.org/research/armaments/transfers/transparency/national_reports/spain/spa_10_spanish.pdf

¹³ The initial prosecutorial investigation was closed in 6 cases and the judicial investigation phase was closed in one case. There were no indictments in any of these cases.

ACPO in these two cases is a cause of significant concern for the Working Group and will be further examined in sections 5 (Investigation and prosecution of the foreign bribery offence) and 9 (International cooperation), respectively. An additional three foreign bribery cases, allegedly involving Spanish companies were identified by the Working Group but did not lead to the opening of any investigation in Spain.

11. The background to the seven formal foreign bribery investigations is as follows:¹⁴

Case #1 - Costa Rica Case: This investigation was opened as a result of media reports in 2008 alleging the payment of bribes worth USD 100 000 to a Costa Rican public official between 2002 and 2005 in return for the award of a contract to construct an underground electric cabling system worth USD 55 million. This case was closed due to the expiry of the statute of limitations, which was 3 years at the time.

Case #2 - Oil-for-Food Case: This investigation was initiated in 2006 following facts disclosed in the 2005 Report of the Independent Inquiry Committee into the UN Oil-for-Food Programme that incriminated Spanish nationals involved in contracts for oil and humanitarian goods, acts which allegedly occurred in 2003. Spain took several steps to investigate this case, including inter alia sending an MLA requests to another Party to the Convention and sending Spanish prosecutors to New York to discuss with the Independent Inquiry Committee, in 2007 the ACPO closed the investigative proceedings in this matter due to the lack of evidence of a criminal offence.

Case #3 - Defence Materiel Case: This case was also opened following media reports in 2008 and involves a Spanish defence exporter that was allegedly involved in a consortium that paid bribes worth a total of EUR 115 million to public officials in return for a defence contract worth EUR 969 million. Although the case was formally closed on the basis of a lack of evidence of the commission of criminal offences, a reason provided by the prosecutor was the lack of reciprocity with the country of origin of the foreign public officials. Investigations into the matter are ongoing in the third country.

Case #4 - Libya Case: This case followed media reports in 2008 that a Spanish company bribed Libyan public officials approximately USD 9 million to obtain contracts in relation to oil extraction. The case was also the subject of an international arbitral award and a UK High Court decision. The prosecutor closed the initial proceedings in this case due to the expiry of the limitation period.

Case #5 - Angola Case: This investigation was initiated in 2009 and related to around EUR 20 million in bribes allegedly paid to Angolan dignitaries between 2006 and 2009 in the context of a contract for public works projects in that country worth EUR 300 million. The Central Investigating Magistrate's Court in Madrid reviewed the facts of this investigation and issued an order to stay proceedings in May 2011, largely due to lack of evidence.

Case #6 - Morocco Case: This case was initiated following an MLA request sent to Spain in 2008 by another Party to the Convention, which disclosed alleged bribes of EUR 3.2 million paid to Moroccan officials between 2006 and 2008 in the context of a contract for the sale of military vehicles worth EUR 174 million. The limitation period therefore expired in Spain in April 2011. The investigation in this case was not opened until July 2011. The fact that the case was time-barred meant that the necessary evidence could not be obtained through the MLA which was requested from another Party to the Convention in the same year. The case was closed in March 2012.

¹⁴ These investigations are listed in the order in which the Spanish authorities provided them to the evaluation team, so as to avoid confusion when drafting the report (based on this documentation).

Case #7 - Latvia Case: This case originated from an MLA request from Latvia concerning bribes of about EUR 7.1 million allegedly paid to Latvian public officials by a Spanish company in the context of power plant projects. This was the only investigation that was ongoing in 2012 but the proceedings were closed a month before the on-site visit, following discussions with Latvia, due to expiry of the limitation period. The investigation continued in Latvia with regard to the public official and the Spanish individual and company that allegedly paid the bribes in this case. The ACPO informed the evaluation team that in October 2012 it obtained a statement from the natural person and a representative of the legal person involved in this case, following a request from the Latvian authorities.

Commentary:

The lead examiners are seriously concerned that none of the very few foreign bribery investigations initiated since the foreign bribery offence entered into force in Spain, almost 13 years ago have resulted in prosecutions or convictions and that one of the reasons for this is a dire lack of communication between the relevant authorities. They are particularly alarmed at the low number of foreign bribery investigations given the size of the Spanish economy and its significant external commercial activities, including in high-risk sectors and countries. They recommend that Spain review its overall approach to enforcement in order to effectively combat international bribery of foreign public officials, as recommended under paragraph V of the 2009 Recommendation. To this end, the lead examiners recommend that Spain provide a written self assessment report in one year on (1) progress in amending its Penal Code; and (2) prosecuting foreign bribery cases. They also recommend that the Working Group take appropriate measures throughout the follow up process, including the possibility of a Phase 3bis evaluation, should Spain fail to take steps to address the Group's recommendations.

5. Co-operation by the Spanish Authorities in this Evaluation

12. Before the on-site visit, Spain provided limited information in its responses to the standard Phase 3 Questionnaire and supplementary questions. Very limited statistics were provided and Spain did not provide English translations of much of the relevant legislation prior to the on-site. The scant information made preparations for the on-site visit difficult and reduced its effectiveness. A substantial part of the discussions during the visit was devoted to relatively basic issues that should have been clarified in the questionnaire responses. As a consequence, little time was left for more in-depth discussions.

13. During and following the visit, Spain nevertheless made significant efforts to provide translations of relevant legislation, documents, case law and to respond to additional questions from the evaluation team. The additional information was helpful, although still limited in a number of areas. In addition, these materials were provided when the evaluation team was drafting this report, and thus made the drafting process more difficult. More importantly, the materials raised new questions and issues, relating both to legislation and cases, which the evaluation team should have discussed during the on-site visit. Having been deprived of the opportunity to do so, the evaluation team faced difficulties in assessing some of these issues.

B. IMPLEMENTATION AND APPLICATION BY SPAIN OF THE CONVENTION AND THE 2009 RECOMMENDATIONS

14. This part of the report considers the approach of Spain in respect of key Group-wide (horizontal) issues identified by the Working Group for all Phase 3 evaluations. Consideration is also given to country-specific (vertical) issues arising from progress made by Spain on weaknesses identified in Phase 2, or from changes in the domestic legislation or institutional framework of Spain. Concerning weaknesses identified in Phase 2, the Phase 2 recommendations and issues for follow-up are set out as Annex 1 to this report.

1. Foreign bribery offence

15. No foreign bribery case has ever been prosecuted and, *a fortiori*, sanctioned in Spain since the entry into force of the foreign bribery offence in 2000, i.e. almost 13 years ago. During the on-site visit, the examiners tried to assess with a large range of panellists (i) why the seven investigations reported by Spain were discontinued without indictment (although all these cases fell under the wording of the foreign bribery offence that was in force at the time where the facts took place, i.e. before the 2010 reform described below)¹⁵; and (ii) whether the new legislation, which entered into force in 2010, will allow Spain to overcome past difficulties and remedy flaws identified in Phase 2.

(a) Current state of the law

16. In October 2010, in the context of its regular progress report, Spain informed the Working Group¹⁶ that its Penal Code had been amended by Organic Act 5/2010 on a large range of topics, including on the foreign bribery offence.¹⁷ The revised Penal Code entered into force on 23rd December 2010. The Working Group did not conduct a Phase 1 bis evaluation of these new provisions at the time. This Phase 3 evaluation is thus the first opportunity for the Working Group to examine in depth these provisions.

(i) Bribery of foreign public officials (art. 445 PC)

17. Corruption in international business transactions has been defined as an autonomous crime under revised art. 445 PC. It is now inserted under a specific Chapter X “On felonies of corruption in international commercial transactions” and uses a language that is very close to Article 1 of the Convention, hence *prima facie* implementing Phase 2 recommendation 4b.

(ii) Bribery of officials of the European Union and of another Member State of the European Union (art. 427 PC)

18. While Spain never refers to art. 427 PC in its replies to the questionnaires, this article establishes a separate offence of both active and passive bribery of officials of the European Union and of another Member State of the European Union (hereinafter “EU officials”) incorporated into Chapter V on “Corruption” which contains, among other things, all of the domestic bribery provisions. The EU officials targeted under art. 427 CP also being foreign public officials, this separate offence also falls under Article 1 of the Convention.

¹⁵ At the time of this report, no case had been prosecuted or even investigated under these revised offences.

¹⁶ DAF/INV/BR/M(2010)3/REV1.

¹⁷ Law amending Organic Act 10/1995 of 23 November.

19. Article 427 PC states that the terms set forth in preceding articles of the PC shall also apply when the acts considered concern EU officials. As was confirmed during the on-site visit by all members of the judiciary and lawyers, this clearly applies the provisions of art. 424 PC on active domestic bribery to the art. 427 PC offence, and excludes any reference to the revised elements of the art. 445 PC foreign bribery offence. Article 424 PC in turn states that active bribers shall be sanctioned in the same manner as domestic officials are sanctioned for passive bribery. In order to apply art. 427 PC, it is thus necessary to refer first to art. 424 PC and then to the provisions for the passive bribery of domestic public officials (art. 419 to 422 PC) to determine the specific act of the public official induced by the bribe: act “contrary to duties”, or “not carried out”, or “unfairly delayed” (art.419), act “inherent to his office” (art.420) including when received as a “reward” (art.421), or “act in view of his office or duty” (art. 422). This implies a precise characterisation of the act induced by the bribe on the basis of the subdivision of Spanish domestic bribery law into three different provisions based on five different types of expected actions of the public official. All representatives of the legal profession met on-site agreed on the complexity of such a system while underlining their lack of experience of the application of art. 424 PC beyond the domestic arena.

20. The Spanish authorities indicated during the on-site visit that the enactment of two separate offences, respectively under arts. 427 and 445 PC, aims at implementing - and accordingly tracking the language of - two international obligations. The former is intended to implement the Anti-Bribery Convention, whereas the latter is intended to implement certain anti-corruption instruments of the European Union. However, there was a lack of clear understanding on the part of the Spanish authorities that art. 427 PC is a foreign bribery offence with provisions that have a bearing on the implementation of the Anti-Bribery Convention, and should therefore be aligned accordingly.¹⁸

21. Conversely, the prosecutors, trial judges, academics and defence lawyers met on-site unanimously admitted that both articles cover the offence of foreign bribery. With regard to a possible conflict between the two provisions of the Code, a majority of participants indicated that pursuant to the criteria in art. 8(1) PC (on the resolution of conflicts of law), the *lex specialis* (art. 427 applying to the bribery of EU officials) would supersede the *lex generalis* (art. 445 applying to foreign public officials in general), in each case where the recipient of the bribe is an EU official, especially when (according to general criminal principles) it is more favourable to the defendant. Hence two rules apply to the foreign bribery offence and the determination of the one that would apply mainly depends on the origin of the bribed official (EU or non-EU official). However, one panellist held that the *lex specialis* is rather art. 445 PC because it deals with the special offence of foreign bribery “in business transactions” and that this would apply art. 445 even to cases of bribery of EU officials. The hesitations and diverging opinions heard on this issue show that keeping a separate provision for these categories of foreign public officials may be a source of confusion, as a judge met on-site indicated.

22. At the time of finalising this report, the Spanish authorities added a new interpretation to the debate. They contended that the conflict between art. 427 and art. 445 is resolved by art. 8(4) PC, which provides that “Failing the preceding criteria [including the criteria in art. 8(1) PC], the most serious criminal provision shall exclude those punishing the act with a minor punishment.” They infer from this rule that “art. 445 excludes art. 427 PC”. As a result, art. 427 would only apply to passive bribery of EU officials (over which, in practice, Spain would only have limited jurisdiction). The part of the offence which specifically targets the active bribery of EU officials would thus be disregarded because of the existence of art. 445 PC, although both articles were adopted at the same time as part of the same reform of the PC, in 2010. Not only does this argument contradict the views of legal specialists heard on-site, but the argument that art. 427 would only apply to passive bribery of EU officials contradicts the information provided by the Spanish authorities in the context of the GRECO third evaluation round where “the

¹⁸ The replies to the Phase 3 questionnaires supplemented by the Spanish authorities after the on-site visit continued to avoid reference to article 427 PC.

GRECO acknowledges the fact that, pursuant to art. 427 PC, both active and passive bribery ... of some international officials ..., as well as foreign officials of some EU Member States would be covered.”¹⁹ Nonetheless, at the same time as providing this new interpretation, Spain announced that this issue will be addressed in a revision of the Penal Code with a view to clarify the applicable legislation. This was confirmed in a letter dated 4 December 2012 from the Spanish Minister of Justice to the Chair of the Working Group which contained an undertaking to expedite this legislative process.

(b) New and outstanding issues raised in Phase 2 concerning certain elements of the offence

(i) The autonomy of the offence and the definition of foreign public officials

23. In Phase 2, a definition of a foreign public official had not been included in the Penal Code, hence Phase 2 recommendation 4c to clarify (in particular) the definition of foreign public official. With the 2010 revision of the PC, a definition of a foreign public official was introduced into art. 445 para.3 incorporating the wording in Article 1(4)(a) of the Convention and hence implementing Phase 2 recommendation 4c. However, as was confirmed on-site, the broad definition in art. 445 para. 3 does not apply to the European officials targeted under art. 427 PC. Instead, art. 427 provides for two separate definitions: one for the officials of the European Union and one for the officials of another Member State of the European Union. Regarding officials of the European Union, *prima facie* the definition in art. 427 PC does not appear to raise major difficulties – although it may provide a relatively narrow definition of its “agents” (a strictly legal rather than a functional definition). However, regarding officials of another Member State of the European Union, the definition in art. 427 PC, expressly refers to the criminal laws of that Member State. This is contrary to commentary 3 to the Convention, which underlines that Article 1 of the Convention requires the establishment of an autonomous offence not requiring the proof of the law of a particular foreign official's country. Consequently, the loophole identified in Phase 2 in this regard remains with regard to foreign public officials of other Member States of the Union.²⁰

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

24. Revised art. 445 PC no longer refers to the domestic bribery offences. As a result, it no longer requires reference to foreign law for its application, as Spain emphasises in its replies. It provides an autonomous definition of the foreign bribery offence, hence implementing Phase 2 recommendation 4a.

25. However, the same is not true with regard to art. 427 PC, which, as discussed above, refers to the provisions applicable to Spanish domestic bribery. Because of the subdivision of domestic bribery law into three different provisions based on five different types of expected actions of the public official, it requires specific evidence of the expected acts of foreign officials in order to establish the offence and determine the applicable sanction. In Phase 2 the need for recourse to foreign law was already considered a particularly serious issue by the Working Group in light of the need to produce specific evidence of the nature of the expected act of the foreign official.²¹ This, according to representatives from the legal profession met on-site, requires reverting to the law of the State of the foreign official, which they perceived as one of the main challenges in establishing proof of the offence. A magistrate also anticipated that this difficulty will be exploited by defence lawyers who will systematically advocate the act committed is one of those requiring the lower level of penalty (as further discussed under section 3 below). Contrary to what was stated by the practitioners during the visit, the Spanish authorities asserted prior to

¹⁹ See GRECO, Third Evaluation Round Compliance Report on Spain, adopted on April 2011, at paragraph 18 and 19.

²⁰ As also noted by the GRECO in its Third Evaluation Round Compliance Report on Spain, *ibid.*

²¹ Phase 2 report, at para. 116.

finalising the report that it is not necessary to revert to the law of the foreign public official's country to characterise that official's act and that these can be interpreted according to Spanish law. They also refer to the ease with which such information can be obtained within the EU.²²

26. It remains that contradictory information was obtained as to whether it would be possible to prosecute the offence, should the act not be considered a crime under the law of the foreign public official's country (for instance an act "not carried out", or "unfairly delayed" as provided under 419 PC or an act inherent to his duties requiring the exercise of discretion as provided under art.420 PC). In practice, under the former anti-bribery offence,²³ when the same system currently set out in art. 427 was applicable to the bribery of all foreign officials (whether European or not), the impossibility of characterising the type of act induced by the alleged bribe was one of the main considerations taken into account when deciding not to prosecute the alleged bribery acts in five out of the seven foreign bribery cases investigated in Spain to date (Angola, Costa Rica, Morocco, Latvia and Oil-for-Food cases). While the Magistrate's Court decision in the Angola case expressly refers to the foreign law, the Spanish authorities argue that in the other four cases, the determination that the acts carried out were "unjust acts" (the criteria in force under former legislation - see Phase 2 report) was analysed from the exclusive standpoint of the Spanish law and Supreme Court case law.

27. The inconsistent views expressed with respect to the extent to which reference to the foreign law is needed as well as the inconsistent approach of judges and prosecutors in practice shows, at least a degree of uncertainty. The loophole identified in Phase 2 with regard to the autonomy of the offence thus potentially remains for art 427, with regard to the bribes paid to EU officials.

(iii) Coverage of the official's acts in relation to the performance of official duties

28. In Phase 2, the Working Group adopted recommendation 4b that Spain ensure that all bribes to a foreign public official to affect the official's exercise of discretion would constitute the basis for a foreign bribery offence. In practice, the doubt raised in Phase 2 as to whether such acts would be covered by the different provisions in force -- including cases where the briber was the best-qualified bidder -- has been reinforced by the only interpretation of the offence given by a Court to date. In the Angola Case,²⁴ the Central Investigating Magistrate Court²⁵ (hereinafter the Court) considered the absence of proof of "an irregular act" as a ground for ordering the stay of proceedings (against the opinion of the ACPO prosecutors). The Court ruled that no irregular act had been demonstrated, and therefore accepted the arguments of the Defence that "such contracts can be awarded without tender" (in this case a contract of around USD 300 million). The Court supported its decision with the fact that "it has not been revealed whether other companies participated in the tender"; and "there is no evidence at all of irregularities in the contract allocation process". This raises serious concerns with regard to Commentary 4 to the Convention, which expressly states that such considerations are irrelevant.²⁶ The Court did not examine the possibility that a regular act ("an unjust act not constituting a crime related to the exercise of his duty"), including the

²² Additional Protocol to the European Convention on Information on Foreign Law Strasbourg, 15 March 1978 – to which all the countries of the European Union, except Slovenia and Ireland, are members by which Parties undertake to supply one another with information on their substantive and procedural law and judicial organisation in the criminal field.

²³ See former art. 445 PC, still applicable to all offences that have taken place before 23rd December 2010.

²⁴ The alleged offences were perpetrated before 23 December 2010.

²⁵ In the Angola Case, the ACPO prosecutors requested the approval of an investigative magistrate (in the Central Investigating Magistrate's Court) to bring formal charges against 10 individuals (under former art.445 PC).

official's exercise of favourable discretion, could have been induced by the alleged bribe. The Spanish authorities underline that this decision does not reflect the view of the majority of the prosecutors, including the ACPO, who often refer to the Spanish Supreme Court case law on domestic corruption according to which a contract awarded after the payment of a bribe would always constitute an "unjust act", even when the successful bidder was the best-qualified.²⁷

29. During the visit, the Spanish prosecutors also underlined that, given that the facts examined by the Court took place before the reform of the Penal Code, it is based on the former anti-bribery offence which was narrower than revised art. 445 PC. The Spanish authorities indicate that the new notion of "acting in relation to exercise of public functions" under art. 445 PC is now broad enough to encompass all the situations listed under Phase 2 recommendation 4b. However, with regard to EU officials, while the definition of "acts inherent to his office" (art 424 and 420 PC) is broader than former requirement of "an unjust act not constituting a crime related to the exercise of his duty" (former art.420 PC), it remains narrower than the definition under new art. 445 PC and may not cover all the situations listed under Phase 2 recommendation 4b(ii) and (iii).²⁸

(iv) *The requirement of an irregular benefit*

30. The decision in the Angola Case also appears to be based on a shift from the characterisation of an "irregular act" of the foreign public official to a requirement for an "irregular benefit". According to prosecutors and academics met on-site, this requirement of an irregular benefit is based on an interpretation of the offence in Article 1 of the Convention as transcribed in art. 445 PC (in both the former and current versions of the text) which infers from the language "to obtain a contract or other irregular benefit" ("*u otro beneficio irregular*"; "advantage" in Article 1) that the contract itself (or other benefit obtained through the bribe) must be irregular to constitute an offence (see above). This interpretation disregards Article 1(4) c) and commentaries 3, 4 and 5 to the Convention. The Spanish authorities stress that this is an isolated decision which was taken against the opinion of the ACPO and is not binding on other courts.

31. It also emerged from the conversations with the legal professions that Spain's translation of Article 1 of the Convention, as published in the Spanish Official Journal at the time of the ratification of the Convention includes an error as instead of referring to the broad objective (as in Article 1) of obtaining or retaining "business" it refers to obtaining or retaining "a contract". The exact coverage of "a contract" as opposed to "business" was unclear to a number of panellists. This translation error may, to an extent, have contributed to the misinterpretation of the requirement in Article 1 of the Convention and art. 445 PC (into which the term "contract" is reproduced).

32. Of even more serious concern are the elements taken into account by the Court in the Angola Case to assess the potential irregularity of the contract. These amount to a catalogue of elements that Commentary 7 to the Convention lists as irrelevant: the value of the advantage put into the perspective of the total amount of the contract obtained (respectively USD 30 million and 300 million), the perceptions of local custom and tolerance of such payments by local authorities, or the alleged necessity of the payment in order to obtain or retain business or other improper advantage.

33. Should the Court's interpretation of the offence and related requirement for an irregular benefit be confirmed by case law (that is, under Spanish legal system, should there be two subsequent decisions of

²⁷ See STS (21-12-1999), caso "Roldan", STS (28-03-2001), STS (07-11-2001).

²⁸ Recommendations 4b (ii) requires the coverage of all bribes for an act or omission in relation to performance of official duties, regardless of whether it is offered to the official "in the exercise of his/her post"; and 4b (iii) of all bribes for acts or omissions in accordance with the official's duties other than small facilitation payments

the Supreme Court confirming this interpretation), it would represent a serious loophole in the Spanish implementing legislation and enforcement of the Convention.

(v) *Coverage of promises, bribes through intermediaries and bribes to third parties*

34. Revised article 445 PC expressly covers promises, bribes through intermediaries and bribes paid for the benefit of a third party, in line with Article 1 of the Convention. In contrast, the provisions in art. 424 PC on the domestic active bribery offence (which, through art. 427 PC, apply to the bribery of EU officials) do not expressly cover such situations as was confirmed by prosecutors during the on-site visit. However, with regard to intermediaries, after the on-site visit, the Spanish authorities referred to art. 28 PC on aiding and abetting which through the notion of a “principal” (i.e. “those who carry out the act by themselves or by means of another person whom they use as an instrument”) covers bribes through intermediaries. With regard to third parties, the Spanish authorities stressed that the reference to a “person” (in addition to a public official), under art. 424 PC (to which art 427 refers) is also meant to cover bribes to a person who is not a public official, i.e. a third party.²⁹

35. The Court order in the Angola Case however raises a concern with regard to the coverage in practice of bribes through intermediaries and to third parties (the Court order does not deal with promises). Although the Court examined this possibility, it emerges from its reasoning that the evidentiary threshold required in practice would make it almost impossible to prove. The Court considered that “it is common knowledge the worldwide existence of companies that, in fact, are ‘procurement companies’ and this does not mean that their activities are necessarily unlawful” and even if such is the case, the Spanish company “does not necessarily have to know whether such persons or companies employ that money to pay public officials.” Additionally, in the specific case where the intermediaries in question were paid a lump sum of USD 20 million by the Spanish company, “the fact that there is no documentation concerning specific ‘advising services’ does not imply the service did not exist because, indeed, it could be based on meetings, telephone calls, e-mails etc.” Such an evidentiary hurdle is all the more concerning in the context of this Court order, as it was rendered at the end of the initial prosecutorial investigation where further elements of proof could have been gathered at the stage of the formal investigation.

36. With regard to bribes that benefit third parties, the Court considered that the payment of alleged bribes to the relative of an elected official (the latter being the chair of the body responsible for the approval of some contracts for public work) is not covered under the foreign bribery offence. The Court did not either consider him as a foreign official (which would have been consistent with Commentary 16 to the Convention)³⁰ or refer to the notion of bribe “to a third party”. The Court thus examined the situation from the sole angle of the role of a potential intermediary. The Court concluded that “there is no indication that [the money] went to any public official; so there can be no doubt about what his [(the relative of the elected official)] partners [(the companies which allegedly acted as intermediaries)] declared: the [USD] 16.5 million were asked by [the relative of the elected person] ... as a loan to purchase a house in London.”

(vi) *Coverage of bribes to foreign public officials composed of non-pecuniary benefits*

37. The payment of benefits other than pecuniary is now covered (as recommended in Phase 2 recommendation 4c) with the new formulation of the offences in art. 445 PC (“other kind of benefit”) and in art. 419 and 421 PC, which apply to the bribery of EU officials (through art 427 and 424 PC) and

²⁹ Also see the executive summary of the review of Spain’s implementation of the UNCAC (published on 7 June 2011 on the UN website).

³⁰ Commentary 16 provides that: ‘In special circumstances, public authority may in fact be held by persons not formally designated as public officials. Such persons, through their *de facto* performance of a public function, may, under the legal principles of some countries, be considered to be foreign public officials’

explicitly refer to “gifts, favours or rewards of any nature”. However, here again, in practice the ruling by the investigating judge in the Angola Case appears to put a very high evidentiary threshold on the prosecution of non-pecuniary bribes. In this case, expensive gifts (3 cars, a luxury watch, air tickets) were given to foreign officials with a decisive role in the award of public contracts, including a high level official. However, the Court considered that “there is no evidence at all that such ‘kindness’ led to having the contract awarded”.

(c) *Defences and exemptions from prosecution*

(i) *Small facilitation payments*

38. In their replies to the Phase 3 questionnaires, the Spanish authorities state that the amount of the bribe is irrelevant under Spanish legislation. Small facilitation payments are not only an issue of amount but also of definition (as indicated under Commentary 9 to the Convention). The Spanish authorities do not refer to a definition of a bribe in the Penal Code that would encompass such payments but they refer to two Supreme Court decisions, which treated facilitation payments as bribery and provided a broad definition of such payments.³¹

(ii) *Exemption from punishment in case of reporting to law enforcement authorities (effective regrets)*

39. Article 426 PC exempts from punishment an individual who paid a bribe following solicitation from a public official but reports it, within two months and before proceedings have commenced, to the relevant authorities. In Phase 2, doubts regarding a similar provision’s application to the foreign bribery offences gave rise to recommendation 4c to clarify that such is not the case. As in Phase 2, this provision applies to the domestic active bribery offence. It does not apply to the offence of foreign bribery under art. 445 PC, which now appears in a separate Chapter of the Penal Code. However, given that art. 424 PC (which applies to EU officials through art. 427 PC) refers to “the same prison sentences as the corrupt authority, officer or person”, art. 426 could logically apply to 427 and 424 PC. The Spanish authorities indicate that this provision has never been used in a foreign bribery case and is rarely used in relation to other offences. They stress that the application of this exception has so far be given a very limited application in general. Nonetheless, inconsistent views were expressed on this matter by the legal practitioners and actors in the fight against corruption met by the evaluation team and the grounds for maintaining such an exception in the PC was questioned by a trial judge.

Commentary:

The lead examiners are concerned by the continued lack of enforcement of the foreign bribery offence, almost 13 years after the entry into force of the Convention in Spain. While they welcome the entry into force, in December 2010, of the legislative amendments introduced in the Spanish Penal Code and are encouraged to see that the revised art. 445 PC appears to implement most of the Phase 2 recommendations (hence prima facie covering the elements of the offence foreseen under Article 1 of the Convention), they are seriously concerned by the fact that this revised offence only applies to the bribery of non-European foreign officials and that most of the serious flaws and weaknesses identified in Phase 2 remain in the separate

³¹ A first Supreme Court decision, dated 24 May 1989, declared that “the fact of offering certain compensations to public officials so that the files they are interested in are quickly solved is something unjust entailing the corruption of the public function, against the principle of equality and socially reprehensible”. A second Supreme Court decision, dated 29 April 1995, also qualified as bribery the fact of offering a gift “to avoid difficulties”.

foreign bribery offence applying to “officers of the European Union or civil servants who are nationals of another Member State of the Union” (EU officials)(arts. 427 and 424 PC) with a potential impact not only on the offence and related sanctions but also on the enforcement of the offence as further discussed under section 5 of this report. They note that diverging opinions have been expressed with regard to a possible conflict of law between these two texts. They greatly welcome the official announcement made by the Spanish Minister of Justice prior to the finalisation of this report, that a revision of the Penal Code is being launched with a view to clarify the applicable legislation and they encourage the Spanish authorities to proceed with the related legislative changes as a matter of priority.

While they note that this is an isolated decision, non-binding on the other Courts, the lead examiners are concerned by (i) the Spanish Central Investigating Magistrate’s Court’s narrow interpretation of the offence in article 445 PC, as confirmed on-site by Academics and other actors in the fight against bribery, which requires that the contract or other benefit obtained through the bribe be “irregular”; and (ii) the irrelevant factors taken into account in determining such irregularity as these, in particular, disregard Commentary 7 to the Convention.

With respect to the implementation of Article 1 of the Convention through the offences of bribing a foreign public official (art. 445 PC) and bribing EU officials (art. 427 PC), the examiners recommend that, Spain amend the current statutory framework to consolidate or harmonise the offence under art. 427 PC with the one under art. 445 PC, to remove inconsistencies between the two offences which could provide obstacles to the effective implementation of the Convention, including as follows:

(a) by clarifying that the definition of a foreign public official encompasses “officers of the European Union or civil servants who are nationals of another Member State of the Union”, that this definition is in all cases autonomous and that characterisation of the expected acts of foreign officials does not require recourse to foreign law in order to establish the offence;

(b) by clarifying that all bribes to a foreign public official to affect the official’s exercise of discretion, including where the act induced by the bribe is in accordance with the official’s duties would constitute the basis for a foreign bribery offence, regardless of whether the Company could properly have been awarded the business and whether the benefit obtained is “irregular”;

(c) by ensuring that the promise of a bribe, the use of intermediaries and bribes paid to a third party are covered in all cases of bribery of a foreign public official without any distinction;

(d) by clarifying that the defence under art. 426 PC in cases of corruption offences reported to law enforcement authorities (tantamount to “effective regret”) does not apply to the foreign bribery offences, including the offence under art. 427 PC.

The examiners recommend that the impact on the scope and effective enforcement of the offence of the use of the term “contract”, instead of “business”, in Spain’s translation of the Convention and in the foreign bribery offence under art. 445 PC, be followed up by the Working Group as practice develops. The examiners also recommend that the coverage of non-pecuniary benefits under the new legislation be followed up in practice as case law develops.

2. Responsibility of legal persons

(a) *Standard of liability*

(i) *A regime of liability established only in December 2010*

40. In Phase 1, the Working Group found that Spain did not meet the standards of the Convention with regard to liability of legal persons for foreign bribery and corresponding sanctions. In 2003, two new provisions were added to the Penal Code to introduce a form of criminal liability for legal persons, which, at the time of Phase 2, were not deemed to be in line with the requirements of the Convention. The Phase 2 report therefore recommended that, with respect to the liability of legal persons for foreign bribery, Spain amend the law to ensure that all legal persons can be held directly liable for bribery of foreign public officials (recommendation 5a); and exclude requirements of individual liability as a prerequisite for the liability of the legal person (recommendation 5b). At the time of its Phase 2 written follow up, in June 2008, Spain's plans to review its regime of criminal liability of legal persons had not materialised and the above recommendations were deemed as "not implemented".³² In October 2010, in the context of its regular progress report, Spain informed the Working Group³³ of the introduction of a regime of liability for legal persons into its revised Penal Code which entered into force on 23rd December 2010.³⁴ As for the revised offences of foreign bribery (discussed under section 1 above), a Phase 1bis examination of the new law could not be conducted at the time and its analysis was thus postponed to the Phase 3 evaluation. This will therefore be the first time, in December 2012, that the new regime of liability of legal persons will be assessed by the Working Group.

41. With very few exceptions, Spain did not provide replies to the additional questions designed to assess its new regime of liability other than quoting the new provisions. However, during the on-site visit, prosecutors referred to a State Prosecution Service (SPS) circular (circular 1/2011) providing guidelines to the ACPO prosecutors on the implementation of the new regime for liability of legal persons. This is of particular interest as the circular is publicly available on-line and representatives of the private sector thus referred to it on a couple of occasions. Of this 114-page document, only 6 pages of conclusions were translated into English and forwarded to the examiners after the on-site visit. An abstract of the preamble to Organic Act 5/2010, which introduced the new regime of liability of legal persons was also provided after the onsite visit.

42. One reason for the limited amount of information received is the absence of enforcement of the new corporate liability regime in relation to any offence, at the time of drafting this report. The prosecutors met on-site also indicated that they were not aware of a legal person being under investigation or prosecution for domestic bribery or another serious economic offence. After the on-site visit, media reports broadly covered an investigation for alleged economic offences involving for the first time a large Spanish financial institution as a defendant, which had been rescued by the Spanish State. The Spanish authorities indicated that they could not provide information on this case given that criminal proceedings were ongoing.

³² In December 2009, in the context of its oral follow up, Spain reported that a new bill was before the Spanish Parliament. This report was accompanied by a letter from the Minister of Justice to the Chair of the Working Group. The Group decided to reply to this letter to acknowledge the important step taken, but also that the Group was concerned with the time that had elapsed since the Phase 2 recommendations in 2006. Spain was invited to report orally, at every Working Group meeting, on progress made on the matter.

³³ DAF/INV/BR/M(2010)3/REV1

³⁴ Organic Act 5/2010 amending Organic Act 10/1995 of 23 November.

(ii) *The concept of corporate criminal liability in the Spanish Penal Code*

43. The new Spanish regime of criminal liability for legal persons introduced by Organic Act 5/2010, in December 2010, is contained in revised art. 31 bis. Organic Act 5/2010 also amended the level of sanctions applicable to legal persons for foreign bribery in 445 para. 2 PC (as further discussed under section 3 below). Panellists met during the on-site visit unanimously admitted that this is the first time that a regime of liability of legal persons was introduced in the Spanish Penal Code. Under the new art. 31bis PC corporate liability regime, criminal liability can be attributed to legal persons for certain Penal Code offences committed by a natural person in offences which specifically state that companies can also be held liable. This is the case for both foreign bribery offences (under art. 445 para. 2 PC and under art. 427 PC para. 2) and for the false accounting offence (art. 310 bis PC).

(iii) *Entities covered - State-owned and State-controlled enterprises (SOEs)*

44. In its replies to the Phase 3 supplementary questions, the Spanish authorities indicate that the concept of legal entities (as it is used in art 31bis and 445 para. 2) is defined under art. 35 of the Civil Code. This article appears to cover a large range of entities.³⁵ However, art. 31bis PC clearly provides under para. 5, for certain categories of legal person, which cannot be held criminally liable. Of a particular concern is the exclusion of “*commercial public entities*” and “*public companies carrying out public policies or providing services of general economic interest*”. According to the various actors in the fight against bribery met on-site, the combination of both criteria results in the exclusion of a large range of both State Owned Enterprises (SOEs)³⁶ as well as private companies which remain largely State controlled in a number of areas of “*general economic interest*”, like the water, energy and transport sectors.³⁷ In Spain, the exclusion of these companies from criminal liability is all the more concerning given that these companies are in many cases controlled by regional governments. For example, TMB – the metropolitan transport company of Barcelona – has significant global operations building and supporting foreign metro systems. A press article³⁸ on the public sector reforms referred to there being over 2000 public companies in the regions.

45. The rescued financial institutions may potentially fall under this exception. During the on-site visit, prosecutors asserted that these institutions are not excluded from the scope of the Spanish criminal corporate liability. As mentioned above a number of press articles appear to confirm this interpretation as these reveal that a large financial institution, together with former members of its board were being

³⁵ Article 35 of the Civil Code provides that “Are legal entities:1. The corporations, associations and foundations of public interest recognised by Law. [...]; 2. The associations of private interest, civil, commercial or industrial, granted by Law their own entity, regardless of the one of each partner.”

³⁶ On the last count provided by the OECD Competition Division, Spain had 151 SOEs with a combined 160,000 employees (source: www.oecd.org/dataoecd/55/42/48512721.pdf). In terms of economic weight of SOEs this places Spain in the “middle group” within OECD (although the number is large mostly because a large number of “patrimoine” hotels are registered as individual SOEs).

³⁷ This category in particular includes the State controlled companies targeted by the European Directive 2004/17/EC³⁷ coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors. Although in Europe, the enterprises in this sector were, in most cases, privatised in the early 2000’s and operate on the relevant market on a normal commercial basis, they remain largely State controlled, as recognised by the Directive which states that “*One major reason for the introduction of rules coordinating procedures for the award of contracts in these sectors is the variety of ways in which national authorities can influence the behaviour of these entities, including participation in their capital and representation in the entities' administrative, managerial or supervisory bodies.*”

³⁸ <http://www.publico.es/espana/426018/el-gobierno-suprime-el-17-de-las-empresas-publicas>.

investigated for a number of suspected economic crimes, at the time of drafting this report, on charges of serious economic crimes, allegedly including falsifying accounts, dishonest administration, price manipulation and appropriation. However, while at the time of drafting this report, the investigation appeared to have entered the judicial phase (see section 5 below) whether such an entity would or would not fall within the exception under art. 31bis para. 5 had not yet been decided by a Court.

46. Another illustration of the difficulty in determining the exact scope of the exception was provided on-site by representatives of the defence sector who indicated that their lawyers had a meeting, one day prior to the panel discussions, to determine whether they would fall under the exception and that they concluded that they may apparently not. This remained to be tested at the time of drafting this report. Art. 31bis PC, para. 5 provides for an exception to this exclusion from liability, where these entities have been created in order to avoid criminal liability. However it is so limited in scope that it is not likely to alleviate the very serious concern raised by this exception. In a letter dated 4 December 2012, the Spanish Minister of Justice announced the intention of the Spanish authorities to review their legislation to extend the regime of liability of legal persons to cover all State-owned and State-controlled companies.

Commentary:

The lead examiners welcome the entry into force, in December 2010, of a regime of criminal liability of legal persons under the Spanish Penal Code. They are in particular encouraged by the express specification that the prosecution or identification of an individual is not required as a prerequisite for the liability of the legal person, hence implementing Phase 2 recommendation 5b.

However, they are seriously concerned with the exclusion from criminal liability of Spanish State-owned and State-controlled companies. This represents a major loophole in the new regime of liability of legal persons, which hence only partially implements Phase 2 recommendation 5a. The lead examiners therefore recommend that Spain, as part of the legislative reform announced on 4 December 2012, amend the Penal Code to ensure that State-owned and State-controlled companies can also be held liable for bribery of foreign public officials under art 31bis PC.

(b) Level of requirement with regard to the natural person's liability

(i) Absence of requirement of the liability of a natural perpetrator

47. The Spanish authorities indicate in their replies that the new regime does not require an individual to be held liable as a prerequisite for the liability of the legal person and hence implements Phase 2 recommendation 5b. Art. 31bis para. 2 specifies that a legal person will be held liable "even if the specific natural person has not been identified or it has not been possible to prosecute him/her". At the time of drafting this report, no legal person had been sanctioned for foreign bribery or any other offence, and this provision had never been enforced. Nonetheless, the Spanish prosecutors and judges met on-site were confident that it would be applied in future and prior to finalising this report, the Spanish authorities generally referred to an increasing number of investigations potentially involving legal persons, although no more details were provided to the evaluation team in support to this statement. Art. 31bis para. 3 also provides that mitigating or aggravating circumstances applied to the natural person's liability as well as death or incapacities do not have any impact on the legal person's liability. This, in theory, appears to comply with the requirements of the Convention.

(ii) *Principal offenders likely to trigger the liability of the legal person and notion of “due control”*

48. Art 31bis PC imposes liability on legal persons for offences committed by two categories of principal offenders: natural persons in senior positions (legal representatives and managers either *de facto* or *de lege* – art. 31bis para.1) and natural persons subject to their management or supervision (natural persons subject to the authority of those in senior positions) and over whom “*due control*” has not been exercised (art. 31bis para. 2).

49. This *prima facie* appears to implement the approach recommended by Section B b) of the Good Practice Guidance on Implementing Specific Articles of the Convention (Annex I to the 2009 Recommendation). Much of the discussions on-site focussed on whether the new regime of liability and its notion of “*due control*” covers situations where a person in a senior position not only “directs” or “authorises” a lower level person to perpetrate the offence but also “fails to prevent” it “through a failure to supervise” or “a failure to implement adequate internal controls, ethics and compliance programs and measures”. According to panellists, this full range of situations is intended to be covered under the notion of “*due control*”. The standards of a “*due control*” are unspecified in the law but at the time of finalising the report, the Spanish authorities indicated that the criteria defining the concept of “*due control*” are set out in detail in the SPS Circular.

50. However, art. 31bis specifies that the failure to exercise “*due control*” over the employee (and the related possibility of the payment of bribes) must be assessed in light of “*the specific circumstances of the case*”. The same emphasis on the circumstances of the case is contained in the SPS Circular 1/2011 which states (under Conclusion 3) that “the object of the criminal process should not be determined by the objective or hypothetical suitability of the compliance program but should be focussed on proving, through the evidence obtained in each case, that the legal persons [...], representatives [...], administrators [...] and subordinates [...] committed an offence in the specific circumstances established by law.” At the time of finalising this report, the Spanish authorities underlined that the “*circumstances of the case*” include the proof that the offence has been committed to the benefit or advantage of the legal person. They assert that this does not require any identification of the individual offender as there is no need to prove intent.

51. However, when it comes to the requirement to demonstrate a lack of “*due control*” in order to establish corporate liability, the Spanish authorities emphasise that a compliance program is “just an incidental issue” and that the conduct of specific individuals in implementing such a program is of limited interest in the establishment of the liability of the legal person. They further stress that the latter should depend on establishing the criminality of the individuals’ conduct “regardless of an eventual self regulation system”. Should this interpretation be confirmed by case law, it would not only be difficult to reconcile with art. 31, para. 2 which does not require the identification of the individual perpetrator but it would also limit the possibilities of proving “a failure to supervise” or “a failure to implement adequate internal controls, ethics and compliance programs and measures” as required under Annex I to the 2009 Recommendation. Conversely, as further discussed below, the explanations provided by the Spanish authorities imply that “*due control*” in the form of compliance programs and internal controls put into place by a company may constitute a defence from liability.

(iii) *Possible defences and/or mitigating factors*

52. While the absence of “*due control*” may not be sufficient to establish the liability of a legal person, a related question is whether the existence of such control could conversely constitute a defence to the liability of legal persons and if so, which standards such “*due control*” would have to meet. Art. 31bis PC, para. 4, also lists four mitigating factors, including (d) “Establishing effective preventive measures before the hearing”. The extent to which the concept of effective preventive measures may differ from that of “*due control*” was also explored with panellists during the on-site but no clear reply was provided. Since

internal compliance programmes could play a crucial role in mitigating or absolving legal persons from liability, the assessment of the existence and efficacy of these programmes could be a significant issue in determining the liability of legal persons for the foreign bribery offence. After the on-site visit, the Spanish authorities confirmed the existence of such a defence where they indicated that “a mere inadequate performance of due control by, for instance, a middle-ranking official or any other employee, whenever it becomes established that the managers or governing bodies of the legal person have exercised, either by themselves or by delegation, all the appropriate measures in order to prevent, detect and react to possible crimes, shall not in principle determine the criminal liability of the legal person, without prejudice to the particular circumstances of each case.” As stated below, in section 7(c), Spanish companies have increasingly been strengthening their internal controls, ethics and compliance measures, however it was not clear from the replies of representatives of the private sector and business representatives whether this is in response to the entry into force of the new Spanish regime of liability of legal persons or the threat of the far reaching US Foreign Corrupt Practice Act and UK anti-bribery Act.

53. On top of “Establishing effective preventive measures”, art. 31bis PC, para. 4, lists three other mitigating factors: (a) confession before “criminal procedure” starts against the legal person; (b) collaboration in the investigation at any time of the procedure; (c) “repairing or diminishing the damage” at any time before the hearing. In the absence of implementing rules, guidelines or case law, the exact scope of these mitigating factors and their impact on the liability of a legal person, remains to be determined, in particular to make sure that these may not, in practice be considered as defences to the liability of legal persons (this is further discussed under section 3).

(iv) *Bribery “for the account” and “to the benefit” of the legal person*

54. Liability under art. 31bis PC also depends on whether the offence was committed “for the account” and “to the benefit” of the legal person. This means that a legal person is not liable if the principal offender acted to his or her exclusive advantage, which does not raise specific concerns. However the combination of the criteria “for their account” and “to their benefit” also excludes an indirect advantage such as the advantage of a third party; e.g. bribes to the advantage of a subsidiary (or *vice versa*) or bribes to obtain an indirect advantage such as an improved competitive situation. This is in line with the same loophole in the implementation of the Convention (discussed above under section 1 on the offence) identified with regard to natural persons, under art. 424 PC, which through art. 427 PC applies to the bribery of EU officials. However, it narrows, with respect to legal persons, the scope of the offence of bribery of non- EU officials under art. 445 PC, which, with regard to natural persons, expressly covers the bribes paid to a third party. In a letter dated 4 December 2012, the Spanish Minister of Justice announced the intention of the Spanish authorities to review their legislation to cover cases where a bribe is paid to obtain an indirect advantage.

(v) *Bribery through intermediaries*

55. Annex I to the 2009 Recommendation clearly states that Member Countries should ensure 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. This situation is not expressly covered under art. 31bis PC. As it is also not specifically excluded (as is the advantage of a third party examined above), it remains to be seen whether the Spanish Courts will deem it possible to revert to the terms of the applicable offences for this purpose. This would, in any case ensure the coverage of such situations only where the bribes are paid through intermediaries to a non-EU official as only art. 445 PC covers bribes through intermediaries (but not art. 424 PC - see discussion under section 1). This represents another loophole in the Spanish regime of liability of legal persons.

(c) *Principles of prosecution of legal persons*

56. In their replies to the Phase 3 questionnaires, the Spanish authorities indicate that the same principles apply to both natural and legal persons without providing any detail. They stress that there are no legal difficulties involved in criminal proceedings against legal persons in the absence of proceedings against the natural person who perpetrated the corrupt acts. Likewise, the Spanish authorities and prosecutors indicate that investigative techniques and criminal proceedings do not differ from those applying to natural persons. In the absence of experience of investigation or prosecution of legal persons to date, this should be monitored.

Commentary:

The lead examiners are concerned with the vagueness in the law with regard to the possible enforcement of the lack of “due control” criteria. They recommend that Spain ensure by any appropriate means that the criteria of “due control” as well as the onus and level of proof of this standard of liability be specified with a view to ensure coverage of the full range of situations required in Annex I to the 2009 Recommendation, in particular under its subsection B) b) and that the implementation of compliance programs and internal controls by a legal person cannot be used as a defence to avoid liability.

The lead examiners are also concerned with the requirement that corporate liability under art. 31bis PC depends on whether the offence was committed “for the account” and “to the benefit” of the legal person. They welcome the announcement by the Minister of Justice of a review of the legislation to cover cases where a bribe is paid to obtain an indirect advantage. Nonetheless, they recommend that the Working Group follow up on whether art. 31bis PC imposes liability on a legal person when a principal offender bribes to the advantage of a subsidiary (or vice versa) or when an indirect advantage, such as an improved competitive situation, results from bribery.

While the lead examiners are aware that corporate liability was only introduced two years ago into the Spanish legal system, they are nonetheless concerned by the total absence of prosecutions against legal persons for any offence to date although they are encouraged by the investigation reported in the press involving a large Spanish Bank. They therefore recommend that Spain take steps to increase the effectiveness of the liability of legal persons in foreign bribery cases, including through raising awareness among prosecuting authorities throughout the country to ensure that the new range of possibilities available under the law for holding legal persons liable for foreign bribery is understood and applied consistently and diligently, with a view to more effectively enforcing the new corporate liability regime.

3. **Sanctions**

(a) *Sanctions for natural persons*

57. In Phase 2, the Working Group recommended that Spain increase the criminal sanctions applicable to foreign bribery in order (i) to provide for effective, proportionate and dissuasive sanctions in all cases, including in particular for bribery to obtain a favourable exercise of discretion; and (ii) to ensure that effective mutual legal assistance and extradition are not excluded by the level of applicable sanctions in any foreign bribery case (recommendation 6a). Spain was also asked to consider whether to increase available sanctions for foreign bribery cases involving significant amounts of money in order to achieve sanctions proportional to those for similar economic crimes (recommendation 6b). These recommendations

were considered not implemented at the time of the written follow-up. Since then, the 2010 revision of the Penal Code introduced a new regime of sanctions applicable to foreign bribery.

(i) *Relevant legislation and applicable criminal sanctions*

- Prison sentences

58. Pursuant to revised art. 445 PC (bribery of foreign public officials), imprisonment for a person who bribes or attempts to bribe a foreign public official is punishable with imprisonment from 2 to 6 years. Pursuant to art. 427 PC (bribery of EU officials)³⁹, an act “contrary to the duties”, or “not carried out”, or “unfairly delayed” (art.419 PC) is punishable with imprisonment ranging from 3 to 6 years while an act inherent to the public official’s office is subject to a prison term of 2 to 4 years (art. 420 PC). At the time of the Phase 2, acts similar to those now covered by art. 419 PC were only punishable by fines and acts covered by art. 420 PC were punishable by prison sentences from 2 to 6 years or 1 to 4 years (former art. 445 PC). Although the level of sanctions has generally increased since Phase 2, discrepancies remain. While bribery of a foreign public official under art. 445 and bribery of a European official to perform an act contrary to his or her duties are both punishable with imprisonment ranging from 3 to 6 years, bribery of an European official to perform an act inherent to his or her office is subject to a lesser prison term of 2 to 4 years (art. 420 PC) which does not address Phase 2 recommendation 6a (i).

- Fines

59. In Phase 2, the Working Group expressed concerns that the maximum fines were linked to the size of the bribe and limited to at most three times its value. Since then, Spain has extended the day-fine system (art. 50 PC) to the bribery offences. Pursuant to this system, active bribery under arts. 445, 419 and 420 PC is now punishable with a fine of twelve to twenty-four months (i.e. from EUR 720 to EUR 288 000). Art. 445 PC provides for an alternative sanction based on the amount of the profit where the profit exceeds the above mentioned maximum fine (EUR 288 000). The Spanish authorities stress that this approach increases the deterrent effect of the sanctions although this only applies to the offences under art. 445 PC. However, guidelines on how to calculate the profit derived from bribery have not been issued, and, during the on-site visit, the Spanish authorities were unable to provide a method for the calculation of the profit.

60. The possibility of calculating the amount of the fine based on the size of the profit is not contemplated under art. 427 PC regarding the bribery of EU officials and hence does not apply to the offences under art. 419 and 420 PC. The need to characterise the expected acts of the EU official in order to establish the offence and determine the applicable sanction (see section 1 on the offence) may also be a source of uncertainty as to the level of sanctions. Additionally, as highlighted during the on-site visit by a prosecutor, given the difficulty to prove an act contrary to the officials’ duties, the defence lawyers will systematically advocate that the act induced by the bribe is the one triggering the lower level of penalty (i.e. art 420).

- Comparison with other economic offences

61. As a matter of comparison with sanctions available for other economic offences, domestic active bribery is punishable with the same sentences as those available for the bribery of EU officials. Corruption between private individuals is punishable with a sentence of imprisonment of 6 months to 4 years, special barring from practice of industry or commerce for a term from 1 to 6 years and a fine of up to 3 times the

³⁹ Art. 427 PC refers to art. 424 PC that incorporates by reference the penalties under arts. 419, 420 and 422 PC in cases of bribery of a European official.

value of the profit or advantage obtained. Embezzlement (art. 432 PC) is punishable with a sentence of imprisonment from 3 to 6 years and absolute barring for a term of six to ten years and if the embezzlement is especially serious, the sentence is increased to 4 to 8 years' imprisonment and absolute barring for a term of 10 to 12 years. Fraud (*estafa*) of special gravity is punishable by 1 to 6 years of imprisonment and a fine from 6 to 12 months, and in certain aggravated cases, by up to 8 years' imprisonment (see arts. 248-250 PC.)

Conclusion

62. The Phase 2 recommendation 6a (ii) has now been implemented by Spain: with the 2010 amendment of the PC, all offences under arts. 445, 419 and 420 PC provide for sentences of imprisonment and therefore permit mutual legal assistance and extradition. However, Spain does not provide for effective, proportionate and dissuasive sanctions in all cases as recommended in Phase 2. A lesser level of fines is available for the bribery of EU officials than for the bribery of other foreign officials (under section 445 PC) where the profit obtained exceeds EUR 288 000. Less severe prison sentences are also applicable to acts inherent to the public official's office (art. 420 PC). Therefore, recommendation 6a (i) has only been partially implemented. Finally, the maximum sentences available in the law for the most serious of other comparable economic crimes are higher than those available for foreign bribery (with the exception of those available for domestic active corruption and private corruption). Hence, despite the efforts to increase sanctions applicable to acts of foreign bribery, recommendation 6b has not been fully implemented.

(ii) *Administrative sanctions*

63. Pursuant to art. 445 PC, in addition to the above penalties, a person who bribes or attempts to bribe a public official shall also be barred (i) from entering into public sector contracts; (ii) from the possibility of obtaining public subsidies or aid; (iii) from the right to enjoy tax and social security benefits or incentives, and (iv) from intervening in commercial transactions derived from public funds for a period of seven to twelve years. However, art. 419 and 420 PC do not contemplate the possibility that the offender be barred from public employment and office in addition to fines and imprisonment except where the bribe is paid to obtain a contract that is subsidised by public funds, e.g. contracts funded by development aid or supported by export credit (art. 424(3) PC). In the latter case, the briber shall be barred from obtaining public subsidies and aid, from entering into contracts with public sector institutions, entities or bodies and from enjoying tax and Social Security benefits or incentives. Debarment under this provision only applies in a limited number of cases, and is available for a shorter term than that which is available under art. 445 PC, i.e from three to seven years under art 423(3) while it is from seven to twelve years under art. 445 PC.

(iii) *Sanctions reached under Conformidad*

64. Spanish criminal procedure provides for a form of settlement known as *conformidad* (see discussion under section 5.⁴⁰ *Conformidad* is available for offences providing for a penalty not exceeding 6 years imprisonment (art. 787 Code of Criminal Procedure, hereafter CCP). While it could therefore theoretically apply to foreign bribery, as was confirmed during the on-site visit, this type of settlement had never been used in foreign bribery cases at the time of drafting this report.⁴¹ During the visit, the Spanish authorities indicated that the prosecutors, when assessing the appropriate level of sanctions in the context

⁴⁰ See Spain report to the Eurojustice network: http://www.euro-justice.com/member_states/spain/country_report/

⁴¹ Defendants might have been in the past less inclined to use such agreements in bribery cases that were likely to be statute-barred anyhow (at a time when the foreign bribery offence was statute-barred after three years).

of *conformidad*, do not have more flexibility than when applying the mitigating factors foreseen in the law (see below) in normal trial procedures. No statutory discount is provided for entering into a *conformidad*, although it is not possible to impose sanctions below the statutory minimum provided under the applicable offence (art.787(2) CCP). Nonetheless, some criminal cases seem to suggest that there is, in practice, scope for negotiation (see below).

65. In the absence of relevant data, it is not possible to evaluate the impact of these agreements on the level of sanctions imposed although, according to media releases, *conformidad* was used in a very high profile domestic corruption case (known as the “Malaya case” where very large amount of bribes were paid between 2002 and 2006 in return for a planning permit in Marbella). The Spanish authorities indicate that four defendants in this case have agreed to the penalty sought by the prosecution although no information was made available to the examiners on the level of these penalties or the reduction of penalties applied as a result of the charges admitted by the defendants and the existence of possible mitigating factors.⁴² The lack of information on the actual practice of this form of agreement in corruption cases as well as the discount applied to sanctions for other offences in practice under such plea agreements raise concerns.

(iv) *Mandatory reduction of sanctions and mitigating factors*

66. In Phase 2, the Working Group recommended that Spain eliminate the mandatory reduction of sanctions that applied for foreign bribery in cases of solicitation and where the foreign public official did not carry out an unjust act (recommendation 6c). The revised art. 424 PC now expressly clarifies that solicitations do not lead to a reduction of sanctions. While a similar express provision has not been included in art. 445 for the offence of bribing foreign public officials, no such mandatory reduction is either contemplated. With regard to EU officials, while “an unjust act [not constituting a crime related to the exercise of his duty]” (former art.420 PC) has been replaced under the revised Code by “acts inherent to his office” (arts. 424 and 420 PC) a concern remains since the latter are still subject to a lesser level of sanctions. Recommendation 6c has therefore only been partially implemented.

67. A confession prior to the discovery of the offence or compensation to the victim for the damages caused or lessening their effects prior to the trial constitute mitigating factors (arts. 21 and 66 PC). Where there is one attenuating factor, sentences are in the lower half of the range for the offences (art. 66 PC). Where there are two mitigating factors, a “penalty inferior in one to two degrees” to the one in the basic offence shall be applied. It thus appears that in cases involving a confession at the outset of the case and attempts to remedy the effects of the bribery, very substantially reduced penalties would apply. While some of these mitigating factors are common to many countries, their use and impact on the overall effectiveness of the level of sanctions should be followed up as practice develops.

(v) *Suspension and conversion of prison sentences*

68. There are two types of alternative measures to incarceration in the Spanish legal system. First, for sentences imposed for less than two years, suspended sentences can be issued: provided that the offence is the first offence by that person and that the person has paid compensation to the victim (except when the person is unable to do so) (art. 80-81 PC). In practice, it appears that judges tend to ‘automatically’ grant a

⁴² According to the press (see http://elpais.com/diario/2011/10/23/andalucia/1319322123_850215.html), in return for a confession, the prosecution would request a significantly reduced sentences for defendants prosecuted in the “Malaya case” - 11 year prison terms reduced to two years and three months, replaceable with a total fine of EUR 225,000. The prosecution of this case was still ongoing at the time of this report.

suspended sentenced to first-time offender.⁴³ Second, judges can also substitute jail sentences with fines or community work (with the consent of the convicted party) in cases involving prison sentences of less than one year⁴⁴ (art. 88 PC).⁴⁵ The examiners were provided with one example of a domestic corruption case⁴⁶ (for acts committed prior the 2010 reform of the Penal Code) where one jail sentence (of one year, six months and one day) was suspended⁴⁷ and two other jail sentences (of 3 months) were converted to a six month fine equivalent to EUR 540. Should this example illustrate the practice of the Courts of conversion and suspension of sentences in corruption cases, and be applied to foreign bribery, this may question the effectiveness, proportionality and dissuasiveness of the sanctions imposed against natural persons.

(vi) *Level of sanctions applied in practice - Data available on sanctions against natural persons*

69. There have been no convictions of any natural person for foreign bribery since Phase 2. Although some data on the implementation of the sanctions in domestic active corruption cases since Phase 2 could have shed light on the practice of sanctions by Spanish Courts, no data regarding the enforcement of other economic offences was made available by the authorities despite repeated requests.

Commentary:

The lead examiners commend Spain for the general increase in the statutory level of criminal sanctions that can be imposed on individuals in foreign bribery cases. They welcome the introduction of a broad range of administrative sanctions in cases of bribery of non-EU officials (art. 445 PC). However, the examiners have concerns over the existence of two distinct sanctions regimes that apply to the two offences of foreign bribery (under art. 445 and 427 PC). Compared to the offence of bribery of foreign public officials (art. 445 PC), the offence of bribery of EU officials (art. 427), (i) is punishable with a lesser level of fines where the profit obtained exceeds EUR 288 000; (ii) is subject to less severe prison sentences where the bribe induces an act inherent to the public official's office (art. 420 PC); and is subject to less severe administrative sanctions that are also only available in cases where the bribe was paid to obtain a contract subsidised by public funds (art. 424(3) PC). Additionally, the specific act of the public official induced by the bribe needs to be determined in order to identify the applicable sanction. The examiners consider that this places a very high evidentiary burden on the prosecution, which is likely to jeopardise the implementation of effective, proportionate and dissuasive sanctions in Spain in foreign bribery cases involving EU officials. They also consider that the origin of the bribed person cannot justify a different treatment in the level of available sanctions for an offence that is equally covered under Article 1 of the Convention.

⁴³ See “Suspended sentences in Spain: Decarceration and recidivism”, José Cid, 2005: <http://prb.sagepub.com/content/52/2/169.full.pdf+html>

⁴⁴ This threshold was revised in the 2010 reform of the Penal Code (it amounted to two years at the time of Phase 2).

⁴⁵ Pursuant to art. 88 PC, the convicted person's personal circumstances, the nature of the offence, the conduct of the accused and his/her efforts to repair the damage, provided that the person concerned is not an habitual criminal, are factors that can be taken into account to decide the substitution of jail sentences with fines or community work.

⁴⁶ Decision EDJ 2009/52591 SAP Jaen of 2 February 2009.

⁴⁷ The offender was also sentenced with special disqualification from electoral candidature during the time of the sentence, special disqualification from a public position for a period of four years, six months and one day, and a fine amounting to EUR 4,500. The Court agreed to the suspension of the sentence because “the nature of the facts and the circumstances of the offender do not show the accused as a particularly dangerous person, as outlined in Article 80.1 of the Criminal Code.”

Therefore the lead examiners recommend that Spain amend the current statutory framework to harmonise the regime of sanctions for bribery of European officials with the one available for bribery of other foreign public officials (under art. 445 PC) and fully implement recommendation 6a (i) to provide for effective, proportionate and dissuasive sanctions in all cases, including in particular for bribery to obtain a favourable exercise of discretion. The lead examiners also reiterate Phase 2 recommendation 6b and recommend that Spain increase available sanctions for foreign bribery cases involving significant amounts of money in order to achieve sanctions proportionate to those available for similar economic crimes.

Additionally, since the calculation of fine available under art. 445 PC is linked to the size of the profit, guidelines should be developed on how to calculate the proceeds of bribery to individuals and/or companies who have benefited from corrupt transactions.

As no sanctions have been imposed in relation to the foreign bribery offence to date, the lead examiners consider that it is not possible to fully assess whether Spain's sanctions regime is in practice effective, proportionate and dissuasive. They recommend that the Working Group follows up, as case law develops that the sanctions imposed against natural persons are effective, proportionate and dissuasive, especially in the light of Spain's system of suspending and converting sentences of imprisonment. They also consider that the Working Group should monitor the application of mitigating circumstances as case law develops in order to evaluate its impact on the dissuasive effect of sanctions. The Working Group should also follow up on the level of sanctions applied in cases of solicitation of bribes by foreign public officials.

The lead examiners recommend that Spain compile statistics on the criminal, civil and administrative sanctions imposed for domestic and foreign bribery in order to assess whether they are effective, proportionate and dissuasive.

Conformidad (the plea agreement procedure that exists in Spain) has not been tested yet in a foreign bribery prosecution. However, this procedure has been used in the context of large scale domestic corruption cases although, in the absence of specific information provided by Spain, it has not been possible to assess the impact on the level of sanctions imposed in such cases. The examiners consider therefore that the Working Group should monitor the use made of this procedure in Spain, especially with regard to its impact on the level of sanctions imposed in practice.

(b) Sanctions for legal persons

70. In Phase 2, the Working Group recommended that Spain amend the law to provide that legal persons are subject to effective, proportionate and dissuasive sanctions for foreign bribery, including fines or monetary sanctions (recommendation 6d). The recommendation was considered not implemented at the time of the written follow-up. In 2010, a new regime of criminal liability of legal persons was introduced in Spain that establishes a new regime of criminal sanctions.

(i) Relevant legislation and applicable criminal sanctions

71. Under art. 445 (2) PC, when, pursuant to art. 31bis PC, a legal person is responsible for foreign bribery, the punishment shall be a fine from two to five years (i.e. from EUR 21 000 to EUR 9 million), or from three to five times the profit obtained if the resulting amount is higher. Article 427 (2) PC also foresees sanctions applicable to legal persons held liable for bribing an EU official by reference to the provisions applicable to Spanish domestic bribery as follows: (i) for the offence under art. 419 PC, the legal person shall similarly be subject to a fine from two to five years (i.e. from EUR 21 000 to EUR 9

million), or from three to five times the profit obtained when the resulting amount is higher; and (ii) for the offence under art. 420 PC: the legal person shall be subject to a lower fine from one to three years (i.e. from EUR 10 800 to EUR 5 400 000), or of two to four times the profit obtained when the resulting amount is higher.

72. Under art. 427(2) PC, the determination of the applicable sanction to legal persons therefore requires the characterisation of the expected acts of foreign officials (as defined under arts. 419 and 420 PC), which will require reverting to the law of the State of the foreign official. This is contrary to Commentary 3 to the Convention (see section 1 on the offence) and is likely to jeopardise the application of the regime of sanctions against legal persons in foreign bribery cases that involve an EU official.

73. Both provisions under art. 445 (2) PC and art. 427(2) PC foresee the calculation of the fine based on the level of the amount of the profit obtained. However, as mentioned above regarding natural persons, guidelines on how to calculate the profit gained by legal persons from bribery have not been issued, and thus it is uncertain how it would be quantified in practice.

(ii) *Supplementary penalties*

74. Art. 445 (2) PC states that pursuant to the rules established in art. 66 bis PC, the judges and courts may also impose on legal persons the following penalties: (1) dissolution of the legal person; (2) suspension of its activities for a term that may exceed five years; (3) closure of its premises and establishments for a term that may not exceed five years; (4) prohibition to carry out the activities through which it has committed, favoured or concealed the felony in the future; (5) debarment from public subsidies and aid, contracts with the public sector and tax or social security benefits and incentives, for a term that may not exceed fifteen years and (6) judicial intervention to safeguard the rights of the workers or creditors for the time deemed necessary, which may not exceed five years (art. 33 PC, section 7, b) to g)). In cases of bribery of EU officials, art. 424(3) PC contemplates the possibility that a legal person is barred (i) from obtaining public subsidies and aid; (ii) from entering into contracts with public sector institutions, entities or bodies and (iii) from enjoying tax and Social Security benefits or incentives where the bribe is paid to obtain a contract that is subsidised by public funds, e.g. contracts funded by development aid or supported by export credit. Debarment under this provision does not only apply in a limited number of cases, it is also available for a shorter term than that which is available under art. 445(2) PC, i.e. from three to seven years under art 423(3) while it can be applied to up to fifteen years under art. 445(2) PC.

75. The preamble to the Organic Act 5/2010 clearly states that fines should be considered as the common and general penalty in all cases and that additional and more severe measures should be reserved for cases fulfilling the criteria under new art. 66 bis PC and taking into account: a) their [the penalties] need to prevent continuity of the criminal activity or its effects; b) their economic and social consequences, and especially the effects on workers and c) the post in the structure of the legal person held by the natural person or body that failed in its duty to control. The SPS Circular 1/2011 echoes the legislature when it states that “when it comes to sanctioning the legal person, the only penalty that shall anyhow be imposed on the legal person is the fine, which must be the priority action of prosecutors in their indictments unless special preventive reasons or the seriousness and specific circumstances of the incriminated conduct (number of injured parties, amount of the damage, etc.) suggest otherwise.” Sanctions such as debarment from public subsidies and aid and contracts with the public sector can significantly discourage companies from engaging in bribery and judges should be encouraged to use these types of sanctions, where appropriate. It appears that the consideration of the “economic and social consequences, and especially the effects on workers” (as set out in art. 66 bis PC) could strongly deter judges to impose such sanctions. This could prevent the application of effective, proportionate and dissuasive sanctions.

(iii) *Sanctions through Conformidad*

76. *Conformidad* (see above) also applies to legal persons under art. 747(8) CCP. No case law was provided by the authorities as to the impact of this type of settlement on the level of sanctions applicable to a legal person.

(iv) *Mitigation of sentences*

77. Certain mitigating factors may reduce the fine imposed in a given case as set out in article 31bis (4) PC. They are the same as for natural persons, including those provided under art. 66 PC (see above), which might very substantially lower the applicable penalties. More specifically, the availability of effective preventive measures (art. 31 bis (4) d) could play an important role in mitigating liability, as highlighted by one panellist during the visit. However, in the absence of implementing rules, guidelines or case law, the exact scope of these mitigating factors and their impact on the sanctions applicable to legal persons, remains to be determined (see section 2 on legal persons).

(v) *Level of sanctions applied in practice - Data available on sanctions against legal persons*

78. There have been no convictions of legal persons for foreign bribery or any other offence in Spain since the entry into force of the new regime of liability of legal persons, two years ago.

Commentary:

The lead examiners commend Spain for the high level and broad range of sanctions available in law, which can be imposed on legal persons for foreign bribery of non-EU officials. They are, in particular, encouraged by the availability of administrative sanctions such as debarment from public subsidies and aid, contracts with the public sector and tax or social security benefits and incentives, for a maximum term of fifteen years. However, they note that less severe administrative sanctions can be imposed on legal persons for foreign bribery of EU officials and only in cases where the bribe is paid to obtain a contract that is subsidised by public funds. In addition, as no such sanctions had been imposed at the time of this report, their effectiveness, proportionality and dissuasiveness cannot be assessed in practice. The lead examiners encourage Spain to make full use of the broad range of measures available for sanctioning legal persons and recommend that the Working Group monitor in particular the implementation of the administrative sanctions under the conditions set out in art. 66 bis PC.

In foreign bribery cases that involve EU officials, the determination of the applicable sanction against legal persons requires establishing the specific act of the public official induced by the bribe. The lead examiners consider that this is likely to jeopardise the implementation of the sanctions against legal persons. They therefore recommend that Spain amend the current statutory framework to harmonise the regime of sanctions against legal persons under art. 427 PC with the one under art. 445 PC.

Considering the broad scope of the mitigating factors, the lead examiners consider that the Working Group should monitor the application of mitigating circumstances, including through the procedure of conformidad, as case law develops in order to ensure that these factors lead to the imposition of sanctions against legal persons that are effective, proportionate and dissuasive.

4. Confiscation of the bribe and the proceeds of bribery

79. In Phase 2, the Working Group decided to follow up, as practice develops, on seizure and confiscation in foreign bribery cases, including any possible limiting effect of art. 431 PC (further discussed below). The confiscation of illegal assets is regulated by art. 127 PC which has now been in force, in its current wording since 2003. Confiscation is applicable to the bribe and the proceeds of the bribery (direct and indirect proceeds and regardless of the transformations they may have undergone). Seizure can also be ordered in cases where the offender is not convicted as a result of an exemption from criminal liability or because the case was statute bared. Article 127 (3) PC also provides for the confiscation of property of equivalent value. A limitation period is applied to the cases where the property is held or owned by a *bona fide* third party. In addition, the Penal Code contains another provision on confiscation (art. 431), which is specific to the corruption offences under Chapter VI of the PC, including the offence of bribery of a European official under art 427PC.⁴⁸ It is much narrower than art. 127 and refers only to confiscation of the actual gift or bribe. In Phase 2, the Working Group was concerned that the narrower provision in art. 431 PC may, in practice, supersede art. 127, hence narrowing the scope of available confiscation measures in foreign bribery cases. While this concern has now partially been alleviated regarding the offence under art. 445 PC -- to which art. 431 does not refer and thus apply -- this concern remains with regard to the offence of bribing a European official. No statistics and/or case law was provided that could illustrate the use made by the Spanish authorities of art. 431 PC.

80. With regard to legal persons, in Phase 2, Spain claimed that art. 127 PC would apply to legal persons although legal persons could not be held criminally liable at that time. In the 2010 amendments to the Penal Code, the sanctions applicable to legal persons expressly listed under arts. 445 (2), 427 (2) or 33(7) PC (see Section 3 of the report) do not include confiscation. However the Spanish authorities affirmed that art. 127 PC equally applies to both natural and legal persons for all malicious offences. The authorities also state that confiscation is not considered in Spain as a penalty but as an “ancillary consequence of the offence”, which would explain why it is not listed with the sanctions under arts.445 (2), 427 (2) or 33(7) PC. However, Spain did not provide statistics or case law where seizure and confiscation measures have been taken against legal persons before or after the reform of the Penal Code.

81. The procedural rules governing confiscation and pre-trial seizure have not changed since Phase 2. However, an Asset Recovery Office was established in 2010 (art.367 septies CCP) within the Ministry of Interior and will be in charge of tracing and identifying proceeds of organised crime. This Office was not operational at the time of the on-site visit. The magistrates met on-site welcomed the creation of this Office that is seen as an important tool to tackle the proceeds of crime and focus investigations on asset recovery. The Tax Inspectorate bodies and the police support units currently assist the ACPO in tracing and recovering illegally gained property. However, no example has been provided where this cooperation actually resulted in the identification of bribes or proceeds of bribery and the practice by the courts of *in rem* confiscation and value-based confiscation that are foreseen under art. 127 PC. Assessing the application of confiscation and provisional measures in practice is hampered by a lack of information. Spain has not shown any enforcement results since the revision of its legal framework for confiscation in 2003. No statistics or cases have either been provided of seizure and confiscation in the context of domestic corruption, especially in relation to proceeds obtained by a briber. The lead examiners also note that no provisional measures were taken in the 7 investigations of alleged foreign bribery carried out since the entry into force of the Convention.

82. With regard to training, the lead examiners have been informed that judges occasionally participate in seminars on confiscation and seizure but that no training courses are provided on a regular basis. Regular trainings would seem particularly relevant since the procedural rules do not address the very

⁴⁸ “In all the cases foreseen in this Chapter and in the previous one, the handouts, presents or gifts shall be confiscated”.

practical aspects of the confiscation of proceeds and their quantification, which is particularly challenging for all parties to the Convention, especially where a legal person is involved.

83. In a letter dated 4 December 2012, the Spanish Minister of Justice announced a reform of the regime of confiscation (as part as a more general legislative reform also discussed under other sections of this report) with the objective of strengthening the use of seizure, confiscation of the proceeds from bribery, confiscation in the absence of conviction, as well as *in rem* confiscation.

Commentary:

The lead examiners are encouraged by the commitment made by the Minister of Justice to review the Spanish rules on confiscation. In this context, they recommend that Spain clarify, by any appropriate means, that confiscation in all foreign bribery cases is governed by art. 127 PC and that the limitations under art. 431 PC do not apply where a bribe is paid to an official of the European Union or to a public official from an EU member State.

The lead examiners are seriously concerned by the continued lack of implementation of Article 3(3) of the Convention by Spain. Although the legal framework foresees the confiscation of the proceeds of the bribery of a foreign public official, this article has not been enforced in practice in relation to any offence since its entry into force, 9 years ago. Additionally, confiscation of the bribe and the proceeds of the bribe from a legal person is not expressly provided by law and the application of art. 127 PC to legal persons has not been clarified by case-law. The lead examiners recommend that Spain clarify that legal persons can be subject to confiscation measures on the same basis as natural persons.

The lead examiners also recommend that Spain take steps to ensure that law enforcement authorities and prosecutors seek confiscation in corruption cases, whenever appropriate. Dedicated training and guidance on the practical aspects of the confiscation of the proceeds of bribes and their quantification should also be provided. Spain could use for guidance initiatives developed at international level in this area (such as the joint OECD-StAR analysis on “Identification and Quantification of the Proceeds of Bribery”). Finally, the lead examiners encourage Spain to make the Asset Recovery Office operational as a matter of priority.

5. Investigation and prosecution of the foreign bribery offence

(a) Organisation and principles of investigation and prosecution and resources

84. Phase 2 recommendation 3a that Spain “implement the decision of the Spanish authorities to attribute to the ACPO the power to investigate and prosecute all foreign bribery cases other than minor cases without the need for a case-specific determination of special significance by the Attorney General of Spain (FGE), take additional measures to ensure that all significant foreign bribery allegations are investigated and continue to provide the necessary resources to investigators and prosecutors” was deemed implemented at the time of Spain’s Phase 2 written follow up but it was decided that the Working Group should continue to monitor its implementation.

(i) Organisation of investigations and prosecutions in Spain

- Specialised Police forces

85. Section 126 of the Constitution provides that the Police is subordinate to judges and public prosecutors in the investigation of crimes. The Police is placed under the responsibility of the Ministry of Interior and is regulated under the Police Act (*Ley Orgánica de Fuerzas y Cuerpos de Seguridad del*

Estado). In addition to the Civil Guard and the National Police, some regions, like Catalonia and the Basque Country, have set up their own police forces. As in Phase 2, both the Civil Guard and the National Police had units specifically assigned to ACPO⁴⁹ that specialise in the fight against corruption. Human resources (20 persons in total) remain at the same level as in Phase 2.

86. In addition, each prosecutor has the possibility of assigning specific act(s) or operation(s) to other forces in the broader context of an investigation that remains as a whole led by the prosecutor in its first phase and, by the investigating magistrate in its second phase (section 11 of Royal Decree, *Real Decreto*, 769/1987, section 4.4 of the Prosecution Service Act and section 35 of Police Act). The prosecutors met on-site indicated that, in practice, none of the police forces has so far been involved in a foreign bribery investigation and that these technical investigations have instead involved experts attached to the ACPO. Nonetheless, police may also play an important part in the detection and enforcement of the foreign bribery offence, for instance in the context of investigations which may start on the basis of another offence. According to the law enforcement representatives met on-site, with the exception of the police unit specifically assigned to the ACPO, the police forces do not receive specific training on foreign bribery.

- The Special Public Prosecutor's Office against Corruption and Organised Crime (ACPO)

87. The State Prosecution Service (*Fiscalía General del Estado*, hereinafter SPS) is comprised of prosecution services attached to various courts, as well as certain special prosecution services and general offices. The head of the SPS is the State General Prosecutor (*Fiscal General del Estado*, hereinafter FGE), who is nominated by the Government. The ACPO is a special prosecution service for economic crime and corruption cases. Although it forms part of the SPS, the ACPO differs from other public prosecution offices because it has support units permanently assigned to it. According to ACPO prosecutors met on-site, their office deals with no more than 300 cases per year amongst which 50 new proceedings started in 2012. As is the case in the public prosecution offices of other countries, the ACPO is structured hierarchically and its prosecutors are bound by instructions, including by the FGE.

88. Since Phase 2, the ACPO resources have been reinforced with the addition of 6 Prosecutors (15 instead of 9 at the time of Phase 2, each with more than 10 years experience) and 16 Delegate Prosecutors (which are newly created positions further reinforced in 2012) on top of the already existing Assistant Chief Prosecutor and Chief Prosecutor.⁵⁰ Special units remain assigned to the ACPO from the Tax Department (10 tax inspectors instead of 9 at the time of Phase 2); from the Support Unit of the General Administrative Inspectorate of the Civil Service (2 inspectors and 3 administrators); and from the two principal law enforcement agencies, the Civil Guard and the National Police (20 officers as in Phase 2). The ACPO "delegates" in regular SPS offices⁵¹ focus on domestic offences and have not been involved in any foreign bribery case so far. According to ACPO prosecutors, foreign bribery offences should generally be investigated and prosecuted centrally by the ACPO. The ACPO representatives met on-site were satisfied with the increased human resources mentioned above, as well as with the financial resources available to the ACPO. They explained that ACPO's budget is included in the overall Ministry of Justice budget which means that there is no specific amount allotted to the ACPO, hence allowing a level of flexibility in its resources.

⁴⁹ With the 2007 amendment of the Organic Statute of Public Prosecution Service (EOMF), the ACPO (formerly anti-Corruption office) was renamed Special Public Prosecutor's Office against Corruption and Organised Crime but the former acronym (ACPO) still designates this specialised prosecution office as was confirmed on-site.

⁵⁰ The Chief Prosecutor of the ACPO is selected by the Government on a proposal submitted by the FGE, after having consulted the FGE Council (*Consejo Fiscal*).

⁵¹ Barcelona, Balearic Islands, Valencia, Alicante, Murcia, Almeria, Seville, Malaga-, Cadiz, Tenerife and Las Palmas.

- Training

89. During the on-site visit, the prosecutors in the ACPO demonstrated an excellent level of awareness of the offences under art 445 PC and a good level of the offence under art 424 PC which, through art. 427 PC, applies to the bribery of EU officials. However they lacked experience and training on the application of both offences and on the enforcement of art. 424 to foreign bribery offences which, as discussed under section 1, raises a number of serious difficulties. A reason for this situation may be that the last training on the foreign bribery offence dates back to 2009 and that no training has been provided, even to these specialised prosecutors, in spite of the entry into force of the revised PC and its new foreign bribery offences, on 23 December 2010. Conversely, according to the Spanish authorities, trainings have been provided on the new regime of liability of legal persons.

- Attribution of foreign bribery cases to prosecutors: the "special significance" criterion for ACPO jurisdiction

90. Pursuant to the information provided by the ACPO after the on-site visit, the 2007 reform of the Organic Statute of Public Prosecution Service (*Estatuto Orgánico del Ministerio Fiscal* – hereinafter EOMF),⁵² reinforced the specialisation and effectiveness of the ACPO for fighting foreign bribery offences, hence, in the view of the Spanish authorities and ACPO representatives, implementing recommendation 3a. In support of this view they indicated that the amended EOMF has expressly established the competence of the ACPO over bribery offences in international business transactions, whereas, before 2007, the text only referred to the generic term of “bribery” (former art. 18 ter).⁵³ However, the text remains unchanged with regard to the requirement that, the offence must be of “special significance” as defined by the FGE. In Phase 2, this requirement for an individual decision from the FGE to determine ACPO jurisdiction was seen as a potential obstacle to the effective investigation and prosecution of the foreign bribery offence by the ACPO. The situation has evolved with Direction 4/2006⁵⁴ on the powers and organisation of the ACPO as it now specifies that the ACPO has jurisdiction over any serious case of bribery of foreign official without the need for a case-specific determination of special significance by the FGE.

91. With regard to ACPO jurisdiction more generally, even where a case is attributed to the territorially competent prosecutor, e.g. where an investigation started on the basis of another offence, the ACPO prosecutors indicated that the case would be referred to them as soon as it revealed elements of foreign bribery. On the basis of the information available at the time of drafting this report, no foreign bribery case had been handled by another prosecution office than the ACPO.

92. However, the analysis of the cases (discussed under the introduction) revealed a failure to transmit information to the ACPO regarding two cases involving foreign bribery allegations. This situation raises concerns with regard to coordination between various law enforcement authorities and, in particular, between the SPS and the ACPO. In the Panama Case, Spain informed the evaluation team that the SPS, which had been informed of media allegations of bribery of public officials in Panama, closed the case without informing the ACPO, which only heard about the case following its discussion by the Working Group. In the El Salvador Case, another important foreign bribery allegation was revealed in an extradition request from El Salvador for a Spanish national wanted for bribery of Salvadorian public officials (this case is discussed under section 9 of this report). Spain explained that the request was processed by the

⁵² Law 50/1981 of 30 December 1981 as amended by Law 24/2007 of 9 October 2007 which entered into force on 11 October 2007.

⁵³ Article 19.4, ñ) of the revised Organic Statute of Public Prosecution Service.

⁵⁴ Direction 4/2006 entered into force on 12 July 2006.

High Court without the knowledge of the ACPO. In these two cases, the ACPO therefore did not have an opportunity to consider the facts disclosed in the request in the context of a possible foreign bribery investigation or prosecution.

Commentary:

The lead examiners note and recommend the continuation of the efforts made by Spain since Phase 2 to ensure that the ACPO is adequately staffed and has enough financial resources. However, they regret that, in spite of the large reform of the Penal Code, which entered into force in December 2010 and included, in particular, a revision of the foreign bribery offences, no training has been provided to the ACPO prosecutors and the specialised personnel assigned to it, along with other members of the judiciary and representatives of law enforcement authorities potentially involved in these cases. This is all the more important in the context of (i) the Central Investigating Magistrate Court decision to close a foreign bribery case revealing that elements taken into account in this decision were not in line with Article 1 of the Convention; and (ii) a lack of clarity as to whether all the foreign bribery offences, and in particular, the offences of bribery of EU officials would fall under the unique jurisdiction of the ACPO.

Hence, the lead examiners recommend that the police forces and magistrates, in particular in the Central Investigating Magistrate Court, receive adequate training (i) on the specific elements of the foreign bribery offences; on the investigative techniques adapted to this offence; and more generally, (ii) about the need to more actively and pro-actively detect, investigate and prosecute the offence of bribery of foreign public officials by both individuals and companies. They also recommend that the ACPO, including the specialised agents attached to it, receive specific trainings to update their knowledge on the above mentioned topics, in particular with regard to the revised foreign bribery offences in the Penal Code.

The lead examiners are encouraged by the 2007 reform of the Organic Statute of Public Prosecution Service(EOMF) which has expressly established the competence of the ACPO over serious bribery offences in international business transactions, hence pursuing the efforts of specialisation of the ACPO recommended under Phase 2 recommendation 3a. However, they recommend that Spain (i) clarify by any appropriate means that the foreign bribery offence under the jurisdiction of the ACPO includes the offences of bribery of an EU official under art. 427 PC; (ii) take all necessary steps to reinforce the coordination between the SPS and the ACPO and more generally between the relevant authorities in relation to foreign bribery allegations, investigations, prosecutions and international cooperation; and (iii) ensure that the courts and other law enforcement authorities systematically and urgently inform the ACPO of any foreign bribery allegation which comes to their knowledge, with a view to allow this highly specialised prosecutor's office to perform effectively the central role it has been allocated in the fight against foreign bribery.

(ii) *Principles of investigations and prosecution*

- Principle of mandatory prosecution

93. Spain follows the principle of mandatory prosecution in accordance with the EOMF and arts. 100 and 105 CCP. In theory, the prosecution must prosecute all crimes although there appear to be limits to this

obligation, which explain that it is sometimes described as a “regulated opportunity” (*oportunidad reglada*).⁵⁵

- Reasons for staying prosecution or avoiding a full criminal trial

94. In a number of specific circumstances, the prosecutors can decide not to prosecute a case or to terminate a prosecution (although the approval of the investigating magistrate is required in the judicial investigation phase – see below).

95. One reason for staying proceedings or not prosecuting is obviously where an offence has become statute barred. Out of the 7 foreign bribery cases investigated in Spain to date, 5 were closed on this basis.⁵⁶ Additionally, 3 foreign bribery cases, discussed in the context of the Working Group as involving Spanish companies and 2 cases brought to the attention of the Spanish authorities by foreign countries did not lead to the opening of any investigation in Spain (Panama and El Salvador cases). The Spanish authorities indicate that these 5 cases were statute barred before coming to their attention.

96. Another reason for concluding cases without a full criminal trial is the use of the abbreviated procedure of *conformidad* (a plea agreement between the prosecution and the accused, discussed in detail below). Prosecutors can also decide not to prosecute due to lack of grounds for prosecution (art. 5 EOMF), but also due to a lack of sufficient evidence of the criminal conduct revealed by the initial prosecutorial investigation (see below on the different investigation phases) which leaves room for a degree of discretion (art. 641 CCP). It is on the basis of the latter provision that the prosecutors decided (or requested the investigative judge to decide in the Costa Rica Case) to close 6 out of the 7 cases of foreign bribery investigated to date.⁵⁷ The same reason formed the basis of the investigating magistrate’s decision not to file an indictment in the 7th case (Angola Case), this time against the prosecutors’ opinion. An assessment of the reasons for closing these cases shows that the evidentiary threshold was high and, in at least one instance (in the Angola Case) even requiring the proof of elements beyond those which would be required to be proved if the offence were defined as under Article 1, paragraph 1 of the Convention (see discussion under section 1 of this report).

- Commencement of cases

97. While foreign bribery can be prosecuted *ex officio* (on the prosecutor’s own initiative - art. 105 CCP), Spanish law also allows victims, including foreign citizens and companies, to bring private prosecutions (*acusación particular*, section 24.1 of the Constitution) by filing a criminal complaint. Under private prosecution, the complainant becomes an accusing party (*querrela*) in the case during the investigation and trial phases. In the case where the prosecutor decides to close a case, the victim can still lodge its complaint directly with the investigating judge. Spanish law also allows people not directly connected to the crime to take part in the case in bringing a public action and thus initiate proceedings (*acusadores populares/acción popular*, section 125 of the Constitution). Case law has extended the right to bring an *acción popular* to legal persons. This right does not extend to foreign citizens or to foreign companies but Spanish associations or NGOs involved in the fight against bribery could theoretically bring a claim to initiate a a foreign bribery case investigation or prosecution.

⁵⁵ See Euro Justice report on Spain: http://www.euro-justice.com/member_states/spain/ (p.422).

⁵⁶ 4 were filed by the ACPO prosecutors and 1 by the investigating judge following a request from the ACPO.

⁵⁷ The latter figure overlaps the figure mentioned above with regard to the number of cases filed as statute barred because in some instances, both reasons were raised in the same case, in support to the decision not to prosecute.

98. In the legal systems where it is contemplated, private prosecution is often described as a remedy for prosecutor's inaction.⁵⁸ The broad availability of private prosecution can be an important safeguard in this respect. In a number of high profile domestic cases, individuals or associations, such as associations of consumers, have exercised the right of private prosecution or *acción popular*. However, a prosecutor met in Phase 3 indicated that this possibility of an *acción popular* would remain limited with respect to foreign bribery as art. 23(2)(b) of the Organic Act of the Judicial Power (LOPJ) requires that, when an offence is committed outside of the Spanish territory, the case can only be brought by the prosecutor or the aggrieved party. At the time of drafting this report, no foreign bribery investigation had started on the basis of private prosecution or an *acción popular* in Spain.

99. Notwithstanding this large range of possibilities to prosecute a case, the Phase 2 report noted a limit to the power of prosecutors and judges to commence cases on their own initiative if it were determined that foreign bribery cases are subject to jury trial. As the Law on Jury Trials (art. 24(1)) may require that jury trial cases be commenced by a "party", this could exclude the possibility of prosecutors and judges commencing the case *ex officio*. This led to Phase 2 recommendation 3d that Spain take appropriate measures to "*clarify the law in order to remove uncertainty about whether foreign bribery cases are subject to trial by jury*". This recommendation was deemed not implemented at the time of the Phase 2 written follow up. In their replies to the Phase 3 questionnaires, the Spanish authorities contended that this issue has now be clarified with the revision of the PC (Organic Act 5/2010), pursuant to which foreign bribery is now an autonomous crime, no longer enshrined in the chapter on bribery offences and that accordingly it no longer falls within the jury's remit. It remains that article 1.2.g) of Organic Act 5/2010 on the Jury Court provides that domestic bribery is one of the offences that falls within the scope of the Jury Trials since it refers to article 419-426 PC. This raises the question of whether cases of bribery of EU officials are subject to trial by jury through the reference to art. 424 PC enclosed in art. 427 PC. The inconsistent replies obtained in this regard during the on-site visit show a need to further clarify this issue. Hence, Phase 2 recommendation 3d remains only partially implemented.

- Conduct of cases: the initial prosecutorial investigation and the judicial phase

100. Prior to the opening of a judicial procedure, the SPS can investigate cases in a phase known as the initial prosecutorial investigation (*diligencias informativas*). In Phase 2, the Working Group decided to follow up on "the role of the FGE with regard to the prosecution of foreign bribery cases, including the impact of the rule requiring that the FGE grant extensions for prosecutorial investigations that last more than six months". At the time of its Phase 2 written follow up, Spain explained that with the revision of the EOMF, in 2010, the period of time granted to the Public Prosecutor for the initial prosecutorial investigation of a corruption case had been extended from six to twelve months, which can be extended without limit (art. 5.2 para. 4 EOMF).⁵⁹ According to ACPO prosecutors, during the over 12 years of existence of the ACPO, the FGE has never denied an extension. The period of time taken for the initial prosecutorial investigation, in the seven cases investigated to date, ranged from 5 months (in the Defence Materiel Case) to just below 12 months (in the Costa Rica Case).

101. If at the conclusion of a prosecutorial investigation, the prosecutor considers that there is insufficient evidence of a criminal offence, the prosecutor can file or close the proceedings with the agreement of the Chief Prosecutor of the ACPO.⁶⁰ In the absence of any complainant or identified victim,

⁵⁸ Private Prosecution: A Remedy for District Attorneys' Unwarranted Inaction". *The Yale Law Journal* (The Yale Law Journal Company, Inc.) 65 (2): 209–234. Dec., 1955 ; and <http://law.jrank.org/pages/900/Criminal-Procedure-Comparative-Aspects-Prosecution.html>

⁵⁹ Article 5.2, paragraph 4 of the Organic Statute of Public Prosecution Service.

⁶⁰ In practice, the prosecutor in charge of the investigation submits a proposal to file the proceedings, summarising the procedural steps taken and evidences gathered and the grounds for filing the case.

the ACPO prosecutors must notify the Chief Prosecutor of the ACPO of the closure of proceedings and the reasons for such decision.⁶¹ Of the 7 cases investigated to date, 6 were closed by the ACPO prosecutors at this stage of the proceedings on the grounds of lack of evidence.

102. Following a prosecutorial investigation, the prosecutor can request the relevant investigating magistrate to carry out a judicial investigation and provide him/her with the evidence obtained up to that point. Once a judge becomes involved, the judicial investigation (*diligencias previas*) begins. According to the Spanish authorities, while the prosecutors would then supervise the proceedings, the investigation would be carried out by the investigating magistrate. ACPO prosecutors confirmed at the on-site visit that due to the nature of foreign bribery cases, they would, in most cases, file them with a central investigating magistrate who has jurisdiction to act throughout Spain and can prepare the case for the National Court. Out of the 7 cases investigated in Spain to date, only 2 went beyond the stage of the prosecutorial investigation. Out of these 2 cases, 1 only was subject to an order of a central investigating magistrate to start judicial investigation in April 2008 (Costa Rica Case). A year and a half later, the investigating magistrate ordered the dismissal of the investigation on the basis of a request from the ACPO on the grounds that it was not possible to file an indictment against the suspect because the criminal conduct could not be evidenced “beyond reasonable doubt”. In the other case (Angola Case), the central investigating magistrate ordered a stay of proceedings, hence rejecting the ACPO’s request to enter the judicial investigation phase.

- Independence of the Public Prosecutor’s Office and of the investigating magistrates

103. The Spanish authorities stress that pursuant to art. 7 EOMF, a prosecutor acts objectively and independently “without prejudice that he might receive instructions from his senior”. They also stress that they do not receive instructions from the Ministry of Justice and that they do not have an obligation to inform the Ministry on the opening or closing of a case. The same is not true with regard to the FGE as prosecutors, including the ACPO, are required to inform the FGE about significant cases and the FGE can give instructions in individual cases. The FGE is nominated by the Government but the Spanish authorities underline that the reform of the EOMF in 2007 has established that the FGE has a mandate of four years during which he may only be dismissed for objective reasons (art. 31) which has significantly reinforced his independence and impartiality. They also refer to art. 29 EOMF which provides that the FGE’s appointment requires a report from the General Council of the Judiciary and a hearing of the candidate, prior to his appointment before the Congress of Deputies in order to examine his merits and suitability. The Phase 2 report noted that the FGE has appeared before the Justice and Interior Committee of the Parliament to explain actions in high profile cases and his interaction with the ACPO. Given that the FGE exercises a considerable degree of hierarchical control over the prosecution service and in particular the ACPO, this raises the question of the independence of the prosecution with regard to the other powers, especially in high profile cases of foreign bribery. This question is all the more important considering that Prosecutors frequently continue to play a central role in the investigation during the judicial phase. In Phase 2, certain commentators, including a magistrate subsequently appointed to the Supreme Court, had noted that the decline in the role of the investigating magistrate and the corresponding increased reliance on prosecutors raises general concerns about the prosecution of politically sensitive cases because of the degree to which the SPS and ACPO are subject to the FGE.

104. The possibility for private individuals (including defendants) and groups to initiate private prosecutions against investigating judges for acts performed in the course of their professional duties has raised concerns in media reports about possible limits to the guarantees of these magistrates’ independence,

⁶¹ In the case of a private prosecution initiated by a complaint, the prosecutor must notify the person(s) who claimed to have been injured by the offence of that decision in order that he/she may have the opportunity to repeat his/her accusation before the investigating magistrate. [See Article 773(2) LECrim].

including possible consideration of the prohibited factors in Article 5 of the Anti-Bribery Convention. The Spanish authorities underline that sanctioning a judge who has breached the law in the course of his professional duties should be regarded as an example of the soundness and independence of the Spanish Judicial System.

105. The Phase 2 report stressed that, the ACPO reportedly had difficulties in commencing certain cases where the FGE did not agree with the ACPO's view that prosecution was required. The Working Group decided at the time to follow up with regard to the prosecution of foreign bribery cases and the role of the FGE. In Phase 3, no difficulty in this regard was reported by the ACPO in the context of the 7 cases of foreign bribery investigated to date. ACPO prosecutors also stressed that the clarification of the jurisdiction of the ACPO on significant cases of foreign bribery and the extension of the preliminary investigation period, from 6 months to 1 year, have contributed to lessen the influence of the FGE.

Commentary:

The Lead examiners are concerned that the level of investigative activity conducted by the ACPO in Foreign bribery cases seems too low. This may be due, at least in part, to cases being prematurely closed. This is exemplified in the Costa Rica and the Angola cases. The lead examiners therefore recommend that the Spanish authorities ensure that foreign bribery allegations are not prematurely closed.

With regard to the commencement of foreign bribery cases, the lead examiners are encouraged by the broad range of possibilities offered under Spanish legal system, including the safety net that private prosecution may represent. They also note the extension of the period of time granted to the Public Prosecutor for the initial prosecutorial investigation of a corruption case from six to twelve months. Nonetheless, they recommend that Spain clarify by any appropriate means that foreign bribery cases involving an EU official as provided under art. 427 and 422 PC are not subject to the Law on Jury Trials (art. 24(1)) in order to fully implement Phase 2 recommendation 3d.

In view of the limited number of investigations and the total absence of foreign bribery prosecutions in Spain, almost 13 years after the entry into force of its foreign bribery offence, the lead examiners recommend that the guarantees of independence from the other powers (i) of the State Prosecutor General (FGE) and indirectly those of the ACPO, as well as those (ii) of the investigating magistrates be followed up with a view to ensure that a potential lack of independence of the prosecution combined with its increasingly prominent role does not lead to the consideration of factors prohibited under Article 5 of the Convention.

(iii) *Sources of allegations*

106. In Spain, a case usually begins with a simple report (*denuncia*) or a criminal complaint (see above). Reports can be filed with the police, a prosecutor or a judge. Prosecutors can also commence cases on their own initiative and ACPO prosecutors indicated that important cases of corruption in the domestic arena have begun as a result of ACPO reacting to press reports. With regard to the 7 foreign bribery cases investigated to date in Spain, cases started on the basis of: (i) a report of the Independent Inquiry Committee into the United Nations Oil for Food program (Oil-for-Food Case); (ii) a press release (Costa Rica Case); (iii) information obtained in the course of OECD Working Group meetings (Defence Materiel and Libya Cases); (iv) Spanish FIU (SEPBLAC) reports (Angola Case); and (v) mutual legal assistance requests from Switzerland (Morocco Case) and Latvia (Latvia Case).

107. The Spanish authorities also indicated that in one instance, a case had been reported to law enforcement by a Spanish representation in a foreign country but that in the absence of sufficient grounds, it was not investigated. It emerged from the discussions on site that the prosecutors did not turn to the Spanish representation to try to obtain more information. Three other cases allegedly involving Spanish companies and individuals that had given rise to media coverage and were discussed in the course of OECD Working Group meetings, have also not been investigated. In a final case, the Spanish authorities received a request from El Salvador to extradite a Spanish national. They refused the extradition but did not start an investigation against their national (this case is discussed under section 9 of this report). This reflects the limited pro-activity deployed so far by the Spanish prosecution when it comes to opening a case of foreign bribery.

(iv) *Availability of data on cases*

108. At the time of the Spanish Phase 2 written follow up, recommendation 3e “that Spain take appropriate measures to improve the collection and dissemination of statistical information relevant to evaluating the fight against foreign bribery” was deemed fully implemented on the basis of the replies provided by the Spanish authorities in their report. These replies mentioned, in particular that “the Deputy Directorate General of Judicial Registries of the Ministry of Justice, at the request of the Directorate General of International Legal Cooperation, had approved to include in the Project of Interconnection of Registries the creation of a new specific computer code or crimes of Article 445 of the Penal Code, in order to distinguish in the statistics the registering of all judgments of conviction regarding the commission of a crime of bribery, which will specifically have the number code 9445, besides corruption, bribery or influence peddling by any authority public official or elected post.”

109. However, in their replies to the Phase 3 questionnaires, the Spanish authorities were unable to provide statistics distinguishing between enforcement actions concerning alleged foreign bribery, related accounting misconduct and related money laundering misconduct. They indicated that “No information is available due to the absence of a specific record for this type of offence.” They were also unable to provide an explanation as to the reason why this project had not been implemented. Furthermore, the ACPO prosecutors met during the on-site visit were not aware of this project. They explained that the cases they are dealing with do not receive a special code and that they are only designated by name. Moreover, while they were confident that their office would be attributed all foreign bribery cases under art. 445 PC, they could not affirm that offences of bribery of EU officials under art 427 and 424 PC would receive the same treatment. As a result, in the absence of availability of centralised data, they were not in position to assert with certainty that no offences of bribery of EU officials under art 427 and 424 PC were being investigated by local prosecutor’s offices at the time of the on-site visit. Recommendation 3e was therefore not implemented. At the time of finalising this report, the Spanish authorities referred to the European Criminal Records Information System (ECRIS) in place since April 2012 in Spain.⁶²

Commentary:

The lead examiners also recommend that Spain use proactive steps to gather information from diverse sources of allegations and enhance investigations.

In addition, they recommend that Spain raise awareness at the national level about the need to prioritise the investigation of foreign bribery offences.

⁶² According to Spain article 445 PC has been currently assigned the data processing number 22219 that corresponds to the offence of corruption in international commercial transactions and that belongs to the ECRIS family 1305.

The lead examiners recommend that Spain take the necessary steps to implement Phase 2 recommendation 3e, notably through considering the establishment of a national database for all ongoing cases with a view to ensure coordination of foreign bribery investigations, including the offences of bribery of EU officials, nationally and to avoid intelligence gaps.

(b) Investigation tools and challenges in the investigation of foreign bribery

110. While the ACPO has special support units, it does not have any additional legal powers beyond those available to regular prosecutors. The Phase 2 report even noted that on paper, the ACPO has fewer powers to investigate the economic situation of a suspect, including relevant bank information, than the FGE's Office for the Prevention and Repression of Illicit Traffic in Narcotic Drugs (ADPO).⁶³ On the contrary, in their Phase 2 written follow-up report, the Spanish authorities indicated that "Special Public Prosecutor's Office extended and reinforced competences shall, by themselves, provide the means to ensure that all important reports on bribery of foreign public official are investigated." This general statement was reiterated in Phase 3 but no detailed information or specific textual reference was provided in support of this. The ACPO representatives met on-site considered that they have sufficient powers including access to bank information.⁶⁴

111. No information was provided by Spain before the on-site visit with regard to the range of investigative techniques available for investigating foreign bribery. While the use of undercover agents may be authorised by the investigating magistrate or the prosecutor in charge of an investigation on acts pertaining to organised crime,⁶⁵ according to the prosecutors and law enforcement representatives met on-site, this had never been used in foreign bribery investigations, at the time of the visit. The ACPO prosecutors also stressed the very limited investigation tools available to them in the prosecutorial investigation phase and, in particular, the impossibility of conducting searches and wiretapping. After the on-site visit, Spain specified that ACPO prosecutors undertake fact-finding missions and have the power to give orders to other law enforcement agencies but they confirmed that they cannot undertake investigative measures involving the restriction of fundamental rights, such as searches and wiretapping, without the authorisation of the Investigating Magistrate's Court. No information was provided as to the ease with which these authorisations are granted and whether these may be granted at the preliminary investigation stage.

Commentary:

Given the limited amount of information received in the context of this evaluation on the investigation tools available to the ACPO in Spain, the lead examiners recommend that the Working Group follow up on the investigative powers available to the ACPO prosecutors and that the investigation tools available to them in the prosecutorial investigation phase are sufficient and in particular include the possibility to conduct searches and wiretapping (within the limits of its data protection rules and the provisions of its Constitution).

⁶³ See details on the different laws on bank secrecy under Phase 2 report, para 54.

⁶⁴ Spain refers to article 773.2 CCP and to articles 4 and 5 EOMF. Spain also indicate that the Criminal Division of the Supreme Court has explicitly decided on the validity of the request on financial information made by the Prosecution Service during its investigations: see Sentence 1607/2005 of 26 December (Granados Perez) or Sentence 986/2006 of 19 June (Garcia Perez).

⁶⁵ See Euro Justice report on Spain: http://www.euro-justice.com/member_states/spain/ (p.410)

(c) *Termination of prosecution and “plea agreements” (conformidad)*

(i) *Grounds for dispensing with prosecution and control by the court over decisions not to prosecute*

112. If at the conclusion of a prosecutorial investigation, the prosecutor considers that there is insufficient evidence of a criminal offence, the prosecutor can file or close the proceedings with the agreement of the Chief Prosecutor of the ACPO.⁶⁶ Similarly, once the judicial investigation is completed, the judge can decide, *inter alia*, (i) to close the case (*sobreseimiento*) if there is insufficient evidence or the facts do not reveal commission of a crime (this was used in the Costa Rica Case), on the basis of the conclusions of the prosecutor (as also discussed above under “mandatory prosecution”); or (ii) issue a formal decision which opens the intermediate phase of proceedings (preparation of the oral phase). In turn, if the judge does not decide to transfer the case to the relevant court for the oral phase, the intermediate phase can end by the judge closing the case.

(ii) *Principles and practice of “conformidad” (also discussed under section 3 on sanctions)*

113. No information was provided by Spain on this issue in the response to the Phase 3 questionnaire before the visit. Spanish criminal procedure provides for a form of settlement known as *conformidad* (a process through which a defendant agrees to the termination of his case by expressing his “conformity”).⁶⁷ It may apply to offences with a penalty not exceeding six years, which includes all the foreign bribery offences under art. 445 but also under art. 427 PC. It generally operates when the accused and the defence attorney agree to the charges that contain the most serious penalty sought by the prosecution (the latter including both the SPS/ACPO and private prosecutors). *Conformidad* is sometimes characterised as a unilateral act by the prosecution, but various provisions, including the possibility to take into account mitigating factors, provide some scope for negotiations about the maximum requested sanction which the defence then accept. In practice, the prosecution service undertakes to reduce the penalty in exchange for the defendant’s acceptance of the most serious charges. Hence, while *conformidad* does not require an explicit recognition of guilt, it is tantamount to it as the defendant agrees with the charges.⁶⁸

114. *Conformidad* may take place at different stages of the procedure, from the judicial investigation stage until just before the hearing. It makes the hearing unnecessary although the judge must hear the accused to verify that his consent has been freely given and that he is aware of the consequences stemming from it. The judge has the power to reject the settlement and order the continuation of the case. Once accepted, these settlements cannot be appealed. During the visit, one magistrate indicated that art. 787 CCP has recently been amended to allow a legal person to agree to a *conformidad* through its legal representatives (new para. 8). Magistrates also indicated that *conformidad* proceedings receive the same publicity as any judgement although they specified that such publication does not include factual elements. Examples of such publications were provided to the examiners just prior to the adoption of this report by the WGB.

115. The use of these settlements has apparently increased in recent years but Spain did not provide figures as to the extent of this increase. Neither was information provided as to the use of *conformidad* to sanction domestic bribery but media reports referred to its use in high profile domestic bribery cases.⁶⁹

⁶⁶ In practice, the prosecutor in charge of the investigation submits a proposal to close the proceedings, summarising the procedural steps taken and evidences gathered and the grounds for closing the case.

⁶⁷ Stephen C. Thaman, *Plea-Bargaining, Negotiating Confessions and Consensual Resolution of Criminal Cases*, vol 11.3 ELECTRONIC JOURNAL OF COMPARATIVE LAW (December 2007), <http://www.ejcl.org/113/article113-34.pdf>.

⁶⁸ *Ibid.*

⁶⁹ El Pais: http://elpais.com/diario/2011/10/23/andalucia/1319322123_850215.html.

While legal practitioners confirmed during the on-site that it may be used for the settlement of foreign bribery cases, it had never been used in such cases at the time of drafting this report.

Commentary:

The lead examiners recognise the value and flexibility provided by the conformidad procedure under art. 787 CCP, which has enabled Spain to sanction individuals, in domestic bribery cases. However, they recommend that Spain, as necessary and in compliance with the relevant rules and procedures, and respecting the fundamental rights of the Defendant, ensure that the decisions published include elements of the arrangements reached through conformidad, when appropriate, such as the terms of the arrangement (in particular, the amount agreed to be paid), as this would add accountability, raise awareness, and enhance public confidence in the enforcement of the anti-corruption legislation in Spain.

(d) Statute of Limitations

116. At the time of the Phase 2 written follow up, the recommendation that Spain ensure that the statute of limitations applicable to all foreign bribery offences extends for an adequate period of time for the investigation and prosecution of the offence was considered not implemented. Limitation periods ranged from 3 to 10 years depending on the exact characterisation of the offence (i.e. on the act induced by the bribe). The limitation period for foreign bribery and other corruption offences was extended in 2010, with the revision of the Penal Code. This extension automatically stemmed from the increase of the level of sanctions, the length of the limitation period being based on the sanctions for the corresponding offence.⁷⁰ For the offences under arts. 445 (bribery of a foreign public official) and 419 PC (bribery of an EU official for an act contrary to his/her duty), where the maximum prison term is 6 years, the limitation period is now 10 years. For the offence under art. 420 PC (bribery of an EU official for an act inherent to his/her office), where the maximum prison term is 4 years, the limitation period is 5 years.

(i) Two different limitation periods for three bribery offences

117. The lead examiners are seriously concerned by the impact of the statute of limitations on Spanish investigations and prosecutions of the foreign bribery offence. The information on enforcement activity provided by Spain shows that out of the 7 cases of alleged foreign bribery (for acts that occurred before the 2010 reform and to which the former 3 year limitation period applied) that have been investigated by the ACPO, 5 were closed because they were time barred (three quarters of the cases). The prosecutors met during the on-site visit also indicated that, in another case of alleged foreign bribery, no investigation was opened by the ACPO due to the limited amount of time left before this case would have become statute-barred. During the on-site visit, the Spanish authorities unanimously recognised that a three year limitation period, such as existed before the 2010 reform of the Penal Code, did not allow a reasonable period of time for discovery and investigation of domestic and transnational bribery offences. The Spanish press regularly mentions domestic corruption investigations that have been abandoned because of the expiration of the limitation period. During the on-site visit, ACPO prosecutors indicated that they are confident that the new 10 year limitation period will allow them sufficient time for investigating and prosecuting foreign bribery cases. This was without taking into account the 5 year time limit for investigating the offence under art. 419 PC.

118. The effectiveness of a shorter limitation period, in a system with two distinct limitation periods based on the origin of the foreign official (EU official or non-EU official) and the type of act induced by the bribe (offence under art. 445, 419 or 420 PC) raises concerns. Where the acts of bribery are discovered

⁷⁰ See Phase 2 report, at paragraph. 99.

5 to 10 years after the last bribe payment was made, the offence of bribery of an EU official would be time-barred for the acts covered under art. 420 PC but not for the acts covered under art. 419 PC. Similarly, the acts of a non-EU official under 445 PC would not be time-barred. The different limitation periods can also cause difficulties in investigating and prosecuting cases, especially in cases where up to a certain point in the investigation, it is not possible to characterise the act induced by the bribe, nor whether the bribed person is an EU official or not and therefore determine the applicable offence and limitation period. The Spanish authorities and prosecutors met on-site contended that investigations of bribery cases involving EU officials are rendered more efficient by specific mechanisms of judicial cooperation in place among EU member States (such as the European arrest warrant or cooperation through EU agencies such as Europol or Eurojust that aim at facilitating cooperation in criminal matters). However, the lead examiners consider that the existence of two distinct limitation periods (five or ten years) on the basis of the origin of the bribe not only create an obstacle to the effective investigation of the offence but is also based on an artificial distinction that is not contemplated under the Convention.

119. Some lawyers and academics met by the examiners also highlighted the inefficiency of the Spanish criminal justice system as a factor undermining the administration of justice. Given the difficulty in detecting corruption offences, the complexity of foreign bribery cases, and the frequent need to rely on mutual legal assistance, limiting the ability to bring charges to five years after the commission of the offence may obstruct the effective enforcement of such offences. The Libya and Latvia cases concretely illustrate this difficulty as they were both dismissed as time-barred after 5 years. As a consequence, it appears that the current statute of limitations of 5 years remains too short to allow for the effective prosecution of foreign bribery in Spain. This is particularly true in a country where the conditions for interruption and suspension of the limitation periods appear limited.

(ii) *Calculation of the limitation periods*

120. These periods are presumed to run from the time of the commission of the offence to the initiation of the criminal proceedings (art.132 (1) PC). It is unclear what would constitute in practice “the initiation of the criminal proceedings”. In cases of continuous offences, those terms are calculated from the day on which the last offence took place (art. 132(2) PC). In a corruption case, the lead examiners were told that the judges would take into account the last bribe instalment for bribes paid over a period of time. This seems illustrated by the majority of the 7 cases investigated to date (in the Morocco and Lybia cases in particular). However, in the Latvia case, the date of the conclusion of the contract with the foreign public official was considered as the day on which the offence took place, “the subsequent payments being part of the completion stage of the offence”. The date of discovery of facts has no impact on the calculation of the limitation period.

(iii) *Suspension and interruption*

121. The limitation period is suspended when there is a legal or *de facto* obstacle (for instance, because of illness of the defendant or of immunity).

122. The limitation period is interrupted by any substantive judicial act ordered by a judge and leading to trial under the rules set out in art. 132(2) PC. The judicial acts that can interrupt the statute of limitations are however not enumerated in the law but derive from case law. Case law has shown that court orders, search warrants or wire tapping⁷¹ constitute judicial acts, which interrupt the limitation period. The Spanish authorities stated that any investigative or pre-indictment step taken by an investigative judge, such as a request for mutual legal assistance or extradition, would interrupt the running of the limitation period. No case law was provided to substantiate this statement. However, non-substantive judicial acts (such as the

⁷¹ See Supreme Court decision 1187/2010 of 27 December.

translation of a document)⁷² or substantive acts not directed against the accused (such as statements from other accused persons) do not interrupt the limitations period. The limitations period continues to run during periods where the accused is out of the country or in hiding.⁷³ Similarly, measures taken by the Defence which could amount to contempt would not interrupt the statute of limitations.⁷⁴

(iv) *Statute of limitations applicable to legal persons*

123. The authorities indicated that the same limitation period applies to legal persons where the related natural person committed a criminal offence, including bribery. This means that an interruption of the limitation period for proceedings against a natural person would also apply to the proceedings against the legal person, if no separate proceedings are being pursued against that legal person. Where separate proceedings are conducted against a legal person, the limitation period would be interrupted by actions that correspond to those actions serving to interrupt the limitation period for natural persons. Nevertheless, in the absence of specific case law involving a criminal liability of a legal person to date in Spain, it remains uncertain how limitation periods will be calculated in this context.

Commentary:

The lead examiners are seriously concerned by the high proportion of foreign bribery investigations in Spain that have been closed because they were time barred in Spain since Phase 2 (close to three-quarters of the total number of cases under investigation).

In this context, the lead examiners welcome Spain's efforts to extend statute of limitations applicable to foreign bribery offences from 3 to 10 years but they remain preoccupied by the persistence of a shorter limitation period for certain foreign bribery offences depending on the origin of the recipient of the bribe and the alleged foreign bribery offence. In addition, a statute of limitations of five years from the date of the offence for the bringing of bribery charges does not appear sufficient for the purpose of foreign bribery investigations in view of the time spent for initial prosecutorial investigations to date and given the limited possibilities for suspension and interruption of the limitation period in Spain. The lead examiners therefore recommend that Spain, as part of its announced reform of the Penal Code, extend the statute of limitations applicable to the offences under art. 420 PC and align it with the period (10 years) for the offences under arts. 419 and 445 PC. They also recommend that Spain review the possibilities for suspension and interruption of the limitation period with a view to cover, in particular, situations where the accused is out of the country or in hiding. They finally recommend that Spain clarify the rules governing the statute of limitations applicable to legal persons.

⁷² See Supreme Court decision 975/2010 of 5 November.

⁷³ See Phase 2 Report, page 32.

⁷⁴ Also see the Review of implementation of the United Nations Convention against Corruption by Spain, Executive summaries of 7 June 2011, page 12.

6. *Money laundering*

(a) *Changes in the offence and other anti-money laundering (AML) mechanisms*

(i) *The money laundering offence*

124. The most significant change in the AML regime since Phase 2 is the enactment of Act 10/2010 on prevention of money laundering and terrorist financing, which entered into force on 30 April 2010 and which transposes the European Directive 2005/60/EC (the Third Money Laundering Directive). The Act has brought a number of significant changes including the extension of the predicate offence to include all crimes and the criminalisation of self-laundering. All corruption and bribery offences are accordingly predicate offences for money laundering which is a significant improvement since the Phase 2 evaluation (at that time, only offences with maximum penalties of more than three years' imprisonment were predicate offences). Penalties for money laundering include prison terms of six months to six years, fines of up to three times the value of the laundered assets, as well as exclusions from public office or from certain activities.

(ii) *Applicable requirements to politically exposed persons*

125. During the Phase 2 evaluation, Spain was asked to modify and expand the treatment of politically exposed persons (PEPs) in the money laundering prevention guidelines for credit institutions and in other relevant guidelines as appropriate (recommendation 2d). This recommendation was deemed "implemented satisfactorily" at the time of the Phase 2 written follow up. Article 14 of Act 10/2010 requires reporting entities to apply enhanced customer due diligence (CDD) measures in their business relationships or transactions with PEPs. Ministerial Order EHA/2444/2007 of 31 July 2007 also details the reporting obligation, including in relation to PEPs. All entities subject to the Act (including credit institutions and the accounting, auditing and legal professions) are therefore subject to the same detailed requirements and guidance vis-à-vis PEPs, as recommended by the Working Group in Phase 2. The authorities indicated that the total number of suspicious transaction reports (STRs) made in relation to PEPs (and possibly related suspicion of corruption and foreign bribery) was 44 in 2009, 39 in 2010 and 47 in 2011. The financial institutions met during the on-site visit indicated that they rely very much on their obligation to monitor their business relationships with PEPs as a way to detect possible instances of foreign bribery.

(iii) *Resources of the Spanish Financial Intelligence Unit (SEPBLAC)*

126. SEPBLAC's main functions are to receive, analyse and disseminate information transmitted by the reporting entities and has been also given AML supervisory powers in relation to certain entities. In Phase 2, Spain was asked to ensure that the money laundering authorities had adequate resources to carry out their expanded duties effectively (recommendation 2d). This recommendation was deemed "implemented satisfactorily" at the time of the Phase 2 written follow up. Based on figures provided by the authorities, it appears that the number of SEPBLAC employees has remained stable since 2005 (80 on average) with an increase of the personnel in SEPBLAC's supervision department over the years. Nonetheless, the volume of analytical work to be delivered by the FIU remains high (the number of STRs received by SEPBLAC was close to 3,000 in 2011). It seems therefore important that the extra human resources allocated to the supervisory work do not occur at the expense of the analytical functions and that the FIU is given sufficient resources to carry out all its responsibilities efficiently. This is an issue that the authorities should continue to closely monitor.

(b) Application of AML legislation to the predicate offence of foreign bribery

(i) Awareness raising

127. In Phase 2, the Working Group recommended that Spain work with the accounting, auditing and legal professions to raise awareness of the foreign bribery offence and its status as a predicate offence for money laundering (recommendation 1c). This recommendation was deemed “partially implemented” at the time of the Phase 2 written follow up. To assist the reporting entities in meeting their obligations, the authorities indicated that the Spanish Treasury publishes risk indicators per sectors and activities and that SEPBLAC publishes typology reports. However, no specific initiative was launched to raise awareness of the foreign bribery offence as a predicate offence for money laundering. A representative of the auditing profession met during the on-site visit highlighted the efforts made by the Ministry of Finance to deliver training on the obligation to report suspicious transactions.⁷⁵ In this context, the lead examiners believe that SEPBLAC could be more proactive in reaching out to reporting entities subject to AML obligations, including in relation to the detection of possible instances of foreign bribery.

(ii) Detection of foreign bribery via money laundering reporting

128. SEPBLAC regularly exchanges information with investigative bodies and prosecutors. In 2009, 27 intelligence reports were sent by the FIU to prosecutors, 28 in 2010 and 26 in 2011. In 2009, 26 reports were sent to police forces, 20 in 2010 and 21 in 2011. One case of alleged foreign bribery has been initiated and investigated by the ACPO as a result of this exchange of information. The case was finally closed in September 2011. Other reports sent by SEPBLAC contributed to enrich two ongoing investigations within the ACPO. During the on-site visit, the ACPO acknowledged the quality of the information received from SEPBLAC and its good level of cooperation. There appears to be, however, a certain lack of feedback from the ACPO to the FIU on the use made of the intelligence reports in ACPO investigations. The lead examiners believe that such feedback would be a useful tool for the FIU to understand in what circumstances its reports may result in or contribute to criminal investigations. It would also allow SEPBLAC to improve the quality of the information it provided to the reporting entities.⁷⁶

Commentary:

The lead examiners welcome the recent enhancement of the anti-money laundering regime in Spain, especially in relation to PEPs. In the context of awareness raising, they recommend that SEPBLAC reach out to reporting entities subject to AML obligations in a more proactive way, including on their duty to detect possible instances of foreign bribery.

The lead examiners recommend that Spain continue its efforts to detect money laundering linked to foreign bribery. They also recommend that the ACPO provide feedback to SEPBLAC about the outcome of specific cases generated or enriched by information transmitted by the FIU.

⁷⁵ It is worth noting that the accounting and auditing profession sent 6 STRs to the FIU in 2010 and 5 in 2011.

⁷⁶ The authorities indicated that there is an ongoing project to interconnect SEPBLAC with the Civil Guard computer system to allow another type of automatic feedback.

7. Accounting requirements, external audit, and company compliance and ethics programmes

(a) Accounting requirements and false accounting

(i) Key accounting standards

129. In Spain, all companies must apply the Spanish GAAP⁷⁷ in their standalone financial statements, which is essentially based on the International Financial Reporting Standards (IFRS) but presents some differences in accounting and disclosure requirements. In their consolidated financial statements, companies (including state-owned companies) can choose between the IFRS as adopted by the EU⁷⁸ or the Spanish GAAP (except listed companies and groups⁷⁹ that need to prepare consolidated financial statements in conformity with IFRS as adopted by the EU). The application of the GAAP to SMEs⁸⁰ (Royal Decree no 1515/2007) is not compulsory. SMEs are subject to simplified accounting requirements and are exempted from external audit requirements. Failure to comply with the reporting format of IFRS and submission within the reporting period will attract the appropriate sanction, including fines.⁸¹

(ii) False accounting

130. The making of accounting documents or records containing false or incomplete information is sanctioned under criminal law (art 290 PC).⁸² The penalty is from one to three years of imprisonment and a fine from six to twelve months (from EUR 360 to EUR 144,000). The Spanish authorities indicated that this article has been interpreted broadly to apply not only to the director of a company but also to all its managers but no relevant case law was provided in support of this statement. The authorities also indicated that art. 290 PC is frequently applied, but no statistics have either been made available to substantiate this statement. It is as well uncertain what elements of proof are required to demonstrate that the misconduct intended to financially “harm the entity, partners or a third party” and in what circumstances such misconduct might lead to a sanction.

131. Art. 310 PC punishes more generally individuals who are obliged by law to keep accounting books and records and who perform certain illicit acts such as double accounting, recording non-existing operations or non-recording existing operations. The penalty thus encountered is 5 to 7 months’

⁷⁷ The Spanish Generally Accepted Accounting Principles (GAAP) were approved on 16 November 2007 by Royal Decree 1514/2007.

⁷⁸ Regulation 1606/2002(EC) of 19 July 2002, art. 4.

⁷⁹ Spain has no longer any listed company in which the State has a majority stake and there is only one listed company in which the State has a stake, albeit a minority one. All the remaining companies and corporations are not listed in the stock exchange. See the OECD Report on “the Size and Composition of the SOE Sector in OECD Countries” of May 2011: [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/CA/SOPP\(2011\)6/ANN3/FINAL&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/CA/SOPP(2011)6/ANN3/FINAL&docLanguage=En)

⁸⁰ In Spain, SMEs should be companies or individuals, which meet at least two of the following conditions at the close of two consecutive years: (i) net turnover not exceeding € 5,750,000; (ii) balance sheet total not exceeding € 2,850,000; and (iii) average employees during the year not exceeding 50.

⁸¹ According to art. 283 of Royal Legislative Decree 1/2010 of 2 July. The authorities indicated that the fines imposed per year for failure to comply with the obligation of deposit amount to more than EUR 1 million each year (from 2006 to 2011).

⁸² Pursuant to art. 290 PC, it is an offence for a *de facto* or *de jure* director (“*administrador*”) of a company that has been incorporated or is being formed to falsify annual accounts or other documents in order to cause financial harm to the entity, partners or a third party.

imprisonment. The authorities indicated that the number of convictions for false accounting on the basis of art. 310 PC have been as follows: 33 (2006); 18 (2007); 7 (2008); 17 (2009); 1 (2010); 1 (2011); 4 (2012). No information was provided on the level of sanctions imposed and the status of the convicted persons (e.g. accountants, auditors, external auditors). Legal persons committing such offences are liable to a fine of six months to one year (EUR 5,400 to EUR 1 800 000) (art. 310 bis PC). The Judges may also impose the additional penalties available for legal persons (Sub-Sections b) to g) of Section 7 of art. 33 PC). No information was provided by the authorities on the enforcement of art. 310 bis PC.

132. In the absence of sufficient data, the examiners are therefore not in the position to satisfactorily assess the level of enforcement of the accounting offences in Spain. Feedback from the private sector during the on-site visit indicates that the extension of the false accounting offence to legal persons has created an extra level of incentive for companies to put in place necessary safeguards in order to comply with the law.

(iii) *Treatment of facilitation payments under accounting and auditing requirements*

133. During the on-site visit, representatives from the auditing profession indicated that the legislation provides sanctions for all cases of false accounting regardless of monetary thresholds and that there is no materiality requirement applicable in Spain. From their understanding, failure to accurately record payments made in Spain or abroad and that are quantitatively immaterial would still constitute a violation of the Spanish accounting requirements. This information was neither confirmed nor denied by the Spanish authorities.

(b) *External audit requirements*

134. All statutory auditors and audit firms are subject, in the exercise of the audit activity, to a public oversight system governed by the Institute of Accounting and Auditing or ICAC (*Instituto de Contabilidad y Auditoría de Cuentas de España*, attached to the Ministry of Economy and Competitiveness). The ICAC has the ultimate responsibility for, *inter alia*, quality control, investigations and sanctions.

(i) *External auditing requirements and independence*

135. Spanish domestic law has incorporated the rules and regulations of the European Union (including the EEC Directive on the control of accounts and external audit).⁸³ All companies (including SOEs) except SMEs are required to file a complete reporting pack and are obliged to undergo an annual external audit (art. 257.1 of the Companies Act). Auditors and audit firms must be independent from the audited entities (art. 12 and following of the consolidated text of the Auditing Law). In order to guarantee their independence, auditors and audit firms are legally bound to establish safeguards that enable threats in this regard to be detected, assessed, reduced and, if applicable, eliminated. These safeguards are due to be periodically reviewed, applied individually to each audit and documented on working papers for each audit. The Auditing Law identifies possible causes of incompatibility and threats to independence that can stem from factors such as self-review, self-interest, advocacy, familiarity or trust, or intimidation. The ICAC is the organisation responsible for monitoring adequate compliance with the duty of independence.

⁸³ Directive 43/2006/EC of the European Parliament and of the Council of 17 May 2006 on statutory audits of annual accounts and consolidated accounts. As a consequence of the approval of this Directive, Spain has introduced new legislation on statutory audits of annual accounts and consolidated accounts in Law 12/2010, of 30 June (so-called “Auditing Law”), Royal Legislative Decree 1/2011, of 1 July and Royal Decree 1517/2011 of 31 October.

(ii) *Awareness raising*

136. In Phase 2, Spain was asked to encourage the auditing and accounting professions to develop specific training on foreign bribery in the framework of their professional education and training system (recommendation 1c). At the time of the on-site visit, the lead examiners noted a general lack of pro-activity on the behalf of the public authorities in raising awareness of the foreign bribery offence among these professions. For instance, discussions during the visit revealed that no steps had been undertaken by the relevant authorities to raise awareness of the 2009 Recommendation, and its Annex 2 among the accounting and auditing professions. In a letter of 10 December 2012, the ICAC required these professions to develop specific training on foreign bribery in the framework of their professional education and training system and to adopt specific “red flag” indicators to help detecting foreign bribery in companies’ accounts. Such initiatives are welcome although their implementation by the auditors and accountants will require to be followed up by the Working Group.

(iii) *Reporting obligations – Experience in detecting and reporting*

137. Spanish external auditors are subject to the Technical Standards on Auditing, which are based on International Standards on Auditing (ISA). The ICAC adopted ISA 240 in Technical Standards agreed in 2000 and 2001. The Spanish authorities have indicated that the latest amendments made to ISA 240 and ISA 250 are in the process of being inserted in a revised version of the Spanish Technical Standards. During the onsite visit, ICAC representatives referred to two cases where auditors were sanctioned for infringement of the reporting obligations foreseen by the auditing legislation (see below). The Spanish authorities indicated that information regarding sanctions imposed against these two individuals is confidential and could hence not be provided to the examiners..

(iv) *Reporting to management (internal reporting)*

138. At the time of the Phase 2 written follow-up, the Phase 2 recommendation that Spain continue to improve the applicable measures to require auditors to report all suspicions of bribery by any employee or agent of the company to management (recommendation 2c) was deemed as not implemented. The Technical Standard on Auditing related to “Compliance of legal rules applicable to the audited entity” (2001) still does not require the auditor to report infringements that are not significant and have no effect on the financial statements (paragraph 32). Although the reporting requirement under the 2000 Technical Standard does not contain such restrictive language, the doubt on the scope of the reporting expressed in Phase 2 remains. The Spanish authorities indicated that this issue is being addressed in the context of the revision of the Spanish Technical Standards that was taking place ongoing at the time of drafting this report.

(v) *Reporting to competent authorities (external reporting)*

- Reporting to regulators

139. The Technical Standard on Auditing related to “Compliance of legal rules applicable to the audited entity” (2001) provides the principle of reporting to regulators any event or decision, regarding the audited entity or institution, that has come to the auditor’s attention in the course of performing their functions and that could (a) constitute a serious violation of the contents of the legal, regulatory or administrative provisions establishing the conditions of the authorisation or specifically regulating the exercise of their activities; (b) jeopardise the continuity of the entity’s operations or seriously affect its stability or solvency; (c) involve a qualified opinion, adverse opinion or disclaimer of opinion or prevent the audit report from being issued (paragraph 35). No figures were provided by the Spanish authorities on the number of reports submitted by auditors to the regulators in application of this Technical Standard.

- Reporting to law enforcement authorities

140. Art. 262 CCP provides an obligation to report to law enforcement authorities which applies to “those who by reason of their charge, office or profession receive notice of a public crime” In Phase 2, Spanish authorities contended that art. 262 required auditors to report suspicions to prosecutors with regard to all companies. Conversely, at that time, the auditors did not consider that such an obligation applied to them. Since Phase 2, where contradictory information was received in this regard, art. 25 of the consolidated text of the Auditing Law has clarified that art. 262 CCP applies to auditors and that the reporting of suspicions by auditors is therefore exempt from the confidentiality requirement set out in the consolidated text of the Auditing Law. There are no statistics with regard to the use of art. 262 by auditors, all offences confounded. Spain stated that no cases of foreign bribery have been detected through auditing. However, since this reporting requirement coexists with another requirement for auditors to report any suspicion of money laundering to the FIU further guidance on these reporting obligations may be needed.

141. When the auditors detect “errors”, “irregularities” or “lack of compliance with the legislation” committed by the audited entity (or by any of its members in the name of the entity) auditors indicated on-site, that they are required to: (i) inform about facts in the audit report which are significant for the true image of the financial statements; (ii) inform the governing bodies of the entity; (iii) report to regulators; (iv) report to law enforcement authorities; and (iv) review and evaluate whether the internal control system established by the audited entity provides a reliable basis to determine the scope and nature of the audit procedures, and inform the governing bodies of the entity about the significant weaknesses detected in that control system.

142. During the on-site visit, Spanish auditors indicated that auditors take possible instances of foreign bribery into account when detecting and reporting fraud as well as factors such as whether the audited company operates in corruption-prone countries or sectors. However, no information was provided with regard the actual use of these types of indicators and no guidance in that respect has been issued by the public authorities.⁸⁴

Commentary:

The lead examiners are concerned by the lack of sufficient data showing enforcement of the accounting offences in Spain. They recommend that Spain ensure that accounting offences are effectively investigated and prosecuted, particularly in connection with bribery cases, and that the criminal and administrative penalties against natural and legal persons for false accounting offences are effective, proportionate and dissuasive in practice. They also recommend that Spain compile statistics with regard to investigations and prosecutions of accounting offences and the types of sanctions imposed.

The lead examiners welcome the recent requirement by the ICAC that the auditing and accounting professions develop specific training on foreign bribery and adopt “red flag indicators” to help detecting foreign bribery in companies’ accounts. They recommend that the implementation of this requirement be followed up by the Working Group.

The lead examiners reiterate recommendation 2c of Phase 2 and encourage Spain to pursue the reform of its Technical Standards in order to clarify the requirement to report to management that applies to auditors. This should be accompanied by additional awareness

⁸⁴ The authorities indicated that the Annex to the Technical Standard on “Auditing on errors and irregularities” provides for examples of circumstances that may increase the risk of errors and irregularities, even though none of these examples addresses the more specific risk of corruption or bribery.

raising measures so that auditors know that they should identify, detect and report foreign bribery.

The lead examiners commend the Spanish authorities for having clarified the scope of auditors' obligations to report suspicions of foreign bribery to the competent authorities. To ensure adequate implementation of the reporting obligation and in order to enhance the auditors' capacity to detect foreign bribery, they recommend that Spain further publicise this requirement and provide training to the auditing profession on the circumstances under which such reporting is required.

(c) Company internal controls, ethics and compliance programmes or measures

(i) Audit of Compliance Management Systems

143. External auditors in Spain are required to obtain an understanding of an audited company's internal controls for ensuring reliable financial reporting and compliance with applicable laws and regulations. They must also communicate deficiencies in internal controls detected during audits to company management or those charged with the company's governance.⁸⁵ Representatives from the profession indicated during the on-site visit that their clients are increasingly seeking to establish internal compliance programs, especially due to the introduction in Spanish law of criminal liability of legal persons. Large Spanish companies active abroad have also developed internal compliance programmes addressing bribery issues because of their exposure to the US Foreign Corrupt Practices Act and UK anti-bribery legislation. At the time of this report, the Spanish authorities had not taken steps to promote the good practice guidance on internal controls, ethics and compliance contained in Annex II of the 2009 Recommendation for further combating bribery to Spanish companies.

(ii) Ethics and compliance programmes or measures

144. Out of the 12 companies met during the on-site visit, five had reviewed their Code of Conduct following Spain's enactment of the corporate criminal liability framework set out in art. 31bis PC and two companies used the Annex II Good Practice Guidance in their compliance programs. Based on discussions during the on-site visit and review of the publicly available compliance programs for the companies that participated in the discussions during the on-site visit, the majority of companies have a general policy on integrity however few mention specifically the need to prevent, detect and report bribery of any kind, let alone bribery of foreign public officials. One SME participated in the on-site visit, it is involved in the defence industry and was the subject of foreign bribery allegations in the past. At the time of writing, this SME did not have a publicly available compliance program or code of conduct. Nevertheless, the larger companies stated that Codes of Conduct of many of the larger companies also cover suppliers and collaborators who are therefore bound by these Codes. Companies involved in the defence industry also emphasized developments in compliance standards for agents and suppliers, both in Spain and in the EU more generally. Notably, Spanish companies in the defence industry are now subject to the Secretary of State Defence Instruction 44/2011 which is a 'Code of conduct for voluntary subscription for Ministry of Defence armament and equipment contractors and subcontractors'. This Code aims to guarantee transparency in defence contracting at a domestic and European level, but does not refer specifically to prevention of corruption or bribery in any form. In addition, Spanish defence companies operate under the Aerospace and Defence Industries Association of Europe 2007 'Common Industry Standards for European Aerospace and Defence'. Paragraph 2 of these Standards set out the industry's 'commitment to observe

⁸⁵ See section 2.4 of the Technical Standard on Auditing published by Resolution of the Accounting and Auditing Institute of 19 January 1991 and Resolution of the Accounting and Auditing Institute of 1 September 1994.

and apply the anti-corruption rules embedded in national legislation implementing the 1997 OECD Convention and UNCAC as well as any other applicable law.’ Compliance and due diligence in the defence industry is explored in greater detail in section 11(e) Defence Exports.

Commentary:

Regarding company internal controls, ethics and compliance programmes or measures, the lead examiners recommend that Spain promote, jointly with the relevant professional associations, internal controls, ethics and compliance programmes or measures in businesses involved in commercial transactions abroad, including SMEs, with reference to inter alia Annex 2 of the 2009 Recommendation, Good practice guidance on internal controls, ethics, and compliance.

8. Tax measures for combating bribery

(a) Non-deductibility of bribes

145. At the time of Spain’s Phase 2 evaluation, neither the Companies Tax Law nor the Personal Income Tax Law contained an express prohibition on the deductibility of bribes and Spain relied on jurisprudence from the Supreme Court to the effect that expressly prohibited behaviours could not give rise to a deduction. Furthermore, there were concerning exceptions to the prohibition on the deductibility of ‘gifts and generosity’ in art. 14 of the Companies Tax Law, namely ‘expenses derived from public relations with clients or suppliers’, and ‘expenses correlated with earnings.’⁸⁶ The Working Group recommended that Spain take appropriate measures to make explicit the prohibition of the deduction for tax purposes of bribes paid to foreign public officials (recommendation 7). In its Written Follow-Up Report, Spain informed the Group that the Ministry of Economy and Finance published an Instruction on 5 March 2007 which states that bribes to foreign public officials (as defined in article 445 of the Penal Code) are not tax deductible.⁸⁷ The Group therefore considered that this recommendation had been implemented satisfactorily.

146. During the on-site visit, the binding nature of the 2007 Instruction was discussed with the State Taxation Authority (*Agencia Estatal de Administración Tributaria* (AEAT)) and the autonomous tax authorities from the Basque Country and Navarra. While the AEAT and the Ministry of Finance considered the 2007 Instruction as binding, the Basque and Navarra tax authorities were not only unaware of its existence but also considered in any case that it was only an opinion and did not bind the regional tax authorities which have autonomy in relation to the imposition of taxes in those regions. Following the on-site visit, the Ministry of Finance cited a decision of the Spanish Supreme Court,⁸⁸ which established the non-deductibility of expenses incurred in connection to an unlawful conduct. The Spanish authorities asserted that it also applies to the autonomous tax regions. Despite this jurisprudence, which predates the 2007 non-deductibility of bribes paid to foreign officials, the situation observed on-site remains unchanged. The autonomous tax regions do not consider themselves subject to the express prohibition on the tax deductibility of bribes paid to foreign public officials contained in the 2007 Instruction. This is a possible loophole in Spain’s framework for expressly prohibiting the tax deductibility of bribes, given that the taxation laws in Navarra and the three territories of the Basque country contain exceptions to non-deductible expenses for public relations expenses and expenses in relation to promotion of goods or

⁸⁶ Phase 2 Report, paras. 157 and 160.

⁸⁷ For the text of the Instruction, please see: <http://www.minhap.gob.es/Documentacion/Publico/Tributos/DGTcorrupción.pdf> (in Spanish).

⁸⁸ Supreme Court Decision, dated 4 July 1998.

services which are similar to those in the central Companies Tax Law that were of concern in Phase 2 and supposedly rectified by the 2007 Instruction.⁸⁹ The Basque and Navarra authorities noted an initiative underway to develop a new corporate tax law, to bring it into line with EU standards, and that non-deductible expenses would be included in the drafting proposals. However, at the time of drafting this report, the exact scope and timeframe for this initiative remains unclear.

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

(i) *Reporting obligations*

147. A clearer reporting obligation has been enacted since Phase 2 in the form of article 60.3 of the General Regulation for tax management and inspection proceedings and for the development of common rules on procedures relating to the implementation of taxes, approved by Royal Decree 1065/2007. This regulation develops the overarching reporting obligation set out in the General Tax Law (Law 58/2003) and requires tax administration officials to inform law enforcement authorities via the competent authority, of facts which are discovered in the course of their activities which could constitute crimes other than those that are only able to be prosecuted at the request of the aggrieved person (i.e. slander or defamation under article 215(1) PC). It would seem that earlier plans to adopt regulations to Law 58/2003 to include additional detail about the need to report fraud with regard to public subsidies, money laundering and corruption have been abandoned. Tax officials present during the on-site visit stated that there was no specific reporting policy in relation to bribery and that whether a report was made would depend on the evidence received. Tax officials apparently need more than a mere suspicion of bribery of foreign public officials before they report a matter to law enforcement authorities; for example, a matter would not be reported if the taxpayer did not indicate the origin of the expense. During the finalisation of this report, Spain indicated that Territorial Offices of SPS are informed about the tax crimes discovered by tax officials in the course of their duties, however tax crimes that ‘affect the national territory’ are reported to the ACPO. In 2010, 1095 reports were made to the ACPO in relation to suspected tax crimes and 1090 such reports were made in 2011, reportedly amounting to EUR 669.19 and EUR 882.64 million in fraudulent expenses respectively. According to information provided after the on-site visit, most of the cases concerned real estate and irregular invoicing. It is unclear whether bribery of foreign public officials could have been the subject of the irregular invoicing in these cases.

(ii) *Detection of bribery through tax audits and income statements*

148. In relation to the role of tax authorities in detecting possible instances of foreign bribery, tax officials on-site stated that there was no bribery-specific risk analysis undertaken during tax audits and that detection of bribery was not a core function of the tax administration. The tax authorities noted that it would be difficult to detect potential foreign bribery purely on the basis of annual tax returns as there was no section in the standard form for payments made abroad. However they did indicate that when conducting tax audits of certain companies doing business abroad they developed an annual plan of issues to investigate, although this did not include bribery. When assessing whether a tax fraud offence under article 305 PC has occurred, the Spanish tax administration stated that tax officials will only consider the infringements to be criminal if the shortfall exceeds EUR 120 000. In response to the evaluation team’s concerns about the detection of bribes under EUR 120 000, tax officials stated that these could be detected as part of tax audits, ‘and they could be considered an administrative infringement.’ This could create a significant loophole for bribes under this amount to go undetected by the tax authorities, or even be

⁸⁹ Article 24 of Navarra’s Ley Foral 14/1996 provides that bequests and donations made as a public relations effort or made to promote, directly or indirectly, the sale of goods are exceptions to the non-deductible expenses set out in the article. In the Basque country, art. 14(e) of regulations 24/1996 (Álava), 7/1996(Gipuzkoa) and 3/1996 (Bizcaia) contain almost identical provisions.

claimed as a tax deduction. Of additional concern is the fact that if bribes are detected in tax audits, as the tax officials suggested, they would be considered ‘administrative infringements’ and therefore might not be reported to law enforcement authorities. In Phase 2, tax officials stated the organisational objective to audit every large and very large company every four years so as to avoid expiry of the statute of limitations between audits. In practice, this goal was achieved with regard to very large companies but not with regard to large companies.⁹⁰ Following the on-site visit, Spain stated that a more efficient system of risk-based audits had been put in place. However, the details of this system, and in particular whether it focuses on the risk of foreign bribery, were not provided.

(iii) Training and awareness raising

149. Spain’s Phase 2 report notes that there had been no directives or guidelines issued to Spanish tax authorities to make them aware that foreign bribe payments are not deductible or to explain the relevant Penal Code provisions. The report also noted that tax authorities did not appear to be aware of the OECD Bribery Awareness Handbook for Tax Examiners. Spain’s Phase 2 report also noted that tax inspectors received only preliminary training regarding corruption at the outset of their career, but that there was no continuing education.⁹¹ The Working Group therefore recommended that Spanish tax authorities incorporated training with regard to foreign bribery and its tax treatment into the training plan for tax inspectors and consider adapting existing Spanish translation of the OECD Handbook for Tax Examiners for use in Spain (recommendation 7). Spain’s Written Follow-Up Report noted that the Public Finance School had introduced a specific seminar on combating foreign bribery for new tax inspectors, which included content on the OECD Tax Handbook (translated into Spanish along with other OECD tax publications by the Spanish tax authorities in 2006), which describes “red flag” indicators of bribery and the steps that a tax examiner should take to detect bribe payments when conducting a tax examination. While the Working Group considered that this recommendation had been implemented satisfactorily, it recommended following up on awareness raising on the non-deductibility of bribes among taxpayers.

150. At the on-site visit, the AEAT noted that the Public Finance School continued to teach a module on bribery and stated that despite the lack of permanent training offered to tax auditors, they were still aware of the prohibition on the deductibility of bribes. This statement did not appear to apply to the regional tax administrations, as exemplified in the lack of awareness among the Basque and Navarra authorities of the existence of the 2007 Instruction (see above, Section 8(a) on the non-deductibility of bribes). Spain did not provide any additional information on awareness raising activities since Phase 2, particularly among taxpayers, on the non-deductibility of bribes.

(c) Exchange of tax information

(i) With Spanish law enforcement authorities

151. Article 95 of the General Tax Law sets out the central regime for confidentiality of tax information in Spain, and art. 95(1)(a) contains the exception for sharing such information with law enforcement authorities for the investigation and prosecution of crimes other than those that are only able to be prosecuted at the request of the aggrieved person (i.e. slander or defamation under article 215(1) PC). There are almost identical provisions in Navarra and the three territories of the Basque country.⁹² Spain does not maintain statistics relating to the sharing of information in practice with law enforcement

⁹⁰ Phase 2 Report, para. 161.

⁹¹ Phase 2 Report, paras. 11, 158 and 161.

⁹² Article 105, Ley Foral 13/200 (Navarra); art. 92, Norma Foral 6/2005 (Álava); art. 92, Norma Foral 2/2005 (Gipuzkoa); art. 94, Norma Foral 2/2005 (Bizcaia).

authorities under art. 95(1)(a) and related articles in the autonomous tax regions. Nonetheless, at the on-site visit, ACPO officials stated that they had easy access to tax returns and current accounts both for their own investigations and for the purposes of responding to MLA requests. In terms of the exchange of information between the tax administration and SEPBLAC, under article 16.1 of Law 19/1993, SEPBLAC has direct, immediate access to information held by Spain's tax authorities. With regard to the availability of other information to Spanish tax authorities, art. 93(3) of the General Tax Law provides that bank secrecy is not an obstacle to tax investigations.

(ii) *With other countries*

152. In Phase 2, the lead examiners commended Spain for its approach to incorporating the optional language in Paragraph 12.3 of the Commentary to Article 26 of the OECD Model Tax Convention in its bilateral tax treaties.⁹³ This language allows the use of information received by a Contracting State for non-tax purposes including corruption-related investigations, when certain conditions are met. Spain also had a policy of requiring exchange of information provisions in all its tax treaties and excluding the use of bank secrecy as a bar to the provision of tax information. To date, Spain has concluded agreements for the automatic exchange of tax information with Argentina, Canada, Chile, Costa Rica, the Czech Republic, France, Italy, Mexico the Netherlands, Portugal, Sweden and the USA. Since Phase 2, Spain has incorporated the optional language in 17 new Double Tax Conventions (DTCs)⁹⁴ and 7 new Tax Information Exchange Agreements (TIEAs).⁹⁵ In addition, on 28 September 2011, Spain ratified the Protocol amending the Convention on Mutual Administrative Assistance in Tax Matters,⁹⁶ which allows the use of information received by a Party for non-tax purposes including corruption-related investigations, when certain conditions are met. The Protocol will enter into force on 1 February 2013 and the original Convention entered into force in Spain on 1 December 2010. The autonomous regional tax administrations are bound, under the Economic Agreements they concluded with the Spanish central authorities, to abide by the international agreements or treaties signed and ratified by the Spanish State, and are therefore required to provide tax information in accordance with Spain's international obligations. In terms of exchanging tax information in practice, the AEAT has sole jurisdiction in Spain to share tax information and incoming requests must be channelled through the AEAT. The AEAT confirmed that to date no information has been exchanged with foreign tax authorities in relation to foreign bribery.

⁹³ On 17 July 2012, after the on-site visit to Spain, OECD Council approved an "Update" to Article 26 of the Model Tax Convention and its Commentary, including Commentary 12.3. The Working Group on Bribery has not yet had an opportunity to assess the impact of this update on implementation of the 2009 Tax Measures for Further Combating Bribery of Foreign Public Officials in International Business Transactions. As the current report involved an on-site visit prior to the entry into force of this updated article 26 in the Model Tax Convention, the review under this section is based on the provisions of the Model Tax Convention as they were in force at the time of the visit. The Update can be accessed at the following weblink: [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).

⁹⁴ Albania (2010); Armenia (2007); Barbados (2010); Bosnia and Herzegovina (2008); Colombia (2005); El Salvador (2008); Georgia (2010); Germany (2011); Jamaica (2008); Kuwait (2008); Moldova (2007); Nigeria (2009); Pakistan (2010); Panama (2010); Saudi Arabia (2007); Senegal (2006); and Uruguay (2009).

⁹⁵ Andorra (2010); Aruba (2008); Bahamas (2010); Curaçao (2008); Caribbean side of the Netherlands (2008); Saint Martin (2008); and San Marino (2010).

⁹⁶ The status of signatures and ratifications is available at www.oecd.org/ctp/eoi/mutual.

(d) *Tax amnesties*

153. Royal Law-Decree 12/2012, of 30 March (Tax Amnesty Law), introduced a range of tax and administrative measures aimed to reduce the public deficit in Spain and regularise hidden income. Under this legislation, until 30 November 2012, individual and corporate taxpayers are permitted to voluntarily disclose unreported income or assets by paying a special 10% levy on the amount or acquisition value, with no criminal or administrative penalties, surcharges or interest. Spain's Socialist Party announced on 25 June that it would appeal the constitutionality of this legislation in Spain's Constitutional Court.⁹⁷ During the on-site visit, the Spanish authorities clarified that a special tax return would be created to implement the law, and that if potential money laundering or foreign bribery was detected as a result of reviewing these special tax returns, it would be routinely reported to law enforcement authorities. After the on-site visit, the ACPO informed the evaluation team that it had received one report originating from a special tax return under the new law, it is unclear whether it might involve potential bribery of foreign public officials. During the on-site visit, the Navarra and Basque authorities clarified that the Tax Amnesty Law does not apply in the autonomous tax regions.

154. A complementary legislative initiative entered into force after the on-site visit, on 31 October 2012, in the form of Law 7/2012 to prevent and combat tax fraud (*Ley de modificación de la normativa tributaria y presupuestaria y de adecuación de la normativa financiera para la intensificación de las actuaciones en la prevención y lucha contra el fraude*). It creates, *inter alia*, a new obligation to report on foreign accounts and assets; removes the limitation period for non-declared income (which is currently 4 years for administrative cases and 5 years for criminal cases); allows the adoption of precautionary measures when investigating possible tax crimes; limits cash payments and establishes liability for successor companies in the event of liquidation of the company subject to tax measures. This new legislation could not be discussed on-site.

Commentary:

The lead examiners are concerned that a possible loophole for the deductibility of bribes remains in the autonomous tax regions of the Basque country and Navarra. They therefore recommend that the Basque and Navarra tax authorities take appropriate measures to make explicit the prohibition of the deduction for tax purposes of bribes paid to foreign public officials. In addition, they are concerned that bribes under the EUR 120 000 threshold for detecting tax crimes could go undetected, be claimed as tax deductions and, as they are considered as 'administrative infringements', might not be reported to law enforcement authorities. They recommend that Spain ensure that suspicious expenses, irrespective of their size, are routinely analysed by Spanish tax officials.

Noting that neither central nor regional tax authorities have detected possible instances of bribery of foreign public officials in the course of tax audits, the lead examiners recommend that Spain train tax officials on the applicable reporting obligation. In addition, the lead examiners suggest following up on whether the system of risk-based audits is adequate in terms of the risks taken into account, including the risk of foreign bribery, when deciding which companies to audit, and how often.

In relation to awareness raising, the lead examiners note that little has been done to inform tax officials and taxpayers alike, of the prohibition on the tax deductibility of bribes. They

⁹⁷ Spain's Tax Amnesty to be appealed today, Bloomberg 25/06/2012: <http://www.bloomberg.com/news/2012-06-25/spain-s-tax-amnesty-to-be-appealed-today-europa-press-reports.html>.

recommend that central and regional tax authorities inform both tax officials and taxpayers of this prohibition, along with the type of expenses that are deemed to constitute bribes, including gifts and entertainment expenses.

The lead examiners commend Spain for its continued inclusion of the optional language in the OECD Model Tax Convention and for ratifying the Protocol amending the Convention on Mutual Administrative Assistance in Tax Matters, which allows information received for tax purposes to be used for other purposes under certain conditions.

Finally, the lead examiners have significant concerns the potential for Spain's Tax Amnesty Law to impede the effective detection and reporting of possible foreign bribery by tax officials. They are encouraged by complementary initiatives undertaken to reduce the impact of the amnesty on the prevention, detection and punishment of tax offences and other economic crimes, and recommend that the Working Group follow up on this issue.

9. International cooperation

(a) MLA and extradition: Relevant legislation

155. As noted in the Phase 2 report the basic framework in Spain for granting and requesting MLA is set out in articles 276-78 LOPJ.⁹⁸ Article 276 provides that MLA requests are to be approved by the Chief Justice of the Supreme Court (*Tribunal Supremo*), the High Court (*Tribunal Superior de Justicia*) or the Ministry of Justice, which will then transfer them to the competent authorities of the requested State, either through the consular or diplomatic channel or directly if provided for in international treaties. Article 277 provides that the Spanish courts shall provide MLA to foreign law enforcement authorities as requested and in accordance with international treaties to which Spain is a Party, or in the absence of a treaty, if there is reciprocity. Spain is a party to a number of bilateral and multilateral MLA treaties, which are automatically incorporated into national legislation once published, in accordance with article 96 of the Constitution. Since Phase 2, Spain has concluded a range of bilateral MLA and extradition treaties.⁹⁹

156. Article 278 LOPJ mandates the MOJ to determine whether there is reciprocity, and provides that even if there is reciprocity, MLA can be refused if the case falls within Spain's exclusive jurisdiction; if the assistance requested is outside the competence of the Spanish law enforcement authorities; if the MLA requests does not meet the requirements of authenticity or is not in Spanish; or if the object of the MLA request is against the public interest. As noted in the Phase 1 and Phase 2 reports on Spain's implementation of the Convention, dual criminality is generally not a condition for granting MLA. However, Spain made a reservation to the 1959 European Convention on Mutual Assistance in Criminal Matters requiring that the offence be an extraditable offence in both jurisdictions for seizure or confiscation to be granted. In addition, Spain requires dual criminality for the execution of coercive measures in response to MLA requests. MOJ officials at the on-site visit clarified that dual criminality is only required in relation to MLA requests for freezing or seizure of assets or search warrants. Judges in the national courts are responsible for deciding whether dual criminality exists.

157. The framework for active extradition is set out in articles 824 to 833 of the Spanish Criminal Procedure Code (*Ley de Enjuiciamiento Criminal*). Under art. 827, extradition can be requested based on international treaties, written or customary law, or in the absence of these, based on the principle of

⁹⁸ Phase 2 Report, para. 85.

⁹⁹ New bilateral MLA agreements have been concluded with: Brazil (2006); India (2006); Japan (2009); Mauritania (2006); Mexico (2006); Morocco (2009) UAE (2009). New bilateral extradition agreements have been concluded with: Algeria (2006); Mauritania (2006); Morocco (2009); UAE (2009)

reciprocity. Spain's framework for passive extradition is set out in Act 4/1985, on passive extradition (*Ley de Extradición Pasiva*). In relation to extradition, there were concerns in Phase 2, that due to most multilateral and bilateral extradition treaties requiring an extraditable offence to be punishable by at least one year's imprisonment under the laws of the requesting and the requested Parties, some of the foreign bribery offences (articles 421, 425-6) would not be extraditable offences. The Working Group accordingly recommended that Spain increase the criminal sanctions applicable to the foreign bribery offence to ensure that effective MLA and extradition were not excluded by the level of applicable sanctions in any foreign bribery case (recommendation 6a). This recommendation was found not to have been implemented during Spain's Phase 2 Written Follow-Up evaluation, as Organic Act 5/2010 increasing the sanctions for the foreign bribery offence had not then entered into force. The subsequent increase in sanctions to 2 to 6 years' imprisonment for the article 445 foreign bribery offence introduced by Organic Act 5/2010 allay this concern.

(b) MLA in practice

158. Since Phase 2 the MOJ, Spain's Central Authority, has executed a staggering total of 18 674 MLA requests. Of these requests, 21 related to bribery offences, of which 7 were issued by Spain and 14 were received from other countries. Four of the requests received from foreign countries related to bribery of foreign public officials. Spain responded to these within periods ranging from 3 months to one year. The MOJ confirmed, however, that none of the requests received were made with reference to Article 9 of the OECD Anti-Bribery Convention. ACPO officials present during the on-site visit confirmed that they had no difficulty accessing bank information in order to respond to MLA requests and that bank information has actually been shared in foreign bribery cases. In terms of response times, Spain stated that the time taken to fulfil MLA requests depends on the measure requested. On average, responses to requests for bank information or identification of telephone numbers or email addresses take 4 months and summoning witnesses or taking statements takes 2 months.

159. In terms of Spain's requests for MLA, 5 of the 7 requests issued by Spain related to bribery of foreign public officials and each request cited Article 9 of the Convention, and according to Spain the responses to these requests were prompt and very useful, albeit the information obtained did not result in any actual prosecutions. The High Court decided to dismiss proceedings in the Angola case due, *inter alia*, to the fact that the country where the bribes had allegedly been paid 'did not cooperate in the past and will not cooperate in the future in proving the facts'.¹⁰⁰ However, on the basis of the information provided by Spain, it would appear that Angola had never been asked to provide evidence in relation to the alleged facts. Similarly, one of the factors in the decision to close the Defence Materiel Case was that MLA could not be obtained because there was no bilateral MLA agreement with the country concerned (which was, nonetheless, a Party to UNCAC) and it did not offer reciprocity. It is concerning that Spanish authorities have closed potential cases of foreign bribery due to lack of international cooperation, when there has been no attempt to obtain the requisite evidence from the countries in question.

160. As a member of the European Union, Spain has used the Eurojust network to obtain more effective international cooperation in criminal cases. At the on-site visit, ACPO officials confirmed that Eurojust had been useful in coordinating meetings between Spanish and foreign prosecutors to resolve issues relating to MLA and jurisdiction. Spain is also a member of the Conference of Ministers of Justice of Ibero-American Countries (COMJIB). ACPO officials on-site stated that this network was useful in facilitating the exchange of information, for example, in one case information was exchanged via videoconference with relevant officials in Uruguay. Spain also participates in the Working Group on

¹⁰⁰ Unofficial translation, National High Court, Central Investigating Magistrate's Court One, Preliminary Investigation 339/2010.

Bribery's annual informal meetings of law enforcement officials and attested to the usefulness of direct contact with foreign prosecutors.

(c) *Extradition in practice*

161. Spain has had only one case in which the extradition of a Spanish citizen was requested in relation bribery of foreign public officials. According to the Spanish High Court's decision in this case, Court No. 13 of Paz de San Salvador issued the detention order on 14 January 2005 under the 1997 Treaty on Extradition between El Salvador and Spain.¹⁰¹ An Interpol Red Notice was issued on 30 October 2006 and Spain did not receive a formal extradition request from El Salvador until 21 May 2010. The request was for the Spanish citizen in question to face trial in El Salvador for allegedly paying bribes in 2002 to Salvadorian officials in exchange for awarding his company a public procurement contract worth USD 30 million. In March 2011 this request was refused by the Criminal Affairs Chamber of the High Court (Tribunal for terrorism, organised crime and crimes committed abroad that must be judged in Spain) at the request of the Public Prosecutor, who invoked Article 6 of the 1997 Extradition Treaty which provides an exception to the extradition of nationals in the absence of an undertaking of reciprocity from the requesting country. The court denied extradition on the basis of a lack of reciprocity, as follows: 'the requesting authority was asked to confirm reciprocity, that is to say, whether they would surrender one of the nationals following a request for extradition. Four years later, this question has not been given an answer in any way.'¹⁰² Nevertheless, the High Court's refusal of the extradition request was made 'without prejudice to an eventual subsequent request from the requesting authority to undertake judicial measures in Spain through the appropriate instruments of international legal cooperation.' Spain took no independent measures to either seek a confirmation of reciprocity from El Salvador in order to proceed with the request. Nor did Spain take any independent measures to investigate the Spanish individual in question for possible Spanish offences in relation to this case. According to the Spanish authorities, El Salvador has not asked Spain to prosecute the individual in question. During the on-site visit, this was invoked by the prosecutors in charge of the case as the reason for Spain not prosecuting its national. At the time of finalising the report, Spain instead claimed (a) the request was processed by the High Court without the knowledge of the ACPO and (b) that the case was time-barred before Spain received notice of the initial Interpol Red Notice. In relation to the first argument, the fact that an Interpol Red Notice could be received and subsequently an extradition request could be transmitted through the diplomatic channel and central authority to the High Court which would then make a decision, but that the SPS or the ACPO would not be alerted to potential Spanish offences contained in the request at any stage in this process, demonstrates a lack of communication that is a cause for concern in and of itself (for an analysis of the failure to prosecute in this case, also see Section 5: Investigation and Prosecution of the Foreign Bribery Offence). Expiry of the limitation period notwithstanding, the circumstances of this case raise questions about Spain's ability to comply with the legal principle of *aut dedere aut judicare* and Article 10 of the Convention, which requires Parties to assure that they can either extradite their nationals or that they can prosecute their nationals for the offence of foreign bribery.

Commentary:

The lead examiners welcome the availability of data on MLA requests issued and received by Spain in relation to foreign bribery cases. They commend Spain on its responsiveness to incoming requests and on its use of regional and informal networks, such as Eurojust, IberRed and the Working Group's informal meetings of law enforcement officials, to find innovative solutions to difficulties encountered in seeking and providing MLA. However, the

¹⁰¹ High Court, Criminal Division, Order No. 52/10; Extradition Procedure No. 26/10 (Central Investigating Magistrate's Court No. Six).

¹⁰² Ibid.

lead examiners are concerned that the Spanish authorities have closed potential foreign bribery cases without attempting to obtain evidence through MLA. They therefore recommend that Spain take steps to ensure that its authorities are more proactive in seeking MLA or other forms of international cooperation in possible foreign bribery cases.

*As regards extradition, the lead examiners are seriously concerned at the lack of independent action taken by the relevant Spanish authorities to pursue extradition to the requesting country or prosecution in Spain, in a case in which the extradition of a Spanish citizen was requested and subsequently denied for alleged bribery of foreign public officials. They recommend that Spain take measures to assure either that it can either extradite or prosecute its nationals for the offence of bribery of foreign public officials. In doing so, Spain should raise awareness among its judges, prosecutors and Central Authority of the obligations contained in Article 10 and of the legal principle of *aut dedere aut judicare*.*

10. Public awareness and the reporting of foreign bribery

(a) Awareness of the Convention and of the foreign bribery offence

162. In its Phase 2 evaluation the Working Group recommended that Spain raise the level of awareness of the foreign bribery offence within the public administration and particularly among agencies that interact with Spanish companies active in foreign markets (recommendation 1a). In its Written Follow-Up Report, the Working Group noted that because Organic Act 5/2010 had not been adopted at that time, awareness raising efforts were limited. However, the Group noted its expectation that Spain would develop training activities targeting the police, prosecutors and the judiciary, lawyers and the private sector once the Act entered into force. The lead examiners also suggested that the MITC/MOJ brochure be revised once the Bill was adopted.¹⁰³ Initiatives undertaken since Phase 2 to train and raise awareness in specific areas of the public and private sectors (e.g. tax officials and taxpayers; accountants and auditors; SEPBLAC officials; law enforcement authorities) are addressed in the relevant sections of this report.¹⁰⁴

(i) Public sector awareness

163. Spain's Phase 2 report noted that the MFA did not have specific training for its agents on the need to raise awareness among Spanish companies doing business abroad of the risks and consequences of bribery of foreign public officials, nor of the need to report suspected instances to Spanish law enforcement agencies. The Working Group recommended that Spain issue regular guidance to staff in Spanish embassies and commercial offices concerning the steps that should be taken where credible allegations arise, in the foreign press or elsewhere, that a Spanish company or individual has engaged in foreign bribery, and take measures to ensure the effective transmission of suspicions to prosecutors in Spain (recommendation 2a). The Working Group noted, when considering Spain's Written Follow-Up Report, that in June 2008 a letter was sent to Spanish Commercial Offices abroad reminding them of their responsibility to detect and report suspicions of foreign bribery. However the letter did not set out the potential sources of such allegations, such as the press, nor the procedure to be followed. Recommendation 2a was therefore considered to have been partially implemented.

¹⁰³ Phase 2 Written Follow-Up Report, para. 3

¹⁰⁴ See Section 5(a)(iv) on training for law enforcement authorities; Section 6(b)(i) on awareness raising by SEPBLAC in relation to foreign bribery as a predicate offence for money laundering; Section 7(b)(ii) on awareness raising in the accounting and auditing profession, and Section 8(b)(ii) on training and awareness for central and regional tax authorities, and taxpayers.

164. The Organic Act 5/2010 entered into force on 23 December 2010 and a new MITC/MOJ brochure was published in May 2011 including the Convention and the updated Spanish legislation (namely, Articles 31bis and 445). The brochure has been circulated to Spain's export credit and trade promotion agencies, Spain's company for development finance, regional and provincial Directorates for Commerce in Spain and all 98 Spanish Commercial Offices abroad for distribution. In addition, in April 2012 a Circular was sent to the heads of Spanish Commercial Offices abroad to inform them of the changes introduced by Organic Law 5/2010 and remind them of the obligation to report to 'the Central Services' and to the ACPO. As was the case in 2008, the 2011 Circular does not specify the potential sources of allegations, nor how such allegations should be reported and to whom they should be addressed. Furthermore, the Circular was not sent to officials at Spanish overseas embassies, who are equally likely to encounter possible instances of bribery by Spanish companies and individuals abroad in the course of their bilateral representations or in the provision of consular services. MFA officials on-site confirmed that there is no procedure in place in the Ministry for its overseas officials to report credible allegations that arise.

(ii) *Private sector awareness*

165. According to Ministry of Economy and Competitiveness officials at the on-site visit, Spain's 300 largest international investors all received a copy of the MITC/MOJ brochure, and this publication was also distributed to the Spanish Confederation of Business Organisations and to trade organisations. Despite these efforts, some of the companies present during the private sector panel were unaware of the brochure. Only a third of the companies present at the on-site visit were aware of the Anti-Bribery Convention and the art. 31bis PC corporate criminal liability framework. Nevertheless, business associations met during the on-site visit remarked a dramatic change in corporate culture since the introduction of corporate criminal liability in Spain in 2010, and that the majority of large companies have already or are in the process of implementing anti-bribery compliance programmes. Lawyers and legal academics met during the on-site visit noted that Spanish companies were at the very early stages of implementing compliance programmes and that this was only gradually filtering down to SMEs. They stated that SOEs have very poor levels of corporate compliance, which is of even greater concern due to the SOE exception to corporate liability (see above, Section 2, Responsibility of Legal Persons). There was a general consensus among private sector representatives that the government did not make efforts to publicise Organic Act 5/2010 and that any increased awareness was as a result of efforts within the private sector. This suggests the continued need for the Spanish administration to reach out to companies of all sizes and sectors about the Spanish framework for combating bribery of foreign public officials and the tools available to ensure compliance with this framework.

(b) *Reporting suspected acts of foreign bribery*

166. As noted in Spain's Phase 2 report,¹⁰⁵ art. 262 CCP contains a general reporting obligation which applies to 'those persons who because of their positions, professions or affectation learn of a public crime', and therefore to certain categories of employee in the private sectors and public sector officials. The sanction for failing to report contained in art. 259 CCP is from 25 to 250 *pesetas* (EUR 0.15 to 1.50) and is therefore not meaningful. One government representative at the on-site visit stated that the non existence of an official channel to report to law enforcement is a problem, and could create a perception in the private sector that there is no need to report possible offences committed in the course of their commercial operations.

167. In the public sector, art. 262 CCP requires that public officials who fail to report a suspected offence be reported to superiors so that administrative measures may be taken. Specifically, art. 14 of the Regulation on the Disciplinary Regime for Public Officials in the State Administration contains sanctions

¹⁰⁵ Phase 2 report, paras. 30-33.

up to dismissal. Despite this range of reporting obligations, Spain has confirmed that there are no established reporting channels currently in place within the Spanish administration for reporting bribery of foreign public officials. In addition, employees of independent statutory agencies, such as CESCE (Spain's export credit agency) are not subject to reporting obligations and sanctions for non-reporting by public servants contained in art. 262 CCP and the Disciplinary Regime Regulation as they are not deemed to be civil servants.

168. In terms of reporting in practice, the only report of suspected foreign bribery made by Spanish officials was the report made to the SPS in 2010 by the Spanish Embassy in Panama. As mentioned above in section 4 (Cases involving the bribery of foreign public officials), the SPS reportedly closed the case without informing the ACPO, which only heard about the case following its discussion by the Working Group. Given that this report was based on media articles, the Public Prosecutor's Office considered that it could not instigate criminal proceedings in the absence of additional documentation from the Embassy that would identify the employees of the Spanish company in question who would have carried out the alleged acts. One government representative at the on-site visit stated that the non existence of an official channel to report to law enforcement is a problem, and could create a perception in the private sector that there is no need to report possible offences committed in the course of their commercial operations.

(c) Whistleblower protection

169. In Phase 2, the Working Group recommended that Spain consider steps to better protect from retaliatory action employees who make reports in good faith (recommendation 2b). Spain's Written Follow-Up Report noted that the Prosecutor General's Office had modified its website to publish and clarify the effects of art. 262 CCP but that nothing had been done to ensure protection of whistleblowers. Recommendation 2b was therefore considered not to have been implemented. Since then, the Working Group adopted the 2009 Recommendation on Further Combating Bribery in International Business Transactions, Recommendation IX (iii) of which recommends that Member countries should ensure that appropriate measures are in place to protect from discriminatory or disciplinary action public and private sector employees who report in good faith and on reasonable grounds to competent authorities suspected acts of bribery of foreign public officials in international business transactions.

170. In relation to whistleblower protection in the public sector, Spain cites the individual rights of public servants set out in art. 14 of the Basic Statute for Public Employees (Law 7/2007). None of the rights listed in paragraphs a) to e) of this provision relate to protection from retaliatory action when reporting suspected crimes in good faith. Spain also refers to Organic Law 19/1994 on Protection of Witnesses and Experts in criminal cases, which would only potentially protect whistleblowers who are subsequently called as witnesses or experts if and when a prosecution eventuates and does therefore not address the 2009 Recommendation to ensure whistleblowers protection. Spain does not have any form of private sector whistleblower protection. Following the on-site visit, Spanish authorities noted that a recently appointed expert commission was working on the revision of the Criminal Procedure Code with a view to adoption of the amendments by the current government. It could not provide any more information on the nature of the proposed amendments.

Commentary:

Despite the existence of a general obligation in Spain to report suspected offences, there is a clear lack of reporting of suspected instances of foreign bribery both by the private sector and general public, as well as within the public sector. The lead examiners consider that this is partly due to the inexistence of a reporting channel. They recommend that Spain create and publicise a clear means by which such reports can be made to law enforcement authorities. In addition, the lead examiners recommend that Spain inform officials at Spanish overseas

embassies of Spain's framework for combating foreign bribery, along with the obligation to report suspected instances of bribery to Spanish law enforcement authorities. The Spanish Ministry of Foreign Affairs should also establish an internal procedure to facilitate such reports from embassies.

Another reason for the extremely low level of reporting could be that Spanish law provides no protection for whistleblowers in either the public or private sector, as recommended by 2009 Recommendation IX(iii) and in line with Annex II.A.11(ii) to the 2009 Recommendation. The lead examiners are encouraged by the legislative proposals mentioned by Spain and recommend prompt adoption of an appropriate regulatory framework to protect public and private sector employees from any discriminatory or disciplinary action when they report suspicions of bribery of foreign public officials in good faith and on reasonable grounds.

In relation to the private sector, the lead examiners recommend that Spain raise awareness among companies of all sizes and sectors of the implications of art. 31bis PC and of the risk of corporate liability for bribery of foreign public officials, along with the corresponding need to put in place an effective anti-bribery compliance programme. To this end, the Spanish authorities should actively promote implementation of the Annex II Good Practice Guidance in the private sector.

11. Public advantages

(a) Officially supported export credits

171. CESCE is Spain's officially supported export credit and insurance agency. It is majority-owned by the State and large national banks such as Santander, BBV and Sabadell. It has more than EUR 39 000 million in insured sales, 42.5% of which are in foreign markets. It operates in 10 countries in Europe and Latin America, and has 14 offices throughout Spain. CESCE has 500 exporters in its database and all major Spanish exporters are CESCE clients. CESCE adheres to the 2006 Recommendation of the Council on Bribery and Officially Supported Export Credits (2006 Exports Credits Recommendation), which asks export credit agencies of adhering countries to take various anti-corruption measures, *e.g.* measures to prevent, detect and report bribery; and denial of support where a transaction involves bribery or a client was previously convicted of bribery. Spain is also a member of the OECD Working Party on Export Credits and Credit Guarantees (ECG), which surveys how adhering countries have implemented the 2006 Export Credit Recommendation.

(i) Anti-corruption declarations by exporters

172. Spain's Phase 2 Report noted that CESCE requires applicants to declare awareness of the Convention and undertake not to bribe, along with signing anti-corruption clauses in export credit contracts. Contrary to the then 2003 Export Credit Action Statement, CESCE did not extend the declaration to include agents working on behalf of the applicant.¹⁰⁶ The Working Group therefore recommended that Spain ensure that declarations required from applicants for support from CESCE provide for an undertaking to prevent bribery by persons acting on behalf of the applicant and/or exporter (recommendation 1a). CESCE subsequently amended its anti-bribery policy to require that the exporter must declare *before support is provided* that neither him or herself nor anyone acting on his or her behalf in relation with the export transaction for which official support has been requested, has failed to fulfil the Convention or any of the related Spanish laws. In light of this adjustment, the Working Group considered that this component of recommendation 1a had been implemented, while other components relating to

¹⁰⁶ Spain Phase 2 Report, para. 16.

broader awareness raising by the Spanish administration had not, therefore it was considered partially implemented. CESCE's anti-bribery policy is now applicable to all insurance programmes, including short term. Since 2007, CESCE has been requiring all exporters that benefit, directly or indirectly, from officially supported export credits to submit a declaration.¹⁰⁷ The Declaration must also now include the exporter's commitment to provide CESCE with detailed information on agents' commissions upon demand, prior to being granted coverage.

(ii) *Due diligence and reporting*

173. Recommendation 1(c) of the 2006 Export Credit Recommendation recommends that export credit agencies verify whether exporters and applicants are listed on the publicly available debarment lists of international financial institutions (IFIs). CESCE checks weekly whether exporters and, where appropriate, applicants are listed on such debarment lists,¹⁰⁸ *before support is provided*. According to CESCE, a Spanish company has never been listed on such a debarment list. CESCE also monitors the media and provided an example, during discussions at the on-site visit, of a Spanish company in the energy sector that had been the subject of media reports of bribes paid in an Eastern European country. The company was put on CESCE's 'watch list' and invited to complete a questionnaire and meet with CESCE officials.

174. In accordance with CESCE procedures, if an exporter or applicant appears on a debarment list, or is currently under investigation for violation of laws prohibiting bribery of foreign public officials in any country, CESCE conducts enhanced due diligence and the approval of the application is suspended pending the outcome of that process. In terms of the due diligence process, CESCE requires the applicant to provide a written submission outlining the reason for the charge, conviction or IFI debarment, along with the corrective measures that have been taken including in relation to the individuals involved in the corrupt transaction. If there is any evidence that bribery was involved at any time in the award or execution of the export transactions, the issue is brought to the attention of the CESCE Board of Directors which has the discretion to refer the case to the ACPO. There have been only two instances where this procedure has been invoked in practice in relation to possible bribery of foreign public officials, the first in relation to the media report mentioned above and the second when an exporter reported suspected bribery in its operations to CESCE management. In neither of these cases did CESCE make a report to the ACPO. After the on-site visit, CESCE indicated that the reason it did not report either of these cases to the ACPO was that after evaluation of the cases no 'credible evidence'¹⁰⁹ was discovered and consequently no further actions were taken. As noted above (Section 10(b): Reporting suspected acts of foreign bribery), CESCE is an independent statutory agency and its officials are not considered public officials. They are therefore not subject to the same obligations to report suspicions of bribery, or other criminal offences, as Spanish public officials.

¹⁰⁷ Spain's responses to the Survey on Measures taken to combat Bribery in Officially Supported Export Credits (2010), p. 2.

¹⁰⁸ The World Bank, the African Development Bank, the European Bank for Reconstruction and Development, the Inter American Development Bank and the Asian Development Bank agreed in April 2010 to create a common list of companies debarred from their public procurement contracts.

¹⁰⁹ CESCE interprets 'credible evidence' in accordance with the language set out in the footnote (5) to recommendation 1(h) of the 2006 Export Credit Recommendation: 'For the purpose of this Recommendation, credible evidence is evidence of a quality which, after critical analysis, a court would find to be reasonable and sufficient grounds up on which to base a decision on the issue if no contrary evidence were submitted.'

(iii) *Agents' commissions*

175. CESCE covers agents' commissions to a maximum of 5% of the value of total exports (goods and services). It requires the amounts of commissions to be disclosed at the time of application, and whether the commission is paid in Spain and abroad. CESCE requires additional information 'on an exceptional basis', and will only require the agent's details and assess whether the purpose and level of a commission is consistent with standard business practice in the event of 'discrepancies in the figures' submitted by the applicant. CESCE clarified at the on-site visit that in practice this meant they would look into more detail at agents' commissions that were 10% or more of the value of the exports. In the context of large transactions, this could mean that still significant sums could escape detection. CESCE confirmed that it has only come across three cases in which the commission exceeded 5% and in each case the transaction was evaluated by two different CESCE committees.

(iv) *Sanctions*

176. CESCE excludes any loan related to a contract whose validity or enforceability has been considered to be in violation of the law, null or unenforceable due to non-compliance with any legislative provision applicable to the transaction, by a competent court either in Spain or abroad. Insurance cover expressly excludes loans related to export transactions or loan agreements which involve bribery in violation of article 445 of the Spanish Penal Code, when this is expressly admitted by the Insured, or where there has been a firm court decision. In terms of interim measures, CESCE can withhold support in the event that the insured export transaction becomes the object of a legal proceeding and claims payments will be retained until a final judgment is issued. CESCE has never taken these measures against exporters in the context of foreign bribery proceedings or convictions.

(v) *Awareness raising*

177. CESCE has an ongoing anti-bribery communications strategy and carries out periodic mailouts to medium and long term loan recipients. In 2007 it conducted a targeted mailing campaign to alert clients to changes introduced in CESCE's anti-bribery policy and it contacted clients to inform them of changes to the Spanish legal provisions, presumably following the enactment of Organic Law 5/2010. All new applicants also receive a copy of this communication upon receipt of the application. . After the on-site visit it informed the evaluation team that the introductory paragraph in the current version of the letter to new applicants specifically refers to the Spanish legislation implementing the Convention and the fact that foreign bribery is criminalised in article 445 PC. In terms of encouraging clients to implement anti-bribery compliance programmes, CESCE uses the following text in a standalone document provided to applicants: 'We appreciate your collaboration and we encourage you to develop and apply appropriate management control systems that combat bribery, hoping that you share with us the opinion that combating bribery does not only correspond to governments and Public Administration but to all members of Society.' CESCE nonetheless indicated that it periodically reviews its anti-corruption procedures along with the wording of communications with clients. This could usefully include references to the tools that clients may use to implement such compliance programmes, such as the Annex II *Good Practice Guidance*.

(b) *Regional trade promotion agencies*

178. Apart from CESCE, there are a number of regional trade promotion agencies, such as PromoMadrid and ACCIÓ. ACCIÓ's International Cooperation Department provides both technical assistance and takes an active role in European Cooperation Projects. ACCIÓ also offers an International Public Procurement Service which provides information on procurement opportunities with foreign administrations, foreign public procurement processes and on the ground support to Catalan businesses bidding for tenders. Spain's Phase 2 report noted that experience with trade promotion agencies at the

regional level was variable; some regional agencies had instituted anti-corruption clauses whereas others had not.¹¹⁰ During discussions on-site it was established that neither PromoMadrid nor ACCIÓ had specific anti-corruption measures in place and they had done nothing to raise awareness among their clients of the risks and consequences of bribing public officials abroad. One of the reasons given for the lack of awareness raising measures was because there had been no specific requests from companies for this kind of advice. In terms of the risks faced by their clients, it is worthwhile noting that one fifth of manufacturing businesses in Catalonia export their products and 34% of Spanish exporters are located in Catalonia.

(c) Public procurement

179. At the time of Spain's Phase 2 evaluation, article 20(a) of the Law on Contracts with the Public Administration governed debarment from public procurement, which was for a set period of eight years. The article 20(a) sanction was in theory automatic, but in practice the Ministry of Finance and Public Administration made the decision following a referral by the Consultative Committee for Public Contracts (*Junta Consultiva de Contratación*, a representative of which will be present during this panel). The Phase 2 Report notes that Consultative Committee representatives did not receive necessary information from the judicial authorities and that there was no functioning mechanism for the transmission of information relating to foreign bribery convictions other than by spontaneous reports from the Spanish administration. Accordingly, the Working Group recommended that Spain take practical measures to improve the flow of information to the authorities responsible for the administrative sanctions systems, in particular from the judicial authorities (recommendation 6e). This recommendation was considered not to be implemented during the Working Group's consideration of Spain's Phase 2 Written Follow-Up Report.

180. Since Phase 2, Royal Legislative Decree 3/2011 entered into force, amending the Law on Contracts with the Public Administration to insert articles 60 and 61. Article 60(1)(a) prohibits natural persons from contracting with the 'public sector' where they have received a final conviction for specified criminal offences, including bribery. This prohibition extends to legal persons whose administrators or representatives have received a final conviction for these crimes, as well as to companies formed by a subsequent merger or acquisition (article 60(2)). Article 61(1) provides that the debarment upon final conviction for foreign bribery will be administered directly by contracting authorities, subject to the scope and duration of the debarment being specified in the court decision in which that individual or company is convicted. If the debarment conditions are not specified in the judgment, article 61(2) provides that they shall be determined taking into consideration the existence of fraud or bad faith on the part of the individual or company and the extent of damage caused to the public interest. In any case, the debarment period cannot exceed eight years for individuals or companies subject to a final conviction and must be of a minimum of two years following registration on the Official Register Debarred Tenderers and Companies (*Registro Oficial de Licitadores y Empresas Clasificadas*). Article 61(5) provides that the contracting authorities must inform the Consultative Committee and the competent authorities of the autonomous communities of their debarment decisions. Given that the debarment process has now been outsourced to the various contracting authorities, with little central oversight by the Ministry of Finance and Public Administration, the Working Group's concerns in Phase 2 about the flow of information between the various relevant authorities are all the more pertinent.

181. As there have been no convictions of Spanish companies for bribery of foreign public officials to date, no Spanish companies have been debarred from Spanish public procurement contracting on the basis of a conviction for this offence. The Ministry of Finance and Public Administration does, however, maintain a list of excluded companies on its website, which currently numbers 27, the last company having

¹¹⁰ Phase 2 Report, para. 17.

been debarred in 2010.¹¹¹ Spain, as a member of the EU, is bound by article 45 of the EU Procurement Directive (Directive 2004/18/EC), to exclude any candidate or tenderer who has been the subject of a conviction of corruption (including foreign bribery) by final judgement of from participation in a public contract. The Consultative Committee can have recourse to foreign convictions for bribery when considering debarment; however officials on-site stated that there would need to be effective communication of this conviction from abroad, and within the relevant Spanish agencies.

(d) Official development assistance (ODA)

182. There are a range of central and regional development agencies in Spain. Those represented during the on-site visit were the AECID (Agencia Española de Cooperación Internacional para el Desarrollo), COFIDES (Compañía Española de Financiación del Desarrollo) and ICO (Instituto de Crédito Oficial). AECID falls under the foreign affairs portfolio and its primary function is to provide development grants to non-profit NGOs and foreign governments.¹¹² At the time of Phase 2, AECID did not have any specific rules to combat corruption but Spain indicated that these would be adopted following general legal reforms in 2007. Officials at the on-site visit confirmed that AECID's contracts had not changed since Phase 2. AECID referred to a case that had come to its attention via a former employee of an AECID-funded NGO who reported that the salaries paid to NGO officials ranged from 40 to 60% less than those reported on the payroll (which was paid with AECID funds). Following AECID due diligence it was determined that the NGO was overstating the amount paid to its employees and diverting the difference (in the realms of EUR 700 000) into the company's own account, in order to avoid certain tax measures. Spain stated that given the nature of the projects undertaken by the NGO, it was extremely unlikely that there would be scope for the surplus funds to be used to bribe public officials in the country where the NGO operated. In December 2010, the AECID Director publicly revoked the AECID-accreditation of the NGO in question and AECID sought reimbursement of the amount in question. AECID did not report this matter separately to tax or law enforcement authorities for investigation of possible criminal or tax offences. During the finalisation of this report AECID indicated that the reason it did not report this case was because it related to fraud on ODA reporting and not tax fraud, because non-profit organisations are not taxed on donations. It is concerning that AECID did not consider potential criminal aspects of the case, specifically whether it involved potential bribery of foreign public officials, and in turn whether it should be reported to the ACPO.

183. COFIDES provides medium and long term financial support for viable private direct investment projects located in foreign countries; it operates on a for-profit basis. Its financing capacity enables COFIDES to invest between 0.25 and EUR 30 million per operation and it prioritises assistance to SMEs. The resources at COFIDES' disposal include its own shareholders' equity, to back direct investment projects located in emerging or developing countries, and the resources of the State-owned Fund for Foreign Investment (FIEX) and Fund for SME Foreign Investment Operations (FONPYME). COFIDES total financing capacity exceeds EUR 1,000 million. Spain's Phase 2 report noted that COFIDES had issued a Code of Ethics in September 2005 and expected to amend its contracts to contain a specific reference to the Convention, a declaration by co-contractors that a copy has been received, and a commitment not to engage in bribery as defined in the Convention.¹¹³ Officials at the on-site visit stated that COFIDES introduced anti-bribery clauses in 2002 and an anti-money laundering due diligence process in 2011. COFIDES informed of two cases involving possible bribery of Costa Rican and Nicaraguan

¹¹¹ Spain, list of debarred companies; <http://www.minhap.gob.es/es-ES/Servicios/Contratacion/Junta%20Consultiva%20de%20Contratacion%20Administrativa/Documents/Prohibicion%20de%20contratar.pdf>

¹¹² AECID Statute, Royal Decree 1403/2007: http://www.aecid.es/en/aecid/normativa/aecid/Estatuto_aecid/.

¹¹³ Spain Phase 2 Report, para. 20.

public officials at the beginning of 2012 by Spanish companies that were also clients of COFIDES. In neither case did COFIDES take steps to inform the ACPO, although according to information provided following the on-site visit, the ACPO subsequently considered and closed the both cases. The ACPO closed the first case due to the 'existence of management division through the agency agreement' and the second case, 'after interrogating the company's director.' An investigation by the European Anti-Fraud Office (OLAF) is ongoing in relation to the first case. COFIDES officials did not see the need to report to the ACPO as the cases were both already before the courts in the countries involved. COFIDES would focus primarily on the decision of those courts when deciding whether to suspend or revoke the contracts with the companies involved. COFIDES is not subject to public sector reporting obligations. Furthermore, there are no internal guidelines on forwarding information to the ACPO. COFIDES prefers to contact the company directly in such instances 'to manage the reputational risk for the company' and, according to COFIDES comments following the on-site visit, 'to be sure that the information about a possible case of bribery from a 'third party' has already been identified by the company or not, and steps taken'. According to COFIDES, the next step would be to inform the Secretariat of State for Trade in the Ministry of Economy and Competitiveness, rather than report directly to the ACPO. Following the on-site visit, COFIDES informed the evaluation team that it is working to promote the Convention and has co-published an anti-corruption handbook (*Guía práctica para la gestión de riesgos y herramientas de implantación – Lucha contra la corrupción y promoción de la transparencia*) with the Global Compact Spanish Network. . In addition, the Working Group notes a statement from the COFIDES Chair, dated 3 December 2012, that COFIDES will endeavour to develop internal guidelines in 2013 to facilitate accessible channels for the reporting to Spanish law enforcement authorities of possible cases of foreign bribery and train its staff accordingly.

184. ICO is a State-owned corporate entity attached to the Ministry of Economy and Competitiveness through the Secretariat of State for the Economy. It has the status of the State's Financial Agency. ICO was established in June 1971 by Royal Decree 706/1999. As a Specialised Credit Institution, ICO provides medium and long-term financing for investments by enterprises established in Spain. In 2011 ICO had a total of EUR 94 577 million assets which surpasses that of a number of regional development banks. ICO officials present at the on-site visit stated that ICO had contract clauses that enabled it to halt payments in the event of a formal bribery investigation and to demand reimbursement if there is a conviction. ICO officials do not, however, check Spanish or International Financial Institutions debarment lists before financing companies.

(e) Defence exports

185. International trade in defence materiel, mainly aircraft and naval vessels, is important for the Spanish economy (see above, Section 4(b): Spain's exposure to bribery of foreign public officials); it is also an industry that is extremely vulnerable to bribery of foreign public officials. The Secretariat of State for Foreign Trade (SSFT) attached to the Ministry of Economy and Competitiveness, informed by the Inter-Ministerial Regulatory Board on Foreign Trade in Defence and Dual-Use Material (*Junta Interministerial Reguladora del Comercio Exterior de Material de Defensa y de Doble Uso*, JIMDDU), is the body responsible for authorising each external trade transaction concerning defence material, other material and dual-use items and technologies. Defence exports are regulated by Law 53/2007 on control of external trade in defence and dual-use material, Chapter II of which sets out the requirements for defence exporters to obtain authorisation of the Ministry of Industry, Tourism and Trade. Royal Decree 2061/2008 establishes a Special Register for External Trade Operators in Defence and Dual-use Material (Spanish acronym REOCE). There are currently around 780 companies listed on this defence export registry, of which almost 90% are SMEs. The authorisation and registration of defence exporters does not currently include the need for exporters to declare that they and anyone acting on their behalf have not, and will not, engage in foreign bribery. During discussions of the draft report, Spain informed the Working Group of a

proposed reform to Royal Decree 2061 to require declarations by exporters, verification of prior bribery convictions and temporary or permanent suspension from the REOCE.

186. A JIMDDU representative at the on-site visit confirmed that registration could be suspended or revoked if a company did not comply with defence export regulations and that in the past companies had been suspended in practice, although none had been suspended for bribery of foreign public officials. Article 15.6 of Royal Decree 2061/2008 requires JIMDDU to ‘check whether any document exists indicating the participation of the applicant or operator in unlawful activities, ... in which case the said application would be denied. In the event of a change in the initial conditions in the sense just described, the suspension or nullification of a previously approved registration may be proposed.’ Despite this framework, two of the seven foreign bribery investigations opened in Spain since Phase 2 (see above, Section 4: Cases involving bribery of foreign public officials) involved Spanish defence exporters and in neither of these cases had JIMDDU questioned their defence export authorisation. In relation to detection and reporting of suspected foreign bribery during defence export authorisation procedures, JIMDDU is not subject to a legislative requirement to report suspected offences to law enforcement authorities although it does submit annual statistical information on levels of defence exports and destination countries to the Spanish Parliamentary Defence Committee.

Commentary:

In the absence of a conviction of a Spanish company for foreign bribery, it is difficult to assess whether Spain has implemented Phase 2 recommendation 6e that Spain take practical measures to improve the flow of information to the authorities responsible for the administrative sanctions systems, in particular from the judicial authorities. The lead examiners therefore recommend that this issue is followed up as practice develops.

The lead examiners are concerned at the failure of Spanish export credit and development assistance agencies to alert law enforcement authorities to possible cases of foreign bribery discovered in the course of providing finance. They recommend that CESCE review its reporting procedures, for example by clarifying the criteria for reporting instances of suspected foreign bribery. COFIDES should establish clear reporting guidelines, and train its staff accordingly; the lead examiners therefore strongly encourage COFIDES to pursue its stated intention to do so. In general, the Spanish government should consider whether to extend public sector reporting obligations to officials of Spanish agencies that are not currently covered by these obligations.

Given the size of the defence industry in Spain and the recognised global vulnerability of this industry to foreign bribery, the lead examiners recommend that Spain: (i) ensure that, when authorising exporters of military equipment and dual-use goods, JIMDDU requires an anti-bribery declaration on the part of applicants and considers whether they are the subject of bribery prosecutions or convictions; and (ii) consider the temporary or permanent disqualification of enterprises convicted of bribing foreign public officials from applying for export authorisation. They encourage Spain to pursue its proposal to modify Royal Decree 2061 in accordance with this recommendation.

C. RECOMMENDATIONS AND ISSUES FOR FOLLOW-UP

187. The Working Group on Bribery is seriously concerned with Spain's lack of active enforcement of its foreign bribery offence, almost 13 years after its entry into force, with only 7 investigations opened that had all been closed at the time of this report. No individual or company has ever been prosecuted or sanctioned for foreign bribery. The Working Group welcomes the introduction in the Spanish Penal Code of a separate foreign bribery offence in 2010. However, it is concerned at the introduction at the same time of a specific offence for the bribery of European officials, which contains all the deficiencies identified in Phase 2 in the former foreign bribery offence, in particular, with regard to the scope of the offence, the level of sanctions, and the statute of limitations. The Working Group is encouraged by the entry into force, in 2010, of a regime of liability of legal persons, which for the first time since the entry into force of the Convention in Spain, offers a wide range of possibilities for holding companies liable for foreign bribery offences. However, the Working Group is seriously concerned that this new regime of liability excludes from its scope a large range of State-owned enterprises. In this context, the Working Group welcomes the reform of the Penal Code announced by Spain's Minister of Justice at the time of finalising this report.

188. The Phase 2 evaluation report on Spain adopted in March 2006 included recommendations and issues for follow-up (as set out in Annex 1). Of the recommendations that had not been fully implemented at the time of Spain's October 2008 Written Follow-Up Report, the Working Group concludes that: Recommendations 5(b), 6(a)(ii), 6(d) have been implemented, Recommendations 1(a), 1(b), 1(c), 2(c), 3(c), 3(d), 4(a), 4(b), 4(c), 5(a), 6 (a)(i), 6(c), 6(e) remain partially implemented and Recommendations 2(a), 2(b), 3(e), 6(b) remain not implemented.

189. The Working Group requests that Spain provide a written self assessment report in one year (*i.e.* in December 2013) on (1) progress in amending its Penal Code; and (2) prosecuting foreign bribery cases, including on implementation of recommendations 2(b), 3(a), 5(g), 8(b) and 10. It further invites Spain to submit a written follow-up report on all recommendations and follow-up issues within two years (*i.e.* in December 2014). The Working Group will take appropriate measures throughout this process, including the possibility of a Phase 3*bis* evaluation, should Spain have failed to take steps to address its recommendations.

1. Recommendations of the Working Group

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

1. Review its overall approach to enforcement in order to effectively combat international bribery of foreign public officials. [Convention, Article 1, 2009 Recommendation, V.]

2. Regarding the foreign bribery offence, the Working Group recommends that Spain proceed, as a matter of priority with the legislative changes announced on 4 December 2012 and, in particular, amend the current statutory framework to consolidate or harmonise the offence under art. 427 PC with the one under art. 445 PC, to remove inconsistencies between the two offences which could provide obstacles to the effective implementation of the Convention, including:

- a) by clarifying that the definition of a foreign public official encompasses "officers of the European Union or civil servants who are nationals of another Member State of the Union", that this definition is in all cases autonomous; and that characterisation of the expected acts of foreign officials does not require recourse to foreign law in order to establish the offence;

- b) by clarifying that all bribes to a foreign public official to affect the official's exercise of discretion, including where the act induced by the bribe is in accordance with the official's duties would constitute the basis for a foreign bribery offence, regardless of whether the Company could properly have been awarded the business and whether the benefit obtained is "irregular";
 - c) by ensuring that the promise of a bribe; the use of intermediaries and bribes paid to a third party are covered in all cases of bribery of a foreign public official; and
 - d) by clarifying that the defence under art. 426 PC in cases of corruption offences reported to law enforcement authorities (tantamount to "effective regret") does not apply to the foreign bribery offences, including the offence under art. 427 PC. [Convention, Article 1, 2009 Recommendation, III ii) and V, Phase 2 recommendations 4a. and 4b.]
3. Regarding the responsibility of legal persons, the Working Group recommends that, as part of the legislative reform announced by Spain in its letter to the Group dated 4 December 2012, Spain:
- a) Amend the Penal Code to ensure that State-owned and State-controlled enterprises can also be held liable for bribery of foreign public officials under art 31bis PC; [Convention, Article 2, Article 5 and 2009 Recommendation III ii), V, Annex I(D), and Phase 2 recommendation 5a.]
 - b) Ensure by any appropriate means that the criteria of "due control" as well as the onus and level of proof of this standard of liability be specified with a view to ensure coverage of the full range of situations required in Annex I to the 2009 Recommendation, in particular under its subsection B) b) and that the implementation of compliance programs and internal controls by a legal person cannot be used as a defence to avoid liability; [Convention, Article 2, 2009 Recommendation V, III ii), Annex I(B) and Phase 2 recommendation 5a.]
 - c) Take steps to increase the effectiveness of the liability of legal persons in foreign bribery cases, including through raising awareness among prosecuting authorities throughout the country to ensure that the new range of possibilities available under the law for holding legal persons liable for foreign bribery is understood and applied consistently and diligently, with a view to more effectively enforcing the new corporate liability regime. [Convention, Article 2, 2009 Recommendation V, III ii), Annex I(B) and Phase 2 recommendation 5a.]
4. Regarding sanctions, the Working Group recommends that Spain:
- a) Harmonise the regime of sanctions (both criminal and administrative) for bribery of European officials with the one available for bribery of other foreign public officials (under art. 445 PC) for both natural and legal persons to ensure effective, proportionate and dissuasive sanctions in all cases, including for bribery to obtain a favourable exercise of discretion; [Convention, Article 3; 2009 Recommendation V and Phase 2 recommendation 6a.i)]
 - b) Increase available sanctions for natural persons in foreign bribery cases involving significant amounts of money in order to achieve sanctions proportionate to those available for similar economic crimes; [Convention, Article 3; 2009 Recommendation V and Phase 2 recommendation 6b.];
 - c) Develop guidelines on how to calculate the proceeds of bribery to individuals and/or companies who have benefited from corrupt transactions to ensure effectiveness and consistency in the calculation of the fine available under art. 445 PC, which level depends on the size of the profit; [Convention, Article 3; 2009 Recommendation V]

- d) Compile statistics on the criminal, civil and administrative sanctions imposed for domestic and foreign bribery in order to assess whether they are effective, proportionate and dissuasive; [Convention, Article 3; 2009 Recommendation V]
- e) With regard to confiscation, (i) clarify, by any appropriate means, that confiscation in all foreign bribery cases is governed by art. 127 PC and that the limitations under art. 431 PC do not apply; (ii) also clarify that legal persons can be subject to confiscation measures on the same basis as natural persons; (iii) take steps to ensure that law enforcement authorities and prosecutors seek confiscation in corruption cases, whenever appropriate; (iv) provide training and guidance on the practical aspects of the confiscation of the proceeds of bribes and their quantification; and (v) make the Asset Recovery Office operational as a matter of priority. [Convention, Article 3.3].

5. Regarding the investigation and prosecution of foreign bribery cases, the Working Group recommends that Spain take the necessary steps to:

- a) Ensure (i) that the police forces and magistrates, in particular in the Central Investigating Magistrate Court, receive adequate training on the specific elements of the foreign bribery offences; on the investigative techniques adapted to this offence; and more generally, about the need to more actively and pro-actively detect, investigate and prosecute the offence of bribery of foreign public officials by both individuals and companies; and (ii) that the ACPO, including the specialised agents attached to it, receive specific training to update their knowledge on the above mentioned topics, in particular with regard to the revised foreign bribery offences in the Penal Code; [Convention, Article 5 and 2009 Recommendation III i), Annex I(D)]
- b) (i) Clarify by any appropriate means that the foreign bribery offence under the jurisdiction of the ACPO includes the offences of bribery of an EU official under art. 427 PC; (ii) reinforce the coordination between the SPS and the ACPO and more generally between the relevant authorities in relation to foreign bribery allegations, investigations, prosecutions and international cooperation and (iii) ensure that the courts and other law enforcement authorities systematically and urgently inform the ACPO of any foreign bribery allegation which comes to their knowledge; [Convention, Article 5 and 4 and 2009 Recommendation, Annex I(D)]
- c) Ensure that foreign bribery allegations are not prematurely closed; [Convention, Article 5 and 2009 Recommendation, Annex I(D)]
- d) Clarify by any appropriate means that foreign bribery cases involving an EU official, as provided under art. 427 and 422 PC, are not subject to the Law on Jury Trials (art. 24(1)); [Convention, Article 5, 2009 Recommendation, Annex I(D)] and Phase 2 recommendation 3d.]
- e) (i) Use proactive steps to gather information from diverse sources of allegations and enhance investigations (ii) raise awareness at the national level about the need to prioritise the investigation of foreign bribery offences; and (iii) consider the establishment of a national database for all ongoing cases with a view to ensure coordination of foreign bribery investigations, including the offences of bribery of EU officials, nationally and to avoid intelligence gaps; [Convention, Article 5, 2009 Recommendation, Annex I(D) and Phase 2 recommendation 3e.]
- f) As necessary and in compliance with the relevant rules and procedures, and respecting the fundamental rights of the Defendant, ensure that the decisions published include elements of the arrangements reached through *conformidad*, when appropriate, such as the terms of the

arrangement (in particular, the amount agreed to be paid); [Convention, Article 3 and 2009 Recommendation, Annex I(D)]

- g) Concerning the statute of limitations, as part of its announced reform of the Penal Code (i) extend the statute of limitations applicable to the offences under art. 420 PC and align it with the period (10 years) for the offences under arts. 419 and 445 PC; (ii) review the possibilities for suspension and interruption of the limitation period with a view to cover, in particular, situations where the accused is out of the country or in hiding; and (iii) clarify the rules governing the statute of limitations applicable to legal persons. [Convention, Article 6]

6. Regarding mutual legal assistance, the Working Group recommends that Spain take steps to ensure that its authorities are more proactive in seeking MLA or other forms of international cooperation in possible foreign bribery cases. [Convention Article 9; 2009 Recommendation XIII(i) and (iii)]

7. Regarding extradition, the Working Group recommends that Spain (i) take measures to assure either that it can either extradite or prosecute its nationals for the offence of bribery of foreign public officials; and (ii) raise awareness among its judges, prosecutors and Central Authority of the obligations contained in Article 10 of the Convention and of the legal principle of *aut dedere aut judicare*. [Convention, Articles 6 and 10(3)]

Recommendations for ensuring effective prevention and detection of foreign bribery

8. Regarding tax measures to combat bribery of foreign public officials, the Working Group recommends that Spain ensure (a) that tax officials are trained on the applicable requirement for reporting suspected offences to law enforcement authorities; (b) that the Basque and Navarra tax authorities take appropriate measures to make explicit the prohibition of the deduction for tax purposes of bribes paid to foreign public officials; (c) that central and regional tax authorities inform both tax officials and tax payers of this prohibition, along with the type of expenses that are deemed to constitute bribes, including gifts and entertainment expenses; and (d) that suspicious expenses, irrespective of their size, are routinely analysed by Spanish tax officials; [2009 Tax Recommendation, I; Phase 2 recommendation 7]

9. Regarding raising awareness of the foreign bribery offence, the Working Group recommends that Spain raise awareness among companies of all sizes and sectors of the implications of art. 31bis PC and of the risk of corporate liability for bribery of foreign public officials, along with the corresponding need to put in place an effective anti-bribery compliance programme; [2009 Recommendation, Annex II]

10. Regarding reporting suspicions of foreign bribery, the Working Group recommends that Spain (i) create and publicise a clear means by which reports of suspected instances of foreign bribery can be made by both the private sector and general public to law enforcement authorities; (ii) establish an internal reporting procedure within the Ministry of Foreign Affairs and inform officials at Spanish overseas embassies of the obligation to report suspected instances of bribery to Spanish law enforcement authorities; and (iii) consider whether to extend public sector reporting obligations to officials of Spanish agencies that are not currently covered by these obligations. [2009 Recommendation IX ii); Phase 2 recommendation 2a.]

11. Regarding whistleblower protection, the Working Group recommends that Spain promptly adopt an appropriate regulatory framework to protect public and private sector employees from any discriminatory or disciplinary action when they report suspicions of bribery of foreign public officials in good faith and on reasonable grounds; [2009 Recommendation IX iii)]

12. Regarding money laundering, the Working Group recommends that Spain (i) ensure that SEPBLAC, reach out to reporting entities subject to AML obligations in a more proactive way, including

on their duty to detect possible instances of foreign bribery; (ii) continue its efforts to detect money laundering linked to foreign bribery and, (iii) ensure that the ACPO provide feedback to SEPBLAC about the outcome of specific cases generated or enriched by information transmitted by the FIU. [Convention, Article 7 and 2009 Recommendation, III i)]

13. Regarding accounting rules and external audit, the Working Group recommends that Spain:

- a) Ensure that accounting offences are effectively investigated and prosecuted, particularly in connection with bribery cases; [Convention, Article 8]
- b) In order to ensure adequate implementation of auditors' obligations to report suspicions of foreign bribery: (i) further publicise this requirement and provide training on the circumstances under which such reporting is required; (ii) pursue the reform of its Technical Standards in order to clarify the requirement to report to management that applies to auditors, and (iii) raise awareness so that auditors know that they should identify, detect and report foreign bribery. [2009 Recommendation X B. iii)]

14. Regarding company internal controls, ethics and compliance programmes or measures, the Working Group recommends that Spain promote, jointly with the relevant professional associations, internal controls, ethics and compliance programmes or measures in businesses involved in commercial transactions abroad, including SMEs, with reference to *inter alia* Annex 2 of the 2009 Recommendation, Good practice guidance on internal controls, ethics, and compliance. [2009 Recommendation, X. C. i); Annex II]

15. Regarding public advantages and export credit, the Working Group recommends that Spain:

- a) Reinforce the reporting framework in place in CESCE and COFIDES, for example by clarifying the criteria for reporting instances of suspected foreign bribery and training staff accordingly; [2009 Recommendation IX]
- b) Pursue its proposal to modify Royal Decree 2061 in order to ensure that, when authorising exporters of military equipment and dual-use goods, JIMDDU (i) requires an anti-bribery declaration on the part of applicants and considers whether they are the subject of bribery prosecutions or convictions; and (ii) considers the temporary or permanent disqualification of enterprises convicted of bribing foreign public officials from applying for export authorisation. [2009 Recommendation XI i)]

2. Follow-up by the Working Group

16. The Working Group will follow up on the issues below as case law and practice develop:

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

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

- d) The level of sanctions imposed against natural and legal persons, including through *conformidad*; are effective, proportionate and dissuasive: in the light of (i) Spain’s system of suspending and converting sentences of imprisonment; and (ii) the application of mitigating circumstances, especially in cases of solicitation of bribes by foreign public officials; [Convention, Article 3; 2009 Recommendation V]
- e) The use made of administrative sanctions under the conditions set out in art. 66 bis PC; [Convention, Article 3; 2009 Recommendation V]
- f) The use made of criminal and administrative penalties for false accounting against natural and legal persons; [Convention, Article 8; 2009 Recommendation X A iii)]
- g) The implementation by the auditing and accounting professions of their obligation to develop specific training on foreign bribery and adopt “red flag indicators” to help detecting foreign bribery in companies’ accounts; [Convention Article 8; 2009 Recommendation III i)]
- h) The guarantees of independence from the other powers of (i) of the State Prosecutor General (FGE) and indirectly those of the ACPO, as well as those (ii) of the investigating magistrates, with a view to ensure that a potential lack of independence of the prosecution combined with its increasingly prominent role does not lead to the consideration of factors prohibited under Article 5 of the Convention; [Convention, Article 5 and 2009 Recommendation, Annex I(D)]
- i) The investigative powers available to the ACPO prosecutors and that the investigation tools available to them in the prosecutorial investigation phase are sufficient and in particular include the possibility to conduct searches and wiretapping (within the limits of its data protection rules and the provisions of its Constitution); [Convention, Article 5 and 2009 Recommendation, Annex I(D)]
- j) Whether the system of risk-based tax audits is adequate in terms of the risks taken into account, including the risk of foreign bribery, when deciding which companies to audit, and how often; [2009 Tax Recommendation, I. ii)]
- k) The impact of the Tax Amnesty Law on the effective prevention, detection and punishment of possible foreign bribery by tax officials; [2009 Recommendation III (iii); 2009 Tax Recommendation II]
- l) The flow of information to the authorities responsible for the administrative sanctions systems, in particular from the judicial authorities. [2009 Recommendation XI i); Phase 2 recommendation 6e]

**ANNEX 1 PHASE 2 RECOMMENDATIONS TO SPAIN AND
ASSESSMENT OF IMPLEMENTATION BY THE WORKING GROUP ON BRIBERY**

Recommendations in Phase 2		<i>Written follow-up*</i>
<p>With respect to awareness raising and prevention-related activities to promote the implementation of the Convention and the Revised Recommendation, the Working Group recommends that Spain:</p>		
1a.	Take additional measures, including further training, to raise the level of awareness of the foreign bribery offence within the public administration and among those agencies that interact with Spanish companies active in foreign markets, including trade promotion, export credit and development aid agencies and ensure that declarations required from applicants for support from CESCE provide for an undertaking that applies to bribery by persons acting on behalf of the applicant and/or exporter (Revised Recommendation, Paragraph I);	<i>Partially implemented</i>
1b.	Take action to improve awareness among business organisations and companies of the legislation regarding foreign bribery and of the intention to enforce it, including promoting better coordination between Ministries and agencies responsible for legal and economic affairs for purposes of producing explanatory materials relating to foreign bribery (Revised Recommendation, Paragraph I);	<i>Partially implemented</i>
1c.	Work with the accounting, auditing and legal professions to raise awareness of the foreign bribery offence and its status as a predicate offence for money laundering, and encourage those professions to develop specific training on foreign bribery in the framework of their professional education and training systems (Revised Recommendation, Paragraph I).	<i>Partially implemented</i>
<p>With respect to the detection and reporting of the offence of bribing a foreign public official and related offences to the competent authorities, the Working Group recommends that Spain:</p>		
2a.	Issue regular guidance to staff in Spanish embassies and commercial offices concerning the steps that should be taken where credible allegations arise, in the foreign press or elsewhere, that a Spanish company or individual has engaged in foreign bribery, and take measures to ensure the effective transmission of suspicions to prosecutors in Spain (Revised Recommendation, Paragraph I);	<i>Partially implemented</i>
2b.	Facilitate the reporting of suspicions of foreign bribery to prosecutors, including by clarifying and publicizing the effect of art. 262 LECrim and considering steps to better protect from retaliatory action employees who make reports in good faith (Revised Recommendation, Paragraph I);	<i>Not implemented</i>
2c.	Continue to improve the applicable measures to require auditors to report all suspicions of bribery by any employee or agent of the company to management	<i>Not</i>

	and, as appropriate, to corporate monitoring bodies, and consider more effective measures than art. 262 LECrim to require auditors, in the face of inaction after appropriate disclosure within the company, to report all such suspicions to the competent law enforcement authorities (Revised Recommendation, Paragraph V.B);	<i>implemented</i>
2d.	Modify and expand the treatment of politically exposed persons (PEPs) in the current money laundering prevention guidelines for credit institutions and in other relevant guidelines as appropriate, and ensure that the money laundering authorities have adequate resources to carry out their expanded duties effectively (Revised Recommendation, Paragraph I).	<i>Satisfactorily implemented</i>
With respect to the investigation and prosecution of foreign bribery and related offences, the Working Group recommends that Spain:		
3a.	Implement the decision of the Spanish authorities to attribute to the Anti-Corruption Prosecution Office (ACPO) the power to investigate and prosecute all foreign bribery cases other than minor cases without the need for a case-specific determination of special significance by the Attorney General of Spain (FGE), take additional measures to ensure that all significant foreign bribery allegations are investigated and continue to provide the necessary resources to investigators and prosecutors (Convention, Article 5; Revised Recommendation, Paragraph 1);	<i>Satisfactorily implemented</i>
3b.	Reconsider the rule requiring that the suspect be informed during the initial investigation of foreign bribery allegations in light of its likely interference with the effectiveness of the investigation (Convention, Article 5; Revised Recommendation, Paragraph 1);	<i>Satisfactorily implemented</i>
3c.	Take appropriate measures, such as increasing the applicable sanctions, to ensure that the statute of limitations applicable to all foreign bribery offences extends for an adequate period of time for the investigation and prosecution of the offence (Convention, Art. 6);	<i>Not implemented</i>
3d.	Clarify the law in order to remove uncertainty about whether foreign bribery cases are subject to trial by jury (Convention, Articles 5, 6; Revised Recommendation, Paragraph 1);	<i>Not implemented</i>
3e.	Take appropriate measures to improve the collection and dissemination of statistical information relevant to evaluating the fight against foreign bribery (Revised Recommendation, Paragraph I).	<i>Satisfactorily implemented</i>
With respect to the offence of foreign bribery , the Working Group recommends that Spain:		
4a.	Amend the law to ensure that the foreign bribery offences do not require recourse to foreign law for their application (Convention, Art. 1);	<i>Not implemented</i>
4b.	Take all necessary action to ensure that the following would constitute the basis for a foreign bribery offence: (i) all bribes to a foreign public official to affect the official's exercise of discretion; (ii) all bribes for an act or omission in relation to performance of official duties, regardless of whether it is offered to the official "in the exercise of his/her post"; and (iii) all bribes for acts or omissions in accordance with the official's duties other than small facilitation payments (Convention, Art. 1);	<i>Not implemented</i>
4c.	Clarify the definition of foreign public official and that art. 427 PC does not apply to the foreign bribery offences, and ensure that the law applies to bribes to foreign public officials composed of non-pecuniary benefits (Convention, Art. 1).	<i>Not implemented</i>

With respect to the liability of legal persons for foreign bribery , the Working Group recommends that Spain:		
5a.	Amend the law to ensure that all legal persons can be held directly liable for bribery of foreign public officials (Convention Art. 2);	<i>Not implemented</i>
5b.	Exclude requirements of individual liability as a prerequisite for the liability of the legal person (Convention Art. 2).	<i>Not implemented</i>
With respect to sanctions for foreign bribery , the Working Group recommends that Spain:		
6a.	Increase the criminal sanctions applicable to foreign bribery in order (i) to provide for effective, proportional and dissuasive sanctions in all cases, including in particular for bribery to obtain a favourable exercise of discretion; and (ii) to ensure that effective mutual legal assistance and extradition are not excluded by the level of applicable sanctions in any foreign bribery case (Convention, Art. 3(1));	<i>Not implemented</i>
6b.	Consider whether to increase available sanctions for foreign bribery cases involving significant amounts of money in order to achieve sanctions proportional to those for similar economic crime cases (Convention, Art. 3);	<i>Not implemented</i>
6c.	Eliminate mandatory reductions of sanctions for foreign bribery (i) in cases of solicitation; and (ii) in cases where the foreign public official does not carry out the unjust act (Convention, Art. 3(1));	<i>Not implemented</i>
6d.	Amend the law to provide that legal persons shall be subject to effective, proportional and dissuasive sanctions for foreign bribery, including fines or monetary sanctions (Convention Art. 2, 3);	<i>Not implemented</i>
6e.	Take practical measures to improve the flow of information to the authorities responsible for the administrative sanctions systems, in particular from the judicial authorities (Convention, Art. 3).	<i>Not implemented</i>
With respect to related accounting/auditing, money laundering and tax offences and obligations , the Working Group recommends that Spain:		
7.	Take appropriate measures to make explicit the prohibition of the deduction for tax purposes of bribes paid to foreign public officials, incorporate training with regard to foreign bribery and its tax treatment into the training plan for tax inspectors, and consider adapting existing Spanish translations of the OECD Handbook for Tax Examiners for use in Spain (Revised Recommendation, Paragraphs I, IV).	<i>Satisfactorily implemented</i>

* The right-hand column sets out the findings of the Working Group on Bribery on Spain's written follow-up report to Phase 2, considered by the Working Group in March 2006.

Follow-up by the Working Group

The Working Group shall follow-up on the issues below as practice develops in Spain, in order to assess:

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

- b) The role of the FGE with regard to the prosecution of foreign bribery cases, including the impact of the rule requiring that the FGE grant extensions for prosecutorial investigations that last more than six months (Convention, Art. 5; Revised Recommendation, Paragraph I);
- c) Seizure and confiscation in foreign bribery cases, including any possible limiting effect of art. 431 PC (Convention, Art. 3);
- d) The implementation of the decision of the Spanish authorities to attribute to the Anti-Corruption Prosecution Office (ACPO) the power to investigate and prosecute all foreign bribery cases other than minor cases without the need for a case-specific determination of special significance by the Attorney General of Spain (FGE), [...] additional measures to ensure that all significant foreign bribery allegations are investigated and continue[d] [provision of] the necessary resources to investigators and prosecutors (Convention, Article 5; Revised Recommendation, Paragraph 1);
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- e) [The adoption of] appropriate measures to make explicit the prohibition of the deduction for tax purposes of bribes paid to foreign public officials, incorporate training with regard to foreign bribery and its tax treatment into the training plan for tax inspectors, and [whether Spain has] considered adapting existing Spanish translations of the OECD Handbook for Tax Examiners for use in Spain (Revised Recommendation, Paragraphs I, IV)¹¹⁵.

¹¹⁴ In the Phase 2 report, this issue was subject to recommendation 3 (a) that was deemed as satisfactorily implemented at the time of the Phase 2 written follow-up report. Nonetheless, since these new rules had not been tested in practice and because of the expected amendments to the offence, the Working Group decided that the implementation of recommendation 3 (a) in the Phase 2 report should be followed up.

¹¹⁵ In the Phase 2 report, this issue was subject to recommendation 7 that was deemed as satisfactorily implemented at the time of the Phase 2 written follow-up report. Nonetheless, the Working Group decided that the implementation of recommendation 7 in the Phase 2 report should be followed up.

ANNEX 2 LIST OF PARTICIPANTS IN THE ON-SITE VISIT

Government Ministries and Bodies

- Ministry of Economy and Competitiveness
- Ministry of Finance and Public Administration
- Ministry of Foreign Affairs and Cooperation
- Institute of Accounting and Auditing (ICAC)
- Ministry of Industry, Energy and Tourism
- Ministry of Interior
- Ministry of Justice
- State Tax Agency
- Basque and Navarra Tax Authorities

Government-Funded Bodies

- Spanish Institute for Foreign Commerce (ICEX)
- PromoMadrid
- Spanish Export Credit Agency (CESCE)
- Official Credit Institute (ICO)
- Spanish Company for Development Finance (COFIDES)
- National Stock market Commission (CNMV)
- Catalan Internationalisation and Competitive Agency (ACCIO)
- Spanish Agency for International Cooperation (AECID)

Law enforcement and judiciary

- Civil Guard
- National Police
- Spanish General Council of the Judiciary (CGPJ)
- Catalonia Anti-Fraud Office
- State Prosecution Service (SPS)
- SEPBLAC (Spanish FIU)
- Special Public Prosecutor's Office against Corruption and Organised Crime (ACPO)
- Judges from Supreme Court and from National Court

Private Sector

Private enterprises

- Telefónica
- Ferrovial
- Elecnor
- Gas Natural Fenosa
- Siemens
- Iberdrola
- Prosegur
- Zeltia
- Navantia
- Astilleros Gondán

- Repsol

Business associations

- Spanish Bankers' Association
- Exporters and Investors Club
- Spanish Confederation of Business Organisations (CEOE)
- Spanish Confederation of SMEs (CEPYME)
- Council of Spanish Chambers of Commerce

Financial institutions

- Bank of Spain
- BBVA
- Banco Santander

Legal profession and academics

- Autonomous University of Madrid
- Carlos III University Madrid
- Spanish Bar Council
- University of A Coruña

Accounting and auditing profession

- Spanish Association for Accounting and Business Administration (AECA)
- Instituto de Censores Jurados de Cuentas de España (ICJCE)
- Ernst & Young
- KPMG

Civil Society

- Transparency International Spain
- Diario Expansión
- Telemadrid
- Corporate Social Responsibility Observatory

ANNEX 3 LIST OF ABBREVIATIONS, TERMS AND ACRONYMS

Abbreviation	Spanish	English
ACCÍO	Cataluña Competitividad	Catalan Internationalisation and Competitive Agency
ACPO	Fiscalía contra la Corrupción y la Criminalidad Organizada	Special Public Prosecutor's Office against Corruption and Organised Crime
AEAT	Agencia Estatal de Administración Tributaria	State Taxation Authority
AECID	Agencia Española de Cooperación Internacional para el Desarrollo	Spanish Agency for International Cooperation
AML	-	Anti-money laundering
CCP	Ley de Enjuiciamiento Criminal	Code of Criminal Procedure
CESCE	Compañía Española de Seguros de Crédito a la Exportación, S.A.	Spanish Export Credit Agency
CGPJ	Consejo General del Poder Judicial	Spanish General Council of the Judiciary
COFIDES	Compañía Española de Financiación del Desarrollo	Spanish Company for Development Finance
ECG	-	OECD Export Credit Group
EOMF	Estatuto Orgánico del Ministerio Fiscal	Organic Statute of the State Prosecution Service
FGE	Fiscal General del Estado	State General Prosecutor
ICAC	Instituto de Contabilidad y Auditoría de Cuentas	Accounting and Auditing Institute
ICO	Instituto de Crédito Oficial	Official Credit Agency
IFRS	-	International Financial Reporting Standards

JIMDDU	Junta Interministerial Reguladora del Comercio Exterior de Material de Defensa y de Doble Uso	Inter-Ministerial Regulatory Board on Foreign Trade in Defence and Dual-Use Material
LOPJ	Ley Orgánica del Poder Judicial	Organic Act of the Judicial Power
MLA	-	Mutual legal assistance
MOJ	Ministerio de Justicia	Ministry of Justice
PC	Código penal	Penal Code
PEPs	-	Politically exposed persons
SEPBLAC	Servicio Ejecutivo de la Comisión de Prevención de Blanqueo de Capitales e Infracciones Monetarias	Executive Service of the Commission for the Prevention of Money Laundering and Financial Offences (Financial Intelligence Unit)
SME	-	Small and medium sized enterprise
SOE	-	State-owned or State-controlled enterprise
SPS	Fiscalía General del Estado	State Prosecution Service
STR	-	Suspicious transaction report
UNCAC	-	United Nations Convention against Corruption

ANNEX 4 EXCERPTS FROM RELEVANT LEGISLATION

Foreign bribery offence and sanctions

Article 419, Penal Code

The authority or public officer who, to his own advantage or that of a third party, were to receive or solicit, personally or through an intermediary, handouts, favours or remunerations of any kind, or who were to accept an offer or promise to do, while carrying out the duties of his office, in order to carry out an act contrary to the duties inherent thereto, or not to carry out these, or to unfairly delay those he must carry out, shall incur a sentence of imprisonment from three to six years, a fine of twelve to twenty- four months and special barring from public employment and office for a term of seven to twelve years, without prejudice to the relevant punishment for the act perpetrated, omitted or delayed due to the remuneration or promise, if that constitutes a felony.

Article 420, Penal Code

The authority or public officer who, to his own advantage or that of a third party, were to receive or solicit, personally or through an intermediary, handouts, favours or remuneration of any kind, or who were to accept an offer or promise to carry out an act inherent to his office, shall incur a sentence of imprisonment of two to four years, a fine of twelve to twenty- four months and special barring from public employment and office for a term of three to seven years.

Article 421, Penal Code

The penalties stated in the preceding Articles shall also be imposed when the handout, favour or remuneration were received or solicited by the authority or public officer, in the respective cases, as a reward for the conduct described in those Articles.

Article 422, Penal Code

The authority or public officer who, to his own advantage or that of a third party, were to accept, personally or through an intermediary, a handout or gift offered to him in view of his office or duty, shall incur a sentence of imprisonment of six months to one year and suspension from public employment and office from one to three years.

Article 423, Penal Code

The terms set forth in the preceding Articles shall also be applicable to juries, arbitrators, experts, administrators or receivers appointed by the court, or any others acting to carry out a public duty.

Article 424, Penal Code

1. The private individual who offers or delivers a handout or remuneration of any kind to an authority, civil servant or person who participates in the exercise of public duties in order for the latter to perpetrate an act that is against the duties inherent to his office, or an act inherent to his office, or in order for him not to carry out, or to delay what he should carry out, or in consideration of his office or duty, shall be punished in the respective cases, with the same prison sentences and fine as the corrupt authority, officer or person.

2. Should a private individual deliver the handout or remuneration following solicitation by the authority, civil servant or person who participates in exercise of public duties, the same prison sentences and fine shall be imposed on him as on the former.

3. Should the action achieved or intended by the authority or officer be related to contracting proceedings, subsidies or auctions called by public administrations or entities, penalties shall be handed down to the natural persons and, when appropriate, the company, partnership or organisation concerned, of barring to obtain public subsidies and aid, to enter contracts with public sector institutions, entities or bodies and to enjoy tax and Social Security benefits or incentives for a term from three to seven years.

Art. 427 para. 1, Penal Code

1. The terms set forth preceding Articles shall also be applicable when charges are brought against, or the acts concerned affect officers of the European Union or civil servants who are nationals of another Member State of the Union. To these ends, an officer of the European Union shall be construed to be:

1. All persons who have civil servant status or that of a hired agent pursuant to the European Community Officers' Statute, or regime applicable to other agents of the European Union.

2. All persons seconded to the European Union by the Member States, or by any public or private body exercising the equivalent functions carried out by civil servants or other agents of the European Union.

3. The members of bodies created pursuant to the European Union Constituting Treaties, as well as the staff of such bodies, to the extent that the European Union Officers' Statute or regime to which other agents of the European Union are subject is not applicable to them.

A national officer of another Member State of the Union shall also be construed as one with that status for the purposes of application of the criminal laws of that Member State [...].

Article 445 para.1, Penal Code

“Those that, through offers, promises or granting of any undue benefit, pecuniary or of other kind, bribe or try to bribe, whether directly or through intermediaries, foreign public officials or officials from international organizations to the advantage of them or of a third party or comply with their demands in respect to this, so that they act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business, will be punished with penalties of imprisonment from 2 to 6 years and a fine of 12 to 24 months, except when the benefit obtained was greater than the resulting sum, in which case the fine will be an amount of between the value to twice the value of this benefit.

Besides the penalties aforementioned, the liable person will be punished with the prohibition of contracting with public administrations as well as the loss of the possibility of obtaining public subsidies or grants and of the right to have benefits or incentives from taxes or social security, and the prohibition of taking part in commercial transactions with public consequences from 7 to 12 years.

Penalties foreseen in preceding paragraphs will be imposed in its higher half if the object of business were humanitarian goods or services or other essential goods. [...].”

Article 445 para.3, Penal Code

For the purposes of this Article a foreign civil servant is construed to be:

- a) Any person who holds a legislative, administrative or judicial office in a foreign country, both by appointment or by election;
- b) Any person who exercises a public duty for a foreign country, including a public body or a public company;
- c) Any officer or agent of an international public organisation.

Liability of legal persons and sanctions

Article 31 bis, Penal Code

1. In the cases foreseen in this Code, legal persons will be held criminally liable for the crimes committed on their behalf or for their account, and to their benefit, by their legal representatives and their managers *de facto* or by law.

In the same cases, legal persons will also be criminally liable for the crimes committed on their behalf and to their benefit by whoever, in the exercise of mercantile activities and subject to the authority of the natural persons mentioned in the previous paragraph, has been able to carry out the acts because, provided the particular circumstances of the case, the due control over them has not been exerted.

2. Legal persons will be criminally liable whenever a crime is committed by those holding the positions or duties referred to in the preceding paragraph, even if the specific natural person has not been identified or it has not been possible to process [prosecute]¹¹⁶ him/her. When as a consequence of the acts constituting the crime, a fine penalty is given to both, judges or courts will adapt the respective amounts in such a manner that the resulting sum is proportionate to the seriousness of those.

3. The concurrence of circumstances affecting the guilt or aggravating the liability of the accused, in the persons that have materially carried out the actions or in the those that have made them possible for lack of due control, or the fact that these persons have died or have avoided the action of justice shall not exclude nor modify the criminal liability of legal persons, without prejudice to the provision of the following paragraph.

4. Only the following activities, carried out after the commission of the crime and through their legal representatives, will be considered mitigating circumstances of the criminal liability of legal persons:

a) To confess the offence to the authorities, before knowing that there is a criminal procedure against the legal person.

b) To collaborate in the investigation of the deed producing, at any time within the proceedings, new evidence that is decisive to clear up the criminal liability arising from the facts.

c) To proceed, at any moment within the proceedings and before the hearing, to repair or diminish the damage caused by the crime.

d) To establish, before the beginning of the hearing, effective measures to anticipate and detect crimes that could be committed in the future with the means or under the cover of the legal person.

Art 31bis, Para. 5, Penal Code

5. The provisions regarding criminal liability of legal persons shall not apply to State, territorial or institutional public administrations, regulatory bodies, agencies and commercial public entities, political

¹¹⁶ Term used in the translation available on-line on the site of the Ministry of Justice.

parties and trade unions, international public law organizations, nor to others exerting public powers of sovereignty, administrative powers or in the case of public companies carrying out public policies or providing services of general economic interest.

In these cases, courts or tribunals might declare the existence of criminal liability where they consider that it is a legal entity created by their promoters, founders, managers or representatives with the aim to avoid a possible criminal liability.”

Article 427 para. 2, Penal Code

2. When, pursuant to the terms established in Article 31 bis, a legal person is responsible for the felonies defined in this Chapter, it shall have the following penalties imposed thereon:

- a) Fine from two to five years, or from three to five times the profit obtained when the resulting amount is higher, if the offence committed by a natural person has a punishment of imprisonment foreseen exceeding five years;
- b) Fine from one to three years, or of two to four times the profit obtained when the resulting amount is higher, if the offence committed by a natural person has a punishment foreseen of more than two years custodial sentence not included in the preceding Section;
- c) Fine of six months to two years, or of two to three times the profit obtained if the resulting amount is higher, in the rest of the cases.

Pursuant to the rules established in Article 66 bis, the Judges and Courts of Law may also impose the penalties established in Sub-Sections b) to g) of Section 7 of Article 33.

Article 445 para. 2, Penal Code

When, pursuant to the terms established in Article 31 bis of this Code a legal person is responsible for this crime the punishment of a fine from two to five years, or from three to five times the profit obtained if the resulting amount is higher shall be imposed thereon.

Pursuant to the rules established in Article 66 bis, the Judges and Courts of Law may also impose the penalties established in Sub-Sections b) to g) of Section 7 of Article 33.

Conflict of law

Article 8, Penal Code

Acts liable to be defined pursuant to two or more provisions of this Code and not included in Articles 73 to 77 shall be punishable by observing the following rules:

1. A special provision shall have preferential application rather than a general one;
2. A subsidiary provision shall be applied only if the principal one is not, whether such a subsidiary nature is specifically declared or when it may tacitly be deduced.
3. The most ample or complex penal provision shall absorb those that punish offences committed therein.
4. Failing the preceding criteria, the most serious criminal provision shall exclude those punishing the act with a minor punishment.

Confiscation

Article 127, Penal Code

1. All penalties imposed for a malicious felony or misdemeanour shall lead to loss of the assets obtained there from and of the goods, means or instruments with which they were prepared or executed, as well as the gains obtained from the felony or misdemeanour, whatever the transformations these may have

undergone. All shall be seized, unless they belong to a third party in good faith that is not responsible for the felony, who has acquired them legally.

The Judge or Court of Law shall extend the seizure of assets, goods, instruments and gains for criminal activities committed within the setting of a criminal or terrorist organisation or group, or for an offence of terrorism. For these purposes, the property of each and every one of the persons found guilty of felonies committed within the criminal or terrorist organisation or group or for an offence of terrorism that is disproportionate in relation to the revenue lawfully obtained by each one of those persons shall be deemed to have been obtained by the criminal activity.

2. In cases in which the Law foresees imposing a sentence of imprisonment exceeding one year for committing an imprudent felony, the Judge or Court of Law may order the loss of the assets obtained thereby and of the assets, means or instruments with which this has been prepared or executed, as well as the gains from the offence, whatever transformations they may have undergone.

3. If, for any circumstance, it were not possible to seize the assets stated in the preceding Sections of this Article, seizure of other assets for an equivalent value pertaining to those criminally accountable for the act shall be seized.

4. The Judge or Court of Law may order the seizure foreseen in the preceding Sections of this Article even when no punishment is imposed on any person due exemption from criminal accountability or due to the statute of limitations, in the latter case, as long as the unlawful status of the assets is proven.

5. The assets seized shall be sold, if of lawful trade, applying the sums obtained to covering the civil liabilities of the convict if the Law does not foresee otherwise and, if not of lawful trade, they shall be applied to the use provided by the laws and, failing that, shall be destroyed.

Statute of limitations

Article 131, Penal Code

1. Felonies prescribe:

After twenty years, when the maximum punishment set for the offence is imprisonment of fifteen or more years.

After fifteen, when the maximum punishment set by Law is barring for more than ten years, or imprisonment for more than ten and less than fifteen years.

After ten, when the maximum punishment set by Law is imprisonment or barring for more than five years and does not exceed ten.

After five, all other felonies, except those of slander and defamation, which shall prescribe in one year.

2. Misdemeanours prescribe in six months.

3. When the punishment stated in the Law is a compound one, that requiring the longest time to prescription shall be considered to apply the rules considered in this Article.

4. Crimes against humanity and of genocide and offences against persons and assets protected in the case of armed conflict, except those punished under Article 614, shall not have a statute of limitations.

Nor shall offences of terrorism have a statute of limitations, if they have caused the death of a person.

5. In cases of concurrent or related felonies, the term for prescription shall be that of the most serious offence.

Article 132, Penal Code

1. The terms foreseen in the preceding Article these shall be calculated from the day on which the punishable crime was committed. In cases of continued offence, permanent offence, as well as offences requiring assiduity, those terms shall be calculated, respectively, from the day on which the last infraction took place, from when the unlawful situation or the conduct ceased.

In attempted homicide and offences of non-consensual abortion, injury, against liberty, of tortures and against moral integrity, sexual freedom and indemnity, privacy, the right to personal dignity and the inviolability of the dwelling, when the victim is a minor, the terms shall be calculated from the day on which he has come of age, and if he were to die before coming of age, as of the date of his death.

2. Prescription shall be interrupted, leaving the time elapsed without effect, when proceedings are brought against the person deemed to be responsible for the felony or misdemeanour, and shall begin to elapse again from the proceedings halting or ending without sentencing, pursuant to the following rules:

1. Proceedings shall be deemed as being conducted against a specific person from the moment when, at the suit's inception, or thereafter, a reasoned judicial resolution is handed down attributing him the presumed participation in an event that might constitute a felony or misdemeanour.

2. Notwithstanding the foregoing, filing a suit or the accusation brought before a judicial body, in which a specific person is charged with presumed participation in an act that might constitute a felony or misdemeanour, shall suspend calculation of the prescription for a maximum term of six months in the case of an felony and for two months in the case of a misdemeanour, to be counted from the very date the suit is filed or the accusation brought.

If any of the court resolutions mentioned in the preceding Section is issued against the accused or defendant within that term, or against any other person involved in the events, the interruption of prescription shall be deemed to have taken place retroactively, for all purposes, on the date of the suit or accusation being filed.

On the contrary, calculation of the term of prescription shall continue from the date of the suit or accusation being filed if, within the term of six or two months, in the respective cases of felony or misdemeanour, a final court order of non-admission of the suit or accusation is handed down or the Court decides not to proceed against the person sued or accused. Continuation of the calculation shall also take place if the Investigating Judge does not adopt any of the resolutions foreseen in this Article within those terms.

3. For the purposes of this Article, the person against whom the proceedings are filed must be sufficiently determined in the court order, either by direct identification or by data that allow subsequent specification of that identification within the organisation or group of persons charged with the act.

Offence of false accounting

Article 290, Penal Code

The de facto or de jure directors of a company incorporated or under formation, who falsify the annual accounts or other documents that should record the legal or financial status of the company, in such a way to cause financial damage thereto or to any of its shareholders or partners, or to a third party, shall be punished with a sentence of imprisonment from one to three years and a fine from six to twelve months.

If financial damage were actually caused, the penalties shall be imposed in the upper half.

Article 310, Penal Code

He who is obliged by law to keep corporate accounting, books or tax records shall be punished with a sentence of imprisonment from five to seven months when:

a) He absolutely fails to fulfil that obligation under the direct assessment of the tax bases regime;

- b) He keeps different accounts that, related to the same activity and business year, conceal or simulate the true situation of the business;
- c) He has not recorded businesses, acts, operations or economic transactions in general, in the obligatory books, or has recorded them with figures different to the true ones;
- d) He has recorded fictitious accounting entries in the obligatory books.

The consideration as a felony of the cases of fact referred to in Sections c) and d) above, shall require the tax returns to have been omitted, or for those submitted to provide a record of the false accounting and that the amount, by more or less, of the charges or payments omitted or forged exceeds, without arithmetic compensation between them, 240,000 euros for each business year.

Article 310 bis, Penal Code

When, pursuant to the terms established in Article 31 bis, a legal person is responsible for the offences defined in this Title, it shall have the following penalties imposed thereon:

- a) Fine of two to four times the sum swindled or unduly obtained, if the offence committed by a natural person has a punishment of imprisonment foreseen exceeding two years;
- b) Fine of six months to one year, in the cases defined in Article 310.

Pursuant to the rules established in Article 66 bis, the Judges and Courts of Law may also impose the penalties established in Sub-Sections b) to g) of Section 7 of Article 33.

Effective regrets

Article 426, Penal Code

Should a natural person who has coincidentally obtained a handout or other remuneration made by an authority or public officer report the fact to the authority whose duty is of proceeding to investigate the matter, before proceedings commence, as long as no more than two months have elapsed from the date of the events, he shall be exempt of punishment for the felony of corruption.

Obligation to report to law enforcement authorities

Article 262, Code of Criminal Procedure

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

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

Conformidad

Article 787, Code of Criminal Procedure

1. Before the hearing of evidence is started, the counsel of the defence, with the approval of the accused in person, shall be able to ask the Judge or the Court to pass judgment according to the bill of charges that contains the most serious penalty, or with the one that could be submitted in this same act, which can not refer to a different fact, or be this fact defined as a more serious crime than the previous bill of charges.

Should the penalty not exceed six years imprisonment, the Judge or Court shall pass sentence in accordance with that alleged by the defence if the requirements laid down in the following sections concur.

2. If from the description of the facts accepted by all parties, the Judge or Court understands that the accepted criminal definition is correct and the penalty is appropriate in accordance with said classification