

## SPAIN

### REVIEW OF IMPLEMENTATION OF THE CONVENTION AND 1997 RECOMMENDATION

#### A. IMPLEMENTATION OF THE CONVENTION

##### Formal Issues

Spain signed the Convention on December 17, 1997, and deposited the instrument of ratification on January 14, 2000. On January 12, 2000, Spain published, in the State Official Journal, the *Organic Act 3/2000 of the 11<sup>th</sup> of January*, which modifies the *Penal Code* by adding article 445 bis in order to implement the obligations under the Convention. Following the general rules for the entry into force of legislation under article 2 of the *Civil Code*, article 445 bis came into force on February 2, 2000.

##### Convention as a Whole

Article 445 bis of the *Penal Code* establishes the offence of bribing a foreign public official. It also provides sanctions by incorporating by reference the sanctions provided for under article 423 of the *Penal Code* for the bribery of a domestic public official.

The Spanish authorities deemed that it was not necessary to introduce new laws on the other obligations under the Convention as existing provisions in the *Penal Code* and elsewhere in the law were considered satisfactory for this purpose. For instance, the *Penal Code* contains provisions relevant to seizure and confiscation, the statute of limitations and money laundering, and the *Organic Act on the Judicial Power* contains the provisions relevant to jurisdiction over criminal offences.

Article 96.1 of the Spanish Constitution governs the status of international treaties and conventions under Spanish domestic law. Paragraph 1 of article 96.1 states that “validly made international treaties, when officially published in Spain, will form part of the internal legal system”, and the last paragraph of article 96.1 states as follows:

*The provisions of treaties may only be repealed, amended or suspended in the manner provided in the treaties themselves or in accordance with general rules of international law.*

The Spanish authorities provide that the Constitutional Court has acknowledged the “superior rank of international treaties over internal law”.<sup>1</sup>

#### 1.1 General Description of the Offence and related Provisions

The Spanish authorities translate article 445 bis of the *Penal Code* as follows:

*Whoever that, through presents, gifts, offers or promises, corrupts or tries to corrupt, whether directly or through intermediaries, authorities or public officials whether foreign or from international organisations in the exercise of their post to the advantage of them or of a third party, or complies with their demands in respect to this, in order that they act or refrain from acting in*

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<sup>1</sup> Judgement of January 30, 1985, and Judgement 28/1991 of February 14.

*relation to the performance of official duties, in order to obtain or retain a business or other improper advantage in the conduct of international business, will be punished with the penalties set forth in Article 423 in each respective case.*

Article 423, which establishes the offence of corrupting domestic public officials, states as follows:

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

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

Thus, pursuant to article 423.1, it is necessary to refer to the relevant penalties for the passive bribery of a domestic public official in order to determine the appropriate penalties for the bribery of a foreign public official. These penalties are set out in articles 419, 420, 421, 425 and 426, which establish various passive bribery offences in relation to domestic public officials.<sup>2</sup> The severity of the penalties depends on the nature of the act or omission of the public official that the bribe was intended to obtain. For instance, the penalties are most severe in relation to the carrying out of an act or omission “constituting a crime” (article 419) and are less severe in relation to the carrying out of a “characteristic action” of an official’s “duty” (article 425).

Pursuant to article 423.2, the degree of the penalty established through article 423.2 is reduced where a bribe is offered in response to a request from a public official.

Pursuant to article 424, the penalties are reduced when a “bribe is made in a criminal case in favour of a defendant by the defendant’s spouse, or another person in a similarly established and affectionate relationship, or by any ascendant, descendent or sibling”, etc. The Spanish authorities state that this reduction has no applicability whatsoever to the bribery of foreign public officials in international business transactions. They explain that article 424 is restricted in application to the situation where a person bribes a magistrate in relation to criminal proceedings in Spain, in order that his/her relative is treated more favourably in the proceedings.

In addition, article 427 of the *Penal Code* provides the following exemption from punishment in relation to individuals who consent to requests for bribes:

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

Although the *Penal Code* does not expressly prohibit the application of article 427 to the foreign bribery offence under article 445 bis, the Spanish authorities indicate that it has no application to the bribery of foreign public officials, and that this would be clear to a Spanish magistrate from the language of the article and its placement in the *Penal Code* under a separate title.

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<sup>2</sup> According to the Spanish authorities, only the passive domestic bribery offences under articles 419, 420 and 421 apply to the offence of bribing a foreign public official, for reasons described under 1.2.8.

## 1.2 The Elements of the Offence

### 1.2.1 any person

Article 445 bis of the *Penal Code* applies to “whoever”. The Spanish authorities point out that the relevant provisions in the *Penal Code* on criminal responsibility<sup>3</sup> and the nature of a crime or misdemeanor<sup>4</sup> clarify that the *Penal Code* addresses the criminal responsibility of natural persons.

### 1.2.2 intentionally

Article 445 bis applies to bribes made “in order that” a foreign public official “act or refrain from acting in relation to the performance of official duties” and “in order to obtain or retain a business or other improper advantage in the conduct of international business”. Thus, the language of the offence itself imports a subjective, purposive element. Moreover, article 5 of the *Penal Code* states that a penalty cannot be imposed “where there is neither *mens rea* nor negligence”. The Spanish authorities clarify that a particular offence does not apply to negligent conduct unless the offence states this explicitly.

Article 12 of the *Penal Code* provides that “careless acts or omissions shall only be punished when such is expressly provided in law”. Thus, since article 445 bis does not expressly refer to carelessness, it is not possible to commit the foreign bribery offence through carelessness. On the other hand the Spanish authorities indicate that article 445 bis does contemplate the concept of *dolus eventualis*, which has been described by the Supreme Court as follows:

*...dolus eventualis occurs if, the agent has represented a damaging result of possible and not necessary origin, not directly sought after or desired, it is necessarily accepted, without foregoing the performance of intended acts<sup>5</sup>.*

The Spanish authorities further indicate that the penalty is not reduced where the offence is committed through *dolus eventualis*.

### 1.2.3 to offer, promise or give

Article 445 bis captures bribes or attempts to bribe made “through presents, gifts, offers or promises”. The Spanish authorities state that the acts of “offering, promising or giving” are clearly covered by this language.

Article 445 bis also contains language clarifying that an offence is committed where an individual “complies” with the “demands” of a foreign public official to bribe him/her in the way described above. Pursuant to article 423.2, where a person accepts the request of a public official he/she is subject to a reduced penalty. (Article 423.2 is discussed under 3.1/3.2 on “Criminal Penalties...”)

### 1.2.4 any undue pecuniary or other advantage

The Spanish authorities state that “any undue pecuniary or other advantage” is covered in article 445 bis by the language “through presents, gifts, offers or promises”. Spanish law does not establish different criteria for interpreting “presents” and “gifts”, although the Dictionary of the Royal Academy of the Spanish

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<sup>3</sup> Article 27 of the *Penal Code*.

<sup>4</sup> Article 10 of the *Penal Code*.

<sup>5</sup> Judgement 2427/93 of the Supreme Court of October 27.

Language provides certain subtle differences.<sup>6</sup> The Spanish authorities indicate that the two different expressions have been included in the offence to ensure that benefits of all types are covered. They indicate that this language covers advantages of all kinds, real and personal, tangible and intangible, pecuniary and non-pecuniary. The jurisprudence contains examples where money<sup>7</sup>, a remuneration agreement<sup>8</sup>, a painting and a mink coat<sup>9</sup> have been covered by the domestic corruption offences.

### **1.2.5 whether directly or through intermediaries**

Article 445 bis expressly applies in respect of bribes made “directly or through intermediaries”.

### **1.2.6 to a foreign public official**

Article 445 bis of the *Penal Code* applies to bribes given, etc. to “authorities or public officials whether foreign or from international organisations”. Although article 24 of the *Penal Code* contains the definition of national public officials applicable to the offence of bribing a domestic official under article 423, the Spanish legislators decided not to amend this provision to include a definition of foreign public officials. The Spanish authorities state that the Spanish courts will have to apply the definition of “foreign public official” in article 1.4.a of the Convention. The Spanish authorities understand that this definition is a self-executing provision of the Convention. They state that apart from the Constitution itself (discussed above under “Convention as a Whole”), there are precedents for the direct application of the definitions in treaties and conventions. For example, they state that the definition of “narcotics” in the United Nations Single Treaty on Narcotics of June 30, 1961 and the definition of “psychotropic substances” in the United Nations Treaty of June 26, 1971 on psychotropic substances is applied to article 368 of the *Penal Code* concerning drug trafficking. They also state that the definition of chemical weapons in the Treaty on the Prohibition of the Development, Production, Storage and Use of Chemical Weapons ratified by Spain in 1994 is applied to article 566.2 of the *Penal Code* concerning the development or use of chemical weapons.

The Spanish authorities explain that the national Parliament, in making the necessary amendments to internal legislation in order to comply with the obligations assumed under a treaty, carries out a preliminary evaluation of the self-executing nature of the treaty’s provisions. The judicial bodies, in applying the treaty and the implementing legislation, are responsible for ensuring that the self-executing provisions are fulfilled.

### **1.2.7 for that official of for a third party**

Article 445 bis establishes that it is an offence to bribe foreign public officials through presents, etc. “to the advantage of them or of a third party”. It seems clear from this language that the case is covered where the briber and the foreign public official enter into an agreement to transmit the benefit directly to a third party.

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<sup>6</sup> The Dictionary of the Royal Academy of the Spanish Language contains the following definitions: 1. “presents” are things given by one person to another as a mark of recognition; and 2. “gifts” are things given voluntarily or customarily.

<sup>7</sup> Supreme Court Judgement of February 8, 1982.

<sup>8</sup> Supreme Court Judgement 28/10/1986.

<sup>9</sup> Supreme Court Judgement 10/3/1995.

### **1.2.8 in order that the official act or refrain from acting in relation to the performance of official duties**

Article 445 bis expressly applies where a bribe is given, etc. to foreign public officials “in the exercise of their post...in order that they act or refrain from acting in relation to the performance of official duties”. The second part of this language is in complete conformity with the language in article 1 of the Convention. The expression “in the exercise of their post” does not introduce additional requirements, but simply clarifies that the acts to be carried out by the official should relate to the performance of duties if his/her post.

In order to understand exactly what types of acts and omissions are covered by article 445 bis, it is necessary to look at the relevant penalties for domestic public officials. This is not immediately evident by looking at article 445 bis, which incorporates the penalties under the domestic bribery offence in article 423 by reference. Article 423 states that “the person who corrupts or endeavours to corrupt authorities or public officials with donations, presents, offers or promises will be punished with the same penalties of imprisonment and fine as the authorities or public officials in question”. It is an offence for a public official to accept or request a bribe in relation to the following categories of acts or omissions (A discussion of the penalties is contained under 3.1/3.2):

1. “To carry out in the exercise of his duty an action or omission constituting a crime” (article 419). The Spanish authorities state that in order for article 419 to apply to foreign bribery, the act or omission must constitute a crime under the legislation of the foreign public official’s country.
2. “To execute an unjust act not constituting a crime, related to the exercise of his duty” (article 420).<sup>10</sup> The Spanish authorities indicate that the term “unjust act not constituting a crime” covers a violation of an administrative or civil law, a violation of ethical standards, or a breach of duties, according to the law of the foreign public official’s country.<sup>11</sup>
3. To prevent the execution of an action he/she is required to carry out in the exercise of his/her post. (article 421)
4. “To carry out a characteristic action of his duty” (article 425.1) Although not expressly stated in article 445 bis, the Spanish authorities state that article 425.1 does not apply to the foreign bribery offence as it refers to conduct that is outside the ambit of the Convention. They also state that this would be clear to a magistrate due to the placement of the offence in the *Penal Code* under a separate title.
5. “In consideration of his position...or in order that he fulfills an act not forbidden by law”. (article 426) Although not expressly stated in article 445 bis, the Spanish authorities state that article 426 also does not apply to the foreign bribery offence as it refers to conduct that is outside the ambit of the Convention. They further state that this would be clear to a magistrate due to the placement of the offence in the *Penal Code* under a separate title. They explain that the term “in consideration of his position” means that the bribe must have been offered, etc. “due to the fact that (the official) carried out public duties and that if the person in question had not carried out public duties he would not have been offered the gift”.

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<sup>10</sup> The penalty for this offence is less severe if the public official does not actually execute the act.

<sup>11</sup> See the Judgement of the Supreme Court of February 24, 1993 and Judgement of the Supreme Court of March 9, 1994.

Therefore, in summary, article 445 bis covers 1. an act or omission constituting a crime under the legislation of the foreign public official's country; 2. an act constituting an unjust act that is not a crime, but is an unjust act according to the law of the foreign public official's country; and 3. an omission to perform an act that an official is required to carry out in the exercise of his/her post. It appears that not all the acts and omissions of a foreign public official covered by the Convention are covered by article 445 bis. In particular, it is not clear that a penalty would be available in relation to an exercise of discretion that neither constitutes a crime nor an unjust act under the law of the foreign public official's country.

### **1.2.9 in order to obtain or retain business or other improper advantage**

The translation of article 445 bis employs the language "in order to obtain or retain a business or other improper advantage". In the original text of article 445 bis, the words "un contrato" (a contract) are used instead of "a business". It seems clear from a comparison of the two versions that the language in this regard is consistent with the Convention.

### **1.2.10 in the conduct of international business**

Article 445 bis is concerned with bribes aimed at the obtaining or retaining of business or other improper advantage "in the conduct of international business". In this regard the language of article 445 bis is identical to that in the Convention.

## **1.3 Complicity**

Article 1.2 of the Convention requires Parties to establish as a criminal offence the "complicity in, including incitement, aiding and abetting, or authorisation of an act of bribery of a foreign public official".

Article 27 of the *Penal Code* establishes that "principal offenders and accomplices" are responsible for crimes and misdemeanors. Article 28 states that "principal offenders are those who carry out the offence by themselves, jointly or by using another as an instrument". It also clarifies that "principal offenders" include:

- a. Those who abet directly or indirectly others to commit an offence; and*
- b. Those who cooperate in the committing of an offence by performing an action, without which the crime could not have been perpetrated.*

Article 29 defines "accomplices" as those who "not being included" in article 28 "cooperate in the execution of a crime through previous or simultaneous actions".

The requirements for incitement are listed in a decision of the Supreme Court<sup>12</sup>, which include the necessity that the actual perpetrator of the crime is identified and that the incited person must actually commit the offence for which he/she was incited. With respect to co-operation, the Supreme Court states that the decisive factor is its effectiveness, necessity and its importance to the final outcome, and that an agreement prior to committing the offence is sufficient to adduce participation.<sup>13</sup>

These provisions would appear to cover all of the categories of complicity listed in Article 1.2 of the Convention. However, a line is drawn between a principal offender, whose involvement is necessary to the commission of the crime, and an accomplice, whose involvement is not necessary.

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<sup>12</sup> Supreme Court Judgement of May 5, 1988.

<sup>13</sup> Supreme Court Judgement of January 28, 1991.

Article 63 of the *Penal Code* provides that accomplices will receive a lower penalty than that established for the perpetrator of the same offence. Paragraph 2 of article 70.1 further establishes that the reduced penalty shall be calculated “on the basis of the minimum figure stated in law for the offence in question, deducting half of the amount of the same, the result of such subtraction being the minimum limit of the penalty”.

#### **1.4 Attempt and Conspiracy**

Article 1.2 of the Convention further requires Parties to criminalise the conspiracy and attempt to bribe a foreign public official to the same extent as they are criminalised with respect to their own domestic officials.

##### **1.4.1 Attempt**

The Spanish authorities provide that the bribery offences themselves, by applying to offers and promises, contemplate manners of attempting to bribe, and thus there is no necessity to state explicitly that attempts to bribe a foreign public official are covered.

##### **1.4.2 Conspiracy**

Pursuant to article 17 of the *Penal Code*, a conspiracy to commit an offence is only punished where stated expressly in the article concerning the relevant offence. Neither article 423 on the bribery of domestic public officials nor article 445 bis on the bribery of foreign public officials contain an express statement to this effect.

## **2. ARTICLE 2. RESPONSIBILITY OF LEGAL PERSONS**

Article 2 of the Convention requires each Party to “take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the bribery of a foreign public official”.

### **2.1 Criminal Responsibility**

The Spanish legal system does not establish criminal responsibility of legal persons.

### **2.2. Non-Criminal Responsibility**

#### **2.2.1 Secondary Criminal Responsibility of Managers of Legal Persons**

Article 31 of the *Penal Code* establishes a form of secondary criminal liability in relation to the manager of a legal person. It states as follows:

*Any person acting as an administrator(manager) in fact or in law for a corporate body or on behalf of in legal or voluntary representation of another person shall be personally liable, even though he does not possess the conditions, qualities or relations that the relevant concept of the crime or offence requires in order to be the perpetrator of it, should such circumstances be present for the organisation or person on whose behalf or in whose representation he acts.*

The Spanish authorities confirm that article 31 applies with respect to an offence of foreign bribery under article 445 bis and that a person convicted pursuant to article 31 for an offence under 445 bis would be liable to the same penalties as a person whose liability is not established through article 31.

The Spanish authorities state that article 31 does not establish an indiscriminate or automatic rule of objective liability in relation to managers, as to do so would be contrary to the principle of the presumption of innocence. Instead, it is meant to address cases where the requirements necessary for committing an offence are present in the corporate body, but not in any of the individuals of which it consists. The Spanish authorities explain that, for example, the liability of a manager could be established under article 31 if he/she authorized the giving of a bribe or had knowledge that a bribe took place and did nothing to prevent the act.

The Spanish authorities confirm that pursuant to article 31, a manager is liable for the act of any employee of the legal person, irrespective of that employee's position.

The *Penal Code* does not provide a definition of manager, and therefore it is necessary to refer to the definition in the relevant law respecting the legal person for which a person acts to determine whether he/she constitutes a manager. For this purpose it is necessary to refer to the relevant provisions in the *Commercial Code* and laws relating to business corporations, foundations, co-operatives, etc. For instance, with respect to business corporations, article 89.3 of the *Legislative Royal Decree 1564/1989, of December 22* establishes that the term "manager" includes not only members of the Board of Directors, but also executives or persons with the authority to represent the company.<sup>14</sup>

The Spanish authorities confirm that managers of state-controlled or state-owned companies are subject to liability under article 31. They also confirm that it is not necessary that the individual directly responsible for bribing a foreign public official under article 445 bis be convicted in order for the manager to be liable.

### **2.2.2 Administrative and Civil Responsibility**

Pursuant to article 20.a of the *13/1995 Act Concerning Contracts with the Public Administration, modified by the 53/1999 Act*, a legal person is subject to a prohibition to contract with the Spanish public authorities<sup>15</sup> where a criminal offence is committed by its administrator(s) or representative(s) on its behalf. The duration of the prohibition is determined on a case-by-case basis depending on the seriousness of the offence, including the extent of the damage caused to public interests. In any case, the duration of the prohibition cannot exceed 8 years. The Spanish authorities confirm that state-owned or state-controlled companies are subject to article 20.a. of the *13/1995 Act*.

In order for article 20.a to apply, the administrator or representative must have been convicted of the crime in question. The Spanish authorities explain that this type of administrative responsibility is "derived" from the final judgement in the criminal proceedings against the administrator or representative of the legal person. The prohibition can be ordered by a judge during the proceedings at which a person is convicted of bribing a foreign public official or through an administrative procedure following the conviction in the criminal court. In the latter case the Ministry of Economy and Finance orders the prohibition.

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<sup>14</sup> The definition of "manager" in article 89.3 of the *Legislative Royal Decree 1564/1989, of December 22* applies in relation to "infringements" committed by companies.

<sup>15</sup> This is understood to mean the Central Government, the Governments of the Autonomous Communities and the local government bodies.

In addition, pursuant to articles 116 and 120 of the *Penal Code*, legal persons are subject to secondary civil responsibility for the damages associated with crimes committed on their behalf. Civil liability in this regard can be determined at the time of the criminal trial or later before a civil court.

### **3. ARTICLE 3. SANCTIONS**

The Convention requires Parties to institute “effective, proportionate and dissuasive criminal penalties” comparable to those applicable to bribery of the Party’s own domestic officials. Where a Party’s domestic law does not subject legal persons to criminal responsibility, the Convention requires the Party to ensure that they are “subject to effective, proportionate, and dissuasive non-criminal sanctions, including monetary sanctions”. The Convention also mandates that for a natural person, criminal penalties include the “deprivation of liberty” sufficient to enable mutual legal assistance and extradition. Additionally, the Convention requires each Party to take such measures as necessary to ensure that the bribe and the proceeds of the bribery of the foreign public official are subject to seizure and confiscation or that monetary sanctions of a “comparable effect” are applicable. Finally, the Convention requires each Party to consider the imposition of additional civil or administrative sanctions.

#### **3.1/3.2 Criminal Penalties for Bribery of a Domestic and Foreign Public Official**

##### *Penalties*

According to the *Penal Code*, the penalties under article 423 of the *Penal Code* for the various offences of bribing a domestic public official are the same as the penalties under article 445 bis for the bribery of a foreign public official, as article 445 bis incorporates by reference the penalties under article 423. Pursuant to article 423.1 a person who bribes or attempts to bribe a public official “will be punished with the same penalties of imprisonment and fine as the authorities or public officials in question”<sup>16</sup>. The Spanish authorities confirm that this does not refer to the legislation of the country of the foreign public official, and it does not mean that a person who bribes a public official shall be subject to the same penalty as the foreign public official who is the recipient of the bribe. It simply means that the relevant penalties must be inferred from the penalties provided under the *Penal Code* for passive domestic bribery.

According to the Spanish authorities, only the passive domestic bribery offences in articles 419, 420 and 421 apply to article 445 bis. From these provisions it can be determined that the penalties applicable to the active bribery of a domestic/public official are as follows:

1. Imprisonment for a term of between 2 and 6 years and a fine between the value of the bribe and triple the value of the bribe, where the bribe is offered, etc. in order for the public official to carry out in the exercise of his/her duty an action or omission constituting a crime. (article 419)
2. Imprisonment for a term of between 1 to 4 years and a fine between the value of the bribe and triple the value of the bribe where the bribe is offered, etc. in order for the public official to execute an unjust act not constituting a crime, related to the exercise of his/her duty, and he/she executes it. Where the public official does not execute the act, the term of imprisonment is between 1 and 2 years and the fine is the same. (article 420)

The Spanish authorities indicate that the reduction in penalty where the public official does not execute the act has been extended to the active bribery of a foreign public official because in cases where the official does not carry out the unjust act, there is “less damage to “international commercial transactions”.

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<sup>16</sup> Article 423 does not state that the other penalties provided in relation to the passive bribery of a public official (i.e. disqualification from any public employment or post) is applicable to active bribery.

3. A fine between the value of the bribe and triple the value of the bribe where the bribe is offered, etc. in order to prevent the public official from carrying out an act that he/she is required to carry out in the exercise of his/her post. (article 421)

The Spanish authorities indicate that the penalties of imprisonment and fine can be applied cumulatively where they are both applicable.

According to Spain, where the exact value of a bribe is unknown, a Spanish magistrate would estimate the approximate value of a bribe. Thus, even though the fine is measured in terms of the value of the bribe, it would be possible to impose a fine penalty.

For the purpose of comparison, Spain provides that the penalty for fraud against a public body is 1 to 3 years of imprisonment (article 436 et seq.), and the penalty for embezzlement is a fine from 6 to 12 months<sup>17</sup> (article 433).

### ***Reduction in Penalty***

Pursuant to article 423.2, where a bribe is offered, etc. in response to a request of a public official a “penalty inferior in degree to the one” established in article 423.1 shall be applied. Pursuant to article 70.1, such a reduction amounts to reducing the minimum limit of a penalty by one-half.

### **3.3 Penalties and Mutual Legal Assistance**

The Spanish authorities explain that the only requirement concerning the penalty of imprisonment with respect to the provision of mutual legal assistance is established in article 5.1 of the *European Agreement for Judicial Assistance in Criminal Matters of 17 September 1982*. Pursuant to article 5.1, “letters rogatory that require a registering or embargo” can only be granted in relation to extraditable offences under Spanish law.<sup>18</sup> The Spanish authorities indicate that pursuant to article 2 of the *European Extradition Agreement*, extradition is available in respect of offences that are punishable by a deprivation of liberty of at least 1 year under Spanish law and the law of the requesting country. Thus where mutual legal assistance is requested in the form of “letters rogatory” pursuant to the above agreement, it would not be available in relation to every type of bribery of a foreign public official (see list of offences and penalties under 3.1/3.2 on “Criminal Penalties...”).

### **3.4 Penalties and Extradition**

Spain indicates that pursuant to the *Passive Extradition Act*, extradition is available for offences punishable under Spanish law and the law of the requesting country by a deprivation of liberty of at least 1-year. Where a multilateral or bilateral treaty or convention on extradition applies, the requirements therein for providing extradition supersede those under the Act. However, it appears that most of the extradition agreements, including the European Convention on Extradition, similarly impose the 1-year threshold. Thus extradition would not be available in relation to every type of bribery of a foreign public official (see list of offences and penalties under 3.1/3.2 on “Criminal Penalties...”).

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<sup>17</sup> Pursuant to article 50.4 of the *Penal Code*, daily amount of a fine shall be a minimum of 200 hundred pesetas and a maximum of 50 thousand pesetas, and when the duration of a fine is fixed in terms of months, a month shall be considered to be 30 days. On 16 February 2000, 100 Spanish pesetas were valued at .59 U.S. dollars.

<sup>18</sup> Under Spanish law, the purpose of letters rogatory is to register or attach property.

### 3.5 Non-Criminal Sanctions applicable to Legal Persons

The non-criminal sanctions applicable to legal persons are discussed above under 2.2.2 on “Administrative Civil Responsibility”.

### 3.6 Seizure and Confiscation of the Bribe and its Proceeds

#### *Seizure*

The Spanish authorities indicate that seizure is available pursuant to general rules for this purpose established in the *Criminal Procedural Act* (e.g. articles 13, 299, 334 to 338 and 589). They explain that pursuant to these provisions a judge may order seizure of all the assets related to an offence, including the instruments and proceeds, in order to prevent their dissipation or destruction and ensure that they are available for seizure rulings that could be made by the courts at the time of the trial.

#### *Confiscation*

Spain also indicates that confiscation is available as follows under article 127 of the *Penal Code*:

*Penalties imposed for a culpable crime or misdemeanour will bring with them the loss of the effects coming from it and of the instruments used to commit it, as well as the profits coming from the crime whatever the transformations they may have suffered. These effects, instruments and profits will be seized, except when they belong to a bona fide third party, who is not responsible for the crime, and who has legally acquired them. Effects and instruments seized will be sold if their trade is legal, and their product will be used to cover the civil responsibilities of the sentenced person; if their trade is illegal, they will be dealt with according to regulations and if no regulations apply, they will be destroyed.*

Pursuant to this provision, upon conviction for an offence the court can confiscate the “effects, instruments and profits”, which would appear to cover the bribe and the proceeds of bribery.

The Spanish authorities indicate that at present, the Spanish legal system does not permit the confiscation of property the value of which corresponds to that of the bribe and proceeds where they are no longer available because, for instance, they are in the possession of a bona fide third party. However, the possibility of extending the application of article 127 to such cases is currently under review.

Spain indicates that the test for determining whether the property in question is in the possession of a “bona fide third party” is established in article 433 of the *Civil Code*, which establishes that a person possesses property in “good faith if he is unaware of any defect in his ownership or method of acquiring such that invalidates it”.

Pursuant to article 127, the “effects and instruments” that have been confiscated shall be used to cover the “civil responsibilities” of the sentenced person, if their trade is legal. It appears that “effects and instruments” could cover the bribe. Articles 125 and 126 set out the civil responsibilities to which the “effects and instruments” shall be applied in order of priority, beginning with the damage caused by the offence, and followed by the costs incurred by the State for the criminal proceedings, the procedural costs incurred by the defender for his/her defense and, lastly, the fine. According to the Spanish authorities, “effects and instruments” that have been confiscated would only be applied to a person’s “civil responsibilities” if assets that were already attached pursuant to article 589 of the *Criminal Justice Act* in order to provide “surety” for expected criminal liability were not sufficient.

Spain indicates that confiscation under article 127 can also be ordered in relation to a manager of a legal person who, pursuant to article 31 of the *Penal Code*, is subject to secondary criminal responsibility. In addition, confiscation can be ordered when the property is in the possession of a legal person.

### **3.8 Additional Civil or Administrative Sanctions**

The Spanish authorities indicate that the civil and administrative sanctions described in relation to legal persons are also applicable to natural persons. [See discussion under 2.2.2 on “Administrative and Civil Responsibility”]

## **4. ARTICLE 4. JURISDICTION**

### **4.1 Territorial Jurisdiction**

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

Article 23 of the *Organic Act on the Judicial Power* establishes jurisdiction over “crimes and misdemeanors committed in Spanish territory or committed aboard Spanish airlines or ships”. The Spanish authorities explain that the territorial basis of jurisdiction is broadly interpreted so that jurisdiction is established over offences that are committed wholly or partially in Spanish territory. Thus, a territorial link is established where a whole or part of the act of offering, promising or giving a bribe takes place in Spanish territory, and a telephone call, fax or e-mail emanating from Spain would be sufficient to establish jurisdiction.

### **4.2 Nationality Jurisdiction**

Article 4.2 of the Convention requires that where a Party has jurisdiction to prosecute its nationals for offences committed abroad it shall, according to the same principles, “take such measures as may be necessary to establish its jurisdiction to do so in respect of the bribery of a foreign public official”. Commentary 26 on the Convention clarifies that where a Party’s principles include the requirement of dual criminality, it “should be deemed to be met if the act is unlawful where it occurred, even if under a different criminal statute”.

Pursuant to article 23.2 of the *Organic Act on the Judicial Power*, Spain has jurisdiction over crimes under Spanish penal laws committed outside of the Spanish territory by Spanish nationals or foreigners who acquired Spanish nationality following the perpetration of the crime, when the following requirements are satisfied:

The act is punishable in the place where it was carried out, except when this requirement is not necessary by virtue of an international treaty or rule of an international organisation to which Spain is a party;  
Either the “aggrieved party or the Public Prosecutor makes a complaint before the Spanish courts”; and  
The alleged offender has not been acquitted, pardoned or served the sentence abroad for the offence. If only part of the sentence has been served abroad, the corresponding sentence in Spain shall be reduced proportionally.

The Spanish authorities explain that the first requirement is broadly interpreted so that it is not necessary that the country where the offence is committed has established the offence of bribing a foreign public official, as long as the act of bribery is established as an offence.

With respect to the second requirement, since the foreign bribery offence is considered a “public offence” under Spanish law, an “aggrieved party” could be either a private individual or the State Attorney.<sup>19</sup>

### **4.3 Consultation Procedures**

Article 4.3 of the Convention requires that where more than one Party has jurisdiction, the Parties involved shall, at the request of one of them, consult to determine the most appropriate jurisdiction for prosecution.

Spain has a number of procedures in place for allowing consultations and eventual transfer of a case to another Party that can establish jurisdiction over the offence described in the Convention. Spain is a party to both the *European Convention on the Transfer of Proceedings in Criminal Matters* and the *European Convention on Mutual Legal Assistance in Criminal Matters of 1959*, which permit the transfer of criminal cases to the courts of other countries.

Where a convention does not apply, pursuant to article 65 of the *Organic Act on the Judicial Power*, the Penal Section of the Audiencia Nacional is the competent authority to transfer proceedings. Such a transfer would have to be made in accordance with the relevant countries’ internal laws. In these cases consultations would take place through the Ministries of Justice or, in the case of an emergency, through INTERPOL.<sup>20</sup>

### **4.4. Review of Current Basis for Jurisdiction**

Article 4.4 of the Convention requires each Party to review whether its current basis for jurisdiction is effective in the fight against the bribery of foreign public officials, and if it is not, to take remedial steps.

At present Spain does not consider it necessary to modify its basis for jurisdiction.

## **5. ARTICLE 5. ENFORCEMENT**

Article 5 of the Convention states that the investigation and prosecution of the bribery of a foreign public official shall be “subject to the applicable rules and principles of each Party”. It also requires that each Party ensure that the investigation and prosecution of the bribery of a foreign public official “shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved”.

### **5.1 Rules and Principles Regarding Investigations and Prosecutions**

Pursuant to article 124 of the *Spanish Constitution*, the Office of the State Attorney has responsibility for promoting justice in defence of the rule of law, citizens’ rights and the public interest as safeguarded by the law.

The general norms contained in the Constitution and in the *Criminal Procedural Act* are applicable to all criminal offences, including the offence of bribing a foreign public official. Thus the principle of mandatory prosecution applies in all cases. This means that the State Attorney shall, with the aid of the Judicial Police, initiate an investigation as soon as he/she is notified of the possible commission of a crime,

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<sup>19</sup> Where a “public offence” is committed in Spain, the judicial process can also be initiated by the judicial authorities and as a result of a “popular action”.

<sup>20</sup> These are also the steps required under article 13 of the *European Convention on the Transfer of Proceedings in Criminal Matters*.

except in the case of proceedings that shall only be initiated at the request of an interested party.<sup>21</sup> The offence of bribing a foreign public official is not the type of crime for which proceedings must be initiated at the request of an interested party.

Following an investigation, the State Attorney has the following options:

1. Order the proceedings “filed” where there is not adequate evidence of a criminal offence and notify the person(s) who claimed to have been injured by the offence of that decision in order that he/she may have the opportunity to repeat his/her accusation before the examining magistrate; or
2. Instruct the examining magistrate to carry out the relevant preliminary proceedings, provide him/her with all the evidence obtained up to that point, and make the arrested person and the effects of the crime, if any, available to him/her.

The Spanish authorities explain that the State Attorney only plays a very limited role in the suspension or termination of an investigation or prosecution of an offence, and that any such decision is subject to the approval of the Judge. The State Attorney may, in accordance with article 785 bis of the *Criminal Justice Act*, order a case to be “filed” when he/she considers that an offence has not been committed. In such a case, the judicial authorities<sup>22</sup> have the authority to stay proceedings.

Once the examining magistrate takes control of the process, the committal proceedings commence. These involve the preparation of the trial and further investigation to ascertain that an offence was committed and the guilt of the accused person. Although the examining magistrate is responsible for this stage of the process, the State Attorney can provide input on the course of the action to be taken. Following the committal proceedings, the examining magistrate must submit the case to the competent court, which has the following three options, in accordance with articles 622 to 645 of the *Criminal Justice Act*:

1. Order a trial;
2. Return the case to the examining magistrate for further preparation; or
3. Declare a stay of proceedings, either on its own initiative or at the request of the State Attorney, where it is considered that no crime has been committed.

## **5.2 Considerations such as National Economic Interest**

The Spanish authorities state that the factors listed in Article 5 of the Convention shall not influence the investigation and/or prosecution of the offence of bribing a foreign public official.

## **6. ARTICLE 6. STATUTE OF LIMITATIONS**

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

Pursuant to article 131 of the *Penal Code*, the statute of limitations applicable to an offence depends upon whether it is “serious” or “less serious”. Offences that are punishable by a maximum term of imprisonment of more than 5 years and less than 10 years have a limitation period of 10 years. All “other serious offences” have a limitation period of 5 years and “less serious offences” have a limitation period of 3 years. Article 33 of the *Penal Code* establishes that offences carrying a penalty of over 3 years of

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<sup>21</sup> See articles 282-298 and 785 bis of the *Criminal Justice Act*.

<sup>22</sup> The court competent to hear the proceedings, which is normally the County Court.

imprisonment are “serious offences” and offences carrying a fine penalty of over two months are “less serious offences”.

According to the Spanish authorities, pursuant to the formulation under article 131, where the foreign bribery offence is subject to a penalty under article 419, the limitations period is 10 years, and where the penalty is governed by article 420, the limitations period is 5 years. The limitations period is 3 years where the penalty is reduced from 1-4 years to 1-2 years under article 420 because the public official did not execute the act, and where, pursuant to article 421, only a fine is available.

Pursuant to article 132.1 of the *Penal Code*, the limitations period is calculated from the date on which the punishable offence was committed. In the case of a “continuous” offence the period is calculated from the date on which the last offence took place, and in the case of a “permanent” offence it is calculated from the date on which the illegal activity ceased.

Pursuant to article 132.2, the limitations period is interrupted where criminal proceedings<sup>23</sup> are initiated, and the term begins to run anew when the proceedings are stayed or conclude without a conviction.

There is no provision under Spanish law for the suspension of the limitations period where the accused person is outside of Spain.

## **7. ARTICLE 7. MONEY LAUNDERING**

Article 7 of the Convention requires that where a Party has made bribery of a domestic public official a predicate offence for the application of money laundering legislation, it must do so on the same terms for bribery of a foreign public official, regardless of where the bribery occurred.

### **7.1/7.2 Bribery of a Domestic/Foreign Public Official**

Article 301.1 of the *Penal Code* establishes the offence of money laundering as follows:

*Whoever acquires, converts or transmits goods, knowing that these goods originated in a serious crime, or carries out any other act in order to hide or conceal its illicit source, or to help the person who participated in the crime or crimes to avoid the legal consequences of his acts will be punished with a penalty of imprisonment from 6 months to 6 years and a fine from equal to triple the value of the goods.*

*The penalties will be imposed in its superior half when the goods originated in any of the crimes connected with the trafficking of toxic drugs, narcotic or psychotropic substances, described in articles 368 to 372 of this Code.*

Article 301.2 extends the money laundering offence to the hiding or concealing of the true nature, source, location, ownership, etc. of the goods knowing that they are the proceeds of a serious crime.

Article 301.3 reduces the penalty to imprisonment from 6 months to 2 years and a fine between the value of the goods and triple their value where the offence is carried out through serious negligence.

Article 301.4 clarifies that an offence is committed regardless if the predicate offence has been totally or partially committed abroad. Where the predicate offence takes place totally or partially abroad, it is not

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<sup>23</sup> For the purpose of interrupting the running of the limitations period, “proceedings” include all acts leading to committal proceedings such as procedural acts carried out for processing the case.

necessary that it was criminal under the laws in the country in which it was committed in order for article 301 to apply.

It is not necessary to obtain a conviction for the predicate offence in order for article 301 to apply. The money laundering offence is triggered by the carrying out of one of the activities described in article 301 while having knowledge of the illegal origins of the assets. According to the Supreme Court<sup>24</sup>, this requirement implies certainty of the origin of the assets but not a detailed knowledge of the predicate offence. Circumstantial evidence of the existence of the requisite knowledge is adequate for proving the offence.<sup>25</sup>

The Spanish authorities indicate that the term “goods” contemplates the bribe as well as the proceeds of bribery.

The Spanish authorities indicate that the goods that are the object of the money laundering offence must have their origin in a “serious crime” in accordance with the definition thereof in article 13 of the *Penal Code*. In article 13, “serious crimes” are defined as “offences punished by law with serious penalties”. The Spanish authorities explain that “serious penalties” are those that impose a maximum penalty of imprisonment of at least 3 years or involve disqualification and suspension of employment for a period of more than 3 years.

The offence of bribing either a domestic public official or a foreign public official would be considered a “serious offence” for the purpose of applying the money laundering offence under article 301 in the following two cases:

Where an offence is committed under article 419 (i.e. where the bribe was offered, etc. in order that the public official carry out an action or omission constituting a crime); or

Where an offence is committed under article 420 (i.e. where the bribe was offered, etc. in order that the public official execute an unjust act not constituting a crime) and the public official executes the act in question.<sup>26</sup>

Neither an offence pursuant to article 420 (i.e. where the bribe is offered, etc. in order that the public official execute an unjust act and he/she does not execute it) nor pursuant to article 421 (i.e. where the bribe is offered, etc. to prevent an official from carrying out an act that he/she is required to carry out in the exercise of his/her post) constitute a predicate offence as neither one carries a penalty of imprisonment of a maximum of at least 3 years.

## **8. ARTICLE 8. ACCOUNTING**

Article 8 of the Convention requires that within the framework of its laws and regulations regarding the maintenance of books and records, financial statement disclosures and accounting and auditing standards, a Party prohibits the making of falsified or fraudulent accounts, statements and records for the purpose of bribing foreign public officials or of hiding such bribery. The Convention also requires that each Party provide for persuasive, proportionate and dissuasive penalties in relation to such omissions and falsifications.

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<sup>24</sup> Judgement of the Supreme Court of December 24, 1986.

<sup>25</sup> Judgement of the Supreme Court of February 12, 1997.

<sup>26</sup> See the discussion of the penalties for the various bribery offences under 3.1/3.2 on “Criminal Penalties for Bribery of a Domestic and Foreign Public Official”.

## 8.1/8.2 Accounting Requirements/Companies Subject to Requirements

The *Spanish Commercial Code* establishes, in article 25.1, the general principle that “all entrepreneurs must keep orderly accounts suitable to the business conducted to provide for chronological monitoring of all the respective operations, and draw up balance sheets and inventories on a regular basis”. Further provisions in the *Commercial Code* and elsewhere in the law provide accounting requirements in relation to “entrepreneurs”, including the following:

- 1.The entrepreneur or a person duly authorized must maintain accounting books. (article 25.2 of the *Commercial Code*)
- 2.The entries in the accounting books must be certain and clear and follow a chronological order, etc. (article 29.1 of the *Commercial Code*)
- 3.The accounting books and related documents must be kept for 6 years. (article 30.1of the *Commercial Code*)
- 4.At the year-end closing the entrepreneur is required to provide a financial statement, including the balance sheet and income statement. All these documents constitute a single document. (article 34.1of the *Commercial Code*)
- 5.The annual accounts must be clear and must accurately present the assets and liabilities, the financial situation and the trading result. (article 34.2 of the *Commercial Code*)
- 6.Pursuant to the General Plan of Accounting, enacted by *The Royal Decree 1643/90, 20 December*, which applies to all companies regardless of legal form, the information contained in the annual accounts must be understandable, reliable, relevant and subject to comparison.
- 7.In the case of a conflict between the applicable rules, the principle of prudent assessment shall prevail, which requires that the annual accounts reflect every foreseeable risk and possible loss that originated in the financial year or in a previous financial year, and distinguish between realized or reversible risks and losses from those that are potential or reversible. (article 38.1.c of the *Commercial Code*).

Article 1 of the *Commercial Code* states that for the purpose of applying commercial legislation, an “entrepreneur” is an individual who owns a company or a corporate body, which may be a business corporation, limited company, collective company, general or limited partnership, or general or limited partnership with share capital. “Business corporations” include securities companies and agencies, companies holding motorway concessions, banking institutions, venture capital companies, mortgage companies, regional industrial development companies, finance companies and pension fund management companies.

The Spanish authorities indicate that the same requirements are established in relation to joint-stock companies<sup>27</sup>, limited companies<sup>28</sup>, cooperatives<sup>29</sup> and worker-owned companies<sup>30</sup> in the legislation concerning those entities.

Once the annual accounts have been approved, pursuant to article 218 of the *Companies Act*, mercantile companies are required to deposit their financial statements and related documents, including the auditor’s

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<sup>27</sup> Article 171, et seq. of the *Consolidated Text of the Companies Act, adopted under Royal Legislative Decree 1564/1989 of 22 December*.

<sup>28</sup> Article 84 of the *Law 2/95, of 23 March*.

<sup>29</sup> Article 60, et seq. of *Act 27/1999 of 16 July*.

<sup>30</sup> First final disposition of *Act 4/1997, 24 March*.

reports where the company was required to be audited, in the Mercantile Registry Office. Once the accounts are deposited they are publicly available.<sup>31</sup>

### **8.1.1/8.2.1 Auditing Requirements/Companies Subject to Requirements**

The Spanish authorities provide that pursuant to article 203 of the *Companies Act*, certain types of companies are required to be audited, including banks, insurance companies, credit establishments and companies, due to their object, as well as companies that cannot present an abridged balance. In addition, pursuant to article 40.1 of the *Commercial Code*, a judge may compel an entrepreneur to submit annual accounts to be audited if he/she accepts the petition of someone with a legitimate interest in those accounts.

A person with the legal status of an auditor must perform an audit. Pursuant to article 1.2 of the *Law on Accounts Auditing*<sup>32</sup> and article 208 of the *Companies Act*, an audit consists of ascertaining and reporting on whether a company's accounts express, in accordance with the accounting requirements in the *Commercial Code* and elsewhere in the law, an accurate image of the assets and liabilities, financial situation and transactions, etc. of the company. In accordance with the same statutes<sup>33</sup>, the audit report of the annual accounts must contain a record of possible violations of the accounting requirements or any other fact that represents a risk to the financial situation of the company. The Spanish authorities indicate that the audit report of the annual accounts is a "mercantile document".

### **8.3 Penalties**

#### ***Criminal Penalties***

The *Penal Code* contains offences, including the following, which could be applied in relation to the accounting and auditing requirements discussed above:

1. Pursuant to article 290 it is an offence for a director of a company that has been incorporated or is being formed to falsify annual accounts or other documents that must reflect the financial situation of an entity, in order to cause financial harm to the entity, partners or a third party. The penalty is 3 years of imprisonment and a fine from 6 to 12 months.<sup>34</sup> Where the offence results in financial harm, the penalty shall be at the higher end of the scale.
2. Pursuant to articles 392 and 395 it is an offence to falsify a "mercantile document". The penalties for such falsifications range from 6 months to 3 years of imprisonment with a fine of 6 to 12 months under article 392, and 6 months to 2 years of imprisonment under article 395.

#### ***Administrative Penalties***

Administrative penalties that could be applied in relation to the accounting and auditing requirements discussed above, include the following:

1. Pursuant to article 221 of the *Companies Act*, a company that fails to comply with the obligation to deposit annual accounts in the Mercantile Registry can be sanctioned with "the register closing" of the

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<sup>31</sup> In addition, the Spanish authorities indicate that the requirement to deposit the yearly financial statements is regulated under article 365 et seq. of the *Mercantile Registry Regulations, approved under Royal Decree 1784/1996 of 19 July* and *Additional Provision Four of the 15 January 1996 Act Governing Retail Trade*.

<sup>32</sup> 13 June 1988

<sup>33</sup> See article 2 of the *Law on Accounts Auditing* and article 209 of the *Companies Act*.

<sup>34</sup> See footnote 17 on the calculation of fines in terms of months.

company and a fine of up to 500 million pesetas for each year of delay. The “register closing” of a company means that no document can be entered into the Mercantile Registry while the default continues, with the exception of certain documents, including those concerning the removal or resignation of directors. Without access to the Registry, a corporation cannot carry out corporate acts. The effect of this measure is temporary since access is regained when the default is remedied.

2. Pursuant to article 17.1.2 of the *Law on Accounts Auditing, 12 June 1988*, an auditor who prepares an audit report that is not in accordance with the information obtained by the auditor or whose failure to comply with auditing standards could cause harm to third parties or the company audited, can be removed from the Official Registry of Auditors of Accounts.

## **9. ARTICLE 9. MUTUAL LEGAL ASSISTANCE**

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

In addition to the requirements of Article 9.1 of the Convention, there are two further requirements with respect to criminal matters. Under Article 9.2, where dual criminality is necessary for a Party to be able to provide mutual legal assistance, it shall be deemed to exist if the offence for which assistance is sought is within the scope of the Convention. And pursuant to Article 9.3, a Party shall not decline to provide mutual legal assistance on grounds of bank secrecy.

### **9.1 Laws, Treaties and Arrangements Enabling Mutual Legal Assistance**

#### **9.1.1 Criminal Matters**

The Spanish authorities state that Spain can provide mutual legal assistance for the offence of bribing a foreign public official pursuant to a multilateral agreement<sup>35</sup> such as the *Schengen Agreement*, or a bilateral agreement<sup>36</sup> such as the *European Agreement on Legal Assistance of 20 April 1959*, or the principle of reciprocity<sup>37</sup> where there is no multilateral or bilateral agreement in existence between Spain and the requesting country.

The criteria that normally must be met under a bilateral or multilateral agreement in order for Spain to be able to provide MLA include the requirement that the offence in question is not a political offence, that the provision of MLA would not threaten the sovereignty, security or public order of Spain and that the request would not result in the persecution of the person to whom it relates on the basis of his/her race, religion, nationality, ethnic origin, political opinions or sex.

Where there is no applicable bilateral or multilateral treaty and the principle of reciprocity is adopted, pursuant to article 278 of the *Institutional Act on Judicial Authority*, MLA shall only be denied where, for instance, the case in question is within the exclusive jurisdiction of Spain or the subject-matter of the

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<sup>35</sup> Spain is a party to multilateral agreements for the provision of mutual legal assistance in criminal matters with the following countries: Austria, Belgium, Bulgaria, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Luxembourg, Netherlands, Norway, Poland, Portugal, Slovak Republic, Sweden, Switzerland, Turkey, United Kingdom.

<sup>36</sup> Spain is a party to bilateral agreements for the provision of mutual legal assistance in criminal matters with the following countries: Argentina, Australia, Canada, Chile, Mexico and the United States.

<sup>37</sup> Spain applies the principle of reciprocity with the following countries: Brazil, Japan, Korea and New Zealand.

request is clearly contrary to the public order of Spain. Pursuant to article 278.2 of the Act, the Government, through the Ministry of Justice, is responsible for determining whether reciprocity has been established between Spain and the State making the request.<sup>38</sup>

The Spanish authorities indicate that in the absence of a multilateral or bilateral agreement, or the principle of reciprocity, Spain would consider the Convention as a sufficient legal basis for providing MLA.

Spain may provide mutual legal assistance of any type that is not incompatible with Spanish legislation and case law. Thus the measures available include the provision of declarations or witness statements, documents and criminal records, notification of documents, location and identification of persons, transfer of arrested persons, execution of registration orders and attachments and the freezing of bank assets.

### **9.1.2 Non-Criminal Matters**

The Spanish authorities state that Spain can provide mutual legal assistance to Parties requesting assistance in relation to non-criminal proceedings against a legal person.

### **9.2 Dual Criminality**

The Spanish authorities state that mutual legal assistance is generally not conditional on dual criminality. However, in certain cases it is expressly required in a multilateral or bilateral agreement on mutual legal assistance in criminal matters. For instance, article 5 of the *European Convention on Mutual Assistance in Criminal Matters* requires dual criminality in relation to “rogatory letters that request the carrying out of claims relative to embargoes or indemnities”. (See discussion under 3.3 on “Penalties and Mutual Legal Assistance.”) Spain indicates that the agreement for mutual legal assistance between Spain and the United States also contains this requirement.

The Spanish authorities indicate that any requirement of dual criminality present in a multilateral or bilateral agreement or a reciprocal arrangement would be deemed to exist if the offence for which assistance was sought was within the scope of the Convention.

### **9.3 Bank Secrecy**

Article 7.4 of the *Constitutional Act 1/82*, of May 5, establishes an individual’s right to privacy and states that disclosure of private data concerning a person that has been obtained through a professional or official activity is an illegitimate intrusion. This right to privacy serves as the basis of the principle of banking secrecy, but it is not an absolute right, as article 8.1 of the *Constitutional Act* permits the making of laws that interfere with the right to privacy where the interference thereof is in the public interest. For instance, bank secrecy is lifted when financial information is requested by the Judicial Authorities in relation to civil, criminal or litigious administrative proceedings. The financial system is also required, in accordance with *Act 19/93 on Measures to Prevent Money Laundering* and the Regulations thereunder, to co-operate with SEPBLAC<sup>39</sup> (the Executive Department of the Committee for Prevention of Money Laundering and Monetary Offences) in providing information about suspicious or unusual transactions.

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<sup>38</sup> Pursuant to article 276 of the *Institutional Act on Judicial Authority*, requests for MLA shall be conveyed by the Chief Justice of the Supreme Court, the High Court or Audiencia (a division of the High Court) to the Ministry of Justice.

<sup>39</sup> Servicio Ejecutivo de la Comisión de Prevención del Blanqueo de Capitales e Infracciones Monetarias.

## 10. ARTICLE 10. EXTRADITION

### 10.1 Extradition for Bribery of a Foreign Public Official

Article 10.1 of the Convention obliges Parties to include bribery of a foreign public official as an extraditable offence under their laws and the treaties between them.

The Spanish authorities state that extradition can be provided pursuant to Spain's multilateral<sup>40</sup> and bilateral<sup>41</sup> extradition agreements, or the principle of reciprocity<sup>42</sup> where there is no multilateral or bilateral agreement in existence between Spain and the requesting country. Spain indicates that where the *European Convention on Extradition* and "almost all the multilateral and bilateral extradition treaties to which Spain is a party" apply, the offence in question must be punishable under the laws of the requesting Party and Spain by a deprivation of liberty for a maximum period of at least 1-year. The same threshold is contained in the *Passive Extradition Act*. Spain further indicates that, given the severity of the penalties established in the implementing legislation, the 1-year threshold should not be difficult to meet. However, Spain confirms that the 1-year threshold would not be met in relation to every type of foreign bribery covered by the Convention since, pursuant to article 421, no penalty of imprisonment is applied where the bribe is offered, etc. in order to prevent the public official from carrying out an act that he/she is required to carry out in the exercise of his/her post. Spain points out that article 2.2 of the *Passive Extradition Act* permits extradition for which a lesser penalty is imposed where the request refers to several acts and only some of them meet the 1-year threshold requirement.

In addition to the requirement of dual criminality, Spain cannot provide extradition in the cases outlined in articles 3, 4 and 5 of the *Passive Extradition Act*. For instance, pursuant to article 3, where the crime was committed outside the territory of the country requesting extradition, the request may be denied if Spanish legislation does not authorize extradition for a crime of the same type committed outside of Spain. In addition, pursuant to article 4, extradition shall not be granted where, for instance, the crime is of a political nature (unless, for instance, it is an act of terrorism or a crime against humanity as provided in the *Convention for the Prevention and Penalisation of the Crime of Genocide* adopted by the United Nations General Assembly). Pursuant to article 5, extradition may be denied where, for instance, the request has been made for the purpose of persecuting a person for reasons of race, religion nationality or political opinions.

According to article 6 of the *Passive Extradition Act*, a "firm and final ruling of the Court" that denies extradition shall be final. Where the Court allows extradition, the Government shall not be bound by the ruling of the Court and may refuse to provide extradition due to a lack of reciprocity or for reasons of national sovereignty, security, public order "or any other reason in Spain's essential interests". The Government's decision in this regard cannot be appealed.

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<sup>40</sup> Spain is a party to multilateral extradition agreements with the following countries: Austria, Belgium, Bulgaria, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Luxembourg, Netherlands, Norway, Poland, Portugal, Slovak Republic, Sweden, Switzerland, Turkey and the United Kingdom.

<sup>41</sup> Spain is a party to bilateral extradition agreements with the following countries: Argentina, Australia, Brazil, Canada, Chile, Korea, Mexico and the United States.

<sup>42</sup> Spain applies the principle of reciprocity with the following countries: Japan and New Zealand. The Government is responsible for determining whether reciprocity has been established between Spain and the State making the request.

## **10.2 Legal Basis for Extradition**

Article 10.2 states that where a Party that cannot extradite without an extradition treaty receives a request for extradition from a Party with which it has no such treaty, it “may consider the Convention to be the legal basis for extradition in respect of the offence of bribery of a foreign public official”.

Spain indicates that in the absence of an extradition treaty, the OECD Convention would be considered as a legal basis for extradition.

## **10.3/10.4 Extradition of Nationals**

Article 10.3 of the Convention requires Parties to ensure that they can either extradite their nationals or prosecute them for the bribery of a foreign public official. And where a Party declines extradition because a person is its national, it must submit the case to its prosecutorial authorities.

The Spanish authorities provide that Spain can extradite its nationals pursuant to its multilateral and bilateral extradition agreements. They state further that, in accordance with Commentary 33 on the Convention, Spain may consider the Convention as a basis for the extradition of its nationals where there is no applicable treaty.

Pursuant to article 3.3 of the *Passive Extradition Act*, where extradition is refused on the ground of nationality, “the Spanish Government, at the request of the State in which the acts took place, shall report the facts that gave rise to the charge to the Attorney General in order for legal action to be taken, if appropriate, against the person charged”.

## **10.5 Dual Criminality**

Article 10.4 of the Convention states that where a Party makes extradition conditional on the existence of dual criminality, it shall be deemed to exist as long as the offence for which it is sought is within the scope of the Convention.

The Spanish authorities confirm that where the requirement of dual criminality applies (discussed in detail above under 10.1), it is interpreted broadly. This means that it is not necessary that the offence be described in exactly the same way under the requesting country’s laws, as long as the activity in question is punishable.

## **11. ARTICLE 11. RESPONSIBLE AUTHORITIES**

Article 11 of the Convention requires Parties to notify the Secretary-General of the OECD of the authority or authorities acting as a channel of communication for the making and receiving of requests for consultation, mutual legal assistance and extradition.

Upon ratification, Spain notified the Secretary-General of the OECD that the Ministry of Justice is responsible for the matters listed in Article 11.

## B. IMPLEMENTATION OF THE REVISED RECOMMENDATION

### 3. TAX DEDUCTIBILITY

The *Companies Tax Law* does not expressly deny the tax deductibility of bribes given to foreign public officials. Article 14 of that Act lists non-allowable expenses, which include under paragraph 1.e “gifts and generosity”. There are exceptions to the non-deductibility of gifts, including the following:

- “expenses derived from public relations with clients or suppliers”; and
- expenses “derived from the direct or indirect promotion of the company, the selling of goods or the rendering of services”.

In addition, paragraph 2 of article 14 allows the deductibility of expenses in relation to “payments made and the book value of goods donated” where they are related to the fulfillment of the purposes of the following recipient companies:

- (a) Companies involved in regional industrial development.
- (b) Spanish sport federations, local federations, and sports clubs where the amount is received from public sport companies for the promotion and development of non-professional sport activities. In order for this category to apply, there must be a contract for valuable consideration between the donor and the recipient “necessary to perform the purpose and aim of those federations and sport clubs”.

Although it would appear that certain bribes to foreign public officials could be covered by these categories of exceptions to the non-allowable expenses, the Spanish authorities state it is impossible to allow the tax deductibility of an expense that is incurred in the commission of a crime. They provide in support thereof a decision of the Supreme Court of Spain<sup>43</sup> in which the central government appeals the decision of the Superior Court of Justice of the Region of Valencia to allow the tax deductibility of expenses that had been disallowed by the Tax Investigation authorities. The expenses related to costs incurred by a company in advertising and promoting gaming activities, the advertisement thereof which is prohibited by article 39 of the *Gaming Regulations*. Pursuant to article 39.2 of the Regulations, the unauthorized advertising of such activities constitutes “serious misconduct”. In its decision, the Supreme Court of Spain overturns the decision of lower court and upholds the decision of the Tax Investigation authorities, in which it was stated that to acknowledge the expenses as tax deductible “would be tantamount to accepting as legal, in the domain of taxation, behaviour expressly prohibited” by law.

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

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<sup>43</sup> Decision of the Supreme Court, Bench Three, Section Two, which reviews the Remedy of Appeal 3065/1992, lodged by the Central Government against the judgement given on December 31, 1991 by the Contentious-Administrative Bench of the Superior Court of Justice of the Region of Valencia, in Appeal 1734/1990, the appellant being “Begomatosá, SA”, in relation to the Corporation Tax, for a sum of pesetas 1,515, 785.

## EVALUATION OF SPAIN

### General Remarks

The Working Group commends the Spanish authorities for their co-operation and openness during the examination process and recognises their effort in providing an understanding of their laws.

The Working Group considered the Spanish implementing legislation, with the exception of the deficiencies noted below, to be in conformity with the Convention. Spain implemented the Convention through an amendment to the Spanish Penal Code by adding article 445 bis, which establishes the offence of bribing a foreign public official, but links it to their domestic bribery offences, including passive corruption. The Working Group is concerned that this link makes the law complex and may make it difficult to apply to some cases of bribery in international business transactions.

The Working Group is also concerned that the sanctions may not be in all cases effective, proportionate and dissuasive.

### Specific Issues

#### 1. Definition of the Offence

##### 1.1. Acts or omissions of the foreign public official

Article 445 bis states that the penalties for the offence are set forth in article 423, which is the active domestic bribery offence. In turn, article 423 states that a person who corrupts or attempts to corrupt a public official shall be punished “with the same penalties of imprisonment or fine” as the public official in question. The penalties in relation to passive domestic bribery, which are established in articles 419, 420, 421, 425.1 and 426, are divided into 5 categories, and the severity of the penalty depends upon the act or omission that the public official performed in response to the bribe. Spain states that only the penalties in articles 419, 420 and 421 apply to an offence under article 445 bis, with the result that penalties are available for bribes offered, etc. in order for a foreign public official to the following: 1. carry out in the exercise of his/her duty an action or omission constituting a crime in the foreign public official’s country (art. 419); 2. execute an “unjust act” not constituting a crime, which amounts to an unjust act according to the law of the foreign public official’s country (art. 420); and 3. prevent the execution of an action he/she is required to carry out in the exercise of his/her post (art. 421). In view of the interpretation that the Spanish authorities have provided for the term “unjust act” (i.e. a violation of an administrative or civil law, a violation of ethical standards or a breach of duties, according to the law of the foreign public official’s country), the Working Group is uncertain whether Spain can cover all the acts or omissions contemplated by the Convention. In particular, the Working Group is concerned that the Spanish legislation would not cover an exercise of discretion that neither constitutes a crime nor an unjust act under the law of the foreign public official’s country but that is nevertheless covered by the Convention.

In conclusion, the Working Group recommends that the application of the various categories of penalties be monitored in Phase 2 to verify that Spain is able to punish persons in relation to all the acts or omissions of a foreign public official contemplated by the Convention, although the foreign bribery offence defined in article 445 bis of the Penal Code largely reflects the wording in the Convention.

##### 1.2 Definition of foreign public official

Article 445 bis does not provide a definition of “foreign public official” and it does not expressly refer to a definition elsewhere in the law. However, the Spanish authorities state that the courts will be required to apply the definition in the Convention. They state that the Spanish Constitution recognises the superiority of treaties and conventions ratified by Spain over internal legislation, therefore no legal authority providing for the application of definitions in treaties and conventions to internal legislation is needed. Moreover, according to Spain there are precedents for this direct application of definitions contained in international conventions.

The Working Group is concerned that a conflict might arise in the future between the definition in the OECD Convention and the definition in another convention that would apply to foreign bribery, and therefore the court might choose to apply the definition that employs a lower standard. The Working Group believes that this is a general problem that should be followed as a horizontal issue in Phase 2.

## **2. Responsibility of legal persons**

The Spanish legal system does not establish the criminal responsibility of legal persons. The Spanish authorities indicate that their system does, however, provide for the administrative responsibility of a legal person where an administrator or representative is convicted of committing a criminal offence on its behalf. Pursuant to article 20.a of the Act Concerning Contracts with the Public Administration, a legal person is subject to a prohibition to contract with the Spanish public authorities for a maximum period of 8 years in such a case. In addition, pursuant to articles 116 and 120 of the Penal Code, legal persons are subject to secondary civil liability for the damages associated with crimes committed on their behalf.

The Working Group considers that this approach does not address the type of responsibility that is required to be taken under the Convention and thus does not consider Spain to be in compliance with the requirement under article 2 of the Convention. The Working Group therefore recommends that Spain take necessary steps as soon as possible to introduce appropriate measures and sanctions against legal persons.

## **3. Sanctions**

### **3.1 Level of sanctions**

Where, pursuant to article 421, the bribe is offered, etc. in order to prevent a public official from carrying out an act that he/she is required to carry out in the exercise of his/her post, no term of imprisonment is available. In addition, the Penal Code provides for reductions in penalties in 2 cases. Pursuant to article 423.2, the penalty is reduced where a person accepts the request of a public official for a present, etc. The reduction in this regard amounts to a decrease of the minimum limit of the penalty by one-half. Pursuant to article 420, where a bribe is offered, etc. in order for a public official to execute an unjust act not constituting a crime, related to the exercise of his/her duty, the term of imprisonment is reduced from 1-4 years to 1-2 years where the official does not execute the act.

### **3.2 Secondary issues**

Due to the level of the penalties, Spain will not be able to provide extradition in respect of the offence under article 421, for which there is no term of imprisonment. Similar problems will arise for mutual legal assistance where “letters rogatory” related to seizure are requested. MLA (in the specific case mentioned) and extradition are only available for offences that carry a penalty of at least 1-year of imprisonment. In addition, neither the offence under article 420, where the public official does not execute the act, nor the offence under article 421, qualifies as a predicate offence for the purpose of the money laundering offence under article 301 of the Penal Code. Only offences that carry a penalty of over 3 years of imprisonment qualify as predicate offences. Furthermore, the statute of limitations for an offence under article 420 is reduced from 5 to 3 years where the public official does not execute the act. The statute of limitations for the offence under article 421 is also 3 years.

The Working Group regards the level of penalties available for the foreign bribery offence as low relative to other Parties, in part due to the unavailability of confiscation under article 127 of the Penal Code where the assets generated by the foreign bribery offence are no longer available. It is also concerned about the effect that this will have on Spain’s ability to implement some of its other obligations under the Convention, in particular extradition and some cases of mutual legal assistance. The Working Group therefore recommends that Spain reconsider the levels of penalties where imprisonment is not provided and mutual legal assistance and extradition would not be available.