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Anti-Corruption

Spain
Law & Practice
and
Trends & Developments

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SPAIN

Law and Practice

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1. Legal Framework for Offences

1.1 International Conventions

Spain is a party to the following international conventions relating to anti-bribery and anti-corruption:

- the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997); ratified on 14 January 2000;
- the United Nations Convention against Corruption (2003); ratified on 19 June 2006;
- the Council of Europe Civil Law Convention on Corruption (1999); ratified on 16 December 2009;
- the Council of Europe Criminal Law Convention on Corruption (1999); ratified on 28 April 2010;
- the Additional Protocol to the Criminal Law Convention on Corruption (2003); ratified on 17 January 2011; and
- the Convention drawn up on the basis of Article K.3 (2) (c) of the Treaty on European Union on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union.

1.2 National Legislation

All relevant corruption-related criminal offences are provided in the Spanish Criminal Code (SCC) (*Ley Orgánica 10/1995, de 23 de noviembre*). Administrative offences may be found in the Organic Law 6/2002 on Political Parties (*Ley Orgánica 6/2020, de Partidos Políticos*), the Law 5/2006, of April 10th, on conflicts of interest of members of the Government and senior officials of the General State Administration (*Ley 5/2006, de regulación de los conflictos de intereses de los miembros de Gobierno y de los Altos Cargos del a Administración General del Estado*) and the Law 19/2013 on Transparency, Access to Public Information and Good Governance (*Ley 19/2013, de transparencia, acceso a la información pública y buen gobierno*).

1.3 Guidelines for the Interpretation and Enforcement of National Legislation

Interpretation and enforcement of criminal offences is carried out by the judiciary. It is important to recall that in Spain judges and magistrates are independent, and hence not bound by case-law (precedent). Likewise, international law is part of Spanish legislation and directly applicable insofar as the relevant international treaty has been published in the Spanish Official State Gazette (*Boletín Oficial del Estado*) (Article 96 of the Spanish Constitution).

1.4 Recent Key Amendments to National Legislation

The latest amendment of the Spanish Criminal Code (SCC) concerning corruption-related criminal offences took effect via the Organic Law 1/2019 of February 20th (*Ley Orgánica 1/2019,*

por la que se modifica la Ley Orgánica 10/1995, del Código Penal, para transponer Directivas del a Unión Europea en los ámbitos financiero y de terrorismo, y abordar cuestiones de índole internacional). Specifically, it includes amendments to corruption offences committed in the private sphere and expands the conduct of corruption offences to foreign public officials of national public institutions or international organisations, jurors and arbitrators and legal entities, in accordance with the Council of Europe anti-corruption body Group of States Against Corruption (GRECO)'s recommendations.

2. Classification and Constituent Elements

2.1 Bribery

Bribery of public officials is provided in Article 419 of the Spanish Criminal Code (SCC). This provision punishes a public official who, acting within his or her functions, requests, receives or accepts a gift, favour or payment of any kind either to act, to act against his or her duties, or unfairly to delay an act that must be carried out (passive bribery). Receiving and requesting rewards by an authority or public official is also punished. The definition of bribe also includes admitting receipt of a gift because of the role or function of the authority or public official.

It also criminalises the offer or giving of a gift or payment of any kind to the authority or public official (active bribery).

The crime may be committed by an authority or public official. A public official is broadly defined (Articles 423 and 427 of the SCC) as any person who participates in the exercise of public functions, including foreign public officials, national and international jurors and arbitrators, mediators, expert witnesses, administrators appointed by a court and liquidators. Only employees of state-controlled companies providing services in the public interest are included in this definition.

The definition of public officials also includes:

- any person employed or with functions within the legislative branch, the government or the judiciary, both within or outside the European Union;
- persons exercising public functions to a country of the European Union Member State or any other country, for the European Union or a public international organisation;
- public officials or agents of the European Union or a public international organisation; and
- any person who manages European Union financial interests or takes decisions on related matters, within or without the European union.

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Article 286bis of the SCC also punishes bribery in business by private parties. The offence may be committed by any person who promises, offers or grants an unfair benefit or advantage in exchange for undue favour in the acquisition or selling of commodities, engagement of professional services or business relationships, and/or by managers, administrators, employees or collaborators of a company or legal entity that receives, requests or accepts any such unfair benefit or advantage.

2.2 Influence-Peddling

Influence-peddling is criminalised in Articles 428 to 431 of the Spanish Criminal Code (SCC). The crime may be committed by an authority, public official or a private individual who improperly influences another public official to issue a decision that economically benefits the former, or anyone else. Those who request or accept gifts or payments of any kind, or who promise or offer in order to influence another improperly, are also criminally liable.

In order to be criminally liable, abuse of power is required from the public officials or the private individuals improperly influencing the decision, whether due to their position or a special relationship.

The definition of public official includes national and foreign public officials as defined in Article 24 SCC and for the criminal offence of bribery (Article 427 SCC) (See **2.1 Bribery**).

2.3 Financial Record-Keeping

Article 433 of the SCC punishes the following criminal conducts related to financial record-keeping committed by authorities or public officials:

- falsifying their accounting;
- creating or using accounting documents or records containing false or incomplete information; and
- providing false information on the financial situation.

The same definition of public official as the definition for bribery applies to these offences (Articles 24 and 427 of the SCC).

See **2.1 Bribery**. It also extends to liquidators, trustees of assets confiscated by public authorities and individuals entrusted with public funds. These offences may be also committed by legal entities.

2.4 Public Officials

Mismanagement of public funds is punished in Article 432.1 of the Spanish Criminal Code. It may be committed by a public official or authority that has been entrusted with the management of public funds. The offence requires patrimonial damage and use of the funds, thus failing to observe his or her duties. Examples of this offence include, for instance, making payments

for services never carried out, authorising unapproved operations or not claiming credits in favour of the public administration.

Misappropriation of public funds is provided for by Article 432.2 of the SCC. The definition includes public officials or authorities entrusted with public funds that have taken funds for themselves or a third person, or have denied having received the public funds. There must be an obligation to deliver or return the public funds.

The aggravated conduct of these offences includes either of the following circumstances:

- serious damage or obstruction of the public service; and
- value of the damage or appropriated assets of more than EUR50.000.

Value of the damage or taken assets of more than EUR250.000 is considered super-aggravated conduct.

A lesser penalty is provided for when the damage or appropriated asset/s amounts to less than EUR4,000.

The same definition of public official as that for bribery applies to these offences (Articles 24 and 427 of the SCC). See **2.1 Bribery**. It also extends to liquidators, trustees of assets confiscated by public authorities and individuals entrusted with public funds. These offences may be also committed by legal entities.

Chapter VIII of the SCC also punishes public officials or authorities that:

- collude with private individuals to defraud in matters of public procurement or liquidations of public assets (Article 436 of the SCC);
- demand, directly or indirectly, fares or tariffs not due or higher than legally established (Article 437 of the SCC);
- swindle or defraud Social Security by abusing his or her position (Article 438 of the SCC).

2.5 Intermediaries

Articles 419 to 422 of the Spanish Criminal Code also punish the receipt, request or admission of gift or payment of any kind through intermediaries.

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3. Scope

3.1 Limitation Period

In the Spanish system, statutes of limitations are determined based on the maximum penalty provided for the criminal offence (Article 131 of the SCC), namely:

- 20 years for offences with more than 15 years of imprisonment;
- 15 years for offences with more than ten and less than 15 years of imprisonment and more than ten years of professional disqualification;
- ten years for offences with more than five and less than ten years of imprisonment or professional disqualification;
- five years for offences with up to five years of imprisonment or professional disqualification; and
- one year for minor offences.

In cases where the conduct amounts to two or more criminal offences, or in the case of connected offences, the limitation period would be the one provided for the most serious offence.

3.2 Geographical Reach of Applicable Legislation

Spanish courts and tribunals have jurisdiction over criminal offences committed in Spain, notwithstanding Spain's obligations pursuant to international conventions to which it is a party (Article 23.1 of the SCC). In this respect, Spain has jurisdiction over any criminal offence if it is so provided by an international convention to which it is a party or by legislation from an international organisation of which Spain is a member.

Criminal jurisdiction is also established over offences committed by Spanish nationals abroad (the active personality principle) in so far as the following requirements concur:

- double criminality, unless it is not required by applicable international law;
- a criminal complaint has been lodged by the victim or the office of the prosecutor; and
- the person criminally responsible has not been acquitted, convicted or pardoned in a foreign country. In the case of conviction, if the sentence has been partially served, it will be considered to reduce the sentence.

As for the matter concerned, Article 23.4 of the Spanish Organic Act on the Judiciary (*Ley Orgánica 6/1985 del Poder Judicial*) expressly establishes jurisdiction over corruption in the private sector or international economic transactions, provided that:

- the criminal proceeding is instituted against a Spanish national;
- the criminal proceeding is instituted against a foreign national resident in Spain;
- the offence has been committed by any of the following persons within a company or legal entity: manager, administrator, employee, collaborator; and
- the offence has been committed by a legal entity, company, organisation, or by groups or any kind of association of persons with its headquarters or registered office in Spain.

3.3 Corporate Liability

The Spanish Criminal Code (SCC) provides for corporate liability for corruption-related offences, namely, bribery (Article 427bis of the SCC), influence-peddling (Article 430 of the SCC), misappropriation of funds, as well as embezzlement and financial record-keeping (Article 435.5 of the SCC).

Legal entities are criminally responsible if the offence is committed in the name or on behalf of them, or by those under their supervision in performing the activities of the legal entity. Both individuals and companies can be held liable for the same offence. Also, the legal entity may be held responsible even if the individual criminally responsible has not been found and no criminal proceeding has been opened against him or her. Likewise, directors may also be criminally responsible, even if the offence was not committed directly by them.

4. Defences and Exceptions

4.1 Defences

General defences are found in Article 20 of the SCC and include insanity, intoxication, self-defence, necessity, insurmountable fear and legal duty/lawful capacity of office.

In the case of insanity or intoxication, penalties other than imprisonment may be imposed, namely: internment in a psychiatric institution, a detoxification centre or a special education centre, depending on the circumstances.

Mistake of fact and mistake of law also exclude criminal liability if the mistake could not be avoided. Otherwise, the offence would be considered committed by negligence in the case of mistake of fact, or as a mitigating circumstance in the case of mistake of law.

Regarding offences committed by directives or persons representing the legal entity, Article 31bis of the SCC provides the following defences for legal entities:

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- directors have devised and implemented effective prevention measures;
- an independent department is in charge of monitoring internal controls;
- the individuals have committed the crime circumventing the prevention and control mechanisms; and
- the monitoring and oversight of the internal affairs department has been sufficient.

As for offences committed by subordinates of directors or legal representatives, legal entities shall be exempted from criminal liability if an appropriate management and organisation system is in place to prevent the offence.

4.2 Exceptions

No exemptions are established to the aforementioned offences.

4.3 De Minimis Exceptions

No de minimis exceptions are provided for the aforementioned offences.

4.4 Exempt Sectors/Industries

No particular sectors or industries are exempted from the aforementioned offences.

4.5 Safe Harbour or Amnesty Programme

Under Spanish legislation, there are no safe harbour or amnesty programmes that exclude criminal liability of legal entities. However, the following circumstances are established as mitigating circumstances (Article 31 quater of the Spanish Criminal Code):

- self-reporting: confessing the commission of the offence before becoming aware that legal proceedings have been opened;
- collaborating with authorities by providing relevant evidence that helps identify those criminally responsible;
- repairing, in whole or in part, the damage caused; and
- establishing, before the trial starts, compliance procedures to prevent and discover criminal offences.

As for individuals, in the case of bribery, Article 426 of the SCC provides that an individual who reports an offence, before the criminal proceedings are opened and within two months from the date the criminal offence was committed, will not be held criminally responsible.

In addition, reparation of the damage caused and active collaboration with authorities is also expressly provided as a mitigating circumstance for misappropriation of funds, embezzlement and accounting offences by public officials (Article 434 of the SCC).

Reparations and self-reporting are also established as a general mitigating circumstance for individuals (Articles 21.4 and 5 of the SCC).

5. Penalties

5.1 Penalties on Conviction

Generally speaking, penalties for corruption-related offences include imprisonment, prevention from public employment or role, prevention from passive suffrage, and a fine.

Specifically, the following penalties are imposed:

Bribery committed within the private sector:

- imprisonment: six months to four years;
- professional disqualification: one to six years;
- fine: up to three times the amount of the benefit or advantage.

Bribery by public officials (acting against duties, not acting or unfairly delaying an act):

- three to six years of imprisonment;
- disqualification for public employment and passive suffrage: nine to 12 years..

Bribery by public officials (acting within functions in exchange for a gift, payment, offer or promise):

- imprisonment: two to four years;
- fine: 12 to 24 months;
- disqualification from public employment and passive suffrage: five to nine years.

Bribery (accepting a gift):

- imprisonment: six months to one year;
- disqualification from public employment: one to three years.

Active bribery (offering or giving gifts or payment) is punished with the same penalties. Likewise, in cases where the act of the public official relates to procurement procedures, subsidies or auctions, a penalty of disqualification from obtaining them or tax or social security benefits from five to ten years shall be imposed on the individual or legal entity.

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Legal entities shall be punished with a fine of an amount depending on the term of imprisonment provided for persons:

- two to five years, or three to five times the benefit obtained when the term of imprisonment is more than five years;
- one to three years, or two to four times the benefit obtained for a term of imprisonment from two to five years;
- six months to two years, or two to three times the benefit obtained for up to two years of imprisonment.

Influence-peddling by a public official:

- imprisonment: six months to two years;
- a fine: up to twice the benefit obtained;
- disqualification from public employment and passive suffrage: five to nine years.

Influence-peddling by a private individual:

- imprisonment: six months to two years;
- a fine: up to twice the benefit obtained;
- disqualification from obtaining subsidies or tax or social security benefits: six to ten years.

Offering influence-peddling:

- imprisonment: six months to two years;
- for public officials: disqualification from public employment and passive suffrage: one to four years;
- disqualification from obtaining subsidies or tax or social security benefits: six to ten years.

Misappropriation and mismanagement of public funds by a public official:

- imprisonment: two to six years;
- disqualification from public employment and passive suffrage: six to ten years.

Aggravated misappropriation and mismanagement of public funds:

- imprisonment: four to eight years;
- permanent disqualification: ten to 20 years.

Misappropriation and mismanagement of public funds of less than EUR4,000:

- imprisonment: one to two years;
- disqualification from public employment and passive suffrage: one to five years.

Accounting fraud without damage:

- disqualification from public employment and passive suffrage: one to ten years;
- fine: 12 to 24 months.

Accounting fraud with damage:

- imprisonment: one to four years;
- disqualification from public employment and passive suffrage: three to ten years;
- a fine: 12 to 24 months.

5.2 Guidelines Applicable to the Assessment of Penalties

Guidelines to determine the penalty to be imposed are established in the First Book, Title III, Chapter 2, of the Spanish Criminal Code (SCC). Judges and tribunals must provide the reason for the sentence being imposed.

When it comes to completed offences, the sentence must be imposed considering the particular circumstances of the perpetrator and the seriousness of the offence.

A number of rules are stipulated about when mitigating and aggravating circumstances apply. Thus, if there is one mitigating circumstance, the sentence imposed cannot go beyond the first half of the penalty range. If two or more mitigating circumstances concur, the range of the penalty to be imposed would go from half of the minimum up to the minimum. Conversely, when an aggravating circumstance applies, the sentence is imposed within the second half of the penalty range. If two or more aggravating circumstances concur, up to one and a half the maximum established for the offence is imposed.

If aggravating and mitigating circumstances concur, the judge must assess whether qualified mitigating or aggravating circumstances exist.

If the person has been convicted at least three times for offences of the same nature, a sentence may be imposed of up to one and a half times the maximum.

In the case of an attempt, the judge must assess the risk and the stage of execution of the offence.

Penalties for accomplices range from half the minimum penalty established by law up to the minimum.

As for legal entities, the same rules apply. The following criteria shall be taken into account:

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- the need to prevent the continuous criminal activity;
- social and economic consequences;
- the position of the individual who failed to comply with his or her duty of control; and
- penalties for legal entities cannot exceed the maximum established for individuals. Penalties of more than two years may be imposed only if the legal entity is a repeat offender or the entity is used mainly to commit criminal offences.

The penalty of liquidation of legal entities, of more than five years (or permanent) prohibition to perform certain activities or prevention to obtain financial aid, procurement contracts or tax or social security benefits of more than five years, can only be imposed if any of the following requirements apply:

- the legal entity has been convicted at least three times for offences of the same nature; and
- the legal entity is used mainly to commit criminal offences.

Imprisonment of less than three months shall always be replaced by a fine, community service or house arrest. Each prison day is replaced by two days of fine or a day of community service or house arrest.

Generally, the maximum time to serve is 20 years, except if one of the offences is punished with up to 20 years of imprisonment (serving a maximum 25 years), one of the offences is punished with more than 20 years of imprisonment (serving a maximum 30 years), two or more offences are punished with more than 20 years of imprisonment (serving a maximum of 40 years). 40 years is also established as a maximum in the case of terrorism when one of the offences is punished with more than 20 years of imprisonment.

When the same conduct amounts to two or more offences, the sentence imposed must be within the second half of the penalty provided for the most serious offence, unless it is higher than the sum of the penalties of the offences separately.

6. Compliance and Disclosure

6.1 National Legislation and Duties to Prevent Corruption

Articles 31 bis and 31 quater of the Spanish Criminal Code provide for the extinction and the mitigation of criminal liability for legal entities that have devised and implemented an effective compliance programme. However, the failure to set up a compliance programme does not attract a legal consequence.

Legal entities will benefit from a complete exemption of criminal liability if:

- before the commission of the criminal offence, the administrative body has adopted and effectively implemented organisational and management models that include the appropriate monitoring and control measures to prevent crimes of the same nature or to reduce significantly the risk of their commission;
- the supervision of the functioning and execution of the compliance model has been entrusted to an independent body of the legal entity with autonomous initiative and control powers;
- the authors have committed the crime by fraudulently evading the organisational and management models; and
- there has been no omission or insufficient exercise of the supervision independent body.

In addition, organisational and management systems must:

- identify the activities in which the offences to be prevented may happen;
- establish protocols or procedures defining the decision-making process of the legal entity and the execution of such decisions;
- implement adequate financial management models;
- impose the obligation to report potential risks and breaches to the supervising compliance body;
- establish a disciplinary system sanctioning the failure to comply with the measures established by the model; and
- impose a periodic verification and possible amendments to the model when there have been significant violations of its provisions, or when organisational changes take place in the control structure or activity developed by the entity.

In this regard, the Prosecutor Office in Spain has issued its guidelines to Spanish prosecutors on criminal prosecution of legal entities (*Circular 1/2016 sobre la responsabilidad penal de las personas jurídicas conforme a la reforma del Código Penal efectuada por Ley Orgánica 1-2015*). These guidelines identify the criteria to assess the efficiency of compliance programmes in light of the rules established in the Spanish Criminal Code.

Among others, the effectiveness in preventing crimes is considered as a main circumstance.

Finally, the fact that a legal entity has implemented a compliance programme before the beginning of the trial hearing will be considered as a mitigating circumstance.

6.2 Disclosure of Violations of Anti-bribery and Anti-corruption Provisions

There are no specific provisions imposing the disclosure of anti-bribery and anti-corruption violations. However, under Spanish legislation, individuals have the obligation to report crimes of

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which they become aware. Articles 259 and 262 of the Spanish Criminal Procedure Code [*Real Decreto de 14 de septiembre de 1882 por el que se aprueba la Ley de Enjuiciamiento Criminal*] require that those i) who witness a public criminal offence, or ii) who become aware of its commission because of their position, profession or job, report the offence to the public authorities. These provisions apply as well to bribery and other corruption cases.

The penalty provided for the breach of the reporting obligation amounts to the imposition of a fine of up to 250 pesetas (EUR1.5). The legislator has not converted this low amount into euros since in practice the provisions are not enforced.

In addition, the implementation of a compliance programme imposing the obligation to report potential risks and breaches is one of the conditions for the exemption of criminal liability of legal entities. Thus, this would include the reporting of anti-bribery and anti-corruption violations.

6.3 Protection Afforded to Whistle-Blowers

There is no specific law on whistle-blowers' protection in Spain. However, the Spanish Prosecution Office, in its Circular 1/2016 (See **6.1 National Legislation and Duties to Prevent Corruption**), has indicated that the obligation to report in compliance programmes cannot be imposed without the establishment of whistle-blowers' protective measures.

In addition, the Supreme Court and the Constitutional Court have found wrongful dismissals both under the right to freedom of information (Article 20.1.d of the Spanish Constitution) and the right to freedom of expression (Article 20.1.a of the Spanish Constitution), when the employer has dismissed the employee after they have reported criminal offences.

Following the European Court of Human Rights jurisprudence, the Spanish Supreme Court has also accepted anonymous complaints as a basis to open criminal investigations.

Finally, data protection legislation protects the identity of the individual reporting offences in the private sector.

6.4 Incentives for Whistle-Blowers

There are no incentives for whistle-blowers to report bribery or corruption offences in Spain.

6.5 Location of Relevant Provisions Regarding Whistle-Blowing

There are no specific provisions regarding whistle-blowers in Spanish criminal legislation. There are some provisions regarding whistle-blowers in administrative legislation, for instance, in the Private Insurance Organisation and Supervision Act (*Ley*

20/2015, de ordenación, supervisión y solvencia de las entidades aseguradoras y reaseguradoras), and in the Organic Law on Data Protection and Guarantee of Digital Rights (*Ley Orgánica 3/2018 de Protección de Datos Personales y garantía de los derechos digitales*).

7. Enforcement

7.1 Enforcement of Anti-bribery and Anti-corruption Laws

In Spain, there are no specific anti-bribery and anti-corruption laws. As mentioned in **1. Legal Framework for Offences**, corruption-related offences are provided for in the Spanish Criminal Code.

Administrative offences may be found on the Organic Law 6/2002 on Political Parties (*Ley Orgánica 6/2020, de Partidos Políticos*), Law 5/2006, of April 10th, on conflicts of interest of members of the Government and senior officials of the General State Administration (*Ley 5/2006, de regulación de los conflictos de intereses de los miembros de Gobierno y de los Altos Cargos del a Administración General del Estado*) and Law 19/2013 on Transparency, Access to Public Information and Good Governance (*Ley 19/2013, de transparencia, acceso a la información pública y buen gobierno*).

Law 19/2003 establishes a sanctions regime structured in three areas: infringements in matters of conflict of interest, in matters of economic-budgetary management and in the disciplinary sphere. Sanctions provided for include the dismissal from the public office held by the offender, prevention from receiving compensatory pensions, the obligation to restore the amounts unduly received and the obligation to compensate the Public Treasury. Furthermore, it is provided that perpetrators of very serious offences may not be appointed to occupy certain public positions for a period of between five and ten years.

7.2 Enforcement Body

In Spain, investigative phases are conducted by examining magistrates and any public prosecutor has the competency to prosecute corruption cases.

In addition, there is a specialised Anti-Corruption Prosecution Office (*Fiscalía Especial contra la Corrupción y la Criminalidad Organizada*). This office is competent to investigate particularly important cases of economic crimes and corruption-related crimes committed by public officials in the exercise of their official duties. It has real investigative capacities accomplished by tax inspectors, auditors and members of the National Police, and the Civil Guard (*Guardia Civil*). It is composed of 29 prosecutors. The Anti-Corruption Prosecutor's Office can also inter-

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vene directly in any criminal proceeding concerning corruption cases of special importance in the first instance or in appeal. The Attorney General (*Fiscal General del Estado*) evaluates whether a case is of special importance requiring the intervention or investigation by the Anti-Corruption Prosecutor's Office.

Concerning administrative bodies, there is no national anti-corruption agency. In this respect, Spain does not have a general anti-corruption strategy. However, some local and autonomous communities have created anti-corruption agencies with investigatory powers, such as the Anti-Fraud Office of Cataluña; the Agency for the Prevention and Fight against Fraud and Corruption of the Valencian Community; the Office for the Prevention and Fight against Corruption in the Balearic Islands; the Accounts Council of Galicia; and the Municipal Office against Fraud and Corruption of the Madrid City Council.

Some of those agencies have only investigatory powers, whereas others can also impose administrative sanctions based on their statutes. For instance, the Valencian Agency can impose administrative sanctions on any person who obstructs whistleblowers' actions or provides untrue information.

Regarding administrative offences, the Council of Ministers and the Ministry of Finance and Public Administration are competent to institute disciplinary proceedings and impose sanctions, depending on the position of the offender and seriousness of the offence. The Conflict of Interests Office is competent to investigate in certain cases.

7.3 Process of Application for Documentation

In Spain, prosecutors have limited powers concerning the gathering of information. Prosecutors may start an investigation after receiving a complaint from a private person or an administration, but they may also act *ex officio*. Following a preliminary investigation, prosecutors have to decide whether to dismiss the case or to refer it to the competent examining magistrate to carry out further preliminary proceedings. In turn, the examining magistrate has a broad range of tools to gather information and documents concerning the offence. In this case, prosecutors may only request the adoption of precautionary measures or investigative measures by the judge.

7.4 Discretion for Mitigation

Spanish criminal legislation does not recognise pre-trial diversion, deferred prosecution agreements or other similar settlement mechanisms. As such, only Article 31 quater of the Spanish Criminal Code provides that the self-reporting of a criminal offence or the collaboration in the investigation are considered as mitigating circumstances.

Although nothing is provided in the Spanish legislation, the prosecutor may offer a more lenient sentence in exchange for the defendant pleading guilty.

Pursuant to the Spanish Criminal Procedure Code (SCPC) guilty pleas apply only if the penalty does not exceed six years of imprisonment. In any case, guilty pleas have to be approved by the competent court. If accepted, the trial does not take place and the court issues a judgment imposing the accepted sentence (Articles 781 and 655 of the SCPC).

Legal entities may plead guilty by nominating a specially designated person with a special power of attorney.

A court may not accept a guilty plea if it considers that the sentence should be higher in the case of minor sentences (Article 655 of the CPC), or to correct the qualification of the crime and impose an appropriate sentence in accordance with the law prior to acceptance of the pleading (Article 787.3 of the SCPC) in cases of prison sentences.

7.5 Jurisdictional Reach of the Body/Bodies

Any bribery and corruption act committed in Spain can be investigated by Spanish authorities.

Moreover, Article 23 of the Spanish Organic Act on the Judiciary (*Ley Orgánica 6/1985 del Poder Judicial*) establishes the rules for Spanish extraterritorial jurisdiction. Acts abroad may be investigated by Spanish courts if:

- committed by Spanish citizens;
- the acts are also punishable at the place of execution (or there is an international treaty allowing the prosecution);
- a criminal complaint has been filed by the public prosecutor or the aggrieved party; and
- the criminal adjudication has not been made abroad.

For corruption in business and in economic international transactions committed by Spanish citizens or foreigners abroad, extraterritorial prosecution is also allowed if:

- the criminal procedure is directed against a Spanish citizen;
- the criminal procedure is brought against a foreign citizen residing in Spain;
- the offence has been committed by the executive, administrator, employee, or collaborator of a corporation, company, association, foundation or organisation that has its headquarters or registered address in Spain; or
- the offence has been committed by a legal person, company, organisation, groups or any other kind of entity or group of people that has its headquarters or registered address in Spain.

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Traditionally, Spain has used its extraterritorial jurisdiction to prosecute terrorism, torture, genocide, and crimes against humanity. However, recently, extraterritorial jurisdiction has been used to prosecute corruption and money laundering.

7.6 Recent Landmark Investigations or Decisions Involving Bribery or Corruption

There are several high-profile cases concerning corruption charges in Spain. For instance:

- the *Gurtel* case is a political corruption case which implicated the Spanish People's Party (PP). This case is considered as "Spain's Watergate" involving EUR123 million and 200 suspects. It was found that there existed a corrupt bribes-for-contracts network that operated across six Spanish regions between 1999 and 2005. Last October 2020, Spain's Supreme Court confirmed criminal penalties, including charges for corruption, against 29 individuals and upheld the civil liability of the People's Party;
- the *ERE* case is another prominent political corruption case which involved Spain's Socialist Party (PSOE) in the region of Andalucia. High-ranking PSOE officials (including two of Andalucia's ex-presidents) were found to be involved in a corrupt scheme where funds meant for the unemployed and struggling companies were granted instead to persons and entities with close ties to the PSOE members involved. It was found that at least EUR680 million of public funds were diverted through the corrupt scheme between 2000 and 2009. On 19 November 2020, the Provincial Court of Sevilla (*Audiencia Provincial de Sevilla*) convicted 19 former high-ranking officials of misconduct and the misuse of public funds;
- the *Palau de la Música* case is a case involving bribes in public contracts amounting to EUR6.6 million between 2000 and 2009, directed by the president of the Catalan Palace of Music. In April 2020, the Supreme Court confirmed the sentences of the former president of the Catalan Palace of Music and its manager;
- the *Púnica* case also involves the People's Party in corruption charges. The investigation is based on alleged commission in the exchange of public contracts in the Communities of Madrid and Valencia. The total amount defrauded amounted to EUR250 million over two years. The investigation implicated 50 officials and is still ongoing;
- Spain's former king Juan Carlos is also under investigation, which is being carried out by the Prosecutor's Office of the Supreme Court, over his alleged role in a deal under which a Spanish consortium won a EUR6.7 billion contract to build a high-speed rail line in Saudi Arabia. The Spanish former king is suspected to have received EUR88 million as a commission from Saudi Arabia's king Abdullah. On 3 November 2020, the Prosecutor's Office of the Supreme

Court also assumed another investigation against the former king and other royal members. The facts are unclear, but the investigation is based on corruption facts.

Roberto Macias leaked files involving corruption made by the trade union UGT (General Union of Workers) in Andalucia. In May 2020, he was charged with revealing workplace secrets and sentenced to two years of imprisonment. He was denied immunity as a whistle-blower since Spanish legislation does not provide for this protection.

7.7 Level of Sanctions Imposed

The Supreme Court has recently confirmed the conviction of the political party "PP" and 29 individuals in the *Gurtel* case. The political party has been found civilly responsible. The minimum sentence has been five months of imprisonment and the most serious sentence imposed on one of the defendants has been 51 years of imprisonment. The other four defendants' sentences range between 27 and 40 years of imprisonment. Six defendants' sentences range between 12 and 18 years of imprisonment. The rest of the defendants' punishments range between six months and nine years of imprisonment.

In the *ERE* case, the Provincial Court of Sevilla (*Audiencia Provincial de Sevilla*) convicted 19 out of the 21 of the accused individuals. Two individuals were sentenced to nine years of special disqualification. Imprisonment sentences ranged from a minimum of six years to a maximum of seven.

8. Review and Trends

8.1 Assessment of the Applicable Enforced Legislation

The last OECD report on the implementation of the OECD Anti-Bribery Convention by Spain dated from 2015, when Spain had not yet amended its anti-bribery provisions. Among others, the OECD was concerned by the lack of prosecution-based corruption charges.

In 2019, the Group of States against Corruption (GRECO) of the Council of Europe, monitoring States' compliance with anti-corruption standards, published two reports evaluating Spain on: i) "preventing corruption and promoting integrity in central Governments (top executive functions) and law enforcement agencies" and ii) "corruption-prevention in respect of members of parliament, judges and prosecutors." The GRECO noted that Spain was implementing certain recommendations such as the adoption of a Code of Conduct for the members of the Congress of Deputies. However, GRECO recommended reinforcing the regime applicable to top executive functions, the police, and the Civil Guard. The GRECO also recommended that Span-

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ish authorities prioritise the creation of a co-ordinated strategy against corruption.

Additionally, in 2019, Transparency International ranked Spain 30th out of 180 countries with a 62/100 score in its corruption perception index in the public sector.

Finally, in 2018, the European Green Party released the report “The cost of corruption across the EU” which indicated that in Spain corruption costs amount to EUR90 billion annually, representing 8% of its GDP.

8.2 Likely Future Changes to the Applicable Legislation of the Enforcement Body

Spain, as any other EU Member State, is required to transpose the Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law, by 17 December 2021. The Directive protects persons who report certain infringements of Union law, irrespective of how national law classifies them, whether administrative or criminal. This includes the reporting of anti-bribery and anti-corruption violations. Spain has already started work on preparing this transposition.

It must be noted that, in June 2020, the Spanish Parliament voted down a law proposal on anti-corruption (*Ley integral de lucha contra la corrupción y protección al denunciante*) which established, for the first time in Spain, a legal framework of anti-corruption provisions for both the public and private sectors. Under the regime, whistle-blowers benefited, among others, from an immunity against retaliatory measures carried as a consequence of their reporting.

The law proposal included the following titles:

- the first title provided the protection of persons who report anti-corruption violations and their rights;
- the second title created an “independent public-integrity authority” which controlled and monitored the compliance by the authorities and personnel of the public sector with their obligations concerning conflicts of interest, incompatibility regimes and good governance; and
- the third title provided the legal regime of the infractions and sanctions that were committed because of the non-compliance with the law.

In addition, in April 2020, the Ministry of Justice started drafting a proposed legislation to amend the Criminal Procedure Code (*Ley de Enjuiciamiento Criminal*). Among others, it is under consideration to allow prosecutors in the pre-trial stage to carry out judicial investigations without an examining magistrate. Under the current system, the examining magistrate has the power to conduct the investigation and prosecutors may only request the adoption of precautionary measures or investigative measures by the judge.

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Trends and Developments

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Introduction

Throughout the past two decades there have been more than 2,000 corruption cases in Spain. Of these cases, the most notorious have been linked to political corruption scandals that involved some of the country's main political parties. For instance, the high-profile cases *Púnica*, *Gürtel* and *ERE* have prompted the arrest and conviction of high-ranking government officials within the *Partido Popular* (PP) and *Partido Socialista Obrero Español* (PSOE), the latter being the party of which Spain's current President is the Secretary General.

It was due to PP's high-ranking officials' repeated involvement in public corruption accusations that in 2018 a vote of no confidence was passed against the party's leader, who at the time was also Spain's President, Mr Mariano Rajoy, which led to the election of Mr Pedro Sánchez, the country's current President.

Against this background, it perhaps comes as no surprise that corruption has been consistently ranked by Spanish citizens as one of the country's most pressing concerns for the past ten years.

Admittedly, however, Spain has taken meaningful steps to tackle corruption through a series of legislative reforms. This is reflected, for instance, in Transparency International's Corruption Perception Index of 2019, where Spain's score, 62/100, had improved four points compared to that of 2018, albeit still ranking below the European Union's average of 66/100. Indeed, in its press statement, Transparency International stated that a country like Spain, ranked among the top 15 economies in the world, should not have a score below 70 if it wants to maintain its positive image and competitiveness.

Transparency International's stance illustrates Spain's current state of affairs with regard to the fight against corruption: there have been some marked improvements, but more needs to be done.

This article describes the most significant anti-corruption legislative reforms and measures enacted in Spain throughout the past decade. It then proceeds to identify the main areas for improvement, in accordance with recommendations formulated by the European Commission and the Group of States Against Corruption (GRECO), the Council of Europe anti-corruption body. This piece also provides a brief overview of recent devel-

opments in respect of Spain's coalition government's recent legislative reform proposal on the appointment of members of the country's Council of the Judiciary, which drove the President of the GRECO to warn against a potential violation of the Council of Europe anti-corruption standards.

Legislative Reforms

As previously explained, Spain has enacted a series of legislative reforms to strengthen its anti-corruption legal framework and its efforts have been recognised by the GRECO in its Fifth Evaluation Round, published on 13 November 2019, and the European Commission in its 2020 Rule of Law Report (Country Chapter on the rule of law situation in Spain). The European Commission acknowledged that "Spain has strengthened its anti-corruption framework in recent years, both in the preventive and repressive dimensions". Below the most noteworthy legislative developments in the fight against corruption are listed, with an emphasis on those implemented in the past two years.

In 2013, in the wake of the aforementioned political corruption scandals, the Spanish Government launched the Democratic Regeneration Plan (*Plan de regeneración democrática*) which included 40 measures to fight public corruption and improve transparency in public administrations. These measures increased control over the economic activity of political parties, enacted a regulatory framework with regard to transparency and conflicts of interest for senior officials in public administration and provided for the amendments to the Criminal Code.

In February 2019, the Spanish Government implemented a new National Strategy to Combat Organised Crime and Serious Offences 2019-2023, which, among others, aims to provide a framework for the enactment of a unified, over-arching strategy against corruption. The Strategy lists among its objectives the increased sharing of intelligence between investigative agencies to improve co-ordination and investigation capabilities. In addition, the Strategy seeks to promote legislative reform by adapting administrative, criminal and procedural legal instruments to new forms of criminality.

Notably, Spain's Criminal Code was amended through Organic Law 1/2019, which came into effect on 13 March 2019. Inter alia, the preamble of Law 1/2019 explicitly states that the modification of Spain's Criminal Code aims to complete the regulation of corruption crimes in accordance with the GRECO's guidelines.

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In this manner, Article 286bis extends the scope of the offence of private corruption to cover not only persons offering an unjustified benefit or advantage but also those accepting such a benefit or advantage. Moreover, Article 435 extends corporate criminal liability to the crime of embezzlement of public resources, thereby making legal entities who manage or are responsible for such public resources criminally liable.

Other positive developments, mentioned by the GRECO in its Fifth Evaluation Round, include Law 3/2015 Regulating the Exercise of High Office in the Central Administration and Law 19/2013 on Transparency Access to Information and Good Governance. Law 3/2015 codifies the eligibility requirements of high-ranking officials and contains conflict of interest provisions. In turn, Law 19/2013 increases and strengthens transparency in public activity through obligations involving active publicity for all public administrations and entities, recognises and guarantees the right of access to information and sets forth the good governance obligations to be met by public authorities.

Room for Improvement

Despite the measures previously described, Spain's anti-corruption framework is by no means satisfactory and its effectiveness necessitates further urgent reforms.

Most importantly, and as underscored by the European Commission and GRECO, Spain lacks a holistic, over-arching strategy against corruption. For instance, the European Commission, in agreement with the GRECO, calls for a co-ordinated anti-corruption strategy amongst law enforcement authorities and proposes the collective development of such a strategy to reinforce internal compliance mechanisms. Nevertheless, the European Commission refers to the February 2019 National Strategy to Combat Organised Crimes and Serious Offences as a positive step towards a unified anti-corruption strategy, especially since it addresses the need for increased inter-agency co-operation. The 2019 National Strategy is indeed a demonstration of the emphasis that Spain's current administration places on the fight against corruption. However, the practical application of the objectives contained therein has yet to be seen and cannot be considered a comprehensive strategy against corruption.

Another issue that is highlighted by both the European Commission and the GRECO is the absence of legislation in relation to whistle-blower protection. While Law 19/1994 guarantees the physical protection of witnesses and experts who consider themselves to be at risk, there is presently no general whistle-blower protection framework. This is necessary, particularly when it comes to protecting the identity of whistle-blowers in the public administration. Given the prominence of political corruption in Spain, a legislative reform in this regard is imperative. Indeed, without appropriate legal safeguards for the pro-

tection of the physical identity of whistle-blowers, it is, at the very least, doubtful that a culture of transparency and accountability can be instilled in Spain's public administration. Such an environment exacerbates the fear of retaliation and negative publicity. The Spanish government is currently working on draft legislation in this regard, which will transpose European Directive 2019/1937 of 23 October 2019 on the protection of persons who report breaches of Union law into national legislation.

Generally, it also worth pointing out that the scarcity of resources in public administration agencies is an ongoing matter of concern. In this regard, the GRECO's Fifth Evaluation Round, while applauding the creation of independent supervisory organisms such as the Office for the Conflicts of Interest and the Council for Transparency and Good Governance, also strongly recommends the stepping-up of resources devoted to these institutions.

Recent Developments

In Spain, the Council of the Judiciary (CGPJ) is the country's judicial regulatory body. The Council of the Judiciary is composed of 20 members: 12 judges or magistrates, eight lawyers or jurists and a president, who is also the president of the Supreme Court. The appointment of the members of the CGPJ is achieved by a three-fifths majority in Parliament. Since December 2018, this majority has not been achieved in Parliament and thus the CGPJ has been carrying out its functions on a temporary basis. This parliamentary impasse has its roots in political rivalries between the country's governing coalition PSOE and Unidas Podemos and the opposition party PP.

In order to break this deadlock, the political parties PSOE and Unidas Podemos filed on 13 October 2020 a legislative proposal that intends to modify the mechanism for appointments to the CGPJ. The legislative proposal preserves the need for a three-fifths qualified majority during a first round of voting. Thereafter, if that qualified majority is not achieved, the proposal contains a provision for a second round of voting that would only require a simple majority.

In his letter of 14 October 2020, Mr Marin Mrčela, President of the GRECO, addressed Ms Ana Andrés Ballesteros, Head of the Delegation of Spain in the GRECO. In his letter, Mr Mrčela states that "[t]his legislative initiative departs from the Council of Europe standards concerning the composition of judicial councils and election of their members and may result in a violation of the Council of Europe anti-corruption standards [...] Our standards provide that at least half of the council's members should be judges elected by their peers from all levels of the judiciary. GRECO has repeatedly stressed that political authorities shall not be involved, at any stage, in the selection process of the judicial shift." Furthermore, Mr Mrčela describes

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the independence of the judiciary as a “condition sine qua non for an effective fight against corruption.”

Mr Mrčela's warning is in line with a recommendation by the GRECO contained in its Fourth Evaluation Round. Namely, “the need to remove the selection of the judicial shift from politicians.” In its report, the GRECO went as far as to denounce this alleged politicisation the “Achilles' heel of the Spanish judiciary.”

The GRECO's stark warning is yet another reform that Spain must adopt to keep up with the GRECO's and, by extension, European anti-corruption standards. The GRECO's recommendation with regard to the appointment of CGPJ members was made more than seven years ago, and its open disagreement with the government's legislative proposal should not be taken lightly by a nation whose public institutions have been riddled with corruption allegations and in which its citizenship places little trust.

Conclusion

Spain has been shaken by several political corruption scandals that have led to the arrest of high-ranking officials from the country's most prominent political parties. Surveys repeatedly show that Spain's citizenship has little trust in the public administration and remains concerned about corruption. Meaningful legislative reforms have been implemented, which have earned Spain international recognition and have translated into a slightly improved international corruption-perception index.

However, more needs to be done. The findings of the European Commission and the GRECO both advocate for an over-arching, unified strategy against corruption as opposed to standalone reforms whose effectiveness remains doubtful. In this regard, in its Fifth Evaluation Round report the GRECO notes that “[t]he initiatives taken up to the present, although noteworthy, are more of a piecemeal approach hastened by public outcry; they were not based on any prior risk assessment and they do not form part of a targeted strategy. Likewise, there is no evaluation or impact assessment of the anti-corruption measures established to date and virtually all interlocutors met agreed that the weakest aspect of the anti-corruption legislation and institutions refers to their ineffectiveness.”

The government of Mr Pedro Sánchez vowed to make the fight against corruption a priority. This is unsurprising, given its rise to power followed by the vote of no confidence against Mr Mariano Rajoy by reason of his party's involvement in several corruption cases. There are grounds for optimism. The National Strategy to Combat Organised Crimes and Serious Offences prioritises the need for a co-ordinated approach against corruption. A consolidated legislative framework for the protection of whistle-blowers is currently being drafted. The mechanism for the appointment of members of the Council of the Judiciary is under international scrutiny, which will certainly place further pressure on the government to conform to European anti-corruption standards.

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