

THE ANTI-BRIBERY AND
ANTI-CORRUPTION
REVIEW

TENTH EDITION

Editor
Mark F Mendelsohn

THE LAWREVIEWS

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This article was first published in November 2021
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Published in the United Kingdom

by Law Business Research Ltd, London

Meridian House, 34–35 Farringdon Street, London, EC4A 4HL, UK

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Enquiries concerning editorial content should be directed
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ISBN 978-1-83862-756-0

Printed in Great Britain by

Encompass Print Solutions, Derbyshire

Tel: 0844 2480 112

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following for their assistance throughout the preparation of this book:

ANAGNOSTOPOULOS

BAE, KIM & LEE LLC

BAKER MCKENZIE

BLAKE, CASSELS & GRAYDON LLP

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STETTER RECHTSANWÄLTE

STUDIO LEGALE PISANO

TRENCH ROSSI WATANABE

CONTENTS

PREFACE.....	v
<i>Mark F Mendelsohn</i>	
Chapter 1	ARGENTINA..... 1
<i>Vanina Caniza, Fernando Goldaracena, Francisco Fernández Rostello and Nicolás Servente</i>	
Chapter 2	AUSTRALIA..... 12
<i>Robert R Wyld and Angus Hannam</i>	
Chapter 3	BRAZIL..... 58
<i>Heloisa Uelze, Felipe Ferenzini, Fernanda Casagrande and Érica Porfirio</i>	
Chapter 4	CANADA..... 70
<i>Mark Morrison and Michael Dixon</i>	
Chapter 5	CHILE..... 83
<i>Sebastián Doren and Juan Ignacio Donoso</i>	
Chapter 6	COLOMBIA..... 96
<i>María Carolina Pardo Cuéllar and Luis Alberto Castell</i>	
Chapter 7	ENGLAND AND WALES..... 109
<i>Tim Bowden, Roger A Burlingame, Matthew L Mazur and Tom Stroud</i>	
Chapter 8	FRANCE..... 123
<i>Guillaume de Rancourt and Camille Martini</i>	
Chapter 9	GERMANY..... 141
<i>Sabine Stetter and Christopher Reichelt</i>	
Chapter 10	GREECE..... 152
<i>Ilias G Anagnostopoulos and Jerina Zapanti</i>	

Contents

Chapter 11	INDONESIA.....	161
	<i>Andi Kadir, Bernard Sihombing and Nabila Oegroseno</i>	
Chapter 12	ITALY.....	175
	<i>Roberto Pisano</i>	
Chapter 13	JAPAN.....	188
	<i>Kana Manabe, Hideaki Roy Umetsu and Shiho Ono</i>	
Chapter 14	MEXICO.....	199
	<i>Jonathan Edward Adams and Milka López</i>	
Chapter 15	PERU.....	214
	<i>Teresa Tovar Mena and Viviana Chávez Bravo</i>	
Chapter 16	POLAND.....	228
	<i>Tomasz Konopka and Katarzyna Randzio-Sajkowska</i>	
Chapter 17	PORTUGAL.....	240
	<i>Ana de Brito Camacho and João Santos Marta</i>	
Chapter 18	SOUTH KOREA.....	247
	<i>Tony DongWook Kang and Yongman Bae</i>	
Chapter 19	SPAIN.....	258
	<i>Adriana de Buerba and Jorge Wälsler</i>	
Chapter 20	SWITZERLAND.....	271
	<i>Grégoire Mangeat and Hadrien Mangeat</i>	
Chapter 21	UNITED STATES.....	288
	<i>Mark F Mendelsohn</i>	
Chapter 22	VENEZUELA.....	316
	<i>Jesús A Dávila and Adriana Gonçalves</i>	
Appendix 1	ABOUT THE AUTHORS.....	325
Appendix 2	CONTRIBUTORS' CONTACT DETAILS.....	343

PREFACE

The covid-19 pandemic has had a monumental and disruptive effect on practically all aspects of business, politics, law and daily life in nearly every corner of the globe. For companies conducting cross-border business, and legal practitioners who advise them, corruption remains a substantial risk area. And with national governments engaging in large-scale economic stimulus programmes and contracting on an emergency basis with a wide range of suppliers of critical goods and services, the opportunities for fraud, corruption and abuse are replete. The current global health crisis unfolded onto a world stage that is dynamic and roiling with anti-corruption activity and developments. This tenth edition of *The Anti-Bribery and Anti-Corruption Review* presents the views and observations of leading anti-corruption practitioners in jurisdictions spanning the globe, including a new chapter covering Portugal. The comprehensive scope of this edition of the Review mirrors that dynamism.

Over the past two years, countries across the globe have continued to investigate and prosecute a range of corruption cases – many involving heads of state and senior officials – strengthen their domestic anti-bribery and anti-corruption laws, and adopt important new law enforcement policies and guidance documents, though tumultuous international relations, rising economic competition and the effects of the pandemic are combining to threaten international cooperation and the progress of cross-border investigations more generally.

2020 saw French-headquartered Airbus SE reach a US\$3.9 billion coordinated corporate bribery and export controls resolution with authorities in France, the United Kingdom and the United States. The wide-ranging allegations involved alleged bribery of government officials in more than a dozen countries, as well as US export controls-related offences, and now other jurisdictions from Ghana to Malaysia are pressing forward with their own investigations. At the same time, the 1MDB scandal continued to play out, with still further US asset forfeiture actions, criminal charges against a major US Republican fundraiser for allegedly acting as an unregistered foreign agent in an attempt to illegally lobby the Trump administration to drop its probe into the 1MDB corruption scandal and an appeal by former Malaysian prime minister Najib Razak against his convictions on bribery and money-laundering charges and the resulting 12-year prison term. And in Brazil, which has for many years been a hotbed of anti-corruption investigations, President Jair Bolsonaro took the controversial step of ending his country's long-running Car Wash probe, following the resignation of his justice minister who, as judge, had previously presided over the probe.

Given the political turmoil and the global health crisis still confronting us in the remainder of 2021 and into 2022, this book and the wealth of country-specific learning that it contains will help guide practitioners and their clients when navigating the perils of

corruption in foreign and transnational business, and in related internal and government investigations. I am grateful to all of the contributors for their support in producing this highly informative volume.

Mark F Mendelsohn

Paul, Weiss, Rifkind, Wharton & Garrison LLP

Washington, DC

November 2021

SPAIN

*Adriana de Buerba and Jorge Walser*¹

I INTRODUCTION

In Spain, bribery is regulated in the Spanish Criminal Code (SCC). The SCC prohibits the payment and receipt (including the promise or offer) of bribes, both to public officials or authorities and to private entities or individuals in commercial transactions. The SCC also regulates other offences related to corruption (including influence peddling, embezzlement and illegal political financing). These cases are investigated by specialist law enforcement bodies created for this purpose.

In the past few years, Spain has seen some of the biggest corruption cases in its recent history. These have involved several politicians and businessmen and have shaken its political system. This has led to unprecedented decisions by the Spanish courts, including the conviction of a political party for profiting from corruption.

II DOMESTIC BRIBERY: LEGAL FRAMEWORK

i Criminal offence of bribery

Under the SCC, bribery occurs whenever a public official receives or is offered a reward to carry out an act or make an omission in breach of his or her duties or in the performance of these duties.

The offence can take the form of ‘passive bribery’, when the public official receives or requests the bribe, or ‘active bribery’, when an individual offers or gives a bribe to a public official. In Spain, active bribery and passive bribery are regulated as separate offences.

According to the SCC, passive bribery takes place when a public official, for personal benefit or that of a third party, performs one of the following actions:

- a requests or receives a gift, payment or favour or accepts an offer or promise thereof, in exchange for carrying out an act in the exercise of their duties and position that constitutes a criminal offence, or for abstaining from performing their duties;²
- b subsequently requests or receives a gift, payment or favour, or accepts an offer or promise thereof, in exchange for carrying out an act which is inherent to his or her position;³

1 Adriana de Buerba is a partner and head of, and Jorge Walser is an associate in, the white-collar crime and investigations practice at Pérez-Llorca.

2 Article 419 of the SCC.

3 Article 420 of the SCC.

- c* requests or receives a reward for having carried out the acts described above;⁴ or
- d* accepts a gift offered due to his or her position or powers.⁵

On the other hand, active bribery takes place when an individual, for personal benefit or that of a third party, corrupts or attempts to corrupt, by themselves or through an intermediary, a public official with gifts, offers, promises, gratuities, meals or entertainment.⁶

Merely offering or promising a benefit, advantage or gift to a public official, or the public official requesting or accepting it, is sufficient to constitute a criminal offence of bribery, even if the reward is not effectively received or the public official does not carry out the action for which said reward was given.⁷

Payments made to public officials with a view to obtaining a licit benefit (also known as ‘facilitating payments’) are illegal in Spain. However, there are no quantitative or qualitative restrictions on gifts, travel, meals or entertainment. In this regard, there are two main criteria established by Spanish case law⁸ to determine if a gift or gratuity can be considered as an act of bribery:

- a* if the gift or gratuity offered or received is not ‘socially acceptable’; and
- b* if the gift offered or received could affect the decision of the recipient.

In conclusion, whether a gift or gratuity can be considered as part of a bribery offence or not has to be assessed on a case-by-case basis following the aforementioned criteria.

ii Other related offences

The SCC regulates other offences related to bribery and corruption.

Influence peddling

According to the SCC,⁹ this offence takes place when an individual or a public official influences another public official, by exercising the powers deriving from their position or their personal or hierarchical relationship with said public official or any other public official, in order to obtain a decision that results in a personal or a third-party benefit.

Embezzlement

Under the SCC,¹⁰ embezzlement is committed when a public official abuses their powers to administer public assets by exceeding the limits of these powers or retaining said public assets for themselves or for a third party.

4 Article 421 of the SCC.

5 Article 422 of the SCC.

6 Article 424 of the SCC.

7 Spanish Supreme Court ruling no. 343/2019, dated 4 July 2019 [RJ 2019\2957].

8 See Spanish Supreme Court ruling no. 21024/2016, dated 17 March 2017 [RJ\2017\1146].

9 Articles 428, 429 and 430 of the SCC.

10 Articles 432, 433, 433*bis*, 434 and 435 of the SCC.

Fraud and unlawful exactions

According to the SCC,¹¹ these offences can take place when a public official participating in a public procurement process defrauds a public entity, demands undue fees or abuses their position to commit fraud or misappropriate social security benefits.

Negotiations and activities which public officials are prohibited from carrying out, and abuse in the exercise of their public duties

Under this title, the SCC¹² regulates offences such as taking advantage of holding the position of public official to participate in a transaction or business, or the use of inside information to obtain a financial benefit.

iii Definition of public official

The SCC¹³ provides for a broad concept of public official, which includes those individuals who, by provision of the law, or by election or appointment by an authority, participate in the exercising of public duties, including for any public body or state-owned or state-controlled company.

With regard to the offence of bribery, the term 'public official' is also applicable to juries, arbitrators, mediators, experts, administrators or receivers appointed by a court, bankruptcy administrators and any other individuals carrying out a public duty.¹⁴

iv Private corruption

The SCC¹⁵ also prohibits bribery between private entities or individuals in commercial transactions. Corruption in business occurs when an offer, promise, concession or acceptance is made with the object of obtaining unjustified benefits or advantages, of any nature, as compensation for the undue promotion over a third party in the acquisition or sale of goods, the contracting of services or in commercial transactions. The receipt, request or acceptance of a benefit or advantage and the promise, offer or granting thereof constitute separate offences under the SCC.

v Political contributions

The restrictions and limits on making donations to political parties are established in Law 8/2007, of 4 July 2007, on the Financing of Political Parties.

Political parties cannot accept any form of funding from foreign governments and foreign public companies or entities, but they may receive them from foreign individuals within the limits and in accordance with the requirements and conditions established in Law 8/2007.

Under the SCC,¹⁶ receiving or making donations or contributions intended for a political party, federation, coalition or group of voters in breach of Law 8/2007 is considered a criminal offence.

11 Articles 436, 437 and 438 of the SCC.

12 Articles 439, 440, 441, 442 and 443 of the SCC.

13 Article 24.2 of the SCC.

14 Article 423 of the SCC.

15 Article 286*bis* of the SCC.

16 Article 304*bis* of the SCC.

vi Corporate criminal liability

Both individuals and companies can be held criminally liable for bribery of public officials, as well as other corruption related offences, such as influence peddling, corruption in commercial transactions and, since 2019, embezzlement.

Companies are criminally liable for the offences committed in their name or on their behalf and to their benefit by their legal representatives, directors and officers or by those under their authority who have performed such acts in the absence of due control over them.¹⁷

vii Penalties

Under the SCC,¹⁸ the penalties for individuals and public officials who commit bribery are imprisonment for a term ranging from six months to six years (depending on the particular offence), a fine of 12 to 24 months,¹⁹ and special barring from employment or public office for a period of five to 12 years or suspension for one to three years.

The penalty for companies who commit bribery is a fine which can range from six months to five years,²⁰ or two to five times the profit obtained if the resulting amount is higher, depending on the penalties foreseen for the criminal offence committed by the individual.²¹

Additionally, individuals and companies who commit bribery related to procurement proceedings, subsidies or auctions called by the Public Administration or public entities, can also be barred from obtaining public subsidies, entering into contracts with the government and public entities and obtaining tax and Social Security benefits for a period of five to 10 years.²²

Moreover, if a company is found guilty of bribery, the following penalties can also be imposed:

- a* dissolution of the legal entity;
- b* suspension of its activities for a period of up to five years;
- c* closure of its premises and establishments for a period of up to five years;
- d* prohibition from carrying out the activities through which it committed, facilitated or concealed the criminal offence. This prohibition may be temporary (up to 15 years) or permanent;
- e* being barred from obtaining public subsidies, entering into contracts with the public sector and enjoying tax or Social Security benefits for a period of up to 15 years; and
- f* judicial intervention to safeguard the rights of the workers or creditors for the necessary period of time and up to five years.²³

17 Article 31*bis* of the SCC.

18 Articles 419 to 424 of the SCC.

19 A daily rate is set, ranging from a minimum of €2 and a maximum of €400 (see Article 50 of the SCC).

20 A daily rate is set, ranging from a minimum of €30 and a maximum of €5,000 (see Article 50 of the SCC).

21 Article 427*bis* of the SCC.

22 Article 424.3 of the SCC.

23 Articles 33.7 and 66 of the SCC.

Under Spanish Law,²⁴ public contracts obtained through corruption (e.g., by means of bribery) are null and void. Consequently, if a criminal ruling declares that a public contract was obtained through corrupt practices, the public administration can initiate proceedings to render said contract null and void and thereby terminate it.

Another consequence of committing a criminal offence related to corruption is the confiscation of the assets and gains obtained from the perpetration of the offence and of the goods, means or instruments with which it was executed.²⁵ The confiscation can also be extended to assets or gains which have been transferred to a third party acting in bad faith. Exceptionally, Criminal Courts can order the confiscation of goods, personal effects and gains obtained illegally, even if no sentence has been handed down, in certain cases (e.g., when the defendant is in a situation which prevents a trial taking place or when the defendant cannot be sentenced because they are exempted from criminal liability or their liability has expired).

Moreover, under the SCC,²⁶ individuals who, in good faith, profit from the effects of a criminal offence by obtaining a financial gain are obliged to return the item or to provide compensation for the loss and damage incurred up to the amount of their involvement in such offence.

Finally, it is important to note that, in the event that a bribe results in the delivery of an arbitrary or unjust decision or where a public official fails to render a decision, which was due under their duties, said public official can also be sentenced for a criminal offence of perversion of justice,²⁷ or for a criminal offence of urban planning corruption²⁸ if the decision affects urban planning.

viii Defences

In Spain, legal entities can be exempted from criminal liability if a compliance programme is implemented and it is proven that the offender managed to bypass all the controls set by the company to prevent the crime from being committed. The defence based on compliance will be developed further below.

Moreover, in accordance with the SCC,²⁹ a private individual or company that occasionally accepts a request of a bribe from a public official is exempt from criminal liability if they file a report with the competent authorities:

- a* within two months of the offence being committed; and
- b* before an investigation into the facts is opened.

The offender will benefit from a mitigation of liability if they self-report the facts to the competent authorities, even if they do not comply with the above-mentioned requirements.

24 Article 39.1 of Law 9/2017 on Public Procurement in connection with article 47.1 d) of Law 39/2015 on the Public Administrations General Administrative Proceedings.

25 Article 127 and following articles of the SCC.

26 Article 122 of the SCC.

27 Article 404 and following articles of the SCC.

28 Article 320 and following articles of the SCC.

29 Article 426 of the SCC.

ix Settlements

Individuals and companies in Spain which are being investigated in criminal proceedings can reach a settlement agreement with the Public Prosecutor whereby they obtain a reduced sentence in exchange for pleading guilty.

x Civil and criminal enforcement

Under the Spanish Criminal Procedural Law, civil liability that arises from a criminal offence can be tried within the criminal proceedings together with the criminal liability. Otherwise, the civil liability can be tried separately within civil proceedings after the criminal liability has been determined.

III ENFORCEMENT: DOMESTIC BRIBERY

In recent years, Spain has seen a series of domestic bribery cases involving well-known Spanish politicians and businesspersons alike. These cases have attracted media attention worldwide because of the public profile of the individuals involved and the amount of funds defrauded, which uncovered widespread corruption among Spain's main political parties.

Specialised law enforcement bodies have been created in order to investigate these corruption cases, such as the Anti-Corruption Prosecutor's Office, as well as special police units. The criminal law section of the Spanish National Court is in charge of trying the most challenging corruption cases involving several parties and jurisdictions.

Some of the more high profile corruption cases that are still being investigated by Spanish authorities are as follows.

i The Púnica investigation

The *Púnica* investigation is an ongoing investigation which began in 2013 concerning an extensive network of kickbacks for government contracts which implicates several Spanish political leaders – mainly members of Spain's Partido Popular (PP) – and businesspersons. Under this scheme, government officials awarded public contracts to a variety of businesspersons in exchange for bribes. The criminal offences that are being investigated include influence peddling and money laundering. The funds defrauded amount to €250 million. Two former presidents of the Madrid region are also being investigated in the framework of this case in relation to their alleged involvement in an illegal funding scheme for the Madrid branch of the PP.

ii The Gürtel investigation

The *Gürtel* investigation was another scandal involving kickbacks in exchange for public contracts which affected important Spanish businesspersons and local leaders of the PP. This scheme involved bribes paid to PP officials and used to illegally fund the party, as well as tax and account fraud and money laundering. The funds defrauded amount to €123 million. This case was also important since Spain's former Prime Minister was called to testify as a witness during the legal proceedings. Although he was not implicated as a co-conspirator, he was the first sitting Prime Minister called to testify as part of a criminal investigation. The court also held that the PP had profited from the effects of the criminal offence by obtaining a financial gain.

iii The Lezo investigation

The *Lezo* investigation focuses on another corruption scandal at the heart of the Madrid division of the PP between 2003 and 2015, which also affects several well-known Spanish companies (including a leading construction company). The investigation focuses on whether funds were channelled from a state-owned company to benefit members of the PP and involves illegal political party financing and foreign bribery.

IV FOREIGN BRIBERY: LEGAL FRAMEWORK

i Criminal offence of foreign bribery

In 1999, Spain ratified both the Council of Europe's civil and criminal law Conventions on Corruption. In the year 2000, Spain ratified the Organisation for Economic Co-operation and Development's Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

As a result of the international obligations undertaken under these conventions, the SCC was amended several times³⁰ to transpose the corresponding criminal offences of corruption of foreign public officials.

Under the current regulation, the provisions of the SCC regarding domestic corruption and bribery are applicable to foreign bribery. In this regard, the SCC³¹ sets out that the legal regulations on domestic bribery are applicable when the criminal behaviour affects:

- a any person who holds a legislative, administrative or judicial position in a country in the European Union (EU) or any other foreign country;
- b any individual who carries out a public function for a member state of the EU or any other foreign country, including a public body or public company, for the EU or another international public organisation;
- c any civil servant or agent of the EU or an international public organisation; and
- d any individual who has been assigned and is carrying out a public function that consists of the administration of EU financial interests in an EU member state or any other foreign country, or adopting decisions regarding those interests.

The SCC only penalises active foreign bribery, i.e. the misconduct of the person who bribes or attempts to bribe a foreign public official. Conversely, the SCC does not sanction the misconduct perpetrated by the foreign public official who requests or accepts a bribery. The misconduct of the foreign public official is prosecuted and penalised in accordance with the laws applicable in the corresponding foreign country.

ii Definition of foreign public official

The SCC defines a foreign public official in the same way it does a Spanish public official, but it expands the concept to public officials of the EU or foreign countries.³²

30 By virtue of Law 3/2000, 11 January 2000; Law 1/2015, 30 March 2015; and Law 1/2019, 20 February 2019.

31 Article 427 of the SCC.

32 Article 427 of the SCC.

As stated above, the SCC's definition of foreign public official includes individuals who carry out a public function for any public body or state-owned or state-controlled company, for the EU or another international public organisation.

iii Jurisdiction

Spanish courts have jurisdiction to judge the offence of foreign bribery, committed abroad, if the following requirements are met:

- a* the offenders have Spanish nationality;
- b* the act is punishable in the place it was carried out, unless, under an international treaty or a legal act of an international organisation to which Spain is party, this requirement is not necessary;
- c* a criminal complaint has been filed by the aggrieved party or the public prosecutor; and
- d* the defendant has not been acquitted, exonerated or sentenced abroad, or, in the last case, has not complied with the sentence imposed.³³

Spanish courts can also investigate foreign private bribery offences (corruption in business or in international transactions) committed abroad³⁴ whenever one of the following conditions is met:

- a* the procedure is conducted against a Spanish citizen;
- b* the procedure is conducted against a foreigner whose ordinary residence is in Spain;
- c* the offence was committed by a director, administrator, employee, or partner of a company, association, foundation or organisation which has its headquarters or registered office in Spain; and
- d* the offence was committed by a legal entity, company, organisation, groups, or any other class of entities or groupings who have their seat or headquarters in Spain.

iv Corporate criminal liability

Both individuals and companies can be held criminally liable for bribery of foreign public officials. Companies shall be held criminally liable for these offences subject to the same requirements set out above for domestic bribery and corruption.

v Defences

The same defences outlined above for domestic bribery apply to the bribery of foreign public officials.

V ASSOCIATED OFFENCES: FINANCIAL RECORD-KEEPING AND MONEY LAUNDERING

i Spanish laws and regulations on financial record-keeping

The Spanish Companies Act³⁵ contains the accounting rules for companies, including the duty of the Board of Directors to file the annual accounts with the commercial registry and the obligation for certain companies to have their accounts audited.

33 Article 23.2 of the Organic Law of the Judiciary.

34 Article 23.4 n) of the Organic Law of the Judiciary.

35 Royal Decree 1/2010, of 2 July, approving the Spanish Companies Act.

Other regulations³⁶ require listed companies to have their annual accounts audited and to make their audit and financial reports public.

The General Tax Code³⁷ also provides for the obligation to keep accounting books and records.³⁸

Penalties for record-keeping violations

The penalties for violations relating to accounting and record-keeping are established in the tax and corporate regulations and in the SCC.

According to the Spanish Companies Act, failure to comply with the obligation to file annual accounts with the commercial registry can result in the company being ordered to pay a fine.³⁹ Furthermore, failure to comply with the obligation to file the annual accounts can also be construed to be a failure of the company's directors to comply with their general duty of diligence,⁴⁰ which can lead to a liability action by the company.⁴¹

Moreover, the General Tax Code expressly states that failure to comply with accounting and registration obligations constitutes a serious tax violation, which can lead to the imposition of a fine and temporary disbarment from obtaining public subsidies or tax benefits and from entering into contracts with the government.⁴²

The SCC also provides for several accounting-related offences:

- a* accounting fraud:⁴³ the falsification of the annual accounts or other documents that should reflect the legal or economic situation of the company can constitute a criminal offence under the SCC. This conduct is punishable with a prison sentence of one to three years and a fine of six to 12 months;⁴⁴
- b* tax fraud:⁴⁵ failure to comply with the obligation to keep business accounting, books or tax records (e.g., keeping different accounts, making fictitious entries or failing to record transactions accurately) also constitutes an offence under the SCC. This conduct is punishable with a prison sentence of five to seven months;
- c* insolvency fraud:⁴⁶ the SCC also punishes those who, while in a situation of insolvency, formulate the annual accounts or the accounting books in a manner contrary to the law, to hinder the assessment of the real economic situation of the debtor. This conduct is punishable with a prison sentence of one to four years and a fine of eight to 24 months;⁴⁷ and

36 See Royal Decree 4/2015, of 23 October, approving the Stock Exchange Act; Regulation (EU) No. 2017/1129 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market; and Regulation (EU) No. 596/2014 on market abuse.

37 Law 58/2003, of 17 December, on General Taxation.

38 Article 29.2.d) of the General Tax Code.

39 Article 283 of the Spanish Companies Act.

40 Article 225 of the Spanish Companies Act.

41 Article 236 of the Spanish Companies Act.

42 Article 200 of the General Tax Code.

43 Article 290 of the SCC.

44 A daily rate is set, ranging from a minimum of €2 and a maximum of €400 (see Article 50 of the SCC).

45 Article 310 of the SCC.

46 Article 259.1.8) of the SCC.

47 A daily rate is set, ranging from a minimum of €2 and a maximum of €400 (see Article 50 of the SCC).

- d* investment fraud:⁴⁸ with regard to listed companies, the SCC penalises the falsification and misrepresentation of the economic and financial information that the company must publish in accordance with stock market legislation. This conduct is punishable with a prison sentence of one to four years.

Bribes as non-tax-deductible expenses

The Corporate Tax Act⁴⁹ expressly states that the costs of actions which are contrary to the legal system are non-deductible. The Spanish Directorate General for Taxation⁵⁰ has included the payment of bribes as an example thereof.⁵¹

ii Spanish laws and regulations prohibiting money laundering

The SCC⁵² provides for the criminal offence of money laundering, which is punishable with a prison sentence of six months to six years and a fine of up to three times the value of the goods, in addition to the confiscation of the proceeds of the crime.

In addition, Spain has implemented two administrative regulations on the prevention of money laundering, namely: Law 10/2010 on the prevention of money laundering and terrorist financing, and Royal Decree 304/2014 (the AML Regulations), which approves the regulation of Law 10/2010. These regulations establish the obligations for obliged entities to prevent money laundering (i.e., the adoption of due diligence measures and know-your-customer procedures and compliance with their reporting obligations).

Prosecution under anti-money laundering laws

The Executive Service of the Commission for the Prevention of Money Laundering (SEPBLAC) is the authority in charge of enforcing and ensuring compliance with the AML Regulations.

The Spanish Public Prosecutor Office and the criminal courts are in charge of prosecuting and investigating criminal offences related to money laundering.

Penalties for anti-money laundering violations

Non-compliance with the obligations on the prevention of money laundering is subject to administrative penalties under the AML Regulations. Namely, the following penalties may be imposed:

- a* a private or public warning;
- b* a fine of up to the highest of the following amounts: 10 per cent of the total annual turnover of the company, two times the economic value of the operation, five times the amount of the benefits derived from the violation, or €10 million; or
- c* in the case of entities subject to administrative authorisation to operate (such as credit institutions), the temporary suspension or revocation of such authorisation.⁵³

48 Article 282*bis* of the SCC.

49 Law 27/2014, of 17 November, on Corporate Tax.

50 *Dirección General de Tributos*.

51 Decision of 4 April 2016, of the Directorate General for Taxation, regarding the deductibility of interest on tax arrears, in application of Corporate Tax Act 27/2014 (BOE No. 83, of 6 April 2016).

52 Articles 301 and following of the SCC.

53 Chapter VIII of Law 10/2010.

Obligation to disclose suspicious financial transactions

According to the AML Regulations, there is an obligation to report transactions which could reasonably be considered to be related to money laundering to the SEPBLAC (i.e., when the nature and amount of the transactions does not correspond to the volume of activity or background of the customer, or there is no economic, professional or business justification for carrying out the transaction, or both).⁵⁴

Failure to comply with this duty to report is considered a serious offence under Law 10/2010.⁵⁵

VI ENFORCEMENT: FOREIGN BRIBERY AND ASSOCIATED OFFENCES

Although Spain has adequately transposed the international agreements on corruption highlighted above, by 2020, only nine investigations have been initiated in Spain involving bribery of foreign public officials, and only one trial has ended with the conviction of an individual for a foreign bribery offence.⁵⁶

One of the investigations for alleged foreign bribery which is currently ongoing and has received wide media coverage in Spain is the *Defex-Mercasa* case, which affects two state-owned companies accused of paying millions in bribes to secure weapons contracts abroad.

VII INTERNATIONAL ORGANISATIONS AND AGREEMENTS

Spain is a member of several international organisations that deal with anti-corruption and anti-bribery matters, namely, the United Nations, the Council of Europe and the Organisation for Economic Co-operation and Development (OECD). Moreover, Spain is a signatory to, and has effectively transposed, the following international anti-corruption agreements:

- a* the United Nations Convention against Corruption;
- b* the United Nations Convention against Transnational Organized Crime;
- c* the OECD's Anti-Bribery Convention; and
- d* the Council of Europe's Criminal and Civil Law Conventions on Corruption.

VIII LEGISLATIVE DEVELOPMENTS

On 5 March 2019, the Spanish Ministry of Justice⁵⁷ asked the Criminal Law Section of the General Coding Commission to draft a proposal to amend the SCC with regard to offences relating to political corruption.

This proposal aims to unify offences that are in some way related to corruption, such as illegal financing of political parties, misappropriation of funds, urban planning corruption and money laundering, so that they are all considered to be corruption-related offences.

54 Articles 17 and following of Law 10/2010.

55 Article 52 of Law 10/2010.

56 Spanish National Court (Criminal Law Section) ruling no. 3/2017, dated 23 February 2017 [ARP 2017\366].

57 Order of the Spanish Ministry of Justice dated 5 March 2019.

IX OTHER LAWS AFFECTING THE RESPONSE TO CORRUPTION

In addition to the SCC, other Spanish laws, which do not deal directly with bribery and corruption, but contribute to the fight against corrupt practices in Spain by establishing more transparent public procedures and by regulating whistle-blowing channels that can be used to identify and report these offences, are the following:

- a* Organic Law 9/2021, of 1 July 2021, on the enforcement of Regulation (EU) No. 2017/1939, implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office;
- b* Law 19/2013, of 9 December 2013, on Transparency, Access to Public Information and Good Governance: the Spanish government created a website in order to allow citizens to obtain information on matters such as ongoing public tenders, remuneration of high-ranking public officials and subsidies granted to political parties;
- c* Law 9/2007, of 8 November 2007, on Public Procurement: this law aims for more transparency, competition and publicity in public procurement;
- d* Law 8/2007, of 4 July 2007, on the Financing of Political Parties: this law regulates and establishes limits on donations to political parties;
- e* Law 3/2018, of 5 December 2018, on Data Protection: this law regulates the creation of whistle-blowing channels within companies; and
- f* Law 2/2021, of 18 June 2021, on fighting against fraud and bribery in Andalusia and whistle-blowers' protection. This is a regional law.

X COMPLIANCE

In Spain, corporate criminal liability was incorporated into the SCC in 2010 and further regulated in the 2015 reform of the SCC.⁵⁸ According to this regulation, legal entities may be exempted from criminal liability if, among other requirements, the company has adopted, and effectively implemented, a compliance programme establishing monitoring and control measures for the prevention of crimes prior to the commission of the criminal offence. In the event that these requirements have only been partially met, the existence of a compliance programme can operate as a factor which mitigates the company's criminal liability.

Nowadays, the vast majority of medium-sized and large companies in Spain have implemented some kind of internal anti-corruption policy.

The first Spanish Supreme Court decision which sentenced a company by applying this regulation stated that corporate criminal liability relied on the absence of adequate control measures to prevent the commission of crimes (the 'compliance programmes').⁵⁹ The Spanish Supreme Court has confirmed this case law in subsequent decisions since then.

Furthermore, the Spanish Office of the Public Prosecutor published some guidance on the criteria for assessing the effectiveness of a compliance programme in its Memorandum No. 1/2016 of 22 January 2016, which sets out the requirements of these programmes, namely that they must:

- a* implement measures that are adequate to prevent the commission of criminal offences within the company and that are adapted to the specific risks applicable to the company;

⁵⁸ Article 31 *bis* of the SCC.

⁵⁹ Spanish Supreme Court ruling No. 154/2016, dated 29 February 2016 [RJ 2016\600].

- b* establish a whistle-blowing channel to report possible risks and non-compliance to the internal control body in charge of monitoring compliance;
- c* establish a disciplinary system that adequately penalises any failure to comply with the measures laid down in the compliance programme; and
- d* establish a procedure to carry out periodic reviews and modifications of the compliance programme when relevant infringements are detected or when changes occur in the organisation, control structure or activity of the company.

Additionally, the International Organization for Standardisation standards ISO 37001:2016 and ISO 37301:2021, as well as the Spanish Association for Standardisation standards UNE 19601:2017 and UNE 37301:2021, contain further guidance for implementing effective compliance programmes. Moreover, standard ISO 37002:2021 contains guidelines for establishing, implementing and maintaining an effective whistle-blowing management system.

XI OUTLOOK AND CONCLUSIONS

According to the 2020 Annual Report issued by the Spanish Prosecutor's Office, corruption, and especially political corruption, is currently one of the most serious issues affecting Spanish society, as evidenced in several reports and analyses carried out by different organisations. According to the latest survey carried out in 2020 by the Spanish Centre for Sociological Investigation, which measures public opinion in Spain, corruption and fraud were identified as the 10th most pressing problem for Spaniards (behind economic problems, the covid-19 crisis, unemployment and politics). In 2019, corruption was fourth.

Notwithstanding this, Spain's ranking in the 2020 Corruption Perception Index (CPI),⁶⁰ which is published annually by the international NGO Transparency International (TI), has remained at last years' level, four points over the 2018 results with a score of 62/100.⁶¹ Spain holds the 32nd position out of the 180 countries that were part of the report (it was ranked in 30th position in 2019 and in 41st position in 2018), and was ranked 12th out of the 27 EU countries, although it is still below the European average.

However, according to the report published by TI on 23 January 2020, this does not mean that Spain has made sufficient advancements in implementing corruption-prevention mechanisms, and corruption continues to be a pressing issue. In light of this, TI has urged the Spanish government to carry out the necessary legal reforms, such as implementing whistle-blower protection regulations. The report published by TI on 14 October 2020 considered that Spain had made significant advances in enforcement against foreign bribery.

In conclusion, although advancements have been made in recent years in relation to the enforcement of bribery laws, as evidenced by the convictions in corruption cases, there is still a long path ahead, and the Spanish government will have to implement the necessary legal reforms to ensure political integrity and the correct functioning of public entities.

60 The CPI is the global indicator of corruption in the public sector.

61 The higher the score, the lower the level of corruption.

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ISBN 978-1-83862-756-0