

# Overview on anti-corruption rules and regulations in Spain

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**I. What is the anti-corruption legal framework in your country (including brief overview on active / passive bribery, bribery of foreign officials, and commercial bribery, including also relevant case law)?**

## **1. Anti-corruption legal framework**

In Spain, there is not a corruption offence *per se*, but a wide variety of different offences that are included within the scope of what is popularly known as *corruption*, just as in the following cases:

- (i) Offences of corruption within the public sector (arts. 419 to 442 of the Spanish Criminal Code (“SCC”)):
  - Bribery of government officials (arts. 419 to 422 SCC): these offences govern the so-called crime of acceptance of bribes (passive bribery) and penalise any authority, government official (civil servants), juries, arbitrators, mediators, expert witnesses, court-appointed trustees or receivers, bankruptcy trustees or any person having a public role who, to their own benefit or that of a third party, receive or solicit, by themselves or through an intermediary, gifts, favours or payments of any kind or accept offers or promises to carry out, in their official capacity, an act which is contrary to the duties inherent thereto.
  - Bribery of private individuals (art. 424 SCC): this offence punishes any individual who offers or delivers any gifts or payments of any kind to any type of authority or government officials, in order for them to carry out (i) an act that is against the duties inherent to his/her office; (ii) an act inherent to his/her office; (iii) in order for him/her not to carry out, or to delay what s/he should carry out; and (iv) in consideration of his/her office or duty.
  - Corruption involving officials of the EU (art. 427 SCC): this offence expands the application of the provisions related to bribery of government officials to (i) any person holding a legislative, administrative or judicial position in a country in the European Union or any other foreign country, whether by appointment or by election; (ii) any person holding a public appointment for a country in the European Union or for any international public organisation; and (iii) any civil servant or agent of the European Union or of an international public organisation.

- Influence peddling (arts. 428 to 431 SCC): a civil servant or authority who influences another public officer or authority, availing oneself of the powers of his or her office or any other situation arising from his personal or hierarchical relation with the latter, or with any other officer or authority to attain a resolution that may directly or indirectly generate a financial benefit for himself or a third party.
  - Embezzlement of public funds (arts. 432 to 435 bis SCC): an authority or civil servant who, having the power to administer public assets, exceeds the limits of his powers and thus causes detriment to the administered assets.
  - Fraud and illegal levies (arts. 436 to 438 SCC): an authority or public officer who, acting due to his office in any act of the modes of public contracting, or in settlement of public properties or credit, comes to an arrangement with the parties concerned or schemes in any other way to defraud any public institution.
  - Negotiations and activities forbidden to public officials and breaches of trust in the performance of their duties (arts. 439 to 442 SCC): an authority or public officer who, having to intervene, by virtue of his/her office, in any kind of contract, matter, operation or activity, takes advantage of this circumstance to force or facilitate his/her participation, either direct or by intermediary, in such transactions or actions.
- (ii) Offences of business corruption (arts. 286 bis and 286 ter SCC):
- Private bribery (art. 286 bis SCC): this offence requires the act of receiving, requesting and accepting (art. 286 bis 1 SCC) or the act of promising, offering or giving (art. 286 bis 2 SCC) an unjustified benefit or advantage that intends to secure preferential treatment in the acquisition or sale of goods or in hiring professional services, in breach of the recipient's obligations.
  - Bribery in sport (art. 286 bis 4 SCC): the same terms of private bribery described in the preceding paragraph are applicable to the sporting sector, regarding conducts which aims deliberately and fraudulently the premeditation or alteration of the results of a match, game or competition of particular economic or sporting importance.
  - Bribery of foreign public officials (art. 286 ter SCC): these articles set out a specific offence of bribery of foreign public officials that is committed with the aim of obtaining or retaining a contract or business, as well as any other competitive advantage in the context of international economic activities. Above all case law, we highlight the Spanish National Court judgment no. 3/2017, of February 23, insofar as it was the first judgment that applied the provisions set forth in the rule and provided an in-depth analysis of the offence.
- (iii) Illegal political party funding (art. 304 bis and ter SCC): these offences penalise (i) those who give or receive donations or contributions intended for political parties, federations, coalitions or groups of electors in violation of Organic Law 8/2007, of July 4, on political party funding; and (ii) those who participate in illegal structures or organisations, of any type, whose purpose is to finance political parties, federations, coalitions or groups of electors.

In recent years, Spanish courts have investigated and sentenced many corruption cases. We highlight the following ones:

- 'Malaya' case (Vid. Spanish Supreme Court judgment no. 508/2015, of July 27): Spain's largest-ever corruption trial, that ended in 2013 with 53 people convicted for paying more than € 670M in bribes during the 90s (among other offences) and implicated the entire town hall of an important Spanish city.
- 'Nóos' case (Vid. Spanish Supreme Court judgment no. 277/2018, of June 8): the leaders of a nonprofit foundation called Nóos Institute were convicted by using a corporate network of companies to embezzle about € 6 M in public funds for sporting events, among other offences. The relevance of the case relies on the amounts at stake and the importance of the individuals convicted –some of them very close to the Spanish Royal Family–.
- 'Gürtel' case (Vid. Spanish National Court judgment no. 20/2018, of May 17): one of the largest corruption scandals in recent Spanish history which implicated different officers of the Spain's major conservative political party –among many other important Spanish businessman–, in connection with the commission of fraud against the public administration, bribery (active and passive), forgery, misuse of public funds, money laundering, influence peddling, embezzlement, extortion and crimes against the Public Treasury offences.

## **II. Does this framework also cover extra-territorial corruption?**

Yes, it does. As a rule, the Spanish jurisdiction is always competent to hear criminal proceedings arising from offences perpetrated in the Spanish territory or in Spanish aircrafts or ships (art. 23.1 of the Organic Act 6/1985, on the Judiciary ("LOPJ")).

From a general standpoint, Spanish jurisdiction is entitled to investigate those facts committed abroad if they qualify as an offence under Spanish law, the offender is Spanish (or foreign, but he/she acquired the Spanish nationality after perpetrating the offence) and the following circumstances are met (art. 23.2 LOPJ): (a) the crime is punishable in the place where it was perpetrated –except if such requirement is waived by virtue of an international Treaty or a resolution of an International Organisation to which Spain belongs–; (b) the aggrieved party or the Public Prosecutor have filed a complaint before the Spanish Courts; and (c) the offender has not been acquitted, pardoned or convicted abroad, or, in the latter case must not have served the sentence.

In addition, Spanish jurisdiction is also competent to investigate those facts committed abroad when (i) said facts qualify as certain offences related to corruption; and (ii) the aggrieved party or the Public Prosecutor have filed a complaint before the Spanish Courts, provided that:

- The offender is (i) Spanish; or (ii) foreign, and the facts qualify under Spanish law as (a) an offence perpetrated by a Spanish public servant resident abroad while exercising his/her duties; or (b) an offence against the Spanish Public Administration (art. 23.3 h) LOPJ) –which includes bribery, influence peddling and embezzlement of public funds–.

- The offender is (i) Spanish; or (ii) foreign, and the facts qualify under Spanish law as (a) an offence of private corruption; or (b) an offence of corruption in international business transactions, provided that some of the following circumstances are met (art. 23.4 n) LOPJ):
  - The proceedings are brought against a Spanish citizen.
  - The proceedings are brought against a foreign citizen whose habitual place of residence is in Spain.
  - The offence was perpetrated by a director, administrator, employee or collaborator of a commercial undertaking, company, association, foundation or organization based in Spain or with a registered address in Spain.
  - The proceedings are brought against a legal entity, undertaking, organization, groups or any other nature of body or association of people that is based or has a registered address in Spain.

### III. Is there a concept of corporate criminal liability?

Yes, there is. Art. 31 *bis* SCC provides that legal entities shall be held as criminally liable for certain criminal offences<sup>1</sup> in case some of the following requirements are met:

- The offence is committed in their name or on their behalf, and to their direct or indirect benefit, by its legal representatives or those that acting either individually or as members of a body of the legal person authorized to take decisions in the name of the legal person or that possess organization and control powers over such legal person (art. 31 *bis* 1 a) SCC).

Legal entities shall be exempt from criminal liability if the following conditions are fulfilled (art. 31 *bis*.2 SCC):

1. The management body has adopted and effectively implemented, before the perpetration of the criminal offence, organisational and management models that include measures of surveillance and control appropriate to prevent criminal offences of that same nature or to significantly reduce the risk of perpetration thereof.

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<sup>1</sup> There is a closed list of offences that can be committed by a legal person: illegal trafficking in human organs (art. 156 *bis* SCC); human trafficking (art. 177 *bis* SCC); offences related to prostitution and corruption of minors (art. 189 *bis* SCC); offences against privacy, computer trespassing and other computer-related offences (art. 197 *quinquies* SCC); frauds and swindles (art. 251 *bis* SCC); frustration of foreclosure (art. 258 *ter* SCC); punishable insolvencies (art. 261 *bis* SCC); computer-related damages (art. 264 *quater* SCC); offences against intellectual and industrial property, the market and consumers (art. 288 SCC); money laundering (art. 302 SCC); illegal political party funding (art. 304 *bis* SCC); offences against the Public Treasury and Social Security (art. 310 *bis* SCC); offences against the rights of foreign citizens (art. 318 *bis* SCC); offences of illegal construction, building or residential development (art. 319 SCC); environmental offences (arts. 327 and 328 SCC); offences relating to nuclear energy and ionising radiation (art. 343 SCC); offences of risk caused by explosives (art. 348 SCC); offences against public health relating to dangerous substances, medicines, doping, food offences and similar (art. 366 SCC); drug trafficking offences (art. 369 *bis* SCC); money counterfeiting (art. 386 SCC); fraudulent use of counterfeit payment instruments (art. 399 *bis* SCC); bribery (art. 427 *bis* SCC); influence peddling art. 430 SCC); embezzlement of public funds (art. 435 SCC); bribery of a foreign public official (art. 445 SCC); incitement to discrimination, hatred and violence (art. 510 *bis* SCC); and terrorist financing (art. 576 *bis* SCC).

2. The supervision of the functioning of compliance with the prevention model implemented has been entrusted to a body of the legal person with self-governing powers of initiative and control or has been entrusted legally with the function of supervising the effectiveness of the legal person's internal controls.
3. The individual offenders have perpetrated the criminal offence fraudulently eluding the organisational and prevention models; and
4. An omission or insufficient exercise of the function of supervision, surveillance and control on the part of the body to which the second condition refers has not occurred.

In those cases in which only partial evidence of compliance with the preceding circumstances is available, this shall be considered to reduce the penalty.

- The offence is committed when carrying out their corporate activities and on their account and to their direct or indirect benefit, by those who, being subject to the authority of the natural persons mentioned in the preceding paragraph, were able to perpetrate the deeds because the duties of supervision, surveillance and control of their activities were gravely breached by the natural persons mentioned in the preceding paragraph, in view of the specific circumstances of the case.

In this case, legal entities shall be exempt from criminal liability if, before the perpetration of the criminal offence, they have adopted and effectively implemented an organisational and management model adequate to prevent criminal offences of the nature of the one perpetrated or to reduce in a significant way the risk of the perpetration thereof (art. 31 *bis*.4 SCC).

## **IV. What are the penalties for legal entities (if applicable) and natural person**

### **1. Penalties for legal entities**

Broadly speaking, when a legal entity is held as criminally liable according to the criteria set forth in the preceding section, the basic penalty applicable is a fine by quotas or proportional to the amount defrauded, depending on the specific offence committed.

Moreover, depending on the offence and the particular circumstances of the case, judges and courts may also impose to legal entities one or more of the following penalties (art. 33.7 SCC):

1. Dissolution of the legal entity. The dissolution shall cause definitive loss of its legal personality, as well as of its capacity to act in any way in legal transactions, or to carry out any kind of activity, even if lawful.
2. Suspension of its activities for a term that may not exceed five years.
3. Closure of its premises and establishments for a term that may not exceed five years.

4. Prohibition to carry out the activities through which it has committed, favoured or concealed the criminal offence in the future –such prohibition may be temporary or definitive and, if temporary, the term may not exceed fifteen years–.
5. Barring from obtaining public subsidies and aid, to enter into contracts with the public sector and to enjoy tax or Social Security benefits and incentives, for a term that may not exceed fifteen years.
6. Judicial intervention to safeguard the rights of the workers or creditors for the time deemed necessary, which may not exceed five years.

## 2. Penalties for natural persons

With regard to the penalties that may be imposed on natural persons for corruption offences, it is worth noting that the disqualifications provided for in the respective offences change according to the active subject of the offence, i.e. depending on whether it is an individual or a public official or public authority (as defined in arts. 24 and 427 SCC). However, the main penalties of imprisonment and fines do not vary among individuals and public officials.

Please find below a short summary of the main penalties foreseen in the SCC for corruption offences:

- Bribery (arts. 419 to 427 bis SCC): imprisonment up to six years, a fine up to € 288,000 and special barring from public employment and office and from the right to stand for public office for a term up to twelve years, without prejudice to the relevant punishment for the offence perpetrated.
- Influence peddling (arts. 428 to 431 SCC): imprisonment up to two years, a fine of one to two times the benefit intended or obtained, special barring from public employment and office and from the right to stand for public office for a term up to nine years (for public officers), and barring from contracting with the public sector, along with the loss of the possibility of obtaining public subsidies or aid and receiving tax or Social Security benefits or incentives for a period up to ten years (for private individuals).
- Embezzlement of public funds (arts. 432 to 435 bis SCC): imprisonment up to eight years, absolute barring from public employment and office for a term of up to twenty years and from the right to stand for public office for a term up to ten years, and a fine up to € 288,000.
- Fraud and illegal levies (arts. 436 to 438 SCC): imprisonment up to six years, special barring from public employment and office and from standing for public office for a term of up to ten years (for public officers), a fine up to €288,000 (for public officers), and barring to obtain public subsidies and aid, for contracting with institutions, bodies or entities that form part of the public sector, and to take advantage of tax and Social Security rebates for a term of up to seven years (for private individuals).
- Negotiations and activities forbidden to public officials and breaches of trust in the performance of their duties (arts. 439 to 442 SCC): imprisonment of up to six years, special barring from public employment and office and from standing for public office for a term of up to seven years, and a fine up to (i) € 288,000; or (ii) six times the illicit benefits obtained, depending on the applicable offence.

- Business corruption (art. 286 bis to quater SCC): imprisonment of up to six years, special barring from practice of industry or commerce for a term up to six years and a fine of up to three times the value of the profit or the advantage obtained. In addition to the outlined penalties, the offender shall also be punished with a ban from being hired in the public sector, the loss of the possibility of obtaining public subsidies or aid, the forfeit of the right to tax or Social Security benefits and incentives and a ban on participating in commercial transactions of public significance for a period of up to twelve years.
- Illegal political party funding (art. 304 bis and ter SCC): imprisonment of up to five years and a fine of up to five times the illegal amount.

## **V. Which local authorities are competent for corruption investigations?**

Under the Spanish legal system, the judicial investigative stage of every criminal proceedings –including those related to corruption– falls to a special category of judges, the Examining Judges, regardless of whether the proceedings have been initiated *ex officio* or at the request of a party. The competence of the Examining Judges will be determined taking into account several factors (i.e. where the offence took place, who the perpetrators are, etc) that are set out in the LOPJ.

In addition to the powers conferred to the abovementioned Judges, before the start of criminal proceedings the Spanish Criminal Procedure Act also grants certain investigative powers –more limited than the ones attributed to said Judges– to specific non-judicial bodies: the Public Prosecutor's Office and the Judicial Police. For example, the Public Prosecutor's Office, when faced with the news of a public or semi-public crime, must carry out actions aimed at the clarification of the facts as long as they do not concur with judicial actions of the same matter and which, except in the case of detention, do not imply the affection of fundamental rights. Similarly, in the case of the Judicial Police, as soon as any of its members become aware of a public crime, they must inform the judicial authority or a representative of the Public Prosecutor's Office.

Once the Examining Judge starts a judicial investigation, the Public Prosecutor participates in the proceedings as a party in defense of the public interests. For this reason, it is entitled to propose the Examining Judge the adoption of precautionary measures, the collection of additional evidences or the request of judicial cooperation, if necessary, amongst other powers.

From an organizational standpoint, it is important to note that the Spanish Public Prosecutor's Office has a division in charge of investigating specific or very complex corruption or organized crime scandals –the Prosecutor's Office against Corruption and Organized Crime–. In these cases, the investigation of the facts and the representation of the Public Prosecutor's Office during the proceedings is assumed by this specific body.

## **VI. Are there specific whistle-blower regulations?**

The Spanish legal system has specific provisions regarding whistleblowing, namely:

### **1. Spanish Criminal Code**

The SCC provides an exemption of liability of legal entities as long as they had adopted and effectively implemented models that include surveillance and control measures appropriate to prevent criminal offences or to reduce significantly the risk of perpetration of crimes before the perpetration of the offence. In this regard, art. 31 *bis* 5 SCC expressly requires that said models include the obligation of reporting potential risks and compliance breaches to the body in charge of the surveillance of the functioning of the prevention model. Consequently, every criminal compliance program implemented in Spain according to the requirements set forth in the SCC must include a whistleblowing channel to be considered as effective, amongst other requirements.

### **2. Personal Data Protection Act**

From a Personal Data Protection perspective, art. 24 of the Organic Law no. 3/2018, of December 5, on Personal Data Protection and safeguard of digital rights, asserts the lawfulness of the creation and maintenance of information systems through which a private law entity may be made aware, even anonymously, of the commission of wrongdoing within it or by third parties related to it.

### **3. Anti-Money laundering Act**

Furthermore, art. 26 *bis*.1 of Law no. 10/2010, of April 28, on the prevention of money laundering and the financing of terrorism, provides that regulated entities must establish internal channels so that their employees, managers or agents may communicate, even anonymously, relevant information on possible breaches of said Law. As an option, the rule allows integrating these reporting channels as part of the whistleblowing channels required by art. 31 *bis*.5 SCC, but they are conceived to be an specific and independent mechanism of the latter ones.

### **4. Other provisions**

Under Spanish law, whistleblowers have no specific official protection other than the one privately designed by companies and the general provisions set forth in the Law to protect victims or witnesses, nor is there any kind of reward or incentive for denouncing corruption offences.



## **VII. Are there voluntary disclosure / self-reporting programmes and procedures?**

Under Spanish criminal law, there are no voluntary disclosure or self-reporting programmes, beyond the mitigating circumstances of criminal liability provided by the SCC in case natural persons and/or legal entities recognize the facts (arts. 21 and 31 *quater* SCC).

However, Spanish administrative law (art. 62.4 Law no. 39/2015, of October 1) foresees a leniency program for whistleblowers of administrative infringements. According to the provisions set forth in the rule, a whistleblower who commits an administrative infringement has the right to not be punished (from an administrative standpoint) if the following requirements are fulfilled: (i) the whistleblower is the first one that provides the Spanish Administration with evidences enough to start administrative proceedings against the rest of the offenders; (ii) the Spanish Administration does not have enough evidence to investigate the facts at the time the whistleblower decides to collaborate; and (iii) the whistleblower repairs the damages caused.

## **VIII. What are the consequences for assessment of guilt or admission of wrongdoing for future business, work, permits etc.?**

### **1. Legal entities**

Depending on the circumstances of the case, if a legal entity commits a corruption offence, Judges can impose certain additional penalties to fines and they may have a direct impact on its business, work, etc.

As already mentioned in Section IV. 1 *supra*, they are the following ones: (i) dissolution of the legal entity –causing definitive loss of its legal personality, as well as of its capacity to act in any way in legal transactions, or to carry out any kind of activity, even if lawful–; (ii) suspension of its activities for a term that may not exceed five years, (iii) closure of its premises and establishments for a term that may not exceed five years; (iv) prohibition to carry out the activities through which it has committed, favoured or concealed the criminal offence in the future –such prohibition may be temporary or definitive and, if temporary, the term may not exceed fifteen years–; (v) barring from obtaining public subsidies and aid, to enter into contracts with the public sector and to enjoy tax or Social Security benefits and incentives, for a term that may not exceed fifteen years; and/or (vi) judicial intervention to safeguard the rights of the workers or creditors for the time deemed necessary, which may not exceed five years.

Notwithstanding the foregoing, the SCC contains specific provisions that may allow a legal entity to mitigate the penalties imposed, which may be an incentive in order to admit and/or report any sort of wrongdoing. To be admitted as a valid evidence, said mitigating circumstances must be proven in trial by the entity's legal representatives and must be analysed on a case-by-case basis. They are listed in art. 31 *quater* SCC and are the following ones:

1. To proceed to confess the criminal offences to the authorities prior to having knowledge of judicial proceedings being brought against it.

2. To collaborate in the investigation of the facts, providing evidence, at any moment of the proceedings that is new and decisive to clarify the criminal liabilities arising from the deeds.
3. To repair or to decrease the damage caused by the criminal offence at any time during the proceedings and prior to the trial itself.
4. To establish prior to the trial measures that are effective to prevent and discover criminal offences that might be committed in the future by using the means or under the coverage of the legal entity.

## **2. Natural persons**

Depending on the circumstances of the case, if a natural person commits a corruption offence, Judges can impose certain additional penalties to imprisonment and fines, which may have a direct impact on future business, work, etc. For example, in case of public officers, Judges can impose penalties with a direct impact on the individual's work –such as a special or absolute barring from public employment and office or a barring from the right to stand for public office for a variable term, depending on the offence at stake–. In case of private individuals, Judges can also impose penalties with a direct impact on the individual's future businesses –such as a barring from contracting with the public sector, along with the loss of the possibility of obtaining public subsidies or aid and of receiving tax or Social Security benefits or incentives, for a variable term.

As per the legal entities, the SCC contains specific provisions that may allow an individual to mitigate the penalties imposed. Thus, art. 21 SCC allows the Judge to reduce the penalties imposed if some of the following circumstances concur –amongst others–: (i) the individual proceeds to confess the offence to the authorities before having knowledge of the judicial proceedings brought against him; or (ii) the individual compensates the victim for the damages caused or lessens the effects thereof at any phase of the proceedings prior to the trial stage.

## **IX. What are the latest developments in anti-corruption in your jurisdiction?**

The SCC has recently been amended due to the need to transpose several European Directives into the Spanish legal system (Organic Law 1/2019, of 20 February, in force since 13 March 2019). As a result, the wording of the offences related to bribery, influence peddling and embezzlement –amongst others– has been modified to increase not only the punishable conducts, but also the number of subjects that can be considered as authors of said offences:

- International jurists and arbitrators can now be considered as authors of bribery offences (art. 423 SCC).
- The applicable concept of public servant to corruption offences (art. 427.d) SCC) has been broadened to include not only the officials of the European Union, but also certain individuals linked to the European Union ("any person that has been assigned and who is exercising a public service task consisting in managing or deciding on the financial interests of the European Union").

- For the first time, it is provided in the SCC that the crimes of embezzlement and influence peddling may be committed by international or European Union officials (arts. 431 and 435 bis SCC), a provision which has hitherto only been contained in relation to bribery offences.
- The offence of embezzlement of public funds admits for the first time its commission by a legal entity (art. 435.5 SCC).

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