

Spain

I. Brief Introduction to the Legal System of Spain

The Spanish legal system is a civil law system based on comprehensive legal codes and laws rooted in Roman law, as opposed to common law, which is based on precedent court rulings.

The basic features of this model are:

- the separation between the public and private sectors of the legal system, with the general division thereof into sections covering constitutional, criminal, administrative, tax, civil, commercial, social and procedural matters.
- primacy of written law, within the system of sources as defined in the Civil Code, namely law, custom and the general principles of law.
- hierarchical organization of the judiciary with a system of jurisdictional appeals.

II. Spain's Anticorruption Laws

Spain signed the OECD Convention on December 17, 1997, and ratified it on January 14, 2000. The treaty's provisions were implemented by Organic Act 3/2000 of January 11, 2000, which amended the Spanish Criminal Code, adding Article 445. Article 445 is a statute specifically addressing bribery of foreign public officials and officials of international organizations. The definition of the Spanish Criminal Code is somewhat wider than the definition of the OECD Convention as it includes not only foreign officials but also foreign "authorities" i.e. political appointees having decision making power. Foreign bribery is characterised as obtaining or retaining "a contract" as opposed to the OECD Convention which use the term "obtaining or retaining business." Aside from this, the Spanish definition of foreign bribery also includes that the conduct must to the benefit of the foreign officials or third parties, in line with the legal concept of domestic bribery. The law came into force on February 2, 2000, as prescribed by the general rules for the entry into force of new legislation under article 2 of the Spanish Civil Code.

Spain does not have a separate and specific law on bribery or anti-corruption; the OECD Convention was implemented by adding an specific provision to the Spanish Criminal Code, which includes all type of possible crimes under Spanish law. The main Spanish anti-corruption regulations are included in the Spanish Criminal Code, under the headings "Bribery"

(“*Cohecho*”), Book II, Title XIX, Chapter V of the Spanish Criminal Code, and “Corruption Offenses in International Business Transactions” (“*De las negociaciones y actividades prohibidas a los funcionarios públicos y de los abusos en el ejercicio de su función*”, Book II, Title XIX, Chapters IX and X of the Spanish Criminal Code), where the new Article 445 has been inserted.

The Spanish Criminal Code sets forth two kinds of bribery, passive and active bribery: (i) passive bribery, often called demand side, occurs when the foreign official or authority receive an undue pecuniary payment or a non pecuniary gift or a promise or an offer to make a payment or a gift to grant a contract or an improper advantage to the payor or to a third party; (ii) active bribery, or supply side, occurs when someone pays to a foreign official or authority for the purpose of gaining or retaining a contract or an improper advantage.

Sanctions

Under Spanish law, criminal sanctions for bribes apply to the payor and to the recipient of the bribe. Penalties provided under Articles 419, 420, 421, 422 and 424 of the Spanish Criminal Code vary in severity according to the nature and unlawfulness of the act or omission by the foreign public official that the bribe was intended to secure. Article 424 imposes the same penalties on both the foreign public official and the person offering the bribe, with some limited exceptions. Penalties are imprisonment from 6 months to 7 years and disqualification from public office for between 1 year and 12 years. Articles 56 and 107 of the Spanish Criminal Code provide that a natural person found guilty of a crime, including that of corruption, can be barred for a period of 1 to 5 years from holding certain positions, including management functions in a legal person, prohibition from participating in any entrepreneurial activity, owning a company or possessing shares in it.

Legal persons

Before the new amendment to the Spanish Criminal Code through the Organic Act 5/2000 of June 22, 2000, the law applied to natural persons only because at the time there was no criminal liability of legal persons under Spanish law contrary to the prescriptions of the OECD Convention but in line with traditional Spanish law (“*societas deliquere non potest*”). Article 31 the Spanish Criminal Code, which became effective on December 23, 2010, provides that companies may be held criminally liable in the following cases:

- for criminal offenses committed by their legal representatives, agents, or by their directors including “shadow directors,” acting on behalf or for the account of such companies and for their benefit,
- for criminal offenses committed in the context of corporate activities by persons acting under the authority of the individuals mentioned in the preceding paragraph, acting on behalf of or for the account of such legal persons and for their benefit, who have committed such acts because of the failure by such

persons to exercise due control over them, having regard to the specific circumstances of each case.

III. Assessment

The OECD Working Group issued its Phase 3 report on Spain in December of 2012. The Working Group reported “serious concerns that, almost 13 years after the entry into force of Spain’s foreign bribery offense, no individual or company has ever been prosecuted or sanctioned for this offense.”¹ The Working Group noted that only seven investigations of foreign bribery had been conducted and all of them had been closed. It criticized the introduction of a separate offense of bribing European officials because that law had deficiencies in the scope of the offense, level of sanctions, and the statute of limitations, and recommended that this law be harmonized with Spain’s other foreign bribery law. It applauded the inclusion of liability of legal persons but criticized the omission of officials of state-owned enterprises from this regime of liability. The Working Group expressed its concern that Spain has never implemented the confiscation measures of its law that was passed almost 10 years ago.

Spain is ranked 30 on Transparency International’s 2012 Corruption Perception Index. Spain ratified the UN Convention on September 16, 2005. It ratified the IACA on October 13, 2011. Spain is a member of GRECO.

IV. Texts

A. The Spanish Criminal Code. www.mjusticia.gob.es

¹ Phase 3 Report on implementing the OECD Anti-Bribery Convention in Spain, Dec. 2012, at 5.