



Q&A IN RELATION TO BRIBERY OFFENCES IN SPAIN

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1. Legal Framework

What is the legal framework governing bribery in the Spain?

- The Spanish law that regulates bribery and corruption is the Código Penal (Spanish Criminal Code or SCC).

2. What Constitutes a Bribe?

What constitutes a bribe?

- The Supreme Court has identified three elements that contribute to corruption: (i) the existence of a power of official action (in public corruption) or of administration, direction or management of businesses (in private corruption); (ii) the search for or obtaining of an undue advantage (tangible or intangible outside the socially admissible use); and (iii) the benefit of oneself or a third party.
- Accordingly, the Spanish Criminal Code distinguishes between two offences: bribery of a public servant or authority and bribery of private entities or individuals.
- Under the Spanish Criminal Code, bribery occurs whenever a public servant or authority receives or is offered a reward to carry out an act or omission breaching duties required of his/her position, or to carry out any act or omission relating to the performance of his/her duties. The offence can take the form of so-called passive bribery, where the initiative to commit the offence originates with the public official or authority, or active bribery, where the bribe is offered at the initiative of the individual paying it.
- 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, within the framework of relations between private entities, as compensation for the undue promotion of the active subject over a third party “in the acquisition or sale of goods, contracting of services or in commercial relations.” This also includes corruption in international economic transactions.

What are the principal offences under this legal framework?

- There is a broad and disparate range of bribery and corruption related offences under the SCC.
- Bribery (articles 419, 420, 421 and 422 SCC): A criminal act against the public administration by which the authority or public official or a private individual, for his/her own or a third party's benefit, performs the following actions or omissions:
 - a public authority or official who requests or receives, themselves or through another person, a gift or present or accepts an offer or promise to perform in the exercise of office an act or omission constituting a crime;
 - a public authority or official who requests or receives, themselves or through other person, a gift or promise for the execution of an unjust act related to the exercise of office that does not constitute a crime;
 - a public authority or official who, by requesting, receiving or being promised a gift, has the purpose of abstaining from an act that they should practice in the exercise of office; and
 - those who with gifts, presents, offers or promises corrupt or attempt to corrupt authorities or public officials.
- Corruption in business (article 286-bis and 286-ter SCC): This crime is configured as a bribe between individuals, typifying both passive corruption (request or acceptance of a benefit by certain persons in the scope of a company) and active corruption (who promises, offers or grants the benefit).
 - As noted above, the object of the offer, promise, concession or acceptance must be unjustified benefits or advantages, of any nature, within the framework of relations between private entities, as compensation for the undue promotion of the active subject over a third party “in the acquisition or sale of goods, contracting of

services or in commercial relations.”

- This also includes corruption in international economic transactions.
- Urban planning corruption (articles 320 and 322 SCC).
- Administrative corruption (articles 404, 405 and 408 SCC).
- Disloyalty in the custody of public documents and disclosure of secrets (articles 413, 414, 415, 416, 417 and 418 SCC).
- Crimes of illegal funding for political parties (article 304 SCC): There are two types of criminal conduct, as defined in article 304-bis:
 - to receive donations or contributions intended for a political party, federation, coalition or group of voters; and
 - to deliver donations or contributions destined to a political party, federation, coalition or grouping of voters, by itself or by another person.
- Political parties must not accept political contributions if they (i) are anonymous, finalist or revocable; (ii) come from the same person, exceed EUR50,000 per year, and (iii) come from legal persons or entities without legal personality.
- Political parties may not accept any form of funding from foreign governments and foreign public companies or entities.
- Influence peddling (articles 428, 429 and 430 SCC).
- Embezzlement (arts. 432, 433, 434 and 435 SCC).
- Fraud and unlawful exactions (arts. 436, 437 and 438 SCC).
- Negotiations and activities prohibited to public officials and abuses in the exercise of their functions (arts. 439, 441, 442 and 443 SCC).
- Corruption in sport (article 286-bis 4 SCC): The manifestation of corruption in the private sphere of sports has been regulated in recent years. The action supposes the obtaining of an unjustified benefit or advantage, the predetermination or the alteration of the result of a test, encounter or sports competition of special economic or sports relevance.

3. Jurisdictional Reach

What is the jurisdictional reach of the legal framework?

- Any offence linked to bribery and corruption committed in Spain shall be dealt with by the Spanish Courts.
- Likewise, Spanish Courts will also investigate those acts committed abroad if (i) the responsible persons are Spanish citizens or foreigners who have acquired Spanish nationality, (ii) the act is punishable at the place of execution, unless, under an international treaty or a legal act of an international organization of which Spain is party, this requirement is not necessary, (iii) there is a criminal complaint filed by the aggrieved party or the Public Prosecutor files, and (iv) the defendant has not been acquitted, exonerated or sentenced abroad, or, in the last case, has not complied with the sentence imposed (Section 23.1 of Organic Act of Judiciary).
- Under section 23.4. n of the Organic Act of Judiciary, Spanish judicial authorities may take jurisdiction where any act committed by Spaniards or foreigners abroad/outside the Spanish territory regarding the criminal offence of corruption between individuals (corruption in business) or in an international transactions, provided that:

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- the procedure is directed against a Spanish citizen;
- the procedure is directed against a foreign citizen who is ordinarily resident in Spain;
- the offence has been committed by the director, manager, employee or partner of a business, association, foundation or organization that has its headquarter or registered office in Spain; or
- the offence had been committed by a legal person, company, organization, group or any other kind of entity or groups of persons having their seat or head in Spain.

4. Who may be liable?

Who may be liable for bribery? (public officials, private individuals, legal entities etc.)

- Private individuals, public officials and the legal entity concerned can be prosecuted for bribery offences under the various sections of the Spanish Criminal Code explained above.
- Legal entities will be criminally liable for offences committed in their name or on their behalf and to their benefit by their legal representatives, directors de facto or de jure or those who, being subject to the authority of the individuals mentioned, may have performed such acts in the absence of due control over them.

Can a parent company be liable for its subsidiary's involvement in bribery?

- In order to analyze whether the control of the parent company over its subsidiary exists, the following aspects, among others, should be assessed: (i) the percentage of participation of the parent company in the share capital of the dependent company; (ii) the existence or not of identity of material and human resources between the two companies; (iii) independence in the decision-making of one and the other; and (iv) the existence of a differentiated social activity.
- Bearing this in mind, if the subsidiary has total autonomy and the capacity for initiative and control in its daily work, it would not be possible to additionally transfer criminal liability to the parent company in the event that a crime was perpetrated within the former, since the organizational defect would have occurred in the subsidiary and not in the parent company.
- However, if the subsidiary is subject to the power of supervision, surveillance and control of the parent company (depending on what is entrusted to it by the management body of the parent company), the aforementioned liability could be accumulated, provided that it can be demonstrated that the parent company also benefited directly or indirectly from the criminal offence committed in the subsidiary.

5. High Risk Areas

Are facilitation payments (i.e. small payments to speed up routine governmental action) considered bribes?

- In order to be punishable, it is necessary that bribery be committed intentionally. According to this, Spanish Courts have generally recognized that two key elements are mandatory:
 - the reward should not be socially acceptable in the sector in which the public official performs his/her duties, and
 - the value of the reward should be high enough to be able to influence the public official's decision.
- Accordingly, not every payment will be considered a criminal offence and any assessment will take into account the specific circumstances of the matter on a case-by-case basis.

Does the legal framework restrict political and charitable contributions?

- Undeclared political contributions by companies are sanctioned by means of a specific criminal offence.
- However, a political or charitable contribution could be regarded as a bribe if given or received with the intention of inducing a public official to act improperly, or as a reward for having done so.

Does the legal framework place restrictions on corporate hospitality?

- Hospitality/promotional expenditures are not expressly mentioned by the ICC and therefore gifts, travel expenses, meals or entertainment for the benefit of public officials are not specifically prohibited.
- However, in light of the above-mentioned definition of a bribe, it is likely that this kind of expenditure in favor of public officials could be seen as an advantage falling under the scope of bribery offences provided for by the ICC.

6. Legal Defences

Are there any defenses for bribery offences?

- There are no statutory defenses for bribery offences committed by individuals, although a defendant may of course argue that the offence is not made out, for example, because the alleged corrupted person was not a public official, or the advantage granted to the public official did not influence his/her behavior.
- A special non-punishment clause will be applied to individuals who commit bribery offences if they voluntarily disclose the facts before becoming aware of an investigation being carried out within four months from the commission of the crime. The individual in such circumstances must also provide useful and concrete information to facilitate evidence-gathering activities and identify other offenders.
- It is a defense for a company charged with the offence of failing to prevent bribery under the 231 Decree to prove that:
 - i. the management adopted and effectively implemented a specific compliance program (i.e. a Model of Organization, Management and Control, 231 Model) suitable to prevent the commission of criminal offences equal to those actually committed;
 - ii. the management of the company appointed an independent and autonomous Supervisory Body for vigilance over the compliance program;
 - iii. the Supervisory Body adequately fulfilled its duties; and
 - iv. either the manager who committed the crime fraudulently eluded the provisions of the 231 Model, or the employee who committed the crime did not respect management's directives.

7. Regulatory and Enforcement Bodies

What are the key regulatory or enforcement bodies with regard to bribery?

- Investigations into allegations of corruption are carried out by the Public Prosecutor's Office, assisted by the police.
- Specific powers are attributed to the Italian Anti-corruption Authority (ANAC), as to ensure effective coordination and exchange of information with the Italian Prosecutor's Offices investigating cases of corruption, as well as to enable the ANAC to supervise relevant public tenders, having also in this regard inspection and sanctioning powers.

8. Legal Consequences

What are the legal consequences of being found guilty of bribery offences?

- Individuals charged with corruption crimes face up to 12 years' imprisonment, depending on the bribery offence concerned (according to the recent increase of sanctions pursuant to Spazzacorrotti law).
- Individuals convicted with more than two years' imprisonment for corruption crimes also face the permanent prohibition of holding public office, as well as a perpetual ban from concluding contracts with Public Administration.
- The debarment from contracting with the Public Administration can now be applied to individuals, as a precautionary measure, also before the issuance of the judgment according to the recent reform of the legislation made by Spazzacorrotti law.
- In the case of conviction for corruption, the confiscation of the price (i.e. the amount of money promised for the commission of the crime) or of the profit (i.e. the advantage deriving from the commission of the crime) of the bribery, or the confiscation of goods belonging to the offender that are of equal value to the said price or profit, is ordered (Section 322-ter ICC).
- Companies convicted of bribery offences may face:
 - i. pecuniary penalties up to a maximum of more than EUR1 million for corruption crimes (depending on the criminal offence concerned);
 - ii. disqualifying sanctions, ranging from four to seven years in the case of crimes committed by top managers and from two to four years in cases of crimes committed by employees – applicable also before the start of the trial – as follows:
 - a. a ban on carrying out the company's business activity;
 - b. suspension or withdrawal of authorizations, licenses or concessions functional to the commission of the crime;
 - c. a ban on concluding contracts with the Public Administration;
 - d. exclusion from (or withdrawal of) contributions, assistance and financing; and
 - e. a ban on advertising goods or services.
 - iii. confiscation of corporate assets; and
 - iv. the publication of the conviction.
- The above-mentioned disqualifying sanctions can be reduced up to a maximum of two years if the company, before the first-instance decision, actively cooperated with the Authorities and eliminated the gaps in its organizational structure through the effective adoption and implementation of a proper compliance program, pursuant to the 231 Decree.

9. Deferred Prosecution Agreements

Are deferred prosecution agreements (DPAs) or other similar settlement mechanisms available?

- If certain conditions are met, a plea bargain (so-called patteggiamento) with Italian prosecuting authorities is allowed for by Italian law (Section 444 Italian Code of Criminal Procedure, ICCP).
- In particular, patteggiamento is a special proceeding whereby the defendant, in agreement with the Public

Prosecutor, does not admit guilt, but offers to accept the punishment, at the same time requesting the judge to impose a sanction reduced by up to one-third compared with the one provided for by the law for the criminal offence concerned.

- Even though a judgment issued upon a patteggiamento is not a guilty verdict, pursuant to ICCP it is equivalent to a conviction. Indeed, certain effects of patteggiamento are the same as those of convictions, e.g., imposition of a criminal sanction (even though in a reduced amount), as established in the plea bargain agreement, and possible confiscation of property etc.

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