



The Legal 500 Country Comparative Guides

Spain: Bribery & Corruption

This country-specific Q&A provides an overview of bribery & corruption laws and regulations applicable in Spain.

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Contributing Firm



Del Rosal, Adame & Segrelles

Authors



Bernardo del Rosal,
Ph.D.
Partner and Professor
of Criminal Law

b.delrosal@dras-abogados.com

1. What is the legal framework (legislation/regulations) governing bribery and corruption in your jurisdiction?

Bribery and corruption are both criminal behaviours, included as such in the Spanish Penal Code ("PC").

2. Which authorities have jurisdiction to investigate and prosecute bribery in your jurisdiction?

As opposed to most other jurisdictions, where Public Prosecutors conduct criminal investigations, in Spain, the competence to prosecute offences is limited to the Examining Magistrates' Courts. The Police (either National Police, Guardia Civil, or other Regional police corps) is obliged to report to the Examining Magistrates' Courts any conduct they may consider to be a crime, acting under its instructions and orders. The Public Prosecution Office, private individuals and legal persons in general, can report to the Examining Magistrates' Courts any conduct they may consider to be a crime and act as party in the criminal procedure.

The Examining Magistrates' Courts are spread all over the Country: there is at least one in each judicial district (a territorial unit which can include one or more municipalities). However, the National Court has its own Examining Magistrates' Courts: The Central Examining Magistrates' Courts, which have jurisdiction throughout the Spanish territory for certain offences.

3. How is bribery defined?

The PC distinguishes between corruption and bribery. The word corruption is reserved to behaviours which take place between individuals, or for behaviours in which one of the parties involved is a foreign public official, and the word bribery is always reserved for behaviours in which one of the parties involved is a public official, either a Spanish public official, or an official from any of the countries of the European Union ("EU").

4. Does the law distinguish between bribery of a public official and bribery of private persons? If so, how is 'public official' defined? Are there different definitions for bribery of a public official and bribery of a private person?

The PC provides for different types of corruption and bribery:

Corruption between individuals (Article 286 bis). There are two types:

1. Active corruption, which consists of promising, offering or granting an unfair benefit or advantage to another individual to obtain, in turn, a benefit for him/herself or for a third party, to the detriment of others; and

(b) Passive corruption, which consists of receiving, soliciting or accepting an unfair benefit or advantage, to the detriment of others. In any of the offences the individuals involved must be the executives, directors, employees or collaborators of a commercial enterprise, company, association, foundation or organisation.

Bribery of authorities or public officials (Articles 419 to 427 bis). There are always two parties involved, one of them should be an authority or a public official (defined in Article 24 PC). There are three types:

1. Active bribery (Articles 424 and 425): where the individual takes the initiative in offering or delivering a gift or remuneration of any kind to an authority or a public official, (i) either for the latter to commit an act in breach of their inherent duties, or an act in compliance to their inherent duties, (ii) or to unfairly delay the performance of their duties; or where the individual delivers a gift or remuneration following solicitation by the authority or public official.
2. Passive bribery in breach of inherent duties: (Article 419) where the conduct of the authority or public official is sanctioned when receiving or soliciting, personally or through an intermediary, gifts, favours or remuneration of any kind, or when accepting offers or promises to commit an act, while carrying out the duties of the public office, which is contrary to the duties inherent to the post they hold, or not to carry out their duties, or to unfairly delay the performance of their duties;
3. Passive bribery in compliance with their inherent duties (Articles 420, 421, and 422): where the following actions by the authority or public official are sanctioned, (i) receiving or soliciting, personally or through an intermediary, gifts, favours or remuneration of any kind, or accepting offers or promises to carry out an act inherent to the public office, or in reward for an act already performed; accepting, personally or through an intermediary, a gift offered in view of the office held or duties performed, not including punishment for small gifts, considered inherent to a friendly or good neighbourly relationship, or (ii) accepting, personally or through an intermediary, a gift offered in view of the office held or duties performed, not including punishment for small gifts, considered inherent to a friendly or good neighbourly relationship.

These provisions also apply for EU officials.

Corruption of foreign public officials in international transactions (Art. 445 bis). This offence punishes those who by offering, promising or granting any undue pecuniary or other kind of benefit, corrupt or attempt to corrupt foreign civil servants or international organisations, personally or through an intermediary, for their own benefit or that of a third party, or who attend to requests in that regard, in order for them to act or abstain from acting in relation to the exercise of public functions to obtain or retain a contract, or other irregular benefit in carrying out international economic activities.

5. What are the civil consequences of bribery in your jurisdiction?

On the one hand, Article 100 of the Spanish Criminal Procedure Law (“CPL”) provides that all offences and misdemeanors, besides the criminal punishment of the guilty party, may give rise to civil action for the return of things, repair of damages, and compensation of material and moral damages caused by the punishable act.

On the other, Article 116 of the PC establishes that all persons held criminally liable for a criminal offence shall also be held liable under Civil Law if the fact gives rise to damages or losses. Some parties may be held subsidiary civil accountable for damages or losses caused by the principal (for instance, employers, parents, etc.), although the liability shall first be enforced against the assets of the offenders, and then those of the accomplices.

The criminal liability of a legal person shall involve its civil liability pursuant to the provisions contained in Article 110 of the PC, jointly and severally with the natural persons who are found guilty of the same facts.

6. What are the criminal consequences of bribery in your jurisdiction?

For offences involving either active or passive corruption between individuals, imprisonment of between six months and four years, be specially barred from being active in the industry or business for between one and six years, and be fined up to three times the value of the benefit or advantage obtained.

Where the offence is committed by a legal entity, it may be fined a daily amount for one to three years, if the offence entails a prison term of more than two years; and otherwise fined a daily amount for six months to two years, in other cases.

For offences involving bribery, the punishment depends on the type of offence committed.

For passive corruption offences: (i) passive bribery in breach of inherent duties, entails a prison term of three to six years, a daily fine for 12 to 24 months and special barring from employment and holding public office for seven to 12 years; (ii) passive bribery in compliance with inherent duties, entails a prison term of two to four years, a daily fine for 12 to 24 months and special barring from employment and holding public office for three to seven years; (iii) passive bribery in compliance with inherent duties for accepting gifts offered in accordance with the post or duty, entails a prison term of six months to one year and suspension from employment and holding public office for one to three years.

Active corruption offences entails the same punishment, both in terms of the imprisonment and fines corresponding to the authority or civil servant, except in cases in which the act is related to a procurement, granting or auction process tendered by the Public Administration, in which case the individual or legal entity will also be barred from obtaining grants or public aid and tax and Social Security incentives and from being awarded public sector contracts, for between three and seven years.

For cases in which a legal entity is found liable for the offence, the legal entity will be fined a daily amount during two to five years or three to five times the benefit obtained, if the offence entails a prison term of more than five years; or fined a daily amount during one to three years or two to four times the benefit obtained, if the offence entails a prison term of two to five years; or fined a daily amount during six months to two years or three times the benefit obtained, in the rest of the cases. In addition, the judge may also order that the legal entity be wound up, its activities be suspended for not more than five years, its premises and establishments be closed for not more than five years, the court intervene in the entity's administration, in order to safeguard the rights of the employees or creditors, for not more than five years, and the entity be prohibited from carrying out, in the future, the activity during the exercise of which the offence was committed, concealed or favoured.

7. Does the law place any restrictions on hospitality, travel and entertainment expenses? Are there specific regulations restricting such expenses for foreign public officials?

There are no specific restrictions on hospitality, travel and entertainment expenses. The limit is not written anywhere; depends on the Court judging the case and has to do with "socially admissible" uses. It also needs to be proved that there is a connection between the delivery of the gift, hospitality, travel, and entertainment expenses and the public office of the authority or public official, which means that the reason for that hospitality or expenses must be the condition of authority or public official receiving them.

8. Are political contributions regulated?

Political contributions are regulated by the Organic Law 8/2007, of 4 July on the financing of political parties (amended in 2012 and 2015), which allows contributions of individuals to political parties under 50,000 € per year, although anonymous contributions and contributions coming from legal entities are forbidden.

Besides, the PC punishes (Article 304 bis) whoever receives donations or contributions aimed at a political party, federation, coalition or group of electors in violation of Organic Act 8/2007, of 4 July, or those who give donations or contributions aimed at a political party, federation, coalition or group of electors, personally or through an intermediary. Legal entities can be held criminally liable of this crime.

9. Are facilitation payments regulated? If not, what is the general approach to such payments?

Yes, as seen in answer to question 4.

10. Are there any defences available?

Besides the general defenses included in the PC for any crime, Article 426 states that when a

natural person, who has occasionally accept the request for a gift or other compensation made by an authority or public officer, reports the fact to the authority whose duty is to proceed to investigate the matter, before proceedings commence, as long as no more than two months have elapsed from the date of the deeds, he or she shall be exempt of punishment for the criminal offence of corruption.

11. Are compliance programs a mitigating factor to reduce/eliminate liability for bribery offences in your jurisdiction?

Compliance programs may eliminate or reduce liability.

According to Article 31 bis of the PC, if legal persons want to get exemption from criminal liability, they have to establish an organizational and management program that should include measures of surveillance and control appropriate to prevent corruption or bribery criminal or to significantly reduce the risk of perpetration thereof (compliance program).

The supervision of the functioning of the compliance program has to be 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.

The PC requires any compliance program: (i) to identify the circumstances in which offences may be committed; (ii) to establish protocols or procedures to address the risks identified; (iii) to have appropriate financial controls to prevent the commission of offences; (iv) to impose an obligation to report possible risks and breaches to the body responsible for overseeing the functioning of the compliance program; (v) to establish a disciplinary system that duly penalizes breaches of the program; and (vi) to include regular review of the program, and revisions to respond to either significant breaches of its provisions, or to changes in the organization, the control structure or in the activities performed.

If these circumstances can only be partially proven, this may be taken into account for the purposes of mitigating the penalty.

Not having implemented a compliance program, a mitigating factor is also to established, prior to the start of the oral hearing, efficient measures for the prevention and discovery of the offences that may be committed in the future with the means or under the cover of the legal person.

12. Who may be held liable for bribery? Only individuals, or also corporate entities?

Legal entities can be held criminally liable of the crime of corruption between individuals and of the crime bribery, in any of these cases: (a) if the offence is committed in their name or on their behalf, for their direct or indirect benefit, by their legal representatives or any persons

acting individually or as members of a body of the legal person, who are authorised to take decisions on behalf of the legal person and hold powers of organisation and control within it; and (b) if the offence is committed, in the performance of corporate activities and on behalf and for the direct or indirect benefit of the same, by persons who, while subject to the authority of the natural persons mentioned in the foregoing paragraph, were able to commit the acts due to a serious breach by the former of the duty of control of their activities in view of the particular circumstances of the case.

Legal entities cannot be held criminally liable of corruption of foreign public officials in international transactions.

13. Has the government published any guidance advising how to comply with anti-corruption and bribery laws in your jurisdiction? If so, what are the elements of an effective corporate compliance program?

The PC includes the legal requirement for the compliance programs, as seen in answer to question 11.

14. Does the law provide protection to whistle-blowers?

Not especially.

15. How common are government authority investigations into allegations of bribery?

During the past ten years, very often. In any case, it was not exactly the government the one promoting the prosecutions, but the Public Prosecutor Office, which enjoys certain degree of independence, in many cases because of private denounces.

16. What are the recent trends in investigations and enforcement in your jurisdiction?

As it has been in the past years, the focus is still oriented against public bribery and not that much against corruption between private parties or against corruption of foreign public officials in international transactions corruption.

17. Is there a process of judicial review for challenging government authority action and decisions?

The Public Prosecutor does not decide but asks the Examining Magistrate to decide. Any decision of the Examining Magistrates, to indict an individual or a legal person, to interrogate the defendants, to interrogate witnesses, to request the handover of documents and to issue a search warrant of the defendants' home, properties or offices, etc., or any other is subject to appeal before the Provincial Court.

18. Are there any planned developments or reforms of bribery and anti-corruption laws in your jurisdiction?

Not at this moment.

19. To which international anti-corruption conventions is your country party?

Spain is a party of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (21 November 1997), the Criminal Law Convention on Corruption of the Council of Europe (27 January 1999), the EU Convention against Corruption involving officials of the EU (25 June 1997), and the UN Convention against Corruption (14 December 2005).

20. Do you have a concept of legal privilege in your jurisdiction which applies to lawyer-led investigations? If so, please provide details on the extent of that protection.

The general rule is that any spoken or written communications, documents or correspondence exchanged between a lawyer and their client, opposing parties and other lawyers within the context of a lawyer-client relationship must be kept confidential. Any breach of this duty could lead to the lawyer being held criminally liable and to sanctions being imposed by the Bar Association, as well as by any other potential authority related to the matter. No special provisions rule the context of lawyer-led investigations, because it is an uncommon practice in Spain.

21. How much importance does your government place on tackling bribery and corruption? How do you think your jurisdiction's approach to anti-bribery and corruption compares on an international scale?

I do not think it is especially worried about prosecuting bribery and corruption, although given to a very high level of pressure from the public opinion, and the works of the Public Prosecution Office, criminal procedures go ahead. In an international scale, I do not think that things in Spain are worse than in other EU countries.

22. Generally how serious are organisations in your country about preventing bribery and corruption?

Probably, in the past three to five years, preventing bribery has been an issue for organizations, although there is still much work to be done.

23. What are the biggest challenges enforcement agencies/regulators face when investigating and prosecuting cases of bribery and corruption in your jurisdiction?

A very slow, bureaucratic, and outdated criminal justice system.

24. What do you consider will be the most significant corruption-related challenges posed to businesses in your jurisdiction over the next 18 months?

Probably, a higher level of criminal prosecution of corporations, which still are not in the prosecution plans of the Public Prosecution Office.

25. How would you improve the legal framework and process for preventing, investigating and prosecuting cases of bribery and corruption?

The PC is considered to provide a stringent framework for combating bribery and corruption. However, there are two areas for improvements, although not in the legal framework but in the area of enforcements proactive actions.

The first one, is in the area of private bribery, or bribery between individuals, were it seems as if the Public Prosecution Office was not interested at all in any kind of enforcement actions because no public officials are involved. There is much to be done in this respect.

The second one is in the area of foreign bribery, were the situation is still as it was in 2015, when the OECD said that Spain has not enhanced its proactivity in detection and investigation, has not given adequate priority to combating foreign bribery, has not ensured that the terms of any cases resolved by settlement are made public, and has provided only limited training to police, prosecutors and magistrates on detecting, investigating and prosecuting foreign bribery.