



# Spain - Global bribery offenses guide

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## 1) What is the legal framework governing bribery in Spain?

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

## 2) 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 offenses: 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 offense can take the form of so-called passive bribery, where the initiative to commit the offense 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.

## 3) What are the principal offenses under this legal framework?

There is a broad and disparate range of bribery and corruption related offenses 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, himself 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, himself 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
  - o 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).
  - o 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."
  - o 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:
  - o to receive donations or contributions intended for a political party, federation, coalition or group of voters; and
  - o 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.

#### 4) What is the jurisdictional reach of the legal framework?

Any offense 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 offense of corruption between individuals (corruption in business) or in an international transactions, provided that:

- the procedure is directed against a Spanish citizen;
- the procedure is directed against a foreign citizen who is ordinarily resident in Spain;
- the offense 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 offense 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.

#### 5) 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 offenses under the various sections of the Spanish Criminal Code explained above.

Legal entities will be criminally liable for offenses 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.

## 6) 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 offense committed in the subsidiary.

## 7) Are facilitation payments (ie 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 offense and any assessment will take into account the specific circumstances of the matter on a case-by-case basis.

## 8) Does the legal framework restrict political and charitable contributions?

No, as long as certain limits are not exceeded, as discussed above.

The limit to be able to make contributions to political parties is established in the Law on the Financing of Political Parties, which states that "they may receive non-finalist donations, nominative, in cash or in kind, from natural persons, within the limits and in accordance with the requirements and conditions established in this law," provided that the natural person, in the exercise of an economic or professional activity, is not party to a current contract provided by the legislation on public sector contracts.

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.

## 9) Does the legal framework place restrictions on corporate hospitality?

Similar considerations as those with regard to facilitation payments apply. There is no express prohibition in the Spanish Criminal Code, although the internal policies of companies tend to limit them to those that are justified within what is

reasonable and acceptable, and must conform to the customs and culture associated with the business of the place where they are carried out. In the event that they do not adhere to these circumstances, a bribery or corruption offense could be made out.

## 10) Are there any defenses for bribery offenses?

Bribery offenses entail criminal liability for both individuals and legal entities. Corporations can be exempted from criminal liability if a compliance program is implemented and it is proven that the offender managed to overcome all the controls set by the company to prevent the crime to be committed. Also, to have criminal risk prevention programs helps to mitigate any eventual conviction.

Individuals shall be exempted from criminal liability who occasionally may have agreed to pay a bribe requested by the authority if this is reported to law enforcers prior to any investigation opened and within two months since the facts took place.

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

In Spain there are public bodies in some autonomous regions and city councils created with the specific mission of fighting corruption and bribery, to ensure the proper management of public entities and to ensure they are governed by the principles of transparency and compliance with the law.

These local and autonomous community anti-corruption agencies include: the Anti-Fraud Office of Catalonia, the Agency for the Prevention and Fight against Fraud and Corruption of the Valencian Community; the Office for the Prevention and Fight against Corruption in the Balearic Islands; the Accounts Council of Galicia; the Municipal Office against Fraud and Corruption of the Madrid City Council; and the Management Control Service of the Office for Transparency and Good Practices of the Barcelona City Council.

In addition, there is a Special Prosecutor's Office against corruption and organized crime under the General Public Prosecutor of the State Office, with jurisdiction throughout the national territory, which investigates and hears cases of special significance, relating to economic crimes or other crimes committed by public officials in the exercise of their positions related to corruption. It also investigates economic crimes committed by organized groups, unless they fall under the specific jurisdiction of the Anti-Drug Public Prosecutor's Office or the National High Court Prosecutor's Office.

In accordance with section 19.4 of the Organic Statute of the Public Prosecutor's Office, the Anti-Corruption Prosecutor's Office intervenes directly in criminal proceedings in cases of special transcendence, appreciated by the Attorney General of the State, in relation to crimes, among others:

- crimes against the Public Treasury, against social security and smuggling;
- crimes of prevarication;
- embezzlement of public funds;
- crimes of influence trafficking;
- crimes of bribery;
- negotiation prohibited to officials;
- corruption offenses in international commercial transactions; and
- corruption offenses in the private sector.

## 12) What are the legal consequences of being found guilty of bribery offenses?

We set out the penalties for the key bribery and corruption offenses below:

- Bribery:
  - Individuals and Public officials: imprisonment for a term of three to six years, a fine of 12 to 24 months, and special barring from employment or public office for a term of 9 to 12 years.
- Corruption in business (and corruption in sport):
  - Individual: imprisonment for six months to four years plus special barring in the exercise of industry or commerce for a period of one to six years and a fine of as much as three times the value of the benefit or advantage.

- Legal entity: (i) a fine from one to three years, if the offense committed by a natural person has a punishment foreseen of more than two years imprisonment sentence; or (ii) a fine of two to three times the profit obtained or favored, in all other cases.
- For all cases in which the legal entity is found guilty, the following additional convictions may be imposed on it:
  - dissolution of the legal person. The dissolution shall cause definitive loss of its legal personality, as well as of its capacity to act in anyway in legal transactions, or to carry out any kind of activity, even if lawful;
  - suspension of its activities for a term that may exceed five years;
  - closure of its premises and establishments for a term that may not exceed five years;
  - prohibition from carrying out the activities through which it committed, favored or concealed the felony in the future. Such prohibition may be temporary or definitive. If temporary, the term may not exceed 15 years;
  - 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 15 years;
  - judicial intervention to safeguard the rights of the workers or creditors for the time deemed necessary, which may not exceed five years.

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

No.

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