



Groupe d'Etats contre la corruption  
*Group of States against corruption*



DIRECTORATE GENERAL OF HUMAN RIGHTS AND LEGAL AFFAIRS  
DIRECTORATE OF MONITORING

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Theme I

## Third Evaluation Round

### Evaluation Report on Spain Incriminations (ETS 173 and 191, GPC 2) (Theme I)

Adopted by GRECO  
at its 42<sup>nd</sup> Plenary Meeting  
(Strasbourg, 11-15 May 2009)

## I. INTRODUCTION

1. Spain joined GRECO in 1999. GRECO adopted the First Round Evaluation Report (Greco Eval I Rep (2001) 1E) in respect of Spain at its 5<sup>th</sup> Plenary Meeting (11-15 June 2001) and the Second Round Evaluation Report (Greco Eval II Rep (2004) 7E) at its 23<sup>rd</sup> Plenary Meeting (17-20 May 2005). The afore-mentioned Evaluation Reports, as well as their corresponding Compliance Reports, are available on GRECO's homepage (<http://www.coe.int/greco>).
2. GRECO's current Third Evaluation Round (launched on 1 January 2007) deals with the following themes:
  - **Theme I – Incriminations:** Articles 1a and 1b, 2-12, 15-17, 19 paragraph 1 of the Criminal Law Convention on Corruption (ETS 173), Articles 1-6 of its Additional Protocol (ETS 191) and Guiding Principle 2 (criminalisation of corruption).
  - **Theme II – Transparency of party funding:** Articles 8, 11, 12, 13b, 14 and 16 of Recommendation Rec(2003)4 on Common Rules against Corruption in the Funding of Political Parties and Electoral Campaigns, and - more generally - Guiding Principle 15 (financing of political parties and election campaigns).
3. The GRECO Evaluation Team for Theme I (hereafter referred to as the "GET"), which carried out an on-site visit to Spain from 22 to 23 September 2008, was composed of Mr Atle ROALDSØY, Senior Adviser, Ministry of Justice, Police Department (Norway) and Mr Anton TRONIN, Head of Section on Examination of the Applications on Criminal Matters, Department of the Representative of the Russian Federation at the European Court on Human Rights, Ministry of Justice (Russian Federation). The GET was supported by Ms Laura SANZ-LEVIA from GRECO's Secretariat. Prior to the visit the GET experts were provided with a comprehensive reply to the Evaluation questionnaire (document Greco Eval III (2008) 3E, Theme I), as well as copies of relevant legislation.
4. The GET met with officials from the following governmental organisations: the Ministry of Justice (Secretary of State for Justice, Directorate General of Legislation Policy and Directorate General of International Legal Co-operation) and the Ministry of the Interior. The GET also met with representatives of the State Prosecution Service (including, the Special Prosecution Office against Corruption and Organised Crime), judges and representatives of the General Council of the Judiciary. Moreover, the GET met with Transparency International, academia, the media and criminal defence lawyers.
5. The present report on Theme I of GRECO's Third Evaluation Round – "Incriminations" – was prepared on the basis of the replies to the questionnaire and the information provided during the on-site visit. The main objective of the report is to evaluate the measures adopted by the Spanish authorities in order to comply with the requirements deriving from the provisions indicated in paragraph 2. The report contains a description of the situation, followed by a critical analysis. The conclusions include a list of recommendations adopted by GRECO and addressed to Spain in order to improve its level of compliance with the provisions under consideration.
6. The report on Theme II – "Transparency of party funding" –, is set out in Greco Eval III Rep (2008) 3E, Theme II.

## II. INCRIMINATIONS

### a. Description of the situation

7. Spain signed the Criminal Law Convention on Corruption (ETS 173) on 10 May 2005; it has not yet been ratified. Spain has neither signed nor ratified the Additional Protocol to the Criminal Law Convention (ETS 191).

### Bribery of domestic public officials (Articles 1-3 and 19 of ETS 173)

#### Definition of the offence

8. Criminalisation of bribery is provided for in Articles 419 to 427, Chapter V of Title XIX of the Spanish Penal Code (PC). The relevant provisions on passive bribery ("*cohecho pasivo*") differentiate between five types of situations on the basis of the expected act (lawful/unlawful) ("*cohecho propio/impropio*") of the public official being bribed; each of these situations is punished with a different level of sanction depending on whether:

- (i) the expected action/omission of the public official constitutes a crime (Article 419):

**Article 419, Penal Code: passive bribery (actions/omissions constituting a crime)**

*The authority or public official that, for his/her own benefit or that of a third party, requests or receives, directly or through an intermediary, a gift or present, or accepts an offer or promise for carrying out, in the exercise of his/her duty, an action or omission that may constitute a crime, will be punished with imprisonment for a period of between two to six years, a fine of up to three times the value of the said gift and the specific disqualification from any public employment or post for seven to twelve years, without prejudice to the penalty corresponding to the crime committed by virtue of the gift or promise.*

- (ii) the expected action/omission of the public official is an "unjust act" (Article 420). There is extensive jurisprudence<sup>1</sup> of the definition of "unjust act" which has been repeatedly understood as any act that the public official is not lawfully entitled to perform ("*contrario a lo que es debido*").

**Article 420, Penal Code: passive bribery (actions/omissions constituting an unjust act)**

*The authority or public official that, for his/her own benefit or that of a third party, requests or receives, directly or through an intermediary, a gift or present, or accepts an offer or promise for carrying out an unjust act not constituting a crime, related with the exercise of his/her duty, and does in fact execute it, will be punished with imprisonment for a period of between one to four years, and specific disqualification from any public employment or post for six to nine years. If s/he does not execute the unjust act, the prison term will be from one to two years and specific disqualification from any public employment or post for a period of three to six years. In both cases, a fine shall also be imposed, ranging from the value to triple the value of the gift.*

<sup>1</sup> For example, judgments of the Supreme Court, Criminal Chamber: STS 1096/2006 of 16 November 2006, STS 1076/2006 of 27 October 2006, STS 893/2002 of 16 May 2002, STS 1701/2001 of 24 September 2001.

(iii) the public official refrains (omission) from carrying out an act s/he should have carried out (Article 421):

**Article 421, Penal Code: passive bribery (omission of acts inherent to the public official's duties)**

*When the gift requested, received or promised is aimed at preventing an authority or public official from fulfilling an act which s/he is to carry out in the exercise of his/her duty, the punishment will be a fine from the value to double the value of the gift and specific disqualification from any public employment or post for a period of between one and three years.*

(iv) the public official performs an act inherent to his/her official duty (Article 425); the bribe has been solicited or accepted before/after the performance of the (lawful or unlawful) official act ("*cohecho antecedente/cohecho subsiguiente*"):

**Article 425, Penal Code: passive bribery (performance of acts inherent to the public official's duties)**

- 1. The authority or public official that requests a gift or present or accepts an offer or promise to carry out an act inherent to his/her duty, or as a reward for an act already carried out, will be punished with a fine ranging from the value to triple the value of the gift and suspension from his public employment or post for a period from six months to three years. [lawful acts]*
- 2. In the case of reward for an act already performed, if this were to constitute a crime, there will also be imposed the penalty of imprisonment from one to three years, a fine of six to ten months and specific disqualification from any public employment or post for a period from ten to fifteen years. [unlawful acts]*

(v) the public official accepts a bribe on the basis of her/his public official status (in consideration of the public official's position) or for an act that is not legally prohibited (Article 426).

**Article 426, Penal Code: passive bribery (bribe offered in consideration of the public official's position or in order for the public official to fulfill a lawful act)**

*The authority or public official that accepts a gift or present that is offered to him/her in consideration of his/her position or for the performance of an act that is not forbidden by law, will be punished with a fine of three to six months.*

9. Active bribery ("*cohecho activo*") of domestic public officials is criminalised in Article 423 PC, which refers to the provisions on passive bribery to establish the level of penalty required (less severe penalty in those cases where the individual does not take the initiative to bribe the public official, but rather responds to a public official's demand). The interpretation of the different elements of passive bribery included in Articles 419 to 421 PC (e.g. directly and indirectly, for himself or for herself, in return for an official act) therefore applies to the offence of active bribery. Much doctrinal debate has taken place as to whether Article 423 PC on active bribery, would also cover the corruption instances under Articles 425 PC (acts inherent to the public official's duties) and 426

PC (acts not inherent to the official's duties, but in consideration of his/her function, which are not prohibited by law). In this connection, case law<sup>2</sup> has confirmed that Article 423 PC would indeed cover the acts of a public official specified in Articles 425 and 426 PC ("*cohecho impropio*"); the reference of Article 423 PC *in fine* to its preceding provisions would only serve punitive purposes in so far as the determination of the applicable sanction is concerned.

**Article 423, Penal Code: active bribery**

1. *Any person who corrupts or attempts to corrupt the public authorities or officials, through the use of sops, gifts, offers or promises, will be punished with the same custodial and financial sanctions as the public authorities or officials themselves.*
2. *Any person who attends to such request from public authorities or officials will be punished with sanctions one grade lower than those described in the previous paragraph.*

10. A reform of the Penal Code is ongoing<sup>3</sup>; it contains a number of important amendments with respect to corruption offences. In particular, a simplification of the types of conduct giving rise to a passive bribery offence is foreseen; it is proposed that the five different types of corrupt conducts described above be reduced to three categories: (i) unlawful official acts; (ii) lawful official acts; and (iii) bribe accepted on the basis of the public official's position. Likewise, the draft amendments to the Penal Code provide for an autonomous offence of active bribery which no longer refers back to the relevant provisions on passive bribery and is unequivocally applicable to both lawful and unlawful acts.

Elements of the offence

*"Domestic public official"*

11. The notion of "public official" is developed by Article 24 PC as follows:

**Article 24, Penal Code: authorities and public officials**

1. *For penal purposes, the term authority shall refer to whoever, on his/her own or as a member of a corporation, court or collegiate body, is in command or exercises his/her own jurisdiction. In any case, have the status of authorities the members of the Congress of Deputies, the Senate, the legislative assemblies of the Autonomous Communities and the European Parliament. The public officials of the Public Prosecution Service shall also be considered authorities.*
2. *Public official shall mean every person that, by immediate provision of the law, or by election or appointment of the competent authority, takes part in the exercise of public functions.*

<sup>2</sup> Judgments of the Supreme Court: STS 545/1998 of 13 January 1999, ATS 1178/1998 of 29 April 1998, STS 692/1997 of 7 November 1997.

<sup>3</sup> The authorities indicated that, on 14 November 2008, the Council of Ministers passed the Draft Organic Bill on the Reform of the Penal Code. The Draft was subsequently transmitted to the General Council of the Judiciary and the Attorney General's Office for comments; it will be sent again (in short) to the Council of Ministers and then to Parliament for further consultation and adoption in due course.

12. In particular, the term "*authority*" refers to elected authorities, including the members of Parliament (Congress of Deputies and Senate), the legislative assemblies of the Autonomous Communities and the European Parliament, as well as members of the judiciary (judges and other holders of judicial offices<sup>4</sup>, whether elected or appointed) and officials of the State Prosecution Service.
13. The term "*public official*" is understood broadly on the basis of a status oriented definition by which a formal link with public administration is required (*every person that, by immediate provision of the law, or by election or appointment*), which is then supplemented with functional elements, notably, by relying on the public nature of the function performed by the person concerned (*takes part in the exercise of public function*).
14. Furthermore, there is extensive jurisprudence<sup>5</sup> (and academic studies) reflecting on the notion of public official and confirming that, in the framework of penal legislation, this is to be interpreted to the widest extent possible (beyond administrative law). In this context, it would not only cover those persons carrying out a public function in the State administration - whether at central, regional or local level -, but also individuals vested (by law, election or appointment) with public authority to perform certain duties of State administration (e.g. employees of public enterprises, employees of companies which have been officially granted particular rights or licenses to perform public services, etc.), irrespective of their type of contract and the temporary/permanent character of the functions performed.
15. Finally, the draft amendments to the PC specifically provide for the applicability of the relevant articles on active and passive bribery provisions of domestic public officials to public officials of the European Communities and foreign officials of other EU countries with a view to transpose the EU Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union<sup>6</sup>.

*"Promising, offering or giving" (active bribery)*

16. The elements of "promising", "offering" and "giving", although not transposed *verbatim*, are covered by Article 423 PC, which punishes the corruption or attempt to corrupt a public official through the use of sops, gifts, offers or promises. The Supreme Court has interpreted the verbs "*to corrupt or attempt to corrupt*" in a very broad manner so as to cover those actions aimed at inducing the public official to act, either in an unlawful or a lawful manner ("*cohecho activo propio/cohecho activo impropio*")<sup>7</sup>, through the use of sops, gifts, offers or promises.

*"Request or receipt, acceptance of an offer or promise" (passive bribery)*

17. The elements of "request", "receipt" or "accept" are covered in the relevant provisions dealing with passive bribery of a public official in return for an unlawful act ("*cohecho propio*"), i.e. Articles 419 to 421 PC. While in Articles 419 and 420 PC the aforementioned terms are expressly referred to, the term "acceptance of an offer or promise" is not used in Article 421 PC, but is meant to be covered by the notion of being "promised".

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<sup>4</sup> For example, judgment of the Supreme Court, STS 636/2006 of 8 June 2006.

<sup>5</sup> For example, judgments of the Supreme Court, Criminal Chamber: STS 1590/2003 of 22 April 2004, STS 68/2003 of 27 January 2003, STS 537/2002 of 5 April 2002, STS 2361/2001 of 4 December 2001.

<sup>6</sup> Council Act of 26 May 1997 drawing up the Convention made on the basis of Article K.3 (2)(c) of the Treaty on European Union, on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union [Official Journal C 195 of 25 June 1997].

<sup>7</sup> Judgments of the Supreme Court: STS 545/1998 of 13 January 1999, ATS 1178/1998 of 29 April 1998, STS 692/1997 of 7 November 1997.

18. The provisions dealing with the exertion of influence in return for a lawful act ("*cohecho impropio*") do not systematically cover the different corrupt conducts provided for in the Criminal Law Convention on Corruption (ETS 173). In particular, Article 425 PC (commission of acts inherent to a public duty) does not include a specific reference to the term "receive", but this is meant to be comprised in the notion of "acceptance". Article 426 PC (bribe accepted for an act that is not legally prohibited or on the basis of the public official status) only refers to the "acceptance of gifts or presents". It has nevertheless been understood by the courts that the acceptance of an offer/promise would also be covered by Article 426 PC<sup>8</sup>; again, the term "receive", although not expressly transposed, would be comprised in the notion of "acceptance".
19. According to well established jurisprudence, it is possible to punish not only instances where corrupt pacts<sup>9</sup> have been agreed (bilateral character of the offence), but also unilateral requests<sup>10</sup>, independently of whether the official's request is effectively accepted by the individual, whether the bribe is received, or whether the illegal act/omission materialises at a later stage. Moreover, since the legal interest that the Spanish Penal Code aims to safeguard in bribery offences is the confidence of citizens in the fairness of public administration, it is immaterial the final use made of the bribe (for example, whether the public official keeps it for him/herself or gives it to charity)<sup>11</sup>.

*"Any undue advantage"*

20. The relevant provisions of the Penal Code concerning bribery do not use the term "undue". Jurisprudence has generally established a limit on gifts which is not to exceed what would be considered as a social courtesy; nevertheless, the criterion for determining whether a gift or present could be considered as acceptable is to be left to the courts and assessed on a case-by-case basis (for example, a recent adjudicated case dealt with a bribe to a driving test examiner consisting of some boxes containing wine bottles<sup>12</sup>). In any event, the representatives interviewed by the GET confirmed that it is understood that any "gift or present" (whether due or undue) may come under the scope of the offence if it has a rewarding nature which purpose is to influence a public official's action in service<sup>13</sup>.
21. The term "gift or present" is commonly understood as any material benefit, which can be valued in quantifiable pecuniary terms. The economical assessment of the benefit appears also to be the principle lying behind the determination of the penalty when this consists of a fine, i.e. the fine is to be fixed by the relevant court on the basis of the value of the gift/present. The draft amendments to the Penal Code incorporate a reworked definition of the terms used to define the advantage so that it refers to both material and immaterial benefits ("*gift, favour or reward of any nature*"). Moreover, the reference to monthly fines in the sanctions eliminates any allusion to a purely economic assessment of the bribe.

*"Directly or indirectly"*

22. These notions (and thus, for example, corruption through intermediaries) are explicitly referred to in Articles 419 and 420 PC. Although Articles 423, 425 and 426 PC do not specifically contain the terms "directly or indirectly", the courts have interpreted the latter provisions in a broad manner so

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<sup>8</sup> Judgment of the Supreme Court, Criminal Chamber: STS 636/2006 of 8 June 2006.

<sup>9</sup> Judgment of the Supreme Court, Criminal Chamber: STS 504/2003 of 2 April 2003.

<sup>10</sup> Judgment of the Supreme Court, Criminal Chamber: STS 1096/2006 of 16 November 2006, STS 636/2006 of 8 June 2006, STS 2052/2001 of 7 November 2001, STS 776/2001 of 8 May 2001, STS 20/2001 of 28 March 2001, STS 1114/2000 of 12 June 2000.

<sup>11</sup> Judgment of the Supreme Court, Criminal Chamber: ATS 20637/2006 of 1 June 2007 and 27 September 2007.

<sup>12</sup> Judgment of the Supreme Court, Criminal Chamber: STS 513/2008 of 23 July 2008.

<sup>13</sup> See also judgment of the High Court of Andalusia: STJ 6/2007, of 20 March 2007.

as to cover such instances. This was further confirmed by the practitioners met by the GET during the on-site visit.

23. The draft amendments to the Penal Code explicitly refer to the notions of “directly or indirectly” in all the different provisions concerning bribery to avoid any risk of misinterpretation in the future, which would limit the scope of the relevant bribery offences.

*“For himself or herself or for anyone else”*

24. Bribery offences also apply where the gift benefits a third party (*for his/her own benefit or that of a third party*). As above, although third party beneficiaries are only explicitly referred to in Articles 419 and 420 PC, jurisprudence has interpreted Articles 423, 425 and 426 PC as also covering such instances<sup>14</sup>.
25. The draft amendments to the Penal Code explicitly refer to third party beneficiaries in all the different provisions concerning bribery to avoid any risk of misinterpretation in the future, which would limit the scope of the relevant bribery offences contrary to the legislator’s intent.

*“To act or refrain from acting in the exercise of his or her functions”*

26. The bribery offences expressly cover “acts” and “omissions” committed in the past or in the future (*“cohecho subsiguiente”*<sup>15</sup>) by the public official. More specifically, they concern acts committed in connection with the exercise of official duties/functions. This connection is understood broadly: it includes acts that form part of the official’s express powers and authority (even if these are not explicitly laid down in legislation), as well as those instances lying outside of the official’s formal authorities (e.g. discretionary and political acts)<sup>16</sup>. It further expands to those situations where the bribe is offered in consideration of the public official’s position (Article 426 PC). The decisive element of the offence is not whether the official has any discretion to act as requested by the briber, but whether he has been offered, given or promised a bribe in order to obtain something from him/her and therefore, to compromise his/her impartiality<sup>17</sup>. The briber may not even be aware whether the official has discretion or not<sup>18</sup>. According to the jurisprudence in this area, the bribery provisions of the Penal Code aim at safeguarding the principles of equality, impartiality and objectivity of public administration, which would be significantly undermined, even in the official would have acted in the same way without the bribe.
27. Finally, for a bribery offence to occur, it is not required that the induced act or omission by the public official involves a breach of duty or be unlawful as such (Articles 425(1) and 426 PC);

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<sup>14</sup> See for example, judgment of the Supreme Court, Criminal Chamber: ATS 692/1997 of 7 November 1997 where, in respect to a possible corruption offence falling under Article 426 PC, it is said that it is immaterial the use that is made of the bribe, whether the benefit is enjoyed by the bribed person or by, for instance, charity purposes.

<sup>15</sup> The authorities explained that the introduction of bribery a posteriori - so-called *“cohecho subsiguiente”* (i.e. bribery instances where bribe is solicited or accepted after the performance of the official act) serves a procedural purpose as it allows a penalty to be imposed proving the handing over of the money and the public official’s behaviour, without having to prove the prior offer, request or acceptance (i.e. the so-called *pactum sceleris*). In any event, the reward creates a link between the public official which puts at risk the principle of impartiality of public administration. The important nexus is that, in an imprecise way, the public official’s impartiality in relation to unspecified future acts is jeopardised.

<sup>16</sup> For example, judgments of the Supreme Court, Criminal Chamber: STS 440/2007 of 21 May 2007, STS 1096/2006 of 16 November 2006, STS 636/2006 of 8 June 2006, STS 504/2003 of 2 April 2003, STS 20/2001 of 28 March 2001, STS 2052/2001 of 7 November 2001, STS 701/1994 of 4 April 1994.

<sup>17</sup> For example, judgments of the Supreme Court, Criminal Chamber: STS 440/2007 of 21 May 2007, STS 1076/2006 of 27 October 2006.

<sup>18</sup> Judgments of the Supreme Court, Criminal Chamber: STS 293/2007 of 10 April 2007, STS 587/2007 of 28 June 2007.



however, the commission/omission of an unlawful official act entails more severe sanctions (Articles 419, 420 and 425(2) PC – which are considered aggravated cases).

*“Committed intentionally”*

28. A basic principle of the Penal Code is that negligently committed acts are not punishable unless specifically provided for in the relevant offence (Article 12 PC). Therefore, as the provisions on bribery do not mention that they can be caused by negligence, it can be inferred that they can only be committed intentionally.
29. The acceptability or non-acceptability of the gift/present in a bribery situation is assessed depending on whether the benefit was intended to influence the acts of the public servant (and therefore to compromise the necessary impartiality and objectivity of public administration), independently of whether the benefit did indeed have an influence in reality on the service rendered by the official in question. By contrast, if the offer or promise is not intended to influence the official to act illegally, the individual cannot be held responsible for offering, promising or giving a bribe<sup>19</sup>.

Sanctions

30. The severity of the penalties available for passive bribery depends of the unlawful/lawful nature of the act (action/omission) of the public official bribed:
  - if the expected action/omission of the public official constitutes a crime: imprisonment between two and six years, a fine of up to three times the value of the bribe, and disqualification from public office for a period between seven and twelve years (Article 419 PC);
  - if the expected action/omission of the public official is an “unjust act” not constituting a crime:
    - i) if the public official executes the “unjust act”: imprisonment between one and four years and disqualification from public office for a period between six and nine years,
    - ii) if the public official does not execute the “unjust act”: imprisonment from one to two years and disqualification from public office for a period between three and six years.In both cases, the fine to be imposed in conjunction with the abovementioned penalties ranges from the value to triple the value of the gift (Article 420 PC);
  - if the public official refrains (omission) from carrying out an act s/he is required to carry out: a fine from the value to double the value of the bribe, and disqualification from public office for a period between one and three years (Article 421 PC);
  - if the public official performs an act inherent to his/her duty (Article 425 PC):
    - i) if the bribe is received in order for the public official to carry out an act inherent to his/her duty or as a reward for an act already carried out: a fine of up to three times the value of the bribe and disqualification from public office for a period between six months and three years (Article 425(1) PC);
    - ii) if the reward is offered in relation to an act already performed which constitutes a crime: imprisonment between one and three years, a fine of six to ten months<sup>20</sup>, and disqualification from public office for a period between ten and fifteen years (Article 425(2) PC);
  - if the public official accepts a bribe for an act that is not legally prohibited or on the basis of her/his public official status: fine of six to ten months (Article 426 PC).

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<sup>19</sup> Judgments of the Supreme Court, Criminal Chamber STS 636/2006 of 8 June 2006, STS 188/1994 of 2 February 1994.

<sup>20</sup> Fines in Spain are based on a system of day-fines, the number of days being determined on grounds such as the offender's degree of guilt and the circumstances of the offence, and the amount on the basis of the offender's financial situation. In practical terms, a fine of six to ten months consists of 90 to 180 daily rates; daily rates range between 2 and 400 euros (Article 50(4) PC).

31. Active bribery is generally punished with the same level of sanctions as passive bribery (the exception of disqualification from a public post or employment is not applicable here). However, in those cases where the bribe is given/offered/promised in response to a request of a public official, penalties one grade lower to the ones required for passive bribery would apply (Article 423(2) PC – mitigating circumstance). According to Article 70 PC the maximum would be the previous minimum penalty less a day; the minimum penalty would be one half of the previous minimum<sup>21</sup>.
32. The following table illustrates in a schematic manner the available sanctions for active and passive bribery:

Article PC	Offence	Sanction (cumulative)			Extradition possible
		Imprisonment	Fine	Professional disqualification	
<b><i>Passive bribery</i></b>					
Art. 419	Official act constitutes crime	2 - 6 yrs	1- 3 times value of bribe	7 – 12 yrs	Yes
Art. 420	Official act is “unjust act”				
	- executed	1 – 4 yrs	1- 3 times value of bribe	6 – 9 yrs	Yes
	- not executed	1 – 2 yrs	1- 3 times value of bribe	3 – 6 yrs	Yes
Art. 421	Refrain from performing a required official act	No	1- 2 times value of bribe	1 – 3 yrs	No
Art. 425	Official act inherent to duties (bribe solicited or accepted <u>before/after</u> performance official act)				
	(1) does not constitute crime	No	1- 3 times value of bribe	6 months – 3 yrs	No
	(2) constitutes crime	1 – 3 yrs	90 – 180 daily rates	10 – 15 yrs	Yes
Art. 426	Bribe offered in consideration of official position or in order to perform act not forbidden by law	No	90 – 180 daily rates	No	No
<b><i>Active bribery</i></b>					
Art. 423	(1) Corrupt or attempt to corrupt through gifts, offers or promises	Same penalties as in passive bribery		Not applicable	Yes/No (See above passive bribery, i.e. Arts. 421, 425(1) and 426)
	(2) If responding to solicitation by public official	Penalties one grade lower than those established for passive bribery		Not applicable	Yes/No (See above passive bribery, i.e. 421, 425(1) and 426 & 420, 425(2))

<sup>21</sup> For example, for calculation purposes, if the imprisonment penalty consists of 4-8 years imprisonment, the corresponding one grade lower penalty would be 2-4 years imprisonment.

33. By way of comparison, fraud against a public body carries out a prison sentence of one to three years imprisonment (Article 436 PC). Misappropriation of public funds is punished with imprisonment for a period between three to six years; in aggravated cases, the imprisonment term could increase to a maximum of eight years (Article 432 PC).
34. The draft amendments to the Penal Code propose a different sanctioning system exclusively based on day-fines (i.e. sanctions are no longer established in relation to the economic assessment of the bribe). In addition, there is an aggravation of the minimum imprisonment sentences applicable to passive bribery offences, i.e. three years' imprisonment for unlawful official acts (instead of two) and two years' imprisonment for lawful official acts (instead of one or none). As far as active bribery is concerned, the available sanctions are the same that can be applied to passive bribers (with the exception of disqualification from a public post or employment), as well as disqualification from public tenders, contracts with public administration and tax rebates.

#### Court decisions and statistics

35. There is a vast corpus of court decisions dealing with bribery of several categories of public officials (e.g. judges and holders of judicial office, mayors, doctors and nurses, employees of private companies carrying out tasks of a public nature, etc). The interpretation of the key elements (e.g. definition of public official, object of corruption, scope of official act) contained in the relevant bribery offences has been largely developed in the light of those decisions, as illustrated by the paragraphs above.
36. The annual reports of the Attorney General's Office indicate that, in 2006, preliminary investigations were carried out in connection with 89 cases concerning bribery (a 50% increase as compared to 2005 data); in 2007, 47 preliminary investigations had been initiated for trading in influence offences. The latest report of the Attorney General's Office (2008) underlined that, since the establishment of the Special Prosecution Office against Corruption and Organised Crime in 1996, a total of 64 corruption-related judgments had been issued (54 convictions and 10 acquittals).

#### Bribery of members of domestic public assemblies (Article 4 of ETS 173)

37. Pursuant to Article 24(1) PC, those persons who, on his/her own or as a member of a corporation, court or collegiate body, are in command or exercise his/her own jurisdiction, are considered "authorities" and therefore fall under the relevant provisions on bribery. The Penal Code further refers, in particular, to elected members of legislative assemblies, including the members of Parliament (Congress of Deputies and Senate), the legislative assemblies of the Autonomous Communities and the European Parliament. There is no explicit reference to members of other public domestic assemblies, such as public assemblies at local level (including in the autonomous cities of Ceuta and Melilla) or public assemblies not exercising legislative powers. However, the authorities affirm that the definition of the term "authorities" provided by Article 24(1) PC, is wide enough to also cover members of any other public representative body, including those at local level, whose members are elected or appointed and which exercise legislative or administrative powers. The elements of the offence and the applicable sanctions detailed under bribery of domestic public officials apply accordingly to bribery of members of domestic public assemblies.
38. An increasing number of court decisions have dealt with corruption of members of domestic public assemblies, in particular, concerning decisions taken by members of local councils in the planning, licensing and regulatory areas, as well as instances of political turn coating (*"transfuguismo político"*), as for example in Case 1125/2007 of 12 December 2007, Case 1617/2005 of 7

December 2005 and Case 1952/2000 of 19 December 2000. The latter cases were adjudicated in relation to Article 420 PC (actions/omissions of public officials constituting an “unjust act”), the penalties applied consisted of prison sentences ranging from one to three years, fines up to 180,300 EUR and professional disqualification.

### **Bribery of foreign public officials (Article 5 of ETS 173)**

39. With a view to implement the obligations under the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions<sup>22</sup>, a new provision, i.e. Article 445, was introduced under Chapter X, Title XIX of the Spanish Penal Code.

#### **Article 445, Penal Code: bribery in international commercial relations**

1. *Whoever that, through presents, gifts, offers or promises, bribes or tries to bribe, whether directly or through intermediaries, authorities or public officials whether foreign or from international organisations in the exercise of their post to the advantage of them or of a third party, or complies with their demands in respect to this, in order that they act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business, will be punished with the penalties set forth in Article 423 in each respective case.*
2. *Should the guilty person belong to a corporation, organisation or association, including those of a provisional nature, dedicated to carry out these activities, the judge or court shall be able to impose some of the consequences set forth in Article 129 of this Code.*

### **Elements of the offence**

#### *“Foreign public official”*

40. The Spanish Penal Code does not provide an autonomous definition of the term “foreign official”. In this connection, the authorities have indicated that the definition of public official in Article 24 PC cannot be extrapolated to foreign public officials.
41. The draft amendments to the Penal Code incorporate an autonomous definition of foreign public officials, which comprises any person holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected; any person exercising a public function for a foreign country, including for a public agency or public enterprise; and any official or agent of a public international organisation (i.e. a *verbatim* transposition of the OECD Convention).

#### *“Promising, offering or giving” (active bribery)*

42. The elements of “promising”, “offering” and “giving” are covered by Article 445 PC, which punishes the bribing or attempt to bribe a foreign public official through the use of presents, gifts, offers or promises. The offence is also committed where an individual “complies” with the “demands” of a foreign public official to bribe him/her as described above (in such a case of solicitation by the public official, the individual would be subject to a reduced penalty in accordance with Article 423(2) PC – see also paragraph 31 for details). However, active bribery of foreign public officials is only criminalised if the official act (whether lawful or unlawful) is committed in the context of international business transactions (*in order to obtain or retain business or other improper advantage in the conduct of international business*).

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<sup>22</sup> Spain signed the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions on 17 December 1997, and deposited the instrument of ratification on 14 January 2000.

*“Request or receipt, acceptance of an offer or promise” (passive bribery)*

43. Passive bribery of foreign public officials is not criminalised in Spain.

*“Directly or indirectly”*

44. These notions (and thus, for example, corruption through intermediaries) are explicitly referred to in Article 445 PC.

*“For himself or herself or for anyone else”*

45. Bribery offences also apply where the gift benefits a third party (*to the advantage of them or of a third party*).

*Other elements*

46. What is described concerning other specific elements/concepts of the offence (*“undue advantage”, “to act or refrain from acting in the exercise of his or her functions”, “committed intentionally”*) in respect of bribery of domestic public officials applies also in respect of bribery of foreign public officials.

### Sanctions

47. Pursuant to Article 445 PC, the penalties set forth in Article 423 PC on active bribery of public officials apply to active bribery of foreign public officials in the context of international business transactions. In this connection, Article 423 PC refers back to the relevant provisions on passive bribery to establish the required sanction (for details see paragraphs 30 to 32).

48. Some debate has taken place as to whether Article 423 PC can be also applied in connection, not only to its precedent provisions on bribery: Articles 419, 420 and 421 PC (official acts constituting a crime or an “unjust act”), but also to Articles 425 and 426 PC (lawful official acts). Legal commentators appear to share contradictory views in this respect (which have been highlighted by the relevant OECD reports on Spain<sup>23</sup>), but the jurisprudence of the Supreme Court<sup>24</sup> has confirmed that Article 423 PC would indeed be applicable when the briber aims at obtaining both an unlawful (Articles 419, 420, 421 PC) and a lawful (Article 425 and 426 PC) official act.

49. The draft amendments to the Penal Code establish an autonomous offence of active bribery of foreign public officials which sanction consists of imprisonment between three and six years, a fine of 12 to 24 months, and disqualification from public tenders/contracts. The fine could be increased to take into account the benefit obtained from the commission of the offence.

### Court decisions

50. There are no court decisions concerning bribery of foreign public officials.

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<sup>23</sup> Spain: Phase 1 and Phase 2 Reports on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions.

<sup>24</sup> Judgments of the Supreme Court: STS 545/1998 of 13 January 1999, ATS 1178/1998 of 29 April 1998, STS 692/1997 of 7 November 1997.

### **Bribery of members of foreign public assemblies (Article 6 of ETS 173)**

51. Members of foreign public assemblies are not covered by the relevant provisions on bribery of the Spanish Penal Code.

### **Bribery in the private sector (Articles 7 and 8 of ETS 173)**

52. The Spanish Penal Code does not criminalise private corruption. Since there is no private bribery offence, the definition of "public official" has proven to be key to criminalise the broadest possible types of situation giving rise to a bribery offence; it would allow, for example, to punish bribery instances within undertakings which are strictly private, but which continue to be controlled by the State (e.g. Case No. 2052/2001). The safest punitive strategy with regard to private bribery is probably that represented by the offences of misappropriation/mismanagement, in cases where the employee (or the manager receiving the bribe) enters into a contract which harms the undertaking financially. In the civil-law field, private bribery is prohibited by the Law on Unfair Competition, which expressly prohibits "the inducement of workers, suppliers and other persons under contract to breach basic contractual duties that they have agreed to with competitors". Although the Law on Unfair Competition provides exclusively for instruments of a civil nature, the possibility would exist of imposing an administrative penalty (Article 7 of the Law for the Protection of Competition) in those cases where the unfair practice consisting in the payment of bribes was sufficient in scale to "seriously distort competition on the market" and if that distortion affected the "public interest".
53. The draft amendments to the Penal Code introduce the offence of bribery in the private sector with a view to complying with the EU requirements emanating from Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector.

### **Bribery of officials of international organisations (Article 9 of ETS 173)**

54. Active bribery of officials of international organisations is criminalised in Article 445 PC; passive bribery of these categories of officials is not criminalised in the Spanish Penal Code. The elements of the offence and the applicable sanctions detailed under bribery of foreign public officials apply accordingly to bribery of officials of international organisations. There are no court decisions/case law concerning bribery of officials of international organisations.

### **Bribery of members of international parliamentary assemblies (Article 10 of ETS 173)**

55. The Spanish Penal Code only criminalises active and passive bribery of members of the European Parliament, who are explicitly covered by the term "public authorities" according to Article 24(1) PC. Therefore, the elements of the offence and the applicable sanctions detailed under bribery of domestic public officials apply. There are no court decisions/case law involving members of the European Parliament.
56. Members of other international parliamentary assemblies are not covered by the relevant provisions of bribery.

### **Bribery of judges and officials of international courts (Article 11 of ETS 173)**

57. Bribery of judges and officials of international courts is not criminalised by the Spanish Penal Code, with the sole exception of bribery of officials of the International Criminal Court. In this connection, pursuant to Article 471bis of the Penal Code, active and passive bribery of officials of

the International Criminal Court is punished with imprisonment from 2 to 5 years and a fine of up to three times the value of the bribe.

### Trading in influence (Article 12 of ETS 173)

#### Definition of the offence

58. Trading in influence is covered in Articles 428 – 430, Chapter VI, Title XIX of the Penal Code. The relevant provisions on passive trading in influence (accepting or requesting an advantage to exert an improper influence) differentiate between two main types of conduct:

(1) the exertion of an improper influence. In this case the Penal Code establishes a distinction based on the public/private nature of the influence peddler (a) an authority or public official (Article 428 PC) and (b) a particular (Article 429 PC);

#### **Article 428, Penal Code: Exertion of improper influence by an authority/public official**

*The authority of public official that influences another authority of public official, by taking advantage of his/her post or of any other hierarchical or personal relationship with this person or with any other authority or public official so as to obtain a decision which may directly or indirectly generate an economic benefit for such himself/herself or for a third party, will be punished with a prison sentence of six months to one year, a fine of up to double the value of the said benefit, and specific disqualification from any public employment or post for a period of three to six years. When the benefit sought is in fact obtained the sanctions to be applied will be in the upper half of the scale.*

#### **Article 429, Penal Code: Exertion of improper influence by particular**

*The individual that influences an authority of public official taking advantage of his/her personal relationship with this person, or with any other authority or public official, so as to obtain a decision which may directly or indirectly generate an economic benefit for himself/herself or for a third party, will be punished with a prison sentence of six months to one year, a fine of up to double the value of the said benefit, and specific disqualification from any public employment or post for a period of three to six years. When the benefit sought is in fact obtained the sanctions to be applied will be in the upper half of the scale.*

(2) the request or acceptance of gifts/presents and any other type of remuneration in order to exert an improper influence (Article 430 PC).

#### **Article 430, Penal Code: Request/acceptance of gifts/presents/other types of remuneration to exert improper influence**

*Those that offer to carry out the actions described in the previous articles, requesting sops, gifts or any other remuneration, from third parties, or accept offers or promises, will be punished with a prison sentence of six months to one year.*

*In any of the cases that this article refers to, the judicial authority may also impose the suspension of activities of the society, company, organisation or office and the closure of its facilities open to the public for a period of six months to three years.*

59. Active trading in influence (i.e. the promising, giving or offering of an undue advantage to the influence peddler) is not criminalised as a principal offence.

## Elements of the offence

*"Asserts or confirms that s/he is able to exert an improper influence over the decision-making of [public officials]"*

60. This concept is not transposed as such, i.e. the influence peddler does not specifically have to assert or confirm that s/he is not able to exert an improper influence. In this connection, Spanish legislation punishes those instances where the influence peddler takes advantage (*"prevalimiento"*, i.e. in English: prevalent position) of his/her personal/hierarchical relationship with the public official so as to exert an improper influence over the decisions of the latter. The protected legal interests are the same as for in bribery offences: transparency and impartiality in the decision-making process of public administration.
61. For the offence of trading in influence to occur, it is not necessary that the influence is actually exerted and leads to the intended result, the mere assertion of the trader in influence that s/he could exercise such influence would be sufficient for the criminal offence to be committed.
62. More controversial are the cases of alleged influence. In this context, earlier decisions of the Supreme Court stressed the need for the influence to be real and effectively enable the influence peddler to have the power of intervention or improper influence on the decision-making process; otherwise, the perpetrator would be prosecuted for fraud (e.g. Case 8900/1992 of 4 December 1992). However, a more recent judgment of the Supreme Court confirms that cases of pretended influence would also be covered under the relevant provisions of trading in influence (Case 335/2006 of 24 March 2006).

## *Other concepts/elements*

63. The constitutive elements of bribery offences largely apply with regard to Articles 428-430 PC. In particular, intentionality is an implicit component of the various offences. The directly or indirectly nature of the intermediation is explicitly covered. The beneficiary of the undue advantage may be the influence peddler him or herself or a third party.
64. The relevant provisions of the Penal Code concerning trading in influence do not use the term "undue" to qualify the advantage. In this connection, it is understood that any "sop, gift or other type of remuneration" (Article 430 PC) or "any economic benefit" (Articles 428-429 PC), whether due or undue, may come under the scope of the offence if its purpose is to influence the decision-making process of public officials. The Supreme Court has interpreted in a recent judgement that the concept "other type of remuneration" goes beyond the economic nature of the benefit received. In particular, in Case 335/2006 of 24 March 2006, the benefit received by the influence peddler was a working contract for his wife. It appears nevertheless that, in accordance with the other bribery-based offences, it should be possible at the end to value the benefit in quantifiable pecuniary terms.

## Sanctions

65. The penalties established for passive trading in influence are *a)* imprisonment from six months to one year; *b)* a fine of up to double the value of the benefit; and *c)* specific disqualification from any public employment or post for a period of three to six years (this latter penalty does not apply in those cases where the influence peddler is a private person). The sanctions to be applied will be in the upper half of the scale when the intended benefit was indeed achieved.



## Court decisions

66. Several court decisions have clarified the provisions on trading in influence laid out in the Spanish Penal Code as illustrated above (e.g. Case 335/2006 of 24 March 2006, Case 480/2004 of 7 April 2004, etc.)
67. The annual reports of the Attorney General's Office indicate that, in 2006, preliminary investigations were carried out in connection with 24 cases concerning trading in influence (a 100% increase as compared to 2005 data); in 2007, 82 preliminary investigations had been initiated for trading in influence offences.

## **Bribery of domestic arbitrators (Article 1, paragraphs 1 and 2 and Articles 2 and 3 of ETS 191)**

68. Pursuant to Article 422 PC, domestic arbitrators are explicitly covered by the provisions on passive bribery covered by Articles 419 to 421 PC (unlawful official acts). The elements of the offence and the applicable sanctions detailed under bribery of domestic public officials apply accordingly.

**Article 422, Penal Code**

*The foregoing provisions [Articles 419, 420, 421 PC] will be equally applicable to jurors, arbitrators, experts, or any other person who takes part in the exercise of a public function.*

69. The provisions on passive bribery for lawful official acts (e.g. discretionary acts), i.e. Articles 425 and 426 PC are not applicable in respect of domestic arbitrators. Active bribery of arbitrators is punishable in so far this category of persons would be considered public officials exercising public functions in the context of Article 24 PC.
70. There has been one case of bribery of a domestic arbitrator leading to conviction, i.e. Case No. 1096/2006 of 16 November 2006 where a bankruptcy trustee, and his intermediary, were found guilty of a passive bribery offence (Article 420 PC: "unjust acts") for demanding and accepting an amount between 3,600 and 5,000 EUR. They were both sentenced to one year imprisonment, disqualification for a period of three years and a fine of 3,606 EUR. The individual charged with active bribery (Article 423 PC in relation to Article 420 PC) was sentenced to six months' imprisonment and a fine of 1,202 EUR.

## **Bribery of foreign arbitrators (Article 4 of ETS 191)**

71. Bribery of foreign arbitrators is not explicitly criminalised by the Spanish Penal Code. However, the authorities indicate that a *sensu contrario*, nothing prevents a wider interpretation of the concept of arbitrator so as to include foreign persons. This would, moreover, be possible pursuant to the notion of arbitrator developed by Law 60/2003 on Arbitration, which provides for both national and foreign persons to act as arbitrators.

## **Bribery of domestic jurors (Article 1, paragraph 3 and Article 5 of ETS 191)**

72. Pursuant to Article 422 PC, domestic jurors are explicitly covered by the provisions on passive bribery covered by Articles 419 to 421 PC (unlawful official acts). The elements of the offence and the applicable sanctions detailed under bribery of domestic public officials apply accordingly.

**Article 422, Penal Code**

*The foregoing provisions [Articles 419, 420, 421 PC] will be equally applicable to jurors, arbitrators, experts, or any other person who takes part in the exercise of a public function.*

73. The provisions on passive bribery for lawful official acts (e.g. discretionary acts), i.e. Articles 425 and 426 PC are not applicable in respect of domestic arbitrators. Active bribery of arbitrators is punishable in so far this category of persons would be considered public officials exercising public functions in the context of Article 24 PC.

74. There are no court decisions/case law involving domestic jurors.

#### **Bribery of foreign jurors (Article 6 of ETS 191)**

75. Bribery of foreign jurors is not criminalised by the Spanish Penal Code.

#### **Other questions**

##### **Participatory acts (Article 15 of ETS 173):**

76. According to Article 27 PC, principal offenders and accomplices are responsible for crimes and misdemeanours. Moreover, pursuant to Article 28 PC principal offenders include (a) those who abet directly or indirectly others to commit an offence, and (b) those who cooperate in the committing of an offence by performing an action, without which the crime could not have been perpetrated (Article 28 PC). Accomplices are those persons, who not being included in Article 28 PC, cooperate in the execution of a crime through previous or simultaneous actions (Article 29 PC)

77. Joint perpetrators are liable to the same sentences as perpetrators (Article 28 PC) while accomplices are liable to the sentence immediately below the one they would have received if they had been the perpetrators (Article 63 PC).

##### **Jurisdiction (Article 17 of ETS 173)**

78. The rules of Spanish jurisdiction are laid down in Title I of the Organic Act on the Judicial Power (Articles 21 to 25). In particular, Article 23 establishes jurisdiction over acts committed within the territory of Spain (principle of territoriality); although it is not specified whether offences need to be committed in full or in part in the Spanish territory, it is generally understood that territorial jurisdiction is established over offences that are committed both wholly or partially within the national territory.

79. Moreover, Spanish jurisdiction covers criminal acts committed abroad in which Spanish nationals (or foreign nationals who have acquired the Spanish nationality after the offence was committed) are either the offenders or the subjects of the offence (principle of nationality). Spanish jurisdiction also covers acts of Spanish nationals who are at the same time officials of an international organisation, members of an international parliamentary assembly or officials of an international court. Moreover, the authorities confirmed that Spanish jurisdiction applies to domestic public officials and members of domestic public assemblies who are not Spanish nationals, by virtue of their professional/functional link with the Spanish public administration. Finally, Spanish courts have also jurisdiction to know from criminal acts affecting Spain's national interests, regardless of whether they are committed by Spanish nationals or foreigners.

80. Dual criminality is required to establish jurisdiction in respect of acts committed abroad. Therefore, the perpetrator of a criminal offence maybe prosecuted insofar as his/her conduct constitutes a criminal offence in the country where the offence is committed (Article 23(2)a, Organic Act on the Judicial Power). However, pursuant to Article 23(4)i, Organic Act on the Judicial Power, universal

jurisdiction over acts committed outside the territory of Spain is possible if the punishability of the act arises from an international treaty ratified and promulgated by Spain.

### Extradition

81. In Spain, extradition is available for offences punishable by a deprivation of liberty of at least one year.

### Statute of limitations

82. The period of limitation depends on the maximum term on the sanctions which can be imposed for the offence in question as well as its "serious"/"less serious" character. In particular, a limitation period of ten years is provided for offences punishable by a maximum period of imprisonment/disqualification of more than five years and less than ten years. Offences that are punishable by a maximum term of imprisonment/disqualification of more than three years and less than five years have a limitation period of five years. All other "less serious offences" have a limitation period of three years (Article 131 PC).
83. The following table illustrates the applicable limitation periods for bribery and trading in influence included in the Penal Code:

Article PC	Offence	Imprisonment	Disqualification	Relative statute of limitation
<b>Bribery in the public sector</b>				
Art. 419	Official act constitutes crime	2 - 6 yrs	7 - 12 yrs	15 yrs
Art. 420	Official act is "unjust act"			
	- executed	1 - 4 yrs	6 - 9 yrs	10 yrs
	- not executed	1 - 2 yrs	3 - 6 yrs	10 yrs
Art. 421	Refrain from performing a required official act	No	1 - 3 yrs	3 yrs
Art. 425	Official act inherent to duties (bribe solicited or accepted <u>before/after</u> performance official act)			
	(1) does not constitute crime	No	6 months - 3yrs	3 yrs
	(2) constitutes crime	1 - 3 yrs	10 -15 yrs	15 yrs
Art. 426	Bribe offered in consideration of official position or in order to perform act not forbidden by law	No	No	3 yrs
<b>Trading in influence</b>				
Art. 428	Exertion of improper influence by public official	6 months - 1 yr	3 - 6 yrs	10 yrs
Art. 429	Exertion of improper influence by individuals			
Art. 430	Request/acceptance of advantage to exert improper influence		6 months - 3 yrs	3 yrs

84. These periods are presumed to run from the time of the commission of the offence. In the case of a "continuous" offence the period is calculated from the date on which the last offence took place, and in the case of a "permanent" offence it is calculated from the date on which the illegal activity ceased (Article 132(1) PC). The limitation period is interrupted where the criminal proceedings are initiated, and the term begins to run anew when the proceedings are stayed or conclude without a conviction (Article 132(2) PC).

## Defences

85. A person who has committed active bribery may seek recourse to a defence of effective regret. To this end, Article 427 PC provides:

### **Article 427, Penal Code**

*The individual who consents occasionally to a request for a gift or present from an authority or public official, and who reports this fact to that authority which has the duty to make enquiries, before the commencement of any corresponding procedure, will be exempt from punishment, provided that no more than ten days passed since the date of the facts.*

86. This defence is only possible when (1) the bribe was solicited; (2) the bribe-giver voluntarily reports the fact to the responsible investigative authority; (3) the report is made within ten days of the date of the facts. If the effective regret defence is successfully invoked, the offender will be exempted from punishment.

## **III. ANALYSIS**

87. Spain is one of the few GRECO members which have not ratified the Criminal Law Convention on Corruption (ETS 173) (hereafter: the Convention). With respect to the Additional Protocol thereto (ETS 191), this has not been signed nor ratified by Spain. Nevertheless, Spain, like any other member of GRECO, is subject to peer review according to the standards of the Convention and its Additional Protocol which are under examination in the Third Evaluation Round (for details see paragraph 2). The GET notes that Spain was one of the founding members of GRECO; however, it only signed the Convention on 10 May 2005. The GET further notes that Spain ratified, on 19 June 2006, the United Nations Convention against Corruption (UNCAC), which – regarding the corruption offences – covers very much the same ground and is inspired by the same underlying philosophy as the Council of Europe Convention. As the GET explored the outstanding issue of ratification of the Convention, as well as the signature and subsequent ratification of its Additional Protocol, the authorities expressed their intention to become a Party to these instruments, but a clear time frame for doing so was not indicated. The GET recommends **to proceed swiftly with the ratification of the Criminal Law Convention on Corruption (ETS 173) as well as the signature and ratification of its Additional Protocol (ETS 191)**. In this context, attention is drawn to the formal Appeal by the Committee of Ministers to States, made at its 103rd Ministerial Session on the occasion of the adoption of the text of the Criminal Law Convention on Corruption (4 November 1998), to limit as far as possible the reservations that they declare pursuant to the Convention, when expressing their consent to be bound by the Convention. On the same occasion the Committee of Ministers appealed to States “which nevertheless find themselves obliged to declare reservations, to use their best endeavours to withdraw them as soon as possible.” The recommendations contained in paragraphs 93, 94, 95, 96 and 98 of this report are without prejudice to the right of Spain to enter declarations and reservations pursuant to Article 37 of the Convention.
88. In Spain, the legislative framework providing for the incrimination of corruption offences suffers from a number of important shortcomings, the details of which will be examined below. Moreover, despite the various revisions of the relevant provisions in the Penal Code concerning corruption offences and despite considerable improvements – reported by both governmental and non-governmental sources – with regard, for example, to the establishment of the Special Prosecution Office against Corruption and Organised Crime (and its corresponding sub-national units), it would appear that corruption still remains a noticeable problem, especially at local level (e.g. urban

planning, licensing), and that further efforts are needed to reduce its occurrence significantly. That said, a non-negligible number of corruption cases have been prosecuted in Spain in the last two decades on the basis of the existing Penal Code; not only have practitioners acquired significant expertise in this type of cases, but they have also greatly added to the interpretation of the criminal provisions in force in a broad and pragmatic manner. The subsequent role of the Supreme Court to further expand and consolidate a flexible interpretation of the existing corruption-related provisions (which in many instances goes beyond their strict literal wording) has enabled extensive jurisprudence to emerge in this area. In this connection, the GET wishes to acknowledge the valuable explanatory contribution provided by the practitioners met during the evaluation visit, who clearly demonstrated their in-depth understanding of the relevant criminal provisions on corruption – and the related jurisprudence – on the basis of their practical experience of prosecuting and adjudicating this category of offences.

89. Furthermore, the Penal Code is subject to ongoing review, which involves a number of changes with a major impact on corruption-provisions. The GET was advised that these changes have been proposed to, *inter alia*, align domestic legislation with European/international requirements in the anti-corruption arena. At the time of the on-site visit, the GET was made aware, in general terms, of certain developments that were expected to happen in the context of the envisaged reform of the Penal Code. The authorities provided the GET, after the visit, with the relevant text of the draft amendments, which have been outlined in the descriptive part of this report and which appear to go in the right direction. However, as these amendments have not as yet been approved by Parliament, the present report can only be based on the legislation in force at the time of the report's adoption. The GET is confident that the issues raised in this report will be taken into account by the authorities and be promptly reflected in the ongoing reform of the Penal Code.
90. Concerning the category of persons covered by bribery/trading in influence offences, it was repeatedly stressed during the on-site visit that the concept of "public official/authority" which is defined in Article 24 of the Penal Code (PC) is extremely wide and flexible. The term "authority" in Article 24(1) PC refers to members of a corporation, court or any other collegiate body exercising "jurisdiction" (i.e. official powers of decision-making); the definition encompasses members of domestic public assemblies (whether exercising legislative or administrative powers), as well as holders of judicial office (including prosecutors). It was explained to the GET, on the basis of numerous examples developed by case law, that the notion of "public official" defined in Article 24(2) PC would comprise any person who performs public functions whether at State, Autonomous Community or local level. Unlike in other areas of the legal order, the criminal law concept of public official does not require incorporation or permanence in public service, but rather "participation in public life" to which access must be gained in any of the three manners prescribed by law, i.e. by immediate provision of the law, by election or by appointment. The authorities highlighted that the courts have been interpreting the term "public official" in a very broad manner since they have taken the view that what is important in corruption offences is to afford effective protection to public office, as well as to the interests of public administration in its different facets and modes of operation; for this reason, numerous categories of persons would come under the provisions relating to bribery in the public sector, including, for example, examiners of driving tests, doctors fulfilling public duties, employees of companies operating public services under a concession, employees of public enterprises, etc. The GET welcomes the flexible approach taken and concludes that the concept of public official/authority – as understood in criminal legislation and relevant jurisprudence – is in line with Article 1(a) and (b) (public official) and Article 4 (members of domestic public assemblies) of the Convention.
91. The definition of the relevant offences concerning bribery in the public sector at domestic level is contained in Articles 419, 420, 421, 425 and 426 PC dealing with passive bribery and Article 423

PC concerning active bribery. With respect to passive bribery, there are five central provisions based on the different types of expected actions/omissions of the public official concerned and their lawful or unlawful nature. If the public official performs an act which is against the law or omits to perform an act that s/he is to do in the exercise of the his/her duties, the offence is to be punished according to Articles 419, 420 or 421 PC ("*cohecho propio*"). If the official accepts the bribe to perform an act which is not legally prohibited, Articles 425 or 426 PC would apply ("*cohecho impropio*"). The basic comprehensive definition of the bribery offence is contained in Articles 419 (criminal act) and 420/421 PC (unjust act/unjust omission) on passive bribery in return for an unlawful act, which incorporate the different material components required by the Convention, i.e. criminalisation of the request or receipt, acceptance of an offer or promise, direct or indirect commission, beneficiaries (including third parties), intent, corrupt acts/omissions performed in the exercise of official duties. The GET was informed that all other bribery provisions, and in particular, their constitutive elements (which are sometimes missing on paper) are to be understood on the light of Articles 419 and 420 PC; the authorities provided supporting jurisprudence confirming this *in extenso* interpretation. The GET noted that the Spanish PC goes beyond the requirements of the Convention since it also criminalises the reception of a benefit after the act has been performed by the public official, without prior offer, request or acceptance, i.e. so-called bribery *a posteriori* ("*cohecho subsiguiente*"). With respect to active bribery, the GET notes that there is no self-determining definition of active bribery in the Spanish Penal Code: the active bribery offence under Article 423 PC is designed as a "mirror offence" based on the corresponding passive bribery provisions. This, in turn, has generated significant discrepancies in interpretation. Much debate has emerged, for example, as to whether Article 423 PC would also cover instances where the bribe is offered to the official for acts not involving a breach of duty, as laid out in Articles 425 and 426 PC; legal doctrine and practitioners have traditionally been divided in this respect. The issue appears to have been settled through a number of Supreme Court decisions confirming the applicability of Article 423 PC (and consequently of Article 445 PC on active bribery of foreign public officials in the context of international business transactions which refers to Article 423 PC), not only to all the conduct referred to in Articles 419-421 PC (unlawful official acts; "*cohecho propio*"), but also those of Articles 425 and 426 PC (lawful official acts, e.g. acts of discretion; "*cohecho impropio*"). A large number of interlocutors suggested that the provisions on bribery could be restructured and reworded to create a simpler and more coherent framework; the draft amendments to the Penal Code go in this direction by classifying passive bribery offences into three provisions dealing with unlawful official acts, lawful official acts and situations in which the bribe is accepted on the basis of the public official's position, and by providing for autonomous offences (fully spelling out the different constitutive elements of the offence) in all cases. The GET can only encourage the authorities to proceed with their reported plans to simplify the classification of bribery offences and to harmonise their wording as such a move would further assist to enhance legal certainty vis-à-vis practitioners and the public at large.

92. Concerning the undue advantage, the relevant bribery provisions refer to the terms "gift or present", whether due or undue, in so far as their acceptance has a bearing on the future/past conduct of the public official. As far as the material/immaterial nature of the advantage is concerned, the GET was confronted with contradictory views during the evaluation visit. Although the concept of advantage ("*gift or present*") which appears in the bribery provisions does not literally exclude immaterial advantages, the determination of the sanction – when this consists of a fine – is based on quantifiable economic terms. While some practitioners considered that this issue could be further developed through court interpretation, others (including academia) were of the opinion that non-pecuniary benefits would not be covered. The GET tested numerous examples of immaterial/intangible advantages, e.g. sexual favours, honorific titles, membership of clubs or closed social networks, horizontal transfers of posts in an organisation, etc., but it could not obtain an unequivocal response confirming that all such advantages would indeed be covered

by the relevant bribery provisions. Some examples were provided after the on-site visit concerning adjudicated bribery offences where the bribe consisted of sexual favours. In order to clarify the matter, the proposed amendments to the Penal Code introduce a broader definition of the notion of advantage ("*gift, favour or reward of any nature*"); likewise, the incorporation of a system of monthly fines in the draft eliminates any reference to a purely economic assessment of the bribe. The GET welcomes this approach and consequently recommends **to clarify beyond doubt that immaterial advantages are covered by the relevant bribery provisions in the Penal Code.**

93. As regards the international dimension of bribery, bribery of foreign public officials and officials of international organisations is criminalised under a specific provision, i.e. Article 445 PC. However, this provision is restricted to active bribery (therefore, under Spanish law it is not possible to prosecute offences of passive bribery of foreign public officials and officials of international organisations), and to the extent to which these are committed in the context of international business transactions; this is certainly not in line with the Convention whose scope is much broader. In this connection, although it is likely that a number of cross-border corruption cases involve business transactions, there are situations where this offence would not apply (for example, bribing of a member of a foreign traffic police force in order to avoid the payment of a fine). Moreover, it was not clear to the GET which categories of foreign public officials would be covered by Article 445 PC, since the authorities signalled that the definition of public official as contained in Article 24 PC could not be used in this respect. Some interlocutors suggested that the definition of foreign public official is to be developed through judicial interpretation. Other interlocutors argued that Article 4(a) of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions would be directly applicable. Until now, there has been no case law/jurisprudence that would support these points of view. To improve the current uncertainty of terms, the proposed amendments to the Penal Code incorporate a *verbatim* transposition of the definition of foreign public official used in the OECD Convention (and would therefore cover any person holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected; any person exercising a public function for a foreign country, including for a public agency or public enterprise; and any official or agent of a public international organisation). Finally, members of foreign public assemblies are not covered by the relevant bribery provisions of the Penal Code. The same gap exists with respect to bribery of members of international parliamentary assemblies – other than members of the European Parliament who are explicitly covered by bribery provisions, and judges and officials of international courts – with the sole exception of those serving in the International Criminal Court who would be punishable for bribery offences according to Article 471bis of the Penal Code. Based on the aforementioned findings, the GET recommends **to (i) clarify the notion of foreign public official; (ii) enlarge the scope of Article 445 PC concerning active bribery of foreign officials and officials of international organisations beyond situations involving international business transactions; (iii) criminalise passive bribery of foreign officials and officials of international organisations; and (iv) ensure that bribery of members of foreign public assemblies, international parliamentary assemblies (other than members of the European Parliament), as well as judges and officials of international courts (other than those serving in the International Criminal Court) is criminalised.**
94. Turning to bribery of domestic jurors and arbitrators, these categories of persons are covered under Article 422 PC which specifically refers to Articles 419, 420 and 421 PC on passive bribery for unlawful official acts. Therefore, Article 422 PC does not cover situations in which these categories of persons are bribed in order to commit acts in the exercise of their functions, which do not entail a breach of duty (e.g. discretionary acts), as established in Articles 425 and 426 PC. Moreover, active bribery of jurors and arbitrators would also fall outside the scope of Article 422 PC (since Article 423 PC is not explicitly referred to in the list of applicable offences

under Article 422 PC). Some interlocutors argued that the relevant provision on active and passive bribery of public officials would be fully applicable to jurors and arbitrators in so far as they are considered to be public officials exercising public functions. The GET finds it difficult to accept this reasoning, especially since it would appear that the Spanish legislator has opted to regulate bribery of jurors and arbitrators through a specific separate provision in the PC (Article 422). The GET further notes that even if admitting such reasoning, Spanish legislation would not cover the full scope of the Convention as it would, for instance, leave outside the ambit of application of bribery provisions arbitrators acting on the basis of an arbitration agreement between private persons (commercial arbitration). Contradictory views were expressed regarding the latter issue: the authorities initially indicated that bribery of domestic jurors and arbitrators is criminalised if committed in the exercise of public functions, but not when they are only collaborating in the exercise of such functions or when they are just acting within the field of private relations; the authorities subsequently argued that even cases of commercial arbitration would be covered. For the sake of legal certainty, the GET considers it appropriate to provide explicitly for the criminalisation of active bribery of domestic jurors and arbitrators. Furthermore, bribery of foreign jurors and arbitrators is not covered specifically. However, some interlocutors indicated that nothing would prevent a wider interpretation of the concept of arbitrators/jurors in Article 422 PC so as to include foreign persons. They further added that, in the case of arbitrators, such an interpretation would be possible pursuant to the definition of arbitrator included in Law 60/2003 on Arbitration which provides for both national and foreign persons to act as arbitrators. These views were not unanimously shared by the different representatives interviewed by the GET during the evaluation visit and there was no jurisprudence which could bring greater light to the issue. For this reason, the GET remains unconvinced that it would be possible, under the current legislative framework, to charge these categories of persons with bribery. Moreover, the GET notes that with respect to the specification made by the authorities concerning foreign arbitrators, these would only be covered to the extent that they apply Spanish law. In view of the above, the GET recommends to **(i) review Article 422 (bribery of jurors and arbitrators) of the Penal Code to ensure that the criminalisation of bribery of jurors and arbitrators is in line with the Additional Protocol to the Criminal Law Convention on Corruption (ETS 191); and (ii) criminalise bribery of foreign arbitrators and jurors.** This would certainly facilitate the ratification of the Additional Protocol to the Criminal Law Convention on Corruption (ETS 191), as recommended in paragraph 87.

95. Bribery in the private sector is not criminalised in Spain. In the view of the GET, criminalising private sector bribery in accordance with Articles 7 and 8 of the Convention is essential as public and private functions seem to be, to an increasing degree, intertwined with each other and the distinction between the sectors is becoming more and more blurred. In this connection, the GET acknowledges the fact, which was repeatedly stressed by the authorities, that in Spain the notion of public officials is of such a broad nature that it covers a very large number of persons who in other countries would be considered as belonging to the private sector sphere. That said, criminalisation of bribery in the private sector remains crucial especially since this form of corruption may cause significant damage to society at large given the value of the sums (and potential bribes) often involved in business transactions. Furthermore, the GET notes that the draft amendments to the Penal Code introduce the offence of bribery in the private sector with a view to complying with the EU requirements emanating from Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector. The GET welcomes the intention of the authorities to regulate this area and therefore recommends **to criminalise bribery in the private sector in accordance with Articles 7 and 8 of the Criminal Law Convention on Corruption (ETS 173).**



96. Trading in influence is criminalised in Articles 428, 429 and 430 PC. While recognising the strong features of the Spanish system, as developed by jurisprudence, with respect to trading in influence (e.g. possibility to punish even in those cases where the influence is not exerted, coverage of both real and alleged influence), the GET identified three shortcomings. Firstly, all interlocutors concurred that although the concept of “undue advantage” is described in broader terms than in connection with bribery offences (i.e. the trading in influence provisions refer to “*sop, gift or other type of remuneration*”), it is generally understood as any benefit (whether due or undue) of an economic nature or at least, which could be quantifiable in economic terms; doubt was nevertheless cast as to whether immaterial advantages would be covered. Some examples were provided, after the on-site visit, concerning court decisions where the benefit consisted of a certain type of immaterial advantage, i.e. sexual favours. Secondly, the GET noted that while the Spanish penal system criminalises passive trading in influence, it does not mention instances of active trading in influence. In this connection, it would appear that the relevant trading in influence provisions in the PC are geared towards punishing the exertion of influence, rather than the trading in influence itself. In particular, the promising, giving or offering of an undue advantage to the influence peddler is not criminalised as a principal offence. The authorities explained that, in principle, it would be possible to punish any individual who promises, gives or offers an undue advantage as an instigator, according to the general rules on participation contained in Article 28 PC. The GET noted, however, that no case was cited to demonstrate the prosecution of an active trading in influence offence in the latter instance; in this respect, the GET is of the opinion that the Spanish system would benefit, in terms of legal certainty, if active trading in influence were to be criminalised as a principal offence. Thirdly, the relevant trading in influence provisions are not applicable to foreign public officials, members of foreign public assemblies, officials of international organisations, members of international parliamentary assemblies, and judges and officials of international courts. In the light of the shortcomings identified with respect to trading in influence, the GET recommends to **(i) criminalise active trading in influence as a principal offence; (ii) criminalise trading in influence in relation to foreign public officials, members of foreign public assemblies, officials of international organisations, members of international parliamentary assemblies and judges and officials of international courts; and (iii) clarify beyond doubt that immaterial advantages are covered by the relevant trading in influence provisions in the Penal Code.**
97. In Spain, the types of sanctions for bribery/trading in influence offences include: imprisonment, fines and disqualification; the PC provides for their cumulative application. The severity of the penalties available for bribery in the public sector depends on the unlawful/lawful nature of the act of the public official bribed. The maximum sanction applicable for a bribery offence is six years’ imprisonment when the expected action/omission of the official constitutes a crime (Article 419 PC); when the expected action of the official constitutes an “unjust act”, the maximum imprisonment sanction is four years’ imprisonment (Article 420 PC). The GET noted, nevertheless, that Articles 421 (omission of acts inherent to the public official’s duties), 425(1) (performance of acts inherent to the public official’s duties) and 426 PC (bribe offered in consideration of the public official’s position or in order for the public official to fulfil a lawful act) do not carry sanctions of imprisonment. Breaches of the latter provisions are only subject to sanctions consisting of fines and professional disqualification. As regards Article 421 PC, in particular, it is questionable whether refraining from performing a required official act is indeed less punishable than not executing an official act under Article 420 PC. The damaging effects of the criminal acts might well be similar in these different circumstances. The GET finds it difficult to understand why the legislator has chosen this solution. More generally, the absence of the possibility to sanction the conduct referred to in Articles 421, 425(1) and 426 PC with imprisonment, makes extradition impossible since, in Spain, extradition is only available for offences punishable by a deprivation of liberty of at least one year. The GET recalls that Article 19 of the Convention involves the

obligation to attach to the commission of bribery/trading in influence offences by natural persons penalties of imprisonment of a certain duration which can give rise to extradition. It should be mentioned that the draft amendments to the Penal Code propose an increase in the minimum imprisonment sentences applicable to bribery offences, i.e. three years' imprisonment for unlawful official acts (instead of two) and two years' imprisonment for lawful official acts (instead of one or none); this would make extradition possible in respect of all bribery offences. With respect to the available imprisonment sanctions for trading in influence, these range from six months to one year. The GET notes that the level of sanctions for trading in influence is lower than those for other comparable offences under Spanish criminal law (cf. bribery in the public sector for unlawful acts, fraud, misappropriation of public funds, see paragraphs 30 and 33 for details); this may well lead to the presumption that trading in influence is a less serious offence, contrary to the intention of the drafters of the Convention. For this reason, the GET has serious doubts as to whether the sanctions for trading in influence can be regarded as effective, proportionate and dissuasive in the meaning of the Convention. In the light of the foregoing, the GET recommends to **(i) increase the sanctions for the bribery offences under Articles 421 (omission of acts inherent to the public official's duties), 425(1) (performance of acts inherent to the public official's duties and 426 PC (bribe offered in consideration of the public official's position or in order for the public official to fulfil a lawful act) in order to ensure that these offences can give rise to extradition and (ii) increase the sanctions for trading in influence.**

98. The jurisdictional principles of territoriality and nationality apply to all bribery and trading in influence offences, but Article 23(2)a of the Organic Act on the Judicial Power requires dual criminality for offences committed abroad by (or involving) Spanish nationals. This means that, in these cases, prosecution would only be possible if the act were punishable in the foreign State as well, which would involve a clear restriction as compared to the requirements under Article 17, paragraph 1, littera b) of the Convention. That said, Article 23(4)i of the Organic Act on the Judicial Power provides for the abolition of the dual criminality requirement for all international treaties ratified and promulgated by Spain. The GET recommends **to abolish the requirement of dual criminality with respect to offences of bribery and trading in influence committed abroad.** As indicated above, compliance with this recommendation would be automatic once the Criminal Law Convention on Corruption (ETS 173) and its Additional Protocol (ETS 191) are ratified, in line with recommendation i (paragraph 87).
99. Finally, the GET is concerned about the possible effects of the special defence of effective regret contained in Article 427 PC which exempts the bribe giver from punishment in cases of active bribery in the public sector if (1) the bribe was solicited; (2) the bribe-giver voluntarily reports the fact to the responsible investigative authority; and (3) the report is made within ten days of the date of the facts. The GET explored with the interlocutors interviewed both the advantages of the provisions on effective regret (detection of bribery cases) and the potential risks of misuse (e.g. blackmailing the bribed persons, abuse of a false defence). It was indicated to the GET that, in practice and until now, this provision has been of little relevance as a means of uncovering acts of corruption. It was explained that Article 427 was introduced in the PC in 1995 as a tool to bring forward complaints; however, the authorities were of the opinion that a much more useful and reliable source of information on acts of corruption is information provided by public officials themselves. According to the interlocutors met, the provision has only been used once since it was introduced in 1995 (Judgement of the High Court of Madrid of 29 November 2006 confirming the Judgment of the Provincial Court of Madrid of 2 March 2006 which provides interpretative guidelines as to what is to be considered a "responsible investigative authority" and the possible reporting channels). Furthermore, some interlocutors suggested that Article 21(6) PC, which provides a legal basis for taking into account confessions and reparation of damages for giving reduced sentences, was a more practical way forward. In the GET's view, Article 427 PC goes too

far in exempting the informant from punishment. In principle, very serious cases of active corruption could go totally unpunished by reference to this article. There is a danger that the provision might lead to unreasonable results, since the offender (active briber) in fact has an undisputable legal right to be exempted from punishment if the – very strict and formal – requirements are fulfilled; in this connection, the GET is concerned about the automatic nature of this defence. Moreover, Article 427 PC is reportedly very difficult to apply in practice. One of the reasons for this is the absolute requirement that the information has to be given within ten days from the occurrence of the act. From the discussions held during the on-site visit, including those of the practitioners who are to apply the law, it was not made unambiguously clear to the GET what would be the added value in the fight against corruption of Article 427 PC in its present form. The GET therefore recommends **to keep the application of Article 427 PC on effective regret under review in order to ascertain the potential use and misuse of this defence in the investigation and prosecution of corruption and, if need be, to take appropriate measures.**

#### IV. CONCLUSIONS

100. Spain has not ratified the Criminal Law Convention on Corruption (ETS 173), nor has it signed/ratified the Additional Protocol to the Criminal Law Convention on Corruption (ETS 191). This remains a pressing need, in order to ensure a coordinated criminalisation of national and international corruption, as prescribed by Resolution (97) 24 of the Committee of Ministers of the Council of Europe on the Guiding Principles for the Fight against Corruption (Guiding Principle 2).
101. The incrimination of bribery and trading in influence in the Spanish Penal Code suffers from several substantial inconsistencies and deficiencies as compared to the standards established by the Criminal Law Convention on Corruption (ETS 173) and its Additional Protocol (ETS 191). With respect to bribery in the public sector, the complex legal framework is particularly deficient with respect to its international dimension. Likewise, shortcomings exist in relation to the trading in influence provisions, for example, under the current rules, active trading in influence is not criminalised as a principal offence. Bribery in the private sector is not criminalised at all; this is an important lacuna since this form of corruption may cause significant damage to society at large given the value of the sums (and potential bribes) involved in business transactions. Moreover, the available sanctions for bribery and trading in influence need to be raised to allow for extradition. Finally, the possibility provided by the special defence of effective regret to exempt the bribe-giver, who, if solicited by the public official, declares the offence before it is uncovered, needs to be reviewed to assess its potential for use and abuse.
102. In the last years, despite the various amendments to the relevant provisions in the Penal Code concerning corruption offences which have been introduced over the years and despite major improvements with regard to the establishment of the Special Prosecution Office against Corruption and Organised Crime (and its corresponding sub-national units), it would appear that corruption still remains a noticeable problem, especially at local level, and that further efforts are needed to significantly reduce its occurrence. That said, a notable number of corruption cases have been prosecuted in Spain; this has been possible, to a large extent, through the proactive attitude of prosecutors and judges alike who have acquired extensive expertise in prosecuting and adjudicating this category of offence and have assisted in developing far-reaching jurisprudence in this area. In this particular context and on the basis of the experience gained by practitioners in dealing with corruption offences, the ongoing reform of the Penal Code, which includes amendments to corruption-related provisions, is very much needed; the present report and its recommendations should be seen as a timely contribution to this reform process.

103. In view of the above, GRECO addresses the following recommendations to Spain:
- i. to proceed swiftly with the ratification of the Criminal Law Convention on Corruption (ETS 173) as well as the signature and ratification of its Additional Protocol (ETS 191) (paragraph 87);
  - ii. to clarify beyond doubt that immaterial advantages are covered by the relevant bribery provisions in the Penal Code (paragraph 92);
  - iii. to (i) clarify the notion of foreign public official; (ii) enlarge the scope of Article 445 PC concerning active bribery of foreign officials and officials of international organisations beyond situations involving international business transactions; (iii) criminalise passive bribery of foreign officials and officials of international organisations; and (iv) ensure that bribery of members of foreign public assemblies, international parliamentary assemblies (other than members of the European Parliament), as well as judges and officials of international courts (other than those serving in the International Criminal Court) is criminalised (paragraph 93);
  - iv. to (i) review Article 422 (bribery of jurors and arbitrators) of the Penal Code to ensure that the criminalisation of bribery of jurors and arbitrators is in line with the Additional Protocol to the Criminal Law Convention on Corruption (ETS 191); and (ii) criminalise bribery of foreign arbitrators and jurors (paragraph 94);
  - v. to criminalise bribery in the private sector in accordance with Articles 7 and 8 of the Criminal Law Convention on Corruption (ETS 173) (paragraph 95);
  - vi. to (i) criminalise active trading in influence as a principal offence; (ii) criminalise trading in influence in relation to foreign public officials, members of foreign public assemblies, officials of international organisations, members of international parliamentary assemblies and judges and officials of international courts; and (iii) clarify beyond doubt that immaterial advantages are covered by the relevant trading in influence provisions in the Penal Code (paragraph 96);
  - vii. to (i) increase the sanctions for the bribery offences under Articles 421 (omission of acts inherent to the public official's duties), 425(1) (performance of acts inherent to the public official's duties and 426 PC (bribe offered in consideration of the public official's position or in order for the public official to fulfil a lawful act) in order to ensure that these offences can give rise to extradition and (ii) increase the sanctions for trading in influence (paragraph 97);
  - viii. to abolish the requirement of dual criminality with respect to offences of bribery and trading in influence committed abroad (paragraph 98);
  - ix. to keep the application of Article 427 PC on effective regret under review in order to ascertain the potential use and misuse of this defence in the investigation and prosecution of corruption and, if need be, to take appropriate measures (paragraph 99).
104. In conformity with Rule 30.2 of the Rules of Procedure, GRECO invites the authorities of Spain to present a report on the implementation of the above-mentioned recommendations by 30 November 2010.

105. Finally, GRECO invites the authorities of Spain to authorise, as soon as possible, the publication of the report, to translate the report into the national language and to make this translation public.