

27 May 2011

English only

Implementation Review Group

Second session

Vienna, 30 May-3 June 2011

Item 2 of the provisional agenda

Executive summary: Spain

Legal system

According to the Spanish Constitution treaties ratified by Spain are part of the domestic law and can therefore be applied directly. Spain has a civil law system with a mixed accusatory criminal process. The general rules on criminal law are contained in the Penal Code (Organic Law 10/1995, 23 November) and the Criminal Procedure Code (Royal Decree of 14 September 1882).

Spain signed the United Nations Convention against Corruption (UNCAC) on 16 September 2005 and ratified it by instrument of ratification on 9 June 2006, published in the Official Bulletin on 19 June 2006.

Overall findings

Spain has undergone legal reforms to strengthen its anti-corruption regime. The Criminal Procedure Code has undergone a major reform through Law 38/2002. The Penal Code was amended by Organic Law 5/2010, 22 June, which entered into force on 23 December 2010, with amendments to the corruption offences. In this area the reforms have adapted the Spanish system to the requirements of the EU, OECD, and GRECO.

While Spain can apply UNCAC directly, the practical use of the Convention is limited due to the primary use of European Union instruments and bilateral treaties by Spain, especially in the area of international cooperation.

Criminalisation and Law Enforcement

Criminalisation

All UNCAC offences are criminalised in the Penal Code. The concept of a public official is established for criminal purposes in article 24.2 of the Penal Code. Based on this provision and case law, the concept of “public official” is broadly defined.

Active bribery of a national official is criminalized in article 424 of the Spanish Penal Code. The article explicitly covers a number of the required elements of active bribery, with the exception of indirect bribery through intermediaries. However, case law shows that this is covered through the definition of a “principal” in article 28 of the Penal Code (“principals are those who carry out the act by themselves or by means of another person whom they use as an instrument”).

Further, the concept of “promise” is not explicitly covered; however, cases of a “promise” can be covered by article 424 under the element of “offer”.

According to Spanish legislation, active bribery can only be committed by private persons (natural or legal). In the case of bribery of public officials, the offences of trading in influence (article 428) or abuse of authority (article 404) are applied. However, trading in influence does not specifically criminalize the provision of an undue advantage, and it requires the intention to generate an economic benefit, which is not foreseen by article 15 of UNCAC. Abuse of office requires a substantive decision of the official, which is also not required by UNCAC. Therefore some cases of bribery by public officials are not regulated by the current provisions of the Penal Code.

Passive bribery of domestic public officials is regulated in the new articles 419 to 422 of the Penal Code.

Article 445 of the Penal Code foresees active bribery of foreign public officials and officials of public international organizations as a stand-alone offence. The recent reform of the Penal Code also explicitly provides for the criminal liability of legal persons for certain crimes, including corruption of foreign public officials. The passive bribery of foreign public officials and officials of public international organizations is covered by a direct application of the broadened definition used in article 445 (article 445.3) to the general provision of passive bribery (article 419 and 420).

Misappropriation and embezzlement are addressed in articles 432 to 435 of the Penal Code.

With regard to active trading in influence (428 and 429 of the Penal Code), Spanish legislation does not require the promise, offer or giving of an undue advantage, and hence in this sense Spanish legislation is broader than article 18 (a) of UNCAC. However, Spanish legislation requires that the conduct is carried out for the purpose of economic benefit, while UNCAC does not require this mental element.

Passive trading in influence is covered by article 430 of the Penal Code.

Spain criminalized the abuse of office in article 404 of its Penal Code.

Among the non-mandatory offences contained in UNCAC, illicit enrichment has not been established as a stand alone offence in Spain, as it is considered to be inconsistent with the presumption of innocence contained in article 24 of the Spanish Constitution and its interpretation by the Constitutional Court. For the establishment of criminal responsibility it must be proven that the increase in the assets of the public official has been caused through any of the conducts included in the list of offences regulated in the Penal Code.

Spanish legislation limits bribery in the private sector to a breach of obligations “in the purchase or sale of goods or contracting of professional services.” However, other cases of bribery in the private sector could possibly fall under other provisions of the Penal Code, such as corporate crimes, some offences relating to the market and consumers (such as the discovery or disclosure of commercial secrets) or alteration of free market prices resulting from violence, threat or deception, or fraud.

The embezzlement of property in the private sector constitutes either an offence of misappropriation under article 252, or an offence of unfair administration under article 295 of the Penal Code.

With regard to laundering of proceeds of crime, Spain opted for an ‘all crime approach’. Money laundering is a stand alone offence, hence there is no requirement for a conviction for the predicate offence. Concealment is criminalised in the Spanish Penal Code (article 301) with regards to all criminal activities. Furthermore, when referred to the offences covered by the Convention, aggravated modalities are established.

Obstruction of justice is not specifically criminalized as in article 25 of the UNCAC, but all elements required in this article are covered by the relevant Spanish legislation (articles 464 and 550 to 552 of the Penal Code).

Spain has civil, administrative and in some cases also penal responsibility of legal persons. Organic Law 5/2010 of June 22, reforming the Penal Code, introduces criminal liability of legal persons for the following offences under the Convention: money laundering (article 302), bribery (article 427), trading in influence (article 430), corruption of foreign official (article 445) and criminal organizations or groups (article 570 quarter). Criminal liability is accompanied by joint civil liability for damages caused by the principal. The scope of application of the criminal responsibility of legal persons in the public sector is narrowed by an exception for public entities, including publicly owned companies.

Spain has a minimum period for the statute of limitations for the offences established pursuant to the Convention of 5 years, in some cases for 10 years. While 10 years is a sufficiently long time; the appropriateness of a 5 years statute of

limitation depends on the possibility of prolongation/suspension of the statute of limitation, and the practical application. Spain does not have any regulation that provides for a longer period or interruption of the statute of limitations when the alleged offender has evaded the administration of justice. In the Spanish legal system, contempt does not interrupt the statute of limitations or extend it.

While noting Spain's high level of compliance with UNCAC in the criminalisation area, the reviewers identified some scope for improvement as follows:

- Ensure that cases of "promise" are covered under the concept of "offer" by amendment of the relevant legislation or by judiciary.
- Consider amending relevant legislation to provide clarity with regard to a specific regulation of active bribery by public officials.

Law enforcement

All relevant crimes are punishable by prison sentences, some for several years. In addition, fines and suspension are also provided, as well as, in all cases, the confiscation of profits, even if they have been transformed. The implementation of the new provisions of the Penal Code, however, cannot be considered yet since they only entered into force in December 2010.

The Spanish legal system does not provide jurisdictional privileges for public officials. However, in accordance with the Spanish Constitution, the Legislature must authorize the criminal charge and proceedings of its members, deputies and senators. Case examples showed that the parliamentary practice of granting such authorization was established as a rule.

The prosecution is governed by the principle of legality, so that no discretionary legal powers are foreseen. Parole can only be granted upon completion of three quarters of the sentence, thus taking into account the seriousness of the offences. Spain has regulations on the suspension of public officials, including temporary suspension pending trial.

The confiscation of proceeds and instrumentalities of all crimes are foreseen, even if they have been transformed into other property. The confiscation of the equivalent amount is foreseen if it is not possible to confiscate the proceeds of crime. Confiscation is conviction-based and considered as an accessory sanction for the crime; however, if no sanction can be imposed, the confiscation can be upheld in the absence of a criminal conviction. The confiscated assets are sold and transferred to a single fund for the administration of assets (see Law 17/2003, 29 May). The investigating judge can freeze and seize the instrumentalities of crime during the investigation with a view to securing the economic benefits arising from the crime. The procedure is regulated based on the civil procedure. Spain is in the process of establishing an Asset Recovery Office pursuant to Council Decision 845/2007.

With regard to bank secrecy in investigation and confiscation procedures, the general principle of duty to cooperate with judicial authorities is applied, which prevails over national legislation on bank secrecy. Account information can be requested in cases of “requirements of the public interest” (*imperativos de interes publico*).

The reversal of the burden of proof regarding the lawful origin of alleged proceeds of crime or other property subject to compensation has not been introduced in Spain, it was considered a violation of the principle of the presumption of innocence. However, there is such provision for cases relating to organized crime and related corruption offences.

According to Spain’s witness protection law (Law 19/94), witness protection measures require a judicial decision; they are implemented by the Ministry of Interior, respectively the police forces. The judge can order that the witness or expert participate in the proceedings under reservation of their identity, under visual protection or under registration of the court instead of their residence, and that the police can inhibit that their photos or videos are taken. Further assistance includes police protection, new identities or economic means to initiate a new life at a different place. Spain does not have a specific institutional witness protection programme; the measures are decided upon on a case by case basis. The minimum duration of the measures is the time of the court proceedings, extending as long as necessary. No statistics are kept concerning the number of protected witnesses, neither with regard to the type of offences in which witness protection had to be provided, nor the measures by which witnesses were protected.

There is a legal regime on reports of criminal conduct to the competent authorities and a duty of all citizens to report crimes, which is encouraged by the establishment of hotlines. However, the person reporting criminal conduct has to confirm the report formally afterwards. The fact that there are no specific rules for the protection of whistleblowers in labour and administrative law is a concern.

With regard to the civil consequences and damages of corruption, the Spanish Penal Code (articles 109 et seq) establishes the obligation to repair the damages once there has been a criminal conviction. The annulment of a contract or a concession or other legal instrument is considered part of the reparation of damage.

With regard to law enforcement authorities, the Prosecution Office has constitutional rank; the Prosecutor-General is nominated by the King, on the proposal of the Government, after consultation of the General Council of the Judiciary. The Special Prosecution Office against Corruption and Organized Crime investigates corruption and economic crime cases of particular importance. Within the National Police Corps, there are two units that are mainly in charge of investigating corruption: The Commissioner General of the judicial police and the Central Unit of Fiscal and Economic Crime (UDEP). However, these do not have exclusive responsibilities, all units of the police are authorized to investigate corruption. The Guardia Civil is an armed entity that reports to both the Ministry for Defence and the Ministry of Interior. It has responsibilities of investigations in drug cases, in cybercrime cases, and some authority to conduct under cover

investigations. Within the Guardia Civil, investigations on corruption are carried out essentially by the Chief of Judicial Police, as well as central and 54 territorial units.

Spain has no explicit policies in place to encourage persons who participate in the commission of a corruption offence to supply information. Partial immunity can be granted in bribery cases. Spanish law does not foresee the possibility to provide lower sanctions to those who provide substantial cooperation in the investigation or prosecution; such measures are only foreseen for those who cooperate in drug trafficking or terrorism cases. The witness protection law does not apply to persons referred to in paragraph 1 of article 32 who cooperate in the way described in article 37 of the Convention.

Spanish law foresees a general obligation of all national institutions to cooperate among each other. The Criminal Procedure Code provides for an obligation of all public officials and professionals to report crimes to a prosecutor or judge, or, by default, to the police. The prosecutor has a coordinating role in respect of bodies of pre-trial investigation. However, no specific regulation exists as to the extent to which cooperation is exercised in practice.

There are no regulations on cooperation with the private sector outside the scope of money laundering.

Previous convictions in another state cannot be taken into account with regard to corruption, whereas provisions exist in relation to human trafficking, drug trafficking, and acts of terrorism.

Spain established jurisdiction with regard to corruption offences that were committed in its territory and with regard to those offences committed by Spanish officials residing abroad in the exercise of their functions and offences against the Spanish Public Administration; but not the non-mandatory jurisdiction with regard to offences committed against a national of that State Party. Spain does not extradite nationals except when applying international treaties and according to the principle of reciprocity. In case a Spanish national is not extradited for a Convention offence and is present in Spain, jurisdiction is established only if so provided by a treaty or international agreement. However, Spanish authorities stated that UNCAC can be applied directly in such cases.

Overall, with regard to the UNCAC requirements in the area of law enforcement, the following additional observations are made:

- Consider to adopt statistical information tools to monitor the witness protection policy, and, if appropriate, establish a witness protection programme.
- Ensure specific rules for the protection of whistleblowers in labour and administrative law.

International cooperation

In accordance with Article 96 of the Constitution, ratified international instruments

constitute part of the national legislation and are directly applicable. Spain is a party to a number of multinational and bilateral treaties and agreements. The great majority of international cooperation cases are based on bilateral treaties. In the absence of a treaty, the principle of reciprocity is applied.

Extradition

Spain does not make extradition conditional on the existence of a treaty. It recognizes all offences as extraditable offences that meet the requirements of dual criminality and have a minimum sanction of 1 year of imprisonment.

Extradition is subject to dual criminality with the exception of surrender procedures on the basis of the European Arrest Warrant applied in relation to EU member states. Active extradition is regulated in articles 824 to 833 of the Criminal Procedure Code. The prosecutor has the right to request the judge or court that they propose to the Government to request the extradition from another State. The extradition is requested following the bilateral or multilateral treaties, the domestic law of the requested State, or reciprocity. The general provisions related to extradition in bilateral agreements are foreseen generally under the same conditions as provided for in CoE Convention of 1957; and the bilateral treaty between the Kingdom of Spain and the Republic of Honduras from 1999 can be considered as a typical extradition treaty. Due to the primary use of bilateral treaties, the practical application of UNCAC is limited, and no practical examples of such use of UNCAC are available. There is also no statistical data available on extradition involving corruption related offences.

Spain applies a concept of simplified extradition, which functions with the consent of the extradited person and allows for the trial stage to be omitted. Some conventions reflect such simplified procedure for extradition. Spain does not make the extradition conditional on the conviction of the judge that the offence was committed and thus evidentiary requirements are not relevant.

Spain does not extradite nationals except when applying international treaties and according to the principle of reciprocity. Consequently, the extradition of Spanish nationals is not conditional upon their return, neither in the legislation nor in the treaties.

Spain makes extensive use of the EU judicial cooperation body Eurojust and the European Judicial Network as well as informal networks such as the Ibero-American Legal Assistance Network (IberRed). It is common practice that Spanish judges ask for additional information in order to avoid the refusal of a request for extradition or surrender. Such additional information can involve details concerning the description of the facts of a crime, national legislation related to the statute of limitation and information relating to guarantees (e.g. with regard to the death penalty, permanent sanctions, amnesties etc).

Overall, Spain has put in place the measures required by UNCAC in its legislative and treaty regime.

Mutual legal assistance and transfer of proceedings

When providing mutual legal assistance, Spanish and foreign authorities will usually use the provisions of any bilateral treaty that exists between the parties; however, UNCAC can also be applied directly. With regard to bilateral treaties, mutual legal assistance is provided under bilateral agreements generally under the same conditions as provided for in the CoE Convention of 1959 and its additional protocols. The bilateral treaty between the Kingdom of Spain and the Republic of Brazil from 2008 is a typical mutual legal assistance treaty that would present the general characteristics that Spain follows when negotiating bilateral mutual legal assistance treaties.

In the absence of a treaty, mutual legal assistance is provided on the basis of the principle of reciprocity; in such a case the request should be sent through the diplomatic channel. Spain as an executing state might refuse assistance only in the cases established in article 278 Organic Law 6/1995, 1 July, of the Judiciary. Spain can also apply UNCAC, but there is no case recorded.

Spontaneous information exchange is implemented in daily practice on the basis of all existing instruments used by Spain, including UNCAC.

According to international treaties, Spain requires dual criminality for the provision of mutual legal assistance in cases of coercive measures.

The transfer of a particular person to another state for the purpose of identification, testimony or other assistance is subject to the person's consent. At any moment of the transfer, the person to be transferred can change his or her mind and can oppose the transfer. The transfer is handled by the law enforcement authorities (the police force through their unit of international cooperation and assistance).

The designated central authority in Spain is the Ministry of Justice (Deputy General Directorate of International Legal Cooperation). In urgent circumstances, requests for mutual legal assistance and related communications can be addressed to Spain through the International Criminal Police Organization (Interpol) provided the requests are also sent through official channels through the central authorities. As a general rule, requests for mutual legal assistance (MLA) can be submitted to the central authority directly, without a need to be submitted also through the diplomatic channels. Exceptionally some bilateral treaties require that transmission is made through diplomatic channels. The role of the central authority is defined in a formal manner and the Ministry of Justice does not take into account the substance of the request. When the formal analysis is concluded concerning the identification of the executing authority, it is submitted to the responsible judge, respectively to the foreign central authority. All further communications have to be submitted through the central authority.

Spain uses the services and channels of Eurojust, the European Judicial Network and IberRed to speed up the process in an informal way; the request has in the following to be formalized through the central authority. Eurojust is requested to

coordinate execution in complex cases involving several EU member states or those countries having cooperation agreements with Eurojust. Networks are frequently used to informally exchange information that will later be formalized through a MLA request. This informal exchange can also be done in other languages. The formal request is to be submitted in Spanish, however, in urgent cases and on an exceptional basis, as a first step submissions in English are possible. Requests for additional information are processed through the networks and official channels. Such requests are made when the description of a fact is not clear for the body implementing the request, i.e. to clarify the facts described in a request which usually amounts to additional facts.

Grounds for refusal of MLA are established in article 278 Organic Law for the Judiciary, as well as in treaties; regularly they contain the non-contradiction to internal law and reciprocity. The supreme criterion is that MLA provided cannot contradict domestic legislation.

Fiscal matters as a ground for refusal of mutual legal assistance is generally not contained in the bilateral treaties of Spain.

With regard to the transfer of criminal proceedings, Spain has concluded a number of treaties, including the European Convention of 1972 on Transfer of Criminal Proceedings. However, not all European States have ratified the Convention, so that Spain has additionally included the transfer of criminal proceedings in its bilateral MLA agreements, especially with non-European countries.

Overall, Spain has in place all measures required by UNCAC for mutual legal assistance.

Law enforcement cooperation

Spain considers UNCAC as the basis for mutual law enforcement cooperation in respect of the offences covered by the Convention. It further ratified a number of bilateral and multilateral agreements and arrangements.

Spanish law enforcement authorities cooperate through Eurojust and a number of informal networks (EJN, CARIN, IberRed) with their international counterparts. The Spanish Commission on Prevention of Money Laundering and Currency Violations exchanges intelligence concerning certain types of transactions and on customers with foreign anti-money laundering authorities.

Spain has the possibility to establish and use joint investigation teams in the EU. Those investigation teams consist of officials of two or more Member States of the European Union. The negotiation of the arrangements of a joint investigation team lies with the responsible investigation body. Different procedural regulations exist for the cases that joint investigation teams act within or outside of the territory of Spain. Further, Spain has concluded some bilateral agreements on joint investigation teams, such as with Morocco.

In international cooperation, special investigative techniques are used based on the principle of reciprocity. Domestically, Spain has no specific legal basis for the application of special investigative techniques in corruption cases. Internationally, in the absence of the agreement the principle of reciprocity might be applied, as long as actions requested do not contradict Spanish legislation.

Spain has thus been found to have successful practices in place in the field of international law enforcement cooperation.