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

COUNCIL OF EUROPE CONSEIL DE L'EUROPE

DIRECTORATE GENERAL I – LEGAL AFFAIRS
DEPARTMENT OF CRIME PROBLEMS

Strasbourg, 20 May 2005

Public
Greco Eval II Rep (2004) 7E

Second Evaluation Round

Evaluation Report on Spain

Adopted by GRECO
at its 23rd Plenary Meeting
(Strasbourg, 17-20 May 2005)

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I. INTRODUCTION

1. Spain was the 16th GRECO member to be examined in the Second Evaluation Round. The GRECO Evaluation Team (hereafter referred to as the "GET") was composed of Mrs Anca JURMA, Head Prosecutor, International Cooperation Service, National Anticorruption Prosecutor's Office, Romania; Ms Jane LEY, Deputy Director, Government Relations and Special Projects, U.S. Office of Government Ethics, United States of America; Mr Jacek GARSTKA, Judge, Department of International Co-operation and European Law, Ministry of Justice, Poland. This GET, accompanied by a member of the Council of Europe Secretariat, visited Spain from 19-22 October 2004. Prior to the visit the GET experts were provided with a comprehensive reply to the Evaluation questionnaire (document Greco Eval II (2003) 11E), as well as copies of relevant legislation.

2. The GET met with the Minister of Justice and officials from the following governmental organisations: the Ministry of Justice, the State Prosecution Service, the Ministry of Public Administration, the Ministry of Finance, the Court of Audit, the Ministry of the Interior and the Defender of the People/Ombudsperson. Moreover, the GET met with members of the following non-governmental institutions: General Assembly of the Judiciary, civil servants' trade union representatives and a representative of a Non-Governmental Organisation.

3. The 2nd Evaluation Round runs from 1st January 2003 to 31 December 2005, in accordance with Article 10.3 of the Statute of GRECO. The evaluation procedure deals with the following themes:

   - **Theme I - Proceeds of corruption:** Guiding Principles 4 (seizure and confiscation of proceeds of corruption) and 19 (connections between corruption and money laundering/organised crime), as completed, for members having ratified the Criminal Law Convention on Corruption (ETS 173), by Articles 19 paragraph 3, 13 and 23 of the Convention;

   - **Theme II - Public administration and corruption:** Guiding Principles 9 (public administration) and 10 (public officials);

   - **Theme III - Legal persons and corruption:** Guiding Principles 5 (legal persons) and 8 (fiscal legislation), as completed, for members having ratified the Criminal Law Convention on Corruption (ETS 173), by Articles 14, 18 and 19, paragraph 2 of the Convention.

   Spain has not ratified the Criminal Law Convention on Corruption[1].

4. The present report 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 effectiveness of measures adopted by the Spanish authorities in order to comply with the requirements deriving from the provisions indicated in paragraph 3. The report contains first 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.

[1] On 10 May 2005, Spain signed both the Criminal and the Civil Law Conventions on Corruption.

II. THEME I - PROCEEDS OF CORRUPTION

a. Description of the situation

Interim measures

5. The use of provisional measures (including the seizure of proceeds) can be ordered 1) to prevent the supposed offender from altering his financial position or credit, resulting in the loss of components of possession connected to or obtained from the corruption offence under investigation; 2) when there are reasons to presume that an object can serve as evidence; 3) and, in case of drug related offences, to secure the payment of a confiscation order. Articles 589 to 614 of the Code of Criminal Procedure (hereafter CCP) are applied with regard to the seizure of assets ("*bienes*").

6. The decision to use provisional measures can only be made through an investigation of assets, which will guarantee the consequent financial liabilities of the offender. Such an investigation is carried out by the State Prosecution Service (hereafter SPS) when it is made aware of a possible criminal offence. The Spanish authorities state that the provisions contained in Article 127 of the Criminal Code (hereafter CC) concerning confiscation (see paragraph 8 below) refer also to provisional measures (seizure, freezing). These provisions can be applied to all criminal offences, including corruption.

Management of seized assets

7. The CCP provides for the identification, description and security of the seized goods, which are sealed, when possible, and put into safekeeping under the management of a competent storage unit, destroyed or sold. The measures adopted for the management of seized goods depend on their nature: if the goods are perishable the judge may order their sale, and the proceeds can be used to secure the execution of the final judgement; the goods can be stored (in public establishments or in storage centres) or managed by an "*administrador"* who is nominated by the judge; when assets have been seized from a company or group of companies, the judicial administration of the companies is regulated by the Code of Civil Procedure; if the goods pose a possible danger that could result from their storage, their elimination will be ordered. In cases of illicit drugs, adequate samples will be kept for future evidence or examination.

Legislation on confiscation

8. Article 127 of the CC defines confiscation as a penalty that is enforced by the judicial authorities as an accessory sanction ("*consecuencia accesoria"*) to the commitment of a crime, including corruption. It results in the dispossession of assets that contribute to the personal fortune of the perpetrator. These assets are the instruments used to commit the crime and illegal financial gains obtained from the commitment of the crime, and include any proceeds of crime that have been converted. Confiscation is compulsory when a criminal offence, including corruption, has been committed. In addition, the confiscation of money, presents and gifts is explicitly required under Article 431 of the CC for bribery and trading in influence. It is not possible to deduct expenditures for gaining the proceeds, which could be subject to confiscation.

Nature of confiscation

9. Confiscation of proceeds of crime is regarded as part of the sanction the purpose of which is to dispossess the offender of these proceeds. As a constitutional condition derived from the principle of presumption of innocence, current Spanish legislation requires the prior conviction of a criminal before confiscation order can be issued. However, there is an exception to this rule under Article 127.3, which permits confiscation even when no sentence is pronounced against the offender because of lack of criminal liability (death of the offender, for example) or when, for particular reasons, the proceedings in respect of the defendant cannot be pursued, provided, in the latter case, that the illegal nature of the defendant's assets has been proved.

Management of confiscation

10. The manner in which confiscation is carried out is conditioned by the character of the goods to be confiscated. Goods from legal trade will be sold and the proceeds will be used to cover the offender's civil liability, e.g. to ensure the payment of damages to injured parties of the crime. If the profits of the sale are not used to pay the offenders' debts or if there is an excess amount, they will be credited to the Public Treasury. As for goods of illegal trade, i.e. illicit drugs and firearms, courts will either order their immediate destruction or may keep them under the protection of the relevant judicial body. When the confiscated goods are vehicles, boats, aircrafts or any other instrument or property used in the context of drug trafficking, the State will order their transfer to a special fund, the purpose of which is to finance drug addiction prevention programmes, aid programmes for drug addicts and the prevention and prosecution of drug-related crime.

Value confiscation

11. Article 127.2 CC provides for value confiscation "when, for whatever reason, it is not possible to confiscate the goods or proceeds directly". In view of the fact that the Code does not prescribe a procedure for calculating the value to be confiscated, this exercise must be carried out on an individual basis.

Third parties

12. Confiscation can be ordered also with regard to third parties. There is one exception to the application of this general rule: a confiscation order cannot extend to objects or properties of third parties who were not related to, or unaware of, the crime and if the goods have been obtained legally. Another exception to the rule of mandatory confiscation is when the value of the proceeds deriving from legal trade is disproportional to the character and gravity of the crime.

Investigation concerning proceeds of crime

13. The Special Attorney General's Office for the Repression of Economic Offences related to Corruption (hereafter ACPO) has at its disposal "Support Units" specialised in investigations aimed at identifying and tracing proceeds of economic crime, including corruption. In particular, the Support Units of the Tax Inspectorate and the General State Financial Controller's Office assist the ACPO in relation to movements of funds, fiscal and taxation examination and financial operations, and provide direct access to the Tax Inspectorate's Consolidated Data Base. In appropriate cases, the ACPO can seek assistance from other Tax Inspectorate bodies. In

accordance with Article 95 of the General Taxation Law (Law 58/2003), the SPS and the judicial bodies are able to collect all information needed for carrying out criminal investigations. Moreover, the National Police Force and the Civil Guard Support Units assist the ACPO in tracing and recovering illegally gained property, funds and capital.

Statistics

14. In the absence of statistics on confiscation, the Spanish authorities provided information on two concrete cases of corruption where 1,500 and 54,000 Euros were confiscated.

Money Laundering

15. Under the current Spanish legislation (Article 301 CC) money laundering can be associated with any crime. Law 19/2003 on the Legal Regime governing the Movement of Capital and Foreign Economic Transactions and Specific Measures to Prevent Money Laundering specifies the obligations of financial (and other) relevant organisations, i.e., actions to be taken and procedures to be followed in order to prevent the abuse of the financial system and other areas of the economic sector for the purposes of money laundering. The law establishes new requirements concerning cooperation with the competent authorities dealing with anti-money laundering issues and applies to private persons or entities involved in professional or business activities that are especially vulnerable to money laundering. Law 19/2003 has also broadened the range of bodies/professionals obliged to report suspicious transactions and now includes auditors, accountants, tax consultants, notaries and lawyers.

16. These requirements affect the banking and financial sector in terms of the identification of clients, their professional activities etc., and include the responsibility to report to the Spanish FIU (the Executive Service of the Commission for the Prevention of Money Laundering and Financial Offences – SEPBLAC[2]) any activity that could be related to money laundering. SEPBLAC has the duty to report to the competent judicial authorities a suspicion of money laundering activities, and to supply them with any necessary assistance or cooperation. The Executive Service's Activities Report of 1999 reported that 1091 preliminary investigations had been concluded. The number of cases related to corruption reported by SEPBLAC to the ACPO was 39 in 2002 and 135 in 2003.

Corruption and mutual legal assistance

17. Spain is party to a number of bilateral and multilateral international instruments concerning mutual legal assistance, which are incorporated into national legislation once published in accordance with Article 96 of the Constitution. National legislation, under Article 276 of the Organic Law on the Judiciary, establishes a procedure for requests by Spanish authorities for international legal assistance relating to provisional measures and confiscation, which stipulates that requests (rogatory letters) by Spanish judicial authorities be made in accordance with the provisions of the international treaties. The international treaties applied in cases of provisional measures and confiscation are the European Convention on Mutual Assistance in Criminal Matters; the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime; and the United Nations Convention against Transnational Organised Crime. In Spain the central authority responsible for filing, and responding to, such requests is the Ministry of Justice.

[2] The Commission is an inter-departmental body, chaired by the Secretary of State for the Economy and composed of the Directors of institutions involved in combating money laundering (Police, Special Prosecutors' Offices, Bank of Spain, Securities and Exchange Commission, General Directorate of Insurance, Tax Agency, etc.). One member of the Commission is a representative of the ACPO.

Furthermore, Spain has ratified the Convention for the Application of the Schengen Agreement, including provisions relating to letters rogatory for search and seizure powers, and the provisional application of the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, which includes provisions associated with international judicial cooperation concerning access to bank account information[3]. These instruments have created a direct communication channel between judicial authorities providing an acceleration of interstate communication.

18. If Spain is the requested state then the requesting state must abide by the international instruments to which Spain is a party (see paragraph above). In the case of the absence of the application of a treaty, the cooperation will be regulated by the principle of reciprocity, and its existence will be determined by the Spanish Government through the Ministry of Justice as stated in Article 277 of the Organic Law on the Judiciary.

b. Analysis

19. In Spain, recourse to provisional measures for the freezing and seizure of assets is a usual practice for the police and prosecution services. Detailed legal provisions and procedures concerning the seizure and management of seized assets are in place, differentiated according to the nature of the assets. Articles 589–614 of the Code of Criminal Procedure contain provisional measures, which can be taken in order to ensure, in principle, that the defendant can meet his/her financial liabilities. Also, the seizure of the *corpus delicti* – including the means, instruments and proceeds related to the crime and/or found on the scene of the crime – is provided for by Articles 334-338 of the Code of Criminal Procedure, the purpose of those provisions being to secure evidence during criminal proceedings. Although there is no specific regulation regarding corruption offences, Articles 334-338 of the Code of Criminal Procedure establish some mechanisms to guarantee that confiscation is effective with regard to all kinds of crimes, including those related to corruption, from the beginning of the investigations. However, the GET noted that specific provision allowing provisional measures to be taken in order to guarantee the effectiveness of a confiscation order has only been made in relation to drug related offences, but not in relation to corruption offences: Article 374 paragraph 1.2 of the Criminal Code states that, in case of drug related offences, *"with the purpose of ensuring the effectiveness of the confiscation, the goods, means, instruments and gains could be seized or frozen (…) since the beginning of the investigation".* Therefore, the GET **recommends that a legal provision be introduced specifically providing for provisional measures to be taken for the purpose of guaranteeing the effective confiscation of the proceeds of corruption.**

20. The GET welcomed the recent legislative developments in the field of confiscation of the instruments and proceeds of crime. The introduction of value confiscation and of *in rem* confiscation represents essential tools for the effective deprivation of financial advantages obtained through a crime, including corruption. The confiscation of proceeds/instruments found in the possession of a third party, except for *bona fide* third parties, is also addressed by the law. As regards the application of these measures, the notion of *bona fide* third parties is interpreted in a restrictive manner, excluding those persons who should have been aware of the illicit nature of the goods or who were unable to provide a reasonable explanation for a sudden improvement of their financial situation. Moreover, according to the Spanish authorities, proving the illicit origin of the assets concerned does not necessarily imply a requirement to provide direct proof that assets derive from a particular offence, it being sufficient to have convincing circumstantial evidence of

[3] The Spanish authorities state that the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union is presently in the ratification process.

the criminal origin of the goods (e.g. lack of an economical explanation for certain revenues; timing of a purchase coinciding with that of the commission of a criminal offence; the involvement of the owner of assets in criminal activity, etc.). However, the lack of statistical data on the number of cases, value and grounds for taking provisional measures as well as the number of cases and the value of confiscated property related to corruption make it difficult to obtain an accurate idea of the effectiveness of the existing legislation and the efforts made in practice by law enforcement agencies to deprive a perpetrator of property obtained unlawfully as a result of corruption. Therefore, the GET *observes that statistics should be collected, and properly analysed, concerning provisional measures and subsequent confiscation orders in cases of corruption.*

21. The GET examined the institutional framework and the tools available to the law enforcement agencies in order to perform financial investigations whenever a corruption offence or other serious economic offences are discovered. The Special Attorney General's Office for the Repression of Economic Offences related with Corruption (ACPO) is supported by units of the Tax Inspectorate (AEAT) and of the State Financial Controllers Office (IGAE), which can provide immediate access to the national tax database and in-house expert assistance. The confidentiality of the investigative activities performed by the tax and financial inspectors for the ACPO prosecutors is guaranteed by a protocol signed between the Ministry of Justice and the two authorities concerned. However, only the 11 ACPO prosecutors benefit from direct and immediate support of AEAT and IGAE Inspectors. Prosecutors from all over Spain use the regular channels to obtain the data they need, by filing a reasoned request to the regional Delegation of AEAT. The swiftness of the tax authority's reply varies from region to region and from case to case. Although the GET was told that the ACPO only carries out investigations and prosecutions for the most serious corruption offences, the significant difference between the number of cases assigned to ACPO and those assigned to other prosecutors' offices is striking: in 2003, 5 bribery cases were investigated by ACPO as compared to 80 investigated by ordinary prosecutors' offices. This shows that the vast majority of corruption cases is being dealt with by the "ordinary" prosecution services.

22. The GET was told that information needed to track money flows can sometimes be difficult to obtain from the banks, which are not obliged to communicate detailed information on specific banking operations to prosecutors, unless the authorisation of an investigative judge is presented. The risk of bank customers being alerted was also mentioned to the GET as one of the reasons why prosecutors are reluctant to file requests for data from banks. The need for respecting the confidentiality of investigative tracking leads to preference being given to the use of combined sources of information, mostly indirect sources, the national tax database being mentioned as the most valuable. Therefore, the GET is of the opinion that extended, immediate access (in a controlled manner) to the tax database for prosecutors dealing with corruption and corruption related offences could speed up investigations aimed at tracking funds. The GET was pleased to learn that the Government intends to reform the special prosecutors' offices competent for dealing with corruption and organised crime, in order to enhance their operative capacity. This reform could be a good opportunity to also strengthen the capacity of ACPO's support units.

23. There are two police forces at national level: the National Police and the Civil Guard. They have special departments for the investigation of economic crime, money laundering, organised crime and corruption. The traditional division into two national police bodies with largely separate areas of competence, both territorial and material, does not appear to create particular problems. That said, the GET took the view that the separate and uncoordinated databases of the two police forces may well hamper the carrying out of investigations, including financial investigations aimed

at tracking instruments and proceeds of corruption and facilitating the seizure thereof. During the on-site visit, the GET was informed that an initiative to integrate the databases into one is being considered by the Ministry of Interior. *The GET observes that the setting up of a single database for the National Police and the Civil Guard should be given a high priority*[4].

24. The adoption of Law no. 19/2003 – which extends the categories of entities with an obligation to report any unusual or suspicious transaction – has had an important impact on revealing possible connections between money laundering and corruption. For instance, notaries were included and, since the entry into force of the law, 24 cases of money laundering related to corruption have been reported by notaries, as a result of their obligation to report suspected cases of money laundering in connection with the acquisition of property or the setting up of companies. The GET was informed that 135 reports were sent by SEPLAC to ACPO in 2003 compared to only 39 in 2002, an increase of 235%. Although the reporting system is well regulated, no feedback on the outcome of the reports filed is apparently provided. In this connection, the GET was informed that in 2005 the Ministry of Finance would set up an impact evaluation plan on the results of suspicious transaction reports. Such an impact evaluation would, in the GET's opinion, greatly help clarify the patterns used by perpetrators to launder illicit assets and to revise guidelines to the reporting entities concerning the identification of abnormal transactions or activity. *The GET observes that the setting up of an impact evaluation plan concerning the outcome of suspicious transaction reports should be pursued as a matter of urgency.*

25. The GET commends the introduction to Spanish anti-money laundering legislation of the "all crimes approach" through the recent reform of the Criminal Code. This amendment allows for the prosecution for money laundering of proceeds deriving from all corruption offences contained in the Spanish Criminal Code, including those which, not being considered as serious crimes, were excluded by the previous legislation. Nevertheless, the GET noted that under Spanish legislation corruption in the private sector is not considered criminal offences, contrary to the pertinent provisions of the Criminal Law Convention against Corruption, and as a consequence the list of predicate offences to the money laundering offence is limited. As already mentioned in the descriptive part of this report, Spain has not yet ratified the Criminal Law Convention on Corruption. According to the higher authorities met by the GET, and in particular the Minister of Justice, preparations for the signature/ratification of the above-mentioned convention are at an advanced stage[5]. The GET notes that the ratification of the convention and the ensuing legislative changes would ensure that the links between all types of corruption and money laundering are taken into consideration; this might also facilitate international judicial cooperation in this area.

[4] After the visit, the GET was informed that the Royal Decree 278/2005 of 11 March modifies the structure of the Ministry of the Interior and creates, within the Dirección General de Infraestructuras y Material de Seguridad (State Infrastructures and Security Material Office) a Subdepartament of Information Systems and Security Communications, as one of the main objectives of the Ministry of the Interior is the creation and management of common police databases. Since 30 March 2005, the Police and the Civil Guard are sharing six databases (National Identity Cards, Weapons and Explosives, Reports on Travellers, DNA, SAID (Automatic Fingerprint Identification Service and Voice Recognition).

[5] See footnote No. 1.

III. THEME II – PUBLIC ADMINISTRATION AND CORRUPTION

a. Description of the situation

General structure

26. Spain is a de-centralised State consisting of Autonomous Communities[6] governed by their respective Government, Parliament and Administration[7]. The public administration is composed of the General State Administration, the Autonomous Communities' Administrations, the Entities that combine the local Administration and public right bodies that are dependent on, or attached to, the State, the Autonomous Communities or local Entities.

Legislation on organisation

27. In Spain, the general principles governing the organisation and operation of the State administration are contained in the Constitution: government and administration (Articles 97-103), territorial organisation of the State (Articles 137-158). In particular, the principles of the functioning of the Public Administrations are defined in Article 9.1 of the Constitution which states that "(…) public authorities are responsible for promoting (…) conditions ensuring that freedom and equality of individuals (…) are real and effective (…)". Article 106 of the Constitution and the Law on the Contentious-Administrative Jurisdiction state that the Courts have the judicial administrative authority over Public Administration. In addition, there are a number of legal acts that regulate the implementation of the constitutional principles and the work of specific organisations: the Law 30/1992 on the Legal Regime governing Public Administrations and Common Administrative Procedures (hereafter "Law 30/92"); the Law 30/1984 on Measures for the Reform of the Civil Service (hereafter "Law 30/84"); the Law on the Contentious-Administrative Jurisdiction; the Government Law on the Procedure for Elaborating Regulations; the Law on the Incompatibilities of Personnel of the Service of Public Administration.

Anti-corruption policy

28. As regards anti-corruption policies in public administration, the Organic Law on Criminal Code Reform deals with the prevention of and the fight against corruption. Furthermore, there are institutional control mechanisms regarding the fight against corruption, which are meant to ensure that administrative functions are carried out in respect of basic principles and objectives. These bodies include the Ombudsman, the Court of Auditors, the National Security Exchange Commission, the Commission for the Prevention of Money Laundering and Economic Offences, the State Administration Public Accounts Department (IGAE), the General Inspectorate of the Ministry of Economic Affairs and Finance, the Internal Audit Department of the Tax Inspectorate, and the General Directorate for the Inspection, Evaluation and Quality of Services. All these bodies play a role in performing disciplinary investigations on corrupt conduct of public officials.

Access to information and public consultation

29. Article 105 b of the Constitution states that legislation will determine the general public's access to all administrative documents, with the exception of those pertaining to State security and

[6] Andalusia, Catalonia, the Basque Country, Canaries, Aragon, the Community of Valencia, the Balearic Islands, Castilla y León, Castilla-La Mancha, Madrid, La Rioja, Región de Murcia, Galicia, Navarra, Extremadura, Cantabria, Asturias and the two Autonomous Cities of Ceuta and Melilla.

[7] Articles 148 and 149 of the Constitution determine the competencies that Autonomous Communities may assume.

defence, crime investigations and personal privacy. The right to access administrative documents is dealt with by Article 37 of Law 30/1992, which authorises access to the documents under the conditions that: a) there are no ongoing proceedings relevant to the requested documents; b) the documents do not contain personal details; c) access to the documents will not cause danger to either the public interest or third parties whose protection is of greater importance; d) they do not contain information on national defence and State security, crime investigations, information protected by industrial or commercial secrecy – and are not subject to specific legislation (medical data, Civil Register, electoral files, etc). The Ministry of Public Administrations also provides the public access to a wide array of information through its internet site[8].

30. The practice of public consultation is governed primarily by Article 105 a of the Constitution, which states that "the Law shall regulate the hearing of citizens directly, or through the organisations and associations recognised by law, in the process of drawing up the administrative provisions which affect them…". Public hearings fall into two categories:

- those that are of a general nature (regulated by Article 24 of the Government Law on the Procedure for Elaborating Regulations): when the decision affects the rights of the community, a hearing with the interested parties or with their associations can be organised within a specific period of time, unless there are serious reasons in the public interest not to do so;
- those that concern exclusively one or more parties (individuals) (carried out in accordance with Articles 84-86 of Law 30/1992): before issuing the decision, the relevant administration notifies the interested parties so that they can take part in the procedure. Once an administrative decision has been made, it can be challenged through the administration channels and the courts, according to the appeal system described below.

Administrative procedures

31. If the public (or individuals) have been unlawfully denied access to documents, or more generally want to challenge an administrative decision, they may start an administrative procedure, and, if not satisfied with the decisions taken by the administrative bodies, they can bring the case before the courts**.** The lower administrative level is established by Law 30/1992 and entails three different types of appeal against any administrative act that results in the infringement of the law: to a hierarchically superior body of the administration in question; a reinstatement appeal, which permits a direct appeal to the administrative body in question; an extraordinary appeal on grounds of error of fact to be lodged with the same institution that made the decision. The upper jurisdictional level of the appeal system is provided for by the Law on the Contentious-Administrative Jurisdiction, and is used for appeals against administrative acts that are an infringement of the administrative law (or even in case of inactivity of the Administration); it can be addressed once all administrative remedies have been exhausted.

The Ombudsman

32. Article 54 of the Constitution makes explicit provision for the establishment of an Ombudsman, subsequently introduced by Organic Law 3/1981. The Ombudsman monitors the activities of all persons/bodies carrying out functions within the public administration including ministers, civil servants and administrative authorities (at central level, at the level of the autonomous communities and at local level). The purpose of the investigations of the Ombudsman, which are either instigated of his own initiative or following a request, is to establish whether the acts and

[8] www.map.es

decisions of persons fulfilling the duties of the Public Administration are in compliance with the guiding principles of the Administration. Public Administration bodies are obliged to cooperate in the investigations of the Ombudsman. The Ombudsman has access to all documentation required with the exception of classified documents, in which case "the failure to furnish the said documents must be approved by the Council of Ministers" (Article 22.1). The Ombudsman will report to the State Prosecution Service any suspected cases of criminal offences he/she would come across. Similar institutions exist in most of the Spanish Autonomous Communities.

Employment in the State administration

33. Articles 23.2 and 103.3 of the Spanish Constitution establish the main principles for the access to Civil Service according to equality, merit and ability. Chapter IV of the Law 30/1984 on Measures to Reform the Public Service provides for the principles of selection of civil servants, competition to fill vacancies and promotion procedures. Article 3 of this Law points out that "admission to the Institutions and Grades of civil service will be organised through public examinations and will be governed by the rules of the examination in question". Further, in terms of the selection systems to be used, Article 4 specifies that "the admission of civil service personnel will be conducted through a system of open examinations, restricted entry examinations or selection boards, which shall guarantee in all events, the principles of equality, merit and ability. Open examinations will be the standard entry procedure, unless, in view of the nature of the position to be filled, the use of restricted entry examinations and, in exceptional circumstances, selection boards procedures are organised. Standard examinations consist of holding one or more tests to determine the capacity and abilities of the candidates; restricted entry is based on checking and classifying the candidates' merits and drawing up a list of the best applicants. There is no system of rotation for civil servants who are in a position particularly vulnerable to corruption.

Training

34. Training is provided at both the entry-level and throughout the administrative career of civil servants. The various training programmes not only address the subject of corruption and public ethics, but also take into account the substance of the civil servants' careers, where priority is especially given to those whose position is particularly vulnerable to acts of corruption. The Centre for Training of Senior Civil Service, considered as one of the top civil servants' bodies in the Spanish Public Administration, organises an eight months training programme provided by the National Public Administration Institute, during which lessons on "Public Ethics" address, *inter alia*, possible situations pertaining to corruption that a high grade civil servant could come across during his professional career. The National Public Administration Institute also offers training programmes throughout the year to civil servants of all levels that usually address issues of public ethics. The Training Programme in 2003 included a course on "Public Service Ethics" aimed at the civil servants who carry out duties at the intermediate level. In addition, a Senior Management Programme (addressed to Directors who carry out duties of senior responsibility at the head of State Administration departments) has "Ethics of Public Administrations" as one of its subjects. This programme lasts a total of 50 hours and creates a forum for discussing experiences and making suggestions to enhance public organisations and the use of management in the public sector.

Conflicts of interest and Incompatibilities

35. Rules pertaining to the general incompatibilities for civil servants are contained in Law 53/1984 on Incompatibilities of Personnel of the Service of Public Administrations. The Law is derived from the fundamental notion that employees of the Public Administrations are committed to a specific employment post with the exemptions required by the Public Service itself; it establishes the principle that private activities must not hinder or cause prejudice to the strict accomplishment of duties, or cast doubt on the objectivity or autonomy of the employee. Chapter IV contains provisions regarding civil servants and private activities[9]. Article 19 mentions exceptions regarding activities under the rule of incompatibilities (i.e. administration of personal or family heritage; production and publication of literary, artistic and scientific material).

36. As regards State Government members, Secretaries of State and High Officials of the General State Administration, the Law 12/1995 on Incompatibilities of the State Government Members and High Officials of the General State Administration confirms, as a general principle, the absolute incompatibility between public and private activities, regardless of whether the latter are financially rewarded or not, but permitting certain activities, which are "logically excluded", to be practiced, because they do not influence the official's commitment and autonomy. Consequently, the law provides for the establishment of two registers to monitor those officials' activities: the Activities Register concerns activities that high officials have declared that they have practiced or will exercise once they have finished their service; the Property and Rights Register requires the Officials to confirm the property and heritage rights they own, as well as negotiable financial assets, shares in companies, etc. When high officials leave office they are barred from exercising private functions linked with cases in which they have taken decisions during their time in office, nor can they take part in technical assistance contracts, service contracts or similar contracts with Public Administration, within the two years following their departure from the civil service. In addition, personnel who have left office, but are receiving a form of payment as a result of leaving are forbidden to partake in any private business interests associated with the expertise of the position that they held. In cases of a violation of the regulations on incompatibilities, disciplinary sanctions can be applied[10].

[9] Article 11.1: "In accordance with the terms of Article 13 of the present Law, personnel within the scope of application of this Law cannot perform private activities, whether individually or through an intermediary, including those of a professional nature, whether for their own account or under the direction or at the service of entities or individuals directly related with such activities as are developed in the department, body or entity to which said personnel are assigned. This prohibition does not apply to private activities that the directly concerned party may perform in respect of a legally recognised right."
Article 12.1: In all events, personnel under the area of application of this Law will not be able to perform any of the following activities: a. Private activities, including professional activities, whether for their own account or under the direction or at the service of entities or individuals, in matters that they are currently participating in or in which they have participated in the course of the last two years or have to participate in by virtue of their public role.
This incompatibility applies in particular to professional activities offered to persons who must be given a service during fulfilment of duties in the public role.
b. Membership of the Board of Directors of companies or Managing Board of private entities whose activity is directly related to the department, body or entity in which the personnel provide their services.
c. Holding positions of any nature, whether directly or through an intermediary, in companies, concessionary firms, works contractors, service providers and suppliers, leasing and administrative monopolies, or in companies with public sector participation or guarantee, whatever the legal status of such companies.
d. Participation with over 10% of capital in companies or businesses referred to in the paragraph above.
[10] After the visit, the Spanish authorities reported that a draft Law concerning the Conflict of Interest regulation for the Members of the Government and High officials of the General State Administration was under consideration by the Parliament.

Gifts

37. Article 426 CC states that any authority or public official is prohibited from accepting gifts or donations in association with their position. Violation of this provision shall be sanctioned with a fine ranging from three to six months[11].

Obligations to report criminal offences

38. Article 408 CC states: "The authority or civil servant, who, contrary to the obligations corresponding to his/her position, intentionally omits promoting prosecution of those crimes of which s/he becomes aware of or of the responsible persons of such crimes, will be punished with removal of public office for a period of 6 months to 2 years." In addition, Article 7 section (d) of the Royal Decree 33/1986 states that it is considered a serious offence when those in a position of authority tolerate offences classified as serious or very serious, which have been committed by subordinates[12]. Officials who have reported a crime cannot be sanctioned or removed.

Code of Conduct

39. In the Spanish system, all the acts of public officials and employees, including those of senior officials, are governed by different rules which have the status of law. The expression 'Code of Conduct' is certainly a new concept in the Spanish system. In some bodies, such as the National Commission for the Stock Exchange, the Official Credit Institute or the Bank of Spain, such Codes have been prepared as a subsequent development, but on the basis of existing legal rules. At the time of the visit, there was no code of ethics applicable to public officials/employees[13]. Additionally, studies were being made with a view to preparing a Statute for Public Officials. The authorities of Spain stated that this would comply with Article 103.3 of the Constitution[14] and that the Statute would cover organisational and staff needs establishing the necessary legal framework. In these studies, emphasis will be placed on the relevance of drafting a code of ethics, so that the public service ethic will inspire conduct and preserve public employment from conflicts of interest of any kind. The declared objective is to eradicate abusive, fraudulent or similar behaviour. In this context, the future State Agency for the Evaluation of the Quality of Services and Public Policy, whose tasks were under discussion at the time of the visit, will be a new organisation which should be in charge of assessing how public service activities are delivered to the public, and will therefore offer criteria with regard to the conduct of public officials in providing these services.

40. The Spanish authorities state that the fact that a code of ethics as such has not been incorporated in any legal text does not mean that ethics constitute a concept unknown to civil servants. The concept of a code of conduct is becoming increasingly widespread in the public and private sectors and lessons on ethics are regularly held during basic and in-service training for public officials. Moreover, the notion of a code of conduct is indirectly implemented through the establishment and enforcement of the laws pertaining to duties and obligations of public officials, and the penal sanctions, disciplinary measures, incompatibilities and prohibitions that are exclusively applicable to public officials. These measures have the purpose of guaranteeing

[11] The minimum and maximum daily fine is established in the CC and this fine is fixed on a case by case basis by the judge taking into account different criteria.

[12] The classification of crimes is stated in Articles 6-8 of the Royal Decree 33/1986.

[13] As regards members of Government and high positions within the General State Administration, see footnote no. 13.

[14] "The law shall regulate the status of civil servants, entry into the civil service in accordance with the principles of merit and ability, the special features of the exercise of their right to union membership, the system of disabilities, and guarantees regarding impartiality in the discharge of their duties".

the ethical conduct of civil servants, and their effectiveness is meant to be ensured through the enforcement of penalties of both an administrative and criminal nature. The measures used to monitor and guarantee the ethical conduct of civil servants can be found in the Criminal Code; the Law 30/84; the Royal Decree 33/1986; and Law 12/1995.

Sanctions and Disciplinary measures

41. Royal Decree 33/1986 categorises offences to which sanctions can be applied into very serious, serious and minor misdemeanours *(falta*), any types of discrimination, and breach of provisions regarding incompatibilities; the Decree also specifies the sanctions which can be imposed: discharge, cessation of duties, relocation of post and change of residence and probationary measures. It also provides for the establishment of a Central Personnel Registry that records information comprising the disciplinary sanctions applied to government and administrative personnel and decisions that have been ordered with regard to sanctions enforced on public officials. In addition, some specific provisions are provided as regards the State Security Forces (National Police and Civil Guard).

b. Analysis

42. During the visit, the GET met with public officials representing only the General State Administration. No public officials of the Autonomous Communities or local Entities were present in any of the meetings held. Therefore the GET's knowledge of anti-corruption activities and the regulatory framework applicable to public administration at sub-national level was obtained only through the answers to the questionnaire, the legal texts and other written materials provided to the GET before and during the visit.

43. As part of the review of the organisation, functioning and decision-making processes of public administration, the GET met with the Ombudsman and the Court of Audit as representatives of offices with supervision and oversight of the public administration. Decentralisation is shifting more public funds to the Autonomous Communities than had been the case in the past. The GET was told that supervision and oversight resources at that level has not always kept pace with those changes. *The GET observes that the appropriate Spanish authorities should encourage the Autonomous Communities and the local government entities to include supervision and oversight in their organisational plans to the extent that those services are not provided by the General State Administration and to find opportunities to share good practices with and among the Autonomous Regions and local government entities, whenever appropriate*[15]*.*

44. With regard to decision-making processes, as noted in the descriptive part of the present report, Spain has standard statutory administrative procedures applicable to all levels of public administration. Procedures provide for judicial review of administrative decisions and the GET

[15] After the visit, the GET was informed that the recent first draft of the White Book on Local Government Reform, was prepared by the Spanish Ministry of Public Administration. This document is available in the Ministry's web page (www.map.es), in order to collect as many opinions as possible from public and private sectors. Among its aims, the White Book may provide some help to determine competencies of Local Government, notably in order to evaluate costs and better articulate organisation and performance. The distribution of competencies between Administrations (State, Autonomous Communities and Local Government), is conducted on the basis of co-operation and co-ordination principles. As an example, new instruments of co-ordination among administrations are settled, like the "Sectorial" Conference for Local Issues (in which participates the General Administration, the Regions and Local Administrations), the Commission of Directors General in Local Government (which takes part in the preparation works of the "Sectorial" Conference) and the Conference for Cities (that combine the presence of the biggest cities, the regions and the General State Administration to work in specific urban and metropolitan problems).

was informed that notice of the right to appeal and the procedures for such an appeal is given as a standard practice to those who are parties to proceedings.

45. As far as transparency of government activities is concerned, Law 30/1992 on the Legal Regime governing Public Administrations and Common Administrative Procedures provides for access to information (Articles 35 and 37) and requires public officials to establish and maintain certain official records so that information remains available to be accessed (Article 38). Provisions contained in Article 37, however, do not appear to provide the right to have access to information other than that contained in files relating to "proceedings that have been closed" and only to individuals who are the "holders of that right" or to third parties who have a "direct and legitimate interest" in such information. In the GET's opinion, this law does not appear to be a vehicle for the general public to successfully request information that is not a part of specific administrative proceedings or simply general administrative information. Officials met by the GET were not aware of any studies of the effectiveness or efficiency of the law. One official met by the GET expressed the view that the Government had started to interpret the law more broadly and was providing more information, while another felt that provisions on the access to information were being interpreted in a more restrictive manner. With regard to more generic government information, the GET noted that all levels of the Government were making use of websites for the provision of such information.

46. In spite of the fact that the GET had asked the authorities of Spain to meet with the press and NGOs - those who might typically make requests to the Government for information - only one NGO representative was met; no representatives of the press were invited to meet with the GET. Further, court data provided to the GET about administrative appeals did not distinguish cases of denials for requests for information from other types of administrative appeals; as a consequence, the GET was not in a position to form a clear view regarding the implementing practices of the Government, based upon the frequency or outcome of those appeals. In the GET's view, transparency of public administration is a critical element in the fight against corruption, and the GET noted that while Spain has legal provisions addressing the release of Government administrative information, those provisions could easily be read more narrowly than might helpful in that fight. **The GET recommends to conduct a review of the legal provisions that provide the public with rights to access Government information and the implementation practices that have been developed to determine if the law(s) and/or current implementation practices are inappropriately limiting the public's access to information that would help support the Government in its fight against corruption.**

47. Within Spain there exists a plurality of public employment relationships. There are two general categories of civil servants: public officials and employees hired under contract. Decentralisation has also changed the distribution of these positions within the different levels of the public administration. According to official statistics on public employment, the State Public Administration, previously the primary employer, (which includes Corps and State Security Forces, General State Administration, Justice Administration and Public entities) represents 23% of the positions (540.868 staff), whereas those in the Autonomous Communities are 49% (1.162.057 staff), in local governments 24% (563.392 staff) and in universities 4% (92.547 staff). Despite the diversity of employment relationships, information provided by the authorities of Spain to the GET indicated that there were principles and guidelines for conduct that apply to all civil servants: (1) equal access to employment; (2) employment based upon merit and competence; and (3) impartiality in the performance of duties.

48. In order to meet a Constitutional requirement, Spain has contemplated reform in public service for a number of years. Most recently, Order APU/3018/2004 was issued in September 2004. That Order established a Commission for the study and preparation of the Basic Statute of Public Employment (hereafter Commission). The Order also established that legislation should be prepared based on the principles of openness and transparency, participation, responsibility, efficacy and coherence. The Commission was to report within 6 months after the issuing of the Order. Consequently, at the time of the visit, some of the subjects of the current evaluation were still under consideration by this Commission[16].

49. At the time of the visit, Spain did not have one general enforceable text that could be considered as a code of conduct for its public officials and employees in the General State Administration, nor was the GET aware of such codes at the Autonomous Community or local government levels. The issue of a code of conduct was the subject of one of the recommendations addressed to Spain in the Evaluation Report of the First Round. GRECO stated in its compliance report that this recommendation had been dealt within a satisfactorily manner.

50. In the GET's view, codes of conduct complemented by a fair disciplinary system serve two purposes. They not only provide officials and employees with guidance as to their responsibilities and rights, but widely publicised codes also inform the public about what it should expect of public service officials and employees, so that public confidence in the official is not undermined. A practical aspect of codes with administrative enforcement mechanisms can also set standards of public service that are higher than merely not violating a criminal statute. During the visit, the GET learned from various sources that it would be helpful to officials/employees if they had more guidance on the subject of gifts too, since under the current system Spain primarily relied upon the Criminal Code to address this matter.

51. With regard to the effectiveness of Spain's current system of multiple pieces of legislation dealing with obligations and rights of public officials and employees, the GET found (1) that there was no general written compilation of the criminal and disciplinary standards available to officials and employees or to the general public and (2) that information on disciplinary sanctions was not compiled centrally in a manner that could be used to determine if there were trends in the types of inappropriate behaviour or if, throughout the Government, appropriate disciplinary sanctions followed successful criminal prosecutions. Rather, when the GET asked for such information, it was told by representatives of the Ministry of Public Administration that the investigation service of each ministry or employing entity would be responsible for compiling such information individually. No one authority reviewed the combined results. In conclusion, it appeared to the GET that Spain did not compile basic information necessary to evaluate the effectiveness of the existing criminal and disciplinary sanctions in respect of misbehaviours of public officials/employees. Therefore, **the GET recommends that a full evaluation of the effectiveness of the current system of criminal/disciplinary sanctions that substitute for an enforceable code of conduct for public officials/employees be conducted and that study be made public. It recommends further that Spain compile the current criminal/disciplinary provisions and make them available to public officials and employees and publish the compilation for public information.**

[16] In March 2005 (Order APU/516/2005), subsequent to the GET's visit, the Government adopted the "Code for Good Governance of members of the Government and of the high positions within the General State Administration" which contains a number of principles of reference (*valores de referencia*) "that are to govern the performance of members of the Government and of the high positions of the Government to respond the demands and exigencies of the citizens". The Code covers such subjects as political activities, public information, gifts and use of title.

52. As regards the system for determining conflicts of interest and impartiality, the GET noted that the laws on Incompatibilities (Law 53/1984 and Law 12/1995) focus on outside activities and employments. In the GET's view, while prohibiting outside activities does help with conflicts of interest, it does not fully address the issue. During the visit, the GET found that written standards or clear guidance to public officials on the actions they should take (removing oneself from all participation as civil servant, i.e. recusal) in those circumstances where an interest or activity was not prohibited (such as familial interests or activities) but does in fact conflict with their duties, was either not known to exist or certainly not well understood by the officials concerned. The GET acknowledged that some individual agencies have internal guide-lines on the issue of recusal, but this is not the case for the overall civil service in Spain. Therefore, **the GET recommends that consideration be given to drafting guidelines for public officials/employees addressing situations where interests or activities of the public official/employee are not prohibited but may still create a conflict of interest with his/her actual duties and responsibilities.**

53. Spain has two reporting Registers for State Government Members and High Officials of the General State Administration: one for reporting outside activities and one for reporting property and rights. The Activities Register is public and contains the high officials' declarations concerning all their activities, their participation in enterprises etc. It also contains the high officials communications concerning the future activities they may develop once dismissed from a public function. In seeking information on how these reports are reviewed and used, the GET noticed that they are not used in any proactive way to help advise officials on how to avoid potential conflicts of interest with their specific interests or activities or incompatibilities. The GET was also told by representatives of the Ministry of Finance and Treasury, which has information on the ownership of companies and businesses, that they were not consulted by reviewers of the Registers when the reviewers determined whether 10% of a particular company or business was owned by a public official (a standard established in the Law 53/1984 on Incompatibilities of Personnel of the Service of Public Administration). *The GET observes that this Register system should be redesigned in a way that would allow the reports to be used to provide individual counselling on the prevention of conflicts of interest and incompatibilities.*

IV. THEME III – LEGAL PERSONS AND CORRUPTION

a. Description of the situation

Definition of legal persons

54. In Spain, there are three main types of legal persons: associations, established by a group of people who share the same common interest and desire to achieve the same objective; corporations, which are established and recognised only by Law or other State regulations; foundations, set up to provide sums of money for charity, research and other areas of general interest. The principal legal persons are trading companies (*sociedades mercantiles*), which comprise partnerships, limited partnerships, limited companies and small limited companies.

Establishment and registration

55. The requirements for establishment may be different depending on the nature of the legal person. The most important legal persons in Spain are the limited companies whose registration is regulated by the Revised Text of the Law of Limited Companies. Articles 2 to 8 of this law contain rules on company names, the commercial nature of companies, minimum share capital, nationality, registered address, constitution and inscription, information on partners and persons

with managerial functions. Article 119 of the Code of Commerce states: "Before commencing the business, all commercial Companies must register their constitution, articles of association, agreements and conditions in an official act that must be presented for inscription in the Company Registry". In addition, the Law on Limited Companies provides that "the company will be constituted through a public act that will be recorded in the Commercial Registry (hereafter the Registry). Once the entry has been made, the company will become a legal entity". The Commercial Registry is a State Organisation. The Registry is composed of two different organisations: the Territorial Commercial Registries (located in the capital of each province and responsible for registering all information on business started in their territory as well as recording accounting and auditing documents related to the company), and the Central Commercial Registry (located in Madrid, whose main task is to centralise the information received by the Territorial Registries and to publish them in the Registry itself and in the Official Commercial Registry Bulletin).

Limitation in exercising functions in a legal person

56. Articles 56 (*de las penas accesorias*) and 107 (limitation of rights) of the Criminal Code provide that a person found guilty of an offence, including a corruption offence, can be barred from holding certain positions or exercising certain functions, including managerial functions in a legal person (the system prohibits participation in entrepreneurial activity - owning a company, possessing shares in it, or running a company -, and the holding of public office). This disqualification serves as an additional sentence, which can be imposed for 1 to 5 years.

Legislation on the liability of legal persons

57. The current legal framework does not provide for corporate criminal liability. Criminal liability can only be assigned to an individual who, acting as "administrator or in the name or in representation" of a legal person, commits criminal offences. There is a degree of civil liability for legal persons in that Article 120 CC provides that legal entities can be responsible for the damages caused under civil law "for crimes or offences that have been committed by their employees, representatives or managers during the exercise of their obligations or services".

Sanctions

58. As mentioned in the previous paragraph, only civil liability of legal persons for offences committed by a natural person exists. In addition, Article 129 CC (*de las consecuencias accesorias)* provides for a certain number of accessory measures with regard to legal persons (such as closing or dissolution of the company, suspension of its activities) which "the judge or the court (…) can impose (…) to prevent the continuation of the illegal activity and its effects". These measures could be applied only to certain offences. As regards the corruption offences, Article 129 CC may only be applicable with respect to bribery of foreign public officials. No system has been created for recording legal persons to which those accessory measures might be applied.

Deductibility

59. The general principle mentioned by the Spanish authorities is that expenses related to the perpetration of crimes cannot be subject to tax deduction**.** Article 14 ("Non-deductible expenses") of the revised text of the on Company Tax Law states that "donations and generosities will not be considered as tax deductible expenses". Nevertheless, the same Article adds that "this does not apply to the expenses incurred in public relations with customers or suppliers, or in making

payments to the company personnel in respect of the usual traditions, or in promoting, directly or indirectly, the sale of the company's products or services, or those that are correlated to the company's income".

60. Deductibility of expenses, even if duly accounted for - which would require appropriate supporting documents - cannot be allowed where such expenses are related to an unlawful transaction deriving from a contract without just cause, including where the individual concerned could hypothetically avoid criminal liability owing to the presence of one of the grounds for immunity (state of necessity, insuperable fear, etc). During the evaluation visit, the Spanish authorities, and in particular the tax authorities, highlighted that even though there is no specific provision stating that bribes cannot be deducted, case law and working practice of tax inspectors reportedly show that bribes are not deductible: in case of expenses which might originate from doubtful financial activities and/or expenses, tax inspectors were said to be fully aware of the need to examine such particular situation more thoroughly.

Tax authorities

61. Pursuant to Article 7.4 of Royal Decree 939/1986, which approves the General Regulation of Tax Inspection, "the Tax Inspectorates will report the events that they become aware of in the course of their inspections and that may constitute public crimes or administrative offences, which directly or indirectly infringe the financial rights of the Inland Revenue, to the legal authorities, the State Prosecution Service (SPS) or the appropriate and competent organisations. Likewise, they will provide the data that is required by the competent legal authority when prosecuting the abovementioned crimes". Moreover, Article 95.3 of the General Tax Law provides that when information in the possession of the tax administration indicates the possible existence of an offence, the tax administration will submit to the SPS a detailed report on the facts. Tax authorities work closely with the law enforcement agencies - and especially with the SPS within which a special Support Unit of the State Administration tax Agency has been set up – and support them in complex cases, namely those related to economic crimes, including corruption.

Account offences

62. There is a general obligation for all businesses to keep complete accounting records and books as well as relevant computer programmes, files and archives for six years. As far as violation provisions on the proper maintenance and conservation of accounting and other company records are concerned, the Code of Commerce does not contain direct sanctions; however, if a company goes bankrupt, the lack of appropriate records will be sanctioned by declaring the company fraudulent). By contrast, the Criminal Code provides for a specific "accounting crime" (Article 310)[17]. The Spanish authorities mentioned also Articles 200 and 201 of the Company Tax Law and Article 184 of the General Tax Law providing for specific sanctions for account offences.

[17] "The penalty of seven to fifteen weekends of confinement and a fine of three to ten months shall be applied to punish any person who is obligated by tax law to keep commercial accounting records, books or tax records and:
a) Absolutely fails to discharge the said obligation in the procedure for direct evaluation of taxable bases.
b) Keeps different accounting records referring to the same business and business year, which records hide or simulate the true situation of the company.
c) Fails to enter economic deals, acts, operations or transactions in general in the mandatory books or enters figures other than the true figures for such items.
d) Makes fictitious accounting entries in the mandatory books.

Auditors and accountants

63. Auditors, accountants, tax advisors as well as notaries and lawyers are included in the list of those persons (organisations) who are submitted to a number of specific obligations (to report suspicious transactions to the SEPBLAC, to some action aiming at gathering further elements related to a suspicious situation etc) when they come across any activities that could be related to money laundering. The monetary sanctions provided in case of failure to report are the same as for all institutions having a reporting obligation in this context: 1% of turnover for serious crimes, 5% for very serious crimes and withdrawal of license of exercise of the profession.

b. Analysis

64. Without an appropriate official registration, no legal person is allowed to commence its activity. The registration system for commercial companies, operating via Territorial Commercial Registers, as far as the collection of data and publication of information is concerned, is *de facto* a centralised system. All information is transferred to the Central Commercial Registry, which is responsible for its publication in the Official Commercial Registry Bulletin. Not all the information kept is available to the public (e.g. the origin of funding capital). The Registry is fully computerised and the public has access to the information publicly available via internet. The fee for access to a company file is nine euro, which is fairly moderate and thus cannot be seen as an obstacle to those seeking this information. Law enforcement and judicial authorities have access to all the information contained in the files – under the general conditions which apply to investigative and criminal proceedings.

65. Spain has not yet ratified the Criminal Law Convention on Corruption. The current evaluation does not, therefore, deal with the liability of legal persons for corruption offences as provided by the Criminal Law Convention on Corruption. Therefore, the GET has looked into the liability of legal persons for corruption within the framework of GPC 5. It is clear that the Spanish legal system does not provide for corporate liability. Legal persons may be held liable for the damage caused by corruption only within the framework of civil law provisions on torts. In the GET's view, this is insufficient. Article 56 of the Criminal Code provides for cases where accessory sanctions (*penas accesorias*) can be applied. This includes the prohibition to perform certain activities provided that the court establishes that there is a link between the offence committed and the type of activity exercised, including the holding of a managerial position in a legal person. Information on the imposition of such measures is kept in the registry of criminal convictions. Since there is no direct liability of legal persons for corruption offences, there is consequently no register of legal persons involved in corruption activities. Therefore, **the GET recommends 1) to introduce an adequate system of liability of legal persons for acts of corruption, including effective, proportionate and dissuasive sanctions, and subsequently, 2) to consider to establish a registry of legal persons which have been subject to corporate sanctions.**

66. Laws 44/2202 (on "Measures to Reform the Financial System") and 26/2003 (amending Laws on the Stock Exchange and on Limited Companies) contain provisions which oblige large companies to have a code of conduct of which all company staff are to be aware. The Spanish Chamber of Commerce, which is a public body, carries out vocational training courses for company staff, which include, *inter alia,* issues related to good governance. The GET welcomes the training activities carried out by the Chamber of Commerce and considers that, taking into account its status and the fact that it is operating under the supervision of the Ministry of Trade, this agency might play an even more active role in providing anticorruption education to the business community. Therefore, **the GET recommends that the Spanish authorities encourage**

through all possible means the Chamber of Commerce to play a more active role in promoting ethics in business.

67. Tax deductibility of bribes is addressed on the basis of the general principle of civil law, which prohibits drawing any legal consequence from an act which itself constitutes an offence (or an element thereof), or which is related to the perpetration of an offence. This general approach could be considered as being equivalent to a direct prohibition of the deduction of bribes paid, on the condition that the tax authorities are well aware of such a prohibition and acquainted with its practical implementation. The GET is under the impression that this is the case in Spain. In addition, Article 14 of the Company Tax Law, which prohibits the deduction of "donations and generosities", offered by companies, could be seen as having a potential anti-corruption effect. This effect does not appear to be undermined by the exemption provided for by the same Article which states that "that exemption does not apply to the expense incurred in public relations with customers or suppliers, or in making payments to the company personnel in respect of the usual traditions, or in promoting, directly or indirectly, the sale of the company's products or services, or those that are related to the company's income", given that the tax authorities were found to be trained to check whether the service goods in question have been provided (and even whether the company is in a position to provide that service goods) or whether the latter could dissimulate doubtful financial activities or expenses.

68. In the GET's opinion, tax authorities are well aware of the tax implications of most corruption offences and prepared to perform their detection and investigation tasks. In order to become a tax official, the applicants have to undergo a one-year training course. Further training is provided by the Institute of Tax Studies which, among others, covers the typology of tax offences. Rules on incompatibility applicable to tax inspectors are more stringent than those applicable to other civil servants. Spain has developed a well functioning system of cooperation between the prosecution services and the tax authorities. Tax inspectors are under a specific obligation to report any fact "that may constitute public crimes or administrative offences" directly to the State Prosecution Service.

69. Accountants and private auditors are obliged to report suspicious transactions under anti-money laundering legislation, which provides for sanctions for non-fulfilment, which may range from 1% to 5 % of their yearly turnover. This level of sanction could well be considered as adequate. Moreover, it is also possible to ban the aforementioned professionals from exercising their activity, which in some cases might have more serious repercussions than a purely financial sanction.

V. CONCLUSIONS

70. In Spain, recourse to seizure and confiscation of assets is an usual practice for the police and prosecution services. Detailed legal provisions dealing with seizure, confiscation and management of seized and confiscated assets are in place. Recent legislative developments in the field of confiscation of the instruments and proceeds of crime have introduced *inter alia* the possibility of using value and *in rem* confiscation. The confiscation of proceeds/instruments found in the possession of a third party is also addressed by the law. The Special Attorney General's Office for the Repression of Economic Offences related with Corruption is strongly supported by special units of experts in tax and other financial matters. The Government intends to extend these specific capability of using specialised units to the main prosecutors' offices in the country, in order to enhance their operative capacity. As far as public administration and ethics is concerned, Spain does not have one general enforceable text that could be considered as a code

of conduct for its public officials and employees in the General State Administration. The current system is based on different pieces of legislation dealing with obligations and rights of public officials and there is no general written compilation of the criminal and disciplinary standards available to officials and employees or to the public. As regards legal persons and corruption, the Spanish legal system does not provide for corporate liability. Legal persons may be held liable for the damage caused by corruption only within the framework of civil law provisions on torts.

71. In view of the above, GRECO addresses the following recommendations to Spain:

i. **that a legal provision be introduced specifically providing for provisional measures to be taken for the purpose of guaranteeing the effective confiscation of the proceeds of corruption** (paragraph 19);

ii. **to conduct a review of the legal provisions that provide the public with rights to access Government information and the implementation practices that have been developed to determine if the law(s) and/or current implementation practices are inappropriately limiting the public's access to information that would help support the Government in its fight against corruption** (paragraph 46);

iii. **that a full evaluation of the effectiveness of the current system of criminal/disciplinary sanctions that substitute for an enforceable code of conduct for public officials/employees be conducted and that study be made public. It recommends further that Spain compile the current criminal/disciplinary provisions and make them available to public officials and employees and publish the compilation for public information** (paragraph 51);

iv. **that consideration be given to drafting guidelines for public officials/employees addressing situations where interests or activities of the public official/employee are not prohibited but may still create a conflict of interest with his/her actual duties and responsibilities** (paragraph 52);

v. **1) to introduce an adequate system of liability of legal persons for acts of corruption, including effective, proportionate and dissuasive sanctions, and subsequently, 2) to consider to establish a registry of legal persons which have been subject to corporate sanctions** (paragraph 65);

vi. **that the Spanish authorities encourage through all possible means the Chamber of Commerce to play a more active role in promoting ethics in business** (paragraph 66).

72. Moreover, GRECO invites the Spanish authorities to take account of the *observations* (paragraphs 20, 23, 24, 43, 53) made in the analytical part of this report.

73. Finally, in conformity with Rule 30.2 of the Rules of Procedure, GRECO invites the Spanish authorities to present a report on the implementation of the above-mentioned recommendations by 30 November 2006.