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

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Evaluation Report on Spain

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Secrétariat du GRECO
Conseil de l Europe
F-67075 Strasbourg Cedex

www.greco.coe.int
☎ +33 (0)3 88 41 20 00

GRECO Secretariat
Council of Europe
Fax +33 (0)3 88 41 39 55

I. INTRODUCTION

1. Spain was the sixth GRECO member to be examined in the first Evaluation round on the same dates as Luxembourg. The GRECO evaluation team (hereafter "GET") was composed of Mr Norbert JANSEN, Senior Public Prosecutor in Germany (prosecution expert), Mr Jakub FARINADE, Head of Unit of Supervision on Investigations at the General Customs Inspectorate in Poland (law-enforcement expert) and Ms. Ruth Fitzgerald, Office of the State Attorney General of Ireland (policy expert). The GET, accompanied by a member of the Council of Europe Secretariat, visited Madrid from 6 to 8 November 2000. Prior to the visit the GET experts were provided with a comprehensive reply to the Evaluation questionnaire[1] as well as extracts of relevant legislation.

2. The GET met with officials from the following State institutions: Secretary of State for Justice, Directorate General of Legislation Policy and International Legal Co-operation of the Ministry of Justice, Special Attorney General's Office for the Repression of Economic Offences related with Corruption (ACPO) including the Judicial Police and Civil Guard units attached to this Office, National Court and Prosecution Service assigned to it, State Prosecution Service (SPS)[2] 's Office, Bank of Spain including the Executive Service of the Commission for the Prevention of Money-Laundering and Financial Offences, Directorate General of Treasure and Financial Policy of the Ministry of Finance, Office of the Controller General of the Administration of the State, Service of Inspection of the Securities and Exchange Commission, Directorate General of Civil Service of the Ministry of Public Administrations and Office of the Legal Advisor to the Ministry for Foreign Affairs.

3. Moreover, the GET met with journalists from *El Mundo* a national newspaper which in the recent past has unveiled a number of significant corruption cases.

4. The agenda of the meetings appears at Appendix I.

5. It is recalled that GRECO agreed, at its 2nd Plenary meeting (December 1999) that the 1st Evaluation round would run from 1 January 2000 to 31 December 2001, and that, in accordance with Article 10.3 of its Statute, the evaluation procedure would be based on the following provisions:

   - Guiding Principle 3 (hereafter "GPC 3": authorities in charge of preventing, investigating, prosecuting and adjudicating corruption offences: legal status, powers, means for gathering evidence, independence and autonomy);

   - Guiding Principle 7 (hereafter "GPC 7": specialised persons or bodies dealing with corruption, means at their disposal);

   - Guiding Principle 6 (hereafter, "GPC 6": immunities from investigation, prosecution or adjudication of corruption).

6. Following the meetings indicated above, the GET experts submitted their individual observations and proposals for recommendations to the Secretariat, on the basis of which the present report has been prepared.

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[1] See document GRECO Eval I (2000) 16.

[2] State Prosecution Service (SPS) and State Attorney General's Office (SAG's office) are synonyms. The *State Attorney General* or "Fiscal General del Estado" is the Head of the SPS (see section (b) below).

7. The principal objective of this report is to evaluate the measures adopted by the Spanish authorities, and wherever possible their effectiveness, in order to comply with the requirements deriving from GPCs 3, 6 and 7.

8. The report will first describe the situation of corruption in Spain, the general anti-corruption policy, the institutions and authorities in charge of combating it -their functioning, structures, powers, expertise, means and specialisation-, the investigation techniques and the system of immunities preventing the prosecution of certain persons for acts of corruption.

9. The second part contains a critical analysis of the situation described previously, assessing, in particular, whether the system in place in Spain is fully compatible with the undertakings resulting from GPCs 3, 6 and 7.

10. Finally, the report includes a list of recommendations made by GRECO to Spain in order for this country to improve its level of compliance with the GPCs under consideration.

II. GENERAL DESCRIPTION OF THE SITUATION

11. The Kingdom of Spain is a medium size State (505 000 sq. Km), neighbouring Portugal, France and Andorra. The population in 1998 was 39,371,000 which represents a concentration of 78 inhabitants per sq. Km. The population growth rate over previous year was 0.1%. The GDP in 1999 was 712.1 billion US$ with per capita of 18.100 US$ which represents 81% of OECD countries. GDP growth over 1997-98 was 4% (3.7% over 1998-99), which for this period represents increases by components of 4.1% for private final consumption expenditure and 2.0% for Government final consumption expenditure. Unemployment in 1998 was at 18.6% of active population representing 26.4% of women and 13.6% of men[3].

12. Spain is a member of the European Union (EU) and of most international organisations including the United Nations, the Council of Europe and the OECD. It is also a member of the Financial Action Task Force on money laundering and observer in the Caribbean Financial Action Task Force, and as member of the EU is subject to EC Directive 91/308/EEC on Prevention of the use of the Financial system for the purpose of money laundering.

13. Spain has a European continental legal system where the minimum age of criminal responsibility is eighteen years. It is bound by a large number of different bilateral agreements and conventions on international judicial and police co-operation and could provide mutual legal assistance in corruption cases on the basis of those treaties as well as on the basis of the reciprocity rule. It is party to the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime of 1990 and member of the Council of Europe Group of States against Corruption (GRECO) although it has not yet signed the Criminal and Civil law Conventions on corruption (ETS No 173 and 174).

a. The phenomenon of corruption and its perception in Spain

14. Corruption is a complex phenomenon in Spain. The recent history of the country and transition from dictatorship to democracy explains to a considerable extent the changing perception that the Spanish society has of this phenomena. According to information provided to GET corruption is closely related with political parties' funding. In the transitional phase political parties did not

[3] Soure: *OECD in figures 2000*. OECD, Paris, 2000.

always obey the strict rules on funding and it was considered that a certain degree of political corruption was tolerated in the light of the particular circumstances of this period. However, over the years, these phenomena grew and became unacceptable to the public, particularly as some notorious cases of individual corruption by senior officials (including the Director General of the Civil Guard and the Governor of the Bank of Spain) as well as ministers were unveiled. By the early 90s the fight against corruption marked political debate. Several measures were taken and as a result political credibility became an overriding value.

15. There is no single definition of corruption in the Spanish legal system. Rather, a number of corruption offences are envisaged *stricto senso* in the Spanish Criminal Code of 1995 under various headings[4]. Articles 419 to 427 cover to *passive and active corruption* of Spanish authorities and public officials and Article 24 provides that the term "authority" encompasses the members of Parliament**,** including the Congress of Deputies and the Senate, the legislative assemblies of the autonomous communities and the European Parliament, as well as members of the judiciary and officials of the SPS. Articles 428 to 431 cover *trading in influence*, which refers to Spanish authorities and officials. Article 445a (as revised following the accession to the OECD convention on bribery in international transactions) covers *corruption in international business* and refers to bribery of foreign public officials in international commercial transactions.

16. In addition, the law setting up the ACPO (see section b.3 below) gives the ACPO powers in relation to other offences provided for by the Criminal Code including offences against the Treasury (Articles 305-310), smuggling and offences against exchange control, abuse of official authority (Articles 404-406), use and misuse of privileged information (Article 418, where private individuals are concerned and Article 442 in respect of public officials), misappropriation of public funds (Articles 432-435), fraud and extortion (Articles 436-438), negotiations prohibited to officials (Articles 439-441), illegal exercise of functions (Articles 506-508) and all offences connected therewith.

17. Finally, where any of the corruption related offences as defined above are committed in an organized manner, the offence of "unlawful association" also comes into play under Article 515, para. 1 of the Criminal Code. The Supreme Court has interpreted this provision as embodying a concept of association considerably broader than the one in private law, requiring a certain degree of consistency, as opposed to a sporadic character, and a hierarchical organisation.

18. The Spanish legal system provides for the administrative and civil liability, whether direct or subsidiary, of legal persons resulting from damages caused by their managers or employees. However, there is no provision for the criminal liability of legal persons based on the notion of guilt, as legal persons are not considered as possibly having a criminal intent. Therefore, in practice such liability is assigned to those persons acting on behalf of the moral person as provided by Article 31 of the Spanish criminal Code. However, according to Article 129 of the Spanish criminal Code, legal persons endangering society can be subject to security measures "in the cases provided for in this Code". The Spanish authorities are currently considering the possibility of applying Article 129 of the Spanish criminal Code to economic and corruption offences.

19. Corruption offences are predicate offences for the purpose of money laundering offences as provided in the Convention on laundering, search, seizure and confiscation of the proceeds from crime (ETS no. 141) to which Spain is Party and to which it has made no reservations.

[4] A translation of the relevant provisions is included in Appendix II to this report.

20. Following Article 131 of the Criminal Code, limitation periods vary according to the seriousness of the corruption offence concerned. Thus, for the most serious forms of *passive* and *active corruption* of Spanish authorities and public officials, Spanish law provides a limitation period of 15 years, this period being of 5 to 10 years for less serious forms of the offence.

21. Offences involving corruption are classified as "public" under Spanish legislation and prosecution may follow automatically the receipt by the judge or law officer of the "notitia criminis". Thus, the judicial machinery for the prosecution of this kind of offence may be set in motion: at the initiative of the judicial authority, following a report or a complaint lodged by an individual or by the SPS, or at the initiative of a member of the public through the exercise of the "actio popularis".

22. There are no specific statistics in Spain on corruption offences despite the fact that thorough judicial statistics are collected[5]. However, the ACPO provided the GET with information on the number of cases assigned to it, which provides an indication of the extent of the phenomenon. This information is summarised below. However, it should be mentioned that the number of cases dealt with by the ACPO comprises both cases involving corruption offences strictly speaking (see paragraph 15 above) which are less numerous, and cases involving economic offences (see paragraph 16 above).

Number of corruption cases assigned to the ACPO until 23.10.2000[6]

Year	Cases
1996	47
1997	23
1998	40
1999	20
2000	13

23. However, it should be pointed out that the number of cases dealt with by the ACPO are insignificant in comparison with the total number of criminal offences dealt with by the Courts[7] and the number of decisions in criminal matters which range in the hundreds of thousands[8]. Thus, the low figures quoted above simply mean that the ACPO concentrates on the most significant cases.

24. According to Transparency International *Corruption Perception Index* for the year 2000, Spain is ranked 20 out of 90 countries (score 7 out of 10 (best)) in the tenth best position among the 15 EU member countries. In 1999, Spain ranked 22 (score 6.6) in the twelfth best position among EU members.

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[5] See for instance *Estadisticas Judiciales de España* published yearly since 1952. The GET was provided with the following general statistics: number of cases considered by ACPO since it began to function: 80, number of cases which actually have been considered by the Courts as a result of ACPO's action: 30-40.

[6] For statistics on cases dealt with by the Spanish courts see *Relación de procedimientos judiciales atribuidos a la competencia de la Fiscalía especial para la represión de los delitos económicos relacionados con la corrupción desde su constitución hasta el día de la fecha, 23 de octubre de 2000.*

[7] *Criminal Justice Systems in Europe and North America,* Joaquín Martín-Canivell, Heuni, Helsinki 1998, Table 1. *Total number of criminal offences dealt with by the Courts, 1985 to 1991* in *Spain*. Total number of criminal offences dealt with by the Courts in 1991 were 2,114,202.

[8] *Estadísticas Judiciales de España*, 1998. Total number of crimes convicted in 1998 was 110.672 of which 47.380 crimes against private property, 29.310 traffic related, 7317 drug related.

25. At domestic level, the Spanish Higher Council of Sociological Surveys' "Barometer" edition of November 2000[9] ranked corruption in the ninth place among the main political problems, after terrorism, rivalries between political parties, passiveness of political parties, unemployment, nationalism and separatism and social and economic problems. Therefore, it can be said that today corruption is not, in general, perceived as being a major threat to society.

26. Finally, it is worth recalling the role plaid by the media, notably by the press, in the detection of numerous corruption scandals. The wide media coverage of some corruption cases might have contributed to a perception of this phenomenon going beyond that resulting from the number of serious cases dealt with by the ACPO, following its selective approach.

27. Finally, it should be noted that there appears to be no connection between corruption of public officials and organised crime, other than some marginal cases publicised by the press where links were established between organised crime and certain elected local representatives.

b. Bodies and institutions in charge of the fight against corruption

28. Notorious corruption scandals unveiled in the early 90s and growing public concern about them resulted in the adoption of several measures with a view to tackling these phenomena including the setting up of (a) a Special Attorney General's Office for the Repression of Economic Offences related with Corruption (hereafter "ACPO"), which is a specialized institution including several investigative law enforcement units. It plays a key role in the Spanish anti-corruption policy namely investigation and prosecution and therefore, merits particular attention.

29. The ACPO forms part of (b) the State prosecution service, whose territorial offices will in certain cases be responsible for the investigation and prosecution of corruption related offences, instead of the ACPO. In all cases the State prosecution service just as the courts and tribunals will be assisted by (c) the law enforcement authorities.

30. The Spanish courts (d) are competent for the adjudication of corruption-related cases. The ordinary territorial courts are competent for ordinary cases, while the National Court (*Audiencia Nacional*), a court whose competence covers the whole of the Spanish territory, has exclusive competence over certain particular offences.

31. In addition, a number of specialised economic or financial institutions responsible for auditing public accounts or fighting money laundering and other financial crimes contribute to the fight against corruption by unveiling suspect transactions. They are grouped under the heading (e) *Other bodies* and include the Court of Auditors, both at national and regional level, the *Commission for the Prevention of Money Laundering and Monetary Offences*, the *Executive Service of the Commission for the Prevention of Money Laundering and Monetary Offences* (SEPBLAC) and the *National Securities Exchange Commission*.

32. Finally, it should be noted on the one hand that in Spain, public administrations, law enforcement agencies, courts and tribunals, and offices of public prosecutions have their own inspectorates responsible for ensuring that they function properly, for instance the General Council of the Judiciary for judges, the Public Prosecution Service (SPS) Inspectorate for prosecutors. Although all inspection bodies have a general remit and were not set up specifically to combat the

[9] *Barómetro del Consejo Superior de Investigaciones Sociológicas.* Provisional results for November 2000. Survey no. 2402. Ranking of replies to the question "According to you, which are the most significant political problems affecting the Spaniards?" (Question No. 36, spontaneous reply, several answers possible, maximum three replies).

corruption of public officials in the exercise of their functions, they nonetheless have a duty to pursue investigations in cases where corruption is suspected. On the other hand it is also worth noting that staff serving in State institutions whether executive or judicial do not appear to have specific codes of conduct. This can be explained by the fact that Spain subscribes to the continental model of civil service. In addition, it should be noted that two laws on incompatibilities, which apply respectively to civil servants and high officials, impose specific duties upon these categories of persons and provide for administrative offences and disciplinary sanctions. These laws aim at ensuring the neutrality and the integrity of the civil service *vis-à-vis* corrupt behaviour.[10]

(a) The Special Attorney General's Office for the Repression of Economic Offences related with Corruption (ACPO)

33. The ACPO was set up in 1995 but only became properly operational, with adequate material and human resources, in early 1996. It forms part of the Spanish State Prosecution Service (hereafter "SPS")(b), with which it shares various characteristics including the broad legal basis of its operations as provided for by Article 124 of the Constitution and the SPS Statute It differs, however, from other public prosecution offices by its multidisciplinary character.

34. Indeed, the ACPO is unique in that it is supported by several special units assigned to it from the Tax Department (three inspectors and six deputy inspectors), from the Support Unit of the Civil service's General Administrative Inspectorate (two inspectors and three administrators) and from the *Civil Guard* or gendarmerie and the *National* or criminal police (25 officers). This combination of officials from different branches of the public service, under the sole authority of the head of the ACPO, represents a departure from the traditional operating methods of Spanish offices of public prosecution.

35. Moreover, the ACPO has a direct link - via the tax inspection unit assigned to it - with the Tax Inspectorate's national database containing details of the tax returns of all individuals and legal entities in Spain over the last six years. This is also a unique feature and valuable resource for the work of the ACPO. Moreover, on the basis of the general rules, the ACPO may also have access to other relevant national data bases held by public authorities, including those held by the law enforcement authorities. Prosecutors assigned to the ACPO also have permanent authorisation to travel within Spain and abroad in connection with their work.

36. The ACPO counts 11 prosecutors under the direction of a Chief Prosecutor selected by the Government on a proposal submitted by the SAG, after having consulted the Attorney General Council (*"Consejo Fiscal",* see below). The prosecutors selected have undergone training on economic crime and tax fraud, and most had previous professional experiences in dealing with economic offences. ACPO resources are provided by the SPS budget, which, in turn, is part of the Ministry of Justice's budget.

[10] It should also be noted that Law 30/1984 of 2 August on measures for the reform of the civil service, as revised by Laws Nos. 22/1993, 27/1994, 42/1994, 12/1995, 13/1996, 6/1997, 66/1997, 50/1998, 39/1999 and 55/1999 has introduced for the first time a series of ethical principles including integrity, neutrality, independence, transparency, service to citizens, accountability and a commitment to foster models of good practice. Moreover, the Directorate General of Civil Service within the Ministry for Public Administrations is considering the introduction of a Code of Conduct for Public Officials inspired by Council of Europe recommendation of the Committee of Ministers to the Governments of Member States No. R (2000) 10 *on Codes of Conduct for Public Officials.*

37. The ACPO is competent for two major areas of offences, in principle separated from one another: economic offences and offences committed by public officials in the exercise of their official duties. Article 18 paragraph 3 of the Law establishing the ACPO provides the list of offences which prompt the ACPO's competence. These are:

a. Offences against the Public Treasury, smuggling, and in questions of money exchange control
b. Prevarication offences
c. Offence of abuse or illicit use of privileged information
d. Misappropriation of public funds
e. Fraud and extortion
f. Offences of exercise of undue influence
g. Offences of bribery
h. Negotiations forbidden to civil servants
i. Certain offences against property and socio-economic order (Sections IV and V of Title XIII of Book II of the Penal Code)
j. Offences related with the above

38. This means that the ACPO has a broad competence to deal with corruption cases, regardless of the type of criminality it is associated with.

39. In order for the ACPO to intervene, in addition to falling within the above list, the offences concerned must be of "special significance" as defined by the SAG who can do so in a general manner[11] or on a case-by-case basis by specific instructions. However, in all cases, the determination of the "special significance" has to be objective and be based on criteria resulting from legislation or case law.

40. The Head of the ACPO added that, in practice, a quantitative criterion was also applied in deciding whether the case falls under the jurisdiction of ACPO, as ACPO will intervene only when the economic damage is significant[12].

41. Where either of the two conditions is not met, it is not the ACPO but the relevant territorial Office of the SPS which will be competent.

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[11] See SAG's Instruction No. 1/1996 of 15 January 1996 which provides guidance for cases in which the ACPO's competence to intervene is warranted.
Thus for instance, in the case of *offences committed by civil servants*, the ACPO is competent for those cases attributed to persons who hold the status of Senior Official in the terms described in article 1 of Law 12/1995, of 11 May (RCL 1995/1425), on incompatibilities of members of the Government of the nation and of Senior Officials of the General State Administration, and their equivalents in its Regional, Provincial and Local Administration.
The SAG's office may, however, when there are sufficient reasons, on the one hand pass knowledge of the actions against the above to the respective Attorney General's Offices when, despite the relevance of the perpetrator, the facts lack significance and complexity.
On the other hand, the ACPO may also be attributed the competence to intervene in matters in which other authorities and civil servants of inferior rank are implicated when the complexity of the facts, their economic significance and the social alarm they have produced calls for such measures.
Finally, in cases of offences attributed to persons who enjoy privileges at the Second Hall of the Supreme Court or at the Civil and Criminal Halls of the Higher Regional Courts, in accordance with articles 57.2, and 73.3.a) of the Organic Law of the Judiciary (RCL 1985/1578, 2635 and ApNDL 8375), the SAG shall decide on a case-by-case basis whether or not competence is attributed to the ACPO.
[12] An indicative figure of 100 Million Pesetas (€ 600,000, approx.) was mentioned in this respect, although it was stressed that this was a flexible criterion.

42. The ACPO's intervention has a two-pronged approach: the investigation proceedings and intervention in criminal proceedings. Investigation proceedings are instituted as a result of a complaint either of individual persons or of the Administration or *ex officio*. The ACPO then informs the Attorney General's Office which would have been territorially competent in order to avoid overlapping proceedings.

43. The ACPO is required to keep the SAG informed about the cases it is dealing with and any developments relating thereto, in particular any possible changes in competence[13].

44. The SAG has a certain margin of discretion when exercising the power to attribute cases to the ACPO. Given the particular nature of the offences dealt with by ACPO, the SAG is required to report every six months to the Board of Court Attorneys Generals ("*Junta de Fiscales Jefes de de Sala*") and to the Attorney General Council (*"Consejo Fiscal"*) about procedures in which the ACPO has been called upon to intervene. The Board of Court Attorney Generals *("Junta de Fiscales Jefes de Sala"*) or the Attorney General Council (*"Consejo Fiscal",* see below) may then make observations in view of which, the SAG may ratify his decisions or may modify them, with suitable grounds, when he considers this appropriate.

(b) The State Attorney General's Office or SPS

45. The SPS is governed by Law 50/1981, of 30 December and counts the following bodies:

a. the State Attorney General ("SAG")
b. the Attorney General Council *("Consejo Fiscal")*
c. the Board of Court Attorney Generals *("Junta de Fiscales Jefes de Sala")*
d. the Attorney General's Office at the Supreme Court
e. the Attorney General's Office at the Constitutional Court
f. the Attorney General's Office at the National Court
g. the Special Attorney General's Office for the Prevention and Repression of Illicit Traffic in Narcotic Drugs ("ADPO")
h. the Special Attorney General's Office for the Repression of Economic Offences related with Corruption (ACPO) (see (a) above)
i. the Attorney General's Offices at the Superior Courts of Justice
j. the Attorney General's Offices at the Provincial Courts

46. Article 124 of the Constitution provides that the SPS has the mission of promoting justice in defence of the law, the rights of the citizens and the general interest as well as contributing to guaranteeing the independence of the Courts. It also states that members of this office act in accordance on the one hand, with the principles of unity and hierarchical subordination, and on the other hand, with those of legality and impartiality.

47. As a result, all prosecutors are subject to the SAG, who is in turn appointed by the King on the proposal of the Government after consulting the General Council of the Judiciary ("CGPJ") (cf. Art. 124 para. 4 of the Constitution). The Government, through the Ministry of Justice, may ask the SAG to introduce motions in court in order to promote and defend the public interest. The latter will respond to the Government on the feasibility and adequacy of implementing its request after consulting the SAG's Council.

[13] Article 25 of the Organic Statute of the Attorney General's Office.

48. In addition, differences with regard to the interpretation of the law can sometimes arise between the SAG and individual attorneys serving in the SPS. Such disputes must be resolved through a procedure laid down in the SPS Statute. The effective result of this procedure is that the SAG after statutory consultation with various bodies linked to the SPS, will formulate a view which will prevail over that of the individual prosecutor. This makes the SAG's conduct transparent and open to criticism. Should a difference arise between a senior public prosecutor and a subordinate, a similar procedure is followed although the final decision rests with the SAG.

49. The rules and principles governing the investigation and prosecution of corruption-related offences are the general rules laid down in the Law on Criminal Procedure. Spain follows the rule of strict mandatory prosecution in accordance with the SPS Statute and Article 105 of the Law on Criminal Procedure[14]. The public prosecutor, as soon as she/he receives a report or information on a possible offence must institute criminal proceedings, regardless of any proceeding initiated at the request of the interested party.

50. In criminal procedures, the SPS pursues criminal actions before the courts and requests judicial authorities to carry out searches in order to detect offences and discover offenders. It may also order such measures as preventive detention of suspects and may order the police to conduct whatever investigation activities she/he considers necessary.

51. The SPS is not entirely free to suspend or bring to an end an investigation or prosecution of an offence. In every case, the prosecutor's decision is subject to a final decision by the judge. The competent Investigating Judge has the power to investigate the case, encompassing the procedural documents involved in preparation of the trial and the verification of perpetration of the offences and of the charges upon the offenders. The investigating judge is empowered to do so even if the prosecutor is opposed to the continuance of the proceedings. The public prosecutor may decide to discontinue inquiries, which proceeds the investigation phase, if he or she considered that the facts do not constitute an offence. However, the prosecutor is then obliged to inform the interested parties of this discontinuation, so that they may resubmit their complaint to the investigating judge, who will have the final word.

52. Thus, the SPS does not have the possibility of closing criminal cases with cautions or simplified procedures, but may only request the withdrawal of the case once the investigating process has being completed, if it considers that no offence has been committed.

53. As it has been said above, the ACPO is not competent in all cases to prosecute corruption related offences. Where the ACPO is not competent, other organs of the Prosecution Service or the relevant territorial SAG's Office are competent. In such cases, however, the ACPO may assist these prosecution offices, at their request.

(c) Law enforcement agencies

54. There are two basic law enforcement agencies: the *Civil Guard* and the *National Police* as stated above. In addition, some regions (autonomous communities), like Catalonia and the Basque Country, have set up their own police forces. Both the Civil Guard and the National Police have units specifically assigned to the ACPO and specialised in the fight against corruption. These units are a link between the ACPO and the agencies to which the officers belong.

[14] Some degree of prosecutorial discretion (defined as "regulated opportunity") was recently introduced for the first time by the new law on criminal liability of minors.

55. In addition to that, within the *Civil Guard* two units combat money laundering: the Criminal Investigation Department, which comprises various units deployed in judicial districts, with task forces to combat economic crime on the national and regional levels; and the Tax Service with investigative units at regional, provincial and local level and a nationwide anti-money laundering investigative squad created in 1994.

56. As far as the *National Police* is concerned, within the General Commissariat of the Judicial Police, several units have responsibility for specifically combating money laundering and thus can contribute to the work of the ACPO, namely: the Monetary Offences Investigative Squad (a police unit that reports to SEPBLAC and has jurisdiction over the whole Spanish territory) (see (e) below) and the anti-drug and organised crime units (UDYCO) set up since February 1997 in each of the major police prefectures including Madrid, Galicia, Catalonia, Valencia, Eastern and Western Andalusia, the Canary Islands and the Balearics and with jurisdiction over their respective territories.

57. Finally, it should be noted that under Spanish procedural law, only the investigating judge or the public prosecutor is empowered to co-ordinate joint action in cases of the type under consideration, and that the police cannot close a criminal case since according to the law it does not have such power.

(d) Courts and tribunals

(d1) Introduction

58. Corruption cases, like all other cases, are adjudicated by the courts, which according to Article 117 of the Spanish Constitution have sole competence to exercise judicial functions. The Constitution, the Organic Law on the Judiciary[15] and several ordinary laws, as well as specific procedural statutes govern the organisation and functioning of the judicial system.

59. There is a uniform judicial system, including courts of general –civil and criminal- and specialised - social, labour and administrative - jurisdiction. The Act of 22 May 1995 introduced the jury in trials dealing with certain types of offences, including corruption-related offences. There is no special jurisdiction dealing with corruption cases. The establishment of extraordinary courts is, in any case, forbidden by the Constitution.

60. Judges are selected on the basis of competitive examinations and appointed for their lifetime. In the performance of their duties, judges are bound only by the Constitution and the Law and may not receive any order or instruction. They enjoy immunity for acts performed in the exercise of their duties (see section d. below). They may only be removed from office as a result of disciplinary proceedings for serious breaches of their duties, for instance, by committing a criminal offence in the performance of their functions. Disciplinary proceedings are regulated by the law and are an internal matter for the judiciary.

61. The Judiciary is governed by the *General Council of the Judiciary* ("GCJ") which is an independent organ responsible for recruiting and appointing judges, training, career and disciplinary decisions over the whole of the Spanish territory. The GCJ does not exercise any judicial function. It is chaired by the President of the Supreme Court, and composed of twenty

[15] Organic law 6/1985 of 1 July revised thereafter by Organic law 7/1988, 16/1994.

Members, appointed by the Lower and Upper Houses of Parliament[16]. Neither the Ministry of Justice nor any other agency of the Executive have powers to decide on issues relating to the functioning of the judiciary, ensuring thus full separation of powers and guaranteeing judicial independence. As the governing body of the judiciary, the Council has a constitutional and institutional status similar to that of the Government and the two Houses of Parliament against which it can bring cases involving conflicts of competence before the Constitutional Court.

(d2) The investigation stage of proceedings

62. Spain has the institution of the Investigating Judge (IJ), responsible for the investigation of cases where suspicion is reasonably directed towards a possible perpetrator. The IJ is also competent for authorising the use of investigative measures (see c. below), which could affect the exercise of fundamental rights and freedoms of the suspect.

(d3) Judicial Organisation

63. For the purposes of the administration of justice, Spain is divided into Districts, Provinces and Regions.

64. *District Courts* –which are made of one judge- have jurisdiction to deal in the first instance in criminal cases where the penalty is lower than 6 years imprisonment. All other criminal cases are dealt in the first instance by the *Provincial Courts* –which are made of three judges-, with the exception of cases falling under the jurisdiction of the National Court (see below) and cases where the suspect is a member of a regional Government or the central Government or Parliament, which fall respectively under the jurisdiction of the Higher Regional Court and the Supreme Court (see section d. below).

65. The *Higher Regional Courts* are at the top of the judicial organisation of each region, from which they take their name and over which they exercise jurisdiction, without prejudice to the jurisdiction of the Supreme Court. They constitute the final court of appeal in relation to the application of the law of the region in question. The Higher Regional Courts consist of three Chambers (Civil and Criminal, Administrative and Labour), within which various Sections may also be formed.

66. The *Supreme Court*, sitting in Madrid and exercising jurisdiction over all of Spain, is the highest judicial body in all areas of the law, except in relation to constitutional rights. It consists of 5 Chambers (Civil, Criminal, Administrative, Labour and Military), within which different Sections may be formed.

67. Finally, the *Constitutional Court* is competent to examine the compatibility of legislation with the Constitution and decide on "amparo" appeals on alleged breaches of fundamental rights and freedoms.

(d4) The National Court

68. The *National Court*, sitting in Madrid, exercises jurisdiction over all the Spanish territory of Spain and consists of three Chambers (Criminal, Administrative and Labour), within which different

[16] Each of the Houses of Parliament appoints, by a majority of three-fifths of its members, six Members from among serving Judges drawn from all judicial categories and four Members from among lawyers and other jurists of recognised competence with more than fifteen years' professional standing.

Sections may also be formed (4 in the Criminal Chamber, each made of three judges). Six investigative judges are attached to the National Court. They are competent for conducting the investigation of cases falling under the jurisdiction of the National Court.

69. In the criminal field, it is competent for particularly serious offences as provided by Article 65, paragraph 1,c of the Organic Law on the Judiciary. Although it is not specifically empowered to deal with corruption offences, its jurisdiction in this field results from the power conferred upon it to deal with economic offences in the private sector[17]. However, it should not be considered as a special or exceptional court which, as indicated above, are forbidden by the Constitution (Article 117).

70. At the end of the investigation conducted by the investigative judge, the trial will take place either before a *Central Criminal Court* (made of one judge) or before one of the Sections of the Criminal Chamber of the National Court (each made of three judges) depending on whether the penalty is lower or higher than five years imprisonment. Against the Central Criminal Court's decision it is possible to file an appeal before the Criminal Chamber of the National Court with no subsequent appeal. When the sentence is adopted by a Section of the Criminal Chamber, it is possible to lodge a "cassation" appeal before the Supreme Court.

71. The National Court also plays *"ex lege"* an important role in international judicial relations as it deals with offences committed by Spaniards abroad, with extradition claims by third countries, with international letters rogatory by foreign judges for offences that, if committed in Spain, would have fallen to the competence of the National Court, with transfers of Spanish prisoners convicted abroad, with denouncements filed by other nations and with transfers of proceedings for offences to be prosecuted in Spain.

(e) Other bodies

72. In addition to those mentioned above, there are a number of specialised economic or financial institutions which play a role either in (e1) auditing public accounts or (e2) in the fight against money laundering and can in this capacity also contribute to the fight against corruption by unveiling suspicious transactions.

(e1) Courts of Auditors

73. The Courts of Auditors are responsible for auditing public accounts and, although these are not specifically empowered to deal with corruption related offences, they may unveil, in the course of their work, certain practices by departments of the national, regional or municipal administration that mask criminal conduct.

74. They exist both at national[18] and regional level and they co-operate successfully with the ACPO. Moreover, the national Court of Auditors includes a special Attorney General's Office, the head of which is, as of right, a senior member of the Court. The fact that this special office is also an integral part of the SPS makes for ease and efficiency of relations between it and the ACPO.

[17] E.g.: terrorism, fraud possibly affecting the national economy or with repercussions in more than one province, offences against public health committed by organized groups, money-laundering, offences committed by Spaniards abroad, offences against the Head of State, etc.
[18] See Article 136 of the Constitution.

(e2) Anti-money laundering institutions

75. In addition to the Courts of Auditors, there is a series of financial specialized bodies which co-operate with the ACPO although more often in relation to economic crime and money laundering cases than corruption ones. These are the *Commission for the Prevention of Money Laundering and Monetary Offences,* the *Executive Service of the Commission for the Prevention of Money Laundering and Monetary Offences* (SEPBLAC) and the *National Securities Exchange Commission*[19].

76. The *Commission for the Prevention of Money Laundering and Monetary Offences* is placed under the authority of the Secretary of State for the Economy, which chairs it and is made of representatives of the Government Delegation for the National Anti-Drug Plan, the Special Anti-Drug Prosecutor's Office, the ACPO, the Directorates General of the National Police and the Civil Guard, the Bank of Spain, the National Securities Exchange Commission, the Directorate General for Insurance, the Directorate General for Tax inspection, the Directorate General of Treasury and Regions having their own police forces.

77. The Commission's primary functions are to direct and foster activities designed to prevent the financial system or businesses of any other kind from being used to launder money; to organise co-operation in this area between government agencies and the private sector; to finalise draft provisions governing money laundering-related matters; to submit proposed sanctions to the Minister of the Economy and Finance, if authority for the approval of such sanctions lies with the Minister or with the Council of Ministers as a whole.

78. The Sub-Directorate General for the Inspection and Supervision of Capital Movements of the Directorate General for the Treasury and Financial Policy acts as the Commission's secretariat, drafting implementation standards for provisions involving violations of Act No. 19/1993 and initiating sanction procedures in respect of violations of that Act and of Act No. 40/1979 of 10 December which contains the legal regime for exchange control.

79. The *Executive Service of the Commission for the Prevention of Money Laundering and Monetary Offences* (SEPBLAC) was established by Act No. 19/1993 and is the support unit for the *Commission*. It is the Spanish financial intelligence unit and is placed under the authority of the Bank of Spain, which appoints its Director and has a Monetary Offences Investigative Squad (BIDM) which is a law enforcement unit of the Directorate General for the Police directly reporting to SEPBLAC. In addition, SEPBLAC staff includes employees of the Bank of Spain, the Ministry of the Economy and Finance and the law enforcement agencies. It incorporates inspectors from the areas of government finance, customs, the Bank of Spain and BIDM.

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[19] In order to understand their possible contribution in the fight against corruption, it is necessary to consider briefly the Spanish anti-money laundering policy. This policy involves a two-pronged system including prevention and enforcement elements at domestic level and strong emphasis on co-operation internationally. Preventive aspects are rooted in Act No. 19/1993 of 28 December on certain measures for the prevention of money laundering and Royal Decree No. 925/1995 of 9 June approving regulations in application of the aforementioned Act, which seek to prevent and block money laundering by imposing administrative obligations for reporting and co-operation on financial institutions and on other, non-financial institutions. The primary targets of the Act and the corresponding regulations are the people and institutions making up the financial system. However, the collaboration with SEPBLAC extends beyond the aforementioned.
With regard to enforcement aspects, approval of the new Penal Code shifted the definition of the offence of money laundering from one exclusively tied in with goods arising from illicit drug trafficking, to a new one that also includes funds derived from all serious crimes as provided by Article 13 of the Criminal Code, i.e. those punished with at least 3 years of imprisonment. Among the other enforcement-related provisions is the creation of the ACPO (see (a) above) and the special investigative units set up within the National Police and the Civil Guard (see (c) above).

80. Although it is placed under the authority of the Bank of Spain, which provides the necessary resources, the SEPBLAC performs its own functions independently. It is, however, subject to the directives and supervision of the Commission.

81. SEPBLAC's primary mission is to receive and analyse reports of suspicious and unusual transactions from financial institutions and from other non-financial professions and to perform general supervisory functions. In the exercise of its functions in relation to financial institutions which are subject to special legislation, the SEPBLAC is entitled to obtain from the Bank of Spain, the National Securities Exchange Commission or corresponding regional bodies, all information and collaboration necessary to accomplish them.

82. In addition to financial and non-financial institutions, all authorities or officials who discover facts which could constitute an indication or proof of money laundering are required to report them to the SEPBLAC.

83. Finally, the *National Securities Exchange Commission* is in charge of supervising and inspecting the securities market in Spain and the activities of all natural and legal persons taking part therein and it is empowered to impose sanctions. It is also part of the regulatory machinery of that market which oversees and inspects securities exchanges. It has reported a number of suspected offences on the securities market to the ACPO and has always assisted it when asked to do so.

c. Sources of information and investigation techniques

84. The Code on Criminal procedure imposes upon both public officials (article 259) and citizens in general (article 262) a general obligation to report any crimes which come to their knowledge to the law enforcement or judicial authorities. However, non compliance with this obligation is subject to administrative sanctions. Moreover, the law provides for a certain number of exceptions to the obligation to report (members of the same family, …).

85. By virtue of Article 18 of the Constitution, only judges are empowered to authorise, in the course of criminal investigations, the search of a domicile or other premises, except to catch offenders red-handed. This same provision requires a prior judicial authorisation for intercepting communications. Consequently, neither the SPS nor the police may, without prior judicial authorisation, intercept communications or search a domicile except, in this latter case, *in flagrante delicto*. The Law on Criminal Procedure provides the legal basis for the use of investigation techniques, although it does so in a general manner and not specifically for investigations relating to corruption offences.

86. Subject to this constraint and given that prosecutors are empowered, under Article 4 of the Statute of SPS, to take or order to be taken such action as is lawful under the Law on Criminal Procedure and does not involve measures that call into question or restrict rights, they have considerable room for manoeuvre. Thus, in the context of investigation on corruption-related offences, the prosecutor may request solicitors, registrars and any public authorities to certify the authenticity of legal documents, may request information from the land registry, the commercial registry or the civil registry as well as police records of all types and is entitled to assistance from any civil servant or authority in the exercise of his or her duties.

87. Reference should be made to solicitors' legal professional privilege. Thus, according to Article 416 paragraph 2 of the Law on Criminal Procedure, in the context of criminal proceedings,

solicitors are not under the obligation to provide testimony about facts they learned from their clients in their capacity of defendants. However, this privilege is not considered absolute or unlimited. In certain cases, investigative judges may order the search of the office of a solicitor who is related with a person involved in criminal proceedings, for whom the solicitor does not act as defendant but simply provides legal advice about a behaviour which is criminally punishable. Moreover, the Supreme Court declared in its decisions of 13 June 1990 and 2 July 1991 that solicitors have the duty to co-operate with the tax authorities and provide information about their clients under certain circumstances.

88. Moreover, it should be mentioned that SEPBLAC informs the ACPO about suspicious transactions and thus provides an important contribution to the investigation of corruption-related offences. In 1999 and 2000, the SEPCLAC informed the ACPO of 70 and 92 such transactions, respectively.

89. Organic Law 15/99 of 13 December 1999 on the protection of personal data contributed to cast light in this area by establishing that the person or body concerned may only disclose personal data with the prior consent of the person concerned, unless otherwise provided by law. Article 11 paragraph 2, d of the law further stipulates that the consent of the person concerned shall not be required for the disclosure of data to *inter alia* the SPS, judges or the courts, *in the performance of their duties*.

90. This provision enables the SPS to obtain information from banks, including certain account data; to identify telephone subscribers although not to obtain details of the destination or content of their calls which would require judicial authorisation; and to afford direct assistance to the courts or public prosecution services of other countries under the terms of international agreements such as, for instance, the European Convention on Mutual Assistance in Criminal Matters (ETS No. 30) and the Schengen Agreement.

91. Moreover, this law does not preclude the application of other laws, such as those regulating bank secrecy, which in practice may represent an obstacle for ACPO investigations. Indeed, according to information provided to the GET, banks and other financial institutions would only provide to the ACPO information on the account holder and the state of his/her accounts, but will not provide it directly with full details on account movements or complete financial records and transactions. Where the ACPO is not provided with this information on a voluntary basis, it could obtain it on the basis of the investigative judge's authorisation. The GET observed that the situation differed in the case of the Special Attorney General's Office for the Prevention and Repression of Illicit Traffic in Narcotic Drugs (ADPO) or special anti-money laundering institutions (see b. (e2) above), which are empowered to obtain such information without the need of a judicial authorisation.

92. This is all the more surprising since the setting up of the ACPO was modelled on the basis of the ADPO (set up by Law 5/1988), which according to Article 3.d) does have the power to investigate the economic and financial situation as well as the business operations of all kinds conducted by any person or company suspected of drug-related offences. Moreover, ADPO is empowered to summon public administrations, legal persons and individuals to provide all information deemed necessary in this respect.

93. Similarly, it can be noted that the Law on Criminal Procedure provides the ADPO with the possibility of using controlled deliveries and undercover agents in the investigation of drug-trafficking offences. As a result of a recent legislative change (organic law 5/1999), the use of

these means of investigation may be authorised by the Investigative Judge or the prosecutor (and in some instances the judicial police) in investigations relating to organised crime cases involving certain explicitly defined offences[20]. The list of explicitly defined offences excludes corruption-related ones.

94. The effect of the requirement for judicial authorisation in respect of certain measures - given that the judge authorising such a measure thereby assumes control of the investigation - is that prosecutors normally only seek authorisation for measures involving certain restrictions of rights once the preliminary phase of an investigation has been completed and the measures in question appear necessary to take the case further.

95. Investigative measures can be applied to persons other than suspects incidentally and under certain circumstances. However, it is important to note that the Constitutional Court has stressed that the use of special investigation techniques which entail a restriction of basic rights is strictly subject to the principle of proportionality.

96. The Law on the Protection of Witnesses and Experts provides for various forms of protection which guarantee sufficient protection of witnesses and experts at risk. The GET was informed however, that the ACPO has never availed itself of the possibilities offered by this legislation.

d. Immunities from investigation, prosecution and adjudication for corruption offences

97. The following categories of persons benefit, in the Spanish legal system, from immunities in criminal proceedings: (a) members of the national parliament (deputies and senators) (b) members of regional parliaments and (c) serving members of the judiciary.

98. These categories of persons benefit from *non criminal liability* and *immunity*.

99. *Non-criminal liability* (defined as *"inviolabilidad"* by the Spanish Constitution) is of a substantial character and provides that its beneficiaries cannot be held criminally liable for any opinion expressed or vote cast during a sitting of the Parliament or its working bodies in the case of parliamentarians, or that they cannot be criminally liable for any opinion expressed in the court in the course of proceeding in the case of judges. This immunity cannot be lifted and its purpose is to ensure proper performance of the particular function of its beneficiary. […]

100. *Immunity* implies that no criminal investigation and prosecution can be undertaken against the above-mentioned categories of persons without the prior authorisation by the competent authority, for instance the respective House in the case of deputies and senators. An exception exists in the case of *flagrante delicto* in which case the beneficiaries of the immunities can be arrested.

101. In addition, there is also a procedural privilege attributing to specific (higher) judicial organs the jurisdiction to try persons holding certain posts[21]. It is provided for in Articles 56 and 57 of the

[20] For the purposes of this legislation, organised crime is defined as "the association of three or more persons with the intention of permanently or repeatedly committing one or more of the offences" included in a list contained in paragraph 4 of Art. 202 bis.

[21] Namely: the Head of Government, the Presidents of the Congress of Deputies and Senate, the President of the Supreme Court and of the General Council of the Judiciary, the President of the Constitutional Court, members of the government, deputies and senators, members of the General Council of the Judiciary, Constitutional Court and Supreme Court judges, the Presidents of the National Court and its divisions, the Presidents of the Higher Regional Courts, the State Attorney General, Supreme Court Divisional Prosecutors, the President and members of the Court of Auditors, the President and

Law on Criminal Procedure which establishes that the relevant Chamber (Civil or Criminal) of the Supreme Court is competent to deal with cases involving the civil liability of these persons in the exercise of their functions and for criminal cases involving them.

(a) Deputies and senators

102. Article 71 of the Constitution provides that deputies and Senators enjoy inviolability for the opinions expressed during the exercise of their functions and that during their terms of office, they likewise enjoy immunity and may only be arrested in cases of *flagrante delicto* and may not be indicted or tried without prior authorisation of the respective House.

103. The Rules of Procedure of the Congress of Deputies of 10 February 1982 (Rules Nos. 10-14) and the Rules of Procedure of the Senate of 26 May 1982 (Rule No. 22) contain detailed provisions in this respect.

104. In cases of *flagrante delicto*, the deputy or senator concerned may be arrested and proceedings may be initiated against him or her without the above-mentioned authorisation above. However, the relevant House must be informed of the arrest or initiation of proceedings within 24 hours.

105. In other cases, where the above-mentioned authorization is granted, articles 750-756 of the Law on Criminal Procedure lay down the procedure to be followed. Where such authorization is not granted, proceedings can be pursued against persons co-accused who do not enjoy immunity. Decisions of the Houses regarding the lifting of immunity may be appealed before the Constitutional Court for breach of the right of effective judicial protection (art. 24 of the Constitution) by the parties to the procedure, ie the accused, the victim or the plaintiff (private accuser).

106. The Constitutional Court has cast light on the nature and extent of the parliamentarian immunities by stating that they are not personal rights but rights associated with membership of the legislative body and enjoyed by parliamentarians in that capacity with a view to enabling the Parliament to function effectively and freely. Inasmuch as they constitute obstacles to the functioning of the law, the Constitutional Court has stressed that they have to be interpreted strictly as being subject to the limits imposed by the Constitution and to the principle of reasonable proportionality to their ultimate purpose, and that they may not, therefore, be interpreted according to any criteria that would permit their abuse by resulting in the unconstitutional prevention of access to the procedures prescribed by law[22].

(b) Members of regional parliaments

107. The conditions applying to members of national parliament applies *mutatis mutandis* to members of regional parliaments, who also enjoy inviolability in respect of the opinions expressed and the way they vote in the exercise of their functions, even after they have ceased to perform those functions.

108. Cases involving such persons are heard by the Higher Regional Courts.

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members of the Council of State, the Ombudsman and the presidents and councillors of those regions whose statute of autonomy so provides.

[22] See Constitutional Court Decisions No. 9/1990, No. 526/1986, No. 51/1985.

(c) Serving judges

109. Articles 398-400 of the Organic Law on the Judiciary provide that serving judges may only be arrested by order of the competent court or in case of *flagrante delicto*.

110. This immunity aims at protecting the independence of the judiciary and for that reason, Article 399 of the Organic Law on the Judiciary provides that civil and military authorities must refrain from issuing orders to judges or summoning them to appear.

111. Judges are free from arrest or detention, except by order of the competent judicial authority or in cases of "flagrante delicto" (see Article 398 of the Organic Law on the Judiciary). Criminal proceedings against a judge must be instituted, either before the competent Higher Court of Justice or before the Supreme Court, depending on the hierarchical position of the judge in question.

112. If a judge considers that his independence is being disturbed or interfered with, he or she may so inform the GCJ, although neither the latter nor any other subordinate organ of government of the judiciary may issue general or specific instructions concerning the interpretation or application of the law by judges pursuant to their judicial powers.

III. ANALYSIS

a. A policy for the prevention of corruption

113. In the light of the information gathered, the GET noted that Spain has been affected, particularly in the early and mid-1990s, by a significant number of corruption cases concerning prominent political figures, high officials and business leaders. Most of these cases attracted considerable media attention, as they were being investigated, prosecuted and adjudicated by the Spanish courts. However, the GET observed that there seemed to be little knowledge about the true extent of the corruption phenomenon in the country, even if the 2000 Transparency International Corruption Perception Index and domestic sociological studies[23] provide useful indications in this regard. The GET was, of course, aware of the difficulties of measuring the extent of hidden corruption phenomena.. However, the GET observed that, leaving aside the figures relating to cases dealt with by ACPO, no comprehensive statistical information on investigated, detected, prosecuted or adjudicated corruption cases was available in Spain.

114. The GET observed that an extensive public debate on corruption issues had taken place in Spain in connection with the different scandals that came to light in the nineties. Many parliamentary debates and political statements have been devoted to the problem of corruption, which prompted the Government to take important measures such as the creation of ACPO. The GET observed that the awareness which developed in Spain about the danger of corruption did not lead to the adoption of a comprehensive and multidisciplinary anti-corruption strategy, including, in addition to repressive elements, preventive, educational, research and other elements The GET underlined, in this respect, its conviction that such an strategy is essential in order to ensure a coordinated approach among the different authorities involved in the struggle to successfully eliminate and prevent corruption. The GET considered that additional efforts would be necessary to raise the awareness of Spanish public officials and institutions about the need to remain vigilant and report any suspicion of corrupt practices to the competent authorities. Moreover, the

[23] See 7.

GET noted that Spain is the only GRECO member, which has not signed any of the Council of Europe conventions on corruption.

115. Therefore, the GET recommended the Spanish authorities to draw up an overall multidisciplinary strategy, involving the different authorities concerned in the prevention, detection and prosecution of corruption offences and, in this context, to conduct research on the extent and typologies of corruption phenomena in Spain and compile detailed statistics about detected corruption cases The Spanish authorities could also consider, in this connection, signing the Criminal and/or the Civil law Convention (s) on corruption, as a visible element of such a strategy.

b. Institutions, bodies and services dealing with the prevention, investigation, prosecution and adjudication of corruption offences

116. In spite of the above, the GET noted that the Spanish authorities had reacted promptly to high-level political corruption scandals by enacting new criminal legislation and setting up a special anti-corruption prosecution office –the ACPO- within the State prosecution Service (SPS). The GET considered that the setting up of the ACPO was a crucial step in the fight against corruption in Spain. It welcomed its multidisciplinary character, which brings together prosecutors, tax inspectors, civil service inspectors as well as police officers (Civil Guard and National Police), the high degree of specialisation of its staff and its deep involvement in all major corruption cases in the last years. In the GET's opinion, the ACPO indeed provides the basis for an efficient prosecution of corruption offences.

117. Given that ACPO is called to intervene everywhere in the Spanish territory to deal with the most complicated and serious corruption and corruption-related crimes, which often have nation-wide impact and international connections, the GET considered that it was too modestly staffed (11 prosecutors) to be able to cope effectively with all the important tasks attributed to it although the Head of the ACPO declared that the resources put at his Office's disposal were quite substantial if compared with those of other prosecution offices in Spain. Moreover, it observed the selective approach followed to define ACPO's jurisdiction, which seeks to concentrate, in view of the limited resources available, on the most serious corruption cases. Thus, the vast majority of corruption cases, which do not fill the criteria for attribution to ACPO, fall under the ordinary jurisdiction of the competent local/provincial/regional prosecution office. The GET also realised that territorial prosecution offices lacked any special units, specially trained prosecutors or administrative support to investigate, gather the evidence and bring charges in corruption cases. It is true that they could request ACPO support in specific cases, but in view of the limited resources at ACPO's disposal, such support was unlikely to meet the needs of an efficient investigation and prosecution of complex corruption offences. The GET noted that Law 10/95 provides the possibility for the SAG to appoint special anti-corruption delegates in territorial SPS offices. Such possibility has been used only in Barcelona and Valencia.

118. Consequently the GET recommended, firstly, to strengthen the ACPO by providing it, within the limits of general budgetary constraints, with additional resources, in particular additional staff, with a view to enabling it to deal more effectively with its tasks and support the territorial SPS offices dealing with corruption cases. It further recommended to make a more extensive use of the possibility offered by Law 10/95 of appointing special SAG delegates entrusted with the task of investigating and prosecuting corruption-related offences in major cities, attached to the ACPO, and composed of experienced and specially trained prosecutors assisted by equally qualified police officers and officials.

119. The GET noted with satisfaction the high degree of independence of the Spanish judiciary. According to the Constitution, judges are independent, irremovable and subject only to the rule of law. It observed that it is a criminal offence for a member of the Government, other judges or any other person or body to exert any pressure on a judge in the performance of his or her functions. In the GET's view, judicial independence is also fostered by the fact that the Judiciary has its own governing body –the GCJ- empowered to take decisions, inter alia, in the judges' recruitment, training, career, including promotions, disciplinary proceedings and sanctions. The fact that the Spanish legal system does not allow for the executive or the legislative powers to interfere in these areas, is a valuable safeguard, which contributes to preserve the independence and impartiality of the judiciary and its ability to deal with corruption cases free from political influence or pressure.

120. The GET further noted that the investigating judge is a fundamental figure in the criminal procedure, as it is currently organised by Spanish law. Once in charge of the case, even ex officio, the investigating judge is the master of the procedure, extensive powers being conferred upon him/her to direct the investigation, adopt provisional measures, gather evidence and generally prepare the case for a decision on the merits by the competent court.

121. The GET observed that the "Audiencia Nacional", a centralised judicial body, has become with time, a highly specialised jurisdiction dealing with most serious financial crime and corruption cases and with extensive powers in the field of international co-operation. It pointed out the key role played by the central investigating judges of the Audiencia Nacional, empowered to direct the investigations on the whole of the Spanish territory.

122. With regard to the SPS the GET noted that according to the Constitution, the SAG is appointed by the King on a proposal by the Government, which is empowered to dismiss the SAG at any time. Therefore, in order to remain in his or her post the SAG must keep the Government's confidence. The GET observed, in this connection, that it is for the Government also to appoint the Head of the ACPO, upon a proposal made by the SAG after consulting the Attorney General Council. In addition, the SAG has the power to withdraw a case from ACPO's jurisdiction.

123. Besides, the GET took note that the SPS discharges its duties with due respect to the principles of unity of action and hierarchical dependency. This means, inter alia, that the SAG is empowered to give instructions to the individual prosecutor dealing with a case. The statute of the SPS provides for specific rules to settle disputes between the SAG and an individual prosecutor objecting to the instructions received. In any case, if no agreement is reached, the SAG's opinion will prevail, although a prior consultation of the SPS's statutory bodies is required.

124. Thus, the GET reached the conclusion that the SPS –and consequently the ACPO - did not enjoy the same degree of independence and operational autonomy as judges. The GET was nonetheless aware of the fact that the Spanish legal system provides for some safeguards to prevent cases from being arbitrarily abandoned or charges from being dropped. First, the principle of mandatory prosecution, according to which, if there is enough evidence that an offence has been committed, the prosecutor must press charges against the perpetrator(s). Second, that regardless of the prosecutor's decision not to pursue the case further, the final decision lies always with the IJ. Finally, the Spanish legal system provides for ample opportunities for any member of the public (not only the victim of the offence) to institute a criminal action and eventually press charges against the suspect even if the prosecutor refuses to do so.

125. According to the information provided to the GET, the Spanish Government does not, in practice, give instructions to prosecutors in charge of individual cases. Besides, the GET was not aware of any particular case in which political influence would have been exerted on a prosecutor dealing with a corruption case. However, insofar as such instructions are possible under Spanish law, the GET recommended the Spanish authorities to [...] guarantee that the nature and the scope of the powers of the Government in relation to the SPS be established by law, and that any future exercise of such powers be made in a transparent way and in accordance with international treaties, national legislation and the general principles of law. The GET further recommended that instructions of a general nature be made public in writing and that instructions to prosecute in a specific case carry adequate guarantees of transparency and equity, the prosecutor in charge of the case being entitled to submit to the court any legal arguments of his/her choice, even where they are under a duty to reflect in writing the instructions received. In addition, the GET recommended to the Spanish authorities [...] that instructions not to prosecute in a specific case be in principle prohibited or remain exceptional and subject to appropriate specific control [24].

126. The GET also noted that the ACPO was dependent for its budget upon the budget of the SPS, which is, in turn, part of the budget of the Ministry of Justice. This could have an incidence on the public's perception of the ACPO's independence. The GET therefore recommended to the Spanish authorities to take particular care to ensure that this financial dependency does not diminish the SPS's independence.

c. Sources of information

127. The GET observed that all public officials were under the obligation to report to law-enforcement authorities any criminal offence coming to their knowledge and that failure to comply with such obligation could be sanctioned under Article 262 of the Code of criminal procedure. Besides, it noted that a series of specialised economic and financial institutions responsible for auditing public accounts and fighting money laundering, although not specifically dealing with corruption-related offences, were in a position to contribute incidentally but efficiently, in the course of their work, to the fight against corruption by unveiling suspect transactions and practices by the national, regional or local administrations that may be hiding acts of corruption. In this connection, the GET noted with satisfaction the numerous reports of suspect transactions transmitted by SEBLAN to ACPO, which enable the launching of procedures to determine the possible corrupt origin of suspected funds.

128. In spite of this favourable legal and institutional framework, the GET noted that no information was available regarding the sanctions taken against civil servants for failing to comply with Article 259 of the Code of criminal procedure. In addition, the GET learnt with concern that in practice those authorities competent to investigate and prosecute acts of corruption rarely receive any suspicion reports from public administrations. The fact that investigations on corruption are triggered by media reports or by reports from specialised economic and financial institutions rather than by suspicion reports emanating from public officials, civil service inspectors or supervisory bodies could be indicative, in the GET's view, of insufficient awareness in the civil service of the need to co-operate with law-enforcement authorities and of the need to improve co-ordination between the different authorities involved in the fight against corruption. The GET reiterated, in this context, the recommendation made above (cf. paragraph 112) on the drawing up of an overall and multidisciplinary strategy for the prevention of corruption which would steer

[24] See Council of Europe Recommendation No R (2000) 19 *on the Role of public prosecution in the criminal justice system.*

awareness among Spanish officials about the dangers of corruption and stress the need to remain vigilant, in particular in vulnerable sectors, and report existing signs of corrupt practices to the authorities in charge of detecting, investigating and prosecuting corruption offences.

129. The GET welcomed recent legislative changes introduced by the Government department responsible for the civil service with a view to introducing ethical principles and promoting models of good practice in the ethical field. It recalled that Article 12, paragraph 5 of the Model Code of Conduct for public officials –appended to Recommendation (2000) 10 *on Codes of conduct for public officials* - provides that public officials *"should report to the competent authorities any evidence, allegation or suspicion of unlawful or criminal activity relating to the public service coming to his or her knowledge in the course of, or arising from, his or her employment."* The GET considered that the adoption of a National Code of conduct for public officials, in line with the Model Code as recommended by the Committee of Ministers of the Council of Europe, could be a useful tool to raise awareness among Spanish officials and increase the number of reports on possible corrupt practices as well as the general level of co-operation with those investigating and prosecuting corruption offences.

130. The GET observed that the provisions of the Law on Criminal Procedure dealing with the investigation of criminal offences were equally applicable to the investigation of corruption related offences. It noted that, according to the Constitution, only the investigating judge is competent to authorise, in the course of criminal investigations, a limited range of measures which could interfere in the exercise of the suspect's fundamental rights and freedoms. It also noted that a strict application of the principle of proportionality is required by the Constitutional court's case law to justify the adoption of such measures.

131. The GET noted that specific legislative measures had been introduced in Spain to protect witnesses and other persons who co-operate with the judicial authorities. Spanish law provides for the possibility of withholding the disclosure of witness identity during the investigation of the case, of testifying without being seen by the suspect and his or her lawyer, and of providing new identity and financial means to witnesses at risk. Spanish law does not permit the possibility of anonymous witnesses.

132. The GET took note that Organic Law 5/1999 had recently amended the Law on Criminal Procedure, including new provisions (Articles 263 bis and 282 bis), which empower Investigating judges and Public prosecutors to authorise the use of controlled deliveries (in this case the authorisation by head of Judicial police is also possible) and undercover agents in the investigation of a list of serious offences committed by organised criminal groups. It noted, however, that corruption offences were not included in the list of serious offences and was told that this was due to the fact that such means were considered to be of a limited use in the context of investigation of corruption offences.

133. This being so, the GET recommended to extend the scope of Articles 263 bis and 282 bis of the Law on criminal procedure to enable the use of controlled deliveries and undercover agents in the investigation of corruption related offences committed by organised criminal groups.

134. The GET additionally observed that the above-mentioned powers were given indeed to the ADPO, which, in addition, has wide powers to summon, without a prior judicial authorisation, the Civil service, banks and other financial institutions and private individuals to disclose all information necessary for the investigation of the economic and financial situation of a suspect. The GET noted that the ACPO did not have such powers. Without taking a stand on whether

such invasive powers were strictly necessary in the context of the investigation of corruption offences and although in practice the ACPO manages to obtain such information without particular difficulties, the GET was of the opinion that insofar as they were available for the investigation of certain serious crimes they should also be available for the investigation of corruption, which, just as much as money laundering, can usually be tracked from the transaction back to the source.

135. Thus, the GET also recommended to confer upon the ACPO similar powers to those conferred upon the ADPO to summon public and private individuals and authorities to disclose the information in their possession which would reveal the economic situation of the suspect.

d. Immunities

136. The GET considered that the scope of the procedural immunity afforded to members of parliament and judges was generally acceptable, particularly in view of the fact that the Constitutional Court through various decisions has provided clear indications on the nature and extent of these immunities, stressing that they are not personal privileges but attached to a function and with a view to ensuring that these functions are discharged effectively.

IV. CONCLUSIONS

137. Spain has been affected by corruption to an extent which is difficult to evaluate with precision. Major political corruption scandals drew considerable media attention in the early-90s, lead to many parliamentary debates on the subject and prompted the Government to take important counter-measures. However, little information is available on the number of detected, investigated, prosecuted or adjudicated corruption cases. No detailed statistics or research had been elaborated to measure the extent of corruption phenomena in the country. The GET realised that although a collective awareness had emerged in Spain of the dangers entailed by corruption, this had not lead to the elaboration of an overall and multidisciplinary strategy in this field involving all authorities concerned, promoting awareness among public officials about the dangers of corruption and encouraging them to report to the law-enforcement authorities any suspicions of corrupt practices.

138. This being so the GET considered, however, that the setting up of the Special anti-corruption Prosecution Office (ACPO) was a crucial step forward. Indeed, the ACPO represents a highly specialised and effective instrument to combat corruption. Prosecutors and officers assigned to it have not only undergone general training in handling corruption-related offences but also have particular experience in the field. Thus, the ACPO follows a multidisciplinary approach which is essential to fight corruption successfully. However, the ACPO is only competent for certain cases, although these are the most significant ones. It is also competent to assist any prosecutor investigating into a corruption case anywhere in the country. The GET expressed some concern about the limited resources, particular staff, available to the ACPO and about the lack of specialised units or support for other prosecution services dealing with the great majority of less notorious corruption cases.

139. The GET acknowledged that the independence of the Spanish judiciary was constitutionally safeguarded and that Government and Parliament had no competence over the recruitment, career, training and disciplinary sanctions of judges, matters which fall under the jurisdiction of the General Council of the Judiciary, the governing body of the Spanish judiciary. It also noted that the investigating judge plays a key role in the Spanish criminal procedure and that the

"Audiencia Nacional" has become a specialised jurisdiction which deals with serious cases relating to economic crime and corruption. However, the GET observed that the State Prosecution Service (SPS) has a lower degree of independence than the judiciary on account of the rules for appointing and dismissing the State Attorney General and the latter's powers to give instructions to the prosecutor in charge of the specific case. The SPS's budgetary dependency on the Ministry of Justice could contribute to the perception of a certain degree of SPS dependency on the executive. The GET noted, however, that there are safeguards to prevent cases from being unreasonably abandoned or charges from being arbitrarily dropped, such as the principle of legality, the power of the investigating judge to continue with the case and the large possibilities offered to the victims and citizens in general to exercise a criminal action. Moreover, the GET further pointed out that, in practice, the public service, acting quite differently from different supervisory bodies in the financial sector, very seldom report to the ACPO or the police indications of possible acts of corruption. The GET criticised the fact that certain investigative techniques, available in the investigation of some serious offences, could not be used for the purpose of detecting or gathering evidence of serious corruption offences.

140. In view of the above, GRECO addressed the following recommendations to Spain:

i. to draw up an overall multidisciplinary strategy, involving the different authorities concerned in the prevention, detection and prosecution of corruption offences and, in this context, to conduct research on the extent and typologies of corruption phenomena in Spain and compile detailed statistics about detected corruption cases; the Spanish authorities could also consider, in this connection, signing the Criminal and/or the Civil law Convention (s) on corruption, as a visible element of such a strategy;

ii. to strengthen the ACPO by providing it, within the limits of general budgetary constraints, with additional resources, in particular additional staff, with a view to enabling it to deal more effectively with its tasks and support the territorial SPS offices dealing with corruption cases;

iii. to make more extensive use of the possibility offered by Law 10/95 of appointing special SAG delegates entrusted with the task of investigating and prosecuting corruption-related offences in major cities, attached to the ACPO, and composed of experienced and specially trained prosecutors assisted by equally qualified police officers and officials;

iv. to guarantee that the nature and the scope of the powers of the Government in relation to the SPS be established by law, exercised in a transparent way and in accordance with international treaties, national legislation and the general principles of law, that instructions of a general nature be made public in writing and that instructions to prosecute in a specific case carry adequate guarantees of transparency and equity, the prosecutor being entitled to submit to the court any legal arguments of their choice, even where they are under a duty to reflect in writing the instructions received;

v. to guarantee that instructions not to prosecute in a specific case, be prohibited in principle or remain exceptional and subject to appropriate specific controls;

vi. to take particular care to ensure that the financial dependency of SPS does not diminish its independence;

vii. reiterated, in this context, the recommendation made above (cf. i.) on the drawing up of an overall and multidisciplinary strategy for the prevention of corruption which would steer awareness among Spanish officials about the dangers of corruption and stress the need to remain vigilant, in particular in vulnerable sectors, and report existing signs of corrupt practices to the authorities in charge of detecting, investigating and prosecuting corruption offences;

viii. to consider the possibility of adopting a National Code of conduct for public officials, in line with the Model Code as recommended by the Committee of Ministers of the Council of Europe in Recommendation R (2000) 10, which could be a useful tool to raise awareness among Spanish officials and increase the number of reports on possible corrupt practices as well as the general level of co-operation with those investigating and prosecuting corruption offences;

ix. to extend the scope of Articles 263 bis and 282 bis of the Law on criminal procedure to enable the use of controlled deliveries and undercover agents in the investigation of corruption related offences committed by organised criminal groups;

x. to confer upon the ACPO similar powers to those conferred upon the ADPO to summon public and private individuals and authorities to disclose the information in their possession which would reveal the economic situation of the suspect;

141. Moreover, the GRECO invites the authorities of Spain to take account of the observations made by the experts in the analytical part of this report.

142. Finally, in conformity with article 30.2 of the Rules of Procedure, GRECO invites the authorities of Spain to present a report on the implementation of the above-mentioned recommendations before 31 December 2002.

APPENDIX I

Programme of the visit

Tuesday, 7th November

10.00 Welcome to the evaluation team in the Ministry of Justice
Presentation on the programme of the visit.
11.00 Interview with the Secretary of State of Justice, Mr. José María Michavila
11.30 Visit to Special Public Prosecutor's Office for Economic Crimes
14.00 Working lunch with the members of the Special Public Prosecutor's Office for Economic Crimes.
16.00 Continuation of visit. Meeting with members of the Judicial Police and Civil Guard attached to this Office.

Wednesday, 8th November

9.00 Visit to "Audiencia Nacional". Interview with the President of "Audiencia Nacional" and judges of this Court.
12.00 Visit to SPS. Interview with the Attorney General and members of the Technical Secretariat of this Prosecution Service.
17.00 Meeting with national media representatives, specialized in corruption matters.

Thursday, 9th November

10.00 Meeting in the Bank of Spain with representatives of:

- Executive Service of the Commission of the Bank of Spain for Prevention of Money-Laundering and Financial Offences.
- Directorate General of Treasure and Financial Policy.
- Office of the Comptroller General of the Administration of the State.
- Service of Inspection of the Securities and Exchange Commission.

16.00 Visit to Directorate General of Civil Service of the Ministry of Public Administrations

Friday, 10th November

10.00 Final meeting of the evaluation team in the Ministry of Justice with representatives of:

- Directorate General of Legislation Policy and International Legal Co-operation.
- Special Public Prosecutor's Office for Economic Crimes.
- International Legal Consultants of the Foreign Office.

APPENDIX II

Spanish Criminal Code

TITLE XIV

On offences against the Public Treasury and Social Security

Article 305.

1. Any person who through action or omission, defrauds the national, autonomous or local Treasury by evading payment of taxes, amounts retained at source or amounts that should have been retained or payments derived from remuneration in kind, obtaining fraudulent tax rebates or enjoying other forms of improper fiscal benefits through the same action or omission, when the amount of the defrauded tax payable, or the amount not paid in retained taxes or the amount of the fraudulently obtained rebate or other fiscal benefit improperly enjoyed, exceeds the amount of fifteen million pesetas, will be punished with a prison sentence of one to four years and a fine of up to six times said amount.

The upper half of the scale of sanctions stated in the previous paragraph will be applied when the fraud is made with the concurrence of any of the following circumstances:

a) The use of intermediate person or persons in such a way that the identity of the party truly obliged to pay the tax is concealed.
b) The transcendence or seriousness of the fraud in terms of the defrauded amount or the existence of an organised structure that affects or could affect a large number of taxpayers.

In addition to the sanctions mentioned, the perpetrator will lose the right to obtain grants or public subsidies and the right to enjoy benefits or fiscal incentives or Social Security incentives for a period of three to six years.

2. For the purposes of determining the amounts established in the previous paragraph, if it concerns periodical or periodical declarations of taxes, retentions, payments on account or rebates, it will be the amount defrauded within the corresponding fiscal period or declaration, and if this period should be less than twelve months, the defrauded amount will correspond to the period of one year. In any other case, the amount will be understood to refer to each of the different concepts for which a taxable circumstance is susceptible to payment.

3. The same sanctions will be imposed when the conduct described in the first section of this article is committed against the Public Treasury of the Autonomous Communities Regions), when the defrauded amount exceeds the amount of 50.000 ecus.

4. Any person who regularises his fiscal situation in terms of the debts that are referred to in the first section of this article, before the Tax Authority have given notice of any investigative actions to determine the fiscal debts that are to be regularised, or in the event of such actions not being undertaken, before the Public Prosecutor, the State Lawyer or the Representative of the Regional or Local Administration have laid a complaint or brought an action against said person, or when the Public

Prosecutor or the Examining Judge carry out actions that will allow said person to have formal notice of the commencement of proceedings, will be exempt of criminal liability.

The exemption from criminal liability described in the previous paragraph will likewise apply to said subject for possible accounting irregularities or other instrumental falsifications that, exclusively in connection with the fiscal debts subject to regularisation, may have taken place, prior to the regularisation of said person's fiscal situation.

Article 306.

Any person who through action or omission defrauds the Autonomous Communities' General Budget or other funds administrated by the Communities, for an amount exceeding fifty thousand ecus, evading the payments which should be paid in or using the funds obtained for any purpose other than that for which they were supposed to be used, will be punished with a prison sentence of one to four years and a fine of up to six times said amount.

Article 307.

1. Any person who through action or omission, defrauds the Social Security so as to evade the payment of the relevant contributions and concepts of joint tax collection, obtaining improper rebates or enjoying allowances that are similarly undue and fraudulent, when the amount of defrauded contributions or rebates or allowances exceeds fifteen million pesetas, will be punished with a prison sentence of one to four years and a fine of six times said amount.

The upper half of the scale of sanctions stated in the previous paragraph will be applied when the fraud is made with the concurrence of any of the following circumstances:

a) The use of intermediate person or persons in such a way that the identity of the party truly obliged to contribute to the Social Security the tax is concealed.
b) The transcendence or seriousness of the fraud in terms of the defrauded amount or the existence of an organised structure that affects or could affect a large number of contributors to the Social Security.

2. For the purposes of determining the amount mentioned in the previous paragraph, it will be considered as being that defrauded in each settlement, rebate or allowance, and when these correspond to a period of less than twelve months, the amount will refer to a natural year.

3. Any person who regularises his contributory position with the Social Security in connection with the debts referred to in the point 1 this article, before being notified of the commencement of inspection actions carried out to determine said debts or, in the case that said actions have not been initiated, before the Public Prosecutor or the Social Security Lawyer lays a complaint or brings an action against said person, will be exempt of criminal liability.

The exemption from criminal liability described in the previous paragraph will likewise apply to said subject for possible instrumental falsifications that, exclusively in connection with the debt subject to regularisation, may have taken place, prior to the regularisation of said person's contributory situation.

Article 308.

1. Any person who obtains a grant, a tax allowance or subsidies from public Administrations for more than ten million pesetas, by falsifying the conditions required for its concession or concealing information that would have prevented its authorisation, will be punished with a prison sentence of one to four years and a fine of up to six times said amount.

2. The same sanctions will be imposed on any person who in the performance of an activity funded by grants from Public Administration for an amount exceeding ten million pesetas, does not comply with the established conditions, by substantially altering the ends for which the grants were conceded.

3. In addition to the sanctions mentioned, the perpetrator will lose the right to obtain grants or public subsidies and the right to enjoy benefits or fiscal incentives or Social Security incentives for a period of three to six years.

4. Any person who in respect of the grants, allowances or subsidies referred to in the first and second sections of this article, repays the amounts received, increased by interest calculated from the time the funds were received at a rate equivalent to the legal rate of interest plus two percentage points, before said person has been notified of the initiation of inspection actions or control in respect of said grants, allowances or subsidies, or in the event of said actions not being undertaken, before the Public Prosecutor, the Treasury Counsel or the Representative of the Autonomous or Local Administration should lay a complaint or bring an action against said person, will be exempt from criminal liability.

The exemption from criminal liability described in the previous paragraph will likewise apply to that person for possible instrumental falsifications that, exclusively in connection with the debt subject to regularisation, may have taken place, prior to the regularisation of said person's contributory situation.

Article 309.

Whoever improperly obtains funds from the General Budgets of the Communities or other funds administrated by such bodies, for an amount exceeding fifty thousand ecus, by falsifying the conditions required for their granting or by concealing information that would have prevented its authorisation, will be punished with a prison sentence of one to four years and a fine of six times said amount.

Article 310.

Any person who is obliged by the Tax Legislation to keep mercantile accounts, trading books or fiscal registers will be punished with arrest for of between seven to fifteen weekends and a fine of three to ten months should said person:

a) Neglect absolutely the duties and obligations imposed in respect of the direct estimation of fiscal bases regime.
b) Maintain different sets of accounts for the same activity and financial year that hide or simulate the company's true situation.
c) Not annotate in the mandatory books, the business, activities, operations or in general, economic transactions, or annotates figures different from the true ones.

d) Enter fictitious accounting entries in the mandatory registers.

The consideration as an offence of the situations referred to in c) and d) will require that the tax declarations were not made, or that those that were presented were a reflection of falsified accounts and that the amount, overstated or understated, of the charges or payments omitted or falsified exceeds, without arithmetic compensation between them, the amount of thirty million pesetas for each fiscal year.

TITLE XIX

Offences against Public Administration

CHAPTER I

On the prevarication of public officials and other improper behaviour

Article 404.

Any public authority or official that knowingly dictates an arbitrary decision in any administrative case will be punished with specific disqualification from public employment or post for a period of seven to ten years.

Article 405.

Any public authority or official that, in the exercise of his competence and aware of the illegality, proposes, appoints or concedes the post of a determined public office to any person without the legally established requirement being fulfilled, will be punished with a fine of three to eight months and the suspension from work or public office for a period of six months to two years.

Article 406.

The same fine will be imposed on the person that accepts the proposal, appointment or takes possession of the post mentioned in the previous paragraph, knowing that he does do not fulfil the legal requirements established.

Article 418.

The individual that takes advantage, for himself or for third parties, of secret or price-sensitive information obtained from a public official or authority, will be punished with a fine of up to three times the benefit obtained or provided. If the event causes serious damage to the public cause or to a third party, the punishment will be a prison sentence of one to six years.

CHAPTER V

On bribery

Article 419.

The public authority or official that, for own benefit or that of a third party, asks for or receives, directly or through an intermediary, a gift, or presents or accepts an offer or promise for carrying out, while performing his task, any action or omission that may constitute an offence, will be punished with a prison sentence of two to six years, a fine of up to three times the value of said gift and the specific disqualification from any public employment or post for seven to twelve years, irrespective of the penal sanctions corresponding to the crime committed by virtue of gift or promise.

Article 420.

The public authority or official that, for own benefit or that of a third party, asks for or receives, directly or through an intermediary, a gift, or presents or accepts an offer or promise for carrying out, in the course of performing his task, any unjust action or omission that does not constitute a criminal offence and does in fact execute the unjust action or omission, will be punished with a prison sentence of one to four years, and specific disqualification from any public employment or post for six to nine years, and if the act or omission is not executed, the prison term will be from one to two years and specific disqualification from any employment or post for three to six years. In both cases, in addition a fine of up three times the value of the gift will be imposed.

Article 421.

When the requested, received or promised gift should be in exchange for the public authority or official not carrying out an act that they should while performing his task, the punishment will be a fine of up to double the amount of the gift and the specific disqualification from any public employment or post for a period of one to three years.

Article 422.

The foregoing provisions will be equally applicable to juries, arbitrators, experts, or any other person that participates in exercising the public function.

Article 423.

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

Article 424.

When bribery is involved in a criminal cause to the favour of the offender, and committed by the spouse, common law spouse, ascendant, descendant or sibling, natural or by adoption, the briber will be punished with a fine of three to six months.

Article 425.

1. The public authority or official that solicits a gift or presents or accepts an offer or promise so as to carry out an act inherent to their duty, or as recompense for an act already carried out, will be punished with a fine of up to three times the value of the gift and suspension from practise for a period of six months to three years.

2. In the case of recompense for an action already performed, if this were to constitute an offence, in addition a penalty of a prison sentence of one to three years, a fine of six to ten months and the specific disqualification from any employment or post for a period of ten to fifteen years would be imposed.

Article 426.

The public authority or functionary that accepts a gift that is offered to him in consideration of said person's function or for the performance of an action that is not legally prohibited, will be punished with a fine of three to six months.

Article 427.

Any person who has acceded occasionally to a request for a gift from a public authority or functionary and has notified the relevant authority responsible for investigating such a circumstance, before the commencement of the corresponding legal procedures and no more than ten days after the date of such an event, will be exempt of any penalty for the offence of bribery.

CHAPTER VI

On the trading in influence

Article 428.

The public authority or functionary that influences another public authority or functionary, on the exercise of the authority of their rank or any other situation derived from their personal or hierarchical relationship with this person or with any other authority or functionary so as to attain a resolution which may directly or indirectly generate an economical benefit for such a person or third party, will be punished with a prison sentence of six months to one year, a fine of up to double said benefit or gain, and specific disqualification from any public employment or post for a period of three to six years. If the benefit sought was indeed obtained the sanctions to be applied will be in the upper half of the scale.

Article 430.

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

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

Article 431.

In all the cases reviewed in this chapter and the previous, the sops, gifts or presents will be confiscated.

CHAPTER VII

On Misappropriation of Public Funds

Article 432.

1. The public authority or functionary that, so as to profit, takes or allows a third party, with the same aim, to take the public funds that are in said persons charge due to their position, will be punished with a prison sentence of three to six years and absolute disqualification for the period of six to ten years.

2. The penalty of a four to eight year prison sentence and absolute disqualification for ten years will be imposed if the misappropriation of funds were especially serious in terms of the amounts stolen or the damage thereby caused or loss produced to the public service. The same sanctions will be imposed if the misappropriated objects have been declared to have historical or artistic value, or if they are goods destined to assuage any public calamity.

3. When the misappropriation is less than five hundred thousand pesetas, there will be a fine of between two and four months, a prison sentence of six months to three years and suspension from practise for six months to one year.

Article 433.

The public authority or official that uses public funds or resources at their disposal due to the nature of their post, for ends other than for the public cause, will be punished with a fine of six to twelve months and suspension from practise for six months to three years.

If the guilty person does not repay the stolen amounts within ten days after the commencement of the legal proceedings, he will be punished with the sanctions contemplated in the previous article.

Article 434.

The public official or authority that, for their own or any other party's profit, and causing loss to the public services, gives any private application to movable or immovable goods belonging to any autonomic or local state Administration or Entity or Bodies depending on these, will be punished with a prison sentence of one to three years and specific disqualification from any employment or post for a period of three to six years.

Article 435.

The provisions of this chapter extend to:

1. Those that are in charge, for any reason, of funds, revenues or effects belonging to public Administrations.

2. Those legally designated as holders of public sums or effects.

3. Those administrators or depositories of money and embargoed goods, confiscated or deposited by the public authorities, even though these may belong to private individuals.

CHAPTER VIII

On fraud and illegal levy

Article 436.

The public authority or official that, intervening through their post in any of the actions involved in any form of public contracting or in the disposal of public property, connives with interested parties or uses any other method, to defraud any public entity will be punished with a prison sentence of one to three years and specific disqualification from any public employment or post for a period of six to ten months.

Article 437.

The public authority or official that asks for, directly or indirectly, undue rights or duties or fees, or being due, for amount above the legally established rates, will be punished, without prejudice to the repayments which are legally required, with a fine of six to twenty four months and suspension from practise for six months to four years.

Article 438.

The public authority or official that, taking advantage of his position, carries out any illegal, deceitful or appropriation offence, will be punished with the penalties specifically assigned to these situations, in the upper half of the applicable scale, and the specific disqualification from any public employment or post for two to six years.

CHAPTER IX

On negotiations and activities prohibited to Public Officials and abuse of office

Article 439.

Any public authority or public official who, being responsible for making a report, in the exercise of his duty, concerning any contract, matter, operation or activity, takes advantage of this circumstance to force or make easier his participation in any form, directly or through another person, in such business or activities, will be punished with a fine ranging from twelve to twenty for months and specific disqualification from any public employment or post from one to four years

Article 440.

Experts, arbitrators, liquidators, or disposal specialists that behave in the fashion described in the previous article, in relation to the goods or objects in respect of which they have intervened in the

appraisal, division or adjudication, as well as tutors, guardians, or testamentary executors in respect of goods belonging to their wards or the estate, will be punished with a fine of twelve to twenty four months and the specific disqualification from public employment or post, profession or business, guardianship, tutelage or custodianship, as the case may be, for a period of three to six years.

Article 441.

The public authority or public official who - outside situations allowed by laws and regulations - exercises, directly or indirectly, any professional activity or gives any permanent or temporary advice, under the dependence of or in the service of private entities or citizens, in matters in which he must ordinarily participate or have handled, advised or decided in the office or body in which he is appointed to or he depends on, will be punished with a fine ranging from six to twelve months, and suspension from practise for a period of one to three years.

TITLE XIX BIS

On crimes of bribery in international commercial transactions

Article 445 Bis

Whoever that, through presents, gifts, offers or promises, bribes or tries to bribe, whether directly or through intermediaries, authorities or public officials whether foreign or from international organizations in the exercise of their post to the advantage of them or of a third party, or complies with their demands in respect to this, in order that they act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business, will be punished with the penalties set forth in Article 423 in each respective case.

SECTION 2

On the usurpation of powers

Article 506.

The public authority or official that, not having the required powers, dictates a general provision or suspends its enforcement, will be punished with a prison sentence of one to three years, a fine of six to twelve months and specific disqualification from any public employment or post for a period of six to twelve years.

Article 507.

The Judge that improperly assumes administrative powers that he does not have, or impede the legitimate exercise of them by those who do hold them, will be punished with a prison sentence of six months to one year, a fine of three to six months and the suspension from practise for a period of one to three years.

Article 508.

1. The public authority or official that improperly assumes judicial powers or impedes the enforcement of a sentence passed by the competent judicial authority, will be punished with a

prison sentence of six months to one year, a fine of three to eight months and suspension from practise for a period of one to three years.

2. The administrative or military authority or official that attacks the independence of Judges, guaranteed by the Constitution, by giving them instructions, orders or intimations related to cases or proceedings that they are judging, will be punished with a prison sentence of one to two years, a fine of four to ten months and specific disqualification from any public employment or post for a period of two to six years.