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Spain Wins First Conviction of Individuals for Bribery of a Foreign Public Official

In 2000, Spain amended its criminal code to include bribery of foreign officials. Several weeks ago, Spanish prosecutors convicted two executives under this provision of Spain's criminal code, the first such convictions. These convictions mark a milestone in Spain's enforcement approach to foreign bribery and corruption, perhaps in response to the OECD's concern that Spanish enforcement of foreign bribery offenses was lacking.

I. Legislative Background

Bribery of a foreign official constitutes an offense under article 286 ter of the Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal (the "Spanish Criminal Code"). This offense came into law on January 11, 2000, under Article 445 bis of the Spanish Criminal Code, implementing certain provisions of the OECD's Convention

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on Combating Bribery of Foreign Public Officials in International Business Transactions (the "OECD Convention"). In 2015, a new offense in Article 286 ter replaced the offense under Article 445, following the OECD's criticism that Article 445 did not fully comply with the OECD Convention.[1] The OECD also expressed "serious concerns that, almost 13 years after the entry into force of Spain's foreign bribery offense, no individual or company has ever been prosecuted or sanctioned for this offense."[2]

Under Article 286 ter, it is an offense:

- to offer or give any undue benefit or advantage, pecuniary, or of other kind, corrupt or attempt to corrupt;
- directly or through an intermediary;
- a public authority or official;[3]
- to benefit the perpetrator or a third party;
- with the aim of ensuring that the public authority or official acts or refrains from acting in connection with the exercise of public functions;
- in order to obtain or preserve a contract, business, or any other competitive advantage in the performance of international economic activities.

As we reported in May 2015,[4] Spain also implemented a number of additional provisions that increased the territorial scope of the Spanish prosecutorial authorities relating to bribery and corruption offenses abroad. Very significantly, in 2010, Article 31 bis was introduced to recognize, for the first time, the criminal liability of non-natural persons such as companies. This Article was amended in 2015 to introduce a defense, similar to the "adequate procedures" defense under the UK Bribery Act 2010, whereby a company can escape prosecution for the acts of its officers if it can be shown that an effective and appropriate corporate criminal compliance program was in place at the time that the wrongful conduct occurred.

The introduction of these amendments suggested that the Spanish authorities had taken on board the OECD's criticism and were making determined efforts to improve Spain's enforcement concerning bribery and corruption offenses.

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1. Organisation for Economic Cooperation and Development ("OECD"), "Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Spain" at 12-19 (Dec. 2012), http://www.oecd.org/daf/anti-bribery/Spainphase3reportEN.pdf.
2. *Id.* at 5.
3. This category includes foreign public authorities and officials.
4. Karolos Seeger, Alex Parker, and Laurence Hanesworth, "Spain Adopts New Compliance Defense" FCPA Update, Vol. 6, No. 10 (May 2015), http://www.debevoise.com/insights/publications/2015/05/fcpa-update-may-2015.

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Notwithstanding these changes, the OECD noted in its March 2015 follow-up report, published just prior to the 2015 amendments to the Spanish Criminal Code, that it remained concerned about the "low level of foreign bribery enforcement in Spain and the lack of implementation of the enforcement related recommendations."[5]

II. Conviction of Antonio Leal Parra and Basilio Martinez Abril

On February 20, 2017, two publishing executives from the Spanish company Aplicaciones Pedagógicas Y Comercialización Editorial ("APYCE") admitted to bribing Equitorial Guinea's deputy education minister, Esono Mansogo. The conduct in question concerned a financing agreement entered into by Damas Castro, on behalf of APYCE, and Mansogo, in 2009, whereby the publishing company undertook to donate €70,000 for the training of English and French teachers in the African country.

"Some commentators now expect that it is only a matter of time before Spain records its first successful prosecution of a company for [bribery of foreign officials]."

Rather than paying the donation to the education ministry, the money was paid to Mansogo, after which the company substantially increased its commercial relationship with Equatorial Guinea, securing contracts worth over €16 million between May 2010 and April 2013.

According to the Spanish media,[6] Martinez Abril appears to have been responsible for specifying the terms and amounts of the bribes and Leal Parra apparently ordered the transfers. A third executive initially under investigation, Castro (who signed the financing agreement with Mansogo), was acquitted.

Because the conduct in question took place before implementation of the 2010 and 2015 amendments referred to above, which introduced corporate liability into the Spanish Criminal Code, APYCE itself could not be charged.

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5. OECD, "Spain: Follow-up to the Phase 3 Report & Recommendations" at 4 (Mar. 2015).

6. Entorno Inteligente, "ESPAÑA: La Audiencia Nacional condena por primera vez a unos empresarios por corrupción en transacciones internacionales" (Feb. 26, 2017), http://www.entornointeligente.com/articulo/9664113/ESPANA-La-Audiencia-Nacional-condena-por-primera-vez-a-unos-empresarios-por-corrupcion-en-transacciones-internacionales-26022017.

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III. Sanction

The penalties for bribing a foreign public official under Article 286 ter include:

- imprisonment of between three and six years; and
- a fine of between twelve to twenty-four months,[7] unless the benefit obtained was greater, in which case the fine may be up to three times the amount of said benefit.

In addition, the offender will be prohibited from contracting with the public sector, from accessing public subsidies, tax and social security benefits, and from involvement in public commercial transactions for between seven and twelve years.

Finally, Article 286 quater provides that the penalties should be in the upper half of the above ranges where facts concerning the case are of special gravity, namely where:

- the benefit or advantage obtained is particularly high;
- the action of the offender is not merely occasional;
- the offense has been committed within a criminal organization or group; or
- the business in question deals with humanitarian goods or services or any other goods or services concerning basic needs.

Although not entirely clear, it appears that Leal Para and Martinez Abril were prosecuted under the original Article 445, as the payment in question took place before Article 286 ter came into force. The elements of the offense under Article 445 were substantively the same as under Article 286 ter. However, the sanctions were slightly less severe – the only difference being that imprisonment ranged between two to six years, rather than three to six – which may go some way toward explaining the light penalties imposed on them.

Even so, the sanctions imposed on the defendants (each received a one year custodial sentence, a €1,080 fine,[8] and a prohibition from participating in commercial contracts with public bodies for three years) seem lenient even under the old legislation. This apparent leniency may be explained in part due to the fact that Leal Para and Martinez Abril reached a plea deal with Spanish prosecutors, which was potentially the only option available to the prosecutors in circumstances

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7. Pursuant to Article 50, Spain uses a "fine-days system" to calculate fines (calculated by multiplying a number of days by a monetary value of between €2 and 400 for individuals). Article 50(5) states that this will be reasonably determined by taking into account, amongst other things, the economic means of the offender.
8. Calculated at a rate of €6 per day for a period of six months.

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in which Equatorial Guinea refused to assist the Spanish prosecutors.[9] Had the case gone to trial and resulted in convictions, the sanctions may have been harsher.

IV. Analysis

The fact that Spain has successfully prosecuted individuals for bribery of foreign officials, some 17 years after the relevant law came into force, is significant. Some commentators now expect that it is only a matter of time before Spain records its first successful prosecution of a company for such an offense.

Indeed, Spanish business group Duro Felguera is currently being investigated in relation to allegations that it paid €46 million to a company controlled by a former Venezuelan government deputy minister of energy in 2011, apparently in exchange for public procurement contracts for the construction of a power plant in Venezuela.[10] The prosecutions follow on from a number of high-profile domestic corruption investigations and prosecutions in Spain in recent years, focusing on prominent business people, senior politicians[11] and even members of the royal family.[12]

Nevertheless, Spain has a long way to go before it can be seen as tackling bribery and corruption at home and abroad in a manner as vigorous as many of its northern European counterparts, let alone the UK or the US. Transparency International's most recent Corruption Perceptions Index, for example, ranks Spain 41st out of 176 countries, with a score of 58 on a scale of 1 to 100. In 2015, it came in 36th out of 168 countries, with the same score.[13] Moreover, 80% of Spanish citizens believe that the government has failed to curb corruption, the worst rating of any EU member state and behind only the Ukraine, Moldova, and Bosnia & Herzegovina across all European and Central Asian countries.[14]

Some of these differences may arise from continuing gaps in Spanish legislation: for example, Spain lacks sufficient legislation to protect whistle-blowers,[15] though

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9. Euan Conley, "Spanish Enforcers Turn Their Attentions Abroad" Global Investigations Review (Mar. 3, 2017), http://globalinvestigationsreview.com/article/1129484/spanish-enforcers-turn-their-attentions-abroad.

10. Moritz Reinsch, "Corruption and its Role in Spain's Political Paralysis" Risk Advisory (Sept. 27, 2016), https://news.riskadvisory.net/2016/27/spain-corruption-and-its-role-in-spains-political-paralysis/.

11. Tobias Buck, "Spain's Boom-Era Ills on Trial in Sprawling Corruption Case" Financial Times (Oct. 4, 2016), https://www.ft.com/content/9a36a510-8a2a-11e6-8aa5-f79f5696c731.

12. Charles Penty, "Spain King's Brother-in-Law Convicted as Princess is Cleared" Bloomberg (Feb. 17, 2017), https://www.bloomberg.com/news/articles/2017-02-17/spanish-king-s-brother-in-law-convicted-as-princess-is-cleared.

13. Transparency International, "Corruption Perceptions Index 2016" (2016), http://www.transparency.org/news/feature/corruption_perceptions_index_2016#table.

14. Transparency International, "People and Corruption: Europe and Central Asia 2016" at 5 (2016), https://www.transparency.org/whatwedo/publication/7493.

15. Martin Kenney, "In Spain, Whistleblower Anna Garrido's Ten-Year Ordeal" The FCPA Blog (Oct. 18, 2016), http://www.fcpablog.com/blog/2016/10/18/in-spain-whistleblower-anna-garridos-ten-year-ordeal.html.

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amendments to the Spanish Criminal Code have done much to address the criticisms of the OECD on this point. The OECD and other international observers will therefore be keen to ensure that the convictions of Leal Para and Martinez Abril were not a one-off and that Spain continues to investigate and prosecute both individuals and companies engaging in bribery offenses.

Spanish companies would be well advised to ensure that they have in place suitable anti-corruption compliance mechanisms, if they do not already, in part to increase their prospects of having a defense available if they become the subject of a Spanish investigation.

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UK Supreme Court Clarifies Third Party Rights of Representation

In a significant, recent decision favoring the UK Financial Conduct Authority ("FCA"), the UK's highest court, the Supreme Court, has clarified the grounds on which a third party will be deemed to have been "identified" by the FCA in the context of a warning or decision notice, giving rise to rights of representation under section 393 of the Financial Services Markets Act 2000 ("FSMA").

Background

In 2013, the FCA issued a warning notice, decision notice and final notice to JP Morgan Chase Bank, N.A. ("JPM") in which it criticised the bank's Chief Investment Office ("CIO"). During the relevant period, Achilles Macris had been the International Chief Investment Officer in the CIO. Mr. Macris was not provided with copies of the notices or the opportunity to make representations in relation to them. Although he was not mentioned by name, Mr. Macris referred the matter to the Upper Tribunal on the basis that he had been identified in the notices which referred to the involvement of JPM's "CIO London Management".

Both the Upper Tribunal (Tax and Chancery Chamber) ("Upper Tribunal"), and subsequently, the Court of Appeal, upheld Mr. Macris' claim. The Court of Appeal held that third party rights will arise: (i) where the notice identifies *an* individual (even if unnamed); and (ii) the notice would reasonably lead a person "acquainted" with the third party, or who operated in the same field as the third party in the industry (and therefore would have the requisite specialist knowledge of the relevant circumstances), to believe that the third party was a person prejudicially affected by matters stated in the notice.

Supreme Court Judgment

On March 22, 2017, the Supreme Court allowed the appeal of the FCA and adopted a significantly narrower approach to determining the identification of individuals. The Supreme Court held that a third party could be said to have been "identified" only if it is both apparent from the notice itself that it could only apply to one person (as opposed to a group of individuals) and it is possible to identify the individual either from the notice or publicly available sources. In the Supreme Court's view, recourse to publicly available information will only be permissible where it enables one to "*interpret*" the language of the notice

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(for example, by identifying the "chief executive" of "X Company" through basic internet research), rather than "*supplement*" it.[1] Further, and crucially, the Supreme Court held that the individual's identity must be discernible to a member of the general public, rather than (as the Court of Appeal had ruled) a member of the same industry.

Analysis

The Supreme Court judgment will be welcomed by the FCA. The previous lower court decisions were considered to present significant practical difficulties for the regulator, and required them to exercise considerable caution in the drafting of notices. The decision has, however, raised concerns in the financial services sector that individual rights will not be properly protected and individuals will find themselves unfairly or unduly exposed as a result of the Supreme Court's decision with no recourse to challenge allegations raised against them in the FCA's notices.

Whilst the case does represent a potentially significant limitation of third party rights under section 393 of the FSMA, it should also be remembered that in Serious Fraud Office investigations that are resolved by Deferred Prosecution Agreements with associated statements of fact, any non-parties that might be identified do not have any rights to receive notice or make representations.

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1. *FCA v Macris* [2017] UKSC 19 at 11 per Lord Sumption.

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